1996

Bartel v. Debry : Brief of Appellee

Utah Court of Appeals

Del K. Bartel; Appellant Pro Se; Dale Thurgood; Appellant Pro Se.
John A. Anderson; Van Cott, Bagley, Cornwall & McCarthy; D. Gary Christian; Heinz J. Mahler; Kipp & Christian; Blake Atkin; Atkin & Lilja; Craig R. Mariger; Rob M. Alston; Jones, Waldo, Holbrook & McDonough; Paul M. Belnap; Robert L. Janicki; Strong & Hanni; Craig C. Coburn; Richards, Brandt, Miller & Nelson; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

DEL K. BARTEL, individually, and as to his individual interest in CASCADE ENTERPRISES and CASCADE CONSTRUCTION, and DALE THURGOOD, individually and as to his individual interest in CASCADE ENTERPRISES and CASCADE CONSTRUCTION, Plaintiffs and Appellants, v. ROBERT J. DEBRY, JOAN DEBRY, ROBERT J. DEBRY AND ASSOCIATES, EDWARD T. WELLS, DALE GARDINER, KENNETH W. KARREN, KENNETH W. KARREN, JR., GEORGE R. JENSEN, MICHAEL JENSEN, DAVID JORGENSEN, JAMES BAILEY, DAVID MU, WILLIAM F. BANNON, MICHAEL MILLS, VALLEY MORTGAGE COMPANY and JOHN DOES 1 through 9 Defendants and Appellees.	BRIEF OF APPELLEE DALE GARDINER Court of Appeals No. 960753 Priority No. 15

RESPONSE TO APPEAL FROM JUDGMENTS AND ORDERS OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, HONORABLE HOMER F. WILKINSON, IN CIVIL NO. 920903507-CV

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i. LIST OF ALL PARTIES TO THE PROCEEDING BEING APPEALED.

The parties to the lower court proceedings which are involved in this appeal are as follows:

Name	Status (Lower Court/Appeal)
Del K. Bartel	Plaintiff/Appellant
Dale Thurgood	Plaintiff/Appellant
Robert J. DeBry	Defendant/Appellee
Joan DeBry	Defendant/Appellee
Robert J. DeBry & Associates	Defendant/Appellee
Edward T. Wells	Defendant/Appellee
Dale Gardiner	Defendant/Appellee
Kenneth W. Karren	Defendant/Appellee
Kenneth W. Karren, Jr.	Defendant/Appellee
James Bailey	Defendant/Appellee
David Mu	Defendant/Appellee
David Jorden	Defendant/Appellee

The parties to the lower court proceedings which are not involved in this appeal are as follows:

Name	Status In Prior Proceeding
Lee Bartel	Plaintiff
George R. Jensen	Defendant
Michael Jensen	Defendant
William F. Bannon	Defendant
Michael Mills	Defendant
Valley Mortgage Corporation	Defendant

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I. STATEMENT OF JURISDICTION.

This Court lacks jurisdiction of this matter as Appellants' Notice of Appeal was untimely filed. Appellants' Notice of Appeal was not filed until October 27, 1995, more than 100 days after the trial court's July 10, 1995 Orders disposing of all claims. Accordingly, this Court lacks jurisdiction over this matter. E.g., State v. Montoya, 825 P.2d 676 (Utah Ct. App. 1991)(time for filing an appeal is jurisdictional); Glezos v. Frontier Inv., 896 P.2d 1230 (Utah Ct. App. 1995)(court lacked jurisdiction to consider cross-appeal that was not timely filed). This argument is more fully set forth infra, at section VI.B, pp. 16-18.[1]

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

The following issues are presented for appeal with respect to Appellee Attorney Dale Gardiner:

1. Should this Court disregard or strike Appellants' Brief for its blatant failure to comply with Rule 24, Utah Rules of Appellate Procedure, and summarily affirm the Judgment by the trial court?

2. Does this Court lack jurisdiction over this appeal as a result of Appellants' filing of their Notice of Appeal more than 100 days after the trial court's orders disposing of all claims?

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[1] Moreover, the untimely filing of the Notice of Appeal is the basis of Appellee Dale Gardiner's Motion for Summary Disposition filed December 11, 1995, and that motion is incorporated herein by reference. The Utah Supreme Court has deferred ruling on this Motion pending further consideration. See March 20, 1996 Order, signed by Associate Chief Justice I. Daniel Stewart.

3. Did the trial court properly grant summary judgment on Appellants' claims for abuse of process, conspiracy, interference, civil extortion and coercion, negligence, intentional infliction of emotional distress, and consequential damages asserted against Attorney Gardiner when the undisputed evidence shows that Attorney Gardiner did not file the complaint, was forced by a conflict of interest to withdraw before trial, and took no actions except those allowed under the Rules of Civil Procedure during the window in which he represented Appellants' adversaries?

III. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS.

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of this appeal.

IV. STATEMENT OF THE CASE.

A. NATURE OF THE CASE.

Appellants were opposing parties in prior lawsuits brought by Attorney Gardiner's former clients, Appellees Robert J. and Joan DeBry, in the Third Judicial District Court and the United States District Court for the District of Utah. More than a year after the actions were commenced, Attorney Gardiner entered his appearances on behalf of the DeBrys. He represented the DeBrys until August 31, 1989 when a conflict of interest arising out of a pending divorce between the DeBrys necessitated his withdrawal. The Third District Court litigation was eventually resolved, in part by stipulation and in part by litigation. In that litigation,

Appellants prevailed on some claims, and the Appellee DeBrys prevailed on some. The Federal Court litigation was eventually dismissed as a result of the resolution of the Third District Court lawsuit.

Thereafter, Appellants brought this multi-claim action against numerous parties, including Attorney Gardiner. In their 80-page unverified complaint, which contained more than 450 allegations, Appellants asserted the following causes of action against Attorney Gardiner:

Fifth:	Abuse of Process
Tenth:	Conspiracy
Eleventh:	Interference
Twelfth:	Civil Extortion and Coercion
Twenty Second:	Negligence
Twenty Third:	Abuse of Process
Twenty Fourth:	Intentional Infliction of Emotional Distress
Thirty Second:	Consequential Damages

Appellants' claims against Attorney Gardiner all relate to procedural actions he took on behalf of his clients in the litigation during the window Attorney Gardiner acted as the lawyer for Appellants' adversaries.

B. THE COURSE OF PROCEEDINGS AND DISPOSITION IN THE LOWER COURT.

1. On March 20, 1995, Appellants filed their Consolidated Amended Complaint in the Third Judicial District Court, Salt Lake County, State of Utah. [Record 2726-2805].[2]

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[2] All citations, unless otherwise noted, are to the original record index of District Court No. 920903507, Supreme Court No. 960066, as paginated pursuant to 11(b) of the Utah Rules of Appellate Procedure and filed with the Utah Supreme Court on April 29, 1996.

2. On March 30, 1995, Appellee Gardiner filed a "Motion to Dismiss, Or In The Alternative For Summary Judgment On, Plaintiffs' Consolidated Amended Complaint," and supporting memorandum.[3] [Record 2839-2842 & 2847-2964, respectively].

3. Appellants submitted a response and Appellee Gardiner filed a reply. [Record 3167-3179 & 3384-3443, respectively]. Thereafter, Appellants filed an additional pleading captioned "Plaintiffs [sic] Supplemental Citations In Support Of Response In Opposition To Defendant's Motions To Dismiss And For Summary Judgment." [Record 3474-3477].

4. On April 26, 1995, the Third Judicial District Court, Honorable Homer F. Wilkinson, orally granted the motions to dismiss and for summary judgment in favor of all defendants on all claims in this proceeding with the exception of the claims against Valley Mortgage Company. [Record 3482].

