

2007

# Jason Cody v. Willard Lowe : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

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

unknown.

unknown.

---

## Recommended Citation

Brief of Appellant, *Cody v. Lowe*, No. 20070802 (Utah Court of Appeals, 2007).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/500](https://digitalcommons.law.byu.edu/byu_ca3/500)

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

Jason Cody Pro Se  
P.O. Box 9732  
Ogden, Utah 84409  
Phone (801)627-1182

**COPY**

---

In The Utah Court of Appeals  
In And For The State of Utah

---

Jason Cody,  
Plaintiff/Appellant

Brief of the Appellant

Appellate Case No. 20070802

**VS**

District Court Case No.  
070902903

Willard Lowe  
Defendant/Appellee

---

3.a. Caption of the Case:

In the Second District Court State of Utah  
County of Weber Ogden Department

Jason Cody/Plaintiff

Complaint mi.

**VS**

District Court Civil Case No.  
070902903

Willard Lowe/Defendant

Judge Ernie Jones

---

3.b. Plaintiff Jason Cody  
Defendant Willard Lowe

3.c. Appellant Jason Cody  
Appellee Willard Lowe

**FILED  
UTAH APPELLATE COURTS**

**APR 17 2008**

4. In the Utah Court of Appeals
5. Appellate Case No. 20070802
6. Brief of the Appellant
7. Appeal
8. Appeal from the Second District Court Weber County Judge Ernie Jones
- 9.b. Branden B. Miles, UBN 9777  
Attorney for Defendant  
Willard Lowe
- 9.a. Jason Cody  
Plaintiff  
Pro se

### List of All Parties

Jason Cody/Plaintiff

Willard Lowe/Defendant

### Table of Contents

	<u>Page</u>
Statement of Issues .....	3
Standard of Review .....	3
Constitutional Provisions .....	3
Rules and Citations .....	3
Statement of the Case .....	3-5
Summary of Argument .....	5-6
Conclusion .....	6
Certificate of Service .....	7

This appeal is subject to transfer by the Supreme Court to the Court of Appeals pursuant to the Utah Code Ann. 78-2-2(4).

Appellant asserts the issue the he has been denied Due process of Law by the failure of the Second District Court Clerks and Judges of the Ogden Department to comply with The Utah Rules of Civil Procedure ad case law precedent.

The Standard of Review is the propriety of the dismissal under this Rule is a matter of Law reviewable for correctness. Stokes V. Van Wagoner, 1999, Utah 94, 987 P.2d 602. (See Addendum)

#### 6. The Forth Amendment, the Fifth Amendment, and the Fourteenth Amendment to the Constitution of the United States of America

Utah Court Rules Annotated;

Utah Rules of Civil Procedure: Rule 5(a)(2), Rule 55(a), Rule 55(b)(1)&(2), Rule 54(c)(2), Rule 54(d)(1), Rule 52(c)(1), Rule 8(d), Rule 12(a), Rule 12(b), Rule 12(e), Rule 12(h), Rule 12(h)(1), Rule 7(a), Rule 7(b), Rule 7(c)(2), Rule 7(c)(3)(c), Rule 7(d), and Rule 11(b)(1)&(2). (See Addendum)

Determinative Case Law;

Utah Case Law: St Benedicts Dev. Co. V St. Benedicts Hospital 811 P.2d 194, Russell V. Standard Corp. 898 P.2d 263, Munteer V. Utah Power and Light Co. 823 P.2d 105, Liquor Control Commission V. Athas 243 P.2d 441, Christensen V. Lelis Automatic Transmission Service Inc. 467 P.2d 605, Stokes V. VanWagnor 987 P.2d 602, Clark V. Booth 821 P.2d 1146, Harvey V. Sanders 534 P.2d 905, Salt Lake County V. Salt Lake City 570 P.2d 119, Lind V. Lynch 665 P.2d 1276 , Strand V. Associated Students of Univ. of Ut. 561 P.2d 191. (See Addendum)

#### 7. Statement of the Case

- a. This is a civil case asking damages for several miscellaneous causes of action. (See Amended Complaint in Addendum)
- b. The original complaint filed 05/17 2007 comprising seven causes of action and listed on pages 001-005 of the record index. Was followed by an amended complaint of eight causes of action file on 06/04 2007 and listed on pages 010-013 of the record index.



No answer was ever filed by the Defendant Willard Lowe or his attorney Branden B. Miles within the twenty day period for answering the summons.

The statutory plea period thus expired with no answer filed in this case and Plaintiff through his agent. Ursula Cody, notified the Second District Court Clerk to make entry of default by Defendant in this case on July 3<sup>rd</sup> 2007. The Clerk refused to make such entry upon oral request, so subsequently Plaintiff filed with the Court Clerk through his agent Ursula Cody a written notice to enter default of Defendant on July 5<sup>th</sup> 2007. (See Addendum)

Defendant Willard Lowes alleged answer to the summons and complaint supposedly filed with the Second District Court Clerk on 07/05/2007 and listed as page 027 in the record index was in fact notes Plaintiff gave to his agent Ursula Cody to show the Court Clerk the amount of damages to be awarded to Plaintiff by the judgment of the Clerk at that time. Neither Mr. Lowe nor his Attorney Branden Miles can refute this fact. The alleged answer to the summons carries no signature and is therefore in violation of Utah Rules of Civil Procedure rule 7. (See Addendum) Thus Plaintiff Jason Cody was and is entitled to a judgment by default against Defendant Willard Lowe if the Utah Rules of Civil Procedure are to be followed. The Second District Court Clerks Office and Second District Court Judge Ernie Jones have attempted to ignore the above stated facts and instead circumvent the law to suit their own personal preference by claiming this non existent answer was filed by the Defendant and/or his Attorney. Subsequently Defendants Counsel Branden Miles filed with the Court Clerk a motion to dismiss for failure to state a claim upon which relief can be granted ostensibly filed 07/05/2007 pages 032-050 of the record index. The motion to dismiss for failure to state a claim was actually filed with the Court Clerk on or about 07/09/2007, well after the close of pleadings in this case. Plaintiff Jason Cody made several attempts to correct this erroneous situation by filing various motions and notices with the Court but to no avail. The Court insisted on ignoring the Utah Rules of Civil Procedure preferring instead to exact the Courts personal idea of justice. The Plaintiff Jason Cody then submitted numerous motions to the Court including a motion for leave of the Court to amend complaint, motion to order clerk to make Entry of Default by the defendant Nunc Pro Tunc to July 5<sup>th</sup> 2007, and a motion to schedule a hearing to determine the amount of damages to which the Plaintiff is entitled. (See Addendum) Subsequently after the appropriate time had tolled the Plaintiff submitted notices to submit his afore mentioned motions along with notices to submit the Defendants motion to dismiss for

failure to state a claim and the Defendants motion to consolidate cases 070902903 and 070902904. All these notices were filed with the Court Clerk on 08/27/2007. (See Addendum) The docket for case 070902903 was noted on 08/27/2007 that the case has already been dismissed by Court ruling from Judge Jones. Court is sending back the Notice to Submit to Petitioner mailed 08/29/2007. Prior to the court making a ruling granting the defendants motion to dismiss for failure to state a claim signed by Judge Ernie Jones 08/23/2007. The Defendants Attorney Branden Miles had not filed a notice to submit his motion to dismiss for failure to state a claim. Therefore the only notice to submit the Defendants motion to dismiss for failure to state a claim was filed by the Plaintiff on 08/27/2007 and not accepted by the Court and returned to the Plaintiff resulting in no notice to submit Defendants motion to dismiss. Thus Judge Jones should never have been in a receipt of Defendants motion to dismiss for failure to state a claim if the Utah Rules of Civil Procedure were followed. (See Addendum)

The Court Clerk after having refused to accept the filing of the Plaintiffs above mentioned notices to submit his motions as well as the Defendants motions on 08/27/2007. Nevertheless advised and accepted Branden Miles notice to submit his motion to consolidate on 09/17/2007 pages 123-124 of the record index and Judge Jones Court subsequently issued a ruling regarding defendants motion to consolidate the ruling was made 09/24/2007 and is listed as 127-128 of the record index. This demonstrates bias and preferential treatment of the Defendants filings.

The disposition of the case at Trial Court is the ruling made by Judge Jones on 08/23/2007 granting Defendants motion to dismiss for failure to state a claim pages 120-122 in the record index.

## Summary of Argument

Plaintiff Appellant Jason Cody followed the Utah Court Rules and the Utah Rules of Civil Procedure in filing his initial complaint and summons and amended complaint and summons and complied with the Rules of the court in all manner and thus was entitled to a judgment by default of the defendant when the defendant failed to file an answer to the complaint. The Court should never had made a ruling on defendants motion to dismiss for failure to state a claim. as a notice to submit such motion was never accepted by the Court Clerk and was never submitted by the Defendant or his

Attorney Branden Miles. The Court can't grant a motion that has not been brought before the court.

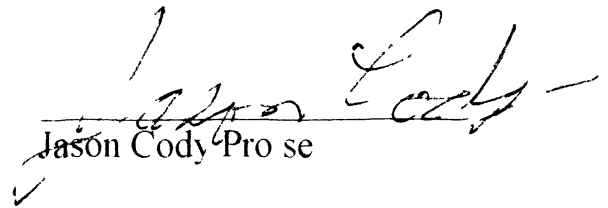
The motion to dismiss for failure to state a claim that was filed with the Court Clerk on or about 07/09/2007 does however have significance in that filing such a motion the defendant and his Attorney admit the truth of the allegations made in the complaint. Thus they have admitted the Plaintiffs allegations by failure to file an answer to the summons and complaint and additionally for a second time admitted to the Plaintiffs allegations by filing that particular motion to dismiss for failure to state a claim upon which relief can be granted.

## Conclusion

The Plaintiff Appellant Jason Cody has abided by the Utah Rules of the Court in filing this action and subsequent notices and motions and became entitled to judgment by default of Defendant when defendant failed to answer the summons of complaint in the allowed amount of time. Plaintiff Appellant then in a diligent fashion notified the Court Clerk of the default of Defendant and should have had an award granted at that time or a hearing scheduled to determine the amount of damages to which the Plaintiff was entitled. The Plaintiff prays for judgment against the Defendant as follows:

1. Reverse the District Courts Ruling and find in favor of the Plaintiff.
2. An award of actual damages, (direct and consequential), in the amount of \$50,000.00 (Fifty Thousand Dollars). Plus special damages for CAUSE OF ACTION NO. 7 in an amount to be determined by the court.
3. An award of punitive damages four times the amount of actual damages awarded.
4. For all costs incurred and for reasonable attorney's fees in the amount of at least \$1,000.00 (One Thousand Dollars).
5. For interest on all judgment awards, at the highest legal rate in the state of Utah.
6. And for such other and further relief as the court may deem proper.

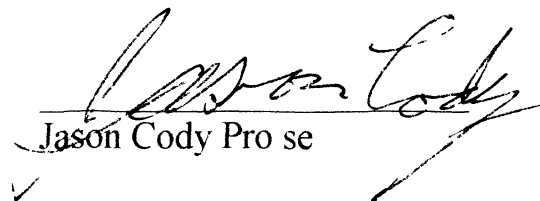
Dated this 17<sup>th</sup> day of April 2008

  
Jason Cody Pro se

### **Certificate of Service**

I hereby certify that a true and correct copy of the forgoing Brief of the Appellant including Addendum was hand delivered to the Defendant Willard Lowe's Attorney Mr. Branden B. Miles on April 18<sup>th</sup> 2008 at the following address Weber County Attorney's Office Branden B. Miles, Attorney for the Defendant, Suite No. 230 at 2380 Washington Blvd. Ogden Utah 84401-1464.

Dated this 17<sup>th</sup> day of April 2008

  
Jason Cody Pro se

**Rule 5. Service and filing of pleadings and other papers.**

(a) Service: When required.

(a)(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(a)(2) No service need be made on parties in default except that:

(a)(2)(A) a party in default shall be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear shall be served with all pleadings and papers;

(a)(2)(C) a party in default for any reason shall be served with notice of any hearing necessary to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason shall be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) pleadings asserting new or additional claims for relief against a party in default for any reason shall be served in the manner provided for service of summons in Rule 4.

(a)(3) In an action begun by seizure of property, in which no person is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made.

(b)(1) If a party is represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. If an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice, service shall be made upon the attorney and the party.

(b)(1)(A) If a hearing is scheduled 5 days or less from the date of service, the party shall use the method most likely to give prompt actual notice of the hearing. Otherwise, a party shall serve a paper under this rule:

(b)(1)(A)(i) upon any person with an electronic filing account who is a party or attorney in the case by submitting the paper for electronic filing;

(b)(1)(A)(ii) by sending it by email to the person's last known email address if that person has agreed to accept service by email;

(b)(1)(A)(iii) by faxing it to the person's last known fax number if that person has agreed to accept service by fax;

(b)(1)(A)(iv) by mailing it to the person's last known address;

(b)(1)(A)(v) by handing it to the person;

(b)(1)(A)(vi) by leaving it at the person's office with a person in charge or leaving it in a receptacle intended for receiving deliveries or in a conspicuous place; or

(b)(1)(A)(vii) by leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

(b)(1)(B) Service by mail, email or fax is complete upon sending. Service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served.

(b)(2) Unless otherwise directed by the court:

(b)(2)(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(b)(2)(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(b)(2)(C) an order or judgment prepared by the court shall be served by the court.

(c) Service: Numerous defendants. In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service. Rule 26(i) governs the filing of papers related to discovery.

(e) Filing with the court defined. A party may file with the clerk of court using any means of delivery permitted by the court. The court may require parties to file electronically with an electronic filing account. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge. The filing date shall be noted on the paper.

**Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.**

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b)(1) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b)(2) Limit on order to show cause. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order.

(c) Memoranda.

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) Length. Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

(g) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.



**Rule 8. General rules of pleadings.**

(a) Claims for relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; form of denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(d) Effect of failure to deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be concise and direct; consistency.

(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(e)(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

**Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.**

**(a) Signature.**

(a)(1) Every pleading, written motion, and other paper shall be signed by at least one attorney of record, or, if the party is not represented by the party.

(a)(2) A person may sign a paper using any form of signature recognized by law as binding. Unless required by statute, a paper need not be accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit a declaration pursuant to Utah Code Section 46-5-101. If a statute requires an affidavit or a notarized, verified or acknowledged signature and the party electronically files the paper, the signature shall be notarized pursuant to Utah Code Section 46-1-16.

(a)(3) An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

**(c)(1) How initiated.**

(c)(1)(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing

the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(c)(1)(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(c)(2) Nature of sanction; limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(c)(2)(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(c)(2)(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(c)(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

**Rule 12. Defenses and objections.**

(a) When presented. Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state and within thirty days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(a)(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(a)(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of defenses. A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) Pleading after denial of a motion. The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) Security for costs of a nonresident plaintiff. When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and

**Rule 52. Findings by the court.**

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(c)(1) by default or by failing to appear at the trial;

(c)(2) by consent in writing, filed in the cause;

(c)(3) by oral consent in open court, entered in the minutes.

**Rule 54. Judgments; costs.**

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

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

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

(d) Costs.

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

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

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

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

**Rule 55. Default.**

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party.

(b) Judgment. Judgment by default may be entered as follows:

(b)(1) By the clerk. Upon request of the plaintiff the clerk shall enter judgment for the amount claimed and costs against the defendant if :

(b)(1)(A) the default of the defendant is for failure to appear ;

(b)(1)(B) the defendant is not an infant or incompetent person;

(b)(1)(C) the defendant has been personally served pursuant to Rule 4(d)(1); and

(b)(1)(D) the claim against the defendant is for a sum certain or for a sum that can be made certain by computation.

(b)(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment against the state or officer or agency thereof. No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

denial made pursuant to Subdivision (b). *General Ins. Co. of Am. v. Carnicero Dynasty Corp.*, 545 P.2d 502 (Utah 1976); *Pratt v. Board of Educ.*, 564 P.2d 294 (Utah 1977).

—**Notice and opportunity.**

The purpose of Subdivision (c) is to provide the parties with notice of the issues raised and an opportunity to meet them, and, where a party has notice and opportunity, failure of the other to plead pursuant to this rule will not bar receipt of evidence on a defense. *Cheney v. Rucker*, 14 Utah 2d 205, 381 P.2d 86 (1963).

If the interests of justice so require and the opposing party is given a fair opportunity to meet the defense, the trial court may permit an affirmative defense that was not pleaded in the answer as required by Subdivision (c) to be tried. *F.M.A. Fin. Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670 (1965).

—**Permissive amendment.**

Where the defendant had not moved to amend its answer to add an affirmative defense after the plaintiff objected to the raising of the defense at trial and the trial court did not undertake the requisite procedural steps for determining whether to allow an amendment, the court abused its discretion in permitting the defense. *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, 974 P.2d 288.

