

2007

William R. Stratton v. JB Oxford Holdings : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WILLIAM R. STRATTON,

Plaintiff/Appellant,

v.

JB OXFORD HOLDINGS, INC.,

Defendant/Appellee.

Civil No. 20070855 - CA

BRIEF OF APPELLEE

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UTAH APPELLATE COURTS

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RESPONSE TO “ISSUES ON APPEAL”

In addition to the issues of appeal set forth by Mr. Stratton, JB Oxford Holdings, Inc. (“JB Oxford”) respectfully suggests that two other issues on appeal are:

1. Were any of the Mr. Stratton’s Motions which are being appealed herein timely filed pursuant to the Rules of Civil Procedure?
2. Is this appeal unwarranted in fact and law, warranting an award of costs and/or fees to JB Oxford?

DETERMINATIVE RULES

Rule 7, Utah Rules of Civil Procedure

Rule 60, Utah Rules of Civil Procedure

RESPONSE TO STATEMENT OF THE CASE

Mr. Stratton’s statement of the case repeatedly and incorrectly asserts that two sets of Orders were entered by the Trial Court. There is no support for this in the record. In fact it is clear, from the record, that there was only one set of Orders that was entered, and that the copies of the Orders in JB Oxford’s counsel’s possession are conformed copies of the Trial Court’s Orders. (R. 1524, p.5)(Mr. Hobbs speaking: “I’ve got *conformed* copies indicating if I may – indicating they’re signed on August 11...”); (R. 1524, p.7)(Judge Medley speaking: “Mr. Hobbs has copies of those orders, *which have the insignia with the indication that they have been signed and entered...*”); (R. 1467)(Affidavit of Crystal Stephen, ¶10)(“the files of Hobbs & Olson contain copies of

court Orders *indicating that they were signed* on August 11, 2005, which were received by Hobbs & Olson on August 15, 2005.”)¹

Similarly, there is no support in the record for Mr. Stratton’s assertions that the interlineations on the court Orders occurred “sometime after” the entry of the Orders. It is apparent that the interlineations are made with the same pen, and these signed Orders with the interlineations were stamped, presumably by the clerk, and entered on that same date.

Lastly, Mr. Stratton’s Statement of the Case omits mention of the fact that JB Oxford’s counsel had submitted the proposed Orders to the court on May 3, 2005, with a letter to Judge Medley and copied to Mr. Stratton’s counsel. That letter indicated that Mr. Stratton’s counsel had requested an extension to file his objections, but that the Orders (along with Mr. Stratton’s objections) would be ready for the court’s review on May 13, 2005. Mr. Van Wagoner received this letter of May 3, and thereafter requested a further stipulation for additional time to file his objections. (R. 1371-74) Mr. Stratton’s counsel filed his objections to the Orders on May 23, 2005. (R. 1375-86)

¹ The Affidavit of Crystal Stephen indicated that copies of the conformed Orders were attached as Exhibit “C”; there are no attachments to the affidavit in the Record. As neither Judge Medley nor Stratton’s counsel made note of the absence of these attachments, it is unclear whether they were somehow lost or were not, through an inadvertent omission, filed with the affidavit. JB Oxford has filed, contemporaneously with this Brief, a Motion to Supplement the Record with these omitted exhibits.

RESPONSE TO APPELLANTS' SUMMARY OF ARGUMENT

Mr. Stratton's Summary of the Argument also improperly suggests, without any evidence to support it, that his "objections were ruled upon sometime after the orders were initially signed and dated." (See Appellant's Brief, p.16.) There is absolutely nothing in the record which supports this new contention that Judge Medley, for no apparent (or even suggested) reason, would have had any reason to retrieve the file after having entered the Orders in August 11, 2005, to make a note that the objections had been "considered and are denied."

