

1996

# Larry R. Vonwald v. Kevin Plumb : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 960851

IN THE COURT OF APPEALS OF THE STATE OF UTAH

LARRY R. VONWALD,	)	
	)	
Plaintiff and Appellee,	)	
	)	Appeal No. 960851
-vs-	)	
	)	Civil No. 930905795
KEVIN PLUMB,	)	
	)	
Defendant and Appellant.	)	

BRIEF OF APPELLEE

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
FOR SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE GLENN K. IWASAKI, DISTRICT COURT JUDGE

PRIORITY CLASSIFICATION NO. 15

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**FILED**

FEB 27 1997

COURT OF APPEALS

LARRY R. VONWALD,  
Plaintiff and Appellee,  
-vs-  
KEVIN PLUMB,  
Defendant and Appellant.

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## JURISDICTIONAL STATEMENT

This appeal is from a final Order of the Third District Court in and for Salt Lake County, State of Utah. The Plaintiff appealed to the Supreme Court of the State of Utah. The Utah Supreme Court has jurisdiction to review this matter pursuant to Section 78-2-2(3)(j) of the Utah Code Annotated (1996).

### STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

I. Whether the trial court correctly amended its prior Order dated January 2, 1996? Whether an ambiguity exists is a question of law for which this Court accords no deference to the trial court's decision. Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co., 899 P.2d 766, 770 (Utah 1995) (citations omitted). With regard to the mistake of fact claim, mistake of fact is an action based in equity, for which appellate courts will reverse a trial court's finding only if it is clearly erroneous. Despain v. Despain, 855 P.2d 254, 257 (Utah App. 1993); Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989).

II. Whether Appellee Plumb is entitled to an award of his attorney's fees incurred in this appeal? "[A] provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract." Salmon v. Davis County, 916 P.2d 890, 896 (Utah 1996) (quoting Management Services v. Development Associates, 617 P.2d 406, 409 (Utah 1980)). More-

over, "the prevailing party in a dispute over a contractual attorney fees provision [is] entitled, not only to attorney fees on appeal, but also to the fees it incurred establishing the reasonableness of the fees for which it was entitled to be indemnified." Salmon, 916 P.2d at 895; James Constructors v. Salt Lake City, 888 P.2d 665, 674 (Utah Ct. App. 1994).

#### **DETERMINATIVE STATUTES, RULES AND CONSTITUTIONAL PROVISIONS**

The determinative statutes, rules and constitutional provisions are set forth in the addendum where not set forth fully in the body of this brief.

#### **STATEMENT OF THE CASE**

The history of this relatively simple case is rather long and tortuous. The case began as an action based upon an alleged breach by Appellee and Defendant Kevin Plumb ("Plumb") of an Earnest Money Sales Agreement. Appellant and Plaintiff Larry R. Vonwald asserted in his Complaint that Plumb breached the Earnest Money Sales Agreement by failing to perform his obligations under the contract (R. 2-3). Plumb counterclaimed against Vonwald seeking return of his earnest money deposit based upon the failure of a condition precedent contained within the contract (R. 7-10).

Plumb filed a Motion for Summary Judgment which motion was granted after a hearing on the matter (R. 28). By Order dated June 8, 1994, the trial court entered summary judgment in favor of Plumb, ordered that the earnest money deposit of \$5,000.00 be

returned to Plumb, and awarded Plumb attorney's fees and costs in the amount of \$4,067.90 (R. 229-32). The June 8th Order further provided for augmentation of Plumb's attorney's fees award for fees expended in collecting Plumb's judgment (R. 231).

Vonwald subsequently appealed the June 8th Order, which appeal was heard by the Utah Court of Appeals as Case No. 94-731-CA (R. 281). In connection with the appeal, Vonwald posted a supersedes bond in the amount of \$5,500.00 (R. 246). Without oral argument, the Utah Court of Appeals affirmed the trial court's June 8th Order in a Memorandum Decision dated May 25, 1995 and remanded the matter to the trial court for a determination of attorney's fees to be awarded to Plumb on appeal (R. 287-88). Vonwald then filed a Petition for Rehearing with the Utah Court of Appeals (R. 311-19), which petition was denied (R. 323).

Vonwald then filed a Petition for Writ of Certiorari with the Utah Supreme Court (R. 320). The Utah Supreme Court denied Vonwald's petition on December 5, 1995 (R. 326). Plumb then submitted a Motion for Release of Cash Bond and a Motion for Entry of Judgment for Attorney's Fees and Costs (R. 327-47). In the December 12th, 1995 Affidavit in Support of Motion for Entry of Judgment for Attorney's Fees and Costs, Plumb requested an award of attorney's fees and costs on appeal in the total amount of \$5,475.44 (R. 327-47).

Thereafter, the parties entered into a Stipulation for Release of Cash Bond ("Stipulation") (R. 348-49) wherein the parties recited that "Defendant has filed a Motion for Entry of Judg-

ment for Attorney's Fees and Costs which is pending before this Court." (R. 348). The Stipulation also included the following paragraph:

4. Upon the receipt of funds by Defendant's counsel as specified herein, Plaintiff shall be deemed to have satisfied all obligations in favor of the Defendant and the Order of the Court shall reflect the same.

(R. 349).

On or about January 2, 1996, the trial court entered the Order for Release of Cash Bond (R. 350). Thereafter, on January 5, 1996, Plumb filed a partial Satisfaction of Judgment, containing the following language:

Nothing herein shall be construed as a Satisfaction of that certain Judgment in the sum of \$4,064.90 rendered in this matter against Plaintiff Larry R. Vonwald and in favor of the Defendant Kevin Plumb, which Judgment was docketed in this Court on or about the 8th day of June, 1994, which judgment, together with interest and costs remains outstanding as of this date.

(R. 353).

Disputing Plumb's entry of the partial Satisfaction of Judgment, Vonwald filed a Motion for Full Satisfaction of Judgment (R. 356). Plumb responded to Vonwald's motion by filing a Motion to Amend Order (R. 394-96) and a Memorandum in Opposition to Plaintiff's Motion for Full Satisfaction and to Stay Execution and in Support of Defendant's Motion to Amend Order (R. 397-407).

Vonwald's Motion for Full Satisfaction of Judgment and Plumb's Motion to Amend Order came on for before the trial court on April 1, 1996. Vonwald offered absolutely no evidence either at the hearing or prior to the hearing in the form of affidavit testi-

mony to contradict the facts presented by Plumb in support of Plumb's claims of ambiguity in the settlement agreement or mistake of fact (R. 356-91). From the hearing, the trial court denied Vonwald's Motion for Full Satisfaction of Judgment and granted Plumb's Motion to Amend Order (R. 443). Vonwald thereafter objected to the Proposed Order and in support of his objection, offered the same arguments he had advanced in support of his Motion for Full Satisfaction and in Opposition to Plumb's Motion to Amend (R. 444-50). Plumb then responded to Vonwald's objection by filing a Memorandum in Opposition to Plaintiff's Objection to Proposed Order (R. 451-456).

Without the necessity of another hearing on the matter, the trial court entered its Order dated April 24, 1996 granting Plumb's Motion to Amend Order and denying Vonwald's Motion for Full Satisfaction of Judgment (R. 460-64). The trial court then entered a final Order and Judgment on May 14, 1996, in substantively the same form as the April 24th Order (R. 469-72).

Vonwald thereafter filed his Notice of Appeal appealing from the Orders dated April 24, 1996 and May 14, 1996 (R. 475). The trial court ordered a cash supersedeas bond to be set by Vonwald in the amount of \$6,700.00 relative to this appeal (R. 482-83).

#### **STATEMENT OF THE FACTS**

All of the facts relevant to the determination of the issues presented in this appeal are set forth above in Statement of the Case.

### SUMMARY OF THE ARGUMENT

Most of the claims raised by Vonwald on appeal were not properly preserved below, and not properly addressed on appeal pursuant to Rule 24 of the Utah Rules of Appellate Procedure. Accordingly, these claims should not be considered by this Court. For instance, prior to this appeal, Vonwald had never raised the issue of whether Plumb's Motion to Amend Order conformed with the requirements of Rule 9 of the Utah Rules of Civil Procedure. As for Vonwald's Rule 60(b) issue, Vonwald has advanced on appeal no citation to the record and no legal analysis. Similarly, Vonwald has been dilatory in addressing the issues of due process and judicial estoppel in his brief. Where Vonwald has raised issues for the first time on appeal, has failed to adequately cite to the record, and has advanced no significant legal analysis, this Court should presume the correctness of the trial court's decision.

With regard to Vonwald's challenge to the reasonableness of the attorney's fees awarded to Plumb, Plumb asserts that this claim constitutes a violation of Rule 40 of the Utah Rules of Appellate Procedure. Vonwald never challenged the reasonableness of the attorney's fees to the trial court. In fact, the evidence before the trial court indicated that Vonwald had agreed to the amount of attorney's fees sought by and awarded to Plumb. To now challenge on appeal the reasonableness of the attorney's fees awarded to Plumb is utterly frivolous. Consequently, this Court should sanction Vonwald pursuant to Rule 40 for pursuing this



frivolous claim by imposing an award to Plumb of his attorney's fees incurred in defending against this appeal.

The only remaining issue advanced by Vonwald on appeal is his claim that the Stipulation between the parties was not ambiguous. The evidence presented to the trial court does not support Vonwald's assertions on appeal. The language of the Stipulation was ambiguous as the trial court correctly determined. Moreover, the ambiguity of the Stipulation was not the only grounds upon which the trial court granted Plumb's Motion to Amend Order. The trial court also correctly determined that the January 1996 Order should be reformed on the basis of mistake of fact. Accordingly, independent grounds exist for this Court's affirmation of the trial court's May 14, 1996 Order amending the January 1996 Order.

Lastly, Plumb is entitled to an award of his attorney's fees incurred in defending against this latest appeal. This entitlement is based upon (i) the language of the Earnest Money Purchase Agreement between the parties as well as (ii) Vonwald's violation of Rule 40 of the Utah Rules of Appellate Procedure. Accordingly, Plumb requests that this court remand the issue of Plumb's attorney's fees on this appeal to the trial court for determination.

#### **ARGUMENT**

Vonwald's Brief of Appellant appears to present a myriad of issues for this Court's consideration on appeal, most of which merit little if any attention. Moreover, none of the issues pre-

sented by Vonwald bear upon the ultimate issue of whether the trial court correctly entered its Order dated May 14, 1996.

I. THE TRIAL COURT CORRECTLY ENTERED  
ITS ORDER DATED MAY 14, 1996.

In his appellate brief, Vonwald advances five arguments in support of his claim that the trial court erred in entering its Order dated May 14, 1996: (i) that the Stipulation between the parties was not ambiguous, and therefore must be enforced; (ii) that Plumb's Motion to Amend Order was not in conformity with Rule 9 of the Utah Rules of Civil Procedure; (iii) that Plumb's Motion to Amend Order was not proper under Rule 60(b) of the Utah Rules of Civil Procedure; and (iv) that the May 14, 1996 Order amounts to an impermissible taking without due process of law. Only the first of these five arguments warrants analysis by this Court. Accordingly, Plumb will first dispose of the four frivolous claims prior to addressing the question of whether the Stipulation between the parties was ambiguous.

A. Vonwald's Claim That Plumb's Motion to Amend Order Failed to Conform With Rule 9(b) Was Not Properly Preserved, And Therefore Was Waived on Appeal.

In Vonwald's Brief of the Appellant, Vonwald seems to claim that Plumb's Motion to Amend Order was insufficient as a matter of law pursuant to Rule 9 of the Utah Rules of Civil Procedure. (Brief of Appellant at 9-10). However, Vonwald made no such objection to Plumb's Motion to Amend Order prior to the hearing on Plumb's motion. Indeed, Vonwald did not raise the alleged Rule 9

violation in Vonwald's Objection to Motion to Amend Order (R. 427-38) or at the hearing on the matter. Instead, Vonwald first raised the alleged Rule 9 violation in Vonwald's Objection to Proposed Order filed after the hearing on the matter (R. 444-50). Vonwald waived any claim for an alleged Rule 9 violation by failing to properly raise the claim before the trial court prior to the hearing on the matter; and this Court should now abstain from addressing this claim due to Vonwald's failure to properly raise it. American Coal Co. v. Sandstrom, 689 P.2d 1, 4 (Utah 1984) (argument offered in defense of decision below had been waived when not raised below).

Moreover, the evidence presented to the trial court was sufficient to satisfy the requirements of Rule 9. Plumb did state the circumstances constituting the mistake in the Affidavit of Dennis K. Poole dated January 26, 1996 which was filed contemporaneously with Plumb's Motion to Amend Order (R. 408-13). This affidavit amply set forth the circumstances constituting the mistake for which Plumb sought reformation of the Order. Clearly, there was no violation of Rule 9 in Plumb's Motion to Amend Order. Vonwald's claim to the contrary is entirely meritless.<sup>1</sup>

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<sup>1</sup> Vonwald's brief also failed to set forth any authority for the proposition that Rule 9 has any application whatsoever to a motion brought pursuant to Rule 60 to amend an order.

B. Vonwald's Brief on Appeal Fails to Adequately Articulate a Rule 60(b) Violation, and Should be Disregarded by this Court.

One can surmise, based upon Paragraph C of Vonwald's Summary of the Argument, that Vonwald intended, on appeal, to raise as an issue that Plumb's Motion to Amend Order did not comply with Rule 60(b) of the Utah Rules of Civil Procedure (Brief of Appellant at 10).<sup>2</sup> However, in the argument section of Vonwald's brief, Vonwald failed to cite to where, in the record, this issue had been preserved for appeal. Moreover, Vonwald did not even mention this issue in the Argument and Authority section of Vonwald's brief (Brief of Appellant at 10-15). Where Vonwald (i) set forth no legal analysis of this claim, (ii) has not set forth how Plumb failed to comply with Rule 60(b), (iii) failed to marshal any evidence, and (iv) failed to cite to the record, this Court should decline to consider the merits of Vonwald's claim. Phillips v. Hatfield, 904 P.2d 1108, 1109 (Utah App. 1995); see also Koulis v. Standard Oil of Cal., 746 P.2d 1182, 1185 (Utah App. 1987) (refusing to consider brief that failed to contain record citations and that did not conform to Rule 24 requirements for argument section of brief); First Sec. Bank of Utah v. Creech, 858 P.2d 958, 962 (Utah 1993) (refusing to address contention in brief that did not conform to requirements of Rule 24(a)(9)); Steele v. Board of Review, 845

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<sup>2</sup>Vonwald lists the following argument in his Summary of Arguments: "A motion for relief under URCiP 60(b) to be valid requires a showing of exceptional circumstances and cannot be used to relieve a litigant or his counsel from the consequences of his decisions." (Brief of Appellant at 10).

P.2d 960, 961-962 (Utah App. 1993) (striking brief which did not comply with requirements of Rule 24(a)(7) and 24(a)(9)).

C. Vonwald's Due Process and Judicial Estoppel Claims Should Likewise be Disregarded by This Court.

Vonwald's appellate brief also sets forth claims that (i) the Court's amendment of its prior order constitutes a "taking" without due process of law; and (ii) the principle of judicial estoppel prevented Plumb's requested relief (Brief of Appellant at 10-15). Again, Vonwald has completely failed to cite to the record to demonstrate that either of these claims had been properly preserved for trial. Moreover, Vonwald's legal analysis of these claims is sorely lacking. For instance, with regard to Vonwald's due process claim, Vonwald fails to cite to a single case to support his contention, and in fact, acknowledges that "[t]here probably is no precedent declaring the rights and liabilities of the parties under such circumstances." (Brief of Appellant at 12-13).

As for Vonwald's judicial estoppel claim, Vonwald has failed to provide any legal analysis or argument (Brief of Appellant at 15). Clearly Vonwald's appellate brief fails to comport with the requirements of Rule 24(a)(9) of the Utah Rules of Appellate Procedure.<sup>3</sup> As such, this Court should decline to address the

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<sup>3</sup>Rule 24(a)(9) states: "The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. U.R.App.P. 24(a)(9) (1996).

issues of due process and judicial estoppel and "assume the correctness of the trial court's judgment below." Barney v. Utah Dept. of Commerce, 885 P.2d 809, 810 (Utah App. 1994).

D. Vonwald's Challenge to the Reasonableness of Plumb's Attorney's Fees Constitutes Bad Faith and Should be Disregarded by This Court.

Although not specifically designated as an issue on appeal, Vonwald begins the Argument Section of his appellate brief with a challenge to the reasonableness of the attorney's fees claimed by Plumb in defending against Vonwald's first appeal (Brief of Appellant at 10-12). The reasonableness of the attorney's fees claimed by Plumb was never at issue before the trial court. In fact, as set forth in the Affidavit of Dennis K. Poole (R. 408-13), Vonwald and Plumb came to an agreement regarding the attorney's fees claimed by Plumb (R. 410). Vonwald's acceptance of Plumb's attorney's fees on appeal is also reflected in the Stipulation itself (R.348-49).

It is disingenuous at best for Vonwald to now challenge the reasonableness of Plumb's attorney's fees on appeal when Vonwald never raised the issue of reasonableness below but rather agreed and stipulated to payment of such fees. Vonwald's conduct in bringing this meritless claim is consistent with Vonwald's efforts, all along, to stall and avoid paying his obligation in this matter.

This conduct moreover constitutes a violation of Rules 33 and 40(a) of the Utah Rules of Appellate Procedure. Vonwald and

his attorney should be sanctioned pursuant to Rules 33 and 40(b) for needlessly adding to the cost of this litigation by offering spurious claims as grounds for their appeal. Vonwald's appeal is frivolous and "not warranted in law". As damages under Rule 33, Plumb is "entitled to an award of double costs and reasonable compensation and labor [he has] expended defending against the appeal". DeBry v Cascade Enterprises, 310 Utah Adv. Rep. 6, 9 (Utah, filed Feb. 7, 1997) (emphasis added). Accordingly, Plumb requests that this Court sanction Vonwald and his attorney by imposing a fine including Plumb's attorney's fees incurred in defending against this appeal.

E. The Trial Court Correctly Granted Plumb's Motion to Amend Order.

The only argument contained in Vonwald's appellate brief which has been properly preserved and raised before this Court is his claim that the Stipulation was unambiguous (Brief of Appellant at 9, 13-14). However, even this claim lacks merit. Plumb brought his Motion to Amend Order on three grounds: (i) lack of consideration for a release of the June 1994 Judgment (R. 402-03); (ii) ambiguity in the language of the Stipulation (R. 403); and (iii) mistake of fact (R. 403-05). The trial court's final Order of May 14, 1996 clearly set forth that Plumb was entitled to an amendment to the January 2, 1996 Order based upon both (i) the ambiguity in the language of the Stipulation; and (ii) mistake of fact (R. 470). Vonwald has completely failed to raise and address the grounds of

mistake of fact which also supported the trial court's May 14, 1996 Order.

With regard to the issue of ambiguity, the ambiguity arose in conflicting language contained in the Stipulation of the parties dated January 2, 1996 (R. 348-49). Paragraph 1 of the Stipulation states:

1. That Defendant has filed a Motion for Entry of Judgment for Attorney's Fees and Costs which is pending before this Court.

(R. 348). This paragraph clearly refers to the motion by Plumb for and award of the additional attorney's fees he incurred in defending against Vonwald's first appeal. The Stipulation makes no mention of Plumb's prior judgment for attorney's fees in the amount of \$4,067.90 incurred prior to the appeal. Paragraph 4 of the Stipulation then reads:

4. Upon the receipt of funds by Defendant's counsel as specified herein, Plaintiff shall be deemed to have satisfied all obligations in favor of the Defendant and the Order of the Court shall reflect the same.

(R. 349). The ambiguity arises when these paragraphs are read together. Since the Stipulation clearly addressed only the issue of Plumb's attorney's fees on appeal, did paragraph 4 of the Stipulation also only refer to Vonwald's (Plaintiff's) obligation for the attorney's fees incurred on appeal?

The effect of the January 2, 1996 Order was to award Plumb a judgment of \$5,315.44 for Plumb's attorney's fees on appeal (apart from his attorney's fees below). It was therefore logical and appropriate that Vonwald should have been required to provide



a satisfaction of judgment for the amount of attorney's fees on appeal upon receipt of the same; then and only then would there be evidence of satisfaction of the Court's order.

To resolve the ambiguity in the language of the Stipulation, the trial court properly looked at the intent of the parties in entering into the Stipulation. "[W]hen a contract provision is ambiguous because it is susceptible to more than one reasonable interpretation due to uncertain meaning of terms, missing terms, or other facial deficiencies, extrinsic evidence is admissible to explain the intent of the parties." Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co., 899 P.2d 766, 770 (Utah 1995); Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983).

In support of Plumb's Motion to Amend Order, Plumb presented the Affidavit of Dennis K. Poole dated January 26, 1996 wherein evidence was presented to the trial court supporting Plumb's motion (R. 408-13). This evidence went wholly undisputed by Vonwald before the trial court! Since the undisputed evidence presented to the trial court clearly supported Plumb's motion, the trial court did not err in granting the same. Therefore, where the extrinsic evidence regarding the intent of the parties supported Plumb's motion to amend, the trial court's Order dated May 14, 1996 should be upheld by this Court. Willard Pease, 899 P.2d at 770; see also Brown v. Weis, 871 P.2d 552, 559 (Utah App. 1994).

Vonwald's attack on the issue of whether an ambiguity existed in the Stipulation ignores the other grounds for which the trial court amended the prior Order: mistake of fact. The

Affidavit of Dennis K. Poole dated January 26, 1996 also presented evidence to support Plumb's claim for mistake of fact (R. 408-13). Moreover, Plumb argued, in his Memorandum in Support of Defendant's Motion to Amend Order, that the January 1996 Order was the product of either a mutual mistake of fact or a unilateral mistake of fact known to Vonwald (R. 403-05). This mistake of fact went unchallenged by Vonwald both before the trial court and on appeal.

Since Vonwald has not raised as an issue of appeal the question of whether the trial court correctly amended the January 1996 Order on the basis of mistake of fact, this Court must assume the correctness of the trial court's ruling. Moreover, since the trial court had an independent basis for granting Plumb's Motion to Amend Order--mistake of fact--the correctness of the trial court's ruling with regard to the issue of ambiguity is largely moot. Plumb was entitled to reformation of the January 1996 Order based upon mistake of fact. Accordingly, even if this Court determines that the trial court incorrectly determined there to be an ambiguity in the Stipulation as a matter of law, this Court should nonetheless affirm the trial court's May 14, 1996 Order on the basis of mistake of fact.

II. APPELLEE PLUMB IS ENTITLED TO AN  
AWARD OF HIS ATTORNEY'S FEES  
INCURRED IN DEFENDING AGAINST THIS  
APPEAL.

Plumb requests an award of attorneys fees in defending this appeal. The Earnest Money Sales Agreement signed between the parties allowed for the recovery of attorney's fees as follows:

Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise.

(R. 42) Plumb incurred attorneys fees in defending Vonwald's Complaint. Based upon Section N of the Agreement, the District Court granted Plumb an award of attorneys fees in its Order dated June 8, 1994 (R. 229-32). Likewise, the Utah Court of Appeals granted Plumb his attorney's fees on Vonwald's first appeal (R. 283-84).