—**Waiver of defense.**

Because an affirmative defense raises matters outside the scope of plaintiff's prima facie case, matters constituting such defenses must be pleaded, and are not put in issue by a denial pursuant to Subdivision (b) of this rule; failure to so plead constitutes waiver of the defense pursuant to Rule 12(h). *Pratt v. Board of Educ.*, 564 P.2d 294 (Utah 1977).

—**Fraud.**

—**Necessary allegations.**

Defendants were not foreclosed from asserting defenses based on fraud by their failure to use the term "fraud" or a derivative thereof or by their failure to allege every element of common-law fraud, when the substance of the acts constituting the alleged fraud had been pleaded. *Union Bank v. Swenson*, 707 P.2d 663 (Utah 1985).

—**Limitation of Landowner Liability Act.**

The Limitation of Landowner Liability Act (§ 57-14-1 et seq.) constitutes an "affirmative defense" or an "avoidance" in a wrongful death action alleging negligence, and to preserve the act as a defense, it must be raised in the defendant's answer. *Golding v. Ashley Cent. Irrigation Co.*, 793 P.2d 897 (Utah 1990).

—**Mitigation of damages.**

—**Failure to plead.**

Failure to plead mitigation of damages did not result in an automatic waiver of the defense where both the pleadings and the parties' opening statements at trial showed that the plaintiff

plaintiff's failure to mitigate. *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.*, 713 P.2d 55 (Utah 1986).

—**Pleading.**

An employer who wishes to obtain the advantage of the rule that a wrongfully discharged employee is under an obligation to minimize damages, by seeking other employment, must raise the matter as an affirmative defense in his pleadings. *Pratt v. Board of Educ.*, 564 P.2d 294 (Utah 1977).

—**Mutual mistake.**

Mutual mistake is an affirmative defense as it raises matters outside the plaintiff's prima facie case, and the failure to assert it is a waiver of that defense. *Mabey v. Kay Peterson Constr. Co.*, 682 P.2d 287 (Utah 1984).

—**Statute of frauds.**

—**Motion to dismiss.**

The defense of the statute of frauds is an affirmative defense which must be pleaded pursuant to Subdivision (c) and may not be raised by a motion to dismiss pursuant to Rule 12(b). *W.W. & W.B. Gardner, Inc. v. Pappas*, 24 Utah 2d 264, 470 P.2d 252 (1970).

—**Pleading.**

The statute of frauds is an affirmative defense which must be set forth in the pleadings, else it is waived. *Phillips v. JCM Dev. Corp.*, 666 P.2d 876 (Utah 1983).

—**Statute of limitations.**

—**Applicability to plaintiffs.**

Rule that statutes of limitation generally must be pleaded or are waived usually applies to defendants only; this rule cannot hold plaintiff to same accountability; where, in quiet title action, defendant attacks validity of tax sale, only pleading available to plaintiff to assert statute of limitations is in reply, unauthorized under Rule 7(a) as matter of right, except in attacking counterclaim, and otherwise available only by order of court. *Hansen v. Morris*, 3 Utah 2d 310, 283 P.2d 884 (1955); *Thomas v. Braffet's Heirs*, 6 Utah 2d 57, 305 P.2d 507 (1956), overruled on other grounds, *First Equity Fed., Inc. v. Phillips Dev.*, 2002 UT 56, 52 P.3d 1137.

In action to quiet title, plaintiff holders of tax deed were not required to plead statute of limitations (§§ 78-12-5.2, 78-12-5.3) and defendants were not required to anticipate defense of statute of limitations where statute was first pleaded in plaintiff's reply to defendant's answer asserting title. *Thomas v. Braffet's Heirs*, 6 Utah 2d 57, 305 P.2d 507 (1956), overruled on other grounds, *First Equity Fed., Inc. v. Phillips Dev.*, 2002 UT 56, 52 P.3d 1137.

In action by water user challenging charges of water district, plaintiff waived thirty-day limitations statute (§ 17A-2-315) by failing to plead it in answer to defendant's counterclaim. *Tygesen v. Magna Water Co.*, 13 Utah 2d 397, 375 P.2d 456 (1962).



case and is thus not affirmative defense; therefore, where defendant failed to deny in answer that there was consideration for agreement, fact should be taken as admitted. *General Ins. Co. of Am. v. Carnicero Dynasty Corp.*, 545 P.2d 502 (Utah 1976).

There is a distinction between lack of consideration and failure of consideration. When consideration is lacking, there is no contract. When consideration fails, there was a contract when the agreement was made, but the promised performance has failed. Failure of consideration is an affirmative defense under Subdivision (c), whereas the defense of lack of consideration, a negative, is properly pleaded under Subdivision (b). *DeMentas v. Estate of Tallas ex rel. First Sec. Bank*, 764 P.2d 628 (Utah Ct. App. 1988).

#### **Effect of failure to deny.**

In an action for modification of the custody provision in a divorce decree, it was appropriate for the trial court to rule on appellee's petition, absent any responsive pleading, and to accept the allegations in the petition as true in resolving the threshold requirement of whether appellant's circumstances had materially changed; however, it does not follow that appellee's petition entitled her to relief. A trial court asked to render a judgment by default must first conclude that the uncontroverted allegations of an applicant's petition are, on their face, legally sufficient to establish a valid claim against the defaulting party. *Stevens v. Collard*, 837 P.2d 593 (Utah Ct. App. 1992), modified on other grounds, 863 P.2d 534 (Utah Ct. App. 1993).

#### **Purpose of rules.**

The fundamental purpose of the liberalized pleading rules is to afford parties the privilege of presenting whatever legitimate contentions they have pertaining to their dispute, subject only to the requirement that their adversaries have fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved. *Williams v. State Farm Ins. Co.*, 656 P.2d 966 (Utah 1982).

#### **Sufficiency of complaint.**

Complaint need only give fair notice of nature and basis or grounds of claim and indication of type of litigation; it is sufficient unless plaintiff would be entitled to no relief under any state of facts which could be proved in support of claim. *Blackham v. Snelgrove*, 3 Utah 2d 157, 280 P.2d 453 (1955).

Employee's complaint for defamation, intentional infliction of emotional distress, and tortious interference with an employment contract clearly alleged the language complained of; the employee's failure to set forth any allegation in her complaint that a qualified privilege applied and that the privilege had been abused was not fatal in the context of a motion to dismiss for failure to state a claim. *Zoumadakis v. Uintah Basin Med. Ctr., Inc.*, 2005 UT App 325, 122 P.3d 891.

exhibit to a pleading cannot serve the purpose of supplying necessary material averments nor can the content of the exhibit be taken as part of the allegations of the pleading itself. *Girard v. Appleby*, 660 P.2d 245 (Utah 1983).

#### **—Claim against estate.**

Surviving wife's claim as a creditor of her husband's estate under an antenuptial agreement was barred by her failure to make the claim within one year as required by § 75-3-803. Merely providing the estate representative with a copy of the antenuptial agreement, without explaining how the agreement had been breached or the amount the wife was claiming as a creditor under the agreement, did not satisfy the requirements of notice pleading. *In re Estate of Uzelac*, 2005 UT App 234, 526 Utah Adv. Rep. 33, 114 P.3d 1164.

#### **—Found not sufficient.**

Complaint did not state claim for relief from discrimination or arbitrary action where it alleged that plaintiff's land, zoned residential, was unsuitable for residential purposes, city refused to rezone, and zoning ordinance was oppressive, confiscatory and unlawful; relief required that health, safety, morals or general welfare of district and community would be promoted by permitting commercial or industrial establishments in residential area. *Dowse v. Salt Lake City Corp.*, 123 Utah 107, 255 P.2d 723 (1953).

Use of terms "fraud," "conspiracy" and "negligence" in complaint constituted general accusations in the nature of conclusions of the pleader which, without the setting out of basic facts sufficient to constitute the charged actions, would not stand up against a motion to dismiss. *Heathman v. Hatch*, 13 Utah 2d 266, 372 P.2d 990 (1962).

Complaint claiming that there was a breach of the provisions of a title insurance policy, but which did not set out the particular provision or provisions claimed to have been breached, did not meet the requirements of Subdivision (a) and was properly dismissed. *Ellis v. Hale*, 13 Utah 2d 279, 373 P.2d 382 (1962).

Complaint was insufficient where it contained merely broad and general statements that false affidavit and false pleadings were filed and judges contacted, and that these actions prevented plaintiff from obtaining default judgment; proper complaint would have contained such allegations as contents, nature or substance of false statements and of conversations between attorneys and judges. *Heathman v. Fabian & Clendenin*, 14 Utah 2d 60, 377 P.2d 189 (1962).

Complaint that simply averred that "defendant made, declared and published to certain persons certain derogatory and libelous statements relating and pertaining to the plaintiff which tended to degrade and discredit him" was properly dismissed as not stating a cause of action for slander. *Dennett v. Smith*, 21 Utah 2d 368, 445 P.2d 983 (1968).

P.2d 825 (Utah 1990), cert. denied, 502 U.S. 900, 112 S. Ct. 276, 116 L. Ed. 2d 228 (1991).

Trial court erred in granting a Nevada casino's motion to dismiss a Utah patron's personal injury suit, where the patron's complaint alleged sufficient facts to support general personal jurisdiction over the casino by the State of Utah. *Ho v. Jim's Enters., Inc.*, 2001 UT 63, 29 P.3d 633.

#### **Motion for judgment on pleadings.**

Motion for judgment on the pleadings to decide upon distribution of trust assets was inappropriate in a proceeding among trust beneficiaries to determine distribution and offsets. *Cafferty v. Hughes*, 2002 UT App 105, 46 P.3d 233, aff'd, 2004 UT 22, 89 P.3d 148.

Trial court properly granted judgment on the pleadings to defendant restaurants in wrongful death action alleging negligence and negligence per se against the restaurants for furnishing alcohol to decedent, plaintiffs' son, who later died when he lost control of his car, because Utah does not recognize a common-law, first-party action against dramshops for injuries suffered by an intoxicated person. *Miller v. Gastronomy, Inc.*, 2005 UT App 80, 520 Utah Adv. Rep. 9, 110 P.3d 144.

#### **—Matters outside of pleadings.**

##### **—Answers to interrogatories.**

Answers to interrogatories are not a part of the pleadings for purposes of judgment on the pleadings and if the court considers them the other party must have the privilege of offering answering affidavits as upon a motion for summary judgment. *Securities Credit Corp. v. Willey*, 1 Utah 2d 254, 265 P.2d 422 (1953).

##### **—Rights of opposing party.**

On review of a motion on the pleadings treated as a motion for summary judgment under Subdivision (c), the party against whom the judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in a light most favorable to him. *Young v. Texas Co.*, 8 Utah 2d 206, 331 P.2d 1099 (1958).

#### **Motion for more definite statement.**

##### **—Bill of particulars.**

A motion for a more definite statement, and not discovery procedures, is the appropriate means of obtaining the information formerly sought by a bill of particulars. *Securities Credit Corp. v. Willey*, 1 Utah 2d 254, 265 P.2d 422 (1953).

##### **—Criteria.**

A motion for a more definite statement is properly made only when the complaint is indefinite, ambiguous, or vague in either factual allegations or legal theory to such an extent that the moving party cannot reasonably be required to frame his responsive pleading. *Liquor Control Comm'n v. Athas*, 121 Utah 457, 243 P.2d 441 (1952).

certain respects to enable defendant to answer, the proper remedy is a motion for a more definite statement, not a motion to dismiss. *Liquor Control Comm'n v. Athas*, 121 Utah 457, 243 P.2d 441 (1952).

##### **—Purpose.**

##### **—Delay.**

A motion for a more definite statement should be summarily dealt with if made for the purpose of delay. *Liquor Control Comm'n v. Athas*, 121 Utah 457, 243 P.2d 441 (1952).

##### **—Obtaining evidence.**

Motions for a more definite statement are not properly used to obtain evidence from the pleader. *Liquor Control Comm'n v. Athas*, 121 Utah 457, 243 P.2d 441 (1952).

#### **Motion to dismiss for failure to state a claim.**

##### **—Conversion.**

Trial court erroneously characterized defendant's Rule 12(b)(6) motion as one for a judgment on the pleadings, which was improper because defendants' memorandum and attachments were not pleadings. Because the plaintiffs stated a claim for negligence upon which relief could be granted, the dismissal of that claim could not be justified under Rule 12(b)(6). The court should have converted the motion into one for summary judgment. *Tuttle v. Olds*, 2007 UT App 10, 569 Utah Adv. Rep. 10, 155 P.3d 893.

##### **—Explained.**

A motion to dismiss under Subdivision (b)(6) admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194 (Utah 1991); *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995).

##### **—Habeas corpus.**

Although Rule 65B generally governs the drafting, filing, and disposition of habeas corpus petitions, Subdivision (b)(6) of this rule applies to habeas corpus petitions in which petitioner fails to state a claim upon which relief could be granted. *Alvarez v. Galetka*, 933 P.2d 987 (Utah 1997).

##### **—Improper.**

Dismissal of defendant's counterclaim was reversed because the record did not persuade the appeals court that there was no set of facts under which the defendant might succeed. *Olson v. Park-Craig-Olson, Inc.*, 815 P.2d 1356 (Utah Ct. App. 1991) (claim of unjust enrichment if no reimbursement for payment made on loan guarantee).

In a wrongful death action based on attractive nuisance doctrine, the term "aquatic trap" in complaint could reasonably be construed to refer to a hidden trap and complaint was sufficiently descriptive. *Whipple ex rel. Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218 (Utah 1996).

channelling devices, bridges, currents, and trappings and that as a further direct and proximate result of the defective and unreasonably dangerous condition of the irrigation ditch, plaintiffs suffered damages for loss of financial support, comfort, society, advice, care, companionship, affection and happiness of association of the decedent, contained allegations of causation sufficient to survive a Rule 12(b)(6) motion. *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218 (Utah 1996).

The trial court erred in dismissing the plaintiff's case because her allegation of facts concerning each element of the claim of breach of contract was sufficient to survive a motion to dismiss. *Mackey v. Cannon*, 996 P.2d 1081 (Utah Ct. App. 2000).

Representative's case was improperly dismissed because her complaint was sufficient and the defendants below never argued that the complaint was inadequate; the trial court inappropriately relied on factual determinations from the evidentiary hearing to dismiss the case. *Cazares v. Cosby*, 2003 UT 3, 467 Utah Adv. Rep. 12, 65 P.3d 1184.

Trial court erred in dismissing claims for fraud, concealment, and other intentional torts on the grounds that they were barred by the applicable statutes of limitations in Utah Code Ann. §§ 78-12-25(3) and 78-12-26(3). Whether the plaintiff made a prima facie showing that a reasonable plaintiff would not have discovered the claims earlier was a factual finding that should be decided by a jury, not a judge. *Russell/Packard Dev., Inc. v. Carson*, 2003 UT App 316, 482 Utah Adv. Rep. 27, 78 P.3d 616, *aff'd*, 2005 UT 14, 108 P.3d 741.

Dismissal under Subdivision (b)(6) of claim for injuries suffered at a state liquor store was improper; the claim did provide a brief statement of the facts as required by the relevant governmental immunity provision. *Peeples v. State*, 2004 UT App 328, 509 Utah Adv. Rep. 16, 100 P.3d 254.

#### —Parties.

Adoption agencies' declaratory judgment action against an association that had issued an advisory opinion on the applicability of an interstate compact failed to state a claim against the association because, although the association's position was adopted by state officials, its opinion was not binding on anyone. *Alternative Options & Servs. for Children v. Chapman*, 2004 UT App 488, 516 Utah Adv. Rep. 6, 106 P.3d 744.

#### —Proper.

Trial court did not err in granting bank's motion to dismiss under Subdivision (b)(6) where the plaintiff's complaint failed to allege sufficient facts to support a negligence action; the depository bank did not owe the plaintiff, as a non-customer of the bank, a duty of care after another person forged the plaintiff's signature and deposited the checks at the bank. *Ramsey v. Hancock*, 2003 UT App 319, 483 Utah Adv. Rep. 10, 79 P.3d 423.

Trial court properly dismissed a complaint that was entirely and exclusively dependent on the plaintiff's misunderstanding of the defen-

dant's legal obligations toward her and that failed to plead a cognizable and actionable claim. *Pett v. Fleet Mortg. Corp.*, 2004 UT App 150, 499 Utah Adv. Rep. 17, 91 P.3d 854.

Patient's claim was properly dismissed because the patient's risk of recurrence of breast cancer was not an injury; the patient's claim for the increased risk of recurrence of cancer was not actionable. *Medved v. Glenn*, 2004 UT App 161, 499 Utah Adv. Rep. 25, 92 P.3d 176.