RESPONSE TO APPELLANTS' STATEMENT OF FACTS

Much of the Appellants "Statement of Facts" consists not of facts, but rather argument. For example, the characterization of the January 22 hearing as involving the "Court [trying] to make sense of the case history" is a characterization of the hearing, and not one supported by the record. Judge Medley indicated at that time that he had reviewed the file, and he stated:

[T]here is no question that I signed any of the orders. Not only did I sign and enter them but in my own handwriting, by way of interlineation on each of the orders, I have written that plaintiff's objections to the proposed orders are denied. The orders were signed and entered on August the 11th of 2005.
(R. 1524, p.7).

Similarly, suggestions in the "Statement of Facts" that JB Oxford's counsel should have been "admonished," and suggesting what "should have been clear," constitute inappropriate argument and should be disregarded and/or stricken.

The assertion that Judge Hilder, in reviewing the Motion to Disqualify, somehow found a basis for “understandab[le] concern” is also a mischaracterization of the record. The sentence respecting the “understandab[le] concern” referred only to the allegation that Mr. Stratton’s counsel had not seen the conformed copies of the Orders,² and not the merits of the Motion to Disqualify. Judge Hilder concluded that “there is absolutely no evidence suggesting that Judge Medley or his clerk had an *ex parte* contact with either counsel during which Orders were supplied to one lawyer, but not to the other.” (R. 1488)

Prior to the denial of the Motion to Re-Open Discovery for the Limited Purpose of Adducing Evidence Regarding the Creation, Signing, Entry and Dissemination of Certain Orders in this Proceeding, the court held a hearing. (R. 1525) The July 10, 2007 hearing was noticed as a hearing on the Motion to Strike Orders (R. 1490), but Judge Medley also invited Mr. Stratton’s counsel, at that hearing, to address his motion requesting additional discovery.

Mr. Stratton’s counsel began the hearing by seeking a continuance on the hearing of his Motion to Strike, requesting that he be given discovery prior to the argument on the Motion to Strike. (R. 1490, p.6) The request for a continuance was denied. (Id.)

At the hearing on July 10, 2007, Mr. Stratton’s counsel was not asserting, as Mr. Stratton now asserts, that the interlineations post-dated the entries of the orders. He

² While it appears as though the conformed Orders had inadvertently not been attached to Ms. Stephen’s affidavit, a willingness and intent to present them had been forwarded to the Court and Stratton’s counsel on March 15, 2007. (R. 1463-67)

stated at that time “From the transcript of the hearing that we had, the Court indicated that at the time the Court signed the orders, that the Court interlineated the rulings on the objections that I had filed.” (R. 1525, p.6)

Judge Medley inquired as to what might possibly have happened that would warrant additional discovery. Mr. Stratton’s counsel indicated he did not know what happened. (*Id.*, p.11). Judge Medley then requested what additional discovery was sought. Mr. Stratton’s counsel stated he wanted more than the production of documents, and indicated that he may wish to take testimony from JB Oxford’s counsel. (*Id.*, p.14.)

Judge Medley found the Motion to Strike to be untimely (*Id.*, p.17), and found “no cognizable basis under Rule 60 for this Court to grant the relief requested.” (*Id.*, 17-18)

Lastly, the assertions in the Statement of Facts suggesting that the interlineations occurred after August 11, which are repeated several times in the Statement of Facts, are unsupported in the record. In fact, they are contrary to Mr. Stratton’s trial counsel’s understanding as of July 2007. (*Id.*, p.6.)

Mr. Stratton’s suggestion that the court should have “formally enter[ed] the orders as of January 22, 2007” was not suggested below. In July of 2007, Mr. Stratton unsuccessfully sought to strike the Orders, but there was never mention at the hearing or in the Motion to Strike of any “formal entry.”