5. On July 10, 1995, Judge Wilkinson, entered Orders:

a) memorializing his prior granting of Attorney Gardiner's Motion to Dismiss and Motion for Summary Judgment, dismissing with prejudice all causes of action asserted against Attorney Gardiner;

b) memorializing his prior granting of Appellees Robert J. DeBry, Robert J. Debry & Associates, and Edward T. Wells' Motions to Dismiss, dismissing with prejudice all causes of action asserted

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[3] Appellees Robert J. Debry, Robert J. DeBry & Associates, and Edward T. Wells also filed motions to dismiss or, in the alternative, for summary judgment.

against them; and

c) continuing the trial date as to Valley Mortgage to allow Appellants to proceed with the filing of an appeal of the "court's final order of April 26, 1995."

[Record 3543-3549, 3551-3557 & 3558-3560].

6. On October 17, 1995, Appellants filed their Notice of Appeal in this action. [Record 3588-3590].

7. On December 11, 1995, Attorney Gardiner filed a Motion for Summary Disposition of this Appeal with this Court on the basis that the Notice of Appeal was filed too late for the appellate court to obtain jurisdiction. The Utah Supreme Court, by Order dated March 20, 1996, has deferred ruling on the Motion for Summary Disposition until further consideration.

C. STATEMENT OF RELEVANT FACTS.

The relevant facts set forth herein are undisputed as the Appellants failed to set forth any evidence pursuant to Rule 56, Utah Rules of Civil Procedure, to counter the evidence established by Attorney Gardiner in support of his motion for summary judgment. Accordingly, pursuant to Rule 56, these facts are not in dispute. E.g., Schafir v. Harrigan, 879 P.2d 1384, 1391 (Utah Ct. App. 1994); see also, infra, section VI.C at pp. 18-20.

1. On January 24, 1986, Robert J. DeBry and Joan Debry (the "DeBrys") filed an action styled Robert J. Debry and Joan DeBry, Plaintiffs v. Cascade Enterprises, et al., Defendants, in the Third Judicial District Court, State of Utah, Civil No. 860900553, before

the Honorable Pat B. Brian (the "Underlying Lawsuit"). [E.g., *Record 2850 at* ¶ 1].

2. In the Underlying Lawsuit, the DeBrys sought to recover for defects in construction of an office building purchased by the Debrys from, among others, Cascade Enterprises, Cascade Construction, and Appellants Del K. Bartel and Dale Thurgood. [E.g., Record 2850 at ¶ 2].

3. Appellants Bartel and Thurgood filed counterclaims against the DeBrys in the Underlying Lawsuit. [E.g., Record 2850 at ¶ 3].

4. Attorney Gardiner did not file the complaint in the Underlying Lawsuit. In fact, Attorney Gardiner did not become an employee of Robert J. DeBry & Associates until July, 1987 and did not make an entry of appearance in the Underlying Lawsuit on behalf of the DeBrys until July 31, 1987 -- more than a year after the action was commenced. [Record 2850-2851; 2878-2880; 2895 at ¶¶ 2 & 3].

5. Pursuant to a scheduling conference held on August 19, 1988, Judge Brian set May 1, 1989 as the discovery cut-off date in the Underlying Lawsuit. [Record 2851 at ¶ 5].

6. As an accommodation, however, Attorney Gardiner allowed Fidelity National Title to take the deposition of his client, Joan DeBry, after this discovery cut-off date. [Record 2851 at ¶ 6].

7. At the time this deposition was conducted by Fidelity National Title, the Appellants had already taken and completed their deposition of Joan Debry. [Record 2851 at ¶ 7; 2881-2884].

8. The DeBrys filed a complaint against the Plaintiff in Federal District Court on February, 1989 under case No. 89C-1811W (the "Federal Lawsuit"). Attorney Gardiner did not file the Federal Lawsuit. [Record 2851 at ¶ 10; 2894-2898 at ¶ 5].

9. On March 21, 1989 the Appellants filed a motion to dismiss the Federal Lawsuit which was opposed by Attorney Gardiner as counsel for the DeBrys. [Record 2852 at ¶ 11].

10. The Federal District Court denied Appellants' motion to dismiss the federal civil rights claim by order dated May 25, 1989. [Record 2852 at ¶ 12; 2899-2900]. Attorney Gardiner, on behalf of the DeBrys, then stipulated to the dismissal without prejudice of the related state court claims. This dismissal of the related state court claims was agreed to by the DeBrys because those claims were pending in another forum, not because such claims lacked merit. [Record 2852 at ¶ 12; 2894-2898 at ¶ 7; 2901-2910].

11. During the course of the Underlying Litigation, Attorney Gardiner filed a request that Judge Brian recuse himself from presiding over the lawsuit or, in the alternative, that he be disqualified from presiding over the lawsuit. That motion was heard by Judge Daniels who denied the motion. Thereafter, Appellants' motion for Rule 11 sanctions based on the Motion to Disqualify was heard by Judge Daniels. The hearing on that motion for Rule 11 sanctions was held on August 21, 1989. The judge denied any Rule 11 sanctions finding that there was a sufficient basis for bringing the motion. [Record 2894-2898 at ¶ 13].

12. Pursuant to an order of the Third District Court

effective August 31, 1989, Gardiner was forced to withdraw as counsel for the DeBrys due to a conflict of interest arising out of a pending divorce proceeding between Robert and Joan DeBry. [Record 2851 at ¶ 8; 2885-2888].[4]

13. In December, 1989 the DeBrys filed a second lawsuit against Appellants Bartel and Thurgood in the Third District Court under case no. 890907449CV. Gardiner had terminated his employ with Robert DeBry & Associates prior to this time and had no involvement in that lawsuit. [Record 2852 at ¶ 13; 2894-2898 at ¶ 10].

14. On or about February 28, 1990 and after Attorney Gardiner's withdrawal as counsel, the Underlying Lawsuit came on for a bifurcated trial only as to the Appellants, Tri-K construction and Sherwin Knudsen (collectively "Tri-K"); and Geneva Rock Products. [Record 2852 at ¶ 14; 2911-2917].

15. On that day, Appellants and Tri-K reached a settlement on a major aspect of the case. DeBrys and Appellants also entered into a settlement stipulation regarding that major aspect of the case on that day. [Record 2852 at ¶ 14].

16. Judge Brian executed an Order approving the Tri-K settlement and the stipulation between the DeBrys and the Appellants on April 17, 1990. [Record 2853 at ¶ 16; 2911-2917].

17. The trial of the remaining issues between the DeBrys and

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[4] The DeBrys subsequently divorced and due to a stipulation entered into in connection with the divorce wherein Robert DeBry agreed to indemnify Joan, the DeBrys were able to proceed with common representation. [Record 2851 at ¶ 9; 2866; 2889-2993].

the Cascade parties (which included Appellants) in the Underlying Lawsuit commenced on May 21, 1990 and continued intermittently until the jury returned its special verdict on June 20, 1990. [Record 2853 at ¶ 17; 2918-2932].

18. The jury returned a special verdict in favor of the DeBrys on some claims and in favor of the Appellants on other claims. [Record 2853 at ¶ 18; 2918-2932].

19. Thereafter, the DeBrys and Appellants filed various post-trial motions which were denied in part and granted in part pursuant to an Order dated March 28, 1991. [Record 2853 at ¶ 19; 2933-2934].

20. On June 4, 1991, Judge Brian entered a Judgment on the Jury's Special Verdict. [Record 2853 at ¶ 20; 2918-2932].

21. In his Judgment, Judge Brian specifically found that "[t]here is no prevailing party." [Record 2853 at ¶ 21; 2918-2932 at p. 14].

22. Thereafter, both the DeBrys and the Appellants filed appeals from that Judgment. [Record 2853 at ¶ 22].

23. On August 21, 1991, two years after Attorney Gardiner's withdrawal as counsel for the DeBrys, the Federal Lawsuit was dismissed on the grounds that the trial court's decision in the Underlying Lawsuit was res judicata. [Record 2853-2854 at ¶ 23].

