

2008

Mark Greer v. Big 5 Corp, dba Big 5 Sporting Goods, a Corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARK GREER,)	
)	
Plaintiff/Appellant,)	
vs,)	Case No. 20080364 CA
)	
BIG 5 CORP, dba BIG 5 SPORTING)	
GOODS, a Corporation,)	District Court No. 050921371
)	
Defendant/Appellee)	
)	

APPELLANT'S BRIEF

On Appeal from the Final Amended
Judgment of the Third District Court
The Honorable Judge L.A. Dever

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FILED
UTAH APPELLATE COURTS
SEP 26 2008

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vs,)	Case No. 20080364 CA
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STATEMENT REGARDING JURISDICTION

This case is on appeal from two final orders/judgments of the Third Judicial District Court of Salt Lake County issued by the Honorable Judge Lee A. Dever. Mark Greer, the Plaintiff/Appellant, appealed to the Utah Supreme Court, which has jurisdiction pursuant to Utah Code Ann. § 78-2-3(j). The Utah Supreme Court, pursuant to Rule 42 of the Utah Rules of Appellate Procedure, poured this appeal over to this Court. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED ON APPEAL

- I. Whether statute of limitations was tolled due to a statutory prohibition for a period from June 12, 2003 to November 3, 2003 of Appellee BIG 5 CORP, a Delaware corporation.

Standard of Review: The applicability of a statute of limitations is a question of law which is reviewed for correctness. *Spears v. Warr*, 2002 UT 24, 44 P.3d 742. “However, the applicability of the statute of limitations and the discovery rule also involves a subsidiary factual determination--the point at which a person reasonably should know that he or she has suffered a legal injury. This is a question of fact.” *Id.*

- II. Whether placing of the Complaint in the date stamp pleadings drop box

at the rear entrance of Scott Mattheson Courthouse constitutes a filing for purposes of establishing the date filed of pleadings.

Standard of Review: The placing of a complaint in the date/time stamping box for filing pleadings constitutes a filing for establishing the date of filed pleadings is a question of law which is reviewed for correctness. *Spears v. Warr*, 2002 UT 24, 44 P.3d 742. “However, the use of the pleadings drop box also involves a subsidiary factual determination--the point at which a person reasonably should know that he or she has properly filed a complaint. This is a question of fact.” *Id.*

- III. Whether Appellant was entitled to a hearing on Defendant /Appellee’s Motion for Summary Judgment, and/or whether Appellant was entitled to a hearing on Plaintiff/Appellant’s Motion to Alter or Amend.

Standard of Review: The applicability of Rule 7 (e) Utah Rules of Civil Procedure involving a final disposition is a question of law which is reviewed for correctness. *Spears v. Warr*, 2002 UT 24, 44 P.3d 742. “However, the applicability of Rule 7 (e) Utah Rules of Civil Procedure involving a final disposition also involves a subsidiary factual determination-whether the opposition to the motion is frivolous or the issue has been authoritatively decided. This is a question of fact.” *Id.*

DETERMINATIVE AUTHORITY

Resolution of this case necessarily involves application of the following Utah

Code provisions and Rule:

§ 78-12-41 Effect of injunction or prohibition

When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

§78B-2-307 (§ 78-12-25) Within four years.

An action may be brought within four years:

(1) after the last charge is made or the last payment is received:

(a) upon a contract, obligation, or liability not founded upon an instrument in writing;

(b) on an open store account for any goods, wares, or merchandise; or

(c) on an open account for work, labor or services rendered, or materials furnished;

(2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1); and

(3) for relief not otherwise provided for by law.

Renumbered and Amended by Chapter 3, 2008 General Session

Rule 7 of Utah Rules of Civil Procedure

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

STATEMENT OF THE CASE

This case arises out of an accident that occurred on December 1, 2001 at the store of Defendant/Appellee, BIG 5 CORP dba BIG 5 SPORTING GOODS, hereinafter referred to as "BIG 5", located at 2236 South 1300 East, Salt Lake City, Utah. Plaintiff/Appellant, Mark Greer, hereinafter referred to as "Greer", was shopping with his sons for a snowboard. While they were looking at snowboards, one board that was placed on display, high on the wall, fell and hit Greer in the head. Greer's counsel filed the Complaint (R-1-5) in this matter by placing it in the after hours box for filing pleadings near the rear door of the Mattheson Courthouse on November 28, 2005. He date stamped a copy of the Complaint for his records. A copy of that date stamped Complaint (R-60-62) was served on BIG 5. BIG 5 filed a Motion to Dismiss with an accompanying Memorandum in Support of Motion to Dismiss (R-12-20). After withdrawing its Motion to Dismiss (R-29), BIG 5 filed an Answer and Jury Demand (R-24-28). On October 24, 2007, BIG 5 filed a Motion for Leave to