Church's motion to dismiss was granted in a negligence case because it had no common law duty to warn abuse victims about a priest's prior child sexual abuse. There was no special relationship between the parties giving rise to such a duty, the abuse did not occur on church property or during church functions, and the priest was not a church employee, agent, or clergy member. *Doe v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*, 2004 UT App 274, 506 Utah Adv. 25, 98 P.3d 429, *cert. denied*, 106 P.3d 743 (Utah 2004).

Business's complaint against the Utah Department of Transportation, following the closure of an access route to the business during a highway reconstruction project, failed to state a claim for inverse condemnation under Utah Const., Art. I, § 22; the business did not have a protectable property interest in an easement of access through the blocked routes and the business was accessible from another route during the reconstruction project. *Intermountain Sports, Inc. v. DOT*, 2004 UT App 405, 512 Utah Adv. Rep. 40, 103 P.3d 716, *cert. denied*, 109 P.3d 804 (Utah 2005), *cert. denied*, — U.S. —, 126 S. Ct. 343, 163 L. Ed. 2d 54 (2005).

#### —Standard.

In ruling on a motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor. *Munteer v. Utah Power & Light Co.*, 823 P.2d 1055 (Utah 1991); *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995).

#### —Standard of review.

When reviewing a judgment entered on a motion to dismiss under Subdivision (b)(6), the Court of Appeals is obliged to construe the complaint in the light most favorable to the plaintiff and to indulge all reasonable inferences in its favor. *Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107 (Utah Ct. App. 1990); *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194 (Utah 1991).

A motion to dismiss under Subdivision (b)(6) will be affirmed only if it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of its claims. *Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107 (Utah Ct. App. 1990); *Prows v. State*, 822 P.2d 764 (Utah 1991); *Educators Mut. Ins. Ass'n v. Allied Property & Cas. Ins. Co.*, 890 P.2d 1029 (Utah 1995).

When reviewing a dismissal under this rule, an appellate court must accept the material allegations of the complaint as true, and the trial court's ruling should be affirmed only if it clearly appears that the plaintiff can prove no

set of facts in support of his claim. *Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990); *Anderson v. Dean Witter Reynolds, Inc.*, 841 P.2d 742 (Utah Ct. App. 1992), cert. denied, 853 P.2d 897 (Utah 1993); *Wright v. University of Utah*, 876 P.2d 380 (Utah Ct. App. 1994).

Because the propriety of a Rule 12(b)(6) dismissal is a question of law, the appellate court gives the trial court's ruling no deference and reviews it under a correctness standard. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194 (Utah 1991); *Wright v. University of Utah*, 876 P.2d 380 (Utah Ct. App. 1994); *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995); *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218 (Utah 1996).

In determining whether the trial court properly granted a motion to dismiss, the appellate court must accept the factual allegations in the complaint as true and consider all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff. *Prows v. State*, 822 P.2d 764 (Utah 1991); *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218 (Utah 1996).

Father did not dispute that the dismissal of his prior paternity action was a final judgment on the merits for purposes of claim preclusion, but merely argued that he did not authorize his prior attorney to dismiss the first action; however, the father's second complaint contained no allegation that dismissal of his prior action was not authorized. Because the father's second litigation was decided on Rule 12(b) motion to dismiss, an appellate court did not consider factual allegations outside the complaint. (Unpublished decision.) *Belloso v. Lindberg*, 2005 UT App 132, cert. denied, 125 P.3d 102 (Utah 2005).

#### **Motion to dismiss for lack of venue.**

##### **—Forum-selection clause in contract.**

The parties' prior agreement in the contract that is the subject of the dispute as to the place of the action will be given effect unless it is unfair or unreasonable. *Prows v. Pinpoint Retail Sys.*, 868 P.2d 809 (Utah 1993).

A plaintiff who brings an action in violation of a choice-of-forum provision bears the burden of proving that enforcing the clause is unfair or unreasonable; to meet this burden, a plaintiff must demonstrate that the chosen state would be so seriously an inconvenient forum that to require the plaintiff to bring suit there would be unjust. *Prows v. Pinpoint Retail Sys.*, 868 P.2d 809 (Utah 1993).

Trial court did not abuse its discretion in granting the franchisers' motion to dismiss the franchisees' breach of contract claim under Subdivision (b)(3) where the franchisees failed to meet their burden of demonstrating that the forum selection clause in the signed agreement was unfair or unreasonable; the franchisees did not show that suit in Arkansas rather than Utah would be difficult and inconvenient. *Coombs v. Juice Works Dev., Inc.*, 2003 UT App 388, 486 Utah Adv. Rep. 52, 81 P.3d 769.

and breach of contract alleged by investors who lost money in a failed investment venture were properly dismissed because the investors failed to plead damages to a corporation that had assigned its claims to the investors. *Coroles v. Sabey*, 2003 UT App 339, 485 Utah Adv. Rep. 3, 79 P.3d 974.

##### **—Fraud.**

Primary fraud, securities fraud, and secondary fraud claims alleged by investors who lost money in a failed investment venture were properly dismissed because the investors failed to plead with particularity, as required by Rule 9(b), in complaint that merely listed facts and then recited the elements of fraud. *Coroles v. Sabey*, 2003 UT App 339, 485 Utah Adv. Rep. 3, 79 P.3d 974.

##### **—How presented.**

##### **—Affirmative defenses.**

Since an affirmative defense raises matters outside the scope of plaintiff's prima facie case, any matter that does not tend to controvert the opposing party's prima facie case should be pleaded and is not put in issue by denial pursuant to Rule 8(b). *Gill v. Timm*, 720 P.2d 1352 (Utah 1986).

The Limitation of Landowner Liability Act (§ 57-14-1 et seq.) is an "affirmative defense" or an "avoidance" in a wrongful death action alleging negligence, and, to preserve the act as a defense, it must be raised in the defendant's answer. *Golding v. Ashley Cent. Irrigation Co.*, 793 P.2d 897 (Utah 1990).

##### **—Divorce.**

Trial court did not err in refusing defendant's motion to dismiss and for a more definite statement in answer to plaintiff's divorce petition alleging cruelty and habitual intoxication in general terms. *MacDonald v. MacDonald*, 120 Utah 573, 236 P.2d 1066 (1951).

##### **—Election of remedies.**

The defense of election of remedies is an affirmative one that must be raised by way of answer, motion, or demand and may not be raised for the first time on appeal. *Royal Resources, Inc. v. Gibraltar Fin. Corp.*, 603 P.2d 793 (Utah 1979).

##### **—Failure to state claim upon which relief can be granted.**

A complaint does not fail to state a claim unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim. *Liquor Control Comm'n v. Athas*, 121 Utah 457, 243 P.2d 441 (1952); *Christensen v. Lelis Automatic Transmission Serv., Inc.*, 24 Utah 2d 165, 467 P.2d 605 (1970).

A complaint is required to give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved, or it is subject to dismissal under Subdivision (b)(6). *Utah Steel & Iron Co. v. Bosch*, 25 Utah 2d 85, 475 P.2d

since the contract to review bids on an equal basis was too nebulous to be enforceable, and the city is immune to tort action for deceit. *Rapp v. Salt Lake City*, 527 P.2d 651 (Utah 1974).

In an unlawful detainer action in which the notice is defective, the defective notice results in a failure to state a claim upon which relief can be granted rather than lack of subject matter jurisdiction. *Sovereign v. Meadows*, 595 P.2d 852 (Utah 1979).

#### —General and special appearances.

The distinction between general and special appearances has been abolished by Subdivision (b) of this rule. *Ted R. Brown & Assocs. v. Carnes Corp.*, 547 P.2d 206 (Utah 1976).

#### —Statute of frauds.

The defense of the statute of frauds is an affirmative defense which must be pleaded pursuant to Rule 8(c) and may not be raised by a motion to dismiss pursuant to Subdivision (b) of this rule. *W.W. & W.B. Gardner, Inc. v. Pappas*, 24 Utah 2d 264, 470 P.2d 252 (1970).

#### —Venue.

A motion to dismiss is not the correct form for objecting to venue improperly laid; an objection to venue should be made by a motion for change of place of trial. *Cannon v. Tuft*, 3 Utah 2d 410, 285 P.2d 843 (1955).

#### —When presented.

#### —Amended answer.

Motion for leave to file an amended answer was properly denied where movant failed to file anything in support of the motion and did not call the motion for hearing until the case was called for trial four months later. *Hein's Turkey Hatcheries, Inc. v. Nephi Processing Plant, Inc.*, 24 Utah 2d 271, 470 P.2d 257 (1970).

#### Security for costs of nonresident plaintiff.

#### —Failure to file.

An objection raised that security for costs was not filed within one month after notice is at best but a technical one. Dismissal of action with prejudice was an abuse of discretion since the policy of the law is to minimize the effect of technical objections which do not go to the merits and are not prejudicial to the interests of the parties. *Bunting Tractor Co. v. Emmett D. Ford Contractors*, 2 Utah 2d 275, 272 P.2d 191 (1954).

Where plaintiff died 16 days after initiating suit, and 11 days after demand of a nonresident cost bond under Subdivision (j), and, though almost three months later, a surety bond was filed as soon as an administrator was appointed, trial court should not dismiss action for failure to file bond within 30 days. *Hammond v. Calder*, 8 Utah 2d 333, 334 P.2d 562, cert. denied, 361 U.S. 813, 80 S. Ct. 51, 4 L. Ed. 2d 60 (1959).

#### Standard of review.

The propriety of a dismissal under this rule is a question of law, reviewable for correctness. *Stokes v. Van Wagoner*, 1999 UT 94, 987 P.2d 602.

#### Statute of limitations.

Trial court did not abuse its discretion in considering information outside of the complaint for purposes of the relevant date of the inception of the loss for statute of limitations purposes. *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, 53 P.3d 947.

#### Summary judgment.

#### —Conversion of motion to dismiss.

Motion to dismiss pursuant to Subdivision (b)(6) may be converted to summary judgment only when it appears as a matter of law that the plaintiff cannot recover; and where there was a question of actual knowledge of defendant as to the claim against the property, motion to dismiss and summary judgment were improper. *Harvey v. Sanders*, 534 P.2d 905 (Utah 1975).

Motion for dismissal in action for declaratory judgment as to constitutionality and legality of annexation conditions properly treated as motion for summary judgment. See *Child v. City of Spanish Fork*, 538 P.2d 184 (Utah 1975).

It is generally not well advised to treat a motion to dismiss as one for summary judgment. *Salt Lake County v. Salt Lake City*, 570 P.2d 119 (Utah 1977).

Where defendant's motion was initially for dismissal because of plaintiff's failure to state a claim upon which relief could be granted, once matters outside the pleadings were presented to and not excluded by the trial court, the motion was properly treated as one for summary judgment. *Lind v. Lynch*, 665 P.2d 1276 (Utah 1983); *Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120 (Utah 1994).

If a trial court cannot on its own motion convert a Rule 12 motion to dismiss to a Rule 56 motion for summary judgment, then certainly the Supreme Court should not allow the moving party to do so on appeal. *Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990).

When affidavits or other evidence is presented to support a motion to dismiss under Subdivision (b)(6) of this rule and the court does not exclude them, the motion is generally treated as a motion for summary judgment pursuant to U.R.C.P. 56. *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835 (Utah 1996).

This rule does not convert motions based on subdivisions (b)(1) through (5) into motions for summary judgment simply because they include some affirmative evidence relating to the basis for the motion. *Spoons v. Lewis*, 1999 UT 82, 987 P.2d 36; *Walter v. Stewart*, 2003 UT App 86, 67 P.3d 1042, cert. denied, 73 P.3d 946 (2003).

#### —Court's discretion.

If a motion to dismiss under Subdivision (b)(6) is presented, the decision to consider matters outside the pleadings initially lies in the discretion of the trial court. *Strand v. Associated Students of Univ. of Utah*, 561 P.2d 191 (Utah 1977).

#### —Court's initiative.

A court should not, on its own initiative, try to convert a motion for dismissal into one for summary judgment by requesting additional evidence. *Hill ex rel. Fogel v. Grand Cent., Inc.*,

mitted range of discretion in making an award for such costs. *Stevenett v. Wal-Mart Stores, Inc.*, 1999 UT App 80, 977 P.2d 508.

—**Service on adverse party.**

This rule requires that only one verified copy be served and it is to be served to the court; there is no requirement that the copy served upon the party from whom costs are claimed be verified. *Barton v. Carson*, 14 Utah 2d 182, 380 P.2d 926 (1963).

—**Statutory limits.**

Award of costs in excess of those expressly allowed by statute for service of subpoena, witness fees and preparation of model, photographs and certified copies of documents was improper even though the costs represented the actual expenses incurred; fact that Supreme Court has on occasion approved taxing of expense of depositions as costs should not be taken as opening the door to other expenses of the character claimed in the instant case. *Frampton v. Wilson*, 605 P.2d 771 (Utah 1980).

Witness fees, travel expenses, and service of process expenses are chargeable only in accordance with the fee schedule set by statute. *Morgan v. Morgan*, 795 P.2d 684 (Utah Ct. App. 1990).

Witness compensation in excess of the statutory schedule is generally inappropriate as a cost. *Morgan v. Morgan*, 795 P.2d 684 (Utah Ct. App. 1990).

—**Time for claiming.**

Although the trial court may not award costs until after the appeal, if any, the delay in the award of costs does not excuse parties who want to request costs from complying with the deadline in this rule. *Aurora Credit Servs. v. Liberty W. Dev., Inc.*, 2007 UT App 327, 588 Utah Adv. Rep. 3, — P.3d —.

—**Untimely filing of memorandum.**

Although plaintiff filed an unverified memorandum of costs within five days after entry of judgment, because he did not file a verified memorandum of costs until after the five-day period, plaintiff was not entitled to an award of costs. *Walker Bank & Trust Co. v. New York Term. Whse. Co.*, 10 Utah 2d 210, 350 P.2d 626 (1960).

Plaintiffs who were contractually entitled to attorney fees, costs, and expenses, and applied for them five weeks after judgment in their favor, were not barred from receiving an award of such fees by Subdivision (d)(2) because the rule does not apply to expenses or attorney fees. *Howe v. Professional Manivest, Inc.*, 829 P.2d 160 (Utah Ct. App.), cert. denied, 843 P.2d 1042 (Utah 1992).

Failure of defendants to file a verified memorandum of costs within five days of the judgment required that an award of costs be deleted from the judgment. *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998).

The requirement that a verified memorandum of costs be filed within five days after the

who failed to comply with the requirement that she file and serve a memorandum of costs within five days after entry of judgment. *Grindstaff v. Sheville* (In re Sheville), 2003 UT App 141, 473 Utah Adv. Rep. 32, 71 P.3d 179.

—**When not demanded.**

Fact that plaintiff did not ask for attorney fees in his complaint did not preclude trial court from awarding them to him since this rule indicates that there shall be liberality of procedure to reach result which justice requires. *Palombi v. D & C Bldrs.*, 22 Utah 2d 297, 452 P.2d 325 (1969).

District court's award of attorney fees in excess of the fees demanded in the complaint and of costs where no costs were demanded was proper where the proof at trial showed the party was entitled to such relief. *Pope v. Pope*, 589 P.2d 752 (Utah 1978).

**Default judgments.**

Subdivision (c)(2) and Rule 55 prescribes the procedure to be followed by trial courts in entering judgments against defaulting parties, and courts are not at liberty to deviate from those rules just because one party is in default and is not entitled to be heard on the merits of the case. *Russell v. Martell*, 681 P.2d 1193 (Utah 1984).

**Effect of partial final judgment.**

The entry of a final judgment as to fewer than all of the parties or claims does not affect the ability of the district court to proceed with respect to the remainder of the claims and parties; and when an appeal is taken from such a judgment, it only brings before the Supreme Court that portion of the action with respect to which the judgment has been entered, and the rest of the action remains in the trial court and is not necessarily affected by the appeal. *Lane v. Messer*, 689 P.2d 1333 (Utah 1984).

**Final order.**

—**Appealability.**

The final judgment rule, Subdivision (b), applies when the trial court orders a separate trial of the claim, cross-claim, counterclaim, or third-party claim, and failure to have the case certified as final by the trial court, leaving issues and parties before that court, will deprive the appellate court of jurisdiction over an appeal. *First Sec. Bank v. Conlin*, 817 P.2d 298 (Utah 1991).

Appeal of an order that was not final and neither certified nor eligible for certification under Subdivision (b) was not properly taken, and the remedy was dismissal of the appeal. *A.J. Mackay Co. v. Okland Constr. Co.*, 817 P.2d 323 (Utah 1991).