24. Appellants commenced the consolidated actions which are the basis for the instant appeal by filing complaints on or about June 19, 1992 and June 22, 1992. [Record 2854 at ¶ 24, 1-72; 2-59 (of Dist. Ct. No. 920903543)]. Appellants filed amended complaints

in both actions on July 13, 1992 and August 20, 1992. [Record 2854 at ¶ 24, 73-151; 60-116 (of Dist. Ct. No. 920903543)].

25. The District Court granted Robert J. DeBry's motion to dismiss Appellants' claim for active interference and conspiracy to commit fraud in March, 1993. An order memorializing the court's decision was not signed and entered at that time. [Record 2854 at ¶ 25].

26. On July 1, 1994, the Utah Supreme Court rendered its decision on appeal of the Underlying Lawsuit in DeBry v. Cascade Enterprises, 879 P.2d 1353 (Utah 1994). Petitions for rehearing were denied on August 18, 1994. [Record 2854 at ¶ 26; 2935-2954].

27. The Utah Supreme Court's decision generally upheld the damage awards determined by the jury (with some modifications in amount). The Court, however, specifically found that the Appellants did not prove the elements of either an action for fraud or an action for conspiracy to defraud, and therefore vacated the punitive damage award. DeBry, 879 P.2d at 1358-1359. [Record 2854 at ¶ 27; 2935-2954].

28. On March 20, 1995, the Appellants filed their unverified Consolidated and Amended Complaint in this action. [Record 2726-2805]. Attorney Gardiner, among others, filed a Motion to Dismiss, Or in the Alternative for Summary Judgment, on Appellants' Consolidated Amended Complaint. [Record 2839-2842].

29. On April 26, 1995 the trial court ordered from the bench dismissal of all of Appellants' claims against all defendants except Valley Mortgage. [Record 3482].

30. On July 20, 1995, Judge Wilkinson entered his Order dismissing Appellants' Complaint against Attorney Gardiner in its entirety. [Record 3543-3549].

31. On July 10, 1995 the trial court entered its Order dismissing all claims against all other defendants except Valley Mortgage. [Record 3550; 3551-3557; 3558-3560].

32. On July 10, 1995 the trial court entered its Order disposing of the claims of Valley Mortgage by continuing the trial on those claims "[p]rovided that [Appellants] proceed with the filing of appeal of the Court's final Order of April 26, 1995, concerning dismissal and summary judgments granted to specific named defendants." [Record 3558-3560].

33. Appellants did not file their Notice of Appeal until October 27, 1995, more than 100 days after the trial court's July 10, 1995 Orders disposing of all claims as to all parties. [Record 3588-3590].

V. SUMMARY OF ARGUMENTS.

Summary judgment was properly entered in favor of Attorney Gardiner on all of the causes of actions asserted against him by Appellants, opposing litigants to Attorney Gardiner's former clients. There are several independent bases upon which the trial court's judgment in favor of Attorney Gardiner should be affirmed.

First, the judgment should be summarily affirmed on the grounds that Appellants' Brief utterly fails to comply with Rule 24 of the Utah Rules of Appellate Procedure. These severe deficiencies, including the complete lack of any meaningful

analysis of the law, place Attorney Gardiner at a severe disadvantage in responding to Appellants' assertions. Moreover, it is a waste of this Court's time and resources. Accordingly, the Appellants' Brief should be stricken or, in the least, disregarded and the judgment of the lower court affirmed.

Second, this Court lacks jurisdiction to hear this appeal as a result of the Appellants' untimely filing of their Notice of Appeal. The Notice of Appeal was not filed for more than 100 days after the trial court's simultaneous entry of several orders which disposed of all claims and which were, by their very terms, final orders. Accordingly, this appeal should be dismissed and the judgment in favor of Attorney Gardiner left undisturbed.

Finally, judgment was properly entered in favor of Attorney Gardiner as the undisputed evidence established that he was entitled to judgment as a matter of law on all of Appellants' claims against him. The undisputed evidence established that the "wrongful acts" asserted by Appellants against Attorney Gardiner, during his limited representation of the DeBrys, were typical of the procedural wrangling that is expected in our adversary system. In fact, our procedural rules anticipate that these types of disputes will arise during the course of litigation and those rules provide for the resolution of disputes involving procedural conduct of the type Attorney Gardiner purportedly undertook. Moreover, as a matter of law, those remedies (e.g., sanctions under rules 11 and 37) are the exclusive remedies and preclude the bringing of a subsequent, collateral action based solely on purported procedural

improprieties. In sum, Attorney Gardiner's actions in connection with his limited representation of the DeBrys do not give rise to any of the several causes of action asserted against Attorney Gardiner by his former clients' adversaries, the Appellants. Accordingly, the judgment entered in his favor must be affirmed.

VI. ARGUMENTS.

A. APPELLANTS' BRIEF SHOULD BE DISREGARDED OR STRICKEN BECAUSE OF THEIR FAILURE TO COMPLY WITH RULE 24 OF THE UTAH RULES OF APPELLATE PROCEDURE AND THE JUDGMENT IN FAVOR OF ATTORNEY GARDINER SHOULD BE SUMMARILY AFFIRMED.

Rule 24, Utah Rules of Appellate Procedure, provides in part as follows:

> (a) **Brief of the appellant.** The brief of the appellant shall contain under appropriate headings. . .:
>
> > (7) A statement of the case. . . . A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.
> > . . .
> >
> > (9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on.
>
> . . .
>
> (j) **Requirements and sanctions.** All briefs under this Rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Utah R. App. Proc. 24(a) & (j).

Appellants' Brief utterly fails to comply with this Rule. They do

not set forth the facts relevant to the determination of the numerous, vague and almost unintelligible issues they claim are raised by this appeal. Likewise, many of the facts they purport to set forth are argumentative conclusions, unintelligible, and not supported by the record. Moreover, to the extent Appellants purport to cite to the record, those cites are nothing more than references to entire pleadings without reference to any particular page or paragraph. Each of these Rule 24 deficiencies not only wastes the Court's time, it seriously jeopardizes Attorney Gardiner's ability to respond and the Court should summarily affirm the trial court's judgment in favor of Attorney Gardiner. E.g., State v. Price, 827 P.2d 247, 249 (Utah Ct. App. 1992)("We have routinely refused to consider arguments which do not include a statement of the facts properly supported by citations to the record.")(citations omitted); State v. Yates, 834 P.2d 599, 601 (Utah Ct. App. 1992)(summarily affirmed lower court where brief failed to set forth a coherent statement of issues or standard of review for each issue); Trees v. Lewis, 738 P.2d 612, 612-613 (Utah 1987)(do not reach merits where facts not set forth in brief with citations to the record); Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 970 n. 6 (Utah Ct. App. 1989)(courts will disregard improper briefs as they cannot afford the effort and time to prepare appellant's case when the time can be better spent considering properly presented cases).

The argument portion of the Appellants' brief also fails to comply with Rule 24. It contains neither the contentions nor

reasons behind the Appellants' arguments with respect to the issues presented. Moreover, Appellants fail to reference or cite to the record in connection with the legal authorities they claim are applicable, nor do Appellants provide any meaningful analysis. Instead, they choose to simply string cite numerous authorities without any analysis whatsoever. These defects also require that the Court disregard Appellants' brief and summarily affirm the lower court's judgment in favor of Attorney Gardiner. E.g., State v. Day, 815 P.2d 1345, 1351 (Utah Ct. App. 1991)(brief disregarded where analysis is not meaningful); Steele v. Board of Review of Indus. Comm'n, 845 P.2d 960, 962 (Utah Ct. App. 1993)(Court granted motion to strike where argument section of brief failed to provided citations to parts of the record relied on therein); Yates, 834 P.2d at 601 (brief disregarded where no meaningful analysis provided); English v. Standard Optical Co., 814 P.2d 613, 618-619 (Utah Ct. App. 1991)(declined to address issue where legal analysis not meaningful). As this Court has noted, "[e]xtensive citations from numerous case authorities and treatises, while helpful, cannot substitute for the development of appellate arguments explicitly tied to the record before us." West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 n.1 (Utah Ct. App. 1991).

