

1986

Wendell L. Butcher, Irene B. Butcher v. Frank K. Gilroy, R.G.H., Inc. : Brief of Respondent

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

DOCKET NO. 860111-CA * * * * *

WENDELL L. BUTCHER and
IRENE B. BUTCHER,

Plaintiffs and
Appellants,

vs.

FRANK K. GILROY and R.G.H.,
INC., a Utah corporation,

Defendants and
Respondents.

No. 20592

860111-CA

* * * * *

BRIEF OF RESPONDENTS FRANK K. GILROY AND R.G.H., INC.

* * * * *

Appeal from the Order of the
Third Judicial District Court
in and for Salt Lake County,
State of Utah,
Hon. John A. Rokich, Judge

* * * * *

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Clerk, Supreme Court, Utah

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether as pleaded in the Complaint, the Butchers' claims for breach by Gilroy of an agreement between the parties is barred by the six-year statute of limitations applicable to written obligations;

2. Whether Gilroy's sale of property to R.G.H. Inc. in March, 1982 constituted a "payment" under the parties' agreement within the meaning of Utah Code Ann. § 78-12-44 (1977).

STATUTES

This appeal addresses the district court's application of the six-year statute of limitations, Utah Code Ann. § 78-12-23 (1977) which reads as follows:

78-12-23. Within six years.--Within six years

(1) An action for the mesne profits of real property.

(2) An action upon any contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding section [78-12-22].

Reference is also made to Utah Code Ann. § 78-12-1 (1977) which reads as follows:

78-12-1. Time for commencement of actions generally.--Civil actions can be commenced only within the periods prescribed in this chapter, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute.

The plaintiff-appellants have asserted Utah Code Ann. § 78-12-44 (1977) as a basis for avoiding the bar of the statute of limitations. That section reads as follows:

78-12-44. Payment--Acknowledgement--Promise to pay extends period.--In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charge thereby. When a right of action is barred by the provisions of any statute it shall be unavailable either as a cause of action or ground of defense.

In addition, the application of Rules 9, 11, and 24 of the Utah Rules of Appellate Procedure to the prosecution of this

appeal may prove dispositive. These rules are reproduced as Exhibits "E", "F", and "G" of the Addendum. For the convenience of this Court, Rules 8, 9 and 12(b), Utah Rules of Civil Procedure, have been included as Exhibits "H", "I" and "J" of the Addendum.

STATEMENT OF THE CASE

This is an action in which Wendell and Irene Butcher ("Butchers") sought damages and/or an accounting arising from Frank Gilroy's alleged breach of contract, specifically a settlement agreement arising out of a prior lawsuit. See Settlement Agreement, annexed hereto as Exhibit "A" of the Addendum, R. at 37-41. The original Complaint, filed on March 26, 1984, see R. at 2-11, was the subject of a Rule 12(b)(6) motion to dismiss raising the bar of the statute of limitations. See R. at 16-17. On August 13, 1984, the Butchers moved to amend their Complaint, see R. at 22, which was stipulated to by counsel and ordered by the Court. See R. at 43, 45-46; Amended Complaint, annexed hereto as Exhibit "B" of the Addendum, R. at 34-42. On November 19, 1984, R.G.H., Inc. filed a Rule 12(b)(6) motion to dismiss on the ground that the Amended Complaint asserted no claim against it, see R. at

47, and joined in a similar motion filed that day by Gilroy seeking a dismissal grounded upon the statute of limitations. See R. at 49, 51-57. A series of memoranda were filed, and the District Court, the Honorable John A. Rokich presiding, heard the motions on February 25, 1985. See R. at 64-66, 67-72, 74-76, 79.

On March 13, 1985 the District Court entered orders granting both motions to dismiss, true and correct copies of which are annexed hereto as Exhibits "C" and "D" of the Addendum. See R. at 80-83.

On April 1, 1985, counsel for the Butchers filed a Notice of Appeal with the Clerk of the Third District Court, accompanied by two documents, entitled "Docketing Statement" and "Designation of Record on Appeal," respectively. See R. at 84-91.

STATEMENT OF FACTS

The following statement of facts is derived from the Amended Complaint filed in this action, whose factual allegations are to be taken as correct for the purposes of the

Rule 12(b)(6) motions and this appeal. See e.g., Bryan v. Stillwater Board of Realtors, 578 F.2d 1319, 1321 (10th Cir. 1977).

1. "On or about October 18, 1971, Wendell L. Butcher, Irene B. Butcher, and Frank K. Gilroy stipulated to an entry of an order and judgment as Civil No. 179775. As part of the stipulation, a settlement agreement attached hereto as Exhibit A. was entered into. Frank K. Gilroy was to hold title to 33 acres surrounding Mt. Dell Golf Course subject to the requirement in paragraph 6 that he sell the property by April, 1976 for the best price attainable and the proceeds be apportioned with 32% paid to the [Butchers] and 68% to [Gilroy]." Amended Complaint at ¶ 4, R. at 34.

2. "[The Butchers] and Frank K. Gilroy attempted to sell the property over the years but because of various subdivision development changes and watershed questions, the parties were delayed in selling the property." Amended Complaint at ¶ 5, R. at 34-35.

3. "On or about March 8, 1982, within six years of the performance sale date of April, 1976, Frank K. Gilroy sold the

property in question to R.G.H., Inc. without notifying [the Butchers] or accounting to them for their share of the proceeds." Amended Complaint at ¶ 6, R. at 35.

4. "[The Butchers] continued to attempt to sell the property and periodically notified Frank K. Gilroy of their progress in this regard. Frank K. Gilroy at no time notified plaintiffs that he had sold the property, and continued to encourage [the Butchers] in their efforts to find a buyer and acquire the necessary building permits from Salt Lake City. Based upon Frank K. Gilroy's representation and assurances that he was also trying to perform the contract, [the Butchers] continued to attempt to sell the property and work with the city to obtain permits for the property." Amended Complaint at ¶ 7, R. at 35.

5. "To date, Frank K. Gilroy has failed to account to [the Butchers] or pay them the amounts due and owing under the stipulated agreement as was repeatedly promised." Amended Complaint at ¶ 8, R. at 35.

6. R.G.H., Inc. and Gilroy dispute the assertion in the Butchers' statement of facts that "[t]he settlement agreement

required both appellants and respondents to use their best efforts to sell the 34 acres and divide the proceeds proportionately." Butcher Brief at 2. The "Settlement Agreement" attached to the Amended Complaint specifically provides that "such sale or disposition shall be conducted by Gilroy at a price to be determined by Gilroy in his discretion." See "Settlement Agreement" attached to Amended Complaint at ¶ 6, R. at 39. Furthermore, the Amended Complaint specifically states that Gilroy "was to hold title to 33 acres surrounding Mt. Dell Golf Course subject to the requirement in paragraph 6 that he sell the property by April 1976" See Amended Complaint ¶ 4, at R. 34. Therefore, neither the Amended Complaint nor the "Settlement Agreement" annexed thereto reflect the requirement asserted by the brief. See R. at 34-42. In addition, the Butchers make no reference to the pages of the original record in support of any factual assertion in their brief, all in violation of Rule 24(e), Utah Rules of Appellate Procedure. See Part V, infra.

SUMMARY OF ARGUMENTS

1. The Butchers' Amended Complaint pleaded no cause of action whatsoever against R.G.H., Inc. Where a complaint seeks no relief against a named party defendant, it plainly fails to state a claim against that defendant upon which relief may be granted.

2. The settlement agreement at issue between the parties is properly treated as an executory accord and its enforcement is determined through application of contract law principles. The Butchers' claim against Gilroy arises out of his total breach of his duty of performance under the parties' agreement, which occurred when he failed to sell the property in question in April 1976. The Butchers' claim accrued at that time and was barred six years later by the statute of limitations.

3. Nothing about Gilroy's sale of the property to R.G.H., Inc. in March, 1982 operates to extend the time in which the Butchers could commence their action. Gilroy made no "payment" to the Butchers which would toll the statute of limitations under Utah Code Ann. § 78-12-44; nor did the sale itself come within the language of that section. The facts of total breach

by Gilroy and the Butchers' knowledge of those facts were complete in April of 1976.

4. Any non-disclosure by Gilroy of the 1982 sale was immaterial to the Butchers' prospective action against Gilroy for his total breach in 1976. The fact of the ultimate sale was not a fact necessary to the Butchers' determination following April, 1976 that a cause of action existed.

5. The correctness of the rulings by the district court below should be presumed by this Court as a consequence of the Butchers' total failure to support the factual allegations in their brief by citation to the record, their failure to file a docketing statement in compliance with Rule 9 requirements, their failure to follow Rule 11 requirements regarding preparation of a transcript, among other rule violations.

6. The Butchers' argument, raised in their brief, that the statute of limitations should be tolled due to Gilroy's purported absence from the state, is not supported by any well-pleaded facts in their Amended Complaint and is not properly before this Court. The allegation finds no support in the record.

7. The Butchers did not amend their complaint to include any allegation of Gilroy's absence from the state either following the respondent's first motion to dismiss based upon the statute of limitations, or following Judge Rokich's order of dismissal, which had allowed them additional leave to amend. Their election to appeal rather than to amend waives any reliance upon Gilroy's absence as a basis for tolling the statute of limitations. It was not properly at issue before the court below or this Court on review.

ARGUMENTS

I. THE ORDER GRANTING R.G.H., INC.'S MOTION TO DISMISS SHOULD BE AFFIRMED; THE AMENDED COMPLAINT SETS FORTH NO CLAIM AGAINST R.G.H., INC. AT ALL.

Rule 8(a), Utah Rules of Civil Procedure, requires that a pleading setting forth a claim for relief "shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled." This requirement is amplified by Rule 8(e)(1), which demands that "[e]ach averment of a pleading shall be simple, concise, and direct."

The Appellants' Amended Complaint fails to allege any facts stating any claim for legal or equitable relief against R.G.H., Inc. See copy of Amended Complaint annexed hereto as Exhibit "B" of the Addendum; R. at 34-42. In fact, the prayer for relief makes no mention whatsoever of R.G.H., Inc. See R. 35-36.

In the most literal and absolute sense, the Amended Complaint fails "to state a claim upon which relief can be granted" against R.G.H., Inc. See Rule 12(b)(6), Utah Rules of Civil Procedure. The District Court's order granting R.G.H.'s Motion to Dismiss should be affirmed.