This Court has recognized "that a contractual obligation to pay attorney fees incurred in enforcing a contract should also include fees incurred on appeal." Salmon v. Davis County, 916 P.2d 890, 896 (Utah 1996). Moreover, "the prevailing party in a dispute over a contractual attorney fees provision [is] entitled, not only to attorney fees on appeal, but also to the fees it incurred establishing the reasonableness of the fees for which it was entitled to be indemnified." Salmon, 916 P.2d at 895; James Constructors v. Salt Lake City, 888 P.2d 665, 674 (Utah Ct. App. 1994). Just as Plumb was entitled to his attorney's fees for the first appeal, he is likewise entitled to his attorney's fees in defending against this appeal.

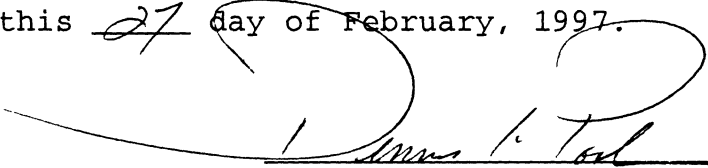
Plumb is further entitled to an award of attorney's fees based upon Vonwald's violations of Rules 33(b) and 40 of the Utah Rules of Appellate Procedure. As deficient and spurious as Vonwald's brief is, Plumb has been required nonetheless to undergo

the expense of answering it. Accordingly, Plumb also requests an award of double attorney's fees on this appeal pursuant to Rule 33(b) of the Utah Rules of Appellate Procedure and requests that this court remand the issue of Plumb's attorney's fees on this appeal to the trial court for determination.

#### CONCLUSION

For the foregoing reasons, Defendant/Appellee Plumb respectfully requests that this Court affirm the trial court's Order dated May 14, 1996 and award Plumb his attorney's fees incurred in defending against this appeal.

DATED this 27 day of February, 1997.



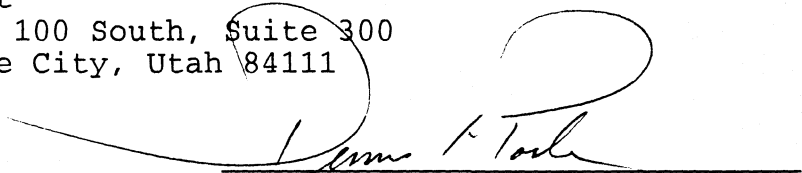
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DENNIS K. POOLE  
ANDREA NUFFER GODFREY  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant and  
Appellant Kevin Plumb

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief of Appellee in Appeal No. 960254 were mailed, United States Mail, postage prepaid, the 27 day of February, 1997, to the following:

Larry L. Whyte, Esq.  
Attorney for Plaintiff and  
Appellant  
265 East 100 South, Suite 300  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Dennis P. Taul", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

### ADDENDUM

1. Order dated June 8, 1994 (R. 229-31)
2. Memorandum Decision dated May 25, 1995 (R. 287-88)
3. Motion for Entry of Judgment for Attorney's Fees and Costs dated Aug. 1, 1995 (R. 289-291)
4. Memorandum in Support of Motion for Entry of Judgment for Attorney's Fees and Costs dated Aug. 1, 1995 (R. 292-295)
5. Affidavit in Support of Motion for Entry of Judgment for Attorney's Fees and Costs dated Aug. 1, 1995 (R. 296-302)
6. Motion for Release of Cash Bond dated Aug. 1, 1995 (R. 303-04)
7. Affidavit of Dennis K. Poole dated Aug. 1, 1995 (R. 305-07)
8. Stipulation for Release of Cash Bond dated January 2, 1996 (R. 348-49)
9. Order for Release of Cash Bond dated January 2, 1996 (R. 350-51)
10. Motion to Amend Order (R. 394-96)
11. Memorandum in Opposition to Plaintiff's Motion for Full Satisfaction and to Stay Execution and in Support of Defendant's Motion to Amend Order (R. 397-407)
12. Affidavit of Dennis K. Poole dated Jan. 26, 1996 (R. 408-13)
13. Minute Entry dated April 1, 1996 (R. 443)
14. Memorandum in Opposition to Plaintiff's Objection to Proposed Order dated April 13, 1996 (R. 451-456)
15. Order dated April 24, 1996 (R. 460-64)
16. Order for Supersedeas Bond and Stay of Proceedings dated Sept. 18, 1996
17. Rule 9, Utah Rules of Civil Procedure
18. Rule 60(b), Utah Rules of Civil Procedure
19. Rule 24, Utah Rules of Appellate Procedure

20. Rule 33, Utah Rules of Appellate Procedure
21. Rule 40, Utah Rules of Appellate Procedure
22. Section 78-2-2(3)(j), Utah Code Ann. (1996)

JUN 8 1994

DENNIS K. POOLE [2625]  
DENNIS K. POOLE & ASSOCIATES, P.C.  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone: (801) 263-3344

SALT LAKE COUNTY  
By H. J. Miller  
Deputy Clerk

---

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

---

LARRY R. VONWALD,  
Plaintiff,

-vs-

KEVIN PLUMB,  
Defendant.

ORDER

2192587  
6-9-94-808an

CASE NO. 930905795

JUDGE GLENN K. IWASAKI

---

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S ATTORNEYS FEES having come on for hearing before the Honorable Glenn K. Iwasaki on the 26th day of May, 1994, and the Defendant appearing by and through his attorney Dennis K. Poole and the Plaintiff neither appearing in person or by counsel, and the Court having considered the affidavits, pleadings and objections for and against an award of such fees, including an objection filed by Plaintiff immediately prior to said hearing, and the court having taken the sworn testimony of Dennis K. Poole and having considered the same, and now desiring to enter an Order with respect to attorney's fees and Defendant's Motion for Summary Judgment which was heard on the 24th day of March, 1994, and the Court having determined that there are no genuine issues of material fact,



ENTERS THE FOLLOWING FINDINGS, ORDERS AND JUDGMENT:

1. Paragraph 7 of the Earnest Money Agreement is clear and unambiguous and contains conditions precedent which were not fulfilled, rendering closing of the contract unenforceable.

2. Based upon the foregoing, the Defendant Kevin Plumb is entitled to Summary Judgment against the Plaintiff Larry R. Vonwald, requiring the return by the Broker of the Earnest Money Deposit in the sum of \$5,000 made by said Defendant pursuant to the terms and conditions of the Earnest Money Agreement dated August 10, 1993.

3. Defendant is entitled to a judgment for its attorney's fees and costs as follows:

<u>Fees</u>	<u>Dennis K. Poole</u>	<u>Andrea Nuffer</u>
October, 1993	\$ 120.00	\$ -0-
November, 1993	\$ 315.00	\$ 207.00
December, 1993	\$ -0-	\$ 828.00
January, 1994	\$ 300.00	\$ 360.00
February, 1994	\$ 225.00	\$ 261.00
March, 1994	\$ 525.00	\$ 310.00
April & May, 1994	\$ Combined:	\$450.00

TOTAL ATTORNEYS' FEES: \$3,901.00

Costs:

Filing fee - Crossclaim	\$ 60.00
Datashare Computer Research	\$ <u>103.90</u>

TOTAL COSTS \$163.90

Such costs and fees are determined to be reasonable and necessary.

4. Defendant's Motion for Summary Judgment with respect to the allegations of fraud asserted by the Plaintiff are treated as a motion for dismissal and the same is hereby granted as a result of the Plaintiff's failure to plead the same with particularity.

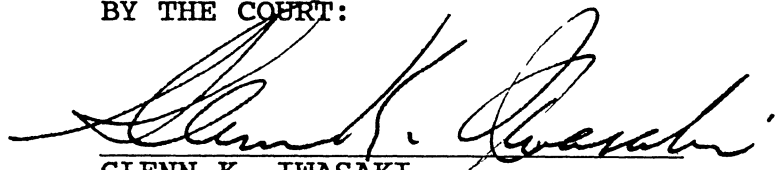
5. Plaintiff's Motion for Summary Judgment to dismiss Defendant's claims and for attorney's fees is denied as a result of the orders and judgments in favor of the Defendant as set forth above.

6. It is further ordered that the judgment in favor of Plaintiff shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise, as shall be established by affidavit.

7. The total judgment of \$4,064.90 against the Plaintiff shall hereafter bear interest at the rate of 5.61% per annum until paid.

ORDER AND JUDGMENT dated this 3<sup>rd</sup> day of June, 1994.

BY THE COURT:

  
GLENN K. IWASAKI  
District Court Judge

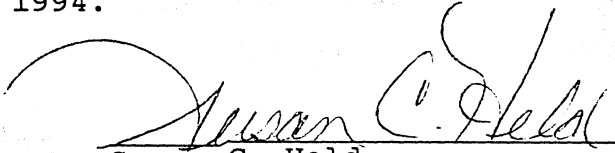
plumb3.ord (sch dir)

MAILING CERTIFICATE

I do hereby certify that I caused to be mailed a true and correct copy of the foregoing ORDER in Civil No. 930905795 to the following:

Larry R. Vonwald, Pro Se  
2535 East Chalet Road  
Sandy, Utah 84093

and by depositing the same, sealed, with first-class postage prepaid thereon, in the United States Mails at Salt Lake City, Utah this 2nd day of June, 1994.

  
\_\_\_\_\_  
Susan C. Held

FILED

MAY 25 1995

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

-----ooOoo-----

Larry N. Vonwald,	)	MEMORANDUM DECISION
	)	(Not For Publication)
Plaintiff and Appellant,	)	
	)	
v.	)	Case No. 940731-CA
	)	
Kevin Plumb,	)	
	)	
Defendant and Appellee.	)	F I L E D
		(May 25, 1995)

-----

Third District, Salt Lake County  
The Honorable Glenn K. Iwasaki

Attorneys: Larry L. Whyte, Salt Lake City, for Appellant  
Dennis K. Poole and Andrea Nuffer, Salt Lake City,  
for Appellee

-----

Before Judges Orme, Davis, and Jackson.

JACKSON, Judge:

Larry R. Vonwald appeals the trial court's grant of Kevin Plumb's motion for summary judgment. We affirm.<sup>1</sup>

Both parties contend that the language contained in paragraph 7 of their Earnest Money Sales Agreement is unambiguous. We agree that the language is unambiguous and conclude that it creates a condition precedent which failed due to Plumb's inability to gain county approval of his plans.

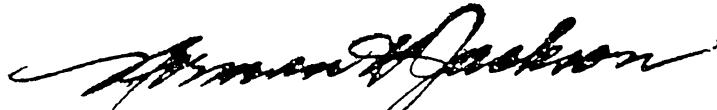
We have reviewed Vonwald's claims that Plumb breached a covenant of good faith and fair dealing, committed fraud, and violated Rule 11. We find these claims to be without merit. See State v. Carter, 776 P.2d 886, 888-89 (Utah 1989) (stating court may decline to address arguments without merit on appeal).

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1. We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3).

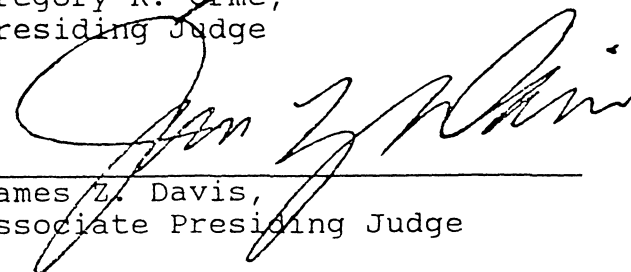
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A contractual provision for payment of attorney fees includes attorney fees incurred by the prevailing party on appeal as well as at trial. Management Servs. Corp. v. Development Assocs., 617 P.2d 406, 409 (Utah 1980). Inasmuch as Plumb prevailed, we remand to the district court for determination of attorney fees to be awarded to Plumb on appeal.

  
\_\_\_\_\_  
Norman H. Jackson, Judge

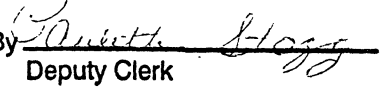
WE CONCUR:

  
\_\_\_\_\_  
Gregory K. Orme,  
Presiding Judge

  
\_\_\_\_\_  
James Z. Davis,  
Associate Presiding Judge

-----  
I, the undersigned, Clerk of the Utah Court of Appeals, do hereby certify that the foregoing is a full, true and correct copy of an original document on file in the Utah Court of Appeals. In testimony whereof, I have set my hand and affixed the seal of the Court.

  
\_\_\_\_\_  
Marilyn M. Branch  
Clerk of the Court

By   
\_\_\_\_\_  
Deputy Clerk

\_\_\_\_\_  
7-26-95  
Date

FILED DISTRICT COURT  
Third Judicial District

AUG 03 1995

By SALT LAKE COUNTY  
Deputy Clerk

DENNIS K. POOLE (2625)  
ANDREA NUFFER (6623)  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone: (801) 263-3344  
Telefax: (801) 263-1010

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

---

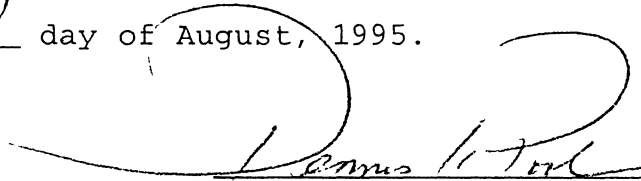
LARRY R. VONWALD,	:	MOTION FOR ENTRY OF JUDGMENT
	:	FOR ATTORNEY'S FEES AND COSTS
Plaintiff,	:	
- vs -	:	CIVIL NO. 930905795
KEVIN PLUMB,	:	JUDGE GLENN K. IWASAKI
Defendant.	:	

---

Comes now the Defendant and pursuant to the Memorandum Decision of the Utah Court of Appeals and the Remittitur by the Utah Court of Appeals, respectfully moves this Court for Judgment against the Plaintiff for: (i) Defendant's attorney's fees on appeal; (ii) for Defendant's costs incurred in connection with the appeal; and (iii) Defendant's attorney's fees in bringing this Motion. This Motion is supported by the Affidavit of Dennis K.

Poole in Support of Motion for Entry of Judgment, and the Memorandum of Points and Authorities submitted concurrently herewith.

DATED this 1 day of August, 1995.

A handwritten signature in black ink, appearing to read "Dennis K. Poole", is written over a horizontal line.

DENNIS K. POOLE  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant


MAILING CERTIFICATE

I do hereby certify that I caused to be mailed a true and correct copy of the foregoing MOTION FOR JUDGMENT in Case No. 930905795 to the following:

Larry R. Vonwald, Pro Se  
2535 East Chalet Road  
Sandy, Utah 84093

Larry L. Whyte, Esq.  
265 East 100 South, Suite 300  
Salt Lake City, Utah 84111

and by depositing the same, sealed, with first-class postage prepaid thereon, in the United States Mails at Salt Lake City, Utah this 1st day of August, 1995.

  
Susan C. Held



FILED DISTRICT COURT  
Third Judicial District

AUG 03 1995

SALT LAKE COUNTY

By                      Deputy Clerk

DENNIS K. POOLE (2625)  
ANDREA NUFFER (6623)  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone: (801) 263-3344  
Telefax: (801) 263-1010

---

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

---

LARRY R. VONWALD,	:	MEMORANDUM IN SUPPORT OF
	:	MOTION FOR ENTRY OF JUDGMENT
Plaintiff,	:	FOR ATTORNEY'S FEES AND COSTS
-vs-	:	
	:	CIVIL NO. 930905795
KEVIN PLUMB,	:	
	:	JUDGE GLENN K. IWASAKI
Defendant.	:	

---

Defendant respectfully submits this Memorandum in Support of Motion for Entry of Judgment for Attorney's Fees and Costs based upon the Memorandum Decision of the Utah Court of Appeals, and the Earnest Money Agreement which is the subject of this action.

FACTS

This matter came before this Court (the Honorable Glenn K. Iwasaki) for hearing on Defendant's Motion for Summary Judgment on the 24th day of March, 1994, and thereafter on Defendant's Motion for Attorney's Fees. The Court granted Defendant's Motion for

000292

Summary Judgment dismissing Plaintiff's claims and awarding Defendant attorney's fees and costs. Plaintiff subsequently filed a Notice of Appeal from the Judgment and Order of this Court regarding said Motions.

On May 25, 1995, the Court of Appeals issued its Memorandum Decision affirming the Judgment and Order of this Court with respect to the dismissal of Plaintiff's claims. The Court of Appeals, in its Memorandum Decision, also found that Defendant and Appellee was entitled to attorney's fees incurred on appeal.

The Utah Court of Appeals remanded the matter to this Court for consideration of an award of such fees and costs and a Remittitur was filed on July 20, 1995.

#### ARGUMENT

The Court of Appeals of Utah, in the case of Leon H. Saunders, et al vs John C. Sharp and Geraldine Y. Sharp, upon remand by the Utah Supreme Court, states as follows:

While courts may, in some situations, award attorney fees on an equitable basis, "attorneys fees, when awarded as allowed by law, are awarded as a matter of legal right." Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985).

One such instance occurs when the right is contractual. In such cases, "the court does not possess the same equitable discretion to deny attorney's fees that it has when fashioning equitable remedies, or applying a statute which allows the discretionary award of such fees." Cobabe v. Crawford, 780 P.2d 834, 836 (Utah App. 1989) (quoting Spinks v. Chevron Oil Co., 507 F.2d 216, 226 (5th Cir. 1975)).

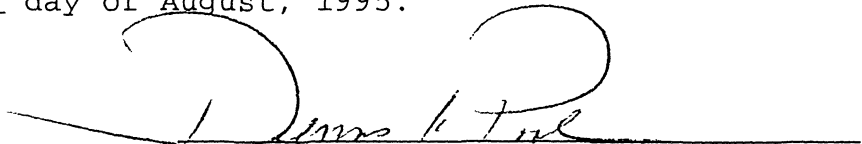
Thus, "provisions in written contracts providing for payment of attorney fees should ordinarily be honored by the courts." Stacey Properties v. Wixen, 766 P.2d 1080, 1085 (Utah App. 1988), cert. denied, 779 P.2d 688 (Utah 1989) (quoting Soffe v. Ridd, 659 P.2d 1082, 1085 (Utah 1983)). . . .

Saunders v. Sharp, 840 P.2d 796 (Utah Ct. App. 1992). Defendant, therefore, is entitled to recover his reasonable attorney's fees, legal expenses and costs incurred in connection with the appeal and in bringing the current Motion. Accordingly, Defendant requests that this Court enter judgment in favor of Defendant in the amount of these fees and costs as more particularly set forth in the Affidavit in Support of Motion for Entry of Judgment for Attorney's Fees and Costs filed simultaneously herewith. Defendant reserves the right to supplement his request for fees and costs for additional costs incurred in pursuing the current Motion.

#### CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court grant Defendant's Motion for Entry of Judgment for Attorney's Fees and Costs.

DATED this 1 day of August, 1995.



DENNIS K. POOLE  
ANDREA NUFFER  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant


MAILING CERTIFICATE

I do hereby certify that I caused to be mailed a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT FOR ATTORNEY'S FEES AND COSTS in Case No. 930905795 to the following:

Larry R. Vonwald, Pro Se  
2535 East Chalet Road  
Sandy, Utah 84093

Larry L. Whyte, Esq.  
265 East 100 South, Suite 300  
Salt Lake City, Utah 84111

and by depositing the same, sealed, with first-class postage prepaid thereon, in the United States Mails at Salt Lake City, Utah this 1st day of August, 1995.



Susan C. Held

FILED DISTRICT COURT  
Third Judicial District

AUG 03 1995

By K. E. POOLE SALT LAKE COUNTY  
Deputy Clerk

DENNIS K. POOLE (2625)  
ANDREA NUFFER (6623)  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone: (801) 263-3344  
Telefax: (801) 263-1010

---

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

---

LARRY R. VONWALD, : AFFIDAVIT IN SUPPORT OF  
Plaintiff, : MOTION FOR ENTRY OF JUDGMENT  
FOR ATTORNEY'S FEES AND COSTS  
-vs- : CIVIL NO. 930905795  
KEVIN PLUMB, : JUDGE GLENN K. IWASAKI  
Defendant. :

---

STATE OF UTAH )  
: ss  
COUNTY OF SALT LAKE )

DENNIS K. POOLE, being first duly sworn, upon oath, deposes and states as follows:

1. I am an attorney at law duly licensed to practice law in the State of Utah, and represent the Defendant with respect to the above entitled action.

2. I am familiar with collection procedures, cases and law generally in the State of Utah and am familiar with the papers and pleadings filed in the above-entitled action.

3. Summary Judgment was entered in favor of Defendant in this matter, in part awarding Defendant his attorney's fees and costs incurred in this matter. Plaintiff appealed the order and judgment.

4. On May 25, 1995, the Utah Court of Appeals issued its Memorandum Opinion affirming the grant of Defendants' Motion for Summary Judgment, and a Remittitur was filed on June 20, 1995.

5. In addition, the Appeals Court found that Defendant was entitled to an award of attorney's fees incurred by Defendant on appeal.

6. The following is a summary of the services, attorney's fees, and time spent by Defendant's counsel in connection with collection efforts, the Appeal and this Motion:

<u>DATE</u>	<u>DESCRIPTION OF SERVICES</u>	<u>AMOUNT</u>
July 1994	Telephone conferences with clients re: notice of appeal and draft letter; research re: motor vehicles, business filings, UCC filings, corporate interests and real property interests of Plaintiff for execution; review notice from Supreme Court, prepare application for and garnishments and related pleadings.  DKP .5 hours EC (paralegal) 16.8 hours	
		\$ 915.00
August 1994	Review Docketing Statement and review of Rules for Summary Disposition. Review Vonwald's Motion for Summary Disposition and	

rules; research regarding reply to Motion for Summary Disposition; draft and edit reply to Motion for Summary Disposition; conf. with Constable re: execution sale; draft letter to Plaintiff re: posting of bond and stay of execution; conf. with Judge re: setting bond on appeal

DKP 2.4 hours  
EC (paralegal) 1.1 hours  
AN (associate) 7.8 hours

1,117.00

October 1994 Review trial transcript and appellate brief

AN (associate) 1.05 hours

115.50

November 1994 Obtain and review record; draft appellate brief, deliver to printer and return record to District Court

DKP .8 hours  
EC (paralegal) 2.0 hours  
AN (associate) 8.9 hours

1,207.00

December 1994 Review notice from court of Appeals and rules of appellate procedure, review notice of pour over from Supreme Court, review reply brief.

DKP .6 hours  
AN (associate) .05 hours

101.50

May 1995 Review decision from Court of Appeals, draft letter to client

DKP .3 hours

48.00

June 1995	Review Petition for Rehearing, rules of Appellate procedure, draft letter to client	
	DKP .4 hours	
	AN (associate) .2 hours	
		86.00

July 1995	Review Remittitur and Draft Motion for attorney's fees and costs, draft Affidavit and Memorandum; draft Motion for Release of Bond	
	DKP 3.0 hours	
		480.00

August 1995	Estimated for review of responsive Memo and attendance at hearing and preparation of Order	
	DKP 2.0 hours	
		320.00

TOTAL FEES	\$ 4,390.00
------------	-------------

The following is a breakdown of the time spent by the individual members of the firm with their hourly billing rates:

Dennis K. Poole, Senior Partner, 2.90 hrs	
@ \$150.00 per hour	\$ 435.00
7.10 hrs @ \$160.00 per hour	\$ 1,136.00

Andrea Nuffer, Associate Attorney, 7.80	
hrs @ \$90.00 per hour	702.00
10.20 hrs @ \$110.00 per hour	1,122.00

Elaine Colby, Paralegal, 19.90 hrs @ \$50.00	
per hour	<u>995.00</u>

Total Fees	\$ 4,390.00
------------	-------------



7. The fees charged are reasonable and are comparable to the hourly rates charged by other law firms in the area for the same type of services.