ADDITIONAL FACTS

1. The Orders from which Mr. Stratton appeals were signed and entered on

August 11, 2005. (R. 1387-1400)

2. The court's entry of the Orders followed the May 23, 2005 filing of objections; on that date (and after he had requested and received several extensions by stipulation), counsel for Mr. Stratton filed objections to the proposed Orders. (R. 1375-86)

3. On November 16, 2006, the court issued a Notice of Order to Show Cause. (R. 1402) Mr. Stratton's counsel appeared at that hearing; counsel for JB Oxford did not. At that time, counsel for Mr. Stratton was ordered to file pleadings within 10 days. (R. 1405)

4. On December 18, 2006, Mr. Stratton's counsel filed a "Notice to Submit". (R. 1406)

5. On January 22, 2007, a hearing was held. At that time, the court clearly notified Mr. Stratton's counsel that the Orders had been entered in August 2005; Judge Medley ordered Mr. Stratton's counsel to file something within 30 days. (R. 1524)

6. On February 21, 2007, Mr. Stratton's counsel filed a Motion to Strike Orders and Set Hearing Date for a Status Conference, and Further Proceedings, and a Motion to Disqualify Judge and Supporting Memorandum. (R. 1413-25) In the Motion to Strike, Mr. Stratton's counsel noted in their filing that "On December 2, 2004, the Court granted these Motions which effectively ended the case." (R. 1413)

7. On March 12, 2007, JB Oxford's counsel filed several pleadings with the

Court. These pleadings were followed by the Affidavit of Crystal Stephen on March 15; the pleadings and affidavits restated that the “Order” in JB Oxford’s counsel’s possession was nothing more than a conformed copy of the court’s Order; blank copies of the proposed Orders had been provided to the court on May 3, 2005. (R. 1449-67)

ARGUMENT

POINT I

THE APPELLANT’S MOTION TO STRIKE, FILED 18 MONTHS AFTER ENTRY OF THE ORDERS, WAS UNTIMELY

Mr. Stratton’s counsel acknowledged in his Motion to Strike, which was filed in February 2007, that he had known that the court had “effectively ended the case” in December of 2004. The filing of that Motion to Strike was over three months after the court had noticed an Order to Show Cause, and was more than 18 months after the entry of the Orders.

The Motion to Strike was based upon Utah R. Civ. P. 60(b)(6), which allows for relief from a judgment “for any other reason justifying relief from the operation of the judgment.”

Rule 60(b) requires that a 60(b)(6) “motion shall be made within a reasonable time. . .” Furthermore, a Rule 60(b)(6) motion may not be used where subsections (1) through (3) of the Rule are applicable. Cf. Richins v. Delbert Chipman & Sons, 817 P.2d 382 (Ut.Ct.App. 1991) (Interpreting then existing Rule 60(b)(7)).

The Motion to Strike asserts, without any basis or evidence (and contrary to the

interlineations on the Orders), that they were “signed without consideration of the timely filed objections of Plaintiff’s counsel.” In making this assertion, Mr. Stratton was either asserting that the court erred by overlooking the objections, or that Judge Medley and JB Oxford’s counsel fraudulently conspired to improperly enter the Orders. In light of these bases, the Motion should have been filed pursuant to Rule 60(b)(1) (mistake) or Rule 60(b)(3) (fraud). Under that Rule, the Motions would have had to have been filed within three months of the entry of the Orders. They were untimely by over 15 months.

Even if Rule 60(b)(6) is applicable, the motion was untimely. The motion itself acknowledges that Mr. Stratton’s counsel had been aware that the case had been effectively ended over two years prior. There is no explanation as to how two years elapsed without counsel’s discovery of the entry of the orders.³ Furthermore, there is no explanation as to how Mr. Stratton’s counsel failed to become aware of the entry of the Orders when the Notice of Order to Show Cause was issued on November 16, or when Mr. Stratton’s counsel appeared without JB Oxford’s counsel at the Order to Show Cause hearing. Even after being specifically told of the entry of the Orders on January 22, counsel waited another 30 days to file the Motion to Strike.

³ At the hearings, Mr. Stratton’s counsel proffered that his secretary had been calling the court to inquire about the status of the Orders. No evidence was ever properly introduced to support this proffer. Even if the proffer is true, however, it fails to explain how a period of well over one year passed without counsel either reviewing the court’s electronic docket, visiting the court house, or contacting opposing counsel or the court’s clerk to explain the delay.