II. THE ORDER GRANTING RESPONDENTS' JOINT MOTION TO DISMISS SHOULD BE AFFIRMED; THE BUTCHERS' ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Settlement Agreement is an Executory Accord Governed by Contract Law Principles.

Recent decisions of this Court have established that "an agreement of compromise and settlement in a legal dispute constitutes an executory accord." L&A Drywall, Inc. v. Whitmore Construction Co., 608 P.2d 626, 629 (Utah 1980) (footnote omitted); accord, Cox Construction Co. v. State Road Commission, 583 P.2d 85 (Utah 1978).

As such, a party to the agreement aggrieved by an alleged breach thereof by the other party has the option of seeking to enforce the settlement agreement, or regarding the agreement as rescinded and moving against the other party on the underlying claim.

L&A Drywall, Inc., 608 P.2d at 629 (footnote omitted). In this case, the Butchers decisively elected to seek enforcement of the Settlement Agreement in an independent proceeding. See also Restatement (Second) of Contracts § 281 (1981).

As such, the express terms of the Settlement Agreement should be construed and enforced as would be the provisions of other written contracts. See e.g., Condo v. Mulcahey, 88 A.D.2d 497, 454 N.Y.S.2d 308 (1982); cf. Millerberg v. Steadman, 645 P.2d 602 (Utah 1982); Robinson v. Utah State Department. of Natural Resources, 620 P.2d 519 (Utah 1980); Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605 (Utah 1979). The rules governing contract actions are applied to actions for breach of compromise or settlement agreements, including such matters as laches or limitations. See 15A C.J.S. Compromise & Settlement § 49 (1967); see also Annot., 94 A.L.R.2d 605 (1964).

B. The Butchers' Action Arises from Breach of the Terms of a Contract and is Barred by the Statute of Limitations.

The applicable statute of limitations provides that an action based on a written contract must be commenced within six years after the cause of action has accrued. Utah Code Ann. §§ 78-12-1; 78-12-23(2) (1977). It is well established that the statute of limitations begins to run at the moment a cause of action arises and the prospective plaintiff gains the right to apply to the courts for remedy. E.g., Fredericksen v. Knight Land Corporation, 667 P.2d 34 (Utah 1982); State Tax Commission v. Spanish Fork, 99 Utah 177, 181-82, 100 P.2d 575, 577 (Utah 1940).

Likewise, the general rule follows that where the period for performance of the contract is fixed, the right of action accrues and the statute begins to run at the expiration of that period. See, e.g., Howarth v. First National Bank of Anchorage, 540 P.2d 486, 490-91 (Alaska 1975) ("[A] cause of action for breach of contract accrues as soon as the promisor fails to do the thing contracted for, and the statute of limitations begins to run at such time.") "A breach of contract is a non-performance of any contractual duty of

immediate performance." Restatement of Contracts § 312; see Enterprise, Inc. v. Nampa City, 96 Idaho 734, 536 P.2d 729, 735 (1975). Thus, the six-year limitations period applicable to this action began running in April, 1976 when Gilroy failed to perform; in April, 1982, that statute became a complete bar to this action.

The obligation of Gilroy to sell the property and distribute its proceeds in April, 1976 represented the whole of Gilroy's remaining performance due under the agreement. As explained by the Restatement of Contracts § 313(1), "[a] total breach of contract is a breach where remedial rights provided by law are substituted for all the existing contractual rights, or can be so substituted by the injured party." Where the "remedial rights provided by law" can be so substituted, the cause of action necessarily accrues, triggering the running of the applicable limitations period. "A claim for total breach is one for damages based on all the injured party's remaining rights to performance." Restatement (Second) of Contracts § 236(1) (1981). "[I]t is clear that, whenever the court will hold that A's breach is a total breach, B can regard A's performance as at an end and at once maintain action for damages for all of his injury, past, present and future."

Corbin on Contracts § 946 at 926 (one vol. ed. 1952); see e.g., Riess v. Murchison, 503 F.2d 499, 1011-12 (9th Cir. 1974).

Where one party is in total breach of his contractual commitments then remaining, the law neither requires the injured party to delay his action until defendant attempts to cure the breach, nor tolls the statute of limitations until he does. Nothing prevented the Butchers from bringing an action against Gilroy when the April 1976 "performance date"--as the Complaint terms it--passed without the sale of the property.

The statute commences operation at the time of the breach, i.e., the failure to perform, rather than when actual damages are sustained as a consequence. E.g. Howarth, supra, 540 P.2d at 490-91. See also 54 C.J.S. Limitations of Actions § 125 (1948) (The statute of limitations begins to run when the contract is broken and the amount or kind of damage which a plaintiff claims and which may be recoverable by him on the breach is immaterial.) Gilroy's failure to perform by April 1976--not the ultimate sale of the property in 1982--was the operative event triggering the running of the limitations period.

III. GILROY'S SALE OF THE PROPERTY IN MARCH OF 1982 DOES NOT
EXTEND THE TIME DURING WHICH APPELLANTS MAY PROPERLY BRING
THIS SUIT.

The Respondent Gilroy sold the real property which was the subject of the Settlement Agreement in March, 1982. That sale, made years after Gilroy's total breach of the Settlement Agreement, cannot extend the time during which the Butchers may rightfully bring suit on the breach of obligations arising from that agreement.

A. Utah Code Ann. § 78-12-44 Does Not Extend Limitations
Period in this Case.

The Butchers argued below and in their Brief that Gilroy's receipt of payment from R.G.H., Inc. in 1982 constitutes a "payment" which operates to toll the statute of limitations pursuant to Utah Code Ann. § 78-12-44 (1978). That section provides:

--In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in

writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense. [Emphasis added.]

Appellants' reliance on that statute to support their argument, however, is inappropriate.

Utah Code Ann. § 78-12-44 was originally based upon and is similar to a Kansas statute. See Holloway v. Wetzel, 86 Utah 387, 45 P.2d 565 (1935). In construing their statute, the Kansas Supreme Court stated:

While the language of the statute is that a part payment shall operate to toll the limitations, it certainly cannot be understood to mean that such part payment made by any one at any time for any purpose would so operate; and it is well recognized in the books that such payment must be made by the obligor against whom the statute is sought to be tolled, or by someone at his direction, and made as a part payment of the debt, under such circumstances as to amount to an acknowledgment of an existing liability.

Good v. Ehrlich, 67 Kan. 94, 72 P. 545, 546 (1903) (emphasis added). Quoting Wood on Limitations, § 97, the Court continued:

In order to make a money payment a part payment within the statute, it must be shown to be a payment of a portion of an admitted debt, and paid to and accepted by the creditor as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder.

Id., 72 P. at 546 (emphasis added).

(In Good v. Erlich, the Supreme Court of Kansas held that collection under a promissory note from a third party pledgee did not constitute a "payment" for purposes of tolling the statute of limitations against the principal debtor.)

The Utah Supreme Court has followed the approach expressed in Good v. Ehrlich in construing Utah Code Ann. § 78-12-44. In Holloway v. Wetzel, 86 Utah 387, 45 P.2d 565 (1935), the Court, in construing a statute identical to Section 78-12-44, stated:

The great weight of authority is to effect that a part payment of either principal or interest by one of two or more joint and several obligors does not of itself suspend the running of the statute of limitations against the other co-obligors The reason for this rule is that joint and several or joint obligors are not necessarily the agent of each other and are not authorized to suspend the running of the

statute, one as against the other, merely because of that relationship; that the payment contemplated by the statute as tolling its effect must be one made by the party himself or by some one authorized by him to make it. The reason is well illustrated by the following language from the case of *Marienthal v. Mosler*, 16 Ohio St. 566, at page 570, in construing a statute identical in language to our Section 104-2-45: "It will be seen, however, that the same effect is given to such part payment as is given to a written promise 'signed by the party charged thereby.' It would seem, therefore, from analogy, that the payment must be made by the party to be affected thereby, or by an agent authorized for that express purpose. In the contemplation of the statute, the part payment of a debt is regarded as evidence of a willingness and obligation to pay the residue, as conclusive as would be a personal written promise to that effect. It could not, then, have been intended to give this effect to payments other than those made by the party himself, or under his immediate direction. Surely nothing short of this would warrant the assumption of a willingness to pay equal to his written promise to that effect."

Holloway v. Wetzell, 86 Utah 387, 391-92 45 P.2d 565, 568
(1935) citation omitted).

It is evident therefore, that before Section 78-12-44 can be applicable to extend a statute of limitations, the following conditions must be satisfied: (1) partial payment of either principal or interest due under a contract must be made, (2) by

the obligor under that contract, and (3) the payment must be made to the creditor under that contract. None of these conditions has been satisfied in the present case. R.G.H., Inc.'s payment to Gilroy arose from the sale of the property to Gilroy, not out of the "agreement" between the Butchers and Gilroy.

Had the Respondent Gilroy made some payment in 1982 to the Butchers, Section 78-12-44 might offer some aid. It is impossible, however, to infer from R.G.H., Inc.'s payment to Gilroy any renewed promise by Gilroy to pay any amount to the Butchers.

If Section 78-12-44 adds anything to this case, it can only add support to the ruling of the court below. To the extent that one may read the Amended Complaint to allege that Gilroy in some way acknowledged or promised to perform the contract following breach through "representations and assurances that he was also trying to perform the contract," Amended Complaint at ¶ 7, R. at 35, the express language of Section 78-12-44 forbids extension of the time for filing of the Butchers' lawsuit. To have such an effect, the new "acknowledgment or

promise must be in writing, signed by the party to be charged thereby." Id. (emphasis added).

The Butchers have pleaded no written promise or acknowledgment signed by Gilroy reestablishing his duty to perform under the contract following the April 1976 breach.

B. Case Law Relied Upon by Appellants Does Not Support Extension of the Limitations Period in this Case.

Both in memorandum below and in their brief on appeal, the Butchers rely upon Fredericksen v. Knight Land Corp., 687 P.2d 34 (Utah 1983), as precedent for maintaining this action. Fredericksen, however, is readily distinguishable on its facts. In that case, the plaintiff claimed entitlement to a share of proceeds from the sale of a number of parcels of land, which share was due whenever a parcel was sold. The parties set no deadlines or dates for the sale as a specific term of their contract. Fredricksen's claims for proceeds simply accrued each time another parcel was sold.