Defendants, who did not seek permission to file an interlocutory appeal under Rule 5 of the Utah Rules of Appellate Procedure and who had, because no final judgment had been entered in the cases, alternative avenues under Rules 54(b) and 65B(e) of the Utah Rules of

**Compiler's Notes.** — This rule is similar to Rule 55, F.R.C.P.

## NOTES TO DECISIONS

Damages.

Divorce action.

Entry of default not warranted.

Failure to plead.

Judgment.

— Conduct of counsel.

— Default entry necessary.

— Failure to follow rule.

— Hearing on merits.

— Punitive damages.

Notice.

Setting aside default.

— Collateral attack.

— Direct attack.

— Discretion of court.

— Grounds.

— Excusable neglect.

— Judicial attitude.

— Movant's duty.

— Setting aside proper.

Time for appeal.

Cited.

### **Damages.**

A default judgment establishes, as a matter of law, that defendants are liable to plaintiff as to each cause of action alleged in the complaint. Nevertheless, it is still incumbent upon the nondefaulting party to establish by competent evidence the amount of recoverable damages and costs he claims. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989).

There is no right to a jury trial on the issue of damages once default has been entered. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989).

To enter a default judgment for unliquidated damages, a judge must review the complaint, determine whether the allegations state a valid claim for relief, and award damages in an amount that is supported by some valid evidence. *Skanchy v. Calcados Ortope SA*, 952 P.2d 1071 (Utah 1998).

### **Divorce action.**

Defendant who failed to file answer in divorce action was not entitled to hearing or notice before entry of default divorce decree even though 90-day statutory period had not elapsed. *Heath v. Heath*, 541 P.2d 1040 (Utah 1975).

### **Entry of default not warranted.**

This rule requires an entry of default against a defendant who fails to appear only if the well-pled facts show that the plaintiff is entitled to judgment as a matter of law. Plaintiff who alleged that the defendant provided necessary and reasonable medical services to the plaintiff in one count and then sought a declaratory judgment in another count alleging the

### **Failure to plead.**

In an action for modification of the custody provision in a divorce decree, it was appropriate for the trial court to rule on appellee's petition, absent any responsive pleading, and to accept the allegations in the petition as true in resolving the threshold requirement of whether appellant's circumstances had materially changed; however, it does not follow that appellee's petition entitled her to relief. A trial court asked to render a judgment by default must first conclude that the uncontroverted allegations of an applicant's petition are, on their face, legally sufficient to establish a valid claim against the defaulting party *Stevens v. Collard*, 837 P.2d 593 (Utah Ct. App. 1992), modified on other grounds, 863 P.2d 534 (Utah Ct. App. 1993).

### **Judgment.**

Judgments by default are not favored by the courts nor are they in the interest of justice and fair play. *Heathman v. Fabian & Clendenin*, 14 Utah 2d 60, 377 P.2d 189 (1962).

### **—Conduct of counsel.**

When defendant's counsel was 27 minutes late on morning trial was commenced because he was unable to obtain from the Supreme Court a writ of prohibition to prevent the holding of the trial on that day due to absence of defense witnesses, the trial court erred in granting a default judgment to plaintiff and refusing to allow defense counsel to participate in the proceedings or challenge plaintiff's evidence, notwithstanding any ill-advised, irritating or contemptuous conduct from defense counsel during the action, since the law prefers that a case be tried on its merits and the parties litigant should not be made to suffer for the misconduct of their counsel. *McKean v. Mountain View Mem. Estates, Inc.*, 17 Utah 2d 323, 411 P.2d 129 (1966).

### **—Default entry necessary.**

No default judgment may be entered under Subdivision (b)(2) unless default has previously been entered. The entry of default is an essential predicate to any default judgment. *P & B Land, Inc. v. Klungervik*, 751 P.2d 274 (Utah Ct. App. 1988).

### **—Failure to follow rule.**

Rule 54(c)(2) and this rule prescribe the procedure to be followed by trial courts in entering judgments against defaulting parties, and courts are not at liberty to deviate from those rules just because one party is in default and is not entitled to be heard on the merits of the case. *Russell v. Martell*, 681 P.2d 1193 (Utah 1984).

Judgment against defaulting party must be



Jason Cody  
Pro Se  
P.O. Box 9732  
Ogden, UT 84409  
Phone: (801) 627-1182

---

**IN THE SECOND JUDICIAL DISTRICT COURT IN AND OF WEBER  
COUNTY, STATE OF UTAH, OGDEN DEPARTMENT**

---

Jason Cody

Plaintiff,

VS.

Willard Lowe,

Defendant.

NOTICE TO MAKE ENTRY  
OF DEFAULT BY  
DEFENDANT

Civil Case No. 070902903 MI

THE HONORABLE JUDGE  
ERNIE W. JONES

---

Comes now the Plaintiff, Jason Cody, Pro Se, and he requests that in accordance with the UTAH RULES OF CIVIL PROCEDURE, Rule No. 55, the court clerk MAKE AN ENTRY OF DEFAULT BY THE DEFENDANT, in the above entitled action, this 5<sup>th</sup> day of July 2007.

Defendant was personally served with the 20 DAY SUMMONS and the AMENDED COMPLAINT on June 11, 2007.

The time has tolled ant the 20 days have expired with no answer or response by the Defendant, thus it is proper to make entry of Judgment by Default in favor of the Plaintiff, at this time.



**ORDER**

The request having been made by Plaintiff, Jason Cody, Pro Se, and good cause appearing, the Clerk of the Second District Court hereby enters a Judgment By Default against the Defendant, Willard Lowe, and in favor of the Plaintiff, Jason Cody on this \_\_\_\_\_ day of July 2007, for all claims made by Plaintiff in this action.

BY THE CLERK OF THE COURT

Dated this \_\_\_\_\_ day of July 2007.

\_\_\_\_\_  
Second District Court Clerk

Jason Cody  
Pro Se  
P.O. Box 9732  
Ogden, UT 84409  
Phone: (801) 627-1182

---

**IN THE SECOND JUDICIAL DISTRICT COURT IN AND OF WEBER  
COUNTY, STATE OF UTAH, OGDEN DEPARTMENT**

---

Jason Cody

Plaintiff,

VS.

Willard Lowe,

Defendant.

**ORDER AWARDING  
JUDGEMENT FOR PLAINTIFF  
BY DEFAULT OF DEFENDANT**

Civil Case No. 070902903 MI

**THE HONORABLE JUDGE  
ERNIE W. JONES**

On June 11, 2007, Defendant Willard Lowe was personally served with a 20 DAY SUMMONS and a copy of the complaint filed with the court by Plaintiff, Jason Cody, in the above entitled matter.

Time having tolled and the 20 day period for Defendant to file an answer to the complaint having expired on July 02, 2007, with no answer or response filed with the court by Defendant.

Now therefore, in accordance with the UTAH RULES OF CIVIL PROCEDURE, Rule 55, addressing Judgment by Default, Plaintiff, Jason Cody, hereby requests that Judgment by Default be entered by the Court, in favor of the Plaintiff, Jason Cody, in this matter at this time, July 05, 2007, for all Plaintiff's claims.

## **ORDER**

For the forgoing reasons, and good cause appearing, the court in accordance with Rule 55 of the UTAH RULES OF CIVIL PROCEDURE, hereby grants Plaintiff's request and hereby enters Judgment in favor of Plaintiff, Jason Cody, on all of the claims made in the complaint by Plaintiff, Jason Cody.

IT IS SO ORDERED

Dated this \_\_\_\_\_ day of July 2007.

---

Second District Court Clerk

Jason Cody  
Pro Se  
P.O. Box 9732  
Ogden, UT 84409  
Phone: (801) 627-1182

SECOND DISTRICT COURT  
2007 JUL 10 PM 1:10

Jason Cody  
Inmate #215687  
W.C.C.F.  
Medical Cell M6  
P.O. Box 14000  
Ogden, UT 84412

---

**IN THE SECOND JUDICIAL DISTRICT COURT IN AND OF WEBER  
COUNTY, STATE OF UTAH, OGDEN DEPARTMENT**

---

Jason Cody

Plaintiff,

VS.

Willard Lowe,

Defendant.

EXPARTE MOTION SUBMITTING  
PREPARED ORDER FOR  
FINAL JUDGMENT

Civil Case No. 070902903 MI

THE HONORABLE JUDGE  
ERNIE W. JONES

---

Comes now the Plaintiff, Jason Cody, Pro Se, and he hereby submits this ORDER  
for FINAL JUDGMENT prepared in accordance with The Utah Rules For Civil  
Procedure, Rules 54 and 55.

The court may utilize this PREPARED ORDER, if it chooses to do so, to wholly  
dispose of all claims in this case at this time. Pursuant to the requirement of Rule 54(b),  
and solely for the purpose to allow the court to make a FINAL JUDGMENT in this  
action, the Plaintiff hereby waives his request for award of Punitive Damages in this  
action at this time. The Plaintiff only requests award of actual damages claimed in the

amount certain of \$50,000.00 (Fifty Thousand Dollars), plus costs in amounts of \$155.00 (One Hundred Fifty Five Dollars) filing fee and \$30.00 (Thirty Dollars) process service fee, for a total award in the amount certain of \$50,185.00 (Fifty Thousand One Hundred Eighty Five Dollars). To be the FINAL JUDGMENT award, disposing of this case. In the event that such Judgment is set aside for any reason, then too the Plaintiff's waiver of attorney's fees and Punitive Damages will also be nullified and withdrawn at the same time the Judgment is set aside.

Dated this 9<sup>th</sup> day of July 2007.

---

Mr. Jason Cody  
Pro Se

Jason Cody  
Pro Se  
P.O. Box 9732  
Ogden, UT 84409  
Phone: (801) 627-1182

Jason Cody  
Inmate #215687  
W.C.C.F.  
Medical Cell M6  
P.O. Box 14000  
Ogden, UT 84412

---

**IN THE SECOND JUDICIAL DISTRICT COURT IN AND OF WEBER  
COUNTY, STATE OF UTAH, OGDEN DEPARTMENT**

---

Jason Cody

Plaintiff,

VS.

Willard Lowe,

Defendant.

ORDER FOR FINAL JUDGMENT

Civil Case No. 070902903 MI

THE HONORABLE JUDGE  
ERNIE W. JONES

Upon MOTION of the Plaintiff, Jason Cody, Pro Se, and good cause appearing,  
The Court hereby ORDERS Judgment in favor of the Plaintiff, Jason Cody, for actual  
Damages in the amount of \$50,000 (Fifty Thousand Dollars) and costs of filing fee,  
\$155.00 (One Hundred Fifty Five Dollars), and costs of Process Service, \$30.00 (Thirty  
Dollars), with \$10.00 (Ten Dollars) awarded for attorney's feels and \$0.00 (Zero Dollars)  
Awarded for Punitive Damages, for a total award of \$50, 185.00 (Fifty Thousand One  
Hundred Eighty Five Dollars), as FINAL JUDGMENT in this action.

SECOND DISTRICT COURT  
01:1 PM 01 JUL 2007

Dated this \_\_\_\_\_ day of July 2007.

BY THE COURT

---

Ernie W. Jones  
District Court Judge

Jason Cody Prose  
P.O. Box 9732  
Ogden, Utah 84409  
Phone 801 627-1182

In The Second Judicial District Court In and For  
Weber County, State of Utah  
Ogden Department

Jason Cody  
Plaintiff

vs.

Willard Lowe  
Defendant

Motion to order Clerk to make  
Entry of Default by the Defendant  
Nunc Pro Tunc To July 05, 2007  
- Includes Proposed Order -  
Civil No. 070902903 mi

The Honorable  
Ernie W. Jones

Comes now the plaintiff, Jason Cody, Prose, and he requests that the court instruct the Clerk of the court to make entry of default by defendant in accordance with the Utah Rules of Civil Procedure, Rule 55 (a) and (b) (b)(1), and to make such entry Nunc Pro Tunc To July 05 2007, for the following reasons; On July 03, 2007, Plaintiff had inquiry made as to whether or not Defendant had filed a timely answer to the above entitled action filed by Plaintiff on May 17, 2007. The clerk indicated that no answer had be filed, and thereby the fact of defendant having failed to plead or otherwise defend within the time allowed was made to appear to the clerk at that time. On July 05, 2007 the plaintiff had filed with the court clerk three separate documents, which were: Request for court clerk to enter default of defendant. and on of the clerk



of the court entering Judgment of amount certain in favor of the Plaintiff, and a Proposed Judgment by default of an amount certain in favor of the Plaintiff - by the court.

At that time the court clerk stated that only a Judge's Clerk can effect those entries and to check back in a few days to a week to see if it had been done. ~~He~~ Upon checking back with the clerk on July 13, 2007 to discover no action ~~had~~ had been taken, The clerk then stated that nothing could be done until the clerk's office received a Certification of Service upon the defendant by the Plaintiff.

On July 14, 2007 the Plaintiff signed such a certificate and had it served by mail upon the defendant's attorney and ~~an~~ original certificate was filed with the court clerk on or about July 16, 2007, despite the fact that I could not find any such requirement in the Utah Rules of Civil Procedure but only to the contrary, see URCR Rule 5 (a) (1)(2) (A)(2)(B).

Therefore, I believe that I have complied with ~~the~~ the requirements of the URCP in this matter since July 05, 2007, and have gone the extra mile at the insistence of the clerk.

I pray that the court will order the clerk to make the appropriate entries in accordance with URCP Rule 5 and Rule 55 and will order the entry of default to be entered as of July 05, 2007.

Dated this 16<sup>th</sup> day of July, 2007.

*Jason Cody*  
Jason Cody Prose

#### Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

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

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

(d) Costs.

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

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

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

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

*Utah Rules of Civil Procedure*

**Rule 55. Default.**

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party.

(b) Judgment. Judgment by default may be entered as follows:

(b)(1) By the clerk. Upon request of the plaintiff the clerk shall enter judgment for the amount claimed and costs against the defendant if :

(b)(1)(A) the default of the defendant is for failure to appear ;

(b)(1)(B) the defendant is not an infant or incompetent person;

(b)(1)(C) the defendant has been personally served pursuant to Rule 4(d)(1); and

(b)(1)(D) the claim against the defendant is for a sum certain or for a sum that can be made certain by computation.

(b)(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

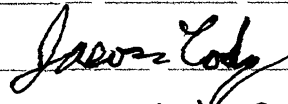
(d) Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment against the state or officer or agency thereof. No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

## Certificate of Service

I, Jason Cody, hereby certify that a true and correct copy of the foregoing motion to order clerk to make entry of default by the defendant and The proposed order, were served by mail, postage prepaid, upon the defendant's attorney Branden B. Miles at 2380 Washington Blvd., suite 230, Ogden, Utah.

Dated this 17<sup>th</sup> day of July, 2002.

  
Jason Cody Pro Se

Jason Cody Pro Se  
P.O. Box 9732  
Ogden, Utah 84409  
Phone 801 627-1182

In The Second Judicial District Court In and For  
Weber County, State of Utah  
Ogden Department

ORDER	
Jason Cody Plaintiff	for clerk to make entry of default by defendant, Nunc Pro Tunc
vs.	
Willard Lowe Defendant	Civil No. 070902903 mi  The Honorable Ernie W. Jones

Upon motion of the plaintiff and good cause  
appearing, this Court hereby orders that the entry of  
default of the defendant is dated July 05, 2007 Nunc Pro Tunc.

Dated This \_\_\_\_\_ day of July, 2007.

By The Court

Ernie W. Jones  
District Court Judge

Jason Cody Pro Se  
P.O. Box 9732  
Ogden, Utah 84409  
Phone (801)627-1182

SECOND DISTRICT COURT  
2007 AUG 27 PM 4:59

---

In The Second Judicial District Court In and For  
Weber County, State of Utah  
Ogden Department

---

Jason Cody  
Plaintiff

VS

Willard Lowe  
Defendant

**NOTICE TO SUBMIT**

Motion to order clerk to make Entry of  
Default by the defendant Nunc Pro Tunc  
to July 25<sup>th</sup> 2007  
*sc*

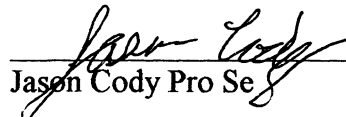
Civil No. 070902903 mi

Judge Ernie W. Jones

---

Comes now the Plaintiff, Jason Cody, Pro Se, and he requests that his motion to order the clerk to make Entry of Default by the defendant Nunc Pro Tunc to July 5<sup>th</sup> 2007 filed July 20<sup>th</sup> 2007 now be submitted to the court for decision.

Dated this 27<sup>th</sup> day of August, 2007

  
Jason Cody Pro Se

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing notice to submit, by U.S. mail, postage prepaid, upon attorney for the defendant, Branden B-Miles, 2380 Washington Blvd, Suite 230, Ogden, Utah 84401.