In sum, it appears as though the Appellants' deficient brief in this case is very similar to the brief submitted in the Price case, wherein the Court wrote the following:

> We find [appellant's] brief clearly deficient under the provisions of Rule 24. The brief fails to set forth a coherent statement of issues and the appropriate standard of review for each issue with supporting

> authority. The "issues" which are listed do not correlate with the substance of the brief. [Appellant's] statement of the case not only omits reference to the course of proceedings and disposition in the trial court, but fails to provide a statement of the relevant facts properly documented by citations to the record. [Appellant's] "argument" does not identify any error by the trial court, refer to the facts or the record, or cite applicable authority, much less provide any meaningful factual or legal analysis.
> . . . [W]e do expect [appellant's] brief to intelligibly present the issues on appeal. [Appellant's] brief does not enable us to locate errors in the record or demonstrate "under applicable authorities" why the errors necessitate reversal. Therefore, we affirm the trial court's denial of [appellant's] motion to suppress.

State v. Price, 827 P.2d 247, 250 (Utah Ct. App. 1992)(citations omitted and emphases added).

As in Price, this Court should summarily affirm the lower court's ruling for Appellants' blatant failure to comply with numerous, critical provisions of Rule 24 of the Utah Rules of Appellate Procedure.[5]

B. APPELLANTS' UNTIMELY NOTICE OF APPEAL FAILED TO VEST JURISDICTION IN THIS COURT AND THE APPEAL SHOULD BE SUMMARILY DISMISSED.

On July 10, 1995 the trial court entered its Order dismissing all claims against all defendants, including Attorney Gardiner, with the exception of Valley Mortgage. Also on July 10, 1995 the Court entered its Order disposing of the claims against Valley Mortgage by continuing the trial on those claims "[p]rovided that

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[5] Appellants, in their Reply Brief, may seek to cure some of the numerous defects in their Brief. That should not be allowed, however, as Attorney Gardiner would not have an opportunity to respond and be heard. Moreover, that is not properly allowed in a reply brief under the Rules of Appellate Procedure. Utah R. App. P. 24(c).

[Appellants] proceed with the filing of appeal of the Court's final Order of April 26, 1995, concerning dismissal and summary judgments granted to specific named defendants." These Orders effectively disposed of all issues in this case and therefore constitute final orders. Indeed, the July 10, 1995 Order on the Valley Mortgage matter expressly referred to the other Orders as "final" Orders and further directed the plaintiffs, now Appellants, to proceed with the filing of an appeal of those decisions.[6]

Pursuant to Rule 4(a) of the Utah Rules of Appellate Procedure, the Appellants were required to file a Notice of Appeal within 30 days of the entry of the final Orders entered on July 10, 1995, or by August 9, 1995. Utah R. App. P. 4(a). This they failed to do. Their Notice of Appeal was not filed until October 27, 1995, more than 100 days after the Orders were entered. [Record 3588-3590].

Once the trial court has entered an order that effectively disposes of all the claims, any previously entered orders that were not final under Rule 54(b) of the Utah Rules of Civil Procedure become final. Sepia Enters., Inc. v. City of Toledo, 462 F.2d 115 (6th Cir. 1972); Sandidge v. Salen Offshore Drilling Co., 764 F.2d 252 (5th Cir. 1985).

It is not necessary that all claims be dealt with on the merits if it is clear that no further action will be taken in the

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[6] That Order referencing the other Orders as "final" and directing the parties to proceed with filing the appeal was approved as to form by the Appellants, either pro se or through counsel, as indicated by their signatures thereon.

trial court on the remaining claims. See Holcomb v. Allis Chalmers Corp., 774 F.2d 398 (10th Cir. 1985)(Where cross claims would die from their own weight once main claim decided on merits, judgment on main claim is final without Rule 54(b) certification.); General Time Corp. v. Padua Alarm Sys., 199 F.2d 351 (2d Cir. 1952)(abandonment of remaining claims makes adjudication of other claims a final judgment without Rule 54(b) certification). The July 10, 1995 Orders entered by the trial court effectively disposed of all claims in the court and they were therefore final Orders.

Appellants' filing of a Notice of Appeal significantly more than 30 days after the entry of those Orders was untimely and, as a matter of law, this Court is without jurisdiction to hear this appeal. E.g., Utah R. App. P. 4(a); State v. Montoya, 825 P.2d 676 (Utah Ct. App. 1991)(time for filing an appeal is jurisdictional); Glezos v. Frontier Inv., 896 P.2d 1230 (Utah Ct. App. 1995)(court lacked jurisdiction to consider cross-appeal that was not timely filed). Accordingly, this appeal should be dismissed and the judgment in favor of Attorney Gardiner should not be disturbed.

C. THE TRIAL COURT PROPERLY GRANTED JUDGMENT IN FAVOR OF ATTORNEY GARDINER ON EACH OF THE EIGHT (8) CAUSES OF ACTION ASSERTED AGAINST HIM IN THE TRIAL COURT.

Summary judgment is proper, pursuant to Rule 56 of the Utah Rules of Civil Procedure, when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. E.g., Utah R. Civ. P. 56(c); Burns v. Cannondale

Bicycle Co., 876 P.2d 415, 418 (Utah Ct. App. 1994). In connection with a motion for summary judgment, Rule 56(e) sets forth the following obligations of a nonmoving party:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Utah R. Civ. P. 56(e)(emphases added).

Moreover, as this Court has noted, when a party 'fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" Burns, 876 P.2d at 419-20 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

In response to Attorney Gardiner's motion for summary judgment which was supported by sworn affidavits and other admissible evidence, Appellants utterly failed to point with specificity to any contrary evidence to establish that there were any issues of material fact in dispute, or which support the conclusory allegations of their unverified complaint.[7] Indeed, in light of

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[7] The vast majority of record citations contained in Appellants' response to Attorney Gardiner's motion for summary judgment were simply references to the entire record of the Underlying Litigation. That is improper. E.g., Brown v. Reardon, 770 F.2d 869, 909 (10th Cir. 1985)(A party is required to allege the facts he claims are in dispute and point with specificity to affidavits or other evidence in the record that supports his

Appellants' failure to produce proper supporting evidentiary material, the judgment granted in favor of Attorney Gardiner was proper and must be affirmed. E.g., Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040 (Utah 1983); Schafir v. Harrigan, 879 P.2d 1384, 1391 (Utah Ct. App. 1994)(summary judgment affirmed where party failed to rebut evidence established by party moving for summary judgment); TS 1 Partnership v. Allred, 877 P.2d 156, 158 (Utah Ct. App. 1994)("Rule 56 requires that the adverse party to the summary judgment motion must respond, by affidavit or otherwise, in such a manner as to set forth a genuine issue of material fact for trial. The adverse party may not rest on mere allegation.")(citing Town of Alta v. Ben Hame Corp., 836 P.2d 797, 804 (Utah Ct. App. 1992)).

Appellants' Consolidated Amended Complaint asserted thirty-two (32) causes of action against the various defendants. The following eight (8) causes of action were asserted against Attorney Gardiner:

Fifth Cause of Action:	Abuse of Process
Tenth Cause of Action:	Conspiracy
Eleventh Cause of Action:	Interference
Twelfth Cause of Action:	Civil Extortion/Coercion
Twenty Second Cause of Action:	Negligence
Twenty Third Cause of Action:	Abuse of Process
Twenty Fourth Cause of Action:	Intentional Infliction of Emotional Distress
Thirty Second Cause of Action:	*Consequential Damages*

These causes of action as they pertain to Attorney Gardiner are addressed in turn.