Amend Answer (R-43-45) and BIG 5 filed an Amended Answer (R-69-73). BIG 5 then filed a Motion for Summary Judgment with accompanying Memorandum in Support of Motion for Summary Judgment (R-74-80). Greer filed a Reply Memorandum in Opposition to Defendant's Motion for Summary Judgment with attachments including the Certificate of Resignation of Registered Agent (R-89-95). BIG 5 filed a Reply Memorandum in Support of Motion for Summary Judgment with a Notice to Submit for Decision (R-96-116). Greer filed a Notice to Submit for Decision and Request for Oral Argument (R-123-124). On March 28, 2008, Judge Dever issued a Ruling granting BIG 5's Motion for Summary Judgment (R125-128). Greer filed a Motion to Alter Judgment or Motion to Set Aside Judgment with a Memorandum in Support of the Motion (R-129-133). Big 5 filed a Memorandum in Opposition to Plaintiff's Motion to Alter, Amend or Set Aside the Judgment (R-134-138). Greer filed his Notice of Appeal on April 25, 2008. On May 5, 2008, Greer filed a Reply Memorandum in support of Motion to Alter Judgment or Motion to Set Aside Judgment (R-145-147) and a Notice to Submit for Decision and Request for Oral Argument (R-148-149) . Judge Dever entered a Minute Entry Ruling/Motion to Alter or Set Aside on May 8, 2008 denying Plaintiff Greer's Motion (R-150-151).

STATEMENT OF FACTS

This case arises out of an accident that occurred on December 1, 2001 at the store of Defendant/Appellee, BIG 5 CORP dba BIG 5 SPORTING GOODS.

Plaintiff/Appellant, Mark Greer, hereinafter referred to as “Greer,” was shopping with his sons for a snowboard. (R-1-5) While they were looking at snowboards, one board that was placed on display, high on the wall above the snowboard rack, dislodged for no apparent reason, other than it had not been secured, and hit Greer in the head. Greer was severely injured and has incurred large medical bills and lost income as a result of this incident. Greer’s counsel filed the Complaint (R-1-5) in this matter by placing it in the after hours box for filing pleadings near the rear door of the Mattheson Courthouse on November 28, 2005, after visiting his father in the hospital shortly before his death. When he dropped it off, he date stamped a copy of the Complaint for his records. A copy of that date stamped Complaint (R-60-62) was served on BIG 5. Initially Big 5 filed a Motion to Dismiss(R-29) which BIG 5 later withdrew. BIG 5 then filed an Answer and Jury Demand (R-24-28). On October 24, 2007, BIG 5 filed a Motion for Leave to Amend Answer (R-43-45) and BIG 5 filed an Amended Answer (R-69-73). BIG 5 then filed a Motion for Summary Judgment with accompanying Memorandum in Support of Motion for Summary Judgment (R-74-80). Greer filed a Reply Memorandum in Opposition to Defendant’s Motion for Summary Judgment, with attachments including the Certificate of Resignation of Registered Agent (R-89-95). BIG 5's Reply Memorandum in Support of Motion for Summary Judgment was filed with a Notice to Submit for Decision (R-96-116). Greer filed a Notice to Submit for Decision and Request for Oral Argument (R-123-124). On March 28, 2008, Judge Dever, without

the requested oral argument (hearing), issued a Ruling granting BIG 5's Motion for Summary Judgment (R125-128). Greer filed a Motion to Alter Judgment or Motion to Set Aside Judgment with a Memorandum in Support of the Motion (R-129-133). Big 5 filed a Memorandum in Opposition to Plaintiff's Motion to Alter, Amend or Set Aside the Judgment (R-134-138). Greer filed his Notice of Appeal on April 25, 2008. On May 5, 2008, Greer filed a Reply Memorandum in Support of Motion to Alter Judgment or Motion to Set Aside Judgment (R-145-147) and a Notice to Submit for Decision and Request for Oral Argument (R-148-149). Judge Dever, again without requested oral argument, entered a Minute Entry Ruling/Motion to Alter or Set Aside on May 8, 2008, denying Plaintiff Greer's Motion (R-150-151).