8. The following is an itemization of the costs expended in collection efforts and on the Appeal:

Collection:

7/28/94	Garnishee Fee	\$ 10.00
7/28/94	Filing Fee for Garnishment and Exec	10.00
8/22/94	Motor Vehicle Search Cost	2.00
10/19/94	Compute research (county records)	<u>85.87</u>
TOTAL COLLECTION COSTS TO DATE		\$ 107.87

Appeal:

8/18/94	Copy costs for Transcript	22.25
11/14/94	Copy costs of briefs	<u>97.08</u>
TOTAL COSTS ON APPEAL		\$ 119.33

9. Plaintiff is entitled to an award of the attorney's fees and costs itemized above pursuant to the Earnest Money Receipt upon

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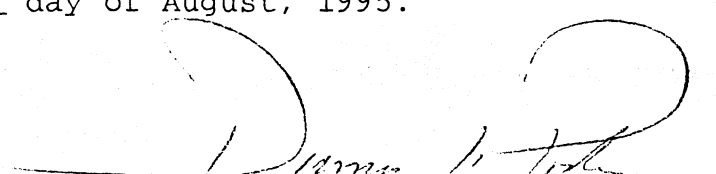
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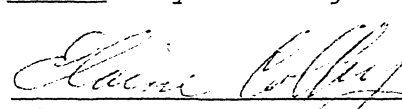
which this action is based and the Memorandum Decision of the Utah Court of Appeals.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 1 day of August, 1995.

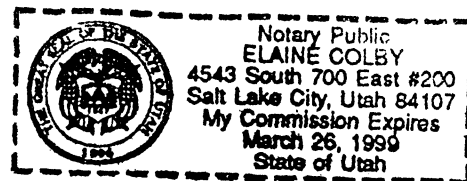
  
DENNIS K. POOLE  
DENNIS K. POOLE & ASSOCIATES  
Attorneys for Plaintiff

ACKNOWLEDGED before me this 1st day of August, 1995 by  
DENNIS K. POOLE.

  
NOTARY PUBLIC  
Residing in Salt Lake, Utah

My Commission Expires:

March 26, 1999




CERTIFICATE OF SERVICE

I do hereby certify that I caused to be mailed a true and correct copy of the foregoing AFFIDAVIT IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT FOR ATTORNEY'S FEES AND COSTS in Case No. 930905795 to the following:

Larry R. Vonwald, Pro Se  
2535 East Chalet Road  
Sandy, Utah 84093

Larry L. Whyte, Esq.  
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Salt Lake City, Utah 84111

and by depositing the same, sealed, with first-class postage prepaid thereon, in the United States Mails at Salt Lake City, Utah this 1st day of August, 1995.

  
Susan C. Held

FILED DISTRICT COURT  
Third Judicial District

AUG 03 1995

By K. Poole Salt Lake County  
Deputy Clerk

DENNIS K. POOLE (2625)  
ANDREA NUFFER (6623)  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant  
4543 South 700 East, Suite 200  
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Telefax: (801) 263-1010

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

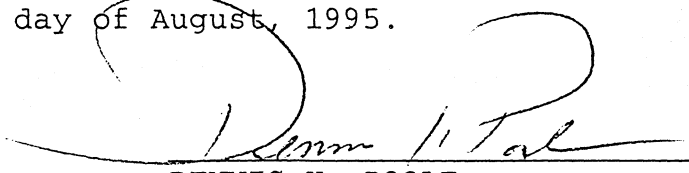
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LARRY R. VONWALD,	:	MOTION FOR RELEASE OF
	:	CASH BOND
Plaintiff,	:	
- vs -	:	
	:	CIVIL NO. 930905795
KEVIN PLUMB,	:	
	:	JUDGE GLENN K. IWASAKI
Defendant.	:	

---

THE DEFENDANT KEVIN PLUMB, by and through his attorney Dennis K. Poole, respectfully moves the Court for an order releasing the Plaintiff's cash supersedeas bond in the sum of \$5,500. This Motion is supported by the Affidavit of Dennis K. Poole filed contemporaneously herewith.

DATED this 10<sup>th</sup> day of August, 1995.

  
DENNIS K. POOLE  
ANDREA NUFFER  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant

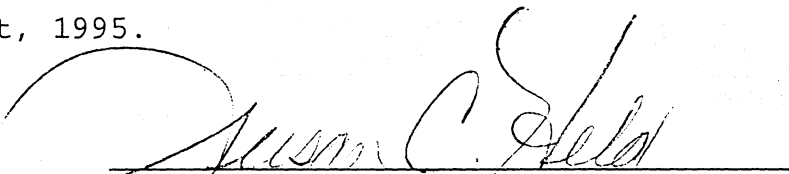
MAILING CERTIFICATE

I do hereby certify that I caused to be mailed a true and correct copy of the foregoing MOTION FOR RELEASE OF CASH BOND in Case No. 930905795 to the following:

Larry R. Vonwald, Pro Se  
2535 East Chalet Road  
Sandy, Utah 84093

Larry L. Whyte, Esq.  
265 East 100 South, Suite 300  
Salt Lake City, Utah 84111

and by depositing the same, sealed, with first-class postage prepaid thereon, in the United States Mails at Salt Lake City, Utah this 1st day of August, 1995.

  
\_\_\_\_\_  
Susan C. Held

AUG 03 1995

By K. J. Cline <sup>SALT LAKE COUNTY</sup>  
Deputy Clerk

LARRY R. VONWALD, : AFFIDAVIT OF  
 : DENNIS K. POOLE  
 Plaintiff, :  
 :  
 -vs- : CIVIL NO. 930905795  
 :  
 KEVIN PLUMB, : JUDGE GLENN K. IWASAKI  
 :  
 Defendant. :

2. Defendant prevailed on a Motion for Summary Judgment on the 24th day of March, 1994, and thereafter was awarded attorney's fees.

3. The Plaintiff in the above-entitled action filed a Notice of Appeal from the Judgment and Order of this Court.

4. On the 30th day of August, 1994, the Honorable Glenn K. Iwasaki entered an order approving a cash supersedeas bond in the sum of \$5,500, which bond in whole or in part has been tendered and posted by the Plaintiff.

5. On May 25, 1995, the Court of Appeals issued its memorandum decision affirming the Judgment and Order in favor of the Defendant and further found that the Defendant was entitled to his attorney's fees and costs incurred on appeal.

6. The Defendant has also incurred attorney's fees and costs relative to its attempts to collect the Judgment which are more particularly set forth in an Affidavit of Affiant in support of Motion for Attorney's Fees filed contemporaneously herewith.

7. Defendant Kevin Plumb has not collected any sums or amounts due upon the Judgment and is entitled to an order of the

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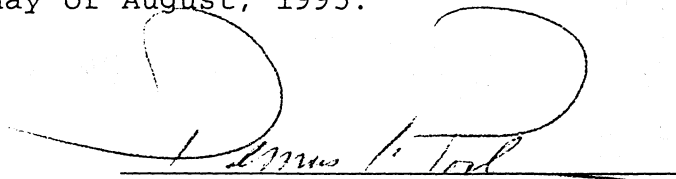
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Court releasing the cash bond to him for application against the Judgment and amounts due him.

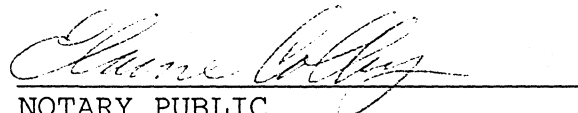
FURTHER AFFIANT SAYETH NAUGHT.

DATED this 1 day of August, 1995.



DENNIS K. POOLE  
DENNIS K. POOLE & ASSOCIATES  
Attorneys for Plaintiff

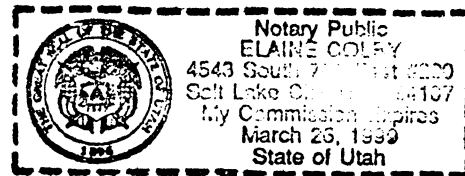
ACKNOWLEDGED before me this 1st day of August, 1995 by  
DENNIS K. POOLE.



NOTARY PUBLIC  
Residing in Salt Lake, Utah

My Commission Expires:

March 26, 1999





CERTIFICATE OF SERVICE

I do hereby certify that I caused to be mailed a true and correct copy of the foregoing AFFIDAVIT OF DENNIS K. POOLE in Case No. 930905795 to the following:

Larry R. Vonwald, Pro Se  
2535 East Chalet Road  
Sandy, Utah 84093

Larry L. Whyte, Esq.  
265 East 100 South, Suite 300  
Salt Lake City, Utah 84111

and by depositing the same, sealed, with first-class postage prepaid thereon, in the United States Mails at Salt Lake City, Utah this 1st day of August, 1995.

  
\_\_\_\_\_  
Susan C. Held

FILED DISTRICT COURT  
Third Judicial District

JAN - 2 1996

DENNIS K. POOLE (2625)  
ANDREA NUFFER (6623)  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone: (801) 263-3344  
Telefax: (801) 263-1010

SALT LAKE COUNTY  
By Charles J. Jensen  
DEPUTY CLERK

---

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

---

LARRY R. VONWALD,	:	STIPULATION FOR RELEASE OF
	:	CASH BOND
Plaintiff,	:	
- vs -	:	
	:	CIVIL NO. 930905795
KEVIN PLUMB,	:	
	:	JUDGE GLENN K. IWASAKI
Defendant.	:	

---

THE DEFENDANT KEVIN PLUMB, by and through his attorney Dennis K. Poole, and the PLAINTIFF LARRY R. VONWALD, by and through his attorney Larry L. Whyte, respectfully stipulate and agree as follows:

1. That Defendant has filed a Motion for Entry of Judgment for Attorney's Fees and Costs which is pending before this Court.
2. Plaintiff and Defendant desire to resolve such Motion and all remaining issues between them in accordance with the terms of this Stipulation.

3. Plaintiff and Defendant stipulate and agree that Plaintiff's cash supersedeas bond in the sum of \$5,500 shall be released by the Clerk of the Court to be disbursed as follows:

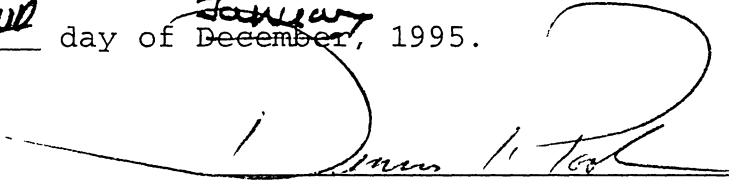
(a) The sum of \$5,315.44 shall be paid to Dennis K. Poole, attorney for the Defendant, for the benefit of Defendant and counsel.

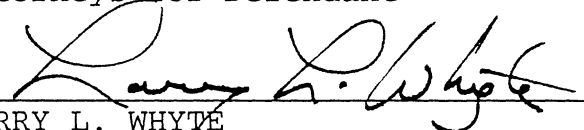
(b) The sum of \$184.56 shall be disbursed to Plaintiff.

4. Upon the receipt of funds by Defendant's counsel as specified herein, Plaintiff shall be deemed to have satisfied all obligations in favor of the Defendant and the Order of the Court shall reflect the same.

5. Upon receipt of such funds, Defendant shall cause a Satisfaction of Judgment to be filed with the Court.

DATED this 2nd day of ~~December~~ <sup>January</sup>, 1995.

  
DENNIS K. POOLE  
ANDREA NUFFER  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant

  
LARRY L. WHYTE  
Attorney for Plaintiff

DENNIS K. POOLE (2625)  
ANDREA NUFFER (6623)  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone: (801) 263-3344  
Telefax: (801) 263-1010

FILED DISTRICT COURT  
Third Judicial District

JAN - 2 1996

SALT LAKE COUNTY  
By [Signature]  
DEPUTY CLERK

---

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

---

LARRY R. VONWALD,	:	ORDER FOR RELEASE OF
	:	CASH BOND
Plaintiff,	:	
- vs -	:	
	:	CIVIL NO. 930905795
KEVIN PLUMB,	:	
	:	JUDGE GLENN K. IWASAKI
Defendant.	:	

---

THE DEFENDANT KEVIN PLUMB, by and through his attorney Dennis K. Poole, and the PLAINTIFF LARRY R. VONWALD, by and through his attorney Larry L. Whyte, having stipulated to the release of Cash Bond and for disbursement thereof, and for good cause appearing

IT IS HEREBY ORDERED that the case bond of the Plaintiff in the sum of \$5,500 be disbursed by the Clerk of the Court as follows:

(a) The sum of \$5,315.44 shall be paid to Dennis K. Poole, attorney for the Defendant, for the benefit of Defendant and counsel.

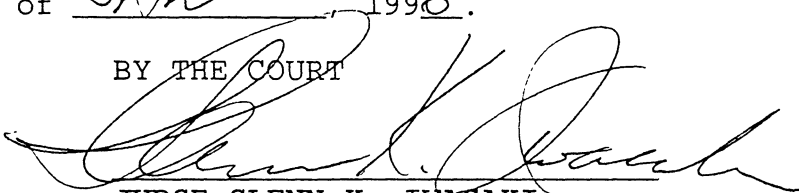
(b) The sum of \$184.56 shall be disbursed to Plaintiff.

IT IS FURTHER ORDERED that upon receipt of funds by the Defendant, Defendant shall file with the Court a satisfaction of Judgment.

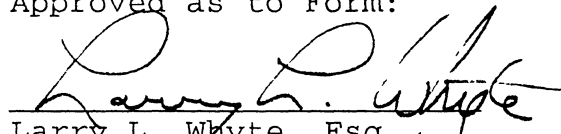
000-350

ORDER dated this 2<sup>nd</sup> day of Jan, 1996.

BY THE COURT

  
JUDGE GLENN K. IWASAKI

Approved as to Form:

  
Larry L. Whyte, Esq.  
Attorney for the Plaintiff

DENNIS K. POOLE (2625)  
ANDREA NUFFER (6623)  
DENNIS K. POOLE & ASSOCIATES  
Attorneys for Defendant  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone (801) 263-3344  
Telecopier (801) 263-1010



---

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

---

LARRY R. VONWALD,	)	
	)	MOTION TO AMEND ORDER
Plaintiff,	)	
	)	
vs.	)	CASE NO. 930905795
	)	
KEVIN PLUMB,	)	
	)	JUDGE GLENN K. IWASAKI
Defendant.	)	

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Defendant, Kevin Plumb, by and through his attorney Dennis K. Poole, pursuant to Rule 60 and/or the equitable powers of this Court, respectfully requests of the Court as follows:

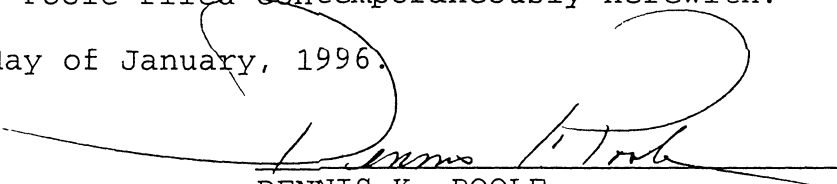
1. Should the Court determine that an Order of the Court dated January 2, 1996, is ambiguous, for an order amending the same to require a satisfaction of the amounts paid as recited in such Order only.

2. For an order amending that certain Stipulation dated the 2nd day of January, 1996, as the result of a mutual mistake of fact or a unilateral mistake of fact which is known, or should have been known, by the Plaintiff.

3. In the event that an ambiguity exists and reformation is not ordered, for an order of the Court vacating such Stipulation and Order based upon mutual mistake of fact or unilateral mistake known to the Plaintiff.

This Motion is supported by Defendant's Memorandum In Opposition to Plaintiff's Motion for Full Satisfaction and to Stay Execution and in Support of Defendant's Motion to Amend Order filed contemporaneously herewith. This Motion is also supported by the Affidavit of Dennis K. Poole filed contemporaneously herewith.

DATED this 30 day of January, 1996.

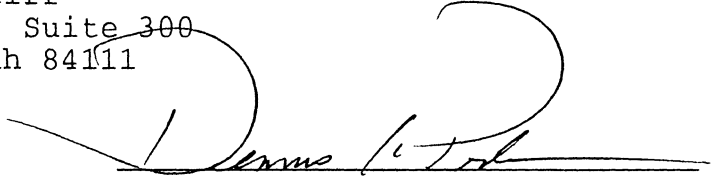


DENNIS K. POOLE  
DENNIS K. POOLE & ASSOCIATES  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion to Amend Order in Case No. 930905795 was mailed, United States Mail, postage prepaid, the 30 day of January, 1996, to the following:

Larry L. Whyte, Esq.  
Attorney for Plaintiff  
265 East 100 South, Suite 300  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Dennis L. Whyte", is written over a horizontal line.



DENNIS K. POOLE (2625)  
ANDREA NUFFER (6623)  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone: (801) 263-3344  
Telefax: (801) 263-1010

---

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

---

LARRY R. VONWALD,	:	MEMORANDUM IN OPPOSITION TO
	:	PLAINTIFF'S MOTION FOR FULL
Plaintiff,	:	SATISFACTION AND TO STAY
	:	EXECUTION AND IN SUPPORT OF
	:	DEFENDANT'S MOTION TO AMEND
	:	ORDER
- vs -	:	
	:	CIVIL NO. 930905795
KEVIN PLUMB,	:	
	:	JUDGE GLENN K. IWASAKI
Defendant.	:	

---

Defendant respectfully submits this Memorandum in Opposition to Plaintiff's Motion for Full Satisfaction of Judgment and Motion to Stay Execution and in support of Defendant's Motion to Amend Order.

I. FACTS

This matter originally came before this Court (the Honorable Glenn K. Iwasaki) for hearing on Defendant's Motion for Summary Judgment on the 24th day of March, 1994, and thereafter on Defendant's Motion for Attorney's Fees. The Court granted Defendant's Motion for Summary Judgment dismissing Plaintiff's claims and awarding Defendant attorney's fees and costs of \$4,064.90 (some-

times referred to herein as the "June Judgment"). Plaintiff subsequently filed a Notice of Appeal from the Judgment and Order of this Court regarding said Motions.

On May 25, 1995, the Court of Appeals issued its Memorandum Decision affirming the Judgment and Order of this Court with respect to the dismissal of Plaintiff's claims. The Court of Appeals, in its Memorandum Decision, also found that Defendant and Appellee was entitled to attorney's fees and costs incurred on appeal. On June 8, 1995, Plaintiff filed a Petition for Rehearing, which Petition was later denied. Later, on September 15, 1995 Plaintiff filed a Petition for Writ of Certiorari with the Utah Supreme Court, which Petition was denied December 7, 1995.

The Utah Court of Appeals remanded the matter to this Court for consideration of an award of attorney's fees and costs. Based upon that remand, on December 12, 1995, Defendant filed two Motions: (i) a Motion for Release of Cash Bond; and (ii) a Motion for Entry of Judgment For Attorney's Fees and Costs specifically for (a) Defendant's attorney's fees incurred on appeal, (b) Defendant's costs incurred in connection with the appeal, and (c) Defendant's attorney's fees in bringing the Motion for additional attorney's fees. Defendant claimed costs and attorney's fees totaling \$5,475.44 on appeal. See Affidavit of Dennis K. Poole dated December 12, 1995, a copy of which is attached to Plaintiff's Motion as Exhibit "E."

During December, 1995, counsel for Plaintiff and Defendant negotiated a \$160.00 reduction in the amount claimed by Defendant under the terms of the December 12, 1995 Motion and Affidavit and thereafter entered into a Stipulation for release of a Cash Bond for payment of the same. Plaintiff now claims that such Stipulation also requires the entry of a satisfaction for the June Judgment of \$4,064.90. Defendant disputes this claim, asserting that it was not the intent of the parties to release the prior judgment which remains unpaid.

## II. ARGUMENT

### A. THE JANUARY 2, 1996 STIPULATION RESOLVED THE OUT-STANDING MOTIONS AND DID NOT SATISFY THE JUNE JUDGMENT.

As the Court is aware, this matter arose out of the Plaintiff's misreading of a condition precedent contained in a Real Estate Purchase Contract between Plaintiff as Seller and Defendant as Buyer. As a result of Defendant's Motion for Summary Judgment, this Court determined that the contract was not ambiguous and that Defendant was entitled to judgment for his attorney's fees and costs. A judgment in the amount of \$4,064.90 was entered on or about June 9, 1994 (the "June Judgment"). Plaintiff has paid nothing against the June Judgment.

Plaintiff chose to appeal the June Judgment to the Court of Appeals and having lost the appeal subsequently made a Request for Rehearing and a Petition for Certiorari. The appellate courts having sustained the June Judgment, on December 12, 1995, Defendant

filed a Motion for attorney's fees and costs incurred on the appeals to which the Court of Appeals concluded Defendant was entitled. Defendant claimed in his Motion for Entry of Judgment for Fees and Costs that he was entitled to a judgment of \$5,475.44.

In response to the Motion, Larry Whyte called Defendant's counsel and negotiated a reduction of \$160.00 in the amount claimed in the Motion and supporting Affidavit. Plaintiff now asserts that he is entitled to a satisfaction of the June Judgment, although no specific negotiations occurred with respect to satisfaction of the prior judgment and nothing was paid against the same. The terms of the parties' Stipulation, the Court's Order and the history of this case do not support Plaintiff's position.

When Plaintiff filed his Motion for Entry of Judgment for Attorney's Fees and Costs and his separate Motion for Release of Bond, no other issues were pending before the Court. The Stipulation dated January 2, 1996 specifically refers to the pending Motion for Entry of Judgment for Attorney's Fees and Costs and the parties desire to resolve such Motion and all remaining issues -- clearly the Motion for Release of Bond. The stipulation then provided that the Clerk would disburse those funds and Defendant would provide a satisfaction "upon receipt of such funds." As is evident from Mr. Whyte's own handwriting on Exhibit "E" to his Motion, he agreed that the amount being negotiated and paid was for fees and costs claimed in the pending Motion and supporting Affidavit (primarily fees and costs on appeal), and had no relationship

to the outstanding judgment. Nowhere does the Stipulation specify that a satisfaction was to be entered as to the June Judgment.

Plaintiff asserts in his Motion that the Defendant agreed the payment was to satisfy all obligations, including the June Judgment. Such an interpretation is a misreading of the Stipulation for the following reasons. First, such a reading is beyond the scope of the Stipulation; by its terms it was to resolve the issue of a claim for additional fees and costs and the pending Motion for release of bond. Second, the outstanding, unsatisfied June Judgment was not an issue pending before the court; the claim for prior fees and costs had already been liquidated and reduced to judgment. Third, there is no reference within the terms of the Stipulation or the Court's Order dated January 2, 1996, to the prior June Judgment, only to a satisfaction related to payment of the amount to be disbursed to Defendant. Fourth, and most important of all, logic does not support Defendant's compromise and satisfaction of an outstanding judgment for an amount in excess of \$4,000, supported by an opinion of the Utah Court of Appeals, by the mere payment of approximately \$5,000, being the amount of the additional claim!<sup>1</sup>

Indeed, if Mr. Whyte intended to receive a satisfaction of all claims totaling in excess of \$9,000, why did he not request the same be specific reference to the prior judgment, especially when he was previously advised that the amounts claimed would not be

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<sup>1</sup> See Argument that Satisfaction was without consideration. Section B.

compromised? Why would counsel for the Defendant agree to the payment of only the additional fees and costs on appeal and waive the amounts due on the June Judgment without any payment at all? Clearly, Plaintiff's request was not within the contemplation of either party and Plaintiff is merely looking for language to support the avoidance of a just debt and obligation.