In contrast, the Settlement Agreement in this case expressly set an 18-month (April, 1976) deadline for Gilroy to sell the property and distribute proceeds. Unlike the

Fredericksen transactions, which were divisible into separate breaches accruing upon sale of each parcel, Gilroy was contractually bound to sell only one parcel. His failure to do so by April, 1976 was a total breach of the Agreement. The Butchers' cause of action arose at that time.

As this Court observed in Fredericksen:

The statute of limitations begins to run at the moment that a cause of action arises. See, e.g., Ash v. State, Utah 572 P.2d 1374 (1977); Kimball v. McCornick, 70 Utah 189, 259 P. 313 (1927). 'Ordinarily, a cause of action for a debt begins to run when the debt is due and payable because at that time an action can be maintained to enforce it.' O'Hair v. Kounalis, 23 Utah 2d 355, 357, 463 P.2d 799, 800 (1970) (quoting State Tax Commission v. Spanish Fork, 99 Utah 177, 182, 100 P.2d 525, 577 (1940). See also M.H. Walker Realty Co. v. American Surety Co., 60 Utah 435, 211 P. 998 (1972) (stating that in a breach of contract action the statute of limitations ordinarily begins to run when the breach occurs).

Id., 667 P.2d at 36. Breach of the contract in this case was complete when April, 1976 passed without sale of the property. Gilroy was at that time obligated to sell and distribute a share of the proceeds from that sale to the Butchers. At that moment, Gilroy became liable to the Butchers for breach of

contract and, according to Fredericksen, the statute of limitations commenced to run.

The Butchers cannot now prevail simply by reading the material terms out of the contract.

The limitations period with respect to Gilroy's breach of the agreement expired in April of 1982. The Butchers did not commence their action until March of 1984, almost two full years after the applicable statute of limitations had expired. Neither the sale of the Property to R.G.H., Inc. in March of 1982 nor Gilroy's receipt of payment for the Property tolled or otherwise extended the statute of limitations for an action from Gilroy's alleged April, 1976 breach, as the Court below correctly ruled.

IV. GILROY'S ALLEGED FAILURE TO NOTIFY BUTCHERS OF THE 1982 SALE DOES NOT PROVIDE BASIS FOR ESTOPPEL OR EQUITABLE TOLLING OF LIMITATIONS STATUTE.

Under the terms of the Settlement Agreement, Gilroy was required to sell the property by April, 1976 and deliver 32% of the proceeds to the Butchers. When the property was not sold

in April, 1976, both the Butchers and Gilroy had actual and complete knowledge that the agreement had been breached.

The Butchers' Amended Complaint does not allege facts sufficient to support any equitable tolling of the statute of limitations, or estoppel of Gilroy or R.G.H. to raise that defense. As set forth in Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981), "the general rule is that a cause of action accrues upon the happening of the last event necessary to complete the cause of action." Id., 635 P.2d at 86 (footnote omitted). Accord, Vest v. Bossard, 700 F.2d 600, 608 (10th Cir. 1983). In a contract action, the cause of action accrues upon breach of the contract.

Utah law recognizes three exceptions to this general rule under which the running of the statute of limitations does not begin to run when the cause of action normally "accrues." These exceptions are found where:

1. Commencement of the limitations period is postponed by legislation;

2. Exceptional circumstances make application of the general rule irrational or unjust; or

3. The defendant has concealed or misrepresented one or more facts necessary to a determination that a cause of action exists.

Myers, 635 P.2d at 86.

None of these exceptions apply to this case. The Butchers knew of the breach of contract by Gilroy at and after the time of the breach in April, 1976. Although the Butchers allege that Gilroy concealed the fact that the property had been sold in 1982, this fact was not necessary to a determination by the Butchers that a cause of action against Gilroy existed beginning in April of 1976 for breach of the Settlement Agreement. Every fact needed to plead that cause of action was known to the Butchers from and after that time.

This case is easily distinguished from cases such as Vincent v. Salt Lake County, 583 P.2d 105, 107 (Utah 1978), in which plaintiffs did not know the cause of damage to their property caused by seeping water and relied on a county

official's knowingly false representation that a county storm drain was not leaking into their property. Nowhere does the Complaint allege that Gilroy made repeated promises to the Butchers, that they would in fact be paid, as did the insurance agent in Rice v. Granite School District, 23 Utah 2d 22, 26-28, 456 P.2d 159, 163 (1969).

The Butchers' naked assertion in the brief that "respondents repeatedly promised to try to sell the property to prevent appellant from suing," Butcher Brief at 4, finds no support either in the allegations of the Amended Complaint, see R. at 34-35, or in any competent evidence in the record. No citation to the record is made by the Butchers, leaving this Court properly to assume the correctness of the court's ruling below. See Part V, infra.

V. APPELLANTS HAVE REPEATEDLY FAILED TO COMPLY WITH THE UTAH RULES OF APPELLATE PROCEDURE IN THE ATTEMPTED PROSECUTION OF THIS APPEAL.

From the outset, the Butchers' prosecution of this appeal has been marred by their repeated failure to comply with the requirements of the Utah Rules of Appellate Procedure. While some of the violations of the rules appear technical in nature,

others are of material importance and prejudicial effect. The cumulative effect of the Butchers' delinquencies frustrates and impairs the appeal process as envisioned by the new Rules, all to the prejudice of respondents Gilroy and R.G.H., Inc.

A. RULE 6: The Butchers Failed to File a Legally Sufficient Bond for Costs on Appeal.

Rule 6 of the Utah Rules of Appellate Procedure requires that each appellant "shall file with such notice [of appeal] a bond for costs on appeal . . . The bond shall be in the sum of at least \$300.00, or such greater amount as the district court may order . . . " At the time that the Butchers' notice of appeal was filed, counsel tendered to the clerk the amount of only \$100.00, which was transmitted to this Court. See R. at 92. The Butchers have filed no affidavit of impecuniosity excusing them from compliance with Rule 6.

B. RULE 9: The Butchers Failed to File a Docketing Statement With This Court; The Docketing Statement Served on Respondents Lacked Required Content.

Rule 9(a) of the Utah Rules of Appellate Procedure requires each appellant to file a docketing statement with the Clerk of the Supreme Court within 21 days of the filing of the notice of

appeal, and that "[a]n original and 7 copies shall be filed, together with proof of service." The Butchers had not filed a docketing statement with this Court as late as July 21, 1985, weeks after the deadline had passed.

A document entitled "Docketing Statement" appears in the record below, R. at 84-88, and was served by mail upon Gilroy and R.G.H., Inc. on March 29, 1985. Even if deemed to be the docketing statement required by Rule 9, its content proves materially deficient in several respects: (1) it cites Rule 72, Utah Rules of Civil Procedure as the "authority believed to confer jurisdiction" on this Court to hear this appeal, notwithstanding the fact that the rule had earlier been repealed, see Utah Court Rules Annotated 287 (1985 ed); (2) it makes a general conclusory statement of the issue on appeal notwithstanding the command of Rule 9(c)(5) that such statements are "not acceptable" and that the issue be "expressed in terms and circumstances of the case"; and (3) it failed to include, as an attachment, a copy of the order of the court below granting the joint motion of Gilroy and R.G.H. to dismiss, contrary to the requirements of Rule 9(d)(1).

The Butchers' failure to comply Rule 9's specific requirements both as to content and filing of the docketing statement justify the imposition of harsh sections. Rule 9(e) expressly provides:

Consequences of Failure to Comply.
Docketing statements which fail to comply with this Rule will not be accepted.
Failure to comply may result in dismissal of the appeal or petition.

As the Advisory Committee Note to Rule 9 re-emphasizes, "Paragraph (e) is explicit that a failure to comply with this Rule may result in dismissal fo the appeal."

C. RULE 11: The Butchers Failed to Comply With Requirements Respecting Preparation of Transcript of the Proceeding Below.

Rule 11(c) of the Utah Rules of Appellate Procedure imposes upon each appellant the specific duty to comply with Subparts (d) and (e) of that Rule. Rule 11(e) expressly requires the appellant to request from the court reporter a transcript of "such parts of the proceedings not already on file as he deems necessary" within 10 days after filing the notice of appeal. "If no such parts of the proceedings are to be requested,

within the same period an appellant shall file a certificate to that effect." Rule 11(e)(1), Utah Rule of Appellate Procedure.

The appellant's duty does not end there. Under Rule 11, silence communicates a specific message: "Unless the entire transcript is to be included, the appellant shall, within 10 days after filing the notice of appeal, file a statement of the issues he intends to present on the appeal and shall serve on the respondent a copy of the request [for partial transcript] or certificate [that no transcript is to be requested] and of the statement." Failure to serve such notice communicates the message that the appellant will request a transcript of the entire proceedings.

As of July 21, 1985, the Butchers had filed no certificate that a transcript would not be requested; nor did they serve upon Gilroy or R.G.H., Inc. any statement of intended issues or of their intent to order less than an entire transcript. Yet it appears from the record that no transcript has been ordered at all.

The Butchers' complete breach of their duties under Rule 11(e) works directly to the prejudice of Gilroy and R.G.H., Inc. For example, the respondents are unable to refer this Court directly to points in the hearing record below wherein they objected to the Butchers' assertion of facts extrinsic to the Amended Complaint in opposing the respondents' motions to dismiss.

Under former Rule 75(a)(1), an appellant's failure to comply with requirements regarding certificates as to transcripts warranted dismissal of the appeal. A similar sanction may prove useful in enforcement of the new Rule.

- D. RULE 24: The Contents of the Butchers' Brief Fail to Comply With Requirements of Rule 24(a), (d), (e), and (f).

In terms of the requirements of Rule 24, Utah Rules of Appellate Procedure with respect to the content of briefs, the Butchers' brief proves deficient in several respects: (1) it does not set out in verbatim fashion the statutes that the Butchers deem to be determinative [Rule 24(a)(5)]; (2) it defies the Rule's injunction to "keep to a minimum references to parties by such designations as 'appellant' and

'respondent'." [Rule 24(d)]; (3) most critically, it wholly fails to make reference to paging in the original record as prepared pursuant to Rule 11(b). Not a single citation to the record appears in the Butchers' brief [Rule 24(e)]; and (4) the "Appendix" to the Butchers' brief does not include "[c]opies of those parts of the record on appeal that are of central importance to the determination of the appeal (e.g. . . . the contract or document subject to construction, etc.)," such as the Amended Complaint or the Settlement Agreement between the Butchers and Gilroy that is the subject of this action. (Emphasis added.) [Rule 24(f)].