SUMMARY OF ARGUMENT

The District Court determined that Plaintiff's Complaint was barred because the District Court Complaint was date stamped December 2, 2005. However, the Plaintiff/Appellant's Counsel's copy date was stamped November 28, 2005, when the Complaint was filed in the court drop box. When challenging a finding of fact, Appellate Counsel is required to properly marshal the evidence. *Child v. Gonda*, 972 P.2d 425, 433-34 (Utah 1998). Here there is literally no evidence to marshal. Mr. Greer properly marshals the evidence supporting the trial Court's findings of fact, which is literally only the filed original complaint. That original complaint is compared with the date stamped copy served upon BIG 5. Additionally, Mr. Greer

having properly marshaled the evidence, shows that evidence exists that would raise sufficient questions of fact and place the rules of law in question, *Chen v. Stewart*, 2004 UT 82, 100 P.3rd 1177. Mark Greer's claims are not barred by the statute of limitation. Plaintiff/Appellant's Counsel placed the original Complaint in the box designated for filing of pleadings after hours on November 28, 2005. Appellant argues that is the date of the filing of the Complaint. If November 28, 2005 is determined to be the date of the filing of Complaint, Summary Judgment cannot be granted. If it is determined that the date stamped by the clerk of court on December 2, 2005, then Summary Judgment is proper unless the statute of limitation has been tolled. Defendant BIG 5, a Delaware Corporation, was subject to statutory prohibition for a period from June 12, 2003 to November 2, 2003. The above arguments are not frivolous and have not been decided and the issue has not been authoritatively decided. Therefore, Mark Greer was entitled to a hearing on both his Opposition to Summary Judgment and his Motion to Alter or Amend Judgment pursuant to Rule 7(e) of Utah Rules of Civil Procedure.

ARGUMENT.

I

**WHETHER STATUTE OF LIMITATIONS WAS TOLLED DUE TO A
STATUTORY PROHIBITION FOR A PERIOD FROM JUNE 12, 2003 TO
NOVEMBER 3, 2003 OF APPELLEE BIG 5 , A DELAWARE CORPORATION.**

Defendant properly states that Plaintiff's Negligence Action must be brought within

four years of the accident unless it is tolled for appropriate reasons. That is exactly what occurred in the present case. If it is determined that placing the Complaint in the rear receptacle is not a filing for date purposes, the Utah Code states, **§ 78-12-41 Utah Code Annotated. Effect of injunction or prohibition.** When the commencement of an action is stayed by injunction or a statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

The Appellee BIG 5, a Delaware corporation, was subject to a statutory prohibition for a period from June 12, 2003 to November 3, 2003 (R-94-95). It was subject to this statutory prohibition because it was no longer an active corporation. This was because it had forfeited its Certificate of Incorporation under Delaware Law.

Delaware Statutes § 136: Resignation of registered agent not coupled with appointment of successor. The period of time that it did not have a Certificate of Incorporation was 144 days. In the present case, according to the ruling of The District Court, the Complaint is filed one day late, a fact disputed by Appellant. Under any circumstances, it is not late. Appellant had an additional 144 days in which to file his Complaint, if he so desired.. The suspension or forfeiture of a corporation stayed the statute of limitations. Further, Utah Code states, **§78-12-35.**

Effect of absence from state.

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return

to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action. The Utah Court of Appeals has upheld this tolling even though the individual was subject to service under the Utah Long Arm Statute, Utah Code Ann. § 78-27-24.