The recent case of Henshaw v. Estate of King, 2007 Ut. App. 378, 173 P.3d 876, reaffirmed that, “[I]n order to obtain relief under Rule 60(b)(6) based on a claim of failure to receive notice of the entry of judgment, ‘the moving party must...show[] diligence in trying to determine whether judgment had been entered or have been actually misled...as to whether there had been entry of judgment.’” Id. ¶28, quoting Oseguera v. Farmers Insurance Exchange, 2003 Ut. App. 46. In this case Mr. Stratton failed to present any admissible evidence of any effort on his part to determine whether or not judgment had been entered after he submitted his proposed objections to the court in May of 2005. It is inconceivable how a period of almost two years could have elapsed without discovery of the entry of these Orders. Clearly such a period of time could not have elapsed without a lack of reasonable diligence.

POINT II

THE APPELLANT HAS NOT PRESENTED ANY BASIS FOR THE STRIKING OF THE ORDERS

Even assuming the Motion to Strike was considered to have been timely, it is without merit. The only asserted basis for the Motion to Strike was the unsupported allegation that there were two sets of Orders, and that one of those sets was somehow “signed without consideration of the timely filed objections of Plaintiff’s counsel.”

As is set forth in the facts above, and as is clear from the court’s record, there is absolutely no basis for Mr. Stratton’s repeated assertion that there were two separate sets of Orders. The record is clear that Judge Medley and JB Oxford’s counsel consistently

spoke only of a conformed Order⁴ (R. 1524, p.5), and the Orders which were in the court's file, and appeared in the court's docket, contained the interlineated notes that the "Plaintiff's Objections have been considered and are denied."

Appellant's Brief attempts to justify the delay by suggesting that JB Oxford's counsel had an obligation to follow up after Mr. Stratton's counsel filed Mr. Stratton's objections, and notify them of the outcome of their objections. In support of this argument they rely upon Rule 58A(d).

While Rule 58A(d) can be read to support an obligation to follow up on submitted orders, it quite clearly does not affect the time for filing an appeal. Similarly there is no reason why it should excuse another party's neglect in monitoring the court's file. Furthermore the Appellant's interpretation of Rule 58A is inconsistent with Rule 7(f)(2), which deals with submitted orders. That rule sets forth a procedure for the submittal of proposed orders and objections upon those proposed orders, but nothing in Rule 7(f) requires the further step of "submitting" the objections.⁵

In Scott v. Majors, 1999 Ut. App. 139, 980 P.2d 214, the Court affirmed that a

⁴ Judge Medley described the Orders in JB Oxford's counsel's possession as "hav[ing] the insignia with the indication that they had been signed and entered" and as "hav[ing] the standard reference there that the orders were signed and entered." (R. 1524 p. 7-8)

⁵ Mr. Stratton's counsel's proffer in the Trial Court, that his secretary had been calling the clerk to inquire about the status of the Orders (R. 1524,p.3), reflects his then existing knowledge that his objections (which were the last the matters filed with the court) were ready for consideration. The implication in his Motion to Strike and in this appeal that he was somehow surprised by the fact that the objections were considered and ruled upon is inconsistent with this assertion.

trial court can rule on matters even where a notice to submit has not been filed. (Id. at ¶¶11, 12.)

To the extent that there was an obligation to submit the Order, that was accomplished by JB Oxford's counsel's letter of May 3, 2005. (R. 1401) That letter suggested that the Orders would be ready for the court's review and signature on May 13, 2005 in the event that no further extension was requested. A further extension was requested and received by Mr. Stratton; Mr. Stratton filed his objections on May 23, 2007. Assuming that anyone had an obligation to "submit" the objections, either party could have done so (Utah R. Civ. P. 7(d)), and it would have been logical for Mr. Stratton's counsel to have done so.⁶

