

1988

Wendell E. Taylor v. The Estate of Grant Taylor, Esther Taylor, Darren G. Taylor, and John Does 1 through 5 : Brief of Respondent

Utah Court of Appeals

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DOCKET NO. 880136-CA

* * * * *

vs.

Defendants and Respondents.

)
)
) Case No. 860481
)
) Category No. 13(b).

88-0136-CA

* * * * *

BRIEF OF RESPONDENTS

* * * * *

Appeal from the Order of the
Third Judicial District Court
in and for Salt Lake County,
State of Utah
Honorable Raymond S. Uno, Judge

* * * * *

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APR 15 1987

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

WENDELL E. TAYLOR,)	
)	
Plaintiff and)	Case No. 860481
Appellant,)	
)	Category No. 13(b).
vs.)	
)	
THE ESTATE OF GRANT TAYLOR,)	
deceased, ESTHER TAYLOR,)	
DARRON G. TAYLOR, and)	
JOHN DOES 1 THROUGH 5,)	
)	
Defendants and)	
Respondents.)	

* * * * *

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES

The following issues are presented for review in this appeal:

1. Does the Supreme Court have subject-matter jurisdiction to hear Plaintiff-Appellant's Appeal?
2. Did the District Court err in granting the Defendants-Respondents' Motion For Summary Judgment? (Raised by Appellant).
3. Did the District Court err in failing to apply a standard of substantial compliance with respect to the relevant statute regarding the execution of testamentary documents? (Raised by Appellant).
4. Did the District Court err in granting Defendants-Respondents' Motion For Attorneys' Fees? (Raised by Appellant).
5. Did the District Court err in failing to make specific findings of fact with regard to the Defendants-Respondents' Motion For Attorneys' Fees on the basis of alleged bad faith conduct or other conduct violating Rule 11, Utah Rules of Civil Procedure? (Raised by Appellant).

STATEMENT OF THE CASE

Respondents accept and incorporate herein Appellant's "Statement of the Case," Appellant's Brief pp. 1-2, except to add that the reason Defendants' Motion to Dismiss was never heard is indirectly relevant to the award of attorneys fees to defendants. Appellant - Plaintiff Wendell Taylor is hereafter referred to as "Wendell."

A. Facts.

Respondents-defendants, only for the purpose of their Motion for Summary Judgment, assumed the truth of the following facts, as set forth in Wendell's complaint, Wendell's Affidavit, and the depositions of Noel and Geraldine Taylor. For the purpose of this appeal, the truth of the following facts--although some are disputed by respondents--is assumed.

1. Grant R. Taylor, deceased, purportedly executed a "Will and/or Codicile" on June 30, 1984. (Wendell's Complaint, paragraph 5, R. 3.) The instrument was allegedly witnessed by Noel Taylor and Geraldine Taylor. (Id., R. 3. A copy of the will attached by Wendell to his Complaint is appended to this Brief as Exhibit "A").

2. Noel Taylor states that he signed the alleged June 30, 1984 Will on June 30, 1984, in Grant Taylor's presence. (Noel Taylor deposition, R. 313, p.6).

3. Geraldine Taylor, however, swears that she did not sign the alleged June 30, 1984 Will until May of 1985, approximately eight months after Grant's death. (Geraldine Taylor deposition, R. 312, p.7).

4. Grant R. Taylor prepared a "Last Will and Testament" on or about August 30, 1984, properly witnessed in Grant Taylor's presence by Jan Johnson and John Stevens. (Wendell Taylor's Complaint, paragraph 8, R. 4; Esther Taylor Affidavit, paragraph 7, R. 39, 77-86).

5. Grant R. Taylor created prior to his death a revocable trust, entitled the Grant R. Taylor Trust, with Grant Taylor as trustee. (Wendell Taylor's Complaint, paragraph 8, R. 4; Esther Taylor Affidavit, paragraph 5, R. 38-9, 41-76).

6. Beneficiaries of the Grant R. Taylor Trust, both before and after its amendment on September 21, 1984, were Grant Taylor and Grant Taylor's children: Darlene T. Jenkins; Darron G. Taylor; and Mark R. Taylor. (Esther Taylor Affidavit, paragraph 6, R. 39, 41-76).

7. Grant R. Taylor married Esther H. Taylor on September 11, 1940. After over 40 years of marriage Grant and Esther

divorced in 1983. Grant and Esther re-married on September 21, 1984. (Wendell Taylor's Complaint, paragraph 8, R. 4; Esther Taylor Affidavit, paragraph 3, R. 38).

8. Grant R. Taylor died on September 26, 1984 at the age of 61 years. (Esther Taylor Affidavit, paragraph 4, R. 38).

9. The estate of Grant R. Taylor was informally probated, and the assets of his estate have been allocated and distributed accordingly. (Esther Taylor Affidavit, paragraph 7, R.39).

10. Noel conveyed to Wendell the original of the alleged June 30, 1984 Will some time in or about February, 1985. At that time, the document had on it the signature of only one witness, that of Noel Taylor. (Noel Taylor deposition, R. 313, pp. 6-7, 11-12). A copy of this version of the alleged June 30, 1984 will is appended to this Brief as Exhibit "B."

11. Geraldine signed the alleged June 30, 1984 will in May, 1985, approximately 8 months after Grant Taylor's death. (Geraldine Taylor deposition, R. 312, p. 7; Noel Taylor deposition, R. 313, p. 6). Geraldine signed as an attesting witness at Noel's request and in Wendell's presence. (Noel Taylor deposition, R. 313, pp. 6, 7, 11-12).

12. Wendell Taylor has admitted that he attended the depositions of Geraldine and Noel Taylor on November 20, 1985

and that as to the conveyance of the document from Noel to Wendell, and as to the subsequent signing by Geraldine, that their testimony was accurate. (Plaintiff's Responses to Admissions and Interrogatories, R. 197-199, Responses Nos. 1 and 3).

B. Procedural History of Case.

The procedural history of the case is relevant to at least two of the issues on appeal: (1) Was the award of attorneys fees to defendants proper? and (2) Does this court have subject-matter jurisdiction to hear this appeal (because of Wendell's failure to timely file notice of appeal)?:

1. Wendell filed this action in October, 1985. In his complaint, Wendell alleged that a will executed by his brother Grant on August 30, 1984 was invalid and prayed that the assets of Grant's estate be redistributed according to the terms of a newly discovered will, allegedly executed by Grant on June 30, 1984. (Complaint, R. 2-7).

2. Attached to Wendell's complaint, and by reference incorporated therein, was a copy of the alleged June 30, 1984 will (R. 6; see Exhibit "A" attached hereto). On that copy was the signature of one, and only one, witness; that of Wendell's other brother, Noel Taylor.