Dated this 27<sup>th</sup> day of August, 2007



Jason Cody Pro Se  
P.O. Box 9732  
Ogden, Utah 84409  
Phone (801)627-1182

---

In The Second Judicial District Court In and For  
Weber County, State of Utah  
Ogden Department

---

Jason Cody  
Plaintiff

VS

Willard Lowe  
Defendant

**NOTICE TO SUBMIT**

Motion to schedule a hearing to  
determine the amount of damages to  
which plaintiff is entitled

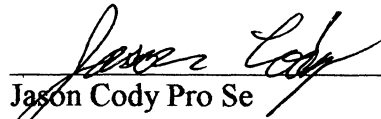
Civil No. 070902903 mi

Judge Ernie W. Jones

---

Comes now the Plaintiff, Jason Cody, Pro Se, and he requests that his motion to schedule a hearing to determine the amount of damages to which plaintiff is filed July 20<sup>th</sup> 2007 now be submitted to the court for decision.

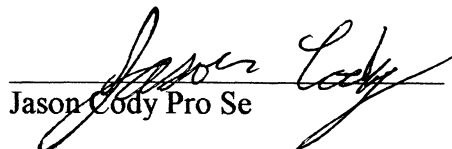
Dated this 27<sup>th</sup> day of August, 2007

  
Jason Cody Pro Se

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing notice to submit, by U.S. mail, postage prepaid, upon attorney for the defendant, Branden B-Miles, 2380 Washington Blvd, Suite 230, Ogden, Utah 84401.

Dated this 27<sup>th</sup> day of August, 2007

  
Jason Cody Pro Se

Jason Cody Pro Se  
P.O. Box 9732  
Ogden, Utah 84409  
Phone (801)627-1182

---

In The Second Judicial District Court In and For  
Weber County, State of Utah  
Ogden Department

---

Jason Cody  
Plaintiff

VS

Willard Lowe  
Defendant

**NOTICE TO SUBMIT**  
Motion for leave of the court  
to amend complaint

Civil No. 070902903 mi

Judge Ernie W. Jones

---

Comes now the Plaintiff, Jason Cody, Pro Se, and he requests that his motion for leave of the court to amend complaint filed July 20<sup>th</sup> 2007 now be submitted to the court for decision.

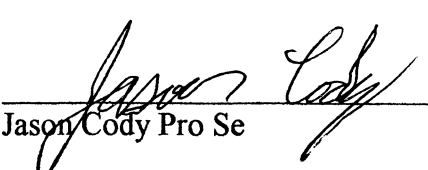
Dated this 27<sup>th</sup> day of August, 2007

  
Jason Cody Pro Se

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing notice to submit, by U.S. mail, postage prepaid, upon attorney for the defendant, Branden B-Miles, 2380 Washington Blvd, Suite 230, Ogden, Utah 84401.

Dated this 27<sup>th</sup> day of August, 2007

  
Jason Cody Pro Se



Jason Cody Pro Se  
P.O. Box 9732  
Ogden, Utah 84409  
Phone (801)627-1182

---

In The Second Judicial District Court In and For  
Weber County, State of Utah  
Ogden Department

---

Jason Cody  
Plaintiff

VS

Willard Lowe  
Defendant

**NOTICE TO SUBMIT**  
Defendants motion to consolidate

Civil No. 070902903 mi

Judge Ernie W. Jones

---

Comes now the Plaintiff, Jason Cody, Pro Se, and in accordance with the Utah Rules of Civil Procedure Rule 7 d, he requests that defendants motion to consolidate, filed July 26<sup>th</sup> 2007 by defendants attorney Branden B-Miles, and the memorandum in opposition filed by plaintiff Jason Cody Pro Se on or about August 13<sup>th</sup> 2007 now be submitted to the court for decision.

Dated this 27<sup>th</sup> day of August, 2007

  
Jason Cody Pro Se

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing notice to submit, by U.S. mail, postage prepaid, upon attorney for the defendant, Branden B-Miles, 2380 Washington Blvd, Suite 230, Ogden, Utah 84401.

Dated this 27<sup>th</sup> day of August, 2007



Jason Cody Pro Se  
P.O. Box 9732  
Ogden, Utah 84409  
Phone 801 627-1182

In The Second Judicial District Court In and For  
Weber County, State of Utah  
Ogden Department

Jason Cody  
Plaintiff

vs.

Willard Lowe  
Defendant

Motion for leave of the  
Court to amend Complaint

Civil No. 070902903 mi

The Honorable  
Ernie W. Jones

Comes now the Plaintiff, Jason Cody, Pro Se, and in accordance with The Utah Rules of Civil Procedure Rule 15(a) and (c) he requests that this court grant him leave to amend his Complaint against defendant Willard Lowe.

It has been brought to the attention of the Plaintiff that his current complaint may be somewhat ~~vague~~ vague and that the way the claims are stated perhaps they are insufficiently precise to be properly construed. If that is indeed the case then Plaintiff humbly apologizes to the court and he requests that the court grant him leave to amend the complaint by making more definite statements which will be more thorough and easily comprehended by all parties and

the court, thus enabling the court to more easily adjudicate all of the claims in this action in a fair and just manner.

Although the Plaintiff believes that the current complaint meets the requirements of The Utah Rules of Civil Procedure Rule 8(a)+(e)(1)+(f), he also believes that the complaint can be made substantially better by amending the claims made to be more thorough and precise by making more definite statements of claims, as the current complaint may be sufficient, it is barely so. In the URCP Rule 8 'notes and decisions' under the heading, — Essential allegations, see — Liberal construction. Which states; Subdivision (a) is to be liberally construed when determining the sufficiency of a Plaintiff's Complaint. Gill V. Timm, 720 P.2d 1352 (Utah 1986). Also see, — Sufficiency of Complaint. Which states; Complaint need only give fair notice of nature and basis or grounds of claim and indication of type of litigation; it is sufficient unless plaintiff would be entitled to no relief under any state of facts which could be proved in support of claim. Blackham V. Snelgrove, 3 Utah 2d 157, 280 P.2d 453 (1955). Under same heading;

Employee's complaint for defamation, intentional infliction of emotional distress, and tortious interference with an employment contract clearly alleged the language complained of; the employee's failure to set forth any allegation in her complaint that a qualified privilege applied and that

the privilege had been abused was not fatal in the context of a motion to dismiss for failure to state a claim. *Zoumadakis V. Uintah Basin Med. Ctr., Inc.*, 2005 Utah app 325, 122 P.3d 891.

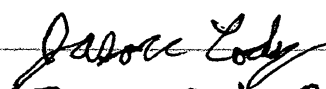
In the URCP Rule 15(a) states in part — and leave shall be freely given when Justice so requires. — and also in 'Notes to decisions' under heading, — Issues not pleaded. — new Cause of action. Which States; Amendment may be allowed if it does not change the liability sought to be enforced against the defendant. While in a technical sense it may be a new cause of action yet it may be allowed if it is not a wholly different cause of action or legal obligation. *Wells V. Wells*, 2 Utah 2d 241, 272 P.2d 167 (1954).

Having set down the grounds and the reasons why Plaintiff requests leave of the court to amend his current complaint, enhancing the claims by more thorough and precise definite statements, Plaintiff prays that the Court will grant his request and allow him to enable the Court to more readily adjudicate the claims on account of the claims being made more thorough and more easily construed by everyone.

The Pro Se Plaintiff hopes that the court understands that the Plaintiff uses the common or ordinary meanings of words and not any specialized legal language connotations peculure to lawyers.

A copy of the proposed amended complaint is provided.

dated this 17<sup>th</sup> day of July, 2007

  
Jason Cody Pro Se

## Certificate of Service

I, Jason Cody, hereby certify that a true and correct copy of the foregoing Motion for leave of the Court to amend complaint along with a copy of the proposed amended complaint was served by U.S. mail, postage prepaid, upon the defendant's attorney, Branden B. Miles, at 2380 Washington Blvd., Suite 230, Ogden, Utah.

Dated this 18<sup>th</sup> day of July, 2007.

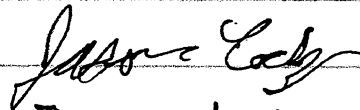


Jason Cody Pro Se

## Certificate of Service

I, Jason Cody, Pro Se Plaintiff in Civil No. 070902903 mi, hereby certify that true and correct copies of; Request for court clerk to enter default of defendant, along with, Order of the clerk of the court to enter Judgment of amount Certain against defendant, as well as, Proposed Judgment by default of an amount certain, against defendant - By the Court, were all served upon Attorney for the defendant, Branden Miles, at 2380 Washington Blvd - Suite 230, Ogden, Utah. Service was by U.S. mail, postage prepaid, on July 16, 2007. All three of these documents were initially filed with the court clerk on July 05, 2007.

Dated this 14<sup>th</sup> day of July, 2007.

  
Jason Cody Pro Se

# COPY

**JASON CODY**

**Plaintiff**

**v.**

**WILLARD LOWE**

and

**RENEE HANCOCK**

## Defendants

)  
)  
)  
) **MOTION TO CONSOLIDATE AND**  
) **MEMORANDUM IN SUPPORT THEREOF**  
)  
)  
) **Case No. 07090293 MI (Lowe)**  
) **Judge Ernie W. Jones**  
)  
)  
) **Case No. 070902904 MI (Hancock)**  
) **Judge Roger S. Dutson**  
)  
)

## FACTS

1

Mr. Lowe's head onto the asphalt of the roadway. Renee Hancock, 69-years-old, observed the plaintiff punching Mr. Lowe and ran out to help. Ms. Hancock attempted to pull the plaintiff off of Mr. Lowe, but the plaintiff seized her hand and bit down, breaking a bone and severing a tendon in her finger.

Eventually a neighbor pulled the plaintiff off of Mr. Lowe, and the police were called. The police and medical personnel arrived to treat Mr. Lowe and Ms. Hancock, and both were transported to a hospital. Mr. Lowe sustained multiple abrasions to his head, his eye was severely swollen, and he was bleeding profusely from various cuts in his head. Ms. Hancock was treated for the broken bone in her hand and had a tendon partially severed in her pinky. She has since undergone physical therapy but continues to have problems with numbness and her ability to hold things with that hand. The plaintiff had no serious injuries.

The plaintiff was charged with Aggravated Assault, a third degree felony; Assault with Substantial Bodily Injury, a class A misdemeanor; and Criminal Mischief, a class A misdemeanor. Information on the criminal case can be found under case number 061902461.

On February 15, 2007, after the evidence was heard during a non-jury trial, the Plaintiff was found guilty beyond all reasonable doubt for these offenses. On April 2, the Plaintiff was sentenced to a suspended prison sentence with formal probation and 180 days in the Weber County Jail. He is currently an inmate at the jail.

Around June 1, 2007, the plaintiff filed two separate claims against Willard Lowe and Renee Hancock. Each claim cited against both defendants causes of action of harassment, malicious mischief, obstruction of justice, perjury, submitting false claims, conspiracy to commit perjury and obstruction of justice, intentional infliction of emotional distress, and malicious



prosecution. The facts alleged under each claim in both complaints are, overwhelmingly, identical. Specifically, the facts supporting the causes of action of submitting false claim, obstruction of justice, perjury, conspiracy to commit obstruction of justice and perjury, malicious prosecution, and intentional infliction of emotional distress are verbatim.

The causes of action for harassment and malicious mischief also contain factual allegations that are nearly identical. Under the cause of action for harassment, the plaintiff alleges that both defendants caused a potted tree and a truck to be placed in the roadway near the plaintiff's driveway. Further, under the cause of action for malicious mischief, the plaintiff alleges that both defendants caused water damage to the plaintiff's shed and caused paint scratches on the plaintiff's car. The only variations between the two complaints are where the plaintiff alleges, first, that Renee Hancock is liable to him for making false statement to a mobile home park organization and for spreading moth balls, and, second, that Willard Lowe is liable to him for assault, trespass, and taking "unwelcome" photographs.

## ARGUMENT

### **I. THE ACTIONS BROUGHT AGAINST WILLARD LOWE AND RENEE HANCOCK SHOULD BE CONSOLIDATED BECAUSE EACH ACTION PRESENTS NEARLY IDENTICAL QUESTIONS OF LAW AND FACT.**

A court may consolidate actions involving a common question of law or fact in order to avoid unnecessary costs or delay.<sup>1</sup> *Utah R. Civ. P. 42(a)*. Trial courts have broad discretion in deciding motions to consolidate. *Sullivan v. Sullivan*, 105 P.3d 963 (*Utah Ct. App.* 2004).

Here, at first glance, the plaintiff's complaints against both Willard Lowe and Renee Hancock present nearly identical questions of both law and fact. Legally, the plaintiff alleges that both Mr. Lowe and Ms. Hancock are liable to him for the same eight claims: harassment, malicious mischief, obstruction of justice, perjury, submitting false claims, conspiracy to commit perjury and obstruction of justice, intentional infliction of emotional distress, and malicious prosecution. Further, under the plaintiff's cause of action heading of "harassment," an additional claim of private nuisance was identified given the facts alleged.

Factually, each claim is supported by nearly identical facts. The facts supporting the plaintiff's claims against both Mr. Lowe and Ms. Hancock for obstruction of justice, perjury, conspiracy, submitting false claims, intentional infliction of emotional distress, and malicious prosecution are verbatim. Similarly, under the plaintiff's claim of harassment, identical facts are

---

<sup>1</sup> Utah Rule of Civil Procedure, Rule 42, reads as follows: "(a) When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. (1) A motion to consolidate cases shall be heard by the judge assigned to the first case. Notice of a motion to consolidate cases shall be given to all parties in each case. The order denying or granting the motion shall be filed in each case. (2) If a motion to consolidate is granted, the case number of the first case filed shall be used for all subsequent papers and the case shall be heard by the judge assigned to the first case. The presiding judge may assign the case to another judge for good cause." *Utah R. Civ. P. 42*.

presented regarding a potted tree and a truck parked on a street.<sup>2</sup> Further, under the plaintiff's claim for malicious mischief, identical facts are presented regarding water damage to the plaintiff's shed and paint scratches to the plaintiff's car.

The only differences between the two complaints are found under the claims for harassment and malicious mischief. First, under the plaintiff's claim for harassment, Ms. Hancock is accused of making false accusations to a mobile home park organization; Mr. Lowe, on the other hand, is accused of assault, trespass, and taking "unwelcome" photographs of the plaintiff. Second, under the plaintiff's claim for malicious mischief, Ms. Hancock is again accused of making false statements to a mobile park organization and of spreading moth balls<sup>3</sup>; Mr. Lowe is again accused of assault.

These differences are superficial at most. The plaintiff's complaints against both Mr. Lowe and Ms. Hancock can be traced back to two common events: first, a common-place dispute between neighbors, and, second, a criminal trial where the plaintiff was found guilty of brutally assaulting both Willard Lowe and Renee Hancock. Yet even these two events are related because a neighborly dispute over the location of a potted tree is what caused the plaintiff to assault the defendants.

The majority of the plaintiff's claims against Mr. Lowe and Ms. Hancock—specifically, those claims of obstruction of justice, perjury, conspiracy, submitting false claim, malicious prosecution, and intentional infliction of emotional distress—are related to the criminal

---

<sup>2</sup> These are the claims which could constitute private nuisance.

<sup>3</sup> That Renee Hancock allegedly spread moth balls is another accusation the defense will assume could be considered a private nuisance.

proceedings in which the plaintiff was prosecuted for assaulting Mr. Lowe and Ms. Hancock. Logically, since these claims against Mr. Lowe and Ms. Hancock arise out of a single criminal trial, the two are factually related and should, therefore, be consolidated.

The remaining claims of harassment and malicious mischief are related to the property dispute between these neighbors. Mr. Lowe and Ms. Hancock share a home which once neighbored the plaintiff, and the plaintiff has identified both Mr. Lowe and Ms. Hancock, not just one or the other, as the persons responsible for his alleged harm. Thus, logically, these claims are also factually related. Additionally, in both of the plaintiff's complaints against Mr. Lowe and Ms. Hancock, the plaintiff referred to other persons such as "guest[s]" and "friend[s]" though the plaintiff does not further identify those persons. However, given the nearly identical facts and the similarity of the charges alleged in both complaints, it can logically be inferred that the plaintiff was referring to Mr. Lowe in his complaint against Ms. Hancock and referring to Ms. Hancock in his complaint against Mr. Lowe. Because this neighborly dispute involves both Mr. Lowe and Ms. Hancock it seems only logical that the two actions should be consolidated.