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contention that the facts are, in reality, disputed." The court will not "find the proverbial needle in a paper haystack.").

1. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF ATTORNEY GARDINER ON APPELLANTS' FIFTH AND TWENTY-SECOND CAUSES OF ACTION FOR ABUSE OF PROCESS.

The centerpiece of Appellants' lawsuit against Attorney Gardiner is the abuse of process claim.[8] If this claim fails, all of the claims brought by Appellants against Attorney Gardiner fall like a house of cards. The abuse of process claim fails as it lacks both a legal and factual basis, requiring the affirmance of the judgment in favor of Attorney Gardiner.

To defeat Attorney Gardiner's motion to dismiss and for summary judgment on their abuse of process claim, Appellants were required to plead and provide record evidence of the following:

1) Attorney Gardiner used the legal process against Appellants for an improper purpose (i.e., to accomplish a purpose other than the purpose for which the process was designed);

2) Appellants were damaged thereby; and

3) The underlying proceedings terminated in favor of the Appellants.

Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 959 (Utah Ct. App. 1989)(emphasis added); Crease v. Pleasant Grove City, 30 Utah 2d 451, 519 P.2d 888, 890 (1974); Restatement (Second) of Torts §§ 674(b), 682 (1976).

Appellants' claim fails as the undisputed evidence shows that the underlying proceedings were not terminated in favor of the Appellants and, moreover, Attorney Gardiner's use of process was not improper.

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[8] Appellants' Amended Complaint asserts two causes of action for abuse of process (the fifth and twenty-third causes of action). The causes of action are redundant and, therefore, this Brief's discussion of the abuse of process "claim" actually pertains to both of Appellants' abuse of process claims.

a) Appellants' Abuse Of Process Claim Fails As The Underlying Lawsuit Did **Not** Terminate In Their Favor.

An abuse of process claim requires that the underlying proceedings terminated in favor of the party who subsequently brings the abuse of process claim. As a matter of law, Appellants' abuse of process claim must fail as they clearly were not the prevailing party of the underlying action.

The abuse of process allegations made by the Appellants, more fully discussed below, assert that Attorney Gardiner and other Appellees abused the process in connection with the Underlying Lawsuit. The express terms of the Judgment in the Underlying Lawsuit provide, however, that Appellants were not prevailing parties. At page 14 of the 1991 Judgment, Judge Brian expressly indicated that "There is no prevailing party" and each party was to bear its own attorneys fees and costs.[9] [Record 2918-2932 at p. 14]. That finding by Judge Brian in 1991, which was not disturbed by the Utah Supreme Court on appeal,[10] was entirely consistent with the undisputed evidence that the DeBrys were awarded judgment against, inter alia, the Appellants based on their faulty construction of the office building. [Id. at p. 4]. Moreover,

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[9] This ruling by Judge Brian that no attorney's fees or costs should be imposed has particular significance. Since Judge Brian had specific statutory authority to impose attorneys' fees sanctions had he determined that the action was improperly filed or pursued, see Utah Code Ann. § 78-27-56, and he chose not to do so, this Court should be reluctant to second guess his decision through a collateral action.

[10] The Supreme Court refused to rule on the issue because Appellants failed to raise the issue below. DeBry v. Cascade Enters., 879 P.2d 1353, 1364 (Utah 1994).

Judge Brian's finding was entirely consistent with the fact that the Appellants and Appellee DeBrys entered into a settlement on a major aspect of the Underlying Lawsuit in February, 1990 -- after Attorney Gardiner's forced withdrawal.

Finally, it should be noted that on appeal the Utah Supreme Court specifically found that the Appellants did not prove the elements of either an action for fraud or an action for conspiracy to defraud, and therefore vacated the punitive damage award against the DeBrys. DeBry v. Cascade Enters., 879 P.2d 1353, 1359 (Utah 1994). Accordingly, the trial court's 1991 Judgment that there were no prevailing parties, coupled with a major settlement effected after Attorney Gardiner's withdrawal and the Utah Supreme Court's decision affirming major relief in favor of the DeBrys against Appellants preclude any finding that Appellants were the "prevailing party" and their abuse of process claim must fail as a matter of law.

b) Appellants' Abuse Of Process Claim Also Fails As The Undisputed Evidence Conclusively Establishes That Attorney Gardiner Represented The DeBrys Only During A Narrow Window And The Wrongs Alleged Against Him Constitute Nothing More Than A Zealous Representation Of His Client And Were Not Improper.

Appellants did not, and could not, counter the evidence that Attorney Gardiner's participation in the Federal Lawsuit and the Underlying Lawsuit was anything but properly pursued and aimed at obtaining a proper adjudication of the disputes between the parties. Thus, judgment was properly granted in favor of Attorney Gardiner because based on the undisputed evidence the "improper

purpose" element of the abuse of process claim could not be satisfied.

1) Attorney Gardiner's Actions In Connection With The Federal Lawsuit Were Proper.

The undisputed record evidence establishes that Attorney Gardiner's only involvement in the Federal Lawsuit was the successful defense of a Motion to Dismiss that had been brought against his clients, the DeBrys, and his appearance at a subsequent scheduling conference on July 31, 1989. [Record 2851-2852 at ¶¶ 10-12; 2894-2898 at ¶¶ 5-9]. Attorney Gardiner did not participate in either the drafting or filing of the Federal Lawsuit against the Appellants, nor is there any allegation that he did so. [Record 2851 at ¶ 10; 2894-2898 at ¶ 5; 2726-2805]. The Federal District Court denied Appellants' motion to dismiss the federal civil rights claims in the Federal Lawsuit which was opposed by Attorney Gardiner.[11] [Record 2852 at ¶¶ 11-12; 2899-2900]. The Appellants cannot successfully assert that Attorney Gardiner's conduct in connection with the Federal Lawsuit was improper or done with an improper purpose when his clients prevailed on the only motion in which he was involved.[12]

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[11] Attorney Gardiner did stipulate to the dismissal of the related state claims, not because they were frivolous, but because they were already pending in the Underlying Lawsuit. Accordingly, the District Court did dismiss those related state claims without prejudice. [Record 2894-2898 at ¶ 7; 2899-2910].

[12] Moreover, the eventual dismissal of the Federal Lawsuit resulted from the fact the state court had litigated the issues and that judgment was res judicata. There was never any substantive adjudication or determination of the DeBry's claims by the Federal Court.

2) Appellants' Allegations That Attorney Gardiner Refused To Allow Re-Cross Examination Of Mrs. DeBry Do Not Constitute Abuse Of Process.

Appellants attempt to bootstrap Attorney Gardiner's refusal to allow another deposition of Mrs. DeBry after the discovery cut-off into an abuse of process claim. That argument simply fails as a matter of law. Appellants' allegations regarding Mrs. DeBry's deposition are as follows:

> 139. That deposition of Joan DeBry was called for by defendant Fidelity National Title Insurance Company in 1990 before the main trial.
>
> 140. That Joan DeBry appeared at the deposition and answered questions as directed by Lynn McMurray, counsel for Fidelity.
>
> 141. That [Appellant] Del K. Bartel attempted to examine Joan DeBry based upon her prior responses, but was precluded from doing so by Dale Gardiner, the DeBrys counsel of record.
>
> 142. That the DeBrys failure to allow examination, through the actions of their attorney, served to frustrate the regular conduct of these discovery procedures and constitutes abuse of process.