3. In response to Wendell's complaint, defendants on October 16, 1985 filed with the court and served on Wendell's counsel a Motion to Dismiss with Prejudice and a Memorandum of Points and Authorities in Support of Defendants' Motion. (R. 8-10). Defendants' Motion to Dismiss was premised on the argument that Wendell was not entitled to relief as a matter of law since the alleged June 30, 1984 will was witnessed by only one person. (Defendant's Memorandum, R. 11-20).

4. Defendants noticed up their Motion for Hearing on October 29, 1985 before Judge Raymond Uno. (R. 31-2).

5. Wendell sought and obtained an ex parte Order from the Court continuing the Hearing date until November 14, 1985.

6. On November 12, 1985, two days prior to the continued hearing date, Wendell's attorney contacted defendants' attorneys by phone and informed them that Wendell would be filing an Affidavit. Also on November 12, 1985, Wendell served on defendants' counsel the Affidavit of Wendell E. Taylor in Opposition to Defendants' Motion to Dismiss with Prejudice. (R. 99-110).

7. In his November 12 Affidavit, Wendell denied that the copy of the June 30, 1984 will appended to the original complaint was "a true and accurate copy" of an original that he had in his possession. (R. 99-100). Appended to Wendell's

Affidavit was another copy of the alleged June 30, 1984 will. (R. 104, see Exhibit B appended hereto). The copy appended to Wendell's Affidavit differed from the copy appended to the original complaint in that the newly-supplied copy contained a third signature, that of Geraldine Taylor. (R.6, 104; Exhibit A and B appended hereto).

8. In light of Wendell's Affidavit, counsel for both Wendell and defendants agreed to continue indefinitely the Hearing date on Defendants' Motion to Dismiss pending an opportunity for defendants' counsel to depose the two alleged witnesses to the alleged June 30, 1984 will. (R. 88-89).

9. On November 19, 1985, defendants' attorneys deposed Noel and Geraldine Taylor. During Geraldine's deposition, she confessed that she did not sign the alleged June 30, 1984 will of Grant Taylor until eight months after Grant's death (R. 312, p.7), and that she then signed at Noel's request. (R. 312, p.8).

10. On January 22, 1986, defendants filed Motions for Summary Judgment and for Attorneys Fees with the Court. (R. 200-202, 132-134). Supporting memoranda were also filed. (R. 135-199, 117-131).

11. Wendell filed a Memorandum in Opposition to Defendant's Motion for Summary Judgment, though no copy of the

Memorandum appears in the Record. A copy is therefore attached to this Memo as Exhibit C. The Memorandum was served on defendants less than 24 hours prior to the hearing. Wendell filed no Memorandum in Opposition to defendant's Motion for Attorneys Fees.

12. On February 20, 1986, the Court heard defendants' Motions. Both defendants and Wendell were represented by counsel and counsel for each presented oral argument. The Court granted both of defendants' Motions, but held determination of the amount of attorneys fees in abeyance pending submission of an affidavit detailing defendants' attorneys fees to the Court. (R. 212). No transcript was made of the hearing. During the hearing, however, the Judge stated, relative to the issue of attorneys fees, that he did not find bad faith on the part of plaintiff. Nevertheless, he ruled that attorneys fees were warranted under the circumstances.

13. On March 3, 1986, defendants filed with the Court an Affidavit in Support of Award of Attorneys Fees. (R. 213-227).

14. Also on March 3, 1986, defendants submitted to the Court a proposed Order Granting Defendants' Motion for Summary Judgment, Dismissing Action with Prejudice and Awarding Defendants Attorneys Fees. (R. 234-237). Defendants, in compliance with Third District Rule of Practice 4(b), served by

hand delivery a copy of the proposed order on Wendell's attorney the same day. (R. 237).

15. On March 14, 1986, eleven days after being served with the proposed order, Wendell filed with the Court and served on defendants an Objection to defendants' proposed Order. (R. 231-233).

16. On March 14, 1986, defendants filed with the Court and served on Wendell their Response to his Objection. (R. 228-230).

17. Wendell did not notice up a hearing on his Objection to defendants' proposed Order.

18. On March 24, 1986, the Court signed defendants' Order as submitted and determined that defendants were entitled to \$5,000 in attorneys fees. Judgment was entered and filed with the Court that same day. (R. 235-237; a copy of the Judgment signed and entered on March 24, 1986 is appended hereto as Exhibit D).

19. On June 10, 1986, defendants served a Writ of Garnishment on Continental Bank & Trust, which responded that it had funds owed to Wendell in its possession. (R. 243-7).

20. On June 10 or 11, 1986, Continental Bank in response to the Writ of Garnishment, notified Wendell by mail and by telephone that his account had been garnished. (Deposition of

Continental Bank officer Jeanne Campbell, R. 311, pp. 7-8). In a phone conversation with Ms. Campbell, Wendell specifically asked the identity of the party or parties who had served Writ. In response, Ms. Campbell identified the action and named the defendants listed on the Writ of Garnishment. (Id. pp. 8-10).

21. On July 1, 1986, defendants filed with the Court and served on Wendell, by mail, a formal notice of the Order Granting Summary Judgment and Award of Attorneys Fees. (R. 254-9).

22. On July 29, 1986, Wendell filed a Substitution of Counsel; A. Howard Lundgren substituting for Stanley S. Adams. (R. 266).

23. On July 29, 1986, Wendell's new attorney Lundgren appeared before the Court on an ex parte basis and moved the Court for an Order extending the time for filing a Notice of Appeal. The Motion was predicated on the representation that Wendell did not receive formal Notice of the Order Granting Judgment until July 3, 1986. Wendell's attorney requested 30 days from July 3, plus an additional 30 days, in which to prepare and file a Notice of Appeal. Wendell's attorney, according to the Motion, requested the additional 30 days because he would be out of town between July 30 and August 15. (R. 267-8).

24. On July 29, 1986, the Court entered an Order Extending Time for Filing Notice of Appeal, extending the time for filing notice "from August 3, 1986 to September 3, 1986." (R. 276).

25. On August 12, 1986, defendants filed with the Court and served on Wendell an Objection to the Order Extending Time for Filing Notice of Appeal. (R. 285-7).

26. On September 3, 1986 Wendell filed with the Court and served on defendants a Notice of Appeal. (R. 292-3).

STANDARDS OF REVIEW

Summary judgment, pursuant to Utah Rule of Civil Procedure 56, is appropriate only where the favored party makes a showing which precludes, as a matter of law, the awarding of any relief to the losing party. Tanner v. Utah Poultry & Farmers Coop., 11 Utah 2d 353, 359 P.2d 18 (1961). Defendants argued to the District Court that even if the allegations set forth in Wendell's original complaint, as modified in his November 16, 1985 Affidavit, were true, that Wendell was entitled to no relief as a matter of law. The Court agreed and granted defendants' motion.

