2007

# William Stratton v. JB Oxford Holdings : Reply Brief

Utah Court of Appeals

No. 20070855

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**IN THE UTAH COURT OF APPEALS**

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WILLIAM R. STRATTON,

Plaintiff/Appellant,

Vs.

JB OXFORD HOLDINGS, INC.,

Defendant/Appellee

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# REPLY BRIEF OF THE APPELLANT

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Appeal from Orders of the
Third Judicial District Court, Salt Lake County, State of Utah,
The Honorable Tyrone E. Medley, judge presiding

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IN THE UTAH COURT

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## I
## THE "CONFORMED COPIES" DO NOT CONTAIN A REFERENCE TO THE INTERLINEATIONS

For the first time, attached as Exhibit C in the Supplemental Filing of Exhibits, Appellee has produced the set of Orders Appellee received by the Court. According to the Affidavit of Crystal A. Stephen, these Orders are "conformed copies" received from the Court in response to her request.

According to Black's Law Dictionary, Sixth Edition, 1990, a conformed copy is an

"exact copy of a document on which has been written explanations of things that could not or were not copied; e.g. written signature might be replaced on conformed copy with notation that it was signed by the person whose signature appears on the original."

The conformed copies clearly do not contain the interlineations. They also do not contain any indication that interlineations denying Appellant's objections were not copied from the original.

It is ironic that Appellee forcefully asserts that there is only one set of orders and that Appellee simply has conformed copies of that one set. It is ironic because if the copies held by Appellee are "conformed copies," then there must be two sets of orders.1

Taking the record at face value, and consistent with Appellee's position, one must concede that the orders were signed, the clerk sent out conformed copies, and then, at some later time, the interlineations were made. This resulted in two inconsistent sets of orders. To conclude otherwise would undermine the undisputed affidavit of Crystal Stephen that the copies are "conformed copies."

One can speculate that another sequence of events occurred.2 Perhaps the clerk merely failed to note the interlineations. However, there is no evidence that this happened, and to so speculate would impute on the clerk a breach of her employment duties. (Unfortunately, Judge Medley stated in Court that he has no memory concerning the specifics of the orders at issue.)

Appellant has established that there are two sets of orders: one with interlineations and

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[1]It should be noted that Appellee sought leave of court to file supplemental exhibits in order to support its position that the copies in counsel's possession are "conformed" copies.

[2]Appellee's counsel seems to contend that the failure to speculate as to what occurred is problematic.

one without. The Court should strike these inconsistent orders and direct the trial court to enter a new set of orders.

II

APPELLANT'S MOTION TO STRIKE WAS NOT UNTIMELY

Appellee strongly argues that the Court should not consider this appeal because of the delay. This was the principle grounds supporting Appellee's Motion for Summary Disposition which has already been denied. 3

Appellee further argues that Appellant has improperly applied for relief under Rule 60(b)(6). Specifically, Appellee asserts that the relief sought should have been pursuant to Rule 60(b)(1) (mistake) or Rule 60(b)(3) (fraud). This argument is made because of the applicable three month time limitation. Neither argument is correct.

"The most common 'other reason' for which courts have granted relief [under Rule 60(b)(6)] is when the losing party fails to receive notice of the entry of judgment in time to file an appeal." Oseguera v. Farmers Ins. Exch., 68 P.3d 1008, 1011 (Utah App. 2003).4

"When the trial court's mistakes--not counsel's--are the reason a judgment is improvidently entered and the entry goes undetected, even if it remains undetected for some time, the court should be anxious to do whatever needs to be done to fix the mistake as soon as it is called to the court's attention. It did not do so here. The trial court thus exceeded the bounds of sound discretion in denying Oseguera's motion under Rule 60(b)(6) for relief from judgment. We

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[3]Appellant hereby incorporates by reference its Opposition to Motion for Summary Disposition and Award of Attorneys Fees.

[4]Appellee cites this case in arguing that the 60(b)(6) relief should be denied. It thus appears that this argument, like many of Appellee's arguments, are at best internally inconsistent.

therefore reverse the trial court's denial of that motion and remand for such proceedings as may now be appropriate." Id at 1012.

Finally, it is asserted that, even if Rule 60(b)(6) is applicable, the motion is still untimely because of Appellant's lack of diligence. This contention is also without merit. As the record reflects, attempts were made by then counsel for Appellant's secretary to determine the status of the orders after they were filed. This fact is acknowledged by Appellee in footnote 3 of its brief.