Particularly as to the requirement that citations be made to the paginated record on appeal, this Court has steadfastly refused to review or consider factual issues not directly identified to the record. As stated in Uckerman v. Lincoln National Life Insurance Co., 588 P.2d 142 (Utah 1978), "[t]his Court need not, and will not, consider any facts not properly cited to, or supported by, the record." Id. 588 P.2d at 144 (applying former Rule 75(p)(2)).

In State v. Steggell, 660 P.2d 252 (Utah 1983), for example, this Court observed that:

With respect to the first three points set forth above, the defendant's brief contains absolutely no references to the trial record or transcript to support his factual allegations. In State v. Tucker, Utah, 657 P.2d 755 (1982), this Court stated: This Court will assume the correctness of the judgment below if counsel on appeal does not comply with the requirements of Rule 75(p)(2)(2)(d), Utah Rules of Civil Procedure, as to making a concise statement of facts and citation of the pages in the record where they are supported.

Id., at 757 (citing Lepasiotes v. Dinsdale, 121 Utah 359, 242 P.2d 297 (1952)). See also, e.g., State v. Wulffenstein, Utah, 657 P.2d 289 (1982). In accordance with the rule set forth in State v. Tucker, we will assume the correctness of the trial court's judgment.

Id., 660 P.2d at 253 (footnotes ommitted). Even more recently, in White River Shale Oil Corp. v. Public Service Commission, _____ P.2d _____, 9 U.A.R.9 (Utah, decided May 2, 1985), this Court stated:

Utah Power and Light Co. has provided no citations to the record in its brief. Utah R. Civ. P. 75 (p)(2)(2)(d)(superceded on January 1, 1985, by Utah Rule of Appellate Procedure 24(e) and 24(K)) requires that, on appeal, the party must

make a concise statement of facts and citation of the pages in the record where those facts are supported. Failing that, this Court will assume the correctness of the judgment below. State v. Steggell, Utah, 660 P.2d 252 (1983) . . .

Id. 9 U.A.R. at 12 n.1.

Nothing in the text of new Rule 24(e) counsels any departure from this Court's prior approach, particularly in cases where the appellant makes no effort to raise his factual assertions through direct citations to the record as prepared and indexed under the Rules.

In this case, this Court should assume the correctness of the district court's rulings, particularly in relation to the Butchers' assertions in their brief of extrinsic facts concerning Gilroy's purported concealment of the 1982 sale or his alleged absence from the jurisdiction at times relevant to the statute of limitations.

VI. THE BUTCHERS' ALLEGATIONS THAT GILROY WAS ABSENT FROM THE STATE ARE NOT PROPERLY BEFORE THE COURT.

At pages 4-5 of the Butchers' Brief, it is argued that:

[t]here is also a question of fact as to whether the Gilroys, who maintain a Nevada residence, were absent from the state to prevent the tolling of the statute. Respondents extended stays in Nevada would delay the tolling of the statute of limitations, until their return under Section 78-12-35, U.C.A., 1953 as amended; see Snyder v. Clune, 390 P.2d 915, 15 U.2d. 54 (1964).

Even assuming that the Butchers meant to say that Gilroy's purported absence prevents the running of the statute of limitations period rather than its tolling, see Black's Law Dictionary 1334 (5th ed. 1979), once again the argument is devoid of citations to the record. See Part V, supra.

Furthermore, nothing in the Amended Complaint offers any support for the Butchers' argument; paragraphs 2 and 3 allege simply tht "Frank K. Gilroy is a resident of the state of Utah" and that "R.G.H., Inc. is a Utah corporation." R. at 34. The factual basis for the district court's rulings is confined to those allegations found within the four corners of the Amended

Complaint. E.g., Geisler v. Petrocelli, 616 F.2d 636, 639-40 (2d Cir. 1980). The court below made no determination to convert the respondents' motions into motions for summary judgment under Rule 56 -- the only way that facts extrinsic to the pleadings could have been considered under Rule 12(b)(6)--and no opportunity was given Gilroy or R.G.H., to present additional pertinent material as would be required if the motion was to be so converted. See Bekins Bar V Ranch v. Utah Farm Prod. Credit Ass'n, 587 P.2d 151, 152 (Utah 1978); Strand v. Associated Students, 561 P.2d 191, 193 (Utah 1977).

Even in the court below the matter was not proffered by affidavit or competent evidence; there, as here, counsel asserted the matter as part of a legal argument, see R. at 75, in a document entitled "Supplemental Reply Memorandum,"--one not provided for in the Third District Court's Supplementary Rules of Practice. See id., Rule 2(i).

Nix v. Fulton Lodge No. 2 of the Int'l Ass'n of Mach. & Aero. Workers, 452 F.2d 794, 798 (5th Cir. 1971), cert. denied 406 U.S. 946 (1972)(Points and authorities do not constitute matters outside the pleading sufficient to transform a Rule 12(b)(6) motion into a motion for summary judgment); Byron v.

University of Florida, 403 F.Supp. 49, 53 (N.D.Fla. 1975)(If a party wants the court to look to an extrinsic matter, he must put that information in proper evidentiary form); See also North Star International v. Arizona Corp. Commission, 720 F.2d 578, 582 (9th Cir. 1983). ("[I]t becomes apparent that a motion to dismiss is not automatically converted into a motion for summary judgment whenever matters outside the pleading happen to be filed with the Court and not expressly rejected by the Court.")

Rule 9(f) of the Utah Rules of Civil Procedure expressly provides that "[f]or 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." Where a plaintiff by the allegations of his complaint erects the bar of the statute of limitations, a motion to dismiss should be granted unless the plaintiff has also pleaded any exception upon which he relies. See e.g., Kincheloe v. Farmer, 214 F.2d 604, 605 (7th Cir. 1954), cert. denied 348 U.S. 920 (1955); Kaiser Aluminum v. Avondale Shipyards, Inc. 677 F.2d 1045 (5th Cir. 1982), cert. denied 459 U.S. 1105 (1983); Jablons v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1978).

VIII. THE BUTCHERS' ELECTION TO APPEAL RATHER THAN TO AMEND
THEIR COMPLAINT OPERATES AS A WAIVER OF ANY RELIANCE ON
GILROY'S PURPORTED ABSENCE.

It must be remembered that the Butchers were put on notice of the statute of limitations defense by the first motion to dismiss. See R. at 16-17. They chose not to plead Gilroy's alleged absence from the state as an exception to that defense in their Amended Complaint.

Furthermore, the Butchers declined the opportunity to further amend their complaint pursuant to Judge Rokich's order see R. at 83, choosing instead to appeal from that order. They in effect chose to stand on their original Amended Complaint and relinquished the argument they would now assert. Accord, Mitchell v. Archibald & Kendall, Inc., 573 F.2d 429, 432-33 (7th Cir. 1978)(applying Federal Rule 12 (b)(6)). That argument therefore can play no part in the testing of that pleading's sufficiency.

CONCLUSION

In applying the statutes of limitations, this Court has said:

In determining the question here presented, due regard must be given to the purpose and object of the statute. The law is wise and beneficial, and its objects sought not to be defeated by interpretation. It is entitled to the same respect as other statutes, and ought to be enforced, not only on the presumption, arising from lapse of time, that the debt has been paid, but because it is essentially a statute of repose. It affords protection against ancient demands, whether originally well founded or not, and serves as a warning against the consequences of laches The statute has a tendency to prevent oppressive charges, which might be made, almost with impunity, after a distance of time when the transaction has faded from memory, or the evidence has been lost, and to produce speedier adjustment of accounts and affairs.

See Kuhn v. Mount, 13 Utah 108, 44 P. 1036, 1037-38

(1896)(emphasis added). As so aptly summarized by the Butchers themselves in their brief on appeal:

An action based upon a written contract must be commenced within six years after the cause of action occurred; see Section 78-12-1, Section 78-12-[23](2), U.C.A., 1953, as amended. Thus, the cause of action


had to be initiated on or before April, 1982
(six years after the date of last
performance on April, 1976), unless
respondents engaged in some type of conduct
to extend the statutory period.

Appellants' Brief at 3. As explained above, the Butchers'
Amended Complaint alleges no claim against R.G.H., Inc.
whatsoever. The allegations against Gilroy relating to conduct
extending the period are either insufficient as a matter of law
or are not properly before either this Court or the court below.

Both of the orders dismissing the Butchers' Amended
Complaint should be affirmed.

DATED: July 25, 1985.

CALLISTER & NEBEKER
James R. Holbrook
Steven E. Tyler
Russell C. Kearl

By 

Attorneys for Respondents
Frank K. Gilroy and R.G.H.,
Inc.

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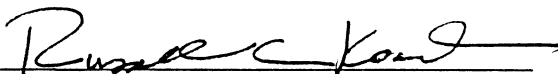
CERTIFICATE OF SERVICE

It is hereby certified by the undersigned that four (4) copies of the foregoing BRIEF OF RESPONDENTS FRANK K. GILROY AND R.G.H., INC. were served by mail, postage fully prepaid, upon counsel for the appellants:

Marcus G. Theodore
Suite 701 - Valley Tower
50 West Broadway
Salt Lake City, Utah 84101

on this 25th day of July, 1985.

CALLISTER & NEBEKER

By 

A D D E N D U M

SETTLEMENT AGREEMENT

THIS AGREEMENT, made and entered into this ____ day of October, 1971, by and between Wendell L. Butcher, hereinafter referred to as "Butcher" and Frank K. Gilroy, hereinafter referred to as "Gilroy".

W I T N E S S E T H:

WHEREAS, the above named parties are presently involved in litigation in the Third Judicial District Court in Case No. 179775, entitled "Frank K. Gilroy, Plaintiff, vs. Peter M. Lowe, et al., Defendants"; and

WHEREAS, both Gilroy and Butcher have claims against each other and desire to resolve and settle said claims prior to the final judgment of the Court trying this matter.