B. THERE IS NO CONSIDERATION FOR RELEASE OF THE JUNE, 1994 JUDGMENT.

Plaintiff asserts that he is entitled to a release of the June Judgment by the parties' Stipulation to satisfy the outstanding claims for attorney's fees and costs on appeal. Yet it is apparent from Mr. Whyte's own handwritten notes on Exhibit "E" that the amount compromised and to be paid related solely to the pending Motion for Entry of Judgment For Attorney's Fees and Costs. (See Page 5 of the Exhibit.) Absolutely nothing was allocated by Mr. Whyte to the prior June Judgment. Consequently, Plaintiff is asking for the release of a prior judgment when admittedly nothing has been paid against it.

As before, Plaintiff is asking the Court to interpret language of a document, in this Case a Stipulation, without consideration of the total facts, events and circumstances before the parties and the requirement that consideration be paid for satisfaction of the June Judgment. Davis v. Barrett, 467 P.2d 603, 604 (Utah 1970) ("it is horn book law that a release is not supported by sufficient consideration unless something of value was received to which the creditor had no previous right."). Because the requested satisfac-

tion of the June Judgment is without any consideration, Plaintiff is not entitled to a satisfaction.

C. IF AN AMBIGUITY EXISTS, DEFENDANT IS ENTITLED TO AN ORDER OF THE COURT AMENDING THE JANUARY 2, 1996 ORDER PURSUANT TO RULE 60.

If any ambiguity exists as to the January 2, 1996 Order and the required issuance of a Satisfaction of Judgment, Defendant is entitled to an Order pursuant to Rule 60 of the Utah Rules of Civil Procedure amending the January Order. The effect of the January 2, 1996 Order was to award Plaintiff a judgment of \$5,315.44. It was therefore logical and appropriate that Defendant be required to provide a satisfaction of judgment for such amount upon receipt of the same; then and only then would there be evidence of satisfaction of the Court's order. The Order so states: "[U]pon receipt of funds by the Defendant, Defendant shall file with the Court a satisfaction of Judgment."

If, because of clerical error, there is an ambiguity that Defendant was to issue a satisfaction as to the January 2, 1996 Order only, the Court has the power pursuant to Rule 60 to modify the prior order and explicitly provide for the limited satisfaction. Clearly, equity and justice would not permit Plaintiff to avoid his legitimate obligations by virtue of clerical error.

D. DEFENDANT IS ENTITLED TO RELIEF FROM A MISTAKE OF FACT.

It is apparent from the facts set forth above that Defendant never intended to issue to Plaintiff a Satisfaction of Judgment for the June Judgment by the mere compromise and settlement of the

additional claims for attorney's fees and costs on appeal. It is also apparent that if the Court adopts Plaintiff's tortured reading of the Stipulation and Order, Plaintiff either was a party to a mutual mistake of fact or had knowledge of Defendant's unilateral mistake of fact.

In order for a mutual mistake of fact to exist,

1. The mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable.

2. The matter as to which the mistake was made must relate to a material feature of the contract.

3. Generally the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake.

4. It must be possible to give relief by way of rescission without serious prejudice to the other party except the loss of his [or her] bargain. In other words, it must be possible to put him [or her] in status quo.

Mostrong v. Jackson, 866 P.2d 573, 580 (Utah App. 1993) (citing B & A Assoc. v. L.A. Young Sons Constr. Co., 796 P.2d 692, 695 (Utah 1990)). There is little doubt in this case that to forgive half of Plaintiff's obligations by virtue of a mistake would be unconscionable. Furthermore, relief is possible; either rescission or reformation is available to the parties, as set forth below. The facts also demonstrate that ordinary diligence was exercised; Defendant prepared the Stipulation and Order, copies were sent to Plaintiff's counsel, and Plaintiff never requested any changes to the Stipulation and Order which Plaintiff perceived to be ambiguous.



Even if a Mutual Mistake has not occurred, the Court is authorized to vacate the Stipulation for a unilateral mistake by Defendant. In Guardian State Bank v. Stangle, 778 P.2d 1, 6 (Utah 1989), the Utah Supreme Court held as follows:

Even apart from cases involving an incorrect memorialization of an agreement, where a unilateral mistake of fact is the basis of the parties' agreement, a court is not always without power to afford relief. For example, in Tolboe Constr. Co. v. Staker Paving & Constr. Co. 682 P.2d 843 (Utah 1984), we upheld the trial court's ruling that an offeree could not rely on promissory estoppel when the offeror made a unilateral mistake which the offeree either knew or must have known about. [Citations omitted.]

Further, in Rothe v. Rothe, 787 P.2d 534 (Utah App. 1990), the Court of Appeals concluded that "[t]he Utah Supreme Court has also clarified that unilateral mistake in the formalization of a writing may also provide an appropriate basis for reformation." Id. at 536.

Thus, in this matter, the Court can reject Plaintiff's assertion that he is entitled to a Satisfaction of the June Judgment, reform the Stipulation to meet the intent of the parties, or as a last resort, vacate the Stipulation between the parties and return the parties to the status quo.

E. DEFENDANT IS ENTITLED TO ADDITIONAL ATTORNEY'S FEES.

The June Judgment provides in Paragraph 6:

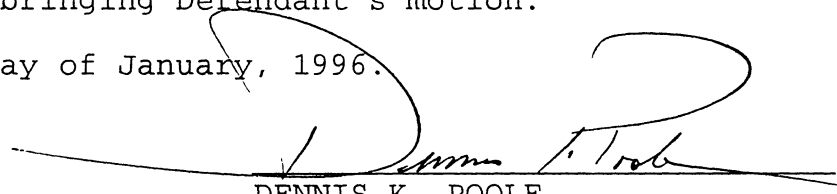
It is further ordered that the judgment in favor of Plaintiff shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise, as shall be established by affidavit.

By virtue of the need for Defendant to defend against Plaintiff's Motions and the filing of his own motion, Defendant has been required to incur additional attorney's fees as set forth in the Affidavit of Dennis K. Poole. Consequently, Defendant is entitled to a judgment for the amount of these additional attorney's fees.

### III. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court enforce the Stipulation as intended by Defendant, or if ambiguous reform the Stipulation, or in the alternative, vacate the Stipulation and Order. Additionally, Defendant requests an award of attorney's fees incurred in defending against Plaintiff's motions and in bringing Defendant's motion.

DATED this 30 day of January, 1996.

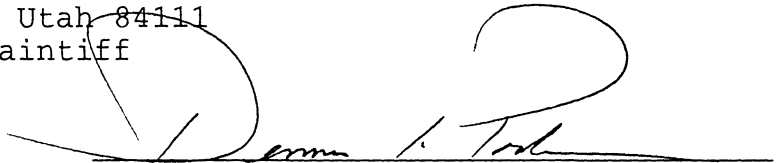


DENNIS K. POOLE  
DENNIS K. POOLE & ASSOCIATES  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR FULL SATISFACTION AND TO STAY EXECUTION AND IN SUPPORT OF DEFENDANT'S MOTION TO AMEND ORDER in Case No. 930905795 was mailed, United States Mail, postage prepaid, the 30 day of January, 1996, to the following:

Larry L. Whyte, Esq.  
265 East 100 South, Suite 300  
Salt Lake City, Utah 84111  
Attorney for Plaintiff

A handwritten signature in black ink, appearing to read "Dennis L. Todd", is written over a horizontal line.

DENNIS K. POOLE (2625)  
ANDREA NUFFER (6623)  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone: (801) 263-3344  
Telefax: (801) 263-1010

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

---

LARRY R. VONWALD,	:	AFFIDAVIT OF
	:	DENNIS K. POOLE
Plaintiff,	:	(January 26, 1996)
- vs -	:	CIVIL NO. 930905795
KEVIN PLUMB,	:	JUDGE GLENN K. IWASAKI
Defendant.	:	

---

STATE OF UTAH )  
                  : ss  
COUNTY OF SALT LAKE )

DENNIS K. POOLE, being first duly sworn, upon oath, deposes and states as follows:

1. I am the attorney for Defendant in the above-entitled action.
2. Defendant prevailed on a Motion for Summary Judgment on the 24th day of March, 1994, and thereafter was awarded attorney's fees.
3. Plaintiff in the above-entitled action filed a Notice of Appeal from the Judgment and Order of this Court.

4. On the 30th day of August, 1994, the Honorable Glenn K. Iwasaki entered an order approving a cash supersedeas bond in the sum of \$5,500, which bond, in whole or in part, has been tendered and posted by Plaintiff.

5. On May 25, 1995, the Court of Appeals issued its memorandum decision affirming the Judgment and Order in favor of Defendant and further found that Defendant was entitled to his attorney's fees and costs incurred on appeal.

6. On June 8, 1995, Plaintiff filed a Petition for Rehearing, which Petition was later denied.

7. On September 15, 1995 Plaintiff filed a Petition for Writ of Certiorari, which Petition was denied December 7, 1995.

8. On December 12, 1995, Defendant filed a Motion for Release of Cash Bond for application against the outstanding judgment and amounts due Defendant.

9. On December 12, 1995, Defendant also filed a Motion for Entry of Judgment For Attorney's Fees and Costs specifically for (i) Defendant's attorney's fees on appeal, (ii) Defendant's costs incurred in connection with the appeal, and (iii) Defendant's attorney's fees in bringing the Motion for additional attorney's fees. The Motion was supported by Affidavit and Memorandum claiming total costs and fees of \$5,475.44. See a true and correct copy of the Affidavit attached hereto as Exhibit "A".

10. Prior to Christmas, 1995, Larry Whyte, attorney for Plaintiff, telephoned Affiant asking if the matter could be

resolved at a discount. Mr. Whyte was specifically told by Affiant that the amounts claimed would not be compromised after the long appellate process, but that payment terms over approximately 60 days would be considered. Mr. Whyte suggested that we should at least resolve the pending Motion and he would get back to Affiant. A few days later Mr. Whyte called again and requested credit upon fees and costs claimed in the December 12, 1995 Affidavit for the one hour that Affiant would not have to attend a hearing, if the matter was resolved. Affiant agreed to the reduction of \$160 for the claimed fees and that the bond would be released to pay the amounts claimed in the Affidavit in exchange for a satisfaction of these claims. (See copy of Affiant's Affidavit dated December 12, 1995, provided to the Court by Mr. Whyte as Exhibit "E" to his Motion which clearly shows on page 5 in Mr. Whyte's handwriting, a reduction of fees attributable to the Motion by \$160.00.) There was no discussion about a satisfaction of the prior judgment and Affiant did not agree to release the same.

11. The negotiated figure set forth above was solely in reference to Defendant's outstanding Motion for additional attorney's fees and costs and had no relationship, factually or by amount, to an outstanding judgment against Plaintiff in the amount of \$4,064.90 docketed with the Court on or about June 8, 1994. A draft of the Stipulation and Order was forwarded to Mr. Whyte, who made no request for changes.

12. On January 2, 1996, Affiant obtained the signature of Mr. Whyte upon a Stipulation for Release of Cash Bond. The Stipulation recites that Defendant has filed a Motion for Entry of Judgment for Attorney's Fees and Costs and that the parties desired to resolve such Motion and the remaining issues. Since the prior judgment had been upheld on appeal, Affiant understood that the only remaining issue for resolution by the Court was Defendant's outstanding Motion for Release of the Cash Bond. Because Plaintiff and Defendant were agreeing that Defendant was to have an order requiring the payment of \$5,315.44 from the Bond, Affiant believed that Defendant was entitled to a satisfaction of judgment upon receipt of that payment. At the time Mr. Whyte's signature was obtained, Mr. Whyte made no mention of obtaining a satisfaction of the June 8, 1994 judgment.

13. Pursuant to the terms of the Stipulation, Affiant obtained an Order of the Court which provided that Defendant was to receive a disbursement of the Bond pursuant to the terms of the Stipulation and that Defendant was obligated to provide a Satisfaction of Judgment upon receipt of the \$5,315.44, clearly referring to this current Order and disbursement and not to any prior judgment. See a true and correct copy of the Order [absent signatures] attached hereto as Exhibit "B".

14. Upon receipt of the payment of \$5,315.44, Affiant filed with the Court a Satisfaction of Judgment (Partial) clearly reserving Defendant's right to pursue the prior Judgment. See a true and

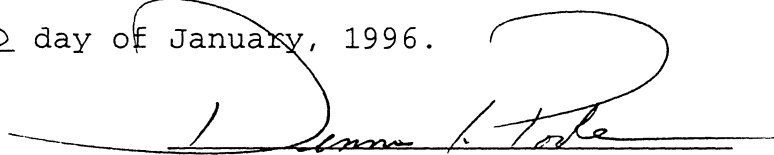
correct copy of the Satisfaction of Judgment (Partial) attached hereto as Exhibit "C".

15. Defendant has incurred additional attorney's fees in responding to Plaintiff's current Motion and in Support of Defendant's own Motion and should be awarded additional fees of not less than \$1,000.00, in preparing this Affidavit and a Memorandum.

16. Defendant Kevin Plumb has not collected any sums or amounts due upon the June Judgment.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 30 day of January, 1996.

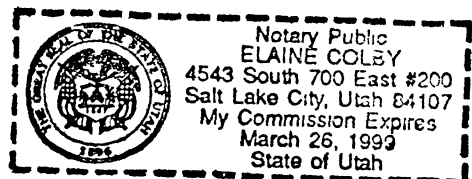
  
DENNIS K. POOLE  
DENNIS K. POOLE & ASSOCIATES  
Attorneys for Plaintiff

ACKNOWLEDGED before me this 30<sup>th</sup> day of January, 1996 by  
DENNIS K. POOLE.

  
NOTARY PUBLIC  
Residing in Salt Lake, Utah

My Commission Expires:

Keene, Utah March 26, 1999

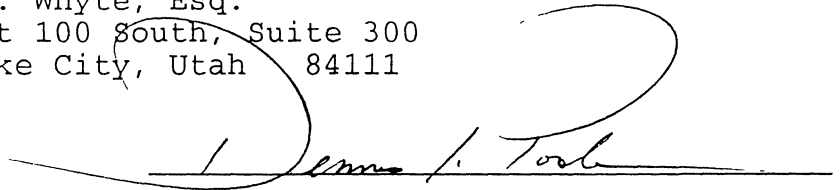




CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing **AFFIDAVIT OF DENNIS K. POOLE** in Case No. 930905795 was mailed, United States Mail, postage prepaid, the 30 day of January, 1996, to the following:

Larry L. Whyte, Esq.  
265 East 100 South, Suite 300  
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "Dennis K. Poole", is written over a horizontal line. A large, loopy flourish extends from the end of the signature.

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

---

VONWALD, LARRY R	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 930905795 CN
	:	DATE 04/01/96
VS	:	HONORABLE GLENN K IWASAKI
	:	COURT REPORTER TAPE
PLUMB, KEVIN	:	COURT CLERK JMB
DEFENDANT	:	

---

TYPE OF HEARING: ORAL ARGUMENTS  
PRESENT:

P. ATTY. VONWALD, LARRY R  
D. ATTY. POOLE, DENNIS K.

THIS CASE COMES BEFORE THE COURT ON ORAL ARGUMENTS ON  
VARIOUS MOTIONS. APPEARANCES AS SHOWN ABOVE.

BASED UPON THE REPRESENTATION OF RESPECTIVE COUNSEL, COURT  
ORDERS THE FOLLOWING:

- 1) PLAINTIFF'S MOTION TO STAY EXECUTION IS GRANTED;
- 2) PLAINTIFF'S MOTION FOR FULL SATISFACTION IS DENIED;
- 3) DEFENDANT'S MOTION TO AMEND ORDER IS GRANTED;
- 4) EACH SIDE TO BEAR THEIR OWN ATTORNEY'S FEES;
- 5) MR. POOLE IS DIRECTED TO PREPARE THE APPROPRIATE ORDER.

DENNIS K. POOLE [2625]  
ANDREA NUFFER [6623]  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone: (801) 263-3344

FILED  
JUL 17 2018  
BY [Signature]

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

---

LARRY R. VONWALD,	:	MEMORANDUM IN OPPOSITION
Plaintiff,	:	TO PLAINTIFF'S OBJECTION
	:	TO PROPOSED ORDER
-vs-	:	
KEVIN PLUMB,	:	CASE NO. 930905795
Defendant.	:	JUDGE GLENN K. IWASAKI

---

The Defendant Kevin Plumb, by and through his attorney Dennis K. Poole and pursuant to the Utah Code of Judicial Administration respectfully submits this Memorandum in Opposition to Plaintiff's Objection to Proposed Order.

ARGUMENT

Defendant responds to Plaintiff's Objections paragraph by paragraph as follows:

1. Plaintiff's objection to Paragraph 1 of the Order is nothing more and nothing less than a re-argument of Plaintiff's prior assertions. Nowhere does Plaintiff contend that the Paragraph is contrary to the Court's ruling. Consequently, the objection is inappropriate and should be stricken.

2. Paragraph 2 of Plaintiff's Objection is again a re-argument of Plaintiff's position which has been ruled upon by the Court.

3. Paragraph 3 is likewise a re-argument of the case and not an objection to the Order. The Court has already determined that an ambiguity existed in the prior Stipulation and Order which would allow the admission of extrinsic evidence. Furthermore, Plaintiff ignores a well established rule that extrinsic evidence maybe admitted to establish the existence of a mutual and/or unilateral mistake of fact.

4. In objecting to Paragraph 4 of the proposed Order, Plaintiff cites Rule 9(b) of the Utah Rules of Civil Procedure alleging that averments of mistake must be set forth with particularity. To the extent that this rule would has application for a post-judgment motion made pursuant to Rule 60, Defendant asserts that he set forth the alleged mistake in particularity as contained in the affidavit of Dennis K. Poole filed in support of Defendant's Motion to Amend. Notwithstanding a sworn affidavit, Plaintiff and his counsel chose not to contest any issue contained in that affidavit by counter-affidavit. Therefore, the Court must accept the statements contained in counsel's affidavit as undisputed facts, which with the admissions of Plaintiff's counsel at hearing, justify the Orders of the Court.

Again, for the most part, the objections of Plaintiff in reference to Paragraph 4 are a re-argument of the case.

5. Plaintiff's argument to Paragraph 7 is unintelligible. It is believed that Plaintiff asserts that Defendant Plumb's Motion to Amend did not request a release of the funds for application against the December Motion for Attorney's fees and costs. Such a request would be useless; Defendant had already received a release of the bond pursuant to stipulation of the parties. Defendant's Motion to Amend requested the Court to revise the parties' Stipulation and the January Order to clarify that the Satisfaction of Judgment to be issued was only for those funds received from the bond funds and applied in satisfaction of Defendant's pending Motion for Attorney's fees and costs and not as a satisfaction of the June, 1994 Judgment. Paragraph 7 amending the Court's January 2, 1996 Order clearly so provides. In essence, the amendment states that receipt of funds from the release of bond results in satisfaction of the January 2, 1996 Order but not as a satisfaction of the June, 1994 Judgment of \$4,064.90.

Plaintiff incorrectly states that the Court set the Stipulation aside. The Court will recall and as cited in the proposed Order (which statement is not objected to by counsel), Mr. Whyte was asked at the hearing if Plaintiff would rescind the parties' settlement agreement if the January 2, 1996 Order was amended. Mr. Whyte stated that no such rescission would be made. Consequently, the Court did not set aside the Stipulation but merely amended the Stipulation and Order clarifying the ambiguity. Thus, the amount of attorneys fees and costs claimed by the Defendant, being the sum

of \$5,315.44, was not and is not an issue before the Court. The settlement and Stipulation regarding such fees and costs stands between the parties. Consequently, by counsel's election not to rescind the settlement agreement, Plaintiff has waived any right to a hearing on the prior petition by Defendant for attorneys fees and costs incurred during the appeal of this matter.

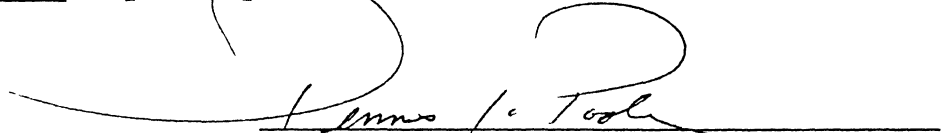
#### REVISED ORDER

As result of the Plaintiff's objection and a re-reading of the proposed Order, Defendant has proposed two grammatical revisions to the Order which are set forth in a black-line copy attached hereto.

#### CONCLUSION

Plaintiff's Objections to the proposed Order is largely an attempt to re-argue the case. Furthermore, Plaintiff is now asserting that the Stipulation was set aside by the Court, a matter neither ruled upon nor an issue before the Court because of Plaintiff's waiver of the right to rescind. Plaintiff's Objections evidence a continued pattern of delay and irrational and illogical interpretation of the issues and rulings of the Court. Consequently, Plaintiff's objections should be denied and Defendant should have his attorneys fees incurred in responding to these objections which are interposed solely for delay and harassment.

DATED this 13 day of April, 1996.

A large, stylized handwritten signature in dark ink, appearing to read "Dennis K. Poole", is written over a horizontal line.

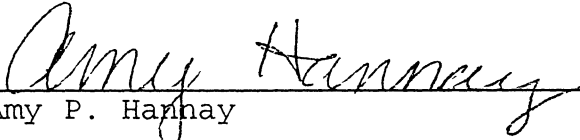
DENNIS K. POOLE  
Attorney for Defendant

CERTIFICATE OF MAILING

I do hereby certify that I caused to be mailed a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S OBJECTIONS in case No. 930905795 to the following:

Larry L. Whyte, Esq.  
265 East 100 South, Suite 300  
Salt Lake City, Utah 84111

and by deposition the same, sealed, with first-class postage prepaid thereon, in the United States Mails at Salt Lake City, Utah this 13 day of April, 1996.

  
\_\_\_\_\_  
Amy P. Hannay



FILED DISTRICT COURT  
Third Judicial District

APR 24 1996

SALT LAKE COUNTY

By [Signature]  
Deputy Clerk

DENNIS K. POOLE (2625)  
ANDREA NUFFER (6623)  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone: (801) 263-3344  
Telefax: (801) 263-1010

---

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

---

LARRY R. VONWALD,	:	ORDER
Plaintiff,	:	
-vs-	:	
KEVIN PLUMB,	:	CIVIL NO. 930905795
Defendant.	:	JUDGE GLENN K. IWASAKI

---

Plaintiff's Motion for Full Satisfaction of Judgment,  
Plaintiff's Motion to Stay Execution and/or Enforcement of  
Proceedings, Defendant's Objection to Plaintiff's Motion and  
Defendant's Motion to Amend Order having come on for hearing before  
the Honorable Glenn K. Iwasaki on the first day of April, 1996, and  
the Plaintiff being represented by his attorney Larry L. Whyte and  
the Defendant being represented by his attorney Dennis K. Poole and  
the Court having considered the arguments of counsel and the  
Affidavit of Dennis K. Poole and Memoranda in Support and Opposi-

tion to such Motions and the Court having further considered the representations of Mr. Whyte that should the Court enter an Order amending the January 2, 1996 Order of the Court that the Plaintiff will not rescind the parties' Settlement Agreement, ~~1996 Order of the Court that the Plaintiff will not rescind the partners Settlement Agreement,~~ and for good cause appearing,

IT IS HEREBY ORDERED, as follows:

1. The motions pending before the Court are equitable in nature and are intended to resolve an ambiguity which is contained in a Stipulation of the parties and an Order of the Court dated January 2, 1996 (the "January Order").