The standard of review applicable to summary judgments requires that this Court view the record in a light most favorable to Wendell, the losing party below. Hoepfner v. Utah Farm Bureau Ins. Co., 595 P.2d 863, 864 (Utah 1979). Again, even if Wendell's allegations--which Respondents dispute--are taken as true, Wendell is precluded as a matter of law from obtaining the relief he sought in the Court below.

Respondents have discovered no Utah cases that dictate the standard of review accorded an award of attorneys fees by a Judge under a Rule 11 or similar context. Respondents urge that the standard to be employed in such situations should presume that the award was well-founded and that the award should be affirmed unless the record indicates that the Judge abused his discretion. See e.g., Basch v. Westinghouse Electric Corp., 777 F.2d 165, 174 (4th Cir. 1985, cert. denied, 106 S.Ct. 1957, (District judge's award of sanctions upheld where appellate court on review of record could find no abuse of discretion).

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction to hear this appeal because Appellant failed to timely file a Notice of Appeal.

A. Appellant's Notice of Appeal was not filed within 30 days of entry of judgment.

B. Failure to give formal notice under Rule 58A(d) does not extend the time for filing Notice of Appeal.

C. Appellant's Notice of Appeal was not filed within 30 days of Appellant's receipt of actual notice of entry of judgment. Rule 58A(d)'s purpose was satisfied by Appellant's receipt of actual notice.

D. If Entry of Judgment is deemed to be the date on which Appellant received formal notice under Rule 58A(d), the extension of time granted Appellant in which he could file a Notice of Appeal exceeded the Court's discretion.

E. Appellant's Notice of Appeal filed on Sept. 3, 1986, 163 days after entry of judgment, was not timely filed. This Court consequently lacks jurisdiction to hear his appeal.

II. The purported June 30, 1984 will is invalid as a matter of law because it was not properly executed.

A. the will was not properly executed because it was not signed by the two witnesses in the testator's presence.

B. The fact that the Legislature added the last sentence of Section 75-2-502 when it adopted the Uniform Probate Code indicates a legislative intent that the provision be enforced.

C. The doctrine of substantial compliance, even if embraced by this Court, does not excise the last sentence of Section 75-2-502.

D. The language of the last sentence of Section 75-2-502 is mandatory in nature; the Legislature intended the sentence to be so interpreted.

E. The doctrine of substantial compliance, when properly understood, is not satisfied in this case in any event.

III. If the alleged June 30, 1984 will is invalid as a matter of law, Appellant lacks standing to challenge Grant Taylor's August 30, 1984 will because he is not an "interested person" under Section 75-3-401(1).

IV. The District Court's award of attorneys fees to defendants was proper.

A. The will attached to the plaintiff's complaint was signed by only one witness.

B. Plaintiff, almost a month and a half later, and a month after defendants pointed out to plaintiff pursuant to a Motion to Dismiss that a will signed by one witness is invalid, informed defendants that the will appended to the complaint was not a "true and accurate copy"; that plaintiff would produce a "true and accurate" copy signed by two witnesses.

C. As a direct consequence of plaintiff's "error," and of plaintiff permitting that "error" to fester for over a month and a half without correcting it, defendants incurred substantial attorneys fees that they otherwise would not have incurred.

D. The Court's award of attorneys fees under the circumstances was warranted under the inherent powers of the court or, alternatively, under Rule 11 if Rule 11 was in effect prior to the filing of the complaint.

E. Findings of Fact with respect to attorneys fees awarded as sanctions are not required, according to Utah R. Civ. P. 52(a).

F. Ample evidence was provided the Court to support its award of attorneys fees to defendants.

LEGAL ARGUMENTS

I. This Court Lacks Jurisdiction to Hear this Appeal because Appellant Failed to Timely File a Notice of Appeal.

The Third District Court, Judge Uno presiding, entered judgment in favor of defendants on March 24, 1986. Wendell's Notice of Appeal, filed September 3, 1986, was filed 163 days after entry of judgment and at least 84 days after he received actual notice of the Court's entry of judgment.

Wendell appeared before the District Court on July 29, 1986 (127 days after judgment was signed and filed) and, in an ex parte hearing, persuaded the Court to extend the time until September 3 in which he could file a Notice of Appeal.

Wendell's motion was premised on the fact that his counsel did not receive notice of the Court's Entry of Judgment until July 3, 1986. Wendell requested 30 days following July 3 in which to file a Notice of Appeal, plus another 30 days because his attorney was leaving town on vacation. Wendell filed his Notice of Appeal on September 3, 1986.

A. Appellant's Notice of Appeal was Not Filed within 30 Days of Entry of Judgment, as Required by Appellate Procedure Rule 4(a).

A losing party may appeal an adverse judgment in a civil action as a matter of right. Utah R. App. P. 3(a). An appeal is initiated by filing with the District Court a "Notice of Appeal," which must be filed "within 30 days after the date of the entry of judgment . . . appealed from." Utah R. App. P. 4(a). "Entry of Judgment" occurs when the Judgment is signed by the Judge and filed by the clerk of the court. Utah R. Civ. P. 58A(c).

The District Court entered summary judgment in favor of defendants, dismissing Wendell's complaint with prejudice, on March 24, 1986. The 30 day period for filing a notice of appeal expired on April 23. Wendell didn't request an extension of the time in which to file a Notice of an Appeal until July 29. The Notice of Appeal itself was not filed until September 3.

Wendell's Notice of Appeal was not filed within 30 days after Entry of Judgment. Consequently, it was not filed in time, pursuant to Appellate Procedure Rule 4(a).

B. Even if "Entry of Judgment" is Deemed not to Occur until the Losing Party Receives Notice of the Entry of Judgment, Appellant still did not File a Notice of Appeal within 30 days Following Actual Notice of Entry of Judgment.

Appellant contends that the 30 day period referred to Appellate Procedure Rule 4(a) does not begin to run until the losing party receives notice of the entry of judgment under Civil Procedure Rule 58A(d). Appellant's Memorandum of Points and Authorities in Opposition to the Respondents' Motion to Dismiss Appeal for Lack of Jurisdiction and Motion to Strike, p. 7.

The purpose of the new Rule 58A(d)¹ is to ensure that non-prevailing parties are informed of entry of judgment against them, so that they may act on such knowledge and decide whether to file a Notice of Appeal within the time prescribed by the Rules of Appellate Procedure. Advisory Committee Note to Rule 58A(d), Utah Bar Letter, January, 1986, p. 5.

In this instance, Wendell was informed and received notice of the judgment against him by no later than June 11, 1986. On June 10, defendants served a Writ of Garnishment on Continental Bank; return of service on which was filed with the Court.

¹ Rule 58A(d) was promulgated by the Supreme Court effective December 1, 1985, according to the Utah Bar Letter, January, 1986, p. 5. The new rule was included in the paperback, blue-cover Utah Court Rules Annotated (1986 ed.), published by the Michie Company. However, the 1986 Supplement to Volume 9B of Utah Code Ann., also published by Michie, contained no reference to the new rule.