POINT III

APPELLANT'S ARGUMENTS RESPECTING RULES 52 AND 59 WERE NOT RAISED BELOW, AND RELY UPON PRECEDENT THAT IS NO LONGER VALID

In an argument which was never raised below, the Appellant argues that the

⁶ Mr. Stratton's arguments respecting the lack of a "notice to submit" are also disposed of in the Henshaw case, supra at p.9. In that case the court noted that, with respect to proposed order "nothing in Rule 7(f) requires the trial court to wait for the expiration of a party's objection period prior to signing a proposed judgment or order." 2007 Ut. Ct. App. ¶25. Under Henshaw it doesn't matter whether or not the proposed orders had ever been submitted. Indeed under Henshaw it is not even necessary that the court reviewed Mr. Stratton's objections. Henshaw clearly establishes that the court's denial of the Rule 60(b) Motion is based upon discretion. This court only rules on the reasonableness of the denial of that Motion to Strike and thus the consideration of the objections becomes entirely irrelevant.

objections which were filed were not in fact objections, but rather they “should have been treated as motions under Utah Rules of Civil Procedure Rule 52(b) or 59.”

Because this argument was not raised below, the Court need not even consider it. Brookside Mobile Home Park v. Peebles, 2002 UT 48 ¶14, 48 P.3d 968.

Additionally, Appellant fails to explain how Rules 52 or 59 could have been applicable prior to the Court’s entry of the Orders. If Rule 52 or Rule 59 motions would have ever been appropriate, they should have been filed between August 12 (*after* entry of the Orders) and before August 22, 2005.

Furthermore, however, the cases upon which Appellant relies in making this argument have either been expressly overruled or are inconsistent with current precedent. In the case of Gillet v. Price, 2006 UT 24, the Utah Supreme Court held that “regardless of the motion's substance, postjudgment motions to reconsider and other similarly titled motions will not toll the time for appeal because they are not recognized by our rules.”

If these motions were to have been treated as if they had been brought under Rules 52 or 59, they would have been untimely. A motion under Rule 52 would need to have been made “not later than 10 days after entry of judgment...” (Utah R. Civ. P. 52(b)) and a motion under Rule 59 would need to of been brought up within the same timeframe. (Utah R. Civ. P. 59(b)) The objections were not filed until May 23 which was 20 days

after the proposed Orders had been submitted to the court.⁷

POINT IV

THERE WAS NO BASIS OR NEED TO ALLOW DISCOVERY

Mr. Stratton, in the court below, sought disqualification of Judge Medley based upon facts which were not supported by the record. The motion for disqualification was heard by Judge Hilder. Judge Hilder found that “there is absolutely no evidence suggesting that Judge Medley or his clerk had *ex parte* contact with either counsel during which Orders were supplied to one lawyer, but not to the other.” (R. 1488) Following that ruling, Mr. Stratton’s counsel continued in his speculative and unwarranted inquiry (which was unwarranted by anything in the record) as to whether there had been two separate sets of Orders. In his Motion, Mr. Stratton failed to present any evidence of impropriety and failed to present any basis as to how discovery could possibly have changed the outcome on the motions, which had been decided over two years earlier.

⁷ Because motions to reconsider are not recognized by the Utah Rules of Civil Procedure, and “Because trial courts are under no obligation to consider motions for reconsideration, any decision to address or not to address the merits of such a motion is highly discretionary.” Tschaggeny v. Milbank Insurance Co., 2007 UT 37, 163 P.3d 615, ¶15. Thus the Trial Court’s ruling will be overturned only “if there is no reasonable basis for the decision.” Id. at ¶16 citing Langeland v. Monarch Motors, 954 P.2d 1058, 1061 (UT 1998).

POINT V

JB OXFORD SHOULD BE AWARDED ITS FEES IN RESPONDING TO THIS APPEAL

Rule 33 of the Utah Rules of Appellate Procedure provides that “if the court determines that [an] ...appeal taken...is either frivolous or for delay, it shall award just damages from which may include single or double costs... and/or reasonable attorney fees, to the prevailing party.” A frivolous appeal includes “one that is not grounded in fact, not warranted by existing law day arguments to extend, modify, or reverse existing law....”

The Appellant’s appeal in this case is not grounded on fact. A review of the Court’s record reveals that from the outset, the Appellant should have realized that the copy of the Order in JB Oxford’s possession was merely a conformed copy of the Order that had been entered by the court. Had the Appellant’s counsel taken the time to review the court’s record, they would have seen that there was no reasonable conclusion to come to, other than that Judge Medley had considered and denied their objections, and entered the Orders on August 11, 2005.