In *Arnold v. Grigsby*, 2008 UTCA 20060481 - 022808; The Court stated,

the trial court nonetheless determined that the tolling provision of section 78-12-35 did not apply in this case because, under Utah's long-arm statute, Dr. Grigsby was subject to Utah's jurisdiction and amenable to service of process in the state where he resided. The trial court relied on *Snyder v. Clune*, 15 Utah 2d 254, 390 P.2d 915 (1964), *Van Tassell v. Shaffer*, 742 P.2d 111 (Utah Ct. App. 1987), and *Ankers v. Rodman*, 995 F. Supp. 1329 (D. Utah 1997), and reasoned that, because the Arnolds could serve Dr. Grigsby in Tennessee, "the purpose of the tolling statute . . . 'to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation'" was not furthered. While there is a certain logic to the trial court's analysis, we conclude that the trial court erred in making this determination, as the issue was recently put squarely before the Utah Supreme Court, which reached the opposite conclusion.

¶21 In *Olseth v. Larsen*, 2007 UT 29, 158 P.3d 532, the Utah Supreme Court answered a certified question of state law from the United States Court of Appeals for the Tenth Circuit. See id. ¶ 1. The question was whether ¶22 The appellee in *Olseth* argued that "when the purpose of the tolling statute conflicts with its literal meaning, the purpose must be given effect." Id. ¶ 20. Accordingly, he claimed that "the tolling statute should no longer apply because the need to delay the running of the statute of limitations ceases to exist when "the long-arm statute . . . brings a defendant within the personal jurisdiction of the court."

The statute of limitations tolled under Utah Code Ann. § 78-12-35 states that when a person against whom a claim has accrued has left the state of Utah

and has no agent within the state of Utah upon whom service of process can be made, and the person is amenable to service outside the state, pursuant to Utah's long-arm statute, Utah Code Ann. § 78-27-24, the statute of limitations is tolled anyway. That is akin to the fact that even though a corporation was not in existence for 144 days it could still be served under Utah law.

If a corporation does not have its Certificate of Incorporation, it does not exist in its own state of incorporation. In this case that state would be Delaware. If it doesn't exist in Delaware, it doesn't exist here in Utah. BIG 5 was absent from the State of Utah. It didn't exist for 144 days. Hence, it was not in Utah regardless of whether it had an agent of process or not. This fact cannot be remedied by the reinstatement of BIG 5 144 days later. Therefore the statute of limitations was tolled for 144 days. For purposes of argument only, if you accept the fact that the filing of the Complaint was not until December 2, 2005, it was still filed within the 4 year statute of limitation.

II

**WHETHER PLACING OF THE COMPLAINT IN THE DATE
STAMP PLEADINGS DROP BOX AT THE REAR ENTRANCE OF
SCOTT MATTHESON COURTHOUSE CONSTITUTES A FILING
FOR PURPOSES OF ESTABLISHING THE DATE FILED OF
PLEADINGS.**

The Third District Court pleadings drop box must be viewed in the same light as a pleadings box located within the confines of the court clerk's office. It would not serve its purpose if it was not. A pleading is deemed filed when it is given to a court clerk whether it is handed, or placed in the drop box. Therefore, when Appellant's Counsel placed the Complaint in the drop box on November 28, 2005, it was filed. November 28, 2005 should be the controlling date for the statute of limitations. Appellant's Complaint was filed within the 4 years required by statute regardless of whether the tolling statute applies.

III

**WHETHER APPELLANT WAS ENTITLED TO A HEARING ON
DEFENDANT /APPELLEE'S MOTION FOR SUMMARY JUDGMENT,
AND/OR WHETHER APPELLANT WAS ENTITLED TO A HEARING ON
PLAINTIFF/APPELLANT'S MOTION TO ALTER OR AMEND.**

Was the Court required to grant a hearing or oral argument in a Motion for

Summary Judgment? Rule 7 (e) of Utah Rules of Civil Procedure states:

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

The Defense Motion for Summary Judgment was under Rule 56. Rule 7(e) of Utah Rules of Civil Procedure states that “the Court **shall** grant a request for a hearing on a motion under Rule 56”. Rule 7(e) does **not** say that the Court **may** grant a request for a hearing on a motion under Rule 56. It states “**shall** grant a request for a hearing on a motion under Rule 56.” The Court has no choice, it is required by statute to grant a hearing on a Rule 56 motion if it is not considered frivolous or if it has been authoritatively decided. Plaintiff’s Motion is not frivolous nor has it been authoritatively decided. Mark Greer’s Motion to Alter or Amend addresses the Court’s mistake in failing to grant the hearing on the Summary Judgment. Hence, its denial by the Court is a dispositive ruling and as such should require a hearing since it is neither frivolous nor has been authoritatively decided.