Continental Bank, pursuant to its normal operating procedure, notified Wendell of the garnishment by mail and by phone. Wendell, when he talked to officer Jeanne Campbell of Continental Bank on the 10th or 11th asked the identity of the parties who had served the Writ. R. 311, p. 10. Continental Bank also mailed to Wendell a copy of the Writ, which identified the parties to the action, the civil number of the action, etc. Id. p. 8 and Exhibit 2 thereto. Furthermore, the information passed to Wendell by Continental Bank came to him after the Court had granted defendants' Motion for Summary Judgment in open court, with his counsel present and presenting argument. See Minute Entry issued by the Court, R. 212.

Although Wendell had not received formal notice pursuant to Rule 58A(d), he was notified and knew of the judgment against him by no later than June 11, 1986. Thirty days then passed and he filed no notice of appeal. Forty-five days passed. Finally, on July 29, at least 48 days after Wendell had received actual notice of the judgment against him, he decided to swap attorneys and request more time in which to file a notice of appeal.

Wendell thus knew by no later than June 11 that his account had been garnished and that judgment had been entered against him. Service by defendants of the Writ of Garnishment on

Continental Bank operated to give Wendell actual notice of the judgment entered against him. Actual notice satisfies the purpose of Civil Procedure Rule 58A(d) and, thus, Wendell's failure to file an appeal within 30 days of his actual knowledge of the judgment warrants dismissal of his appeal under Utah Rule of Appellate Procedure 4. Furthermore, one having actual notice is not prejudiced by a failure to receive statutory notice, and may not complain of the failure to receive statutory notice. First National Bank v. Oklahoma Savings and Loan Board, 569 P.2d 993, 987 (Okla. 1977).

This court has not interpreted delayed notice under Rule 58A(d) to postpone the running of prescribed time period in which notice of an appeal must be filed under Utah Rules of Appellate Procedure 4(a) and (e).² Even if that interpretation is adopted, however, Wendell received notice - actual notice - of the judgment entered against him by no later

² The recent amendments to the Rules of Civil Procedure, which became effective Jan. 1, 1987, amended Rule 58A(d), which had been in effect only just over a year, by adding, "However, the time for filing a notice of appeal is not affected by the notice requirement of this provision." Emphasis added.

than June 11, 1986. Wendell then permitted in excess of 30 days to lapse without filing a Notice of Appeal and without taking any other action to protect his right of appeal.

C. Even if the Date of "Entry of Judgment" is Deemed to be July 1, 1986, the Extension by the Court on July 29 of the Time in Which to File a Notice of Appeal Exceeded the Court's Discretion Under Appellate Procedure Rule 4(e).

Utah Rule of Appellate Procedure 4(e) provides that the initial 30 day period in which a Notice of Appeal may be filed may be extended by court order an additional 30 days, but only upon a showing of "excusable neglect" or "good cause." Wendell requested such an extension on July 29. Wendell's request for an extension, however, was predicated on (1) his selection of new counsel and (2) that his counsel would be out of town for several days.

The term "good cause" in Appellate Procedure Rule 4(e) refers to "an extraordinary circumstance that prevented movant from filing a timely notice of appeal and not to inadvertence or oversight on the part of counsel or to the failure of the client to authorize an appeal." Utah R. App. P. 4(e), Advisory

Committee Note (emphases added). The desire of Wendell's counsel to leave town on vacation does not constitute "good cause" or "excusable neglect" under Appellate Procedure Rule 4(e). See e.g., Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952, 959 (Utah 1984) (citing with approval a Maryland case holding that a senior partner's death and resultant delay in filing notice of appeal did not establish excusable neglect). Plaintiff's choice to hire new counsel toward the end of the 30-day period (assuming the 30 days referred to in Appellate Procedure Rule 4(a) began to run on July 1) likewise does not constitute "excusable neglect" or "good cause." See e.g., Laugesen v. Witkin Homes, Inc., 479 P.2d 289 (Colo. App. 1970).

A Notice of Appeal, as the 7th Circuit observed, is "an extremely simple instrument to prepare and file and if it is subsequently ascertained that an appeal should not be pursued it can be dismissed." Files v. City of Rockford, 440 F.2d 811, 816 (7th Cir. 1971) (interpreting Fed. R. App. P. 4 and citing 9 Moore's Federal Practice ¶ 204.13[3], at 978 (2d ed. 1970)). Wendell's attorney instead of filing a Motion for Extension of Time, could have filed a Notice of Appeal or he could have easily filed a Notice of Appeal before he left town. There was no "good cause" for Wendell having an extra 30 days.

The District Court exceeded its authority under Appellate Procedure Rule 4(e) in granting Wendell an extension on July 29 based on the grounds presented by Wendell. Where an extension is granted by a District Court in the absence of "excusable neglect" or "good cause," the filing of a Notice of Appeal within the extension period is not timely filed under Appellate Procedure Rule 4(e). Prowswood, Inc. v. Mountain Fuel Supply Co., supra.

D. Failure to Timely File Notice of Appeal is Jurisdictional, and Requires Dismissal of the Appeal.

Timely Notice of an Appeal is jurisdictional. Nelson v. Stoker, 669 P.2d 390 (Utah 1983); Watson v. Anderson, 29 Utah 2d 36, 504 P.2d 1003 (1972). Since failure to timely file a Notice of Appeal is jurisdictional, the Supreme Court lacks jurisdiction to hear an appeal in which Notice of Appeal is not timely filed. Bowen v. Riverton City, 656 P.2d 434 (Utah 1982). An appeal, in such circumstances, must be dismissed. Id.; Burgers v. Maiben, 652 P.2d 1320 (Utah 1982); Watson v. Anderson, supra.

The Supreme Court may not enlarge the time for filing a Notice of Appeal. Utah R. App. P. 22(b); Utah R. App. P. 2,

Advisory Committee Note ("Rule 22(b) prohibits the Supreme Court from extending or suspending the time for appeal or review and the district court is otherwise prohibited except as provided by Rule 4(e)"). Emphasis added.

Defendants did not give formal notice to Wendell of the entry of judgment against him until July 1. Wendell, accordingly, wants this Court to declare that the 30 day period referred to in Appellate Procedure Rule 4(a) did not begin to run until July 1, 1986, that his request for an extension of time was warranted and timely made on July 29, 1986, and that his Notice of Appeal was timely filed on September 3, 1986.

No Utah decision has interpreted the in-effect for one year (and published in only some of the official codes) Rule 58A(d) to extend the time period in which a losing party may initiate an appeal. The recent amendment to Rule 58A(d) suggests that it does not.