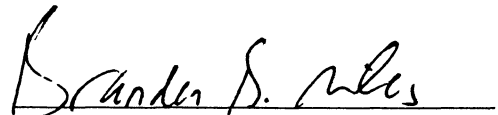
Furthermore, by consolidating these cases, this court would avoid unnecessary costs, delay, and inconvenience, not only to the defendants but to the plaintiff as well since both would only need to be concerned about one hearing instead of two. Additionally, rather than using already sparse judicial resources by assigning the plaintiff's claims to two separate judges this case would only be assigned to a single judge.

### **CONCLUSION**

In conclusion, the plaintiff's claims against Mr. Lowe and Ms. Hancock should be consolidated because both present nearly identical questions of both law and fact. Legally, the

plaintiff's complaint against both Mr. Lowe and Ms. Hancock are nearly identical as both involve causes of action of harassment, malicious mischief, obstruction of justice, perjury, submitting false claims, conspiracy, intentional infliction of emotional distress, malicious prosecution, and private nuisance. Factually, under each cause of action the plaintiff alleges facts against both Mr. Lowe and Ms. Hancock that are verbatim. Logically, the plaintiff's complaints against Mr. Lowe and Ms. Hancock arise out of a single criminal trial or a neighborly dispute: both are factually related and both involve Mr. Lowe and Ms. Hancock.

Dated this 25<sup>th</sup> day of July, 2007.

  
Branden B. Miles  
Deputy Weber County Attorney

### CERTIFICATE OF DELIVERY

I hereby certify that I mailed on the 26 day of July, 2007, a copy of the foregoing MOTION

TO CONSOLIDATE to:

Mr. Jason Cody  
Inmate No. 215687  
Medical Cell M6  
Weber County Correctional Facility  
P.O. Box 14000  
Ogden, Utah 84412

A handwritten signature in cursive script, appearing to read "Angus Ketchum", is written over a horizontal line.

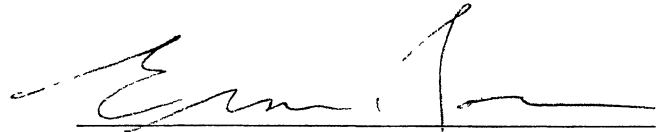
SECOND DISTRICT COURT - OGDEN  
WEBER COUNTY, STATE OF UTAH

---

JASON CODY,	:	
Plaintiff,	:	COURT'S RULING REGARDING MOTION
	:	TO CONSOLIDATE
	:	
vs.	:	Case No: 070902903
	:	
WILLARD LOWE,	:	Judge: ERNIE W JONES
Defendant.	:	Date: September 24, 2007

---

A motion to consolidate this case with another case assigned to Roger S. Dutson was filed by Attorney Branden Miles on July 26, 2007. A notice to submit for decision was submitted September 17, 2007. The Court finds that there is no reason to consolidate this case because this case was dismissed for failure to state claim on August 23, 2007. Judge Dutson has also indicated that he intends to dismiss the other case. The motion to consolidate is, therefore, denied.

  
\_\_\_\_\_  
Judge ERNIE W JONES

Case No: 070902903  
Date: Sep 24, 2007

---

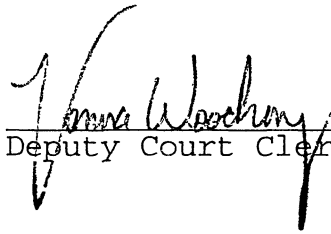
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 070902903 by the method and on the date specified.

METHOD NAME

Mail	JASON CODY Plaintiff P O BOX 9732 OGDEN, UT 844090732
Mail	BRANDEN B MILES Attorney DEF 2380 WASHINGTON BLVD STE 230 OGDEN UT 84401

Dated this \_\_\_\_ day of SEP 24 2007, 20\_\_\_\_.

  
\_\_\_\_\_  
Deputy Court Clerk



Jason Cody Pro Se  
P.O. Box 9732  
Ogden, Utah 84409  
Phone 801 627-1182

In The Second Judicial District Court In and For  
Weber County, State of Utah  
Ogden Department

Jason Cody  
Plaintiff

vs.

Willard Lowe  
Defendant

Motion to schedule a hearing  
to determine the amount of damages  
to which Plaintiff is entitled

Civil No. 070902903 mi

The Honorable  
Ernie W. Jones

Comes now the Plaintiff, Jason Cody, Pro Se, and he moves this court to schedule a hearing in this matter to determine what kinds of damages and the amounts of those damages to which the plaintiff, Jason Cody, is entitled in this case in accordance with the Utah Rules of Civil Procedure Rule 54 (d) (d)(i) and 'notes to decisions' cite under heading, - Claims for relief. Which states; Where liability has been decided but the extent of damages remains undetermined, there is no final order for purposes of appellate review. This is also the case where the trial court's order disposes of a request for declaratory and injunctive relief but leaves unresolved other equitable and legal claims for relief. Olson V. Salt Lake City

Sch. Dist., 724 P.2d 960 (Utah 1986). And also, URCP Rule 55(b) (b)(2) and the 'notes to decisions' cite under heading, - Damages. Which States; a Default Judgment establishes, as a matter of law, that defendants are liable to plaintiff as to each cause of action alleged in the Complaint.

Nevertheless, it is still incumbent upon the nondefaulting party to establish by competent evidence the amount of recoverable damages and costs he claims.

Amica Mut. Ins. Co. V. Schettler, 768 P.2d 950 (Utah Ct. App. 1989).

Having made the court aware of the necessity to have a hearing to determine kinds and amounts of damages to be awarded in this action to wholly dispose of Plaintiff's claims for relief and thus to enable the court to ~~was~~ enter a final Judgment adjudicating all the claims and the rights and liabilities of all the parties, it is only left to schedule the hearing date. Since I am not aware of the court's calendar, I can only state for my part that any day convenient for the court after the middle of September 2007 or as soon thereafter as is possible will be satisfactory for the Plaintiff. Further, the plaintiff believes that one day should be sufficient to complete the hearing and conclude the amount to award.

Therefore, plaintiff prays that the court will schedule a hearing to determine the amount of the damages as soon as is feasible.

Dated this 16<sup>th</sup> day of July, 2007

Jason Cook

To can only be so

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

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

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

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

(d) Costs.

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

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

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

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

*Utah Rules of Civil Procedure*

## **Rule 55. Default.**

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party.

(b) Judgment. Judgment by default may be entered as follows:

(b)(1) By the clerk. Upon request of the plaintiff the clerk shall enter judgment for the amount claimed and costs against the defendant if :

(b)(1)(A) the default of the defendant is for failure to appear ;

(b)(1)(B) the defendant is not an infant or incompetent person;

(b)(1)(C) the defendant has been personally served pursuant to Rule 4(d)(1); and

(b)(1)(D) the claim against the defendant is for a sum certain or for a sum that can be made certain by computation.

(b)(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment against the state or officer or agency thereof. No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

## Certificate of Service

I, Jason Cody, hereby certify that a true and correct copy of the foregoing Motion to Schedule a hearing to determine the amount of damages to which Plaintiff is entitled, was served by U.S. mail, postage prepaid, upon the defendant's attorney, Branden B. Miles, at 2380 Washington Blvd., Suite 230, Ogden, Utah.

Dated this 17<sup>th</sup> day of July, 2007.

*Jason Cody*  
Jason Cody Pro Se

motion put all together.

What  
motion to Dismiss file by  
Brenden Miles July 7, 2007  
if state filed it, has to be  
an Answer to Complaint

Besides Motion to Dismiss  
Get Copy

Judge Dutson.

Answer <sup>on Complaint</sup> ~~File~~ Against Renee

Bonnie

Get Copy

CASE NUMBER 070902904 Miscellaneous

Securities bonniejs  
21-07 Note: Left message with Ursula Cody at phone number on documents that Plaintiff failed to have a certificate of mailing on documents. vickiv  
06-04-07 Filed: Notice to Submit Prepared Order Waiving Plaintiff's Fees, Costs, And Securities vickiv  
06-04-07 Filed: Prepared Order Waiving Plaintiff's Fees, Costs, And Securites vickiv  
06-04-07 Note: Rec: Order Waiving Plaintiff Fees, Costs, And Securities vickiv  
06-14-07 Filed: Amended Complaint Of: Harassment, Malicious Mischief, Obstruction Of Justice, Perjury, Submitted False Claims, Conspiracy To Commit Perjury And Obstruction Of Justice, And Intentional Infliction Of Extreme Emotional Distress, Malicious Prose vickiv  
06-14-07 Filed: Summons vickiv  
06-14-07 Filed: Notice to Submit Affidavit Of Impecuniosity vickiv  
06-14-07 Filed: Affidavit Of Impecuniosity vickiv  
06-14-07 Filed return: Summons and Complaint (No Summons attached) trinaw  
Party Served: HANCOCK, RENAE  
Service Type: Personal  
Service Date: June 11, 2007  
06-19-07 Note: File to RSD vickiv  
06-21-07 Filed order: Order Denying Waiver of Fees cariel  
Judge rdutson  
Signed June 21, 2007  
06-21-07 Filed: Order Waiving Court Fees filed unigned per 06/21/2007 order cariel  
0 5-07 Filed: Complaint No Amount mariag  
07-05-07 Fee Account created Total Due: 155.00 mariag  
07-05-07 COMPLAINT - NO AMT S Payment Received: 155.00 mariag  
Note: Code Description: COMPLAINT - NO AMT S  
07-05-07 Note: Rec: Order Awarding Judgment For Plaintiff By Default Of Defendant vickiv  
07-05-07 Note: File to RSD vickiv  
07-05-07 Filed: Motion To Dismiss For Failure To State A Claim vickiv  
Filed by: HANCOCK, RENAE  
07-05-07 Tracking started for Motion. Review date Nov 08, 2007. vickiv  
07-05-07 Filed: Answer vickiv  
RENAE HANCOCK  
07-10-07 Note: Address changed from P O BOX 9732  
OGDEN UT 84409-0732 vickiv  
07-10-07 Note: Address changed to WCCF #215687 P.O. BOX 14000 OGDEN UT 84412 vickiv  
07-10-07 Notice - NOTICE for Case 070902904 ID 10089087 vickiv  
We are unable to enter the default judgment/certificate in this case for the following reasons:

An Answer has been filed by the defendant.

CASE NUMBER 070902903 Miscellaneous

05-17-07	Note: Address changed from	bonniejs
' 17-07	Note: Address changed to 4375 WEBER RIVER DR #60 OTDEN UT 84405	bonniejs
05-31-07	Tracking started for Motion. Review date Jul 17, 2007.	debbiekc
05-31-07	Tracking started for Under advisement. Review date Jul 31, 2007.	debbiekc
05-31-07	Note: HOLD JUNE 1	debbiekc
06-04-07	Filed: Notice to Submit prepared order waiving plaintiffs fee's costs and securities	debbiekc
06-04-07	Filed: Prepared order waiving plaintiffs fees costs and securities	debbiekc
06-04-07	Filed: Summons - PROOF OF SERVICE NOT ATTACHED TO SUMMONS	debbiekc
06-04-07	Filed: Amended complaint of Harassment, Malicious Mischief, Obstruction of Justice, Perjury, Submitting FASE Claims, Conspiracy to commit Perjury and Obstruction of Justice and Intentional Infliction of Extreme Emotional Distress, Malicious Prosec	debbiekc
06-04-07	Note: Rec Order waiving plaintiffs fees costs and securities	debbiekc
06-06-07	Tracking started for Under advisement. Review date Aug 05, 2007.	debbiekc
06-12-07	Note: FILE TO EWJ: ORDER WAIVING PLAINTIFFS FEE'S	debbiekc
06-12-07	Tracking ended for Motion.	debbiekc
06-12-07	Tracking ended for Under advisement.	debbiekc
06-12-07	Tracking - Under advisement, changed to Review date Aug 12, 2007.	debbiekc
06-14-07	Filed return: Proof of Service -Summons not attached to proof Party Served: WILLARD LOWE Service Type: Personal Service Date: June 11, 2007	debbiekc
06-14-07	Filed: Notice to Submit Exparte Affidavit of Impecuniosity	debbiekc
06-14-07	Filed: Affidavit of impecuniosity	debbiekc
06-15-07	Tracking started for Under advisement. Review date Aug 14, 2007.	debbiekc
06-18-07	Note: Filing fee waiver denied by Judge Jones. Plaintiff must pay filing fee in full before any further pleadings may be filed.	vennaw
06-18-07	Note: Order waiving plaintiff's fees, costs and securities filed unsigned, denied by Judge Jones.	vennaw
06-28-07	Tracking ended for Under advisement.	debbiekc
06-28-07	Tracking ended for Under advisement.	debbiekc
07-05-07	Filed: Complaint No Amount	mariag
07-05-07	Fee Account created Total Due: 155.00	mariag
07-05-07	COMPLAINT - NO AMT S Payment Received: 155.00	mariag
	Note: Code Description: COMPLAINT - NO AMT S	
07-05-07	Filed: Motion to dismiss for failure to state a claim	debbiekc
	Filed by: MILES, BRANDEN B	
07-05-07	Filed: Answer WILLARD LOWE	debbiekc



CASE NUMBER 070902903 Miscellaneous

07-05-07	Note: Rec Notice to make entry of default by defendant & order	debbiekc
05-07	Note: Rec Order awarding Judgment for plaintiff by default of defendant	debbiekc
07-09-07	Filed return: (copy Duplicate) Affidavit of Service	debbiekc
	Party Served: WILLARD LOWE	
	Service Type: Personal	
	Service Date: June 11, 2007	
07-10-07	Filed: Ex parte Motion submitting prepared order for final Judgment	debbiekc
	Filed by: CODY, JASON	
07-10-07	Filed: Notice to Submit Exparte Motion for Final Judgment	debbiekc
07-10-07	Note: Rec Order of Judgment in Favor of the plaintiff	debbiekc
07-12-07	Filed: Certificate of Service	debbiekc
07-12-07	Tracking started for Under advisement. Review date Sep 10, 2007.	debbiekc

Jason Cody Pro Se  
P.O. Box 9732  
Ogden, Utah 84409  
Phone 801 627-1182

In The Second Judicial District Court In and For  
Weber County, State of Utah  
Ogden Department

Jason Cody  
Plaintiff

vs.

Willard Lowe  
Defendant

Motion To Enter Judgment  
by default in favor of Plaintiff  
- Includes Proposed Order -

Civil No. 070902903 mi

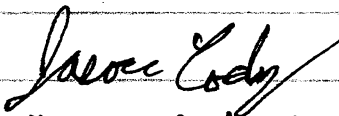
The Honorable  
Ernie W. Jones

Comes now the Plaintiff, Jason Cody, Pro se, and he moves this Court, subsequent to ~~an~~ entry of default by the court clerk, to enter a Judgment by default in favor of the plaintiff in accordance with the Utah Rules of Civil Procedure Rule 55(a) and (b) (b2), and the 'Notes To Decisions' cites under headings, -Default entry necessary. Which states; No default Judgment may be entered under Subdivision (b)(2) unless default has previously been entered. The entry of default is an essential predicate to any default Judgment. P4B Land, Inc. v. Klungervik, 751 P2d 274 (Utah Ct. App. 1988). And also, - Failure to follow rule, which states; Rule 54(c)(2) and this rule prescribe the procedure to be followed by trial courts in

entering Judgments against defaulting parties, and courts are not at liberty to deviate from those rules Just because one party is in default and is not entitled to be heard on the merits of the case. Russell v. Martell, 681 P2d 1193 (Utah 1984).

Therefore, Plaintiff prays that the court will enter a Judgment in favor of the plaintiff, immediately after entry of default by the clerk.

Dated this 16<sup>th</sup> day of July, 2007.

  
Jason Cody Prose

#### Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

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

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

(d) Costs.

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

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

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

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

*Utah Rules of Civil Procedure*

## **Rule 55. Default.**

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party.

(b) Judgment. Judgment by default may be entered as follows:

(b)(1) By the clerk. Upon request of the plaintiff the clerk shall enter judgment for the amount claimed and costs against the defendant if :

(b)(1)(A) the default of the defendant is for failure to appear ;

(b)(1)(B) the defendant is not an infant or incompetent person;

(b)(1)(C) the defendant has been personally served pursuant to Rule 4(d)(1); and

(b)(1)(D) the claim against the defendant is for a sum certain or for a sum that can be made certain by computation.

(b)(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

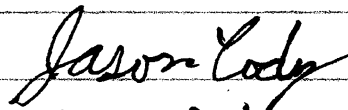
(d) Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment against the state or officer or agency thereof. No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

## Certificate of Service

I, Jason Cody, hereby certify that a true and correct copy of the foregoing motion to enter Judgment by default in favor of the Plaintiff and the prepared order, were served by U.S. mail, postage Prepaid, upon the defendants attorney, Branden B. Miles, at 2380 Washington Blvd., Suite 230, Ogden, Utah.