The Court should note that a motion to compel would have immediately addressed the "due process deprivation" asserted by Appellants. Appellants also could object to the use of the deposition at trial should the eventuality arise. Yet Appellants did not raise the matter before the court in the Underlying Litigation. Appellants' failure to raise the issue in the trial court forecloses their right to raise the issue in a subsequent, collateral action.[13] Thayne v. Beneficial Utah, Inc., 874 P.2d

[13] Indeed, Appellant Del Bartel understood the importance and availability of the remedy in the trial court when he stated that he would allow the court to decide the dispute when not

120, 123 (Utah 1994)(exclusive redress for procedural defect is to raise the issue in the court where it arose, not in subsequent lawsuit); see also Barnard v. Young, 720 F.2d 1188, 1189 (10th Cir. 1983)(proper remedy for overly broad subpoena is motion to quash, not subsequent civil rights action); Ringwood v. Foreign Auto Work, Inc., 786 P.2d 1350, 1357 (Utah Ct. App.)(res judicata bars relitigation of issues that were presented in first suit or could and should have been raised in the first action), cert. denied, 795 P.2d 1138 (Utah 1990).

Even if the Appellants could properly base a subsequent lawsuit on this discovery dispute, Attorney Gardiner's refusal to allow Appellants to again re-cross examine Mrs. DeBry does not rise to the level of egregious conduct needed in an abuse of process action. The undisputed evidences establishes that the Appellants had already taken and completed their deposition of Mrs. DeBry.[14] Moreover, the deposition about which Appellants complain occurred after the discovery cut-off and was an accommodation made by Attorney Gardiner.

Based on the foregoing, judgment was properly granted in favor of Attorney Gardiner on Appellants' abuse of process claim based on his refusal to allow the re-cross examination of Mrs. DeBry by the Appellants.

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allowed to re-cross examine Mrs. Debry. [Record 2958-2964].

[14] Counsel for the Appellants, Mark Larsen, completed his deposition of Mrs. DeBry on August 18, 1988 by stating "That is all I have." [Record 2881-3884].

3) Appellants' Claim That Attorney Gardiner Unsuccessfully Attempted To Recuse Judge Brian Is Not Abuse Of Process.

Regarding the attempt to recuse and disqualify Judge Brian, Appellants' unverified Amended Complaint alleges:

> 188. In an attempt to postpone the 1989 trial date and obtain an extension of time to get expert witnesses back in the action, DeBrys unsuccessfully attempted to recuse Judge Brian.

As set forth more fully above, the Appellants had a full and complete remedy available to them in the event they deemed any attempt to recuse Judge Brian as improper, i.e., a Rule 11 motion. Indeed, the Appellants filed a motion for Rule 11 sanctions which was denied by Judge Daniels, the judge who ruled on the motion to disqualify. In fact, Judge Daniels, in his contemporaneous denial of Rule 11 sanctions, expressly found that there was a sufficient basis for bringing the motion. [Record 2894-2898 at ¶13]. The Appellants thereafter made no attempt to appeal the denial of Rule 11 sanctions either on an interlocutory basis or after the final judgment was rendered. Therefore, any subsequent claims such as Appellants' abuse of process claim and other claims based on similar allegations are res judicata. E.g., Thayne, 874 P.2d 120, 123 (Utah 1994); Barnard, 720 F.2d at 1189; Ringwood, 786 P.2d at 1357.

4) Attorney Gardiner's Forced Withdrawal As Counsel For The DeBrys Does Not And Cannot Constitute Abuse Of Process.

Appellants' next attempt to assert an abuse of process claim against Attorney Gardiner involves the reasons for

which he withdrew as counsel for the DeBrys in the lawsuit. The Amended Complaint alleges as follows:

> 189. DeBry's second tactic to postpone trial involved the withdrawal of Dale Gardiner as counsel of record, that withdrawal being denied by the court.
>
> 190. That after having failed to recuse Judge Brian and to effect Dale Gardiner's withdrawal, the DeBrys successfully called for postponement of the trial, citing a conflict of interest between Robert DeBry and Joan DeBry based upon their pending divorce.
>
> 191. That after postponement of trial in 1989, the DeBrys unaccountably effected the resolution of any conflict that previously existed and they proceeded to trials in February 1990 and May 1990 in this litigation with common representation.

During the pendency of the Underlying Lawsuit, Joan DeBry filed divorce proceedings against Robert DeBry. This created an obvious conflict as to the issue of the potential liability of one party for the actions of the other, i.e., both Robert and Joan were co-plaintiffs and counter-defendants in the Underlying Lawsuit. This conflict of interest was brought to the trial court's attention on July 19, 1989, at which time the trial court held in abeyance Attorney Gardiner's motion to withdraw pending efforts by the DeBrys to settle the conflict. [Record 2865-2866]. At that hearing, Mrs. DeBry's divorce lawyer made an appearance and confirmed the reality of the conflict. [Id.]. Judge Brian then stated that if the DeBry's did not resolve their conflict of interest by August 30, 1989, he would approve Attorney Gardiner's withdrawal as counsel. [Id.].

As of August 31, 1989, no settlement had been reached. As a result, Judge Brian approved Gardiner's withdrawal as counsel for

the DeBrys due to a conflict of interest. [Record 2885-2888]. Thus, Attorney Gardiner withdrew, and quit his employment with Robert J. DeBry & Associates.

The DeBrys subsequently divorced and due to a stipulation entered into in connection with the divorce wherein Robert DeBry agreed to indemnify Joan, the DeBrys were able to proceed with common representation. [Record 2851 at ¶ 9; 2866; 2889-2993]. The uncontroverted evidence establishes that this conflict was genuine and therefore, as a matter of law, Attorney Gardiner is entitled to judgment on Appellants' abuse of process claim.

5) Appellants' Allegations Regarding Attorney Gardiner's "Hiding, Losing and Destroying" Documents Did Not Create An Abuse Of Process.

Finally, Appellants' made an unsupported allegation that Attorney Gardiner destroyed, hid or lost documents sought in discovery. Appellants did not submit any evidence in support of their allegation and, moreover, there is none. The undisputed evidence establishes that Attorney Gardiner produced all documents provided to him, [Record 3408-3411 at ¶ 3; 3422-3424],[15] and Attorney Gardiner contemporaneously confirmed that fact to Appellants. [Record 3425]. Finally, this type of perceived procedural wrong should have been resolved by a motion to compel pursuant to Rule 37 of the Utah Rules of Civil Procedure. It does not rise to an abuse of process claim and, as a matter of law,

[15] Moreover, the undisputed evidence establishes that all relevant documents were produced by the DeBrys to Attorney Gardiner, who in turn provided them to Appellants. [Record 3422-3424; 3408-3411 at ¶ 3].

cannot serve as the basis for a subsequent, collateral action. E.g., Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 123 (Utah 1994)(exclusive redress for procedural defect is to raise the issue in the court where it arose, not in subsequent lawsuit); Barnard v. Young, 720 F.2d 1188, 1189 (10th Cir. 1983)(proper remedy for overly broad subpoena is motion to quash, not subsequent civil rights action); Ringwood v. Foreign Auto Work, Inc., 786 P.2d 1350, 1357 (Utah Ct. App.)(res judicata bars relitigation of issues that were presented in first suit or could and should have been raised in the first action), cert. denied, 795 P.2d 1138 (Utah 1990). Thus, the judgment in favor of Attorney Gardiner on the abuse of process claim should be affirmed.

c. Appellants' Abuse of Process Claim Based On Purported Procedural Improprieties Cannot, As A Matter Of Law, Be Pursued In A Collateral Action And Attorney Gardiner Is Entitled To Judgment In His Favor.