Under any interpretation given to Rule 58A(d), as it affects the running of the 30 day period under Appellate Rule 4(a), Wendell's Notice of Appeal was not timely filed in this case. If Entry of Judgment is deemed to be the date the Judgment was signed and filed, see Utah R. Civ. P. 58A(c), then the Judgment was entered on March 24 and neither Wendell's request for an extension on July 29 nor his Notice of Appeal on

September 3 was timely made. If Entry of Judgment is deemed to be the date on which Wendell received actual notice of the Judgment, then the Judgment would be deemed entered on either June 11 or 12. Again, neither Wendell's request for an extension on July 29 nor his Notice of Appeal on September 3 was timely made. If Entry of Judgment is deemed to be the date on which formal notice was mailed to Wendell pursuant to Rule 58A(d), then the Judgment would be deemed entered on July 1. Under that interpretation, Wendell's request for an extension, though made within 30 days, was made without "good cause," see Utah R. App. P. 4(e), and the Notice of Appeal on September 3 still was not timely filed.

Under any of the above interpretations, Appellant failed to file his Notice of Appeal within the time prescribed by the Rules. This Court consequently lacks subject matter jurisdiction to hear the Appeal, the Appeal should be dismissed, and the summary judgment and award of attorneys fees by the district court should be affirmed.

II. The Purported June 30, 1984 Will is Invalid as a Matter of Law because it was not Properly Executed.

A. The Alleged June 30, 1984 Will was not Executed in Compliance with Utah Code Ann. § 75-2-502.

Wendell's Complaint is founded upon an alleged will, allegedly executed by Grant R. Taylor on June 30, 1984. The alleged will is purported to be Grant's "Final Will and Testament," and is characterized in Wendell's complaint as a "Will and/or Codicile."

Utah Code Ann. § 75-2-502 (1978), which governs execution of wills, provides that:

Except as provided for holographic wills, writings within section 75-2-513, and wills within section 75-2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will. The signing by the witnesses must be in the testator's presence and in the presence of each other. [Emphases added.]

Neither of the versions of the alleged June 30, 1984 will produced by Wendell is a holographic will, since each is typewritten. Nor does either version fall within the ambit of Section 75-2-513 (separate writing identifying bequest of tangible property) or Section 75-2-506 (choice of law as to execution).

Section 75-2-502 thus requires that a will, to be valid, must be witnessed and signed by at least two persons. Furthermore, each of the persons who witnessed the testator's

signature must sign in the testator's presence and must sign in the presence of each other. This requirement, imposed by the last sentence of Utah Code Ann. § 75-2-502 (1978), does not appear in the Uniform Probate Code, and was expressly retained by the Utah Legislature when it adopted a modified version of the Uniform Probate Code in 1975. See Wellman and Gordon, "Uniformity in State Inheritance Laws: How UPC Article II Has Fared in Nine Enactments," 1976 B.Y.U.L.Rev. 357, 381. The purpose of such a provision is to guard against fraud. 94 C.J.S. Wills § 189.

"The right to dispose of property by will is governed and controlled entirely by statute. Such statutes are mandatory, and unless strictly complied with, the instrument, as a will, is void." In re Alexander's Estate, 104 Utah 286, 139 P.2d 432, 434 (1943) (emphasis added) (will invalid where testator did not sign in the presence of witnesses); In re Love's Estate, 75 Utah 342, 285 P. 299, 301 (1930); In re Wolcott's Estate, 54 Utah 165, 180 P. 169, 170 (1919); see also In re McCoy's Estate, 91 Utah 212, 63 P.2d 620 (1937) (will invalid where, although two witnesses signed testator's proposed will, they did not sign at her express request). To construe the statute governing the execution of wills other than literally, is to usurp legislative authority. In re Alexander's Estate, supra 139 P.2d at 434.

By her own admission, Geraldine Taylor did not sign the alleged June 30, 1984 will until May of 1985, eleven months later and approximately eight months after Grant's death. Obviously, Geraldine, the alleged second witness, did not sign the will "in the testator's presence," as mandated by the statute. As such, the June 30, 1984 instrument--even that version appended to Wendell's November 12, 1985 Affidavit--is not a valid will of Grant R. Taylor.

Noel Taylor's alleged signature, by itself, cannot and does not validate the June 30, 1984 document. Utah Code Ann. § 75-2-502 (1978). Where signatures by two attesting witnesses are required by statute, and a purported will is signed by only one attesting witness, such will is invalid. *Id.*; McGarvey v. McGarvey, 405 A.2d 250 (Md. App. 1979); In re Will of Poppe, 302 N.Y.S.2d 708 (N.Y. Surr. Ct. 1969); Seab v. Seab, 203 So.2d 478 (Miss. 1967); Cooper v. Liverman, 406 S.W.2d 927 (Tex. Civ. App. 1966); In re Ritchie's Will, 198 N.E.2d 494 (Ohio Prob. 1962); In re Shattuck's Estate, 37 N.W.2d 555 (Mich. 1949).

A will that is not properly executed cannot be admitted to probate, Utah Code Ann. §§ 75-3-409, -402, -303(3) (1978); In re McCoy's Estate, *supra* at 628, and the decedent's personal representative may not distribute the assets of a decedent's estate according to the terms of such an instrument. Utah Code Ann. § 75-3-703(1) (1978).

B. The Doctrine of "Substantial Compliance" Does Not
Excise the Last Sentence of Utah Code Ann. § 75-2-502
(1978).

Prior to the adoption by the Utah legislature of the Uniform Probate Code in 1985, Utah law required that a properly executed will be witnessed by at least two persons and signed by those two persons in the presence of the testator. See Utah Code Ann. § 74-1-5(4)(1953, 1976 Reprint ed.)(repealed 1975 effec. 1977). The Uniform Probate Code does not contain such a requirement. When Utah adopted its version of the Uniform Probate Code in 1975, the legislature specifically added the last sentence of Section 75-2-502 and thus retained the requirement present in prior Utah law. The fact that the Utah legislature expressly retained the requirement set forth in the pre-1975 Utah Probate Code, one not present in the Uniform Probate Code, indicates a clear legislative intent to retain and enforce the requirement that the witnesses to a will sign in the presence of the testator.

The directive set forth in Section 75-2-502 is simple and straightforward; a will to be valid "must" be signed by two witnesses "in the testator's presence." Words and phrases in statutes are to be construed according to their context and the

approved usage of language. Utah Code Ann. § 68-3-11 (1953). This court has previously held that the word "must" is, as the common usage of the word implies, "mandatory." Glenn v. Ferrell, 5 Utah 2d 439, 304 P.2d 380, 382 (1956) ("the word must is mandatory unless some compelling reason indicating a contrary intent appears."). Moreover, it is assumed when the legislature enacts a statute that the words and phrases in the statute "were chosen advisedly to express legislative intent." Gord v. Salt Lake City, 20 Utah 2d 138, 434 P.2d 449, 451 (1967). A statute should not be "applied other than in accordance with its literal wording unless it is so unclear or confused as to be wholly beyond reason, or inoperable, or it contravenes some basic constitutional right. If it meets these tests . . . [this Court] has a duty to let it operate as the legislature has provided." Id.