CONCLUSION

The Summary Judgment was improper. The Complaint was filed timely. It was filed on November 28, 2005 when it was placed in the pleading receptacle

located at the back of the Mattheson Courthouse. Greer's Counsel should be justified in relying on the date stamp of the pleading receptacle. If that placement is not controlling, it was timely filed because the statute of limitations was stayed by statutory prohibition. That prohibition exists because BIG 5 had forfeited its Certificate of Incorporation under Delaware Law. It forfeited its Certificate of Incorporation for 144 days. It does not matter that when it is reinstated those 144 days disappear. This loss of incorporation for 144 days should stay the statute of limitations even though service could still have occurred just the same as the long arm statute. BIG 5's Motion for Summary Judgment should have had a hearing as it was not frivolous nor had the question been ruled on authoritatively. Greer's Motion to Alter or Amend is also entitled to a hearing because it addresses the failure to allow the hearing in the Summary Judgment matter.

Therefore the Summary Judgment should be set aside and the case should be allowed to go forward.

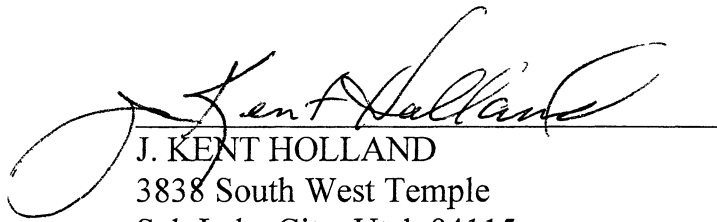
Respectively submitted this ____ day of September 2008.

J. KENT HOLLAND
3838 South West Temple
Salt Lake City, Utah 84115
Attorney for Appellant

located at the back of the Mattheson Courthouse. Greer's Counsel should be justified in relying on the date stamp of the pleading receptacle. If that placement is not controlling, it was timely filed because the statute of limitations was stayed by statutory prohibition. That prohibition exists because BIG 5 had forfeited its Certificate of Incorporation under Delaware Law. It forfeited its Certificate of Incorporation for 144 days. It does not matter that when it is reinstated those 144 days disappear. This loss of incorporation for 144 days should stay the statute of limitations even though service could still have occurred just the same as the long arm statute. BIG 5's Motion for Summary Judgment should have had a hearing as it was not frivolous nor had the question been ruled on authoritatively. Greer's Motion to Alter or Amend is also entitled to a hearing because it addresses the failure to allow the hearing in the Summary Judgment matter.

Therefore the Summary Judgment should be set aside and the case should be allowed to go forward.

Respectively submitted this 14th day of September 2008.


J. KENT HOLLAND
3838 South West Temple
Salt Lake City, Utah 84115
Attorney for Appellant

CERTIFICATE OF SERVICE

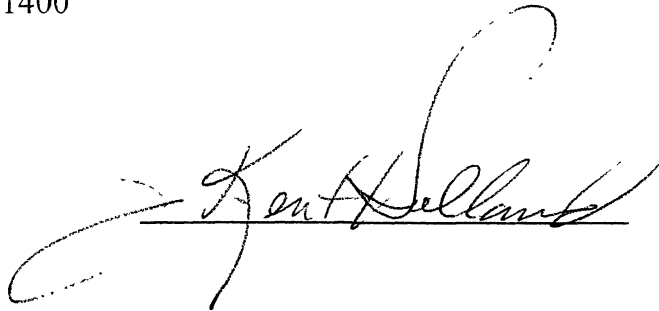
I HEREBY CERTIFY that I am a member of, and/or employed by the law firm of J. Kent Holland, 3838 South West Temple, Salt Lake City, Utah 84115, and that two (2) true and correct copies of the foregoing BRIEF OF APPELLANT were caused to be served upon the following depositing Hand Delivering thereon, this ____ day of September, 2008.