Dated this 17<sup>th</sup> day of July, 2007,

  
Jason Cody Pro Se

Jason Cody Prose  
P.O. Box 9732  
Ogden, Utah 84409  
Phone 801 627-1182

In The Second Judicial District Court In and For  
Weber County, State of Utah  
Ogden Department

Jason Cody  
Plaintiff

vs.

Willard Lowe  
Defendant

ORDER

to enter Judgment by default  
in favor of the Plaintiff

Civil No. 070902903 mi

The Honorable  
Ernie W. Jones

UPON motion of the plaintiff and good cause  
appearing, This Court hereby Orders that Judgment  
by default is entered in favor of the Plaintiff.

Dated this \_\_\_\_\_ day of July, 2007.

By The Court

Ernie W. Jones  
District Court Judge

Jason Cody Pro Se  
P.O. Box 9732  
Ogden, Utah 84409  
Phone 801 627-1182

SECOND DISTRICT COURT

2007 JUL 23 PM 3:33

In The Second Judicial District Court In and For  
Weber County, State of Utah  
Ogden Department

Jason Cody Plaintiff

V.

Willard Lowe Defendant

Memorandum In Opposition  
To Motion To Dismiss for  
Failure to State a Claim

Civil No 070902903 mi

The Honorable  
Ernie W. Jones

Plaintiff Jason Cody, Pro Se, submits this memorandum in opposition to Defendant's Motion to dismiss for failure to state a claim, filed July 9, 2007.

### Introduction

As an initial matter, The Utah Rules of Civil Procedure do not allow for a motion to dismiss for failure to state a claim to be brought after the pleadings are closed and the proper time to file such a motion is prior to ~~the~~ making a final pleading. See U.R.C.P. Rule 12 (a) (b) (e) (h). U.R.C.P. Rule 12 (e) addresses what would be the proper motion to rectify the defendant's stated problems with the sufficiency of the complaint if it were available, but it too would have been required to be filed much



To 5:00 PM on July 02, 2002 which was the close of pleadings.

However, there are other problems with this motion as well. URC P Rule 7(a)(b)(c) (c)(2) (c)(3)(c) addresses the issues that a pleading is not a motion and vice versa, a motion is not a pleading. At Rule 7 (c) (c)(3)(c) the Rule is clear that an overlength memoranda is not permitted without leave of the court, and the record indicates that such leave was not applied for on this motion. The motion is yet further out of compliance by lacking the required table of contents, ect. that shall be part of a memoranda with more than 10 pages of argument.

URCP Rule 8(d) is made a mockery of by this motion to dismiss and its statement of alleged "Facts", and this important Rule that has been upheld for such long standing should be respected by an officer of the Court and not purposely ignored. I contend that it is impossible for an officer of the court to meet his Public Duty to the Court when his practice of law so blatantly flies in the face of URC P Rule 11 (b) (b)(1) (b)(2). Perhaps the Court could encourage him to be more focussed on his Public Duty to the court by getting his attention with sanctions, at the Court's discretion. Perhaps he was hoping that the Court would make findings of fact and conclusions of law in his favor, when the fact is that Defendant and his counsel have already waived the issue of fact by their default by failing to appear, see URC P Rule 52 (c) (c)(1).

Regardless, the Court should not even entertain this Problematic motion but should reject it out of hand for

its repeated failures to comply with the Utah Rules of Civil Procedure Rule 7, Rule 8, Rule 11, Rule 12, and Rule 52. For all these reasons this motion to dismiss for failure to state a claim should be denied by the Court.

### Argument

To begin I would like to make the most strenuous objection to the section of the motion to dismiss for failure to state a claim labeled as "Facts". These are not Facts, at least not true Facts but are rather the same old fabrications and false accusations that the instant action was brought to address. If the defendant and his attorney wanted to once again alledge these so called Facts, why didn't they alledge them in a responsive pleading if they wanted to challenge the averments of my complaint? Why wait and do it in a motion? Especially this particular motion which by its very nature states once again upon being filed that the Facts alledged in the complaint are admitted. See URCP Rule 12(h) (h)(1) which states, (h) Waiver of defenses. A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to ~~join an indispensable party~~ state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by ~~the~~ motion for judgment on the pleadings or at the trial on the merits - also see URCP Rule 12 'notes to decisions' under

heading, Motion to dismiss for failure to state a claim. — Explained, A motion to dismiss under subdivision (b) (6) admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts. *St. Benedict's Dev. Co. V. St. Benedict's Hosp.* 811 P.2d 194 (Utah 1991); *Russell V. Standard Corp.*, 898 P.2d 263 (Utah 1995). — Standard. In ruling on a motion to dismiss for failure to state a claim, The court must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor. *Mounteer V. Utah Power and light co.*, 823 P.2d 1055 (Utah 1991); *Russell V. Standard Corp.*, 898 P.2d 263 (Utah 1995).

A real fact in this case is that the defendant did not file an answer to the complaint as required by URCP Rule 7(a) which states, (a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer. Also see URCP Rule 12(a) which states, (a) When presented. Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state, and within thirty days after service of the summons and complaint is complete outside the state. and Rule 12(b) which states, (b) how presented. Every defense in law or fact, to claim for relief in any pleading, whether

a claim, counter claim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief may be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. Also, under heading of -How Presented- in the 'Notes to decisions' of Rule 12 and the subheading, — Failure to state a claim upon which relief can be granted. A complaint does not fail to state a claim unless it appears to a certainty that the plaintiff would be entitled to No relief under any state of facts which could be proved in support of the claim. *Liquor Control Comm'n V. Athas*, 121 Utah 457, 243 P.2d 441 (1952); *Christensen V. Leis automatic transmission Service Inc.*, 24 Utah 2d 165, 467 P.2d 605 (1970) And, Standard of Review: The propriety of a dismissal under this rule is a matter of law, reviewable for correctness. *Stokes V. Van Wagner*, 1929 Utah 94, 987 P.2d 602 Also U.R.C.P Rule 55(a) states, (a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party. And Rule 54(c) (c)(2) states, Judgment by default. A Judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for Judgment.

Why didn't the defendant file an answer? He certainly had enough time and so did his attorney Mr. Brandden B. Miles, who just happened to be the deputy county attorney that had prosecuted me at the criminal trial where Judge John Morris convicted me on all charges due to the false statements and testimony by the defendant and his friend and probably a large dose of sympathy from the Judge helped as well, I can't say what happened for sure, that day, that convinced the Judge he should find me guilty when clearly the weight of evidence was in my favor, but I realize that these things happen, we hear all the time about a person that has been convicted of crimes and sentenced to prison for several years but then are exonerated by DNA evidence or perhaps the police apprehend a person who turns out to be a serial killer and confesses to crimes and leads police to the remains of the corpse while for the past few years some other poor son of a gun has been serving time for that murder. What I have always held to be one of the great tragedies of a situation like that was how very often the prosecutor would continue to attempt to keep the now exonerated person locked up, I don't suppose I will ever understand that kind of thinking or behavior.

Why, just as recently as June 22, 2007 I was in Judge Morris's Court room for a sentence review hearing and Mr. Miles was still putting forth a great effort to have me transferred from Jail to Prison. It was that morning that I learned the defendant and friend had obviously been in contact with Attorney Miles as he was aware that I had filed these civil suits against them, I didn't know that he was representing them in the civil cases until I discovered that he had filed these motions as their Attorney and then I was puzzled.

I just couldn't make any sense out of it. Here was this prosecutor that I thought had an absolute hatred for me, now representing these defendants as my opponent in these cases and he hadn't filed an answer? What was going on? Certainly an attorney so sharp of mind as Mr. Miles could not have forgotten or neglected to file a timely response, and especially with me as the adverse party, a person whom he would like to see dead was the opinion I had. And then he had filed this motion? This motion! The motion that speaks and says, Yes, I admit all your allegations are true, but I don't think you should get that much money. Then it struck me, and I understood what had happened.  $2 + 2$  made 4. Mr. Miles had obviously, being the excellent attorney that he is, sat down with his clients to discuss things and refresh his memory as to what they had told him had happened on that bright Spring day that had gone so wrong when that criminal, that bully, had attacked them and beat them up. And what legal strategy should we employ to beat down this terrible man who had beaten you nearly to death, and now has the nerve, the audacity to sue you? At about that time things started to unravel and either their conscience had caught up with them, (doubtful) or they were scared that maybe he could prove it. After all he did seem to have that tape recorder handy somewhere and quite often he had his video camera or a regular camera with him, and he's so sneaky, maybe he had some kind of evidence, maybe he could prove it!

So the two conspirators confessed to what they had done to frame him and get him kicked out of the trailer park for good.

What are we going to do now?

Yes, it was quite a conundrum alright. There was a

going to be boggy men jumping out of the bushes on this one.

After all he had his career to think of, he was up and coming, how would it look if people found out he had put an innocent man in jail, nearly in prison. No, that just wouldn't do, and you folks don't want to go to jail, do you? No, we have to make this just go away. Nobody needs to know. I'll represent you to try and save you some money but that's all I can do. (A little bit of ethics) So, that's why they didn't file answers. And that's why they did file this particular motion, yeah that makes sense.

And then I received copies of the motions through the mail. And there, starting right on the first page is the same old story, and he goes on a tirade for a page and a half spewing these so called facts. Now, I'm right back to, I just can't make any sense out of it.

OK, now I think I've got it! Mr. Miles, attorney for the defendant, is being pretty sneaky as well as quite unethical. He has filed this particular motion because he believes that he can use UCRP Rule 12(b) to twist things around and abracadabra, presto change, the motion to dismiss for failure to state a claim suddenly becomes a motion for Summary Judgment and he is allowed to present all the evidence he can muster and essentially get a second chance at things and if he is allowed to bring in his evidence from the criminal trial he prosecuted he can claim that since I was found guilty by Judge Morris, beyond reasonable doubt, that his evidence is therefore impeccable and unimpeachable and he will save the day, after all. Pretty sneaky plan. Good work, for a unethical dishonest scoundrel with no conscience.

decency or any personal honor and who obviously could not care less about his duty and responsibility as an officer of the court, or the canon of ethics, or the simple morality of being truthfull in his dealing with the court, nor any allegiance to Justice and fairplay and the american way.

Just maybe he did forget to file an answer and he is now concerned about the possible liability to his clients, tough.

Don't let him get away with it, hes lying and cheating and making a mockery of URPC Rule 11(b) which states, (b) Representations to the court. By presenting a pleading, written motion, or other paper to the court (whether by ~~file~~ signing, filing, submitting, or later advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or need less increase in the cost of litigation; (b)(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; see also Rule 11 'notes to decisions' - nature of duty imposed. This rule emphasizes an attorney's public duty as an officer of the court, as opposed to the attorney's private duty to represent a client's interest zealously. Clark V. Booth, 821 P.2d 1146 (Utah 1991).

URCP Rule 12 'notes to decisions' heading, Summary Judgment - conversion of motion to dismiss. Motion to dismiss pursuant to Subdivision (b)(6) may be converted to Summary Judgement only when it appears as a matter of law that the plaintiff cannot recover; -- Harvey V. Sanders, 534 P.2d 905 (Utah 1975). It is generally not well advised



to treat a motion to dismiss as one for Summary Judgment. Salt Lake County V. Salt Lake City 520 P.2d 119 (Utah 1977).

Where defendant's motion was initially for dismissal because of plaintiff's failure to state a claim upon which relief could be granted, ~~and~~ once matters outside the pleadings were presented to and not excluded by the trial court, the motion was properly treated as one for Summary Judgment. Lind V. Lynch, 665 P.2d 1226 (Utah 1983).

— Courts discretion. If a motion to dismiss under Subdivision (b)(6) is presented, the decision to consider matters outside the pleadings initially lies in the discretion of the trial court. Strand V. Associated Students of Univ. of Utah, 561 P.2d 191 (Utah 1977).

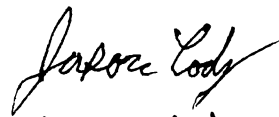
Plaintiff asks the Court to prevent a sham by excluding 'Facts' from the defendant's motion to dismiss for failure to state a claim, as the only reason its there is to be the trigger for Mr. Miles fraud upon the court.

## CONCLUSION

How sad, this whole motion has been a sham from the very start. Attorney Miles is eager to show us how clever he is with his magic motion trick but what he is really doing is thumbing his nose at the rules of the court that guide and govern our system of Justice. Don't allow him to perpetrate this fraud, hold him to the true meaning of his motion which admits by his own filing of it that he acknowledges the truth of the claims made in the complaint. The defendant made the same acknowledgment when he chose not to file an answer. Don't let them pull this 'last one' but instead exclude their 'Facts' which is nothing more than a ticking time bomb. Then deny the motion for the several legitimate reasons that you have to deny it with. Let's uphold the Dignity of our Justice System and not allow Mr. Miles or anyone else to mock it.

For these reasons and the reasons, facts, and case law stated above, and to preserve the righteousness, honesty, and Fairness of our Utah Court Rules, and respect for the Virtue and Dignity of our Justice system and our Courts, I ask you to do what you know to be right, exclude the 'Facts' from your consideration of the motion and strike it from the motion to dismiss, then exercise your discretion and deny this mutated Motion to dismiss for failure to state a claim on account of its failure to comply with the Utah Rules of Civil Procedure.

Dated this 21<sup>st</sup> day of July, 2007.

  
Jason Cody Pro Se

SECOND DISTRICT COURT  
2007 JUL 23 PM 3:33

Jason Cody  
Pro Se  
P.O. Box 9732  
Ogden, Utah 84409  
Phone: (801) 627-1182

---

**IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER  
COUNTY, STATE OF UTAH, OGDEN DEPARTMENT**

---

Jason Cody

Plaintiff,

V.

Willard Lowe

Defendant.

Amended Complaint Of:  
Harassment, Malicious Mischief,  
Obstruction of Justice, Perjury,  
Submitting False Claims, Conspiracy  
To Commit Perjury and Obstruction  
of Justice, Intentional Infliction of  
Extreme Emotional Distress, and  
Abusive and Malicious Prosecution

Civil Case No. 070902903 MI

The Honorable Judge  
Ernie W. Jones

---

Comes now the Plaintiff, Jason Cody, Pro Se, and he complains against Defendant  
and alleges as follows:

**FIRST CAUSE OF ACTION  
(Harassment)**

1. Defendant engaged in actions to harass Plaintiff by making various gestures at Plaintiff and by calling Plaintiff vulgar names and using obscene language.
2. Defendant caused a potted tree to be placed in the roadway near to Plaintiff's driveway to make it difficult for Plaintiff to access and egress his driveway.
3. Defendant parked his pickup truck with large camper shell in the roadway at

the end of Plaintiff's driveway making it dangerous for Plaintiff to exit his driveway due to the obstructed view. This was contrary to the Park's rules.

4. Defendant further harassed Plaintiff by repeatedly trespassing on Plaintiff's leased property after he had been told not to trespass.

5. Defendant harassed Plaintiff by taking unwelcome photos of the Plaintiff and his spouse and their home and cars.

### **FIRST CAUSE ADDENDUMS**

1. Beginning 8:30 PM, June 25, 2005, Defendant called Plaintiff, "The strangest fucker I have ever seen." At approximately 8:00 PM on May 1, 2006, Defendant told Plaintiff, "you're an asshole." I have the first instance recorded on audio tape, for the second I have to eye and ear witnesses. There were several other occasions when he called me "Asshole" or "you're a fucker", but I have no evidence other than my testimony. On many occasions between June 26, 2005 and May 18, 2006, the Defendant shook his fist at me, or flipped me the bird (meaning "fuck you"), or pointed his right hand index finger at me imitating a handgun and would drop his extended thumb like the hammer on a pistol pretending to shoot me. This behavior was witnessed by four other people besides myself. They are Ursula Cody, Gary Klema, Joe Gold, and Leroy Eck.

The gesture of pretending to shoot me with a pistol was especially disturbing as I knew that Renee Hancock had testified in Judge Heffernan's court in December of 2005 that at the urging of Mr. Lowe, she had acquired a concealed weapon carry permit, which led me to believe that both, she and Mr. Lowe, were both armed with handguns, and she testified that she had obtained the carry permit specifically to protect herself from me, the

Plaintiff, and that was of great concern to me as I believed I had two people next door that were off their rocker with paranoid delusions about me and they were both likely armed when allowing themselves to be in my proximity. I was afraid that these old looneys could shoot me in the back at anytime because of the irrational fear they expressed they had of me. I have witnesses who can testify that I told them of my very deep concern.

2. The only plausible explanation for this is that they were intentionally harassing me by putting this potted tree in the roadway, not on Ms. Hancock's leased property, but in the public roadway and ostensibly at the direction of Annette Wright, the property manager for the trailer park, who has been trying to evict me since the spring of 2002.