The language in the last sentence of Section 75-2-502 is simple, direct and clear. The language is also mandatory. It declares that for a will to be valid, the witnesses must sign in the testator's presence. This Court thus has an obligation to enforce the clear terms of the statute.

C. The Doctrine of "Substantial Compliance," in any Event, is Not Satisfied in this Case.

Wendell urges that this Court liberally interpret Section 75-2-502 and rule that with respect to the alleged June 30, 1984 Will the requisites set forth in the statute were substantially complied with. Appellant's Brief p. 13.

Wendell first refers to the Editorial Board Comments following Section 75-5-502, which note that "the formalities for execution of a will have been reduced to a minimum," draws attention to the Board's comments that the witnesses need witness the testator's signature and implies that that is all that is necessary for a will to be valid. Wendell omits that the comments are those of the Joint Editorial Board of the National Conference of Commissioners on the Uniform Probate Code, see "Forward," 8A Utah Code Ann., Title 75 (1978), and not those of the Utah legislature. Wendell likewise omits that the last sentence of Section 75-2-502, which does not appear in the Uniform Probate Code, and on which the Editorial Board Comments are based, was expressly retained by the Utah legislature when it repealed the former law and adopted Utah's version of the Uniform Probate Code.

Second, Wendell relies on Utah Code Ann. § 75-1-102 (1978), which states that the probate code "shall be liberally construed and applied to promote its underlying purposes and policies," and Utah Code Ann. § 68-3-2 (1953), which states

that all statutes "are to be liberally construed with a view to effect the objects of the statutes and to promote justice."

"While it is true that our statutes are to be liberally construed to give effect to their purpose and to promote justice, it is equally true that they should not be distorted beyond the intent of the legislature." Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 341 P.2d 207, 210 (1959). The evolution of Section 75-2-502 and the retention from prior law of the requirement expressed in the last sentence makes it clear that the legislature intended that a will, to be valid, "must" be signed by the witnesses "in the testator's presence and in the presence of each other." A liberal construction may not be employed by Wendell in this instance to eviscerate a plain requirement of the statute.

Finally, Wendell argues that the requirements of Section 75-2-502 were "substantially complied" with in this instance and cites cases from Montana and Kansas in support. In the first case cited by Wendell, In re Estate of Rudd, 369 P.2d 526 (Mont. 1962), the Montana Supreme Court confirmed that it had previously declared "that substantial compliance with the statute [on execution of wills] is sufficient." Id. at 530. Wendell, however, omits reference to the facts and holding of that case. In Rudd, there existed several discrepancies

between the manner in which the will was executed and the formalities required by Montana statute: among others, that Rudd signed the will at least 15 to 30 minutes before the attesting witnesses; that Rudd did not sign the purported will in the presence of the attesting witnesses, and that the witnesses did not sign in Rudd's presence. Id. at 529. The Montana statute -- as does Utah's current statute -- required that there be two attesting witnesses, that each must sign as witnesses, and that each must sign in the testator's presence. Id. Under those circumstances, the trial court ruled that the requisites of the Montana statute on execution of wills "were not substantially complied with." Id. at 531 (emphasis added). The Montana Supreme Court affirmed. Id. at 532.

Wendell also cites In re Estate of Perkins, 210 Kan. 619, 504 P.2d 564 (1972) in support of his position. The Perkins case, as the section quoted by Wendell indicates, stands only for the proposition that "slight or trifling departures from technical requirements" should not operate to defeat a will. Id. at 568. The abject failure to comply with an express requirement of a statute, however, is not a "slight or trifling departure."

In explaining the doctrine of "substantial compliance", the Montana Supreme Court noted in In re Estate of Birkeland, 519 P.2d 154, 156 (1974) that the doctrine requires "substantial compliance with the statute not compliance with a substantial portion of that statute."³ Emphasis in original. The doctrine of substantial compliance "cannot be extended so as to dispense with an essential requirement of the statute made for the purpose of preventing fraud, either upon the testator or those upon whom the law casts his property after death." 79 Am.Jur.2d Wills § 184 (2d ed. 1975). The fact that some of the formalities were complied with in the execution of the alleged June 30, 1984 will is insufficient. Geraldine Taylor did not sign the June 30, 1984 document in the presence of Grant Taylor. Signing in the presence of a testator is a requirement

³ Appellant cited In re Estate of Birkeland in his Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment. Plaintiff cited Birkeland ostensibly for the proposition that "a liberal construction" should be given to the statute on formalities required for execution of wills. Defendant, however, omitted the explanation of "substantial compliance" given by the Court and omitted that the Court in Birkeland, where statutory requisites were not complied with, held that the purported will at issue "was not executed and attested in substantial compliance with" the Montana statute.

that is expressly mandated by statute and a requirement that the Utah legislature clearly intended to have followed. Thus, even if a doctrine of "substantial compliance" is embraced by this Court, the requisites of Section 75-2-502 were not "substantially complied with" under the facts of in this case. The June 30, 1984 document is not a valid will, even under a "substantial compliance" standard.

III. Because the Purported June 30, 1984 Will is not a Valid Will, Appellant Lacks Standing to Challenge the Validity of Grant Taylor's August 30, 1984 Will and/or the Grant R. Taylor Trust.

Unless a contestant is or becomes a beneficiary of a decedent's estate by an adjudication that a decedent's will is invalid, that contestant lacks legal standing to contest that will. In re Estate of Bonfils, 543 P.2d 701 (Colo. 1975). Wendell, for example, would not have standing to petition the Court to set aside the informal probate of Grant Taylor's August 30, 1984 will. Utah Code Ann. § 75-3-401(1) (Supp. 1986) (providing that only an "interested person" may petition to set aside a will).

The "interest" of one who may contest is not the interest of every busybody or tom dicary who may not approve of the will. It must be a financial or property interest derived either from inheritance or under a will. The person so contesting must either gain or lose by virtue of the will in question. * * * It should not be within the power of a stranger or interloper having no interest in the estate to upset and destroy the solemn judgment of the probate court in admitting the will to probate. If [plaintiffs] had no interest, they had no cause of action [citation omitted] and, therefore, had no right to bring or maintain their contest, and the only judgment which the circuit court could enter was dismissal of such suit.

First Presbyterian Church of Monnett v. Feist, 397 S.W.2d 728, 733 (Mo. App. 1965). A "stranger" to a will thus lacks standing to challenge it. In re Dong Ling Hing's Estate, 78 Utah 324, 2 P.2d 902, 904 (1931) (person not an heir not permitted to contest will in probate).