Each of the "wrongful acts" which purportedly serve as the basis for the abuse of process claim against Attorney Gardiner is typical of the procedural wrangling that is expected in our adversary system. In fact, the procedural rules anticipate that these types of disputes will arise during the course of litigation between procedural adversaries, and a process for their resolution is provided. Under the rules, the acts performed by Attorney Gardiner are specifically authorized so long as the constraints of Rules 11 and 37 of the Utah Rules of Civil Procedure are observed. In the event those bounds are believed to have been crossed, summary remedy is provided -- in the very action where the

violation is suspected, before the trial judge fully versed in the facts, circumstances and prior conduct of both parties and who is best suited to judge the bona fides of the procedural posture taken. Should a violation be found, a full panoply of remedies is available in the trial court including summary resolution of the violation, attorney fees, and sanctions if appropriate. Should a litigant fail to avail himself of those remedies or fail to perfect an appeal if denied, he cannot pursue redress for those alleged procedural improprieties in a collateral action. Thayne, 874 P.2d at 123; Barnard, 720 F.2d at 1189; Ringwood, 786 P.2d at 1357. Accordingly, judgment in favor of Attorney Gardiner on Appellants' claims, all of which are based on perceived procedural irregularities, was proper and should be affirmed.

2. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF ATTORNEY GARDINER ON APPELLANTS' "CONSPIRACY" (TENTH) CAUSE OF ACTION.

The undisputed evidence establishes that Attorney Gardiner was entitled to summary judgment on Appellants' "conspiracy" claim. To defeat Attorney Gardiner's motion on their civil conspiracy claim, Appellants were required to allege and cite record evidence to prove the following: (1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof. E.g., Israel Pagan Estate v. Cannon, 746 P.2d 785, 790 (Utah Ct. App. 1987)(citing Citizen State Bank v. Gilmore, 603 P.2d 605 (Kan. 1979)).

Appellants' Amended Complaint alleges that Attorney Gardiner's participation with Robert J. DeBry & Associates and the DeBrys in the action set forth in paragraph 267 (a) through (j) constitute a conspiracy. Appellants further allege "that these acts constitute negligence, abuse of process, malicious prosection, violation of civil rights, fraud upon the court, [and] intentional and gross misconduct at trial." [Record 2726-2805 at ¶ 268].

The undisputed evidence submitted by Attorney Gardiner and which was unrefuted by Appellants establishes that, with respect to each of Appellants' allegations, Attorney Gardiner either had no involvement or his actions were lawful.[16] As a matter of law, if the object of the alleged conspiracy or the means used to attain it were lawful, there can be no civil action for conspiracy even if the plaintiff suffers damages and even if the defendant did act with a malicious motive. Israel, 746 P.2d at 792.

The undisputed evidence establishes, with regard to each specific allegation contained in paragraph 267 of the Consolidated Amended Complaint, the following:

(a) The undisputed evidence establishes Attorney Gardiner did not work with a private detective to obtain Appellants'

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[16] Appellants failed to show that there was any agreement between any of the parties or a meeting of the minds on the object or course of action of the conspiracy. This lack of evidence can be seen by the fact that Appellants' Consolidated Amended Complaint filed nearly three years after the initial complaint still contained general, vague allegations and, in fact, failed to allege any agreement at all. Instead, the Complaint asserts that there was simply a "participation" between the parties. Moreover, Appellants did not submit any evidence to support this cause of action in opposition to Attorney Gardiner's Motion to Dismiss/Motion for Summary Judgment.

personal and confidential information in violation of a court order. [Record 2898-2898 at ¶11; 3408-3411 at ¶ 6].

(b) The undisputed evidence and prior court rulings establish Attorney Gardiner did not wrongfully expand or protract litigation as more fully discussed supra, at pp. 23-30. Moreover, Appellants failure to seek a timely remedy of any alleged misconduct is res judicata. E.g., Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 123 (Utah 1994); Ringwood v. Foreign Auto Work, Inc., 786 P.2d 1350, 1357 (Utah Ct. App.), cert. denied, 795 P.2d 1138 (Utah 1990).

(c) The undisputed evidence and prior court rulings establish Attorney Gardiner did not prosecute any groundless companion cases. More specifically, his limited involvement in the Federal Lawsuit entailed only his successful defense of a motion to dismiss and a scheduling conference. Clearly, given his victory on the motion to dismiss his participation cannot be deemed groundless.

(d) The undisputed evidence establishes Attorney Gardiner did not participate in hiding allegations that the DeBrys caused 28 different contractors to make defective modification to the building. [Record 2898-2898 at ¶11]. To the extent this allegation is a restatement of the Appellants' fraud claim on which the Supreme Court ruled against Appellants, that ruling is res judicata.

(e) The undisputed evidence establishes Attorney Gardiner did not withhold any discovery from Appellants, [Record 3408-3411

at ¶ 3; 3422-3424; 3425], and Appellants' failure to seek a timely remedy is res judicata. E.g., Thayne, 874 P.2d at 123; Ringwood, 786 P.2d at 1357.

(f) The undisputed evidence establishes Attorney Gardiner was not involved in the alleged "escalating litigation in regard to engineering defects that [Appellants] were not liable for." [Record 2898-2898 at ¶11]. Moreover, this allegation is simply a restatement of the fraud claim previously decided against Appellants by the Supreme Court.

(g) The undisputed evidence and prior court rulings conclusively establish Attorney Gardiner simply pursued meritorious litigation on behalf of a client and, as a matter of law, such activity is lawful and there can be no civil action for conspiracy resulting from lawful conduct, even if the opposing party is incidentally damaged. E.g., Israel, 746 P.2d at 792.

(h) The undisputed evidence and prior court rulings establish that Attorney Gardiner did not submit any meritless or frivolous motions to recuse and disqualify Judge Brian. In fact, Judge Daniels, in his contemporaneous denial of Rule 11 sanctions, expressly found that there was a sufficient basis for bringing the motion. [Record 2894-2898 at ¶13]. That ruling, coupled with Appellants' failure to seek a timely remedy by challenging the denial of Rule 11 sanctions, is res judicata. E.g., Thayne, 874 P.2d at 123; Ringwood, 786 P.2d at 1357.

(i) There is no allegation that, while Attorney Gardiner was acting as the DeBry's counsel, Appellants requested any information regarding whether a certificate of occupancy could have been obtained. To the extent Appellants are attempting to again interject a fraud claim, the same is barred as a result of the Supreme Court's prior decision that there was no fraud proved in the Underlying Lawsuit. DeBry v. Cascade Enterprises, 879 P.2d 1353 (Utah 1994).

(j) The undisputed evidence and prior court rulings establish that the Federal Lawsuit was not meritless. Moreover, Attorney Gardiner's short participation in that lawsuit cannot be deemed meritless as he successfully defeated a motion to dismiss made by the Appellants.

As can be seen from the foregoing, the undisputed evidence establishes that with respect to each and every allegation Attorney Gardiner either did not participate in the acts complained of or his actions were entirely lawful. In either event the Appellants are barred as a matter of law from asserting this conspiracy claim and the lower court's judgment in Attorney Gardiner's favor should be affirmed.

3. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF ATTORNEY GARDINER ON APPELLANTS' ELEVENTH CAUSE OF ACTION FOR "TORTIOUS CONDUCT, INTERFERENCE, AND PRIMA FACIE TORT."

Appellants eleventh cause of action purports to state claims for "tortious conduct," "interference," and "prima facie tort." That cause of action, however, utterly fails to state the

elements of any recognizable cause of action. Moreover, it appears to be yet another attempt to plead what is essentially an abuse of process claim. The trial court's judgment in favor of Attorney Gardiner on this cause of action, therefore, was also proper on the bases set forth supra at section VI.C.1, pp. 21-31.

4. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF ATTORNEY GARDINER ON APPELLANTS' TWELFTH CAUSE OF ACTION FOR CIVIL EXTORTION AND COERCION.