And even if the Appellant’s counsel had not understood what had transpired before March 15, 2007, when Ms. Stephen’s Affidavit was filed (R. 1463-67), they then should have come to an understanding as to what had happened. Rather than accept the facts in that Affidavit, which are perfectly logical and consistent with the court’s record, they chose to continue to assert, at the trial level and now in this appeal, accusations

implying a conspiracy between counsel of the court. They continue to make those assertions in the absence of any evidence, whatsoever.

In the case of Peters v. Pine Meadow Ranch Home Association, 2007 UT 2, 151 P3d. 962, counsel made similar and unwarranted allegations of judicial or judicial and counsel's conduct. In that case, the court's language could have been written regarding this case. The court stated:

The Plaintiff's accusations against the judge and defendants counsel in this case are unwarranted, and impertinent and scandalous. The defendants counsel has been required to spend significant amounts of time pulling in researching the file, obtaining an affidavit from a former assistant who was moved out of state, and pulling documents from storage to attempt to ascertain the nature of this case which the Plaintiffs themselves have ignored for several years.

JB Oxford's files in this case were in storage (R1524 p.4), and JB Oxford's counsel was required to obtain an affidavit from an assistant who had moved out of state, (R. 1465-67), and Mr. Stratton's counsel had apparently ignored this case between May 23, 2005 and December 13, 2006.

The appeal of this case, in light of the absence of facts to support their argument, in light of the clear case law respecting the timeliness of motions, and in light of the abuse of discretion standard which governs the appeal, clearly makes this a frivolous appeal.

CONCLUSION

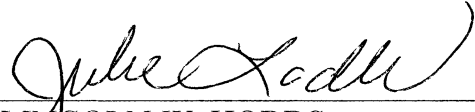
In late 2004, JB Oxford filed and prevailed upon several motions which resolved this case. Mr. Stratton and his counsel were aware of that result on December 4, 2004.

Many months later they received and reviewed proposed Orders on those motions; they filed objections to the proposed Orders pursuant to Utah Rules of Civil Procedure. The court denied their objections in August and entered the Orders, noting on each of the Orders that “Plaintiff’s Objections have been considered and are denied.” For reasons which the Appellant and his counsel have never explained with admissible evidence, they allege they remained unaware of the entry those Orders for a period of over 16 months thereafter, until the court scheduled and held its hearing on the Order to Show Cause. After discovery of the entry of the Orders, the Appellant’s counsel sought to strike the entry of the Orders, attempting without basis to blame the Judge and opposing counsel for their own neglect.

The Appellant’s counsel’s efforts to blame others for their own lack of attention to this case fail, both factually and legally. Their post-judgment motions were untimely, unwarranted and properly denied by the court. Their appeal in this case, in light of the facts and the law, and in light of the significant discretion granted to the Trial Court, is frivolous. This court should affirm the denials of the post-order motions below, and should award costs and fees to JB Oxford, which has been forced to defend this appeal.

DATED this 10th day of April, 2008.

HOBBS & OLSON, L.C.

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

LINCOLN W. HOBBS

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Rule 7

Utah Rules

RULES OF CIVIL PROCEDURE

Part III Pleadings, Motions, and Orders

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

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.

ADVISORY COMMITTEE NOTE

The practice for courtesy copies varies by judge and so is not regulated by rule. Each party should ascertain whether the judge wants a courtesy copy of that party's motion, memoranda and supporting documents and, if so, when and where to deliver them.

Paragraph (f) applies to all orders, not just orders upon motion.

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Rule 60

Utah Rules

RULES OF CIVIL PROCEDURE

Part VII Judgment

Rule 60 Relief from judgment or order.

Rule 60. Relief from judgment or order.

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

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 2008, I caused a true and correct copy of the foregoing BRIEF OF APPELLEE to be served upon the following in the manner indicated:

- ☒ Mail
- ☐ Fax
- ☐ Fed Ex
- ☐ Hand Delivery
- ☐ Personally Served
- ☐ Email

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