2. There is no specific mention in the Stipulation or January Order to a Judgment previously granted in this matter in favor of the Defendant and against the Plaintiff in the sum of \$4,064.90 entered on/or about June 9, 1994 (the "June Judgment").

3. From the Affidavit of Dennis K. Poole on file with the Court, and based upon the prior proceedings, it was the intent of the Defendant, through his counsel, to resolve by Stipulation Defendant's pending Motion for Entry of Judgment for Attorney's Fees and Costs dated December 12, 1995, wherein the Defendant claimed entitlement to attorney's fees and costs of \$5,475.44 ("Defendant's Fee Motion").

4. Upon consideration of Defendant's Fee Motion and supported by the Affidavit of Dennis K. Poole, it is apparent that a mutual mistake and/or unilateral mistake of fact which should have been known to Plaintiff's counsel occurred in the documentation of said Stipulation and the January Order which was intended to resolve Defendant's Fee Motion.

5. As a result of the forgoing ambiguity and mistake of fact, the Plaintiff's Motion for Full Satisfaction be and the same is hereby denied.

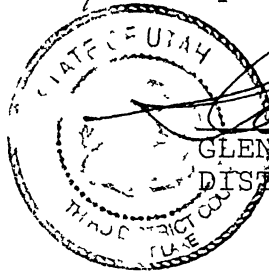
6. Plaintiff's Motion for Stay of Execution is now moot by virtue of the denial of Plaintiff's Motion for Full Satisfaction.

7. The Court's Order dated January 2, 1996 is hereby ordered amended to provide that upon the Defendant's receipt of the sum of \$5,315.44, a partial satisfaction of judgment shall be entered for such amount and that the June Judgment previously entered in favor of the Defendant and against the Plaintiff, Larry R. Vonwald, in the sum of \$4,064.90 (with interest, costs and attorneys' fees as may be provided therein), remains outstanding and unsatisfied as of this date. ~~together with interest and costs remains outstanding and unsatisfied as of this date.~~ The Court notes that Defendant has already filed a partial satisfaction relative to the January 2, 1996 Order, as amended hereby.

8. Based upon the forgoing, and by virtue of the equitable nature of the proceedings before the Court, each of the parties are to bear their own attorney's fees and costs relative to the Motions considered by the Court on April 1, 1996.

ORDERED DATED this 1st day of April, 1996.

By the Court:



Glenn K. Iwasaki  
GLENN K. IWASAKI  
DISTRICT JUDGE

Approved as to form

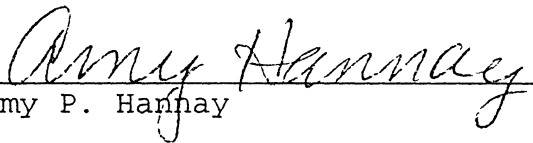
LARRY L. WHYTE

MAILING CERTIFICATE

I do hereby certify that I caused to be mailed a true and correct copy of the foregoing ORDER in Case No. 930905795 to the following:

Larry L. Whyte, Esq.  
265 East 100 South, Suite 300  
Salt Lake City, Utah 84111

and by depositing the same, sealed, with first-class postage prepaid thereon, in the United States Mails at Salt Lake City, Utah this 13 day of April, 1996.

  
\_\_\_\_\_  
Amy P. Hannay

200.00  
\$6,700.  
DENNIS K. POOLE (2625)  
ANDREA NUFFER (6623)  
DENNIS K. POOLE & ASSOCIATES, P.C.  
Attorneys for Defendant  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone: (801) 263-3344  
Telefax: (801) 263-1010

FILED  
06 SEP 25 11:00 AM  
CLERK  
J. A. [Signature]

---

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

---

LARRY R. VONWALD,	:	ORDER FOR SUPERSEDEAS BOND
	:	AND STAY OF PROCEEDINGS
Plaintiff,	:	
-vs-	:	
	:	CIVIL NO. 930905795
KEVIN PLUMB,	:	
	:	JUDGE GLENN K. IWASAKI
Defendant.	:	

---

THE PLAINTIFF LARRY R. VONWALD, by and through his attorney Larry L. Whyte having orally requested the Court to set the amount of a cash supersedeas bond by telephonic hearing on the 19th day of September, 1996, and the Defendant Kevin Plumb being represented by his attorney Dennis K. Poole who participated in such telephonic hearing, and the Court having heard the representations of counsel, and for good cause appearing

IT IS HEREBY ORDERED as follows:

1. That Plaintiff may deposit a cash bond with the Clerk of the Third District Court, Salt Lake County, State of Utah, in the amount of \$6,700.

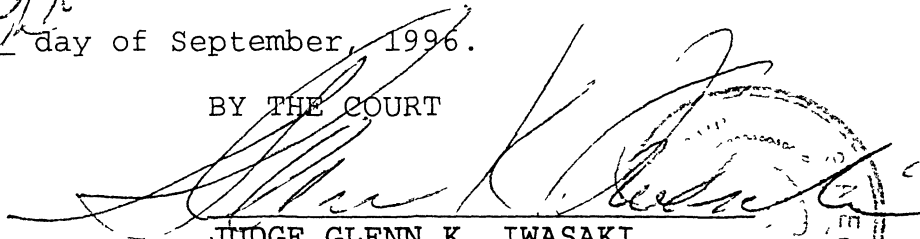
2. Conditioned upon such deposit and the presentation of evidence of the same to Defendant's counsel, and pursuant to the provisions of Rule 62 of the Utah Rules of Civil Procedure, all

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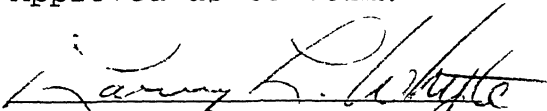
proceedings to collect that certain Order and Judgment entered on or about June 8, 1994 in the principal sum of \$4,064.90 (together with interest and other relief as provided therein) entered in favor of the Defendant and against the Plaintiff, including the enforcement of executions, a sheriff's sale scheduled for this date and continued until September 23, 1996, and any other collection proceedings, are stayed pending appeal.

ORDER dated this 19th day of September, 1996.

BY THE COURT

  
JUDGE GLENN K. IWASAKI

Approved as to Form:

  
Larry L. Whyte, Esq.  
Attorney for the Plaintiff

resolving the threshold requirement of whether appellant's circumstances had materially changed; however, it does not follow that appellee's petition entitled her to relief. A trial court asked to render a judgment by default must first conclude that the uncontroverted allegations of an applicant's petition are, on their face, legally sufficient to establish a valid claim against the defaulting party. *Stevens v. Collard*, 180 Utah Adv. Rep. 19 (Ct. App. 1992).

#### Purpose of rules.

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

Cited in *Hjorth v. Whittenburg*, 121 Utah 324, 241 P.2d 907 (1952); *Dowse v. Salt Lake City Corp.*, 123 Utah 107, 255 P.2d 723 (1953); *Burr v. Childs*, 1 Utah 2d 199, 265 P.2d 383 (1953); *Rees v. Archibald*, 6 Utah 2d 264, 311 P.2d 788 (1957); *McGavin v. Preferred Ins.*

*Exch.*, 7 Utah 2d 161, 320 P.2d 1109 (1958); *Peterson v. Nielsen*, 9 Utah 2d 302, 343 P.2d 731 (1959); *Smoot v. Lund*, 13 Utah 2d 168, 369 P.2d 933 (1962); *Christensen v. Lelis Automatic Transmission Serv., Inc.*, 24 Utah 2d 165, 467 P.2d 605 (1970); *Murdock v. Blake*, 26 Utah 2d 22, 484 P.2d 164 (1971); *Whitmore v. Calavo Growers*, 28 Utah 2d 165, 499 P.2d 849 (1972); *Whitmore v. Industrial Comm'n*, 23 Utah 2d 185, 499 P.2d 1290 (1972); *Pacific Marine Schwabacher, Inc. v. Hydrosift Corp.*, 525 P.2d 615 (Utah 1974); *Midwest Realty v. City of West Jordan*, 541 P.2d 1109 (Utah 1975); *Lignell v. Berg*, 593 P.2d 800 (Utah 1979); *Lewis v. Moultrie*, 627 P.2d 94 (Utah 1981); *Eie v. St. Benedict's Hosp.*, 638 P.2d 1190 (Utah 1981); *Triple I Supply, Inc. v. Sunset Rail, Inc.*, 652 P.2d 1298 (Utah 1982); *Sears v. Riemersma*, 655 P.2d 1105 (Utah 1982); *Rosenlof v. Sullivan*, 676 P.2d 372 (Utah 1983); *Rothey v. Walker Bank & Trust Co.*, 754 P.2d 1222 (Utah 1988); *Sather v. Pitcher*, 748 P.2d 191 (Utah Ct. App. 1987); *Lloyd's Unlimited v. Nature's Way Mktg., Ltd.*, 753 P.2d 507 (Utah Ct. App. 1988); *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.*, 784 P.2d 475 (Utah Ct. App. 1989); *Prows v. State*, 822 P.2d 764 (Utah 1991).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 61A Am. Jur. 2d Pleading §§ 1 et seq., 59, 68 et seq., 141 et seq., 152 et seq., 174 et seq.

**C.J.S.** — 71 C.J.S. Pleading §§ 1 to 53, 63 et seq., 99 et seq., 152 et seq., 163 et seq.

**A.L.R.** — *Infant's misrepresentation as to his age as estopping him from disaffirming his voidable transaction*, 29 A.L.R.3d 1270.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Power of court sitting as trier of fact to dis-

miss at close of plaintiff's evidence notwithstanding plaintiff has made out prima facie case, 55 A.L.R.3d 272.

Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 A.L.R.3d 933.

Dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties, 3 A.L.R.5th 237.

**Key Numbers.** — Pleading ⇐ 1 to 34, 38½ et seq., 76 et seq., 127 et seq., 130 et seq.

### Rule 9. Pleading special matters.

(a) (1) **Capacity.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge, and on such issue the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(2) **Designation of unknown defendant.** When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(3) **Actions to quiet title; description of interest of unknown parties.** In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may describe such unknown persons as "all other persons unknown, claiming any right, title, estate or



interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

(b) **Fraud, mistake, condition of the mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) **Conditions precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) **Official document or act.** In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) **Judgment.** In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) **Time and place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **Special damage.** When items of special damage are claimed, they shall be specifically stated.

(h) **Statute of limitations.** In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

(i) **Private statutes; ordinances.** In pleading a private statute of this state, or an ordinance of any political subdivision thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

(j) **Libel and slander.**

(1) **Pleading defamatory matter.** It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(2) **Pleading defense.** In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

## NOTES TO DECISIONS

## ANALYSIS

Fraud.  
 —Forgery.  
 —General accusations.  
 —Insufficient.  
 —Negligence.  
 —Materiality of representation.  
 —Misrepresentation.  
 —Not properly pleaded.  
 —Properly pleaded.  
 Judgment.  
 —Foreign judgment.  
 Lack of capacity.  
 —Failure to raise.  
 —Waiver.  
 —Specific negative averment.  
 Libel and slander.  
 —Actual harm.  
 Mistake.  
 —Mutual mistake.  
 —Contracts.  
 —Deeds.  
 Ordinances.  
 Special damages.  
 —Accounting.  
 —Amount.  
 —Defamation.  
 —Defined.  
 —General and special damages.  
 —Loss of earnings.  
 —Notice.  
 —Punitive damages.  
 —Allegations of fraud.  
 Statute of limitations.  
 —Pleading.  
 —Reply.  
 —Specificity.  
 Cited.

**Fraud.****—Forgery.**

While in a general way a forgery is fraudulent, this is not the kind of fraud that Subdivision (b) requires to be pleaded with particularity. *Walker Bank & Trust Co. v. Thorup*, 7 Utah 2d 33, 317 P.2d 952 (1957).

**—General accusations.****—Insufficient.**

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

A complaint in an action for allegedly preventing plaintiff from securing default judgment in prior action was insufficient where the allegations contained merely broad and general statements that a false affidavit and false pleadings were filed and judges were contacted, preventing plaintiff from obtaining a default judgment. *Heathman v. Fabian*, 14 Utah 2d 60, 377 P.2d 189 (1962).

In an action against a county building official, plaintiff's allegation that the official's signing of a temporary certificate of occupancy was a "representation to the citizens" by the

county that the county had taken certain actions under the building code did not specifically allege that the official had intentionally or recklessly misrepresented any facts to them and, thus, they failed to state a valid claim for relief. *DeBry v. Noble*, 889 P.2d 428 (Utah 1995).

**—Negligence.**

General allegation that accounting firm was negligent in its preparation of financial statement by reason of omissions and inaccuracies failed to comply with this rule. *Milliner v. Elmer Fox & Co.*, 529 P.2d 806 (Utah 1974).

**—Materiality of representation.**

One of the basic elements of pleading a cause of action based upon fraud is the materiality of the alleged false representation. In some instances the pleader can meet this requirement by simply alleging the representation and its falsity, for by the very nature of the representation it must be either true or false in its entirety. In other instances the materiality of the allegations is dependent upon the true facts. *Davis Stock Co. v. Hill*, 2 Utah 2d 20, 268 P.2d 988 (1954).

**—Misrepresentation.**

The requirement in Subdivision (b) that circumstances constituting fraud should be stated with particularity is not limited to allegations of common-law fraud and reaches all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by the term "fraud" in its broadest dimension. *Williams v. State Farm Ins. Co.*, 656 P.2d 966 (Utah 1982).

**—Not properly pleaded.**

Plaintiff's claim that defendant obtained a release from liability by fraud and misrepresentation was not properly pleaded where the complaint did not allege that the release was obtained by fraud or misrepresentation, and the issue as to the validity of the release arose in plaintiff's affidavit in opposition to defendant's motion for summary judgment. *Norton v. Blackham*, 669 P.2d 857 (Utah 1983).

**—Properly pleaded.**

Insurance company's answer (to action by insured to recover on policy), which alleged that insured's answer on insurance application was fraudulent and material to the acceptance of the risk and that the insurance company would not have issued the policy (at least not at that rate) if the true facts had been made known, was sufficient and fair notice to put in issue all of the statutory defenses of deception in § 31A-21-105, including an omission, incorrect statement, and misrepresentation ultimately found by the jury on a related alcohol question in a medical history attached to the application. *Williams v. State Farm Ins. Co.*, 656 P.2d 966 (Utah 1982).

**Judgment.****—Foreign judgment.**

Setoff was properly allowed against an Arizona judgment pleaded in Utah. The Arizona judgment was res judicata insofar as it held that plaintiff's first cause of action was not

supported by evidence but it could not be res judicata as to matters that the Arizona court expressly refused to determine. *Todaro v. Gardner*, 3 Utah 2d 404, 285 P.2d 839 (1955).

#### **Lack of capacity.**

##### **—Failure to raise.**

##### **—Waiver.**

Where defendant obtained information substantiating his defense of lack of capacity ten days prior to trial but waited until last day of trial to seek introduction of information and defense, trial court did not err in ruling defendant had waived defense. *Hal Taylor Assocs. v. Unionamerica, Inc.*, 657 P.2d 743 (Utah 1982).

##### **—Specific negative averment.**

Pleadings of illegality and lack of subject matter jurisdiction do not put a party on notice to respond to a defense of lack of capacity; lack of capacity defense must be raised by specific negative averment. *Hal Taylor Assocs. v. Unionamerica, Inc.*, 657 P.2d 743 (Utah 1982).

Defendant waived its right to raise the issue of plaintiff's lack of capacity to sue where the pleadings did not contain a specific negative averment of plaintiff's lack of capacity to sue. *Phillips v. JCM Dev. Corp.*, 666 P.2d 876 (Utah 1983).

#### **Libel and slander.**

##### **—Actual harm.**

Although Subdivision (j)(1) does not require a showing of extrinsic facts to support the defamatory words being sued on, it is necessary to show that, as a consequence of those words, plaintiff has suffered actual harm. *Allred v. Cook*, 590 P.2d 318 (Utah 1979).

##### **Mistake.**

##### **—Mutual mistake.**

##### **—Contracts.**

Even though the issue of mutual mistake was not raised by the pleadings, it would have been proper for the court, in consonance with Rule 54(c)(1), to have reformed the contract if a mutual mistake of fact had been established by clear and convincing evidence. *Mabey v. Kay Peterson Constr. Co.*, 682 P.2d 287 (Utah 1984).

##### **—Deeds.**

Where, in quiet title action involving dispute as to deeds, defendant did not set forth with particularity any attack upon the deeds based on mutual mistake, defendant asserted ownership only generally, and in opening statement defendant's counsel did mention mistake but did not ask for an amendment of the pleadings to properly put mistake before the trial court, trial court improperly heard parol evidence intended to modify the deeds and should only have examined the face of the deeds in resolving the dispute. *Neeley v. Kelsch*, 600 P.2d 979 (Utah 1979).

##### **Ordinances.**

Court of Appeals took judicial notice of municipal ordinance, where the information charging defendant with violating the ordinance referred to the ordinance by its section number, and thus complied with Subdivision (j) of this rule. *Brigham City v. Valencia*, 779 P.2d 1149 (Utah Ct. App. 1989).

#### **Special damages.**

##### **—Accounting.**

Although Rules of Civil Procedure are to be liberally construed, some degree of specificity must be had in order to guide the parties and the court in their preparation and deliberations; therefore it was error to award compensatory damages, in action for accounting of partnership profits, based on unpleaded and highly speculative matters such as distress, anxiety, and the effect on profits if the one partner's experience and contacts had been utilized. *Graham v. Street*, 2 Utah 2d 144, 270 P.2d 456 (1954).

##### **—Amount.**

The law does not require a party to plead specifically the exact dollar amount of special damages. *Hodges v. Gibson Prods. Co.*, 811 P.2d 151 (Utah 1991).

##### **—Defamation.**

In action for libel and slander it was not necessary for plaintiff to plead special damages in order to recover for suffering inflicted upon his mind and emotions. *Prince v. Peterson*, 538 P.2d 1325 (Utah 1975).

##### **—Defined.**

Special damages are damages that are a natural consequence of the injury caused but that do not necessarily flow from the harmful act. *Hodges v. Gibson Prods. Co.*, 811 P.2d 151 (1991).

##### **—General and special damages.**

General damages are those which naturally and necessarily result from the harm described and so are said to be implied in law; special damages are those which are not so certain as to be implied in law, but must be pleaded so as to let the adversary know what will be involved. *Cohn v. J.C. Penney Co.*, 537 P.2d 306 (Utah 1975).

General damages are those that are the natural and necessary result of the wrongful act or omission asserted as the basis of liability; special damages are the natural, but not the necessary, result of an injury. *Phillips v. JCM Dev. Corp.*, 666 P.2d 876 (Utah 1983).

##### **—Loss of earnings.**

Loss of earnings to date of trial and impairment of earning capacity are both items of special damages, but they may be proved under an allegation of general damages where the description of the injuries is such that everyone must know that of necessity there would be a loss of earnings and an impairment of earning capacity. *Cohn v. J.C. Penney Co.*, 537 P.2d 306 (Utah 1975).

##### **—Notice.**

In Utah there is no inflexible rule regarding the pleading of special damages; it is a question of whether or not the pleadings contain such information as will apprise the defendant of the special damages which must of necessity flow from that which is alleged. *Cohn v. J.C. Penney Co.*, 537 P.2d 306 (Utah 1975).

One claiming special damages must plead each type of damage specifically so that the opposing party has an adequate opportunity to defend against the plaintiff's claims. *Hodges v. Gibson Prods. Co.*, 811 P.2d 151 (Utah 1991).

**—Punitive damages.****—Allegations of fraud.**

Failure to allege and prove a tort for which compensatory damages would be allowed precluded award of punitive damages; since general allegation of fraud did not establish entitlement to compensatory damages, award of punitive damages was improper. *Graham v. Street*, 2 Utah 2d 144, 270 P.2d 456 (1954).

**Statute of limitations.****—Pleading.**

The defense of statute of limitations was not available unless pleaded. *Tanner v. Provo Reservoir Co.*, 78 Utah 158, 2 P.2d 107 (1931). (It was otherwise as to actions against administrators. *Gulbranson v. Thompson*, 63 Utah 115, 222 P. 590 (1923)).

**—Reply.**

Defendant's plea of statute of limitations was deemed, in law, to have been denied by plaintiff. *Thomas v. Glendinning*, 13 Utah 47, 44 P. 652 (1896); *Tate v. Rose*, 35 Utah 229, 99

P. 1003 (1909); *Tate v. Shaw*, 35 Utah 240, 99 P. 1007 (1909).

**—Specificity.**

Contention that party failed to plead the specific subdivision of the section relied upon would not be considered on appeal where question was raised for the first time, and in any event no one could have been misled. *Attorney Gen. v. Pomeroy*, 93 Utah 426, 73 P.2d 1277, 114 A.L.R. 726 (1937).

Defendant's pleading of the statute of limitations generally without designating the sections of the statute or statutes upon which he relied was not in accordance with Subdivision (h) and therefore was an inadequate plea. *Wasatch Mines Co. v. Hopkinson*, 24 Utah 2d 70, 465 P.2d 1007 (1970).

Cited in *Battistone v. American Land & Dev. Co.*, 607 P.2d 837 (Utah 1980); *Katzenberger v. State*, 735 P.2d 405 (Utah Ct. App. 1987); *Chapman ex rel. Chapman v. Primary Children's Hosp.*, 784 P.2d 1181 (1989).

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d Associations and Clubs § 57; 19 Am. Jur. 2d Corporations §§ 2220, 2225; 22 Am. Jur. 2d Damages § 819 et seq.; 37 Am. Jur. 2d Fraud and Deceit §§ 424 to 427; 50 Am. Jur. 2d Libel and Slander §§ 403, 422 et seq.; 51 Am. Jur. 2d Limitation of Actions § 459; 59 Am. Jur. 2d Parties §§ 27, 34 to 40; 61A Am. Jur. 2d Pleading §§ 9 to 14, 40, 53 to 56, 86 to 88; 65 Am. Jur. 2d Quieting Title § 69.

**C.J.S.** — 7 C.J.S. Associations § 35; 19 C.J.S. Corporations §§ 1327, 1334; 25 C.J.S. Damages § 131; 53 C.J.S. Libel and Slander §§ 128 et seq., 148 et seq.; 54 C.J.S. Limitations of Actions § 269 et seq.; 67A C.J.S. Parties §§ 115, 117; 71 C.J.S. Pleading §§ 8, 21, 22, 25, 27, 33, 76, 80, 86; 74 C.J.S. Quieting Title §§ 56, 63; 82 C.J.S. Statutes §§ 445, 446.

**A.L.R.** — Recovery of punitive damages in action by purchasers of real property charging fraud or misrepresentation, 19 A.L.R.4th 801.