In that footnote, counsel for Appellee wonders why counsel for Appellant did not contact him. This comment must have been made in haste because its author failed to realize that this goes to the crux of the appeal. Rule 58A(d) of the Utah Rules of Civil Procedure squarely places the responsibility of giving notice on the Appellee. As noted by the Court in Workman v. Nagle Constr., 802 P. 2d 709, this obligation is not inert desiderata. Where is the explanation of why no notice was given? To turn a phrase, it is inconceivable how a period of almost two years could have elapsed without counsel for Appellee complying with his statutory obligation to give notice.

Perhaps more important, Appellee's counsel has provided an affidavit of his former principle assistant concerning office policies. Those policies do not include a policy of giving notice of entry of judgment. Therefore, it is Appellee's own failure to comply with the rules that has resulted in the delay, and Appellee's unclean hands should silence its timeliness objections.

## III

## THE BASIS FOR STRIKING THE ORDERS HAS BEEN ESTABLISHED

As was shown above, the conformed copies provided by Appellee establish a set of orders without interlineation. The record also establishes a set of orders with interlineation. Thus, the basis for striking the orders has been established.

## IV

## APPELLEE INCORRECTLY CHARACTERIZES APPELLANTS OBJECTIONS

Appellee mischaracterizes Appellant's objections as motions for reconsideration. Appellee then asserts that Appellant has supported its position by citing cases which have been expressly overruled or are inconsistent with current precedent. Of course, this is a classic, and rather transparent, straw man argument. Appellee sets up this argument by wrongly asserting that Appellant's objections were motions for reconsideration. Appellee then correctly notes that such motions are not allowed under Utah law. The Court should ignore Appellee's mischaracterizations. The Court can and should have considered Appellant's objections as motions under Rule 52 or 59.

Appellee also incorrectly asserts that said motions were untimely since they were filed 20 days after the proposed orders were submitted. The time period to file said motions does not begin to run when the orders were submitted. The time period begins to run when the orders were signed. Pursuant to Rule 58A(c), a "judgment is complete and shall be deemed entered for all purposes ...when the same is signed and filed as herein above provided." Therefore, the motions were premature. This rule does not prohibit filing premature motions. (See Hudema v. Carpenter, 989 P.2d 491, wherein the Court held that a motion filed more than two weeks before entry of judgment, although early, was timely.)

## V

## DISCOVERY WAS REQUIRED

Appellant has shown that two sets of orders exist if the conformed copy is accurate.

Discovery should have been allowed to ascertain the circumstances surrounding this irregularity.

## VI

## CONCLUSION

Appellee's brief is full of sound and fury in an attempt to divert the Court from what Appellee inadvertently establishes: Appellee has a policy of not giving notice of entry of judgment even though such notice is required by Rule 58A(d) of the Utah Rules of Civil Procedure. Appellee has this policy to take advantage of situations like the present where several months elapse from the time orders are submitted to the time orders are signed.

The Court correctly addressed these situations in Workman v. Nagle Constr., supra. Since the Appellant was the losing party and Appellant remained ignorant of the judgment, the trial court should have looked beyond the delay and considered the challenges to the judgment.

In this case, it is clear that the orders were entered on August 11, 2005. However, these orders were later modified via interlineation. When the interlineation occurred is unknown. At the very minimum, both orders should have been stricken and new orders entered.

The trial court abused its discretion in simply considering the delay in ruling on Appellant's motions to strike orders and to re-open discovery. The trial court abused its discretion because it disregarded Workman, and continues to promote the conscious practice of ignoring Rule 58A(d) .

Appellant respectfully requests that the Court order the trial court to grant the relief requested in this appeal.

DATED this 15 day of July, 2008.

Chad M. Steur
Attorney for Plaintiff/Appellant

## CERTIFICATE OF SERVICE

I, Jeni Wood, hereby certify that on this date 16, July 2008 I caused to be served by U.S. mail, postage pre-paid, a true and correct copy of the foregoing **REPLY BRIEF OF THE APPELLANT** upon the party listed below to the following address:

Lincoln W. Hobbs
466 East 500 South, Suite 300
Salt Lake City, UT 84111

Jeni Wood
Legal Assistant to Chad Steur