Appellants' allegations on this cause of action assert the wrongful use of the legal process "by manipulating, extending, and protracting the litigation" in order to extort or coerce Appellants to abandon legal rights and incur legal expenses. [Record 2726-2805 at ¶¶ 284-296]. The term "extort" is legally defined as to "compel or coerce . . . or to gain by wrongful methods. . . or to obtain in an unlawful manner." Black's Law Dictionary (5th Ed. 1979) at p. 525. Extortion on its face, therefore, presumes the use of improper means for an improper purpose. Appellants' extortion/coercion cause of action, therefore, is just another attempt to assert the abuse of process claim which, as discussed supra at section VI.C.1, pp. 21-31, fails as a matter of law. Accordingly, the judgment entered in favor of Attorney Gardiner on this claim should be affirmed.

5. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF ATTORNEY GARDINER ON APPELLANTS' TWENTY-SECOND CAUSE OF ACTION FOR NEGLIGENCE.

Appellants' negligence claim against Attorney Gardiner alleges that he "knowingly," "willfully," "intentionally," and with

"knowledge" participated in various wrongful actions, and that he "negligently participated with the DeBrys in pursuing meritless litigation." [Record 2726-2805 at ¶¶ 378-384]. Appellants further allege that as a result Attorney Gardiner "caused the [Appellants] to rely upon these false representations to [Appellants'] damage and detriment." [Id. at ¶ 387]. Appellants have in substance alleged a fraud claim by pleading the key elements of intent, reliance and damages, but have attempted to mask this claim under the guise of negligence. The obvious purpose in doing so was to avoid the res judicata effect of the Supreme Court's express ruling on appeal that the Appellants' did not prove the elements of an action for fraud in the Underlying Lawsuit. DeBry, 879 P.2d at 1358.[17]

In addition to the claim being barred under the doctrine of res judicata, the negligence claim also fails because, as a matter of law, Attorney Gardiner did not owe any duty to the Appellants, opposing parties in litigation. As the Tenth Circuit Court of Appeals has noted:

> Attorneys engaged in discharging their professional duties to their clients should not be held liable for negligence towards third persons because their paramount and exclusive duty is to their clients, and there is no room for the existence of a duty running to the adversary.

Tappen v. Ager, 599 F.2d 376 (10th Cir. 1979); see also Bird v.

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[17] Appellants' allegations under this negligence cause of action also parallel the alleged misconduct purportedly giving rise to the abuse of process claim. Given that Attorney Gardiner is entitled to judgment as a matter of law on the abuse of process claim, he is entitled to judgment on this negligence claim for the same reasons.

Rothman, 627 P.2d 1097 (Ariz. Ct. App. 1981)(negligence is improper standard upon which to base liability of attorney to an adverse party given the adverse relation), cert. denied, 454 U.S. 865 (1981). Absent a duty owing from an attorney to his adversaries, the negligence claim fails as a matter of law. For the foregoing reasons, the judgment in favor of Attorney Gardiner on Appellants' negligence claim should be affirmed.

6. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF ATTORNEY GARDINER ON APPELLANTS' TWENTY-FOURTH CAUSE OF ACTION FOR THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

A claim for the intentional infliction of emotional distress under Utah law requires proof that the defendant's alleged wrongdoing directly resulted in "severe" or "extreme" emotional distress. E.g., Samms v. Eccles, 358 P.2d 344 (Utah 1961); White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990). Appellants neither plead nor produced any evidence that they suffered severe or extreme emotional distress. Appellants' failure to allege an essential element of the tort of intentional infliction of emotional distress is grounds for dismissal. Boisjolv v. Morton Thiokol, Inc., 706 F.Supp. 795, 801 (D. Utah 1988).

Moreover, a claim for the intentional infliction of emotional distress requires that the defendant's actions constitute "outrageous conduct" which is "of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality" and that such conduct exceeded "all bounds of that usually tolerated in civilized

society." White, 787 P.2d at 1317. Again, there was no allegation or evidence to support Appellants' claim.[18] In fact, the undisputed evidence conclusively establishes that Attorney Gardiner's limited involvement in the Underlying Litigation and Federal Lawsuit does not constitute the type of severely outrageous conduct Appellants must prove to prevail on this claim. E.g., Samms, 358 P.2d at 346-347; White, 787 P.2d at 1317-1318. Accordingly, judgment was properly granted in favor of Attorney Gardiner and that ruling should be affirmed.

7. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF ATTORNEY GARDINER ON APPELLANTS' THIRTY-SECOND CAUSE OF ACTION FOR "CONSEQUENTIAL DAMAGES."

Appellants' assert a separate cause of action for "consequential damages." This is not a cause of action under Utah law and was properly dismissed in favor of Attorney Gardiner.

D. TO THE EXTENT THEY SEEK TO DO SO, APPELLANTS CANNOT PURSUE A CIVIL RIGHTS CLAIM AGAINST ATTORNEY GARDINER AS HE WOULD BE ENTITLED TO JUDGMENT ON SUCH CLAIM AS A MATTER OF LAW.

Appellants' Brief, which fails to comply with Rule 24 of the Utah Rules of Appellate Procedure, purports to set forth some "argument" that Appellants have a "civil rights" claim. While Appellants do not appear to be asserting this claim against Attorney Gardiner, this Brief will set forth the reasons Appellants cannot prevail on this claim as a matter of law.

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[18] Appellants' allegations are simply that Attorney Gardiner actively interfered with completion of the building; that he conspired with others to perpetuate fraud; and that he improperly used the legal process generally. [Record 2726-2805 at ¶¶ 393-400].

As a preliminary matter, such a claim was clearly not pled as to Attorney Gardiner and, as a result, the claim should be dismissed. Moreover, even if the Appellants could, which they cannot, allege any facts to support such a claim, the claim must fail. In order to state a cause of action for a violation of civil rights, a plaintiff must show government action in the conduct complained of. Barnard v. Young, 720 F.2d 1188, 1189-90 (10th Cir. 1983). The only arguable government action would be that Attorney Gardiner was a lawyer licensed by the State.[19] That very argument, however, has been rejected by the Tenth Circuit Court of Appeals as they have ruled that such licensure does not provide the state action component of a civil rights claim. Barnard, 720 F.2d at 1189 ("private attorneys, by virtue of being officers of the court, do not act under color of state law within the meaning of section 1983")(citing Polk County v. Dodson, 454 U.S. 312, 318 (1981)). Accordingly, to the extent the "civil rights" claim is asserted against Attorney Gardiner, he is entitled to summary judgment on that claim.

VII. RELIEF SOUGHT.

Attorney Gardiner asks this Court to affirm the judgment entered by the July 10, 1995 Order of the Honorable Homer Wilkinson in favor of Attorney Gardiner dismissing with prejudice all causes

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[19] That Attorney Gardiner is forced to guess as to what Appellants are or might argue is necessitated by Appellants failure to comply with Rule 24 of the Utah Rules of Appellate Procedure. The Appellants should not be rewarded for violating the Court's rules by having this unfair and undue hardship placed on Attorney Gardiner.

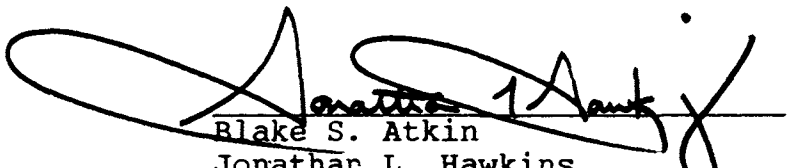
of action asserted against him.

VIII. NO ADDENDUM IS NECESSARY.

No addendum is necessary pursuant to Rule 24, Utah Rules of Appellate Procedure.

DATED this 8TH day of January, 1997.

ATKIN & LILJA, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing BRIEF OF APPELLEE DALE GARDINER were mailed, first-class postage prepaid, this 8th day of January, 1997, to the following:

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