Reports of pleadings as within privilege for reports of judicial proceedings, 20 A.L.R.4th 576.

Amendment of pleading after limitation has run, so as to set up subsequent appointment as executor or administrator of plaintiff who professed to bring the action in that capacity without previous valid appointment, 27 A.L.R.4th 198.

Plaintiff's rights to punitive or multiple damages when cause of action renders both available, 2 A.L.R.5th 449.

**Key Numbers.** — Associations ⇐ 20(5); Corporations ⇐ 513(4), 514; Damages ⇐ 142; Libel and Slander ⇐ 77 et seq., 90 et seq.; Limitation of Actions ⇐ 183; Parties ⇐ 72 to 74; Pleading ⇐ 8(1), (9), (13), (14), (15), (16), (18), 14, 32, 39, 46, 59, 63; Quieting Title ⇐ 34(3); Statutes ⇐ 280.

**Rule 10. Form of pleadings and other papers.**

(a) **Caption; names of parties; other necessary information.** All pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, the file number, the name of the pleading or other paper, and the name, if known, of the judge to whom the case is assigned. In the complaint, the title of the action shall include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action." Every pleading and other paper filed with the court shall also state the name, address, telephone number and bar number of any attorney representing the party filing the paper, which information shall appear in the top left-hand corner of the first page. Every pleading shall state the name and address of the party for whom it is filed; this information shall appear in the lower left-hand corner of the last page of the pleading.

(b) **Paragraphs; separate statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d New Trial §§ 11 to 14, 29 et seq., 187 to 191.

**C.J.S.** — 66 C.J.S. New Trial §§ 13 et seq., 115, 116, 122 to 127.

**A.L.R.** — Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

Quotient verdicts, 8 A.L.R.3d 335.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages — modern cases, 5 A.L.R.5th 875.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness — modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.) — modern cases, 97 A.L.R. Fed. 189.

**Key Numbers.** — New Trial ⇐ 13 et seq., 110, 116.

## 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) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for

obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

**Compiler's Notes.** — This rule is similar to Rule 60, F.R.C.P.

#### NOTES TO DECISIONS

##### ANALYSIS

"Any other reason justifying relief."  
 —Default judgment.  
 —Impossibility of compliance with order.  
 —Incompetent counsel.  
 —Lack of due process.  
 —Merits of case.  
 —Mistake or inadvertence.  
 —Mutual mistake.  
 —Real party in interest.  
 —Refund of fine after dismissal.  
 Appeals.  
 Clerical mistakes.  
 —Computation of damages.  
 —Correction after appeal.  
 —Date of judgment.  
 —Void judgment.  
 —Estate record.  
 —Inherent power of courts.  
 —Intent of court and parties.  
 —Judicial error distinguished.  
 —Order prepared by counsel.  
 —Predating of new trial motion.  
 Court's discretion.  
 Default judgment.  
 Effect of set-aside judgment.  
 —Admissions.  
 Form of motion.  
 Fraud.  
 —Burden of proof.  
 —Divorce action.  
 Independent action.  
 —Constitutionality of taxes.  
 —Divorce decree.  
 —Fraud or duress.  
 —Motion distinguished.  
 Invalid summons.  
 —Amendment without notice.  
 Inequity of prospective application.  
 Jurisdiction.  
 Mistake, inadvertence, surprise or excusable neglect.  
 —Default judgment.  
 —Illness.  
 —Inconvenience.  
 —Meritorious.  
 —Merits of claim.  
 —Negligence of attorney.  
 —No claim for relief.  
 —Delayed motion for new trial.  
 —Factual error.  
 —Failure to file cost bill.  
 —Failure to file notice of appeal.  
 —Nonreceipt of notice and findings.  
 —Trial court's discretion.  
 —Unemployment compensation appeal.  
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 Newly discovered evidence.  
 —Burden of proof.  
 —Discretion not abused.  
 Procedure.  
 —Notice to parties.  
 Res judicata.

Reversal of judgment.  
 —Invalidation of sale.  
 Satisfaction, release or discharge.  
 —Accord and satisfaction.  
 —Discharging representative of estate from further demand.  
 —Erroneously included damages.  
 —Prospective application of judgment.  
 Timeliness of motion.  
 —Confused mental condition of party.  
 —Dismissal for lack of prosecution.  
 —Fraud.  
 —Invalid service.  
 —Judicial error.  
 —Jurisdiction.  
 —Mistake, inadvertence and neglect.  
 —Newly discovered evidence.  
 —Order entered upon erroneous assumption.  
 —"Reasonable time."  
 —Reconsideration of previously denied motion.  
 —Satisfaction.  
 Unauthorized appearance.  
 Void judgment.  
 —Basis.  
 —Lack of jurisdiction.  
 Cited.

##### "Any other reason justifying relief."

Subdivision (7) embodies three requirements: First, that the reason be one other than those listed in Subdivisions (1) through (6); second, that the reason justify relief; and third, that the motion be made within a reasonable time. *Laub v. South Cent. Utah Tel. Ass'n*, 657 P.2d 1304 (Utah 1982); *Richins v. Delbert Chipman & Sons*, 817 P.2d 382 (Utah Ct. App. 1991).

Where a defendant's motion to set aside judgment based on Subdivisions (b)(1) and (7) and his motion for a new trial claimed that plaintiff violated Rule 5(a) on several occasions by not providing defendant with a copy of pleadings, thereby causing surprise, centering on plaintiff's failure to provide a copy of his motion for summary judgment to defendant, which the latter claimed was a clear showing of fraud on plaintiff's part, the trial court could have believed in denying defendant's motion, that fraud was not present in what could be considered a lapse in procedure by plaintiff's counsel. *Walker v. Carlson*, 740 P.2d 1372 (Utah Ct. App. 1987).

Defendant's claim that he mistakenly entered into an ill-advised stipulation without fully understanding its consequences was correctly characterized by trial court as mistake, inadvertence, surprise or neglect under Subdivision (b)(1); because Subdivision (b)(1) applied, Subdivision (b)(7) could not apply and could not be used to circumvent the three-month filing period. *Richins v. Delbert Chipman & Sons*, 817 P.2d 382 (Utah Ct. App. 1991).

**—Default judgment.**

It was not an abuse of discretion for the trial court to relieve a defendant from default and allow her to answer where it was shown that she had mistakenly believed that she was fully protected by a divorce decree and felt that such decree required her husband to bear the obligation and defend the action for her. *Ney v. Harrison*, 5 Utah 2d 217, 299 P.2d 1114 (1956).

Trial judge did not abuse discretion in refusing to set aside default judgment where defendant asserted that he thought the summons was invalid and therefore paid no attention to it. *Board of Educ. v. Cox*, 14 Utah 2d 385, 384 P.2d 806 (1963).

Where any reasonable excuse is offered by defaulting party, courts generally tend to favor granting relief from a default judgment, unless it appears that to do so would result in substantial injustice to the adverse party. *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor*, 544 P.2d 876 (Utah 1975).

Subdivision (b)(7) did not apply in a case where defendant husband sought to set aside a default judgment of divorce 5 2/3 months after its entry on the grounds that plaintiff wife had incorrectly stated the extent of his assets, and that he had not received a copy of the amended divorce decree; therefore the court had no jurisdiction to disturb the judgment. *Kessimakis v. Kessimakis*, 546 P.2d 888 (Utah 1976).

Where defendant stated he failed to answer complaints due to naivete regarding the legal process but admitted that he had discussed the complaint with an attorney, had failed to deliver necessary documents to the attorney, and had never paid the attorney, it was not abuse of discretion for court to refuse to set aside default judgment against defendant "for any other reason justifying relief." *J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979).

Where plaintiff sought relief from a default judgment pursuant to Subdivision (b) on three occasions before three different judges and his motions were denied in the first two proceedings, the third judge was barred by the law of the case from overruling the previous orders. *Mascaro v. Davis*, 741 P.2d 938 (Utah 1987).

**—Impossibility of compliance with order.**

Impossibility of compliance with a court order, such as an order that the defendant return property he has already sold, is an appropriate basis for amendment of the order. *Corbett v. Fitzgerald*, 709 P.2d 384 (Utah 1985).

**—Incompetent counsel.**

The provisions of Subdivision (b)(7) are sufficiently broad to permit a court to set aside an order, dismissing a plaintiff's complaint, which was entered upon an assumption that the plaintiff was procrastinating and not answering interrogatories submitted to him and to enter a new order based upon the record before it that plaintiff was represented by incompetent counsel and that defendants were not being unduly prejudiced. *Stewart v. Sullivan*, 29 Utah 2d 156, 506 P.2d 74 (1973).

**—Lack of due process.**

A party claiming and establishing a lack of due process of law would be entitled to relief from a judgment under Subdivision (b)(7) even

after the expiration of three months, because relief from a judgment on account of a lack of due process of law is not expressly provided for by this rule. *Bish's Sheet Metal Co. v. Luras*, 11 Utah 2d 357, 359 P.2d 21 (1961).

**—Merits of case.**

Where defendant, in his reasons for setting aside default judgment, asserted that the judgment entered was based upon a void contract for the reason that the contract did not comply with the statute of frauds, such assertion went to the merit of the case and could not be considered on motion to set aside judgment. *Board of Educ. v. Cox*, 14 Utah 2d 385, 384 P.2d 806 (1963).

**—Mistake or inadvertence.**

Subdivision (b)(7) may not be used to circumvent the three-month filing period where the basis for the relief from judgment is based on mistake or inadvertence. *Pitts v. McLachlan*, 567 P.2d 171 (Utah 1977).

Subdivision (b)(7) of this rule is not available to one who should have filed under Subdivision (b)(1) but did not do so within the three-month time limitation. *Calder Bros. Co. v. Anderson*, 652 P.2d 922 (Utah 1982).

The provisions of Subdivision (b)(7) may not be used to circumvent the time limitation on motions pursuant to Subdivision (b)(1). *Gardiner & Gardiner Bldrs. v. Swapp*, 656 P.2d 429 (Utah 1982).

Subdivision (b)(7) of this rule may not be resorted to for relief when the ground asserted for relief falls within Subdivision (b)(1) since the three-month limitation on relief under Subdivision (b)(1) would be averted. *Russell v. Martell*, 681 P.2d 1193 (Utah 1984).

The three-month period allowed for Subdivision (b)(1) motions may not be circumvented by filing a motion under Subdivision (b)(7). *Larsen v. Collina*, 684 P.2d 52 (Utah 1984).

**—Mutual mistake.**

The legal descriptions in an otherwise final partition decree could be corrected under this rule because the evidence overwhelmingly supported the conclusion that a mutual mistake occurred in the drafting of the decree, since the partitioning judge did not intend to deprive the claimants of access to a major part of their properties. *Gillmor v. Wright*, 850 P.2d 431 (Utah 1993).

**—Real party in interest.**

In action by corporation for legal services rendered, trial court's denial of defendant's motion to set aside default judgment on grounds plaintiff was not the real party in interest, under Subdivision (b)(7) of this rule, was supported by evidence that plaintiff was the real party in interest and that defendant had knowledge thereof. *Robinson v. Myers*, 599 P.2d 513 (Utah 1979).

**—Refund of fine after dismissal.**

Defendant's motion captioned "Motion for Return of Fine, Costs and Fees and Notice of Hearing," filed twenty days after the order of dismissal of the criminal case against him, although not specified as such, was the proper subject of a motion under Subdivision (b)(1) and also sufficient to invoke Subdivision (b)(7)

relief. *State v. Parker*, 872 P.2d 1041 (Utah Ct. App. 1994).

#### **Appeals.**

An order denying relief under Subdivision (b) is a final appealable order. Moreover, improper or untimely motions do not toll the time for appeal from final orders. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989).

#### **Clerical mistakes.**

##### **—Computation of damages.**

Where damage award was based on the sum of four separate amounts listed in a letter exhibit, and the sum of the amounts was in error, the error was within the definition of a clerical mistake and was subject to correction by the trial court. *Stanger v. Sentinel Sec. Life Ins. Co.*, 669 P.2d 1201 (Utah 1983).

##### **—Correction after appeal.**

Trial court may correct clerical error made in recording of decree after Supreme Court has affirmed erroneous decree on appeal. *Bagnall v. Suburbia Land Co.*, 579 P.2d 917 (Utah 1978).

##### **—Date of judgment.**

##### **—Void judgment.**

Where later judgment was void and different from earlier valid judgment, no appeal could be taken on ground that defendants were appealing from the earlier judgment and that insertion of date of void judgment was merely a clerical error which court could correct. *Nunley v. Stan Katz Real Estate, Inc.*, 15 Utah 2d 126, 388 P.2d 798 (1964).

##### **—Estate record.**

The correction of the record in an estate is properly made in the probate court in which the errors occurred, and the court was justified in accepting parol evidence as to the incorrectness of the record. *Harmston v. Harmston*, 5 Utah 2d 357, 302 P.2d 270 (1956).

##### **—Inherent power of courts.**

The courts of this state had recognized the inherent right of a court to enter a judgment nunc pro tunc to correct clerical errors. *Frost v. District Court ex rel. Box Elder County*, 96 Utah 106, 83 P.2d 737 (1938).

##### **—Intent of court and parties.**

The correction contemplated by Subdivision (a) of this rule must be undertaken for the purpose of reflecting the actual intention of the court and parties. *Lindsay v. Atkin*, 680 P.2d 401 (Utah 1984).

##### **—Judicial error distinguished.**

The distinction between a judicial error and a clerical error does not depend upon who made it; rather, it depends on whether it was made in rendering the judgment (judicial error) or in recording the judgment as rendered (clerical error). *Richards v. Siddoway*, 24 Utah 2d 314, 471 P.2d 143 (1970).

Question of whether an error is "judicial" or "clerical" depends not on who made it, but on whether it was made in rendering the judgment or in recording the judgment. *Lindsay v. Atkin*, 680 P.2d 401 (Utah 1984).

##### **—Order prepared by counsel.**

Erroneous assumption by judge in signing

order that the order as prepared by counsel correctly reflected his judgment was a mistake of a perfunctory or clerical nature which the court could and properly did correct upon its own motion. *Meagher v. Equity Oil Co.*, 5 Utah 2d 196, 299 P.2d 827 (1956).

##### **—Predating of new trial motion.**

A court may not enter a nunc pro tunc predating a motion for new trial that is untimely filed so that the motion will be timely. *Kettner v. Snow*, 13 Utah 2d 382, 375 P.2d 28 (1962).

##### **Court's discretion.**

The trial court is afforded broad discretion in ruling on a motion for relief from judgment under Subdivision (b), and its determination will not be disturbed absent an abuse of discretion. *Birch v. Birch*, 771 P.2d 1114 (Utah Ct. App. 1989).

##### **Default judgment.**

Once a default judgment has been entered, it can only be set aside in accordance with Subdivision (b). *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989).

##### **Effect of set-aside judgment.**

##### **—Admissions.**

Subdivision (b) does not provide that as part of the order setting aside a judgment any admissions are also set aside; those matters are covered exclusively by a motion made as provided by Rule 36(b). *Whitaker v. Nikols*, 699 P.2d 685 (Utah 1985).

##### **Form of motion.**

Trial court did not err in vacating judgment in response to defendants' supplemental statement of objections, which, though clearly mislabeled, was the functional equivalent of a motion to set aside the judgment under Subdivision (b), was filed in contemplation of the rule, contained the same kinds of arguments and assertions one would normally expect to find in a motion to set aside the judgment, and was treated by the trial court as such a motion. *Darrington v. Wade*, 812 P.2d 452 (Utah Ct. App. 1991).

Although a motion entitled "Clarification of Judgment" was not specifically provided for in the Utah Rules of Civil Procedure, because the substance of the motion was to make clear a judgment that was not already clear, the motion was sufficient to invoke Subdivision (b) of this rule. *Kunzler v. O'Dell*, 855 P.2d 270 (Utah Ct. App. 1993).

A motion to reconsider the final judgment of the district court is not provided for under the Utah Rules of Civil Procedure and has never been recognized as a proper motion in this state. *Wisden v. Bangerter*, 893 P.2d 1057 (Utah 1995).

##### **Fraud.**

##### **—Burden of proof.**

Trial court properly refused to cancel a deed executed as part of a property settlement when it found that plaintiff did not prove that she had reasonably relied on the alleged representations of her ex-husband when agreeing to execute the deed. *Despain v. Despain*, 855 P.2d 254 (Utah Ct. App. 1993).



**—Divorce action.**

Motion to set aside provisions of divorce decree concerning child custody and support based upon allegation that wife had perpetrated a fraud upon the court by falsely claiming husband was child's father did not comply with Subdivision (b) and should have been denied. *McGavin v. McGavin*, 27 Utah 2d 200, 494 P.2d 283 (1972).

The wife in a divorce action was entitled to have the decree set aside on the ground of fraud where the assets of the parties may have been more than five times the amount disclosed by the husband who prevented the wife from gaining full and accurate knowledge of his total assets by transferring his corporate holdings to family members without relinquishing control of those assets, by understating the true value of jointly held property, and by avoiding compliance with court-ordered discovery. *Boyce v. Boyce*, 609 P.2d 928 (Utah 1980).

**Independent action.****—Constitutionality of taxes.**

Constitutionality of state income tax rates could only be raised in independent action and not in supplemental proceedings upon warrant for judgment for underpayment of income taxes. *State Tax Comm'n v. Wright*, 596 P.2d 634 (Utah 1979).

**—Divorce decree.**

Where ex-husband brought independent action in equity seeking relief from that part of divorce decree naming him father of unborn child and ordering payments for its support, on ground that child was not his, court properly ordered taking of blood test, and upon showing that ex-husband could not be father, properly granted relief sought. *Egan v. Egan*, 560 P.2d 704 (Utah 1977).

**—Fraud or duress.**

Where "fraud upon the court" is the gravamen of a proceeding to relieve a party of the effect of a judgment, such proceeding must be pursued in an independent action by filing a separate suit, and not by way of motion in the original action. *Shaw v. Pilcher*, 9 Utah 2d 222, 341 P.2d 949 (1959).

The three-month limitation period does not limit the power of a court to entertain an independent common-law action to set aside a judgment or decree for fraud or duress after the three-month period has expired. Rather, the doctrine of laches and other equitable principles determine the time within which the action must be brought. *St. Pierre v. Edmonds*, 645 P.2d 615 (Utah 1982).

This rule does not limit the power of the court to entertain an independent action based on fraud. *Despain v. Despain*, 682 P.2d 849 (Utah 1984).

**—Motion distinguished.**

Where plaintiff filed separate, independent action to vacate six-year-old divorce decree, but reverted to procedure for motion in the original action and trial court dealt with the matter as having been made on motion only, plaintiff's "action" became a motion to set aside judgment and, as such, was properly dismissed

as having been filed beyond the statutory deadline. *Howard v. Howard*, 601 P.2d 931 (Utah 1979).

**Invalid summons.****—Amendment without notice.**

Where original summons designated a court which, because of the amount in controversy, could not have had jurisdiction and summons was improperly amended without notice to defendant to indicate court with jurisdiction and where the complaint had been filed, defendant was entitled to relief from default judgment in latter court based on ground there had been no valid service of summons. *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965).

**Inequity of prospective application.**

The third clause in Subdivision (b)(6) provides a basis for relief from a judgment that has prospective application when subsequent events have occurred making enforcement of the judgment's prospective application no longer equitable. Party who claimed that the judgment never was equitable but that he did not realize its inequity until later, but who did not allege that any subsequent event had rendered the prospective application of the judgment no longer equitable, was not entitled to relief under Subdivision (b)(6). *Richins v. Delbert Chipman & Sons*, 817 P.2d 382 (Utah Ct. App. 1991).

**Jurisdiction.**

The trial court has jurisdiction to consider a Subdivision (b) motion while an appeal is pending. If the trial court finds the motion to be without merit, it may enter an order denying the motion, and the parties may appeal from that order. If, however, the trial court is inclined to grant the motion, counsel should obtain a brief memorandum to that effect from the trial court, and request an order of remand from the appellate court so that the trial court can enter an order. *Baker v. Western Sur. Co.*, 757 P.2d 878 (Utah Ct. App. 1988); *White v. State*, 795 P.2d 648 (Utah 1990).

A trial court has no jurisdiction to consider the merits of an untimely motion under Subdivision (b)(1). *Richins v. Delbert Chipman & Sons*, 817 P.2d 382 (Utah Ct. App. 1991).

**Mistake, inadvertence, surprise or excusable neglect.****—Default judgment.**

A refusal to set aside a default divorce decree was not an abuse of discretion where the conduct of the party in default indicated absence of good faith and where the granting of relief would work an injustice upon the opposing party. *Chrysler v. Chrysler*, 5 Utah 2d 415, 303 P.2d 995 (1956).

It was not an abuse of discretion for the trial court to deny a motion for relief from a default judgment where there was evidence that plaintiff's attorney had called the defendant's attorney several days before the default and reminded him that the matter was in default and in view of the fact that the plaintiff, an elderly woman, had traveled from Seattle, Washington, to be present and presented an accounting

at the default hearing. *Masters v. LeSeuer*, 13 Utah 2d 293, 373 P.2d 573 (1962).

Default judgments should have been set aside where stockholders seeking an opportunity to protect their interest in actions against corporation, showed that process was served on person resigning as president, sending notices to only two other remaining directors when there was no active management functioning; that shareholders' group attempted to form a reorganization committee and hired counsel two days after final day for answering; and counsel on day of appointment, having been refused an opportunity to answer, filed motions to set aside default judgments. *Mayhew v. Standard Gilsonite Co.*, 14 Utah 2d 52, 376 P.2d 951 (1962).

A default certificate may be set aside upon the grounds of excusable neglect. *Heathman v. Fabian*, 14 Utah 2d 60, 377 P.2d 189 (1962).

Refusal to set aside default judgment on ground of excusable neglect was not error where defendant failed to contact his counsel from February to time of trial in September, and counsel did not attempt to contact defendant until ten days before trial even though both had long been informed of approximate time of trial, notwithstanding claim that counsel was unable to contact defendant due to defendant's long working hours and his custom of visiting his wife who was terminally ill with cancer. *Airkem Intermountain, Inc. v. Parker*, 30 Utah 2d 65, 513 P.2d 429 (1973).

Motion for relief from default judgment was properly denied to cosigner (father) who claimed that his son was the proper defendant and took no steps to file an answer to the complaint. *Pacer Sport & Cycle, Inc. v. Myers*, 534 P.2d 616 (Utah 1975).

A trial court is justified in denying relief from a default judgment because of lack of timely request, long passage of time before making such request, general procedural neglect, urgency of hypertechnicality about a statute, or an almost complete absence of substance or merit in the relief for which he prayed. *Heath v. Heath*, 541 P.2d 1040 (Utah 1975).

Motion to set aside default judgment was properly denied in case where defendant offered no reasonable excuse for his nonappearance, failed to respond to repeated attempts to contact him regarding status of the lawsuit he knew was pending, and knew that a hearing had been scheduled and that his counsel had withdrawn. *Heath v. Mower*, 597 P.2d 855 (Utah 1979).

Where defendant claimed default judgment was due to his attorney's failure to communicate with him, and the record showed that defendant failed to contract his attorney for one and half years after he filed his answer and counterclaim, trial court did not abuse its discretion in denying defendant's motion to set aside the default judgment. *Gardiner & Gardiner Bldrs. v. Swapp*, 656 P.2d 429 (Utah 1982).