Rick L. Rose
Kristine M. Larsen
RAY QUINNEY & NEBEKER P.C
36 South State Street, Suite 1400
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of, and/or employed by the law firm of J. Kent Holland, 3838 South West Temple, Salt Lake City, Utah 84115, and that two (2) true and correct copies of the foregoing BRIEF OF APPELLANT were caused to be served upon the following deposing Hand Delivering thereon, this 16th day of September, 2008.

Rick L. Rose
Kristine M. Larsen
RAY QUINNEY & NEBEKER P.C
36 South State Street, Suite 1400
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "J. Kent Holland", is written over a horizontal line. The signature is fluid and stylized, with a large loop at the end of the last name.

J. KENT HOLLAND, #1520
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FILED
UTAH APPELLATE COURTS
SEP 26 2008

IN THE COURT OF APPEALS

STATE OF UTAH,

MARK GREER,

Appellant,

vs,

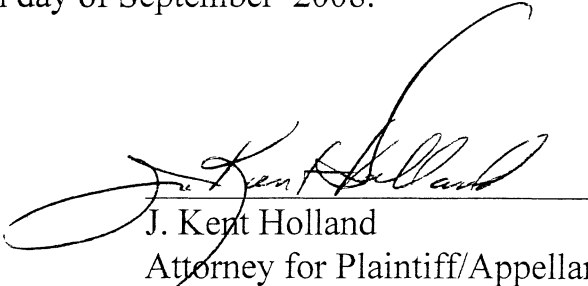
BIG 5 CORP. dba BIG 5 SPORTING
GOODS. a Corporation,

BRIEF ADDENDUM

Case No. 20080364 CA

Plaintiff/Appellant, by and through his counsel of record, J Kent Holland states to the Court that only Addendum necessary is Delaware Statute Corporations § 136 which is attached.


Submitted this 26th day of September 2008.


J. Kent Holland
Attorney for Plaintiff/Appellant

CERTIFICATION

I HEREBY CERTIFY that true and correct copies of Brief Addendum was mailed postage prepaid on 4 day of September 2008 to the following:

Rick L. Rose
Kristine M. Larsen
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
Salt Lake City, Utah 84145

A handwritten signature in black ink, appearing to read "Mr. Rick L. Rose", written over a horizontal line.

§ 136**Statutes****TITLE 8 Corporations****CHAPTER 1. GENERAL CORPORATION LAW****§ 136 Resignation of registered agent not coupled with appointment of successor.**

§ 136. Resignation of registered agent not coupled with appointment of successor.**Subchapter III. Registered Office and Registered Agent**

(a) The registered agent of 1 or more corporations may resign without appointing a successor by filing a certificate of resignation with the Secretary of State, but such resignation shall not become effective until 30 days after the certificate is filed. The certificate shall be executed and acknowledged by the registered agent, shall contain a statement that written notice of resignation was given to each affected corporation at least 30 days prior to the filing of the certificate by mailing or delivering such notice to the corporation at its address last known to the registered agent and shall set forth the date of such notice.

(b) After receipt of the notice of the resignation of its registered agent, provided for in subsection (a) of this section, the corporation for which such registered agent was acting shall obtain and designate a new registered agent to take the place of the registered agent so resigning in the same manner as provided in § 133 of this title for change of registered agent. If such corporation, being a corporation of this State, fails to obtain and designate a new registered agent as aforesaid prior to the expiration of the period of 30 days after the filing by the registered agent of the certificate of resignation, the Secretary of State shall declare the charter of such corporation forfeited. If such corporation, being a foreign corporation, fails to obtain and designate a new registered agent as aforesaid prior to the expiration of the period of 30 days after the filing by the registered agent of the certificate of resignation, the Secretary of State shall forfeit its authority to do business in this State.

(c) After the resignation of the registered agent shall have become effective as provided in this section and if no new registered agent shall have been obtained and designated in the time and manner aforesaid, service of

legal process against the corporation for which the resigned registered agent had been acting shall thereafter be upon the Secretary of State in accordance with § 321 of this title.

(8 Del. C. 1953, § **136**; 56 Del. Laws, c. 50; 56 Del. Laws, c. 186, § 2; 64 Del. Laws, c. 112, § 5; 69 Del. Laws, c. 233, §§ 1-3; 70 Del. Laws, c. 79, §§ 5, 6; 70 Del. Laws, c. 587, § 11.)

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