NOW, THEREFORE, in consideration of the foregoing and of the mutual promises of the parties contained herein, the parties agree as follows:

1. Gilroy will pay to Butcher the sum of \$35,000 cash, payable within five (5) days of the date of this Agreement.

2. Butcher hereby acknowledges that the foregoing sum is received as complete satisfaction of his claim against Frank K. Gilroy for damages, and hereby waives all claim and interest in and to the property known as Mountain Dell Estates, which is the subject matter of the above mentioned litigation. It is recognized that Butchers have heretofore elected to abandon any rights under the contract dated July 26, 1963, relative to the Mountain Dell properties, and shall stipulate that a declaratory judgment may be entered that³⁷ they have no interest therein. Butchers shall further stipulate that the pending Counterclaim by Butchers against Gilroy shall be dismissed with prejudice. Butcher shall quit claim to Gilroy any and all right, title or interest he may have or claim in and to the Mountain Dell properties, and the so-called Fisher and Wand properties. Butchers and Gilroy shall provide to each other reciprocal General Releases of all claims or liabilities to date.

3. Butcher agrees to obtain approval from the appropriate county and state authorities for permission to subdivide the Mountain Dell property and shall be entitled to a period of 36 months from the date of this Agreement to obtain such approval. Gilroy agrees to execute such documents as owner of the properties as may be required in order to obtain such approval, provided, however, that Gilroy shall not be required to expend any funds in connection with the effort to obtain said subdivision approval and all costs in connection therewith will be Butcher's expense. It is understood that subdivision approval and all development work and expense in order to obtain approval of a contemplated subdivision of the Mountain Dell properties shall be the responsibility and at the sole expense of Butcher. Gilroy shall have no responsibility whatsoever in subdivision approval, or any developmental work and expense in connection therewith, or any subsequent developmental work and expense of any kind or nature whatsoever. Subdivision approval shall mean absolute approval of the subdivision, including approvals of going forth absolutely for the sale of lots, including but not limited to Health Department approvals, Water Department approvals, Zoning Department approvals, State Highway approvals, approvals of all governmental agencies and clearances of any kind or nature whatsoever in order to go forward and sell lots without any restrictions of any kind.

4. Butcher agrees to employ the firm of Coon, King & Knowlton or some other competent engineering firm mutually agreed upon to assist him in obtaining the approval of the subdividing of the Mountain Dell Estate properties and to pay all costs in connection therewith and in addition any legal or other expenses necessary to obtain such approval. Butcher agrees to follow the recommendations of such engineers in obtaining such subdivision approval, and it is understood that if the subdivision approval is not obtained by reason of Butcher's failure to follow the recommendations of the engineering firm employed to assist in obtaining subdivision approval his recovery from the sale or disposition of the property as hereinafter provided shall be reduced by 10%.

5. In the event the subdivision is approved within 36 months from the date of this Agreement, the first proceeds from the sale of lots shall be paid to Gilroy until Gilroy has received the sum of \$86,565.58, together with interest thereon from the date of this Agreement to the date of payment calculated at a rate of 8% per annum. Provided, that in the event Gilroy is required to pay interest on the \$35,000 paid to Butcher in connection with this settlement agreement, Butcher will pay such additional interest rate, but not more than a total rate of 9% per annum as to the \$35,000. "First proceeds" shall mean the net proceeds from the sale of each lot, less escrow fees and expenses of sale.

6. In the event Butcher is unable to obtain subdivision approval within 36 months from the date of this Agreement, then, and in that event, the Mountain Dell Estates property shall be sold or disposed of for the best price obtainable, and from the proceeds of such sale Gilroy and Butcher will receive a proportionate share based upon the investment of Gilroy in the property of \$86,565.58 and the investment of Butcher in the property of \$40,877.43. The sale or disposition shall be conducted within 18 months immediately following the expiration of the 36 month period set forth in paragraph 3 herein, and such sale or disposition shall be conducted by Gilroy at a price to be determined by Gilroy in his own discretion.

7. It is understood that Gilroy or his designated attorney in fact will execute all documents reasonably necessary in order to obtain subdivision approval, including but not limited to the Petition for Subdivision Approval, the application to the State of Utah for permission to sell subdivided lands and any other petitions, documents and/or agreements with the municipality of Salt Lake City, Salt Lake County, State of Utah, and/or any subdivisions thereof, provided, however, in all such documents there shall be a disclosure of the fact that Gilroy has not undertaken any responsibility or liability in connection with the approval of the subdivision or any developmental work of any kind or nature whatsoever.

8. In the event at any time Gilroy is not satisfied with the progress being made in connection with the effort to obtain subdivision approval, he shall have the right and option, at his own expense, to provide additional legal or engineering assistance, but such assistance will not be chargeable against Butcher's ultimate recovery from the sale of the property if the subdivision approval is not obtained or from the sale of lots if the subdivision approval is obtained. In no event shall the providing of such legal or engineering assistance be construed to obligate Gilroy to perform any of the subdivision or developmental responsibilities herein, nor excuse Butcher therefrom.

9. Butcher hereby agrees to defend Gilroy from any claim, lien or assertion of judgment or other rights as against the Mountain Dell property or as against Gilroy relative to the Mountain Dell property, provided, however, that Butcher shall have no liability therewith except to provide and pay for such defense.

10. It is agreed that Gilroy shall be provided with a copy of all documents, correspondence or writings which shall be sent or received in connection with attempts to gain subdivision approval, developmental work and any other matter in connection with the Mountain Dell properties. Upon request not more often than each six months, Gilroy shall receive a written status report and shall have the right to examine Butcher's expense records as to the Mountain Dell property at any reasonable time.

11. Butcher agrees not to represent or hold out to any public official, creditor or any other person that Gilroy is a partner, joint venturer, or stands in a principal-agent relationship with Butcher. Whenever Gilroy's name shall appear in all such documents there shall be a disclosure of the fact that Gilroy has not undertaken any responsibility or liability in connection with the approval of the subdivision or any developmental work of any kind or nature whatsoever.

12. Butchers herewith waive and abandon any and all claims as against Gilroy by reason of that certain agreement dated July 26, 1963, between Marlowe Investment Company as Seller and Butchers as Buyer, and herewith acknowledge that they will assert no claim of any kind or nature by reason of any acts which at any time have been occurred by Marlowe Investment Company, or Peter M. Lowe or by reason of that certain agreement between Gilroy and Lowe dated February 3, 1963. Butchers, however, reserve all rights and claims against the defendants Lowe and Marlowe.

13. An escrow arrangement is contemplated in connection with this transaction, and the parties agree to pay escrow fees 50% by each party. The escrow instructions shall provide for a release of lots upon payment to Gilroy of the net proceeds of sales thereof, with the provision that in no event shall there be any release of lots without payment to Gilroy of the net proceeds in each instance. Any property taxes and assessments paid by Gilroy shall be repaid to Gilroy and shall be added to Gilroy's interest in the proceeds payable hereunder. Upon payment of the full balance due to Gilroy, plus interest, the escrow shall be closed and Gilroy shall convey his remaining right, title and interest in and to the property to Butcher. In the event that Gilroy has not been paid all sums due within 12 months after subdivision approval, the escrow agent shall be instructed to list the properties for sale over the multiple listing bureau of the Salt Lake Real Estate Board, at appraisal value.

14. Butchers' rights shall be determined entirely by reason of this contract, and no other or further agreements exist. Any modifications of the foregoing agreement shall be in writing signed by the parties.

15. It is understood that both parties to this Agreement are reserving all rights which they have or believe they have against the defendants Peter M. Lowe, Martha Lowe and Marlowe Investment Company.

IN WITNESS WHEREOF, the parties have hereunto subscribed their names the day and year first above written.

Marcus G. Theodore
Attorney for Plaintiff
Valley Tower, Suite 701
50 West Broadway
Salt Lake City, Utah 84101
Telephone: (801) 359-8622

FILED IN CLERKS OFFICE
SALT LAKE COUNTY, UTAH

OCT 18 11 43 AM '84

H. DIXON JR. CLERK

BY *K. B. Youngberg*

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

WENDELL L. BUTCHER and IRENE B.
BUTCHER,

Plaintiffs,

vs.

FRANK K. GILROY, and R.G.H.
INC., a Utah corporation,

Defendants,

:
:
: AMENDED COMPLAINT
:
: Civil No. C84-1826
:
: Judge Leary
:
:
:
:

COME NOW Wendell L. Butcher and Irene B. Butcher and
allege as follows:

1. Wendell L. Butcher and Irene B. Butcher are residents of the State of Utah.
2. Frank K. Gilroy is a resident of the State of Utah.
3. R.G.H., Inc. is a Utah corporation.
4. On or about October 18, 1971, Wendell L. Butcher, Irene B. Butcher, and Frank K. Gilroy stipulated to an entry of an order and judgment as Civil No. 179775. As part of the stipulation, a settlement agreement attached hereto as Exhibit A. was entered into. Frank K. Gilroy was to hold title to 33 acres surrounding Mt. Dell Golf Course subject to the requirement in paragraph 6 that he sell the property by April, 1976 for the best price attainable and the proceeds be apportioned with 32% paid to the plaintiffs and 68% paid to the defendant.
5. Plaintiffs and Frank K. Gilroy attempted to sell the property over the years but because of various subdivision

development changes and watershed questions, the parties were delayed in selling the property.

6. On or about March 8, 1982, within six years of the performance sale date of April, 1976, Frank K. Gilroy sold the property in question to R.G.H., Inc. without notifying plaintiffs or accounting to them for their share of the proceeds. A copy of the warranty deed is attached hereto as Exhibit B., and by this reference incorporated herein.

7. Plaintiffs continued to attempt to sell the property and periodically notified Frank K. Gilroy of their progress in this regard. Frank K. Gilroy at no time notified plaintiffs that he had sold the property, and continued to encourage plaintiffs in their efforts to find a buyer and acquire the necessary building permits from Salt Lake City. Based upon Frank K. Gilroy's representation and assurances that he was also trying to perform the contract, plaintiffs continued to attempt to sell the property and work with the city to obtain permits for the property.

8. To date, Frank K. Gilroy has failed to account to plaintiffs or pay them the amounts due and owing under the stipulated agreement as was repeatedly promised.

9. Plaintiffs therefore request the court to require Frank K. Gilroy to account for all moneys received and to apportion the same between the parties under the terms of the stipulated agreement. In the event Frank K. Gilroy failed to acquire fair market value for the property, for a judgment against him in the amount of any deficiency.

WHEREFORE, plaintiffs pray for judgment as follows:

1. For the court to require Frank K. Gilroy to account to plaintiffs for all sums received from the sale of the property.

2. For judgment to be entered against Frank K. Gilroy for the amounts due and owing plaintiffs under the stipulated agreement.