3. However, when I complained to the park manager that this behavior was endangering people, especially children, on July 6, 2005, she apparently took no action to alleviate the situation as I was able to take photos of Mr. Lowe's truck being improperly parked and causing this hazard for over 30 consecutive days in July and August of 2005. I can also produce several eye witnesses, such as Joe Gold, Nicholas Stone, Ursula Cody, Charles Levertton, Gary Klema, Leroy Eck, Mark Lucas, Marianne Brunker, etc.

4. This occurred in the summer months of 2005 for the most part, and was done to aggravate me. I even have one photo of Mr. Lowe standing in my driveway on the wrong side of a no trespassing sign on the afternoon of July 28, 2005 at approximately 2 PM. There were witnesses as well, but I have a photo and an audio recording of myself telling Mr. Lowe to cease trespassing while he continued to ignore me and remained on my property. When I complained to the park manager, she said it was minor and I should tolerate it. She did nothing to stop it, so I went to the city police and complained and

showed them the photo. They took the photo for evidence and said they would file a report, but nothing was done to stop it other than an officer spoke to Mr. Lowe and told him not to trespass anymore. Mr. Lowe denied trespassing and told the officer that there was no way for him to be certain that what I was claiming as my driveway might not be a part of my leased property and it could even be part of his girlfriend's (Renee Hancock) leased property. Mr. Lowe wanted to see my property deed and unbelievably the police officer agreed with him. I was so frustrated that I walked away.

5. Again he did this to aggravate me and I took a few photos of him doing this at various times during 2005 and the first 4 and ½ months of 2006, but the best one is a video I recorded on my camcorder on May 18, 2006, immediately prior to Mr. Lowe's attack on me (also on video) at about 5 in the afternoon.

## **SECOND CAUSE OF ACTION**

**(Malicious Mischief)**

1. Defendant is responsible for damage to Plaintiff's vehicle, (scratches in the paint), by causing his friend's front yard gate to open and strike Plaintiff's vehicle while it was parked in Plaintiff's driveway.

2. Defendant caused damage to Plaintiff's property by watering a shed wall of the Plaintiff's while watering his friend's yard.

3. Defendant, without provocations, attacked and physically assaulted Plaintiff while Plaintiff was standing at the end of his driveway, a very short while later, Defendant's friend joined in the assault of the Plaintiff.

## **SECOND CAUSE ADDENDUMS**

1. I have the date and time this occurred during the late summer of 2005, as well as a photo showing the open gate against my truck and Mr. Lowe mowing the lawn of Renee Hancock who saw me take the picture and closed her gate as soon as I had walked away.

2. I have photos of this as well as documentation of the dates are displayed in the photos. I also have date documented photos of the black mold caused by the watering, depicting the extensive damage to my wooden shed and can produce eye witnesses to both the watering of the shed which never took place prior to July 2005 and the damage resulting, these witnesses are Ursula Cody, Wayne Burrows, and Leroy Eck.

3. On May 18, 2006, at about 5:00 PM, the Defendant assaulted and battered the Plaintiff by knocking Plaintiff's camcorder into his face causing two bruises and subsequently struck Plaintiff numerous times attempting to strike Plaintiff in his groin and then bit the Plaintiff's hand causing a great deal of pain as well as two puncture wounds and a laceration from Defendant's teeth. Defendant was joined in this attack on the Plaintiff by his friend Renee Hancock. Paragraphs 2 and 3 were done with malicious aforethought, perhaps paragraph 1 also.

## **THIRD CAUSE OF ACTION** (Obstruction of Justice)

1. Defendant has provided false erroneous information and statements to the police in attempts to cause problems for the Plaintiff and causing Plaintiff to be arrested and jailed by the city police.

2. Defendant has provided false and erroneous information to the courts causing them to take action against the Plaintiff.

### **THIRD CAUSE ADDENDUMS**

1. On May 18, 2006, in the late afternoon, Defendant gave statements to Riverdale Police concerning an altercation with the Plaintiff that had just occurred at about 5:00 PM. These statements were false and accused the Plaintiff of crimes which he did not commit. On the basis of the statements of the Defendant, the Plaintiff was arrested and jailed at that time. Defendant stated that Plaintiff attacked when truly Willard Lowe attacked Plaintiff.

2. Defendant gave the same false information in four different court hearings and trials, wherein based upon this false information the courts made decisions adverse to the Plaintiff. The courts were: Judge Hadley-June, 2006; Judge Morris Preliminary-Summer 2006; Judge Dutson-October 2006 and Judge Morris-February 15, 2007. Defendant also gave false testimony in Judge Heffernan's court in December of 2005, but no adverse action was taken against Plaintiff. Defendant's false information included alleged damage of a camera, eye glasses and hearing aid.

### **FOURTH CAUSE OF ACTION (Perjury)**

1. Defendant has sworn to false information in affidavits.

2. Defendant has given false testimony to the courts on several occasions concerning the Plaintiff.



#### **FOURTH CAUSE ADDENDUMS**

1. Defendant provided an affidavit in Judge Hadley's court in June 2006, wherein Defendant falsely stated that Plaintiff attacked Defendant without provocation on May 18, 2006. Plaintiff has a video recording of part of the incident which clearly proves that Willard Lowe attacked Jason Cody.

2. Defendant has falsely accused Plaintiff of allegations against Plaintiff first provided in the witness and/or victims statement to Riverdale City Police on May 18, 2006, and May 19, 2006. Defendant has committed this perjury in four different court hearings and trials: Judge Hadley's court on or about June 21, 2006; Judge Morris' court preliminary hearing on assault charges filed against Plaintiff in the summer of 2006. Judge Dutson's court on or about October 4, 2006, and Judge Morris' court on or about February 15, 2007.

#### **FIFTH CAUSE OF ACTION** (Submitting False Claims)

1. Defendant has submitted false erroneous claims to the court with regard to medical expenses and damaged property replacement through restitution.

#### **FIFTH CAUSE ADDENDUMS**

1. Defendant, Willard Lowe, alleged Plaintiff intentionally caused damage to his \$250.00 (Two Hundred Fifty Dollar) eyeglasses on May 18, 2006 as well as his \$1500.00 (One Thousand Five Hundred Dollar) hearing aid and his, first \$300.00 (Three Hundred Dollar) then \$400.00 (Four Hundred Dollar), friend's digital camera. Defendant, Willard Lowe, also initially claimed that Plaintiff had caused him a broken nose. He filed a claim

with Judge Morris' court some time in February or March 2007, through Adult Probation and Parole, claiming \$650.00 (Six Hundred Fifty Dollars) to replace his glasses plus \$100.00 (One Hundred Dollars) in gasoline expenses for medical visits in connection with the incident of May 18, 2006. Plaintiff can prove through court transcripts and evidence that Defendant, Willard Lowe, admitted that Plaintiff had not caused him to suffer a broken nose and the evidence proves that there was nothing wrong with his hearing aid, but rather it was discovered that he could not hear well because his ear canal was full of wax. It was also proved that there was nothing wrong with the lenses of Defendant, Willard Lowe's eyeglasses and he really only required new frames. He provided Judge Morris' court with a receipt for the replacement of his eyeglasses in the amount of approximately \$281.00 (Two Hundred Eighty One Dollars) in the summer of 2006 and/or February 15, 2007, this receipt was apparently for eye exam, new lenses, and new frames. Also, it is difficult to imagine that the Defendant traveled 500 miles for Doctor visits.

**SIXTH CAUSE OF ACTION**  
(Conspiracy to Commit Perjury and Obstruction of Justice)

1. Defendant has conspired with other persons to submit false information to police and false testimony to the courts.

**SIXTH CAUSE ADDENDUMS**

1. Defendant, Willard Lowe conspired with Renee Hancock, to provide false information and testimony to the authorities on May 18 and 19, 2006 to Riverdale Police, on or about June 21, 2006 to Judge Hadley's court, on or about October 4, 2006 to Judge

Dutson's court, and February 15, 2007 to Judge Morris' court. This was the same false information described in the foregoing THIRD, FOURTH, and FIFTH CAUSES OF ACTION in this complaint. Their goal was to lose Plaintiff as a neighbor by having him evicted and to be jailed and made to pay money for being a bad neighbor.

**SEVENTH CAUSE OF ACTION**  
(Intentional Infliction of Extreme Emotional Distress)

1. Through the afore mentioned actions of the Defendant, he has caused Plaintiff to be evicted from his home of 34 years, and the dissolution of his marriage, and the subsequent loss of his home itself. Also causing Plaintiff's health problems and exacerbation of various diseases and disorders suffered by Plaintiff, thereby causing Plaintiff to suffer extreme emotional distress.

**SEVENTH CAUSE ADDENDUMS**

1. Because of the false statements and false accusations of the Defendant, Willard Lowe, regarding the Plaintiff he was a significant part of the reason MHP #9 filed two unlawful detainer actions against the Plaintiff, the first of which was brought in August 2005, Civil Case No. 050904644, wherein the Plaintiff was accused of making threats and which was defended Pro Se, with a favorable decision for Plaintiff in that case, Jason Cody. The second of which was tried in Judge Dutson's court on or about October 4, 2006, and was initially defended, Pro Se, but ultimately by brand new attorneys and the Plaintiff lost that case due to the conspiracy and perjury of Defendant and friend. Plaintiff was the subject of a criminal case tried before Judge Morris on February 15, 2007, in which he was convicted of a felony and two Class A misdemeanors due mostly

to the conspiracy and perjury of Defendant and friend. Plaintiff has also been the subject of a civil stalking injunction hearing wherein the Plaintiff defended Pro Se in Judge Hadley's court on or about June 21, 2006, and a decision unfavorable to the Plaintiff, Jason Cody, was rendered due to the conspiracy and perjury of the Defendant and friend. One of the results of being repeatedly involved in litigation for two entire years because of the false accusations of the Defendant and friend, has been the unbelievable amount of stress involved, which progressed into Ulcerative Colitis, Stress Induced Exacerbations of Severe Asthma and episodes of Schizophrenia and the more ordinary, but still unpleasant and unwelcome afflictions of G.E.R.D. and insomnia and the irritability that accompanies them, not to mention the stress of worrying that my neighbor, Renee Hancock, and/or her friend, Willard Lowe, may shoot me at anytime due to their irrational paranoid delusions about me and the knowledge acquired in court, December 2, 2005, that they have concealed weapons permits that were acquired just because of me. These medical conditions and their proximate cause can be corroborated by Stephen Bruce, M.D. Besides the suffering involved there is also the expense of the medications and medical visits to professionals. Unfortunately the Plaintiff was not the only one affected by this enormous amount of unrelenting stress, as his wife, Ursula Cody, also suffered greatly and it all became too much for her to bear in the summer of 2006 when she filed for divorce because she couldn't stand the stress of these legal difficulties continually being brought against me. It destroyed our marital relationship and she was granted her divorce in November of 2006, and then she lost her home valued at \$34,000.00 (Thirty Four Thousand Dollars) that same month of November 2006 when she was evicted from the trailer park and

forced to move her trailer as well supposedly because I had been legally evicted. She sold her home for \$1,000.00 (One Thousand Dollars) to some vulture who was happy to take advantage of her dire predicament, all caused by the Defendant and friend with their false accusations and testimony. Plaintiff felt that he had a responsibility to her and obligated himself to pay his ex-wife \$20,000.00 (Twenty Thousand Dollars) for her loss of home. In addition to that obligation incurred by the Plaintiff, because of the improper and wrongful actions and statements of the Defendant and friend, Renee Hancock, the Plaintiff is now obligated to pay the government additional income taxes of approximately \$1200.00 (One Thousand Two Hundred Dollars) per year and the value of the loss of his spouse, due to the Defendant's wrongful acts, is incalculable but for purposes of this lawsuit, the Plaintiff claims a minimum value of \$100,000.00 (One Hundred Thousand Dollars) for the loss of his spouse due to the continual legal problems sprouting from all the wrongful acts and statements of the Defendant and his friend, Renee Hancock, which were and are outrageous, intolerable, immoral, indecent, illegal, utterly revolting and indefensible.

**EIGHTH CAUSE OF ACTION**  
(Abusive and Malicious Prosecution of Plaintiff)

1. On May 18, 2006, at about 5:00 PM, Willard Lowe and Renee Hancock made serious criminal accusations and gave untruthful statements to the Riverdale City Police alleging that the Plaintiff had assaulted them and also caused damage to their property intentionally. This caused the Plaintiff to be arrested, jailed and prosecuted for serious crimes for which the Plaintiff was convicted of by a Bench Trial in the court of Judge

John Morris on February 15, 2007 and then jailed again and ordered to pay restitution and other costs totaling over \$3000.00 (Three Thousand Dollars) all tolled. Additionally Plaintiff has had to pay \$7,000.00 (Seven Thousand Dollars) for attorney fees in his defense which unfortunately for Plaintiff was not successful due to the Defendant and friend committing perjury against the Plaintiff. The damages Plaintiff suffered due to the false testimony of the Defendant and friend, including his incarceration and restrictions on his liberty due to probation terms will easily exceed \$100,000.00 (One Hundred Thousand Dollars), and were brought about by the malice of the Defendant and friend, because if they had been truthful in their statements to Police and their testimony to the courts it would have been them that was prosecuted rather than the Plaintiff. Defendant and friend tried very hard to have Plaintiff sent to prison for crimes he is innocent of, due to their hatred of the Plaintiff.

Wherefore, Plaintiff prays for Judgment against the Defendant as follows:

1. An award of actual damages, (direct and consequential), in the amount of \$50,000.00 (Fifty Thousand Dollars). Plus special damages for CAUSE OF ACTION NO. 7 in an amount to be determined by the court.
2. An award of punitive damages four times the amount of actual damages awarded.
3. For all costs incurred herein and for reasonable attorney's fees in the amount of at least \$250.00 (Two Hundred Fifty Dollars).
4. For interest on all judgment awards, at the highest legal rate in the state of Utah.

5. And for such other and further relief as the court may deem proper.

Dated this \_\_\_\_\_ day of August 2007

---

Mr. Jason Cody  
Pro Se

2007 JUL 12 AM 11:13

Jason Cody Pro Se  
 P.O. BOX 9732  
 Ogden, Utah 84409  
 Phone 801 627-1182

Jason Cody  
 inmate No. 215687  
 medical Cell M6  
 Weber Co. Correction Facility  
 P.O. BOX 14000  
 Ogden, Utah 84412

IN THE SECOND Judicial District Court In And For  
 Weber County, State of Utah  
 Ogden Department

Jason Cody  
 Plaintiff

vs.

Willard Lowe  
 defendant

Certificate of Service

Civil Case No. 070902903 mi

THE HONORABLE  
 Ernie W. Jones

Comes now the Plaintiff, Jason Cody, Pro se, and he informs this court that he has been and still is under an order by the court to have NO CONTACT with Willard Lowe, the defendant, and has therefore not been able to send him copies of the documents filed with the court clerk until he retained an attorney, which I understand that he has now done.

Therefore, I hereby certify that the true and correct copies of the below listed legal documents that have been filed with the Court Clerk between May 17, 2007 and July 09, 2007 have also been hand delivered to the office of Mr. Lowe's attorney; Branden B. Miles, at the Weber County's Attorney's office located at, 2380 Washington Blvd. Suite 230, Ogden, Utah 84401-1464, on the 9<sup>th</sup> day of July, 2007.

List of Documents Delivered

Complaint of Harassment, Malicious Mischief, Obstruction of Justice, Perjury, Submitting False Claims, Conspiracy to Commit perjury and Obstruction, and Intentional Infliction of Extreme Emotional distress. filed Mo 12, 2007



List of Documents Delivered continued

Ex parte motion to waive fees, costs, and securities filed 5/17/07

---

Notice to Submit Ex parte motion to waive fees, costs, and Securities filed 5/17/07

---

Prepared order to waive fees, costs, and Securities filed 6/04/07

---

Notice to Submit Prepared order to waive fees, cost, and Securities filed on 6/04/07

---

Affidavit of Impecuniosity filed on 6/14/07

Notice to Submit Affidavit of Impecuniosity filed 6/14/07

---

Request for Clerk to enter default by defendant filed 7/05/07

Order to enter Judgment by default by the Clerk filed 7/05/07

Order to enter Judgment by default of an amount certain by the clerk of the Court (with Waiver of Punitive damage and Attorneys fees) filed 7/05/07

---

Prepared Order of final Judgment (by the court) filed 7/09/07

---

Notice To Submit Prepared Order of final Judgment filed 7/09/07

End of List

Dated the 10<sup>th</sup> day of July, 2007

Mr. Jason Cody  
Mr. Jason Cody Prose