In order for defendant to be relieved from a default judgment, he must not only show that the judgment was entered against him through any reason specified in Subdivision (b), but he

must also show that his motion to set aside the judgment was timely, and that he has a meritorious defense to the action. A meritorious defense is one which sets forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered. *State ex rel. Utah State Dep't of Social Servs. v. Musselman*, 667 P.2d 1053 (Utah 1983).

Default judgment should not have been entered in tort case arising out of injuries inflicted upon plaintiff by defendant where contradictions surrounding adequacy of service of process and other factors resulted in genuine mistake on part of defendant, in the absence of which the default would not have occurred. *May v. Thompson*, 677 P.2d 1109 (Utah 1984).

Default judgment was proper where statements of defendant demonstrated indifference on his part, and lack of diligence in pursuing his opportunity to defend. *Russell v. Martell*, 681 P.2d 1193 (Utah 1984).

Neither the Utah Foreign Judgment Act, § 78-22a-1 et seq., nor this rule, permits a court to set aside a foreign default judgment because of alleged inadvertence, mistake, or neglect absent a showing of fraud or the lack of jurisdiction or due process in the rendering state. *Data Mgt. Sys. v. EDP Corp.*, 709 P.2d 377 (Utah 1985).

Failure to reserve rights under § 70A-3-606(1)(a), which governs impairment of recourse or of collateral in regard to commercial paper and does not apply to judgments, could not be used to set aside default judgments against debtors under Subdivision (b)(6) of this rule. *First Sec. Bank v. Aarian Dev. Corp.*, 738 P.2d 1019 (Utah 1987).

#### —Illness.

Illness alone is not a sufficient excuse to make neglect in failing to defend a cause of action a ground for vacating a default judgment. *Warren v. Dixon Ranch Co.*, 123 Utah 416, 260 P.2d 741 (1953).

#### —Inconvenience.

Mere inconvenience or the press of personal or business affairs is not deemed as an excuse for failure to appear at trial. *Valley Leasing v. Houghton*, 661 P.2d 959 (Utah 1983).

#### —Meritorious.

To be relieved from a default judgment, defendant must not only show that the judgment was entered against him through excusable neglect (or any other reason specified in Subdivision (b)), but he must also show that his motion to set aside the judgment was timely, and that his proposed answer contains a defense that is entitled to be tried. *Erickson v. Schenkens Int'l Forwarders, Inc.*, 882 P.2d 1147 (Utah 1994).

#### —Merits of claim.

Usually, it is not appropriate on Subdivision (b) motions to examine the merits of the claim decided by the default judgment. *Larsen v. Collina*, 684 P.2d 52 (Utah 1984).

#### —Negligence of attorney.

An oral promise made by the attorney for the plaintiff to the effect that defendant could have more time in which to answer, where the plaintiff already had obtained a default judgment,

was now sufficient excusable neglect so as to allow the vacation of the default judgment. The defendants were deprived of nothing by the alleged promise inasmuch as the default judgment had already been entered. Such a promise could in no way bind a client who already had a judgment. *Warren v. Dixon Ranch Co.*, 123 Utah 416, 260 P.2d 741 (1953).

Where defendant's counsel withdrew at pre-trial conference and defendant claimed it received no notice to appoint counsel and had no notice of trial until it received notice of default judgment, the default was set aside in the interest of justice, the court stating that where there is doubt about whether a default should be set aside, the doubt should be resolved in favor of doing so. *Interstate Excavating, Inc. v. Agla Dev. Corp.*, 611 P.2d 369 (Utah 1980).

Where plaintiff's attorney and insurance adjuster for defendant's insurance company were engaged in settlement talks at time plaintiff's petition was filed, defendant was entitled to relief from subsequent summary judgment on grounds of "excusable neglect" since plaintiff's attorney had duty to notify adjuster of potential default and did not do so. *Helgesen v. Inyangumia*, 636 P.2d 1079 (Utah 1981).

Party may not claim his attorney's neglect in failing to notify him of proceeding as grounds for setting aside a default judgment where the party has been negligent by not communicating with his attorney. *Gardiner & Gardiner Bldrs. v. Swapp*, 656 P.2d 429 (Utah 1982).

The trial court abused its discretion in refusing to set aside a summary judgment after a failure to observe the rule prescribing the procedure to be followed upon withdrawal of an attorney had been brought to the attention of the court. *Sperry v. Smith*, 694 P.2d 581 (Utah 1984).

The reasons asserted by the defendant for setting aside the default judgment, that his attorney neglected to file an answer and that he mistakenly relied on his attorney's assurances that an answer had been filed, fell within Subdivision (b)(1), not Subdivision (b)(7), and the defendant's filing of a motion to set aside the default judgment six months after its entry was therefore untimely. *Lincoln Benefit Life Ins. Co. v. D.T. Southern Properties*, 838 P.2d 672 (Utah Ct. App. 1992).

#### —No claim for relief.

Trial court abused its discretion in conditioning the setting aside of a default judgment against defendant upon his payment of attorney fees where plaintiff's complaint was fundamentally flawed in that it appeared clearly upon the face of the complaint that no claim for relief was stated. *Sovereen v. Meadows*, 595 P.2d 852 (Utah 1979).

#### —Delayed motion for new trial.

In furtherance of their discretion to grant relief "in furtherance of justice," district courts could allow a notice of motion for new trial to be filed after the prescribed time limit when a proper application and sufficient showing therefor was made. *Audia v. Denver & R.G.R.R.*, 45 Utah 459, 146 P. 559 (1915); *Lund v. Third Judicial Dist. Court ex rel. Salt Lake County*, 90 Utah 433, 62 P.2d 278 (1936).

Party seeking relief "in furtherance of justice" to permit tardy filing of notice of motion for new trial had to do more than merely move the court to act and file the necessary affidavits in support of motion for a new trial; the applicant had to produce proper evidence upon which the court could base findings that through no fault of his he was prevented from filing notice of motion for a new trial within the time fixed by the statute, and had to produce satisfactory evidence why he did not apply for an extension of time at some time within the statutory limitation. *Lund v. Third Judicial Dist. Court ex rel. Salt Lake County*, 90 Utah 433, 62 P.2d 278 (1936).

#### —Factual error.

Correcting a description of real property to conform to the court's ruling, when the legal ruling remained unchanged, was a justifiable reason to change the original order under Subdivision (b). *Kunzler v. O'Dell*, 855 P.2d 270 (Utah Ct. App. 1993).

#### —Failure to file cost bill.

Whether party would be relieved from neglect in failing to file timely cost bill was within discretion of trial court. *Hirsh v. Ogden Furn. & Carpet Co.*, 51 Utah 558, 172 P. 318 (1918).

#### —Failure to file notice of appeal.

Neither Rule 6(b), granting the court power to extend where a failure to act in time is due to "excusable neglect" generally, nor Subdivision (b)(1) authorizing the court to relieve from a final judgment for inadvertence or excusable neglect, applies where the notice of appeal has not been filed in time. *Anderson v. Anderson*, 3 Utah 2d 277, 282 P.2d 845 (1955); *Holbrook v. Hodson*, 24 Utah 2d 120, 466 P.2d 843 (1970).

#### —Nonreceipt of notice and findings.

The fact that his counsel did not receive notice and findings from the clerk of the court does not entitle an appellant to file out of time a motion to amend findings and decree, and a motion for a new trial. *In re Bundy's Estate*, 121 Utah 299, 241 P.2d 462 (1952).

#### —Trial court's discretion.

Trial court has discretion in determining whether a movant has shown "mistake, inadvertence, surprise, or excusable neglect," and the Supreme Court will reverse the trial court's ruling only when there has been an abuse of discretion. *Larsen v. Collina*, 684 P.2d 52 (Utah 1984).

#### —Unemployment compensation appeal.

An administrative law judge's refusal to consider an employer's untimely protest of a determination of benefits by the department of employment security did not contravene a claimed public policy to relieve a party of default for "mistake" or "excusable neglect." *Mini Spas, Inc. v. Industrial Comm'n*, 733 P.2d 130 (Utah 1987).

#### —Workmen's compensation appeal.

Supreme Court could not relieve applicant from operation of the Workmen's Compensation Act section prescribing the time within which a writ of certiorari had to be applied for; fact that applicant's counsel was misinformed by commission's stenographer that there had

been no decision did not authorize granting of relief. *Utah Fuel Co. v. Industrial Comm'n*, 73 Utah 199, 273 P. 306 (1928).

**Newly discovered evidence.**

**—Burden of proof.**

The burden of showing facts to justify the granting of a new trial is upon one seeking such relief. *Kettner v. Snow*, 13 Utah 2d 382, 375 P.2d 28 (1962).

**—Discretion not abused.**

District court held not to abuse its discretion in denying motion for new trial based on "newly discovered evidence." See *Hall v. Fitzgerald*, 671 P.2d 224 (Utah 1983); *Putvin v. Thompson*, 241 Utah Adv. Rep. 14 (Utah Ct. App. 1994).

**Procedure.**

**—Notice to parties.**

Motion to reconsider a motion is not provided for under these rules, but even if it were, trial court erred in hearing defendant's motion and acting upon it *ex parte* and without any notice to plaintiff. *Utah State Employees Credit Union v. Riding*, 24 Utah 2d 211, 469 P.2d 1 (1970).

**Res judicata.**

A denial of a motion under this rule precludes a subsequent collateral attack on the judgment only if the claim or ground actually adjudicated in the Rule 60(b) motion is the same claim asserted in the independent action. *Pepper v. Zions First Nat'l Bank*, 801 P.2d 144 (Utah 1990).

**Reversal of judgment.**

**—Invalidation of sale.**

Where real estate agent was granted default judgment against purchaser of home for uncollected commission from sale, subsequent invalidation of purchaser's and seller's sales contract warranted vacation of default judgment upon purchaser's motion. *Kelly v. Scott*, 5 Utah 2d 159, 298 P.2d 821 (1956).

**Satisfaction, release or discharge.**

**—Accord and satisfaction.**

A judgment defendant is not constrained to raise an alleged accord and satisfaction only as an affirmative defense to further attempts by a judgment creditor to enforce the terms of a judgment. Rather, the issue may be raised seeking direct judicial sanction of the satisfaction by motion or independent action pursuant to Subdivision (b)(6). *Sugarhouse Fin. Co. v. Anderson*, 610 P.2d 1369 (Utah 1980).

When a judgment creditor accepted a promissory note with greater consideration and different performance from the earlier judgment, he released the judgment debtor from the judgment in an accord and satisfaction. *Brimley v. Gasser*, 754 P.2d 97 (Utah Ct. App. 1988).

**—Discharging representative of estate from further demand.**

Relief under this rule is available with regard to an order under § 75-3-1001 discharging a personal representative of an estate from further claim or demand after a final order has been entered. *Morgan v. Zions Nat'l Bank*, 711 P.2d 261 (Utah 1985).

**—Erroneously included damages.**

Defendant, whose insurance company had satisfied judgment against him in automobile accident action which erroneously included amounts plaintiff had received as PIP benefits under its insurance policy, could not seek to modify judgment to exclude erroneously included amount by way of motion pursuant to either Subdivisions (b)(6) or (7). *Laub v. South Cent. Utah Tel. Ass'n*, 657 P.2d 1304 (Utah 1982).

**—Prospective application of judgment.**

Rule permitting relief from a judgment on the basis that it is no longer equitable that the judgment have prospective application was inapplicable between the parties when the judgment had been satisfied by the party seeking relief. *Laub v. South Cent. Utah Tel. Ass'n*, 657 P.2d 1304 (Utah 1982).

**Timeliness of motion.**

A motion to set aside a judgment that is based on a reversed judgment must be made within a reasonable time. *Guardian State Bank v. Stangl*, 778 P.2d 1 (Utah 1989).

Motion by natural mother to dismiss an adoption petition on the grounds of misrepresentation by the adoptive parents, filed more than three months after the entry of her consent to the adoption, was not timely, and the saving clause of this rule did not apply because she did not bring an independent action. *M.L. v. V.H.*, 894 P.2d 1285 (Utah Ct. App. 1995).

**—Confused mental condition of party.**

There was no abuse of discretion in trial court's denial of plaintiff's motion to vacate order dismissing action entered pursuant to release and stipulation of parties where motion was filed six and one-half years after plaintiff's physician detected plaintiff's confused mental condition urged as basis for vacating motion. *Young v. Western Piling & Sheeting*, 680 P.2d 394 (Utah 1984).

**—Dismissal for lack of prosecution.**

Where the evidence indicated that plaintiff had not gotten in touch with his attorney for two years after filing complaint, it was proper for court to deny plaintiff's motion to set aside a judgment, dismissing his complaint for lack of prosecution. *Pitman v. Bonham*, 677 P.2d 1126 (Utah 1984).

A trial court's refusal to set aside a dismissal for failure to prosecute will not be overturned absent an abuse of discretion. *Meadow Fresh Farms v. Utah State Univ. Dept. of Agric.*, 813 P.2d 1216 (Utah Ct. App. 1991).

Trial court did not abuse its discretion in refusing to set aside a dismissal for failure to prosecute, where the underlying events occurred in 1981, an initial action filed in 1983 was dismissed for lack of prosecution, and the instant action based on the same facts was not filed until 1988, by which time many of the potential witnesses might have moved out of state and/or their recollection of the circumstances and events might have dimmed. *Meadow Fresh Farms v. Utah State Univ. Dept. of Agric.*, 813 P.2d 1216 (Utah Ct. App. 1991).

**-Fraud.**

A cross-complaint seeking to set aside a judgment for fraud in its procurement may be brought after the time limit in Subdivision (b) or a motion to set aside a judgment. *Bowen v. Olson*, 122 Utah 66, 246 P.2d 602 (1952).

Motion by ex-husband to order paternity blood test to furnish evidence on possible modification of support decree, based on fraud on court, was governed by time limit in this rule and was too late when filed 14½ months after divorce decree, even though baby was unborn and blood test could not have been performed before the divorce. *McGavin v. McGavin*, 27 Utah 2d 200, 494 P.2d 283 (1972).

**-Invalid service.**

The three-months provision provided for in Subdivision (b) for motions to vacate a judgment has no application to a judgment which is void because of invalid service of summons. *Woody v. Rhodes*, 23 Utah 2d 249, 461 P.2d 465 (1969).

Where the judgment is void because of a totally defective service of process, the time limitations of Subdivision (b) have no application. *Garcia v. Garcia*, 712 P.2d 288 (Utah 1986).

**-Judicial error.**

Where judgment contained no clerical error amendable under Subdivision (a) but may have contained judicial error, trial court erred in granting motion to amend the judgment filed nine years after judgment was entered, since the error was not corrected by timely motion for new trial, appeal or suit in equity. *Richards v. Siddoway*, 24 Utah 2d 314, 471 P.2d 143 (1970).

**-Jurisdiction.**

In suit for injunction, wherein it appeared that parties stipulated that hearing on damages be deferred and tried later, and court made order that plaintiff might later file amended or supplemental complaint with respect to issue of damages, district court did not lose jurisdiction of case because damage issue was not determined during term of court at which injunction was granted and no application for relief "in furtherance of justice" was made within six months after term. *Utah Oil Ref. Co. v. District Court*, 60 Utah 428, 209 P. 624 (1922).

**-Mistake, inadvertence and neglect.**

A motion under Subdivision (b)(1) to set aside a default judgment on the ground of mistake, inadvertence, and excusable neglect of one's attorney, if made more than three months after the judgment was entered, is untimely and properly denied. *Peck v. Cook*, 29 Utah 2d 375, 510 P.2d 530 (1973).

**-Newly discovered evidence.**

Father's petition to reopen a divorce judgment, based on newly discovered evidence, to raise the issue of paternity of a child born during the marriage was procedurally deficient and properly denied by the trial court where the petition was not filed within three months of the divorce judgment. *Roche v. Roche*, 596 P.2d 647 (Utah 1979).

**-Order entered upon erroneous assumption.**

A formal order signed and entered upon the erroneous assumption that it conformed to a direction of the court theretofore made after hearing on the merits is more than a mere inadvertence, and can therefore be set aside more than three months after its entry, provided the motion is made within a reasonable time. *Dixon v. Dixon*, 121 Utah 259, 240 P.2d 1211. (1952).

**-“Reasonable time.”**

Because a losing party moved to set aside the judgment against her within about a month after learning that the judgment had been entered, and her ignorance of the judgment until that time was due in part to a lack of notice that the prevailing party was required to provide pursuant to Rule 58A(d), her motion was timely under Subdivision (b). *Workman v. Nagle Constr., Inc.*, 802 P.2d 749 (Utah Ct. App. 1990).

Although Utah has no statutory limitation period specific to adoptions, in recognition of the need for finality in adoption proceedings, court held that plaintiff's action, brought three and one-half years after adoption order was granted, was not brought within a "reasonable time" under Subdivision (b). *Maertz v. Maertz*, 827 P.2d 259 (Utah Ct. App. 1992).

**-Reconsideration of previously denied motion.**

Trial court committed no error by first denying a motion for summary judgment made by the defendant, and then upon subsequent proceedings within the time limits of Subdivision (b) deciding to vacate that order and reconsidering and granting defendant's motion. *Rees v. Albertson's, Inc.*, 587 P.2d 130 (Utah 1978).

**-Satisfaction.**

The fact of prior satisfaction of the judgment is an important consideration in determining whether a motion to modify the judgment is made within a reasonable time. *Laub v. South Cent. Utah Tel. Ass'n*, 657 P.2d 1304 (Utah 1982).

**Unauthorized appearance.**

Wife who had been personally served with process but had no actual knowledge of action was not entitled to relief from judgment against her and her husband on ground that appearance for her by attorney retained by husband was without her authority. Plaintiff would have been entitled to default judgment against wife, and his position could not be worsened by unauthorized appearance over which he had no control. *Brimhall v. Mecham*, 27 Utah 2d 222, 494 P.2d 525 (1972).

**Void judgment.**

**-Basis.**

A judgment is void only if the court that rendered it lacked jurisdiction over the subject matter or over the parties or was otherwise incompetent to render judgment; a judgment based on a void stipulation may be voidable, but is not void within the meaning of Subdivision (b)(5). *Richins v. Delbert Chipman & Sons*, 817 P.2d 382 (Utah Ct. App. 1991).

**—Lack of jurisdiction.**

It is a basic rule that a judgment is void and subject to collateral attack if lack of jurisdiction in the court appears on the face of the record. *Bowen v. Olson*, 122 Utah 66, 246 P.2d 602 (1952).

Where the affidavit for publication of summons presented no evidentiary facts, a default judgment entered against the defendant can be attacked collaterally. *Bowen v. Olson*, 122 Utah 66, 246 P.2d 602 (1952).

A denial of a motion to vacate a judgment under Subdivision (b) is ordinarily reversed only for an abuse of discretion. However, when a motion to vacate a judgment is based on a claim of lack of jurisdiction, the district court has no discretion: if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs. *State Dept. of Social Servs. v. Vijil*, 784 P.2d 1130 (Utah 1989).

Cited in *Goddard v. Bundy*, 121 Utah 299, 241 P.2d 462 (1952); *Board of Educ. v. Cox*, 16 Utah 2d 20, 395 P.2d 55 (1964); *Parker v.*

*Rolfson*, 525 P.2d 612 (Utah 1974); *Dynapac, Inc. v. Innovations, Inc.*, 550 P.2d 191 (Utah 1976); *Olsen v. Cummings*, 565 P.2d 1123 (Utah 1977); *Pitts v. Pine Meadow Ranch, Inc.*, 589 P.2d 767 (Utah 1978); *Peay v. Peay*, 607 P.2d 841 (Utah 1980); *Miller Pontiac, Inc. v. Osborne*, 622 P.2d 800 (Utah 1981); *Kohler v. Garden City*, 639 P.2d 162 (Utah 1981); *St. Pierre v. Edmonds*, 645 P.2d 615 (Utah 1982); *Kanze v. Kanze*, 668 P.2d 495 (Utah 1983); *Pease v. Industrial Comm'n*, 694 P.2d 613 (Utah 1984); *Wiese v. Wiese*, 699 P.2d 700 (Utah 1985); *In re Estate of Chasel*, 725 P.2d 1345 (Utah 1986); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986); *Myers v. Garff*, 655 F. Supp. 1021 (D. Utah 1987); *Wood v. Weenig*, 736 P.2d 1053 (Utah 1987); *Fackrell v. Fackrell*, 740 P.2d 1318 (Utah 1987); *Tripp v. Vaughn*, 747 P.2d 1051 (Utah Ct. App. 1987); *Blodgett v. Zions First Nat'l Bank*, 752 P.2d 901 (Utah Ct. App. 1988); *Ramon ex rel. Ramon v. Farr*, 770 P.2d 131 (Utah 1989); *Surety Life Ins. Co. v. Rupp*, 833 P.2d 366 (Utah Ct. App. 1992); *Holm v. Smilowitz*, 840 P.2d 157 (Utah Ct. App. 1992).

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d Judgments § 740 et seq.

**C.J.S.** — 49 C.J.S. Judgments §§ 228 et seq., 237.

**A.L.R.** — Incompetence of counsel as ground for relief from state court civil judgment, 64 A.L.R.4th 323.

Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 A.L.R.5th 422.

Relief from judicial error by motion under F.R.C.P. Rule 60(b)(1), 1 A.L.R. Fed. 771.

Propriety of conditions imposed in granting relief from judgment under Rule of Civil Procedure 60(b), 3 A.L.R. Fed. 956.

Construction of Rule 60(a) of Federal Rules of Civil Procedure authorizing correction of clerical mistakes and judgments, orders or other parts of the records and errors therein arising from oversight or omission, 13 A.L.R. Fed. 794.

Independent actions to obtain relief from judgment, order, or proceeding under Rule

60(b) of the Federal Rules of Civil Procedure, 53 A.L.R. Fed. 558.

Lack of jurisdiction, or jurisdictional error, as rendering federal district court judgment "void" for purposes of relief under Rule 60(b)(4) of Federal Rules of Civil Procedure, 59 A.L.R. Fed. 831.

Effect of filing of notice of appeal on motion to vacate judgment under Rule 60(b) of Federal Rules of Civil Procedure, 62 A.L.R. Fed. 165.

Who has burden of proof in proceeding under Rule 60(b)(4) of Federal Rules of Civil Procedure to have default judgment set aside on ground that it is void for lack of jurisdiction, 102 A.L.R. Fed. 811.

Construction and application of Rule 60(b)(5) of Federal Rules of Civil Procedure, authorizing relief from final judgment where its prospective application is inequitable, 117 A.L.R. Fed. 419.

**Key Numbers.** — Judgment ⇐ 294 et seq., 306, 307.

**Rule 61. Harmless error.**

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

**Compiler's Notes.** — This rule is similar to Rule 61, F.R.C.P.

of the court shall transmit the record of the supplemental proceedings upon the preparation of the entire record.

(g) **Appellate court determination.** Upon receipt of the record from the trial court, the clerk of the court shall notify the parties of the new schedule for briefing or oral argument under these rules. Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in other appeals. The findings of fact entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals. (Added effective October 1, 1992.)

#### NOTES TO DECISIONS

**Allegation of facts required.**

Because defendant did not allege any facts in support of his ineffective assistance claim, the appellate court would not remand the case for an evidentiary hearing. It would be improper

to remand a claim under this rule for a fishing expedition. *State v. Garrett*, 849 P.2d 578 (Utah Ct. App.), cert. denied, 860 P. 943 (Utah 1993).