3. For such other and further relief as the court may

deem just and equitable under the premises.

DATED this 16th day of August, 1984.



MARCUS G. THEODORE
Attorney for Plaintiffs

Address of Plaintiffs:

3980 Eldorado Drive
Salt Lake City, UT 84117

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing Amended Complaint was mailed first class postage prepaid this 16th day of October, 1984 to Steven E. Tyler, Switter, Axland, Armstrong & Hansen, 175 South West Temple, #700, Salt Lake City, UT 84101.



SETTLEMENT AGREEMENT

THIS AGREEMENT, made and entered into this ____ day of October, 1971, by and between Wendell L. Butcher, hereinafter referred to as "Butcher" and Frank K. Gilroy, hereinafter referred to as "Gilroy".

W I T N E S S E T H:

WHEREAS, the above named parties are presently involved in litigation in the Third Judicial District Court in Case No. 179775, entitled "Frank K. Gilroy, Plaintiff, vs. Peter M. Lowe, et al., Defendants"; and

WHEREAS, both Gilroy and Butcher have claims against each other and desire to resolve and settle said claims prior to the final judgment of the Court trying this matter.

NOW, THEREFORE, in consideration of the foregoing and of the mutual promises of the parties contained herein, the parties agree as follows:

1. Gilroy will pay to Butcher the sum of \$35,000 cash, payable within five (5) days of the date of this Agreement.

2. Butcher hereby acknowledges that the foregoing sum is received as complete satisfaction of his claim against Frank K. Gilroy for damages, and hereby waives all claim and interest in and to the property known as Mountain Dell Estates, which is the subject matter of the above mentioned litigation. It is recognized that Butchers have heretofore elected to abandon any rights under the contract dated July 26, 1963, relative to the Mountain Dell properties, and shall stipulate that a declaratory judgment may be entered that³⁷ they have no interest therein. Butchers shall further stipulate that the pending Counterclaim by Butchers against Gilroy shall be dismissed with prejudice. Butcher shall quit claim to Gilroy any and all right, title or interest he may have or claim in and to the Mountain Dell properties, and the so-called Fisher and Wand properties. Butchers and Gilroy shall provide to each other reciprocal General Releases of all claims or liabilities to date.

3. Butcher agrees to obtain approval from the appropriate county and state authorities for permission to subdivide the Mountain Dell property and shall be entitled to a period of 36 months from the date of this Agreement to obtain such approval. Gilroy agrees to execute such documents as owner of the properties as may be required in order to obtain such approval, provided, however, that Gilroy shall not be required to expend any funds in connection with the effort to obtain said subdivision approval and all costs in connection therewith will be Butcher's expense. It is understood that subdivision approval and all development work and expense in order to obtain approval of a contemplated subdivision of the Mountain Dell properties shall be the responsibility and at the sole expense of Butcher. Gilroy shall have no responsibility whatsoever in subdivision approval, or any developmental work and expense in connection therewith, or any subsequent developmental work and expense of any kind or nature whatsoever. Subdivision approval shall mean absolute approval of the subdivision, including approvals of going forth absolutely for the sale of lots, including but not limited to Health Department approvals, Water Department approvals, Zoning Department approvals, State Highway approvals, approvals of all governmental agencies and clearances of any kind or nature whatsoever in order to go forward and sell lots without any restrictions of any kind.

4. Butcher agrees to employ the firm of Coon, King & Knowlton or some other competent engineering firm mutually agreed upon to assist him in obtaining the approval of the subdividing of the Mountain Dell Estate properties and to pay all costs in connection therewith and in addition any legal or other expenses necessary to obtain such approval. Butcher agrees to follow the recommendations of such engineers in obtaining such subdivision approval, and it is understood that if the subdivision approval is not obtained by reason of Butcher's failure to follow the recommendations of the engineering firm employed to assist in obtaining subdivision approval his recovery from the sale or disposition of the property as hereinafter provided shall be reduced by 10%.

5. In the event the subdivision is approved within 36 months from the date of this Agreement, the first proceeds from the sale of lots shall be paid to Gilroy until Gilroy has received the sum of \$86,565.58, together with interest thereon from the date of this Agreement to the date of payment calculated at a rate of 8% per annum. Provided, that in the event Gilroy is required to pay interest on the \$35,000 paid to Butcher in connection with this settlement agreement, Butcher will pay such additional interest rate, but not more than a total rate of 9% per annum as to the \$35,000. "First proceeds" shall mean the net proceeds from the sale of each lot, less escrow fees and expenses of sale.

6. In the event Butcher is unable to obtain subdivision approval within 36 months from the date of this Agreement, then, and in that event, the Mountain Dell Estates property shall be sold or disposed of for the best price obtainable, and from the proceeds of such sale Gilroy and Butcher will receive a proportionate share based upon the investment of Gilroy in the property of \$86,565.58 and the investment of Butcher in the property of \$40,877.43. The sale or disposition shall be conducted within 18 months immediately following the expiration of the 36 month period set forth in paragraph 3 herein, and such sale or disposition shall be conducted by Gilroy at a price to be determined by Gilroy in his own discretion.

7. It is understood that Gilroy or his designated attorney in fact will execute all documents reasonably necessary in order to obtain subdivision approval, including but not limited to the Petition for Subdivision Approval, the application to the State of Utah for permission to sell subdivided lands and any other petitions, documents and/or agreements with the municipality of Salt Lake City, Salt Lake County, State of Utah, and/or any subdivisions thereof, provided, however, in all such documents there shall be a disclosure of the fact that Gilroy has not undertaken any responsibility or liability in connection with the approval of the subdivision or any developmental work of any kind or nature whatsoever.

8. In the event at any time Gilroy is not satisfied with the progress being made in connection with the effort to obtain subdivision approval, he shall have the right and option, at his own expense, to provide additional legal or engineering assistance, but such assistance will not be chargeable against Butcher's ultimate recovery from the sale of the property if the subdivision approval is not obtained or from the sale of lots if the subdivision approval is obtained. In no event shall the providing of such legal or engineering assistance be construed to obligate Gilroy to perform any of the subdivision or developmental responsibilities herein, nor excuse Butcher therefrom.

9. Butcher hereby agrees to defend Gilroy from any claim, lien or assertion of judgment or other rights as against the Mountain Dell property or as against Gilroy relative to the Mountain Dell property, provided, however, that Butcher shall have no liability therewith except to provide and pay for such defense.

10. It is agreed that Gilroy shall be provided with a copy of all documents, correspondence or writings which shall be sent or received in connection with attempts to gain subdivision approval, developmental work and any other matter in connection with the Mountain Dell properties. Upon request not more often than each six months, Gilroy shall receive a written status report and shall have the right to examine Butcher's expense records as to the Mountain Dell property at any reasonable time.

11. Butcher agrees not to represent or hold out to any public official, creditor or any other person that Gilroy is a partner, joint venturer, or stands in a principal-agent relationship with Butcher. Whenever Gilroy's name shall appear in all such documents there shall be a disclosure of the fact that Gilroy has not undertaken any responsibility or liability in connection with the approval of the subdivision or any developmental work of any kind or nature whatsoever.

12. Butchers herewith waive and abandon any and all claims as against Gilroy by reason of that certain agreement dated July 26, 1963, between Marlowe Investment Company as Seller and Butchers as Buyer, and herewith acknowledge that they will assert no claim of any kind or nature by reason of any acts which at any time have been occurred by Marlowe Investment Company, or Peter M. Lowe or by reason of that certain agreement between Gilroy and Lowe dated February 3, 1963. Butchers, however, reserve all rights and claims against the defendants Lowe and Marlowe.

13. An escrow arrangement is contemplated in connection with this transaction, and the parties agree to pay escrow fees 50% by each party. The escrow instructions shall provide for a release of lots upon payment to Gilroy of the net proceeds of sales thereof, with the provision that in no event shall there be any release of lots without payment to Gilroy of the net proceeds in each instance. Any property taxes and assessments paid by Gilroy shall be repaid to Gilroy and shall be added to Gilroy's interest in the proceeds payable hereunder. Upon payment of the full balance due to Gilroy, plus interest, the escrow shall be closed and Gilroy shall convey his remaining right, title and interest in and to the property to Butcher. In the event that Gilroy has not been paid all sums due within 12 months after subdivision approval, the escrow agent shall be instructed to list the properties for sale over the multiple listing bureau of the Salt Lake Real Estate Board, at appraisal value.

14. Butchers' rights shall be determined entirely by reason of this contract, and no other or further agreements exist. Any modifications of the foregoing agreement shall be in writing signed by the parties.

15. It is understood that both parties to this Agreement are reserving all rights which they have or believe they have against the defendants Peter M. Lowe, Martha Lowe and Marlowe Investment Company.

IN WITNESS WHEREOF, the parties have hereunto subscribed their names the day and year first above written.

Recorded at Request of Moyle & Draper 600 Dearest Plaza, S.L.C. Ut. 84111

at M. Fee Paid \$

by Dep. Book Page Ref:

Mail tax notice to R.G.H., Inc. Address 3604 Astro Circle, S.L.C., Ut.

3657636

84109

WARRANTY DEED

(Special)

FRANK K. GILROY grantor
of Las Vegas Nevada hereby

CONVEY AND WARRANT against all claiming by, through or under

to R.G.H., INC.,
3604 Astro Circle, Salt Lake City, Utah 84109

grantee

of Salt Lake City, Salt Lake County, State of Utah for the sum of

Ten and No/100-----DOLLARS,
and other good and valuable consideration
the following described tract of land in Salt Lake County,

State of Utah:

The Northeast quarter of the Southeast quarter of Section
11, Township 1 South, Range 2 East, Salt Lake Meridian.

EXCEPTING such documents as may refer to the rights of way
of Salt Lake and Eastern Railroad, Utah Central Railroad,
Denver and Rio Grande Railroad Companies, Knight Power
Company, the Mountain States Telephone and Telegraph Company
and Salt Lake County, but which do not definitely locate said
rights of way in connection with said property.

Subject to all current taxes, easements, restrictions and
rights of way of record or enforceable in law or equity.

WITNESS, the hand of said grantor, this 8th day of
March, A.D. 19 82

Signed in the Presence of

Frank K. Gilroy

STATE OF UTAH,

County of Salt Lake

On the 8th day of March
personally appeared before me Frank K. Gilroy

the signer of the within instrument, who duly acknowledged to me that he executed the same.