Because the June 30, 1984 "Will and/or Codicile" is invalid as a matter of law (see above analysis), Wendell would take no property by an adjudication that Grant's August 30, 1984 will, or that the Grant R. Taylor Trust, is invalid. Even if both instruments are declared invalid, none of the property covered by either instrument would descend to Wendell. Rather, the property would descend to Grant's children and to his spouse Esther under the intestacy statute, Utah Code Ann. § 75-2-101,

to -103 (1978). Even if, as Wendell alleges, Grant's remarriage to Esther was conducted at a time when Grant was not in control of his faculties and was not of sound mind, Wendell would still not take an interest. Even in that extreme situation, the property in Grant's estate would descend to his children under Id. § 75-2-103; it would not descend to Wendell.

Wendell insists that he is an "interested person" under Section 75-1-201(20) by virtue of the fact that the June 30, 1984 document evidences a debt owed by him to Grant Taylor; that he therefore "has a property right in or claim against the estate in the determination of whether the debt to the estate is cancelled." Appellant's Brief p. 11. Wendell's statement misses the point. Wendell is an "interested person" for the purpose of challenging Grant's August 30, 1984 will if, but only if, the prior June 30, 1984 document is held to be a valid testamentary disposition. In that instance, Wendell would be an "interested person" and can challenge the validity of the August 30, 1984 will on grounds of undue influence, etc. If, however, the alleged June 30, 1984 will is invalid as a matter of law, as the district court held, then Wendell is not an "interested person" and has no independent standing to challenge the August 30, 1984 will.

The issues raised in "Point I" of Appellant's Brief, pp. 9-12, consequently are irrelevant. There exist disputed issues of fact with respect to influence and competence concerning the August 30, 1984 will. The fact that such issues are disputed, however, is irrelevant and immaterial if Wendell lacks standing to assert his objections.

Wendell, because he would take no interest even if Grant's August 30, 1984 will and the Grant Taylor Trust were both declared invalid, thus lacks standing to challenge Grant's August 30, 1984 will and the Grant R. Taylor Revocable Trust. As such, the district court was correct in granting summary judgment in favor of defendants and in dismissing Wendell's complaint with prejudice. First Presbyterian Church of Monnett v. Feist, *supra*; Mills v. Kettler, 573 S.W.2d 672 (Mo. App. 1978); In re Bonfil's Estate, *supra*.

IV. Defendants were Entitled to Attorneys Fees Incurred in this Action as a Consequence of The "Inexcusable Neglect" of Plaintiff or his Attorney.

At the hearing on February 20, 1986, defendants also argued their motion for attorneys fees. Defendants presented the Court with two independent bases for awarding defendants

attorneys fees: (1) that the "inexcusable neglect" of plaintiff and/or his attorney warranted attorneys fees and/or (2) that plaintiff's "bad faith" warranted attorneys fees. Defendants' Memorandum, R. 117-131. Wendell presented no memorandum in opposition. Although it is not in the record since no transcript of the hearing was made, the Judge stated orally in ruling on defendants' motion, that he did not think plaintiff's conduct involved amounted to "bad faith." Nevertheless, the Court found attorneys fees warranted under the circumstances and took the matter of fees under advisement pending submission of an affidavit by defendants setting forth their fees. Minute Entry, R. 212. Defendants' attorney subsequently submitted an affidavit detailing defendants' fees. Wendell objected to the award of fees and defendants responded to his objections. On March 24, 1984, after having received Defendants' Memorandum and after having heard oral arguments on the issue, after having received Defendants' Affidavit, and after having been submitted both Wendell's objections and Defendants' response, the Court signed the Order granting defendants' motion for summary judgment and granted defendants \$5,000 in attorney's fees.

Inasmuch as the Court granted defendants attorneys fees, it may be implied from the Judge's comment that he did not find

"bad faith", that he awarded defendants fees on the first of the two bases presented to him. Thus, Appellant's analysis, to the extent that it addresses and analyzes Utah's "bad faith" statute, Utah Code Ann. § 78-27-56 (Supp. 1986), see Appellant's Brief pp. 20-23, may be disregarded.

A. Plaintiff's Conduct in his Management of the Two Versions of the June 30, 1984 Wills Constituted "Inexcusable Neglect."

Wendell attached to his complaint a version of a will signed by only one witness. See Exhibit A hereto. That alleged will was invalid as a matter of law because it was signed by only one witness. After Wendell had been served with Defendants' Motion to Dismiss, which pointed out the flaw in the will, he then produced a second version signed by two witnesses. See Exhibit B hereto.

Wendell has never provided an entirely plausible or suitable explanation for the existence of two versions of the same will, nor has he ever satisfactorily explained just how it happened that the will initially attached to the complaint was not "the true and accurate copy" of the will he allegedly had in his possession. Even if there exists a plausible

explanation, however, Wendell's and his counsel's failure to allege or even notice that the version appended to the complaint was not the "true and accurate" version of the alleged June 30, 1984 will constituted at the very least an egregious oversight and a violation of counsel's responsibility under Rule 11. The damage caused by that oversight was then exacerbated by Wendell waiting over a month and a half following service of process on defendants, and a full 27 days following service of defendants' Motion to Dismiss, to inform defendants less than 48 hours prior to the hearing on defendants' Motion, of the "oversight." In the interim, defendants' counsel advised defendants of the defect concerning the signature, conducted research, prepared a Motion to Dismiss and accompanying Memorandum, and twice prepared oral arguments; all on the understanding that the document at issue contained the signature of only one witness. As a direct consequence of the oversight and "inexcusable neglect" of Wendell and his counsel, defendants thus incurred significant legal expenses which, but for such oversight, would have been avoided.

B. The "Inexcusable Neglect" of Plaintiff and/or his Attorney Justified the Court's Award of Attorneys Fees.

The version of Utah Rule of Civil Procedure 11 in effect when Wendell filed his complaint⁴ required that a party's attorney sign each and every pleading and that the attorney's signature:

constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay.

The Utah version of Rule 11 in effect as of the time Wendell's Complaint was filed is essentially the same as the pre-amended version of Federal Rule of Civil Procedure 11, which was amended in 1983 to expressly provide for the imposition of attorneys

⁴ The current version of Rule 11 very clearly states that appropriate sanctions may be imposed on a party, his attorney, or both, where the Rule is violated. Appropriate sanctions specifically include "the amount of reasonable expenses incurred because of the filing of the pleading, . . . including a reasonable attorneys' fee."

It is not clear to Respondents when the current Rule became effective. Defendants' Memorandum, R. 117-131, submitted to the district court presumed that the current Rule 11 went into effect Dec. 1, 1985, after the filing of the complaint. See Utah Bar Letter, Jan. 1986, p. 5. The 1987 Compilation of the Rules by Michie, as does the 1986 Supplement, however, states that the current version took effect Sept. 4, 1985. Wendell's complaint was filed Oct. 11, 1985. R. 2. If the current Rule 11 was in effect as of September 4, 1985, there is no question but that the complaint filed contravened Rule 11 and that the Court's award of fees was appropriate and warranted.

fees on any attorney who signs a pleading in violation of the rule, on the party who that attorney represents, or on both. See 2A Moore's Federal Practice ¶ 11.01[3].