### Rule 24. Briefs.

(a) **Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, including the contents of the addendum, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(A) citation to the record showing that the issue was preserved in the trial court; or

(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. 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.

(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.

(10) A short conclusion stating the precise relief sought.

(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) **Brief of the appellee.** The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) **Reply brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraph (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) **References in briefs to parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) **Length of briefs.** Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) **Briefs in cases involving cross-appeals.** If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellant shall not exceed 50 pages in length. The brief of the appellee/cross-appellant shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant and shall not exceed 50 pages in length. The appellant shall



then file a brief which contains an answer to the original issues raised by the appellee/cross-appellant and a reply to the appellee's response to the issues raised in the appellant's opening brief. The appellant's second brief shall not exceed 25 pages in length. The appellee/cross-appellant may then file a second brief, not to exceed 25 pages in length, which contains only a reply to the appellant's answers to the original issues raised by the appellee/cross-appellant's first brief. The lengths specified by this rule are exclusive of table of contents, table of authorities, and addenda and may be exceeded only by permission of the court. The court shall grant reasonable requests, for good cause shown.

(h) **Briefs in cases involving multiple appellants or appellees.** In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(i) **Citation of supplemental authorities.** When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(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.

(k) **Brief covers.** The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27.

(Amended effective October 1, 1992; July 1, 1994; April 1, 1995.)

**Advisory Committee Note.** — The brief must now contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

**Amendment Notes.** — The 1992 amendment, effective October 1, 1992, added the third sentence in Subdivision (c) and made stylistic changes in Subdivisions (a)(5) and (7).

The 1994 amendment added the addendum requirement in Subdivision (a)(2); added Subdivisions (a)(5)(A) and (B); inserted "or of central importance to the appeal" in Subdivision (a)(6); inserted "including the grounds for reviewing any issue not preserved in the trial court" in Subdivision (9); added Subdivision a)(11), deleted Subdivision (f), relating to reproduction of statutes, documents, and similar

material, and made related changes throughout the rule; added Subdivision (b)(2); deleted a reference to Subdivision (a)(6) from the citation near the end of Subsection (c); deleted the reporter's transcript from the list in the first sentence in Subdivision (e) and substituted "record" for "transcript" near the end of the last sentence; and made stylistic changes throughout.

The 1995 amendment added the provision for cases reviewed on certiorari in Subdivision (a)(11); added the second sentence in Subdivision (f); and, in Subdivision (g), added the 50-page limit, substituted "appellee/cross-appellant" for "appellee" in the third sentence, and all the language beginning with the fourth sentence.

#### NOTES TO DECISIONS

##### ANALYSIS

Constitutional arguments.

Contents.

—Argument.

—Inappropriate language.

—Standard of review.

—Statement of facts with citation to record.

Failure to file.

—Defective appeal.

Properly documented argument.

Reply brief.

Cited.

**Constitutional arguments.**

In order to make an argument for an innovative interpretation of a state constitutional provision textually similar to a federal provi-

sion, the following points should be developed and supported with authority and analysis. First, counsel should offer analysis of the unique context in which Utah's constitution developed with regard to the issue at hand. Second, counsel should demonstrate that state appellate courts regularly interpret even textually similar state constitutional provisions in a manner different from federal interpretations of the United States Constitution and that it is entirely proper to do so in our federal system. Third, citation should be made to authority from other states supporting the particular construction urged by counsel. *State v. Bobo*, 803 P.2d 1268 (Utah Ct. App. 1990).

#### **Contents.**

A brief must contain some support for each contention. *State v. Wareham*, 772 P.2d 960 (Utah 1989); *State v. Reiners*, 803 P.2d 1300 (Utah Ct. App. 1990).

Extensive quotations from numerous case authorities and treatises, while helpful, cannot substitute for the development of appellate arguments explicitly tied to the record. *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311 (Utah Ct. App. 1991).

Appellant's brief was clearly deficient under the provisions of this rule because it failed to set forth a coherent statement of issues and the appropriate standard of review for each issue with supporting authority, the "issues" where listed did not correlate with the substance of the brief, the statement of the case not only omitted reference to the course of proceedings and disposition in the trial court, but failed to provide a statement of the relevant facts properly documented by citations to the record, and defendant's "argument" did 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. *State v. Price*, 827 P.2d 247 (Utah Ct. App. 1992).

It is improper to use an addendum to incorporate argument by reference that should be included in the body of the brief. *State v. Jiron*, 866 P.2d 1249 (Utah Ct. App. 1993).

Appellate brief that set forth little legal analysis on issue presented, did not specifically discuss how trial court erred, did not attempt to marshal the evidence, and presented no citations to record failed to conform to requirements of this rule. *Phillips v. Hatfield*, 904 P.2d 1108 (Utah Ct. App. 1995).

#### **—Argument.**

Appellants' brief, containing less than a single page of assertions and no citations to the record, no legal authorities, and no analysis whatsoever, was not in compliance with this rule, which requires the brief of an appellant to contain an argument. *Christensen v. Munns*, 812 P.2d 69 (Utah Ct. App. 1991).

Court declined to consider argument that was not adequately briefed. See *State v. Yates*, 834 P.2d 599 (Utah Ct. App. 1992).

Defendant's failure to brief the applicability of a common law construction (the good faith exception to the warrant requirement) under the Utah Constitution at the trial court level and his subsequent failure to develop any

meaningful argument thereunder did not permit higher appellate review of these state constitutional claims, but left the analysis to proceed solely under federal constitutional law. *State v. Horton*, 848 P.2d 708 (Utah Ct. App.), cert. denied, 857 P.2d 948 (Utah 1993).

#### **—Inappropriate language.**

Derogatory references to others or inappropriate language of any kind has no place in an appellate brief and is of no assistance in attempting to resolve any legitimate issues presented on appeal. *State v. Cook*, 714 P.2d 296 (Utah 1986).

#### **—Standard of review.**

The standard of review requirement in Subdivision (a)(5) should not be ignored. The purpose of the requirement is to focus the briefs, thus promoting more accuracy and efficiency in the processing of appeals. *Christensen v. Munns*, 812 P.2d 69 (Utah Ct. App. 1991).

#### **—Statement of facts with citation to record.**

The Supreme Court need not, and will not, consider any facts not properly cited to, or supported by, the record. *Uckerman v. Lincoln Nat'l Life Ins. Co.*, 588 P.2d 142 (Utah 1978).

The Supreme Court will assume the correctness of the judgment in a criminal trial if counsel on appeal does not comply with the requirements as to making a concise statement of facts and citation of the pages in the record where they are supported. *State v. Tucker*, 657 P.2d 755 (Utah 1982).

If a party fails to make a concise statement of the facts and citation of the pages in the record where those facts are supported, the court will assume the correctness of the judgment below. *Koulis v. Standard Oil Co.*, 746 P.2d 1182 (Utah Ct. App. 1987); *Steele v. Board of Review of Indus. Comm'n*, 845 P.2d 960 (Utah Ct. App. 1993).

#### **Failure to file.**

#### **—Defective appeal.**

Where defendant was convicted of operating a motor vehicle without insurance, and attempted to file his appeal pro se, but failed to file a brief or submit a transcript of the record, there was no reversible error presented which would permit the appellate court to reverse the judgment. *State v. Hansen*, 540 P.2d 935 (Utah 1975).

#### **Properly documented argument.**

Brief that was filled with burdensome, emotional, immaterial and inaccurate arguments did not set forth a properly documented argument as required by this rule; therefore the court disregarded it. *Koulis v. Standard Oil Co.*, 746 P.2d 1182 (Utah Ct. App. 1987).

#### **Reply brief.**

As a general rule, an issue raised initially in a reply brief will not be considered on appeal, although the court, in its discretion, may decide a case upon any points that its proper disposition may require, even if first raised in a reply brief. *Romrell v. Zions First Nat'l Bank*, 611 P.2d 392 (Utah 1980).

Cited in *Weber v. Snyderville West*, 800 P.2d 316 (Utah Ct. App. 1990); *State v. Hoyt*, 806 P.2d 204 (Utah Ct. App. 1991); *State ex*

rel. M.S. v. Salata, 806 P.2d 1216 (Utah Ct. App. 1991); State v. Cayer, 814 P.2d 604 (Utah Ct. App. 1991); *English v. Standard Optical Co.*, 814 P.2d 613 (Utah Ct. App. 1991); *Hinckley v. Hinckley*, 815 P.2d 1352 (Utah Ct. App. 1991); *Larson v. Overland Thrift & Loan*, 818 P.2d 1316 (Utah Ct. App. 1991); *State v. Davis*, 821 P.2d 9 (Utah Ct. App. 1991); *State*

*v. Garza*, 820 P.2d 937 (Utah Ct. App. 1991); *Johnson-Bowles Co. v. Department of Commerce*, 829 P.2d 101 (Utah Ct. App. 1991); *Middlestadt v. Indus. Comm'n*, 852 P.2d 1012 (Utah Ct. App. 1993); *Baker v. Baker*, 866 P.2d 540 (Utah Ct. App. 1993); *Barney v. Utah Dep't of Commerce*, 885 P.2d 809 (Utah Ct. App. 1994).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 5 Am. Jur. 2d Appeal and Error §§ 684 to 690.

**C.J.S.** — 4 C.J.S. Appeal and Error § 605 et seq.

**Key Numbers.** — Appeal and Error ⇐ 755 to 807.

### Rule 25. Brief of an amicus curiae or guardian ad litem.

A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae or the guardian ad litem is desirable. Except as all parties otherwise consent, an amicus curiae or guardian ad litem shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus curiae or guardian ad litem will support, unless the court for cause shown otherwise orders. A motion of an amicus curiae or guardian ad litem to participate in the oral argument will be granted when circumstances warrant in the court's discretion.

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 5 Am. Jur. 2d Appeal and Error § 687.

### Rule 26. Filing and service of briefs.

(a) **Time for service and filing briefs.** Briefs shall be deemed filed on the date of the postmark if first-class mail is utilized. The appellant shall serve and file a brief within 40 days after date of notice from the clerk of the appellate court pursuant to Rule 13, unless a motion for summary disposition of the appeal or a motion to remand for determination of ineffective assistance of counsel has been previously interposed, in which event service and filing shall be within 30 days from the denial of such motion. The appellee, or in cases involving a cross-appeal, the appellee/cross-appellant, shall serve and file a brief within 30 days after service of the appellant's brief. In cases involving cross-appeals, the appellant shall serve and file the second brief described in Rule 24(g) within 30 days after service of the appellee/cross-appellant's brief. A reply brief may be served and filed by the appellant or the appellee/cross-appellant in cases involving cross-appeals. If a reply brief is filed, it shall be served and filed within 30 days after the filing and service of the appellee's brief or the appellant's second brief in cases involving cross-appeals. If oral argument is scheduled fewer than 35 days after the filing of appellee's brief, the reply brief must be filed at least 5 days prior to oral argument. By stipulation filed with the court in accordance with Rule 21(a), the parties may extend each of such periods for no more than 30 days. A motion for enlargement of time need not accompany the stipulation. No such stipulation shall be effective unless it is filed prior to the expiration of the period sought to be extended.

(b) **Number of copies to be filed and served.** For matters pending in the Supreme Court, ten copies of each brief, one of which shall contain an original signature, shall be filed with the Clerk of the Supreme Court. For matters pending in the Court of Appeals, eight copies of each brief, one of which shall contain an original signature, shall be filed with the Clerk of the Court of

### Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) **Procedures.**

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

**Advisory Committee Note.** — Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.

If an appeal is found to be frivolous, the court must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages — single or double costs or attorney fees or both — is left to the discretion of the court. Rule 33 is amended to make express the authority of the court to

impose sanctions upon the party or upon counsel for the party. This rule does not apply to a first appeal of right in a criminal case to avoid the conflict created for appointed counsel by *Anders v. California*, 386 US 738 (1967) and *State v. Clayton*, 639 P.2d 168 (Utah 1981). Under the law of these cases, appointed counsel must file an appeal and brief if requested by the defendant, and the court must find the appeal to be frivolous in order to dismiss the appeal.

#### NOTES TO DECISIONS

##### ANALYSIS

##### Frivolous appeal.

—Defined.

—Sanctions.

Cited.

##### Frivolous appeal.

A husband's appeal from a judgment relating to alimony and distribution of marital property was frivolous, where there was no basis for the argument presented and the evidence and law was mischaracterized and misstated. *Eames v. Eames*, 735 P.2d 395 (Utah 1987).

Plaintiff's counsel violated rule and was therefore subject to sanction when, after he investigated plaintiff's malpractice action against defendant orthodontist and found that he could not prove breach of duty or causation,

the record was devoid of any relevant, admissible evidence showing negligence, and after losing on summary judgment, he persisted in filing an appeal. *Hunt v. Hurst*, 785 P.2d 414 (Utah 1990).

An appeal brought from an action that was properly determined to be in bad faith is necessarily frivolous under this rule. *Utah Dep't of Social Servs. v. Adams*, 806 P.2d 1193 (Utah Ct. App. 1991).

Attorney who, after a case had been fully adjudicated, chose to ignore the decision and attempted to relitigate the same case violated Subdivision (a) of this rule and was therefore subject to sanctions. *Schoney v. Memorial Estates, Inc.*, 863 P.2d 59 (Utah Ct. App. 1993).

—Defined.

For purposes of this rule, a "frivolous" appeal

is one having no reasonable legal or factual basis. Lack of good faith is not required. *O'Brien v. Rush*, 744 P.2d 306 (Utah Ct. App. 1987).

A frivolous appeal is one without reasonable legal or factual basis. *Backstrom Family Ltd. Partnership v. Hall*, 751 P.2d 1157 (Utah Ct. App. 1988); *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989).

#### —Sanctions.

Sanctions for frivolous appeals should only be applied in egregious cases, to avoid chilling the right to appeal erroneous lower court decisions. However, sanctions should be imposed when an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing. *Porco v. Porco*, 752 P.2d 365 (Utah Ct. App. 1988); *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989).

Cited in *Barber v. Barber*, 792 P.2d 134 (Utah Ct. App. 1990); *Hurt v. Hurt*, 793 P.2d 948 (Utah Ct. App. 1990); *Mahas v. Rindlisbacher*, 808 P.2d 1025 (Utah 1990); *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163 (Utah Ct. App. 1990); *Mont Trucking, Inc. v. Entrada Indus., Inc.*, 802 P.2d 779 (Utah Ct. App. 1990); *Allred v. Allred*, 807 P.2d 350 (Utah Ct. App. 1991); *Walters v. Walters*, 812 P.2d 64 (Utah Ct. App. 1991); *Griffin v. Memmott*, 814 P.2d 601 (Utah Ct. App. 1991); *Hinckley v. Hinckley*, 815 P.2d 1352 (Utah Ct. App. 1991); *Larson v. Overland Thrift & Loan*, 818 P.2d 1316 (Utah Ct. App. 1991); *Roberts v. Roberts*, 835 P.2d 193 (Utah Ct. App. 1992); *Holm v. Smilowitz*, 840 P.2d 157 (Utah Ct. App. 1992); *Rimensburger v. Rimensburger*, 845 P.2d 960 (Utah Ct. App. 1992).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 5 Am. Jur. 2d Appeal and Error § 912.

**C.J.S.** — 5 C.J.S. Appeal and Error § 637.

**A.L.R.** — Inherent power of federal district

court to impose monetary sanctions on counsel in absence of contempt of court, 77 A.L.R. Fed. 789.

**Key Numbers.** — Costs ⇌ 259 to 263.

### Rule 34. Award of costs.

(a) **To whom allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case.

(b) **Costs for and against the state of Utah.** In cases involving the state of Utah or an agency or officer thereof, an award of costs for or against the state shall be at the discretion of the court unless specifically required or prohibited by law.

(c) **Costs of briefs and attachments, record, bonds and other expenses on appeal.** The following may be taxed as costs in favor of the prevailing party in the appeal: the actual costs of a printed or typewritten brief or memoranda and attachments not to exceed \$3.00 for each page; actual costs incurred in the preparation and transmission of the record, including costs of the reporter's transcript unless otherwise ordered by the court; premiums paid for supersedeas or cost bonds to preserve rights pending appeal; and the fees for filing and docketing the appeal.

(d) **Bill of costs taxed after remittitur.** When costs are awarded to a party in an appeal, a party claiming costs shall, within 15 days after the remittitur is filed with the clerk of the trial court, serve upon the adverse party and file with the clerk of the trial court an itemized and verified bill of costs. The adverse party may, within 5 days of service of the bill of costs, serve and file a notice of objection, together with a motion to have the costs taxed by the trial court. If there is no objection to the cost bill within the allotted time, the clerk of the trial court shall tax the costs as filed and enter judgment for the party entitled thereto, which judgment shall be entered in the judgment docket with the same force and effect as in the case of other judgments of record. If the cost bill of the prevailing party is timely opposed, the clerk, upon reasonable notice and hearing, shall tax the costs and enter a final determination and judgment which shall thereupon be entered in the judgment docket with the same force and effect as in the case of other judgments of record. The determination of the

(c) **Minute book.** The clerk may keep a minute book, in which shall be entered a record of the daily proceedings of the court. The clerk shall prepare, under the direction of the Chief Justice of the Supreme Court or the Presiding Judge of the Court of Appeals, a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk shall give preference to appeals in accordance with the priority of cases provided in Rule 29.

(d) **Notice of orders.** Immediately upon the entry of an order or decision, the clerk shall serve a notice of entry by mail upon each party to the proceeding, together with a copy of any opinion respecting the order or decision. Service on a party represented by counsel shall be made upon counsel.

(e) **Custody of records and papers.** The clerk shall have custody of the records and papers of the court. The clerk shall not permit any original record or paper to be removed from the court, except as authorized by these rules or the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and attachments, as well as other printed papers filed.

(Amended effective October 1, 1992.)

**Amendment Notes.** — The 1992 amendment, effective October 1, 1992, added the Sub-division (c) designation and heading and redesignated the following subdivisions accordingly.

#### **Rule 40. Attorney's or party's certificate; sanctions and discipline.**

(a) **Attorney's or party's certificate.** Every motion, brief, and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member in good standing of the Bar of this state. The attorney shall sign his or her individual name and give his or her business address, telephone number, and Utah State Bar number. A party who is not represented by an attorney shall sign any motion, brief, or other paper and state the party's address and telephone number. Except when otherwise specifically provided by rule or statute, motions, briefs, or other papers need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate that the attorney or party has read the motion, brief, or other paper; that to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, it is not frivolous or interposed for the purpose of delay as defined in Rule 33. If a motion, brief, or other paper is not signed as required by this rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the attorney or party. If a motion, brief, or other paper is signed in violation of this rule, the authority and the procedures of the court provided by Rule 33 shall apply.

(b) **Sanctions and discipline of attorneys and parties.** The court may, after reasonable notice and an opportunity to show cause to the contrary, and upon hearing, if requested, take appropriate action against any attorney or person who practices before it for inadequate representation of a client, conduct unbecoming a member of the Bar or a person allowed to appear before the court, or for failure to comply with these rules or order of the court. Any action to suspend or disbar a member of the Utah State Bar shall be referred to the Ethics and Discipline Committee of the State Bar for proceedings in accordance with the Rules of Discipline of the State Bar.

(c) **Rule does not affect contempt power.** This rule shall not be construed to limit or impair the court's inherent and statutory contempt powers.

(d) **Appearance of counsel *pro hac vice*.** An attorney who is licensed to practice before the bar of another state or a foreign country but who is not a member of the Bar of this state, may appear, upon motion, *pro hac vice*. Such attorney shall associate with an active member in good standing of the Bar of this state and shall be subject to the provisions of this rule and all other rules of appellate procedure.

**Advisory Committee Note.** — The rule is amended to require that counsel provide the court with counsel's Bar number and business telephone number.

#### NOTES TO DECISIONS

Cited in *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163 (Utah Ct. App. 1990).

#### COLLATERAL REFERENCES

**A.L.R.** — Award of damages for dilatory tactics in prosecuting appeal in state court, 91 A.L.R.3d 661.

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies, 13 A.L.R.4th 533.

Adequacy of defense counsel's representation of criminal client regarding appellate and post-conviction remedies, 15 A.L.R.4th 582.

Attorneys: revocation of state court pro hac vice admission, 64 A.L.R.4th 1217.

**Key Numbers.** — Costs ⇐ 252.

### TITLE VI.

## CERTIFICATION AND TRANSFER BETWEEN COURTS.

### Rule 41. Certification of questions of law by United States courts.

(a) **Authorization to answer questions of law.** The Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court acting in accordance with the provisions of this rule if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain.

(b) **Procedure to invoke.** Any court of the United States may invoke this rule by entering an order of certification as described in this rule. When invoking this rule, the certifying court may act either sua sponte or upon a motion by any party.

(c) **Certification order.**

(1) A certification order shall be directed to the Utah Supreme Court and shall state:

(A) the question of law to be answered;

(B) that the question certified is a controlling issue of law in a proceeding pending before the certifying court; and

(C) that there appears to be no controlling Utah law.

(2) The order shall also set forth all facts which are relevant to the determination of the question certified and which show the nature of the controversy, the context in which the question arose, and the procedural steps by which the question was framed.

(3) The certifying court may also include in the order any additional reasons for its entry of the certification order that are not otherwise apparent.

(d) **Form of certification order; submission of record.** A certification order shall be signed by the judge presiding over the proceeding giving rise to the certification order and forwarded to the Utah Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require that all or any portion of the record before the certifying court be filed with the Supreme Court if the record or a portion thereof may be necessary in determining whether to accept the certified question or in answering that question. A copy of the record certified by the clerk of the certifying court to conform to the original may be substituted for the original as the record.

(e) **Acceptance or rejection of certification.** Upon filing of the certification order and accompanying papers with the clerk, the Supreme Court shall promptly enter an order either accepting or rejecting the question certified to it, and the clerk shall serve copies of the order upon the certifying court and all parties identified in the certification order. If the Supreme Court accepts the question, the Court will set out in the order of acceptance (1) the specific

**78-2-1.5, 78-2-1.6. Repealed.**

**Repeals.** — Section 78-2-1.5 (L. 1969, ch. 225, § 2), relating to salaries of Supreme Court justices, was repealed by Laws 1971, ch. 182, § 4.

Section 78-2-1.6 (L. 1979, ch. 134, § 1; 1981, ch. 156, § 1), relating to salaries of justices, was repealed by Laws 1981, ch. 267, § 2, effective July 1, 1982.

**78-2-2. Supreme Court jurisdiction.**

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) a judgment of the Court of Appeals;
- (b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
- (c) discipline of lawyers;
- (d) final orders of the Judicial Conduct Commission;
- (e) final orders and decrees in formal adjudicative proceedings originating with:
  - (i) the Public Service Commission;
  - (ii) the State Tax Commission;
  - (iii) the School and Institutional Trust Lands Board of Trustees;
  - (iv) the Board of Oil, Gas, and Mining;
  - (v) the state engineer; or
  - (vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;
- (f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);
- (g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;
- (h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;
- (i) appeals from the district court involving a conviction of a first degree or capital felony;
- (j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and
- (k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

- (a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;
- (b) election and voting contests;
- (c) reapportionment of election districts;
- (d) retention or removal of public officers;
- (e) matters involving legislative subpoenas; and
- (f) those matters described in Subsections (3)(a) through (d).