Notary Public.

My commission expires Residing in

Exhibit B

BOOK 5352 PAGE 160

FILED IN CLERKS OFFICE
SALT LAKE COUNTY, UTAH

MAR 19 4 08 PM '85

H. DIXON, CLERK

BY  DEPUTY CLERK

GREENE, CALLISTER & NEBEKER
JAMES R. HOLBROOK (A-1516)
STEVEN E. TYLER (A-3301)
RUSSELL C. KEARL (A-1780)
Suite 800 - Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 531-7676

Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WENDELL L. BUTCHER and
IRENE B. BUTCHER,

Plaintiffs,

v.

FRANK K. GILROY and R.G.H.,
INC., a Utah corporation,

Defendants.

ORDER

Civil No. C 84-1826
Judge John H. Rokich

* * * * *

Defendant R.G.H., Inc.'s motion to dismiss came on regularly for hearing before the Honorable John H. Rokich on Monday, February 25, 1985 at 10:00 o'clock a.m. Plaintiffs were represented by Marcus G. Theodore and defendant R.G.H., Inc. was represented by Steven L. Tyler. Based upon defendant's motion and the arguments of counsel, and good cause appearing therefore,


FYHIRT C

IT IS HEREBY ORDERED that the action filed against defendant R.G.H., Inc. is hereby dismissed without prejudice because the complaint filed herein fails to state a claim upon which relief can be granted.

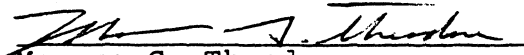
DATED this 12 day of March, 1985.


BY THE COURT:

ATTEST
H. DIXON HINDLEY
Clerk

By  John W. Rokich,
Deputy Clerk Third District Court Judge

Approved as to Form:

By  Date _____
Marcus G. Theodore,
Attorney for Plaintiffs

By  Date Feb. 27, 1985
Steven E. Tyler,
Attorney for Defendants

FILMED

GREENE, CALLISTER & NEBEKER
JAMES R. HOLBROOK (A-1516)
STEVEN E. TYLER (A-3301)
RUSSELL C. KEARL (A-1780)
Suite 800 - Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 531-7676

Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WENDELL L. BUTCHER and
IRENE B. BUTCHER,

Plaintiffs,

v.

FRANK K. GILROY and R.G.H.,
INC., a Utah corporation,

Defendants

ORDER

Civil No. C 84-1826
Judge John H. Rokich

* * * * *

The motion of defendants Frank K. Gilroy and R.G.H., Inc., to dismiss the above-titled action for failure to state a claim upon which relief may be granted by reason that all claims made therein are barred by the appropriate statute of limitations, came on regularly for hearing before the Honorable John H. Rokich on Monday, February 25, 1985 at 10:00 o'clock a.m. Plaintiffs were represented by Marcus G. Theodore and

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SALT LAKE COUNTY, UTAH

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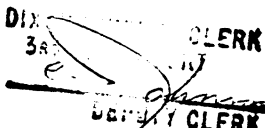
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BY  CLERK
DEPUTY CLERK

EXHIBIT D

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defendants were represented by Steven E. Tyler. Based upon the arguments of counsel and the Court's review of the memoranda filed herein, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. All claims alleged in the plaintiffs' First Amended Complaint are hereby dismissed with prejudice because they are barred by the applicable statute of limitations. See Utah Code Ann., Section 78-12-23 (Repl. 1977).

2. In the event that plaintiffs have not filed an Amended Complaint stating a claim against defendants which is not barred by the statute of limitations on or before March 11, 1985, this action is dismissed with prejudice.

DATED THIS 12 day of March, 1985.

BY THE COURT:

ATTEST
H. DIXON HINDLEY
Clerk
By [Signature]
Deputy Clerk

[Signature]
John A. Rokich,
Third District Court Judge

Approved as to Form:

By [Signature]
Marcus G. Theodore,
Attorney for Plaintiffs

Date _____

By [Signature]
Steven E. Tyler,
Attorney for Defendants

Date Feb. 27, 1985

UTAH RULES OF APPELLATE PROCEDURE

Rule 9. Docketing Statement.

(a) *Time for Filing.* Within 21 days after the notice of appeal or petition for review is filed, the appellant, or the petitioner, shall file a docketing statement with the Clerk of the Supreme Court. An original and 7 copies shall be filed, together with proof of service.

(b) *Purpose of Docketing Statement.* The docketing statement is not a brief and should not contain arguments or procedural motions. It is to be used by the Court in classifying cases, making summary disposition, and making calendar assignments.

(c) *Content of Docketing Statement.* The docketing statement shall contain the following information in the order set forth below:

(1) the authority believed to confer jurisdiction on the Court to hear the appeal or petition for review, or in the case of an interlocutory appeal, the date of the Court order allowing the appeal and the issues which may be appealed pursuant to the granting of an interlocutory appeal. In multi-party or multi-issue cases, particular attention should be paid to Rule 54(b), Utah Rules of Civil Procedure;

(2) a concise statement of the nature of the proceeding, e.g., this appeal is from a final order of the district court, or this petition is for review of an order of an administrative agency;

(3) the date of the judgment or order sought to be reviewed; the date of any order respecting a motion pursuant to Rules 50(b), 52(b), or 59, Utah Rules of Civil Procedure; and the date the notice of appeal or petition for review was filed;

(4) a concise statement of facts material to a consideration of the questions presented;

(5) the issues presented by the appeal, expressed in terms and circumstances of the case, but without unnecessary detail. The questions should not be repetitious. General conclusory statements such as "the judgment of the trial court is not supported by the law or facts" are not acceptable;

(6) any statutes, rules, or cases believed to be determinative of the respective issues stated;

(7) a reference to all related or prior appeals in the case. If the reference is to a prior appeal, the appropriate citation should be given.

(d) *Necessary Attachments.* Attached to each copy of the docketing statement shall be a copy of the following:

(1) the judgment or order sought to be reviewed;

(2) any opinion or findings; and

(3) the notice of appeal and a copy of any order extending the time for the filing of a notice of appeal.

(e) *Consequences of Failure to Comply.* Docketing statements which fail to comply with this Rule will not be accepted. Failure to comply may result in dismissal of the appeal or petition.

EXHIBIT E

ADVISORY COMMITTEE NOTE

This Rule is derived from former Rule 73A, URCivP and is similar to Rule 8 U.S. Tenth Circuit Court with minor changes. The time for filing the docketing statement is changed from 15 days to 21 days after the notice of appeal is filed, and the number of copies to be filed was increased from 6 to an original and 7. Paragraph headings also have been added for ease of reference.

The principal objective of this Rule is to require counsel for the appellant to immediately focus upon and frame the issues to be addressed in the appeal, and thereby assist the Supreme Court in making calendar

assignments, classifying cases, and ruling on summary disposition motions under Rule 10. Additionally, docketing statements enhance the Court's ability to identify jurisdictional defects, monitor pending appeals and to identify at the initial stages those appeals which involve complex and/or multiple issues requiring more detailed consideration.

The content of the docketing statement and requisite attachments are set forth in detail in paragraphs (c) and (d), respectively. Paragraph (e) is explicit that a failure to comply with this Rule may result in dismissal of the appeal.

UTAH RULES OF APPELLATE PROCEDURE

Rule 11. The Record on Appeal.

(a) *Composition of the Record on Appeal.* The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and the index prepared by the clerk of the district court shall constitute the record on appeal in all cases. However with respect to papers and exhibits, only those prescribed under paragraph (d) of this Rule shall be transmitted to the Supreme Court.

(b) *Pagination and Indexing of the Record.* Immediately upon filing of the notice of appeal, the clerk of the district court shall prepare an index of all of the original papers filed in the district court, and shall paginate those papers in chronological order.

(c) *Duty of Appellant.* After filing the notice of appeal, the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of paragraphs (d) and (e) of this Rule and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.

(d) *Papers and Exhibits on Appeal.*

(1) *Criminal Cases.* All of the original papers in a criminal case shall be included by the clerk of the district court as part of the record on appeal.

(2) *Civil Cases.* In all civil cases, the record shall remain in the custody of the clerk of the district court, as set forth in Rule 12(b)(2), during preparation and filing of briefs.

The district court clerk shall establish rules and procedures for checking out the record, after pagination, for use by the parties in briefing.

(A) *Civil Cases with Short Records.* In civil cases where all the original papers total fewer than 300 pages, all of the original papers will be transmitted to the Supreme Court upon completion of the filing of briefs by the parties, as set forth in Rule 12(b)(2). In such cases, the appellant shall serve a notice upon the clerk of the district court, simultaneous with the filing of appellant's reply brief with the Clerk of the Supreme Court, of the date in which appellant's reply brief was filed; if appellant does not intend to file a reply brief, appellant shall notify the clerk of the district court of that fact within 30 days of the filing of respondent's brief with the Clerk of the Supreme Court.

(B) *All Other Civil Cases.* In all other civil cases where the original papers are or exceed 300 pages, all parties shall file with the clerk of the district court, within 10 days after briefing is completed, a joint or separate designation of those papers referred to in their respective briefs. Only those designated papers and the following, to the extent applicable, shall be transmitted to the Clerk of the Supreme Court by the clerk of the district court:

- (i) the pleadings as defined in Rule 7(a), Utah Rules of Civil Procedure;
- (ii) the pretrial order, if any;
- (iii) the final judgment, order, or interlocutory order from which the appeal is taken;
- (iv) other orders sought to be reviewed, if any;
- (v) any supporting opinion, findings of fact or conclusions of law filed or delivered by the trial court;

EXHIBIT F

- (vi) the motion, response, and accompanying memoranda upon which the court rendered judgment, if any;
- (vii) jury instructions given, if any;
- (viii) jury verdicts and interrogatories, if any;
- (ix) the notice of appeal.

(e) *The Transcript of Proceedings; Duty of Appellant to Order: Notice to Respondent if Partial Transcript is Ordered.*

(1) *Request for Transcript; Time for Filing.* Within 10 days after filing the notice of appeal the appellant shall request from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary. The request shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If no such parts of the proceedings are to be requested, within the same period the appellant shall file a certificate to that effect.