Even before the amendment to Federal Rule 11 sanctioning the award of attorneys fees under certain circumstances, however, federal courts had held that courts possess the inherent authority to assess attorneys fees in such circumstances. Id., ¶ 11.01[4]. Courts specifically have the "inherent power," as part of their equitable jurisdiction, to "award attorneys fees when the interests of justice so require," Hall v. Cole, 412 U.S. 1, 5 (1973); as, for example, when the losing party has acted in bad faith, vexatiously or for oppressive reasons," Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 2464 (1980). A court's inherent authority includes the authority to impose attorneys fees on "errant lawyers" who practice before it, Loctite Corp. v. Fel-Pro, Inc., 94 F.R.D. 1, 11 (N.D. Ill. 1980), and, specifically, on counsel guilty of "inexcusable neglect," Schwarz v. United States, 384 F.2d 833, 836 (2d Cir. 1967)(attorneys fees to opposing party as an alternative to dismissal for failure to prosecute). State courts have the same heritage of equity jurisprudence and, hence, the same inherent authority. Roadway Express, Inc. v. Piper, supra, 100 S.Ct. at 2464 n. 13.

An award of attorneys fees may be appropriate, for example, where an attorney's "negligence" causes the "inconvenience of another party," Estate of Pausner, 428 N.Y.S.2d 815, 816 (N.Y. Surr. 1980).

[A]n attorney at law is not usually charged with any costs awarded during the course of litigation, but he may be personally charged if his negligence rather than the negligence of his client, led to the inconvenience of the other party, or when there is palpable bad faith or fraud on the part of the attorney.

Id. (wherein plaintiff's claims were based upon "recently concocted and tailored fabricated records"); See also Basch v. Westinghouse Elec. Corp., supra at 174-5 (affirming award of attorneys fees as sanctions where plaintiff's conduct regarding discovery directly increased and multiplied defendant's cost of litigation). Such attorneys fees may be imposed on the party the errant attorney represents, see e.g., Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078 (2d Cir. 1977), or on the errant attorney himself, Id.; Estate of Pausner, supra.

Defendants are thus entitled to an award of attorneys fees in the amount of fees attributable to the oversight of Wendell and the district court was correct in awarding defendants

attorneys fees. The \$5,000 awarded defendants closely corresponds to the fees incurred by defendants through the date that Wendell finally alerted defendants of his "error."

R. 213, 216 paragraph 4.

C. The Court was Not Required to Make Findings of Fact in Order to Sustain an Award of Attorneys Fees.

Wendell also objects to the award of fees against him on the ground that the Court made no findings of fact concerning fees. Appellant's Brief, p. 1 ("Issue 4"), 23. Utah Rule of Civil Procedure 52(a), in effect in February and March 1986, when Judgment was entered, provided that "Findings of Fact . . . are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)". Utah R. Civ. P. 52(a) (quoted portion of Rule repealed and amended effect. Jan. 1, 1987). Consequently, the Court was under no requirement to enter Findings of Fact with respect to the award of attorneys fees.

Wendell cites Lockhart Co. v. Anderson, 646 P.2d 678 (Utah 1982) and F.M.A. Financial Corp. v. Build, Inc., 17 Utah 2d 80, 404 P.2d 670 (1965) in support of his conclusion that Findings of Fact must be made in order for an award of attorneys fees to

be affirmed. Both cases are distinguishable, first, in that they both involve situations where fees were being awarded as a part of an underlying claim, rather than as a means of sanctioning one of the parties. More importantly, both cases hold only that for an award of fees to be affirmed there must be findings of fact or some evidence in the record to support the award. In both Lockhart and F.M.A. no such evidence appeared in the record. In this instance, however, the requisite evidence was provided through the affidavit submitted by defendants' attorney. R. 213-227.

The district court's award of fees to defendants was made after the Court had reviewed the Memorandum submitted by defendants, after the Court had heard oral arguments on defendants' motion, after the Court had reviewed the Affidavit detailing attorneys fees, and after the Court had reviewed both the Wendell's Objection to the proposed Order and defendants' Response. Wendell chose not to submit any memorandum whatever on the issue of attorneys fees. Wendell also chose not to notice up a hearing on his Objections to defendants' proposed order and the fees detailed in defendants' Affidavit. Although brief arguments in opposition to fees were presented at the February 20 hearing by Wendell's attorney, where no transcript of the proceeding was made, it must be assumed that any

evidence presented and weighed in that hearing (and as supplemented by the affidavit of defendants' attorney) was sufficient to support the court's award of attorneys fees. Barrett v. Melton, 112 Ariz. 605, 545 P.2d 421 (1976). The Court's award of attorney's fees to defendants, in short, is amply supported by the record and by evidence in the record.

SUMMARY OF ARGUMENTS

1. The Court lacks subject matter jurisdiction to hear this appeal because of Appellant's failure to timely file a Notice of Appeal. Consequently, this appeal should be dismissed and the summary judgment and award of attorneys fees in favor of Respondents affirmed.

2. The alleged June 30, 1984 Will of Grant Taylor is invalid as a matter of law because it was not signed by the witnesses in the manner required by Utah Code Ann. § 75-2-502 (1978). A doctrine of "substantial compliance" may not be wielded by Appellant to excise the last sentence of Section 75-2-502. Furthermore, even if this Court were to embrace a doctrine of "substantial compliance," the plain requirements of Section 75-2-502 were not "substantially complied with" in this case. Summary judgment was therefore proper and should be affirmed.

3. If the June 30, 1984 will of Grant Taylor is invalid as a matter of law, Appellant lacks standing to challenge the validity of Grant Taylor's August 30, 1984 Will. Consequently any factual dispute concerning issues of competence or undue influence are not material to the issue of whether summary judgment was appropriate. Summary judgment, again, was therefore proper and should be affirmed.

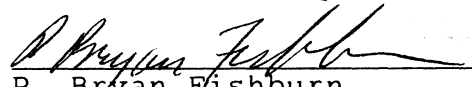
4. Courts possess the inherent power to award attorneys fees in certain circumstances. The attorneys fees awarded defendants in this case were appropriate given the fact that plaintiff admittedly attached what he later professed to be the wrong document to his complaint, then allowed the error to fester for over a month and a half before correcting it, to defendants' economic detriment. The award of attorneys fees to defendants in the amount of \$5,000 was proper under the circumstances, was within the Judge's range of discretion, and should be affirmed.

Respondents respectfully request that the Judgment and Order of the district court below be affirmed, that Appellant's appeal be dismissed with prejudice, and that Respondents be awarded costs for defending this appeal.

DATED: April 15, 1987.

CALLISTER, DUNCAN & NEBEKER

By



P. Bryan Fishburn

Attorneys for Defendants

CDN1198F

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF RESPONDENTS was mailed, postage fully prepaid this 15 day of April, 1987, to the following:

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