(2) *Transcript Required of all Evidence Regarding Challenged Finding or Conclusion.* If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) *Statement of Issues; Cross-Designation by Respondent.* Unless the entire transcript is to be included, the appellant shall, within 10 days after filing the notice of appeal, file a statement of the issues he intends to present on the appeal and shall serve on the respondent a copy of the request or certificate and of the statement. If the respondent deems a transcript of other parts of the proceedings to be necessary, he shall, within 10 days after the service of the request or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has requested such parts, and has so notified the respondent, the respondent may within the following 10 days either request the parts or move in the district court for an order requiring the appellant to do so.

(4) *Payment of Reporter.* At the time of the request, a party shall make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(f) *Agreed Statement as the Record on Appeal.* In lieu of the record on appeal as defined in paragraph (a) of this Rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and transmitted by the district court clerk to the Clerk of the Supreme Court as the record on appeal within the time prescribed by Rule 12(b)(2). The index shall be transmitted to the Supreme Court by the clerk of the district court upon approval by the district court of the statement.

(g) *Statement of the Evidence or Proceedings When no Report was Made or When the Transcript is Unavailable.* If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the respondent, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

(h) *Correction or Modification of the Record.* If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, or the Supreme Court, either before or after the record is transmitted to the Supreme Court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. The moving party, or the court if it is acting on its own initiative, shall serve on the parties a statement of the proposed changes. Within 10 days after service any party may serve objections to the proposed changes. All other questions as to the form and content of the record shall be presented to the Supreme Court.

ADVISORY COMMITTEE NOTE

Rules 11, 12, and 13 govern the preparation and transmission of the record on appeal. They involve substantial departures from prior Utah practice. Rules 10, 11, and 12 FRAP, were the starting point but the final product is largely the Committee's original work.

Paragraph (a). This paragraph provides that the record on appeal includes all of the original papers filed in the district court, the index of the papers, and the transcript, if any. No new record is to be prepared for the appeal and the Supreme Court can rely on any material contained in the district court's original file.

Paragraph (b). As soon as a notice of appeal is filed, the district court clerk is required to paginate all of the papers in the file and prepare an index of them. Under paragraph (d) of this Rule and paragraph (b) of Rule 12, the papers and exhibits in civil cases will remain in the custody of the district court clerk until after briefing is completed. Pagination and indexing allows for the orderly handling of papers and will take place as to the entire court file, even though in cases of 300 or more pages, all the papers will not be transmitted to the Supreme Court.

Paragraph (c). Appellant's obligations do not cease with the filing of a notice of appeal. Each appellant is required to comply with the transcript provisions of paragraph (e), and assist the clerk, when necessary, to assemble and transmit the record.

Paragraph (d). This paragraph is a substantial departure from prior practice under Rule 75 URCivP.

In criminal cases, and in civil cases with records of fewer than 300 pages, all of the original papers filed in the district court will be transmitted to the Supreme Court at the appro-

priate time. In criminal cases, the appropriate time is as soon as the transcript, if any, is completed and filed with the district court clerk under Rule 12(a). If there is no transcript, the papers are to be transmitted within 20 days of the filing of the notice of appeal. See Rule 12(b)(1). The result is that in criminal cases, the original papers and transcript will be in the custody of the Clerk of the Supreme Court during the briefing period.

In civil cases where the record is less than 300 pages, all of the original papers in the file will be transmitted to the Supreme Court Clerk within 20 days after the appellant has filed his reply brief on appeal with the Supreme Court or if appellant elects not to file a reply brief, within 30 days of the filing of respondent's brief with the Clerk of the Supreme Court. See Rule 11(d)(2)(A), Rule 12(b)(2). The appellant has an obligation under paragraph (a) to notify the clerk of the district court, simultaneously with the filing of appellant's reply brief, of the date in which the reply brief was filed with the Clerk of the Supreme Court, or if appellant does not file a reply brief, to notify the clerk of the district court of that fact within 30 days of the filing of respondent's brief in the Supreme Court.

In civil cases with records of 300 pages or more, only a portion of the original papers will be transmitted to the Supreme Court. Transmission of these papers, like transmission of the papers in civil cases with short records, will occur only after briefing is completed. The parties must, after briefing is completed, file with the district court clerk a designation of the papers referred to in their briefs. The matters designated by the parties, along with the mandatory items listed in paragraph (d)(2)(B),

will then be transmitted to the Supreme Court.

In all events the transcript stays with the original papers and will be transmitted with them to the Supreme Court.

Paragraph (e). This paragraph governs the ordering of the transcript of proceedings. It is each appellant's responsibility to order such portions of the proceedings as are necessary for a full consideration of the issues which he intends to raise on appeal. If the appellant orders a transcript of less than the entire proceedings he must file and serve on the respondent a statement of the issues he intends to raise on appeal and a copy of his request for a partial transcript. This is to enable the respondent to consider whether the partial transcript adequately covers the issues which are raised by the appellant. If, in the respondent's view, the partial transcript is insufficient, he may request that the appellant include additional portions of the proceedings. If the appellant fails to do so, the respondent may either move in the district court for an order compelling the appellant to do so or the respondent may order the additional parts himself.

Paragraph (f). The agreed statement provides an alternative to the ordinary procedures for preparation and transmittal of the record. If the parties choose to use an agreed statement, it shall be submitted to the district court for approval and, if approved, transmitted to the Supreme Court in place of the ordinary record after briefing and in accordance with Rule 12(b)(2).

Paragraph (g). This paragraph applies whenever a transcript of the proceedings is unavailable.

Paragraph (h). This paragraph applies whenever there is a question as to whether the transcript or the original papers accurately reflect what occurred in the district court. These disputes should usually be submitted to the district court since it will ordinarily be in the best position to ascertain the correctness of the record. Under unusual circumstances, however, it may be appropriate for such a dispute to be submitted to the Supreme Court, or for the district court or the Supreme Court to act on its own motion. In any event, all parties shall be given notice of proposed changes in the record and an opportunity to object to them.

UTAH RULES OF APPELLATE PROCEDURE

Rule 24. Briefs.

(a) *Brief of the Appellant.* The brief of the appellant shall contain under appropriate headings and in the order here 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, with page references.

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

(4) A statement of the issues presented for review.

(5) Constitutional provisions, statutes, ordinances, rules and regulations whose interpretation is determinative shall be set out verbatim with the appropriate citation. If the pertinent part of provision is lengthy, the citation alone will suffice and in that event, the provision shall be set forth as provided in paragraph (f) of this Rule.

(6) 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. There shall follow a statement of the facts relevant to the issues presented for review. All statements of fact and references to the proceedings below shall be supported by citations to the record (see paragraph (e)).

(7) Summary of arguments. A 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.

(8) An argument. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

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

(b) *Brief of the Respondent.* The brief of the respondent shall conform to the requirements of paragraph (a) of this Rule, except that a statement of the issues or of the case need not be made unless the respondent is dissatisfied with the statement of the appellant.

(c) *Reply Brief.* The appellant may file a brief in reply to the brief of the respondent, and if the respondent has cross-appealed, the respondent 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. No further briefs may be filed except with leave of 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 "respondent." 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.

EXHIBIT G

(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), to pages of the reporter's transcript, 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 include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

(f) *Reproduction of Statutes, Rules, Regulations, Documents, Etc.* If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, to the extent not set forth under subparagraph (a)(4) of this Rule, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the Court in pamphlet form. Copies of those parts of the record on appeal that are of central importance to the determination of the appeal (e.g., the challenged instructions, findings of fact and conclusions of law, memorandum decision, the contract or document subject to construction, etc.) shall also be included in the addendum.

(g) *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 (f) of this Rule.

(h) *Briefs in Cases Involving Cross-Appeals.* If a cross-appeal is filed, the party first filing his 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 respondent shall contain the issues and arguments involved in his appeal as well as the answer to the brief of the appellant.

(i) *Briefs in Cases Involving Multiple Appellants or Respondents.* In cases involving more than one appellant or respondent, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or respondent may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) *Citation of Supplemental Authorities.* When pertinent and significant authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision, a party may promptly advise the Clerk of the Court, by letter, with a copy of all counsel, setting forth the citations. 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.

(k) *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/or the Court may assess attorney's fees against the offending lawyer.

(l) *Brief Covers.* The covers of all briefs shall comply with Rule 27. Cover material shall be heavyweight paper.

ADVISORY COMMITTEE NOTE

This Rule is based on Rule 28 FRAP, with certain modifications. It differs significantly from prior Rule 75(p)(2) URCivP.

Inadequate appellate briefs which do not significantly assist the Court in disposing of the case before it have proven to be a significant problem. In order to alleviate this concern, this Rule clearly specifies the required contents and order of each brief. Under paragraph (k), briefs which do not comply with the requirements of the rule or are otherwise inadequate may be disregarded or stricken by the Court. The Court may also assess attorney's fees against the non-complying lawyers.

Paragraph (a)(1). This paragraph requires that the brief include a complete list of all parties if they are not reflected in the caption of the case in order to permit the Court to identify and evaluate potential conflicts of interest.

Paragraph (a)(4). Unlike prior Rule 75(p)(2) URCivP., this paragraph expressly requires a "statement of the issues" presented for review. The requirement is regarded by the Committee as particularly important.

Paragraph (a)(5). This paragraph requires that constitutional provisions, statutes,

ordinances and regulations involved in the case be quoted verbatim, unless they are unduly lengthy. In that event, they shall be cited and included in the addendum provided for by paragraph (f).

Paragraph (a)(6). This paragraph requires all statements of proceedings and facts to be supported by references to the record. The prior rule contained a similar requirement, but was frequently disregarded in practice. This rule is intended to emphasize that such citations are required in all cases. See also paragraph (e).

Paragraph (a)(7). This paragraph requires a summary of the argument in all cases. This departure from Rule 24 FRAP was made because such summaries were found to be of substantial assistance to the Court.

Paragraph (f). The provision for an addendum has no counterpart in prior practice.

Paragraph (g). The limit of 50 pages for the opening brief of appellant and respondent's answering brief is the same as under prior Utah practice, Rule 75(p)(2) URCivP. The 25-page limit on reply briefs differs from prior Utah practice and coincides with the page limitation under Rule 28(g) FRAP.

UTAH RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleadings.

(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) *Defenses; Form of Denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance of affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(d) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to Be Concise and Direct; Consistency.*

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice.

EXHIBIT H

UTAH RULES OF CIVIL PROCEDURE

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.

UTAH RULES OF CIVIL PROCEDURE

Rule 12. Defenses and Objections.

* * * *

(b) *How Presented.* Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject-matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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EXHIBIT J