

1988

Mountain States Broadcasting Company, a
corporation, and Dan Lacy, and individual v.
Sterrett Neale and Neale Broadcast Alliance : Reply
Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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IN THE COURT OF APPEALS

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OF THE STATE OF UTAH

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DOCKET NO. **880192-CA**

MOUNTAIN STATES
BROADCASTING COMPANY,
a corporation, and DAN
LACY, an individual,

Plaintiffs-
Appellants,

vs.

STERRETT NEALE and NEALE
BROADCAST ALLIANCE,

Defendants-
Respondents.

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Case No. 880192-CA

Category 14b

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE FINAL JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
STATE OF UTAH, THE HONORABLE BOYD L. PARK PRESIDING

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ATTORNEYS FOR RESPONDENTS

JUN 2 1988

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OF THE STATE OF UTAH

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a corporation, and DAN	:	
LACY, an individual,	:	
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Appellants,	:	
vs.	:	
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Defendants-	:	
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	:	
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REPLY BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This action arises out of a sale of an FM and AM radio station in Utah County. The facts of the case are set forth in the Amended Brief of Appellants (plaintiffs-purchasers) and the Brief of Respondent (defendants-sellers). This Reply Brief will address each issue raised by the respondents.

ARGUMENT

POINT I

THE TRIAL COURT'S FINDING WITH RESPECT TO
CERTAIN ITEMS OF MISSING EQUIPMENT WAS
CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE.

Exhibit 19 sets forth what equipment was missing. Plaintiffs initial brief established that the testimony offered by

the plaintiffs with respect to many of the items on Exhibit 19 was not refuted.

Defendants falsely claim that "[t]he gravamen of this appeal is plaintiffs' contention that their evidence must be believed whenever there is a conflict," and that plaintiffs "[argue] that the Court was required to accept [their] version of the facts." (Brief of Respondent at 9, 11.) These statements are untrue. Plaintiffs acknowledged that where the trial court had made a considered finding based upon conflicting evidence, this Court will not overturn those findings. It is because of this rule that plaintiffs have not challenged most of the findings made by the trial court, even though plaintiffs believe that the findings are contrary to the preponderance of the evidence.

This Court should, however, reverse the findings of the trial court if they are contrary to the great weight of the evidence. In making this determination, it is not enough if the findings are supported a mere scintilla of admissible evidence. State v. Walker, 743 P.2d 191, 193 (Utah 1987). Plaintiffs' initial brief established that several of the trial court's findings do meet this test, in that they are contrary to the great weight of the evidence. These findings include the findings with respect to the brain, the missing and defective equipment identified in appellants' initial brief, and the extra payroll expense. Although there may be some isolated shreds of evidence which standing alone might appear to support the trial

court's findings with respect to these items, the evidence taken as a whole is clearly contrary to those findings.

For example, with respect to the Ampex playback electronics, valued at \$2,000.00, plaintiffs established, by citation to clear and straight-forward testimony from both plaintiff and defense witnesses, that the equipment was missing at the time of the sale. Defendants attempt to challenge this testimony by arguing as follows:

Steven Hope, General Manager of KONI after the sale in September, 1982, testified that the Ampex equipment was present in the station and in working condition. (T. 193-95). George Culbertson, former owner and station engineer, testified that the Ampex equipment and the pre-amplifiers were in the station when he performed an inventory in December, 1983. (T. 277, Exh. 69). Michael Pierce, a disk jockey at the station after July 1, 1982, used the Ampex playback equipment. (T. 302).

Brief of Respondent, pages 12-13.

Although in isolation these statements might appear to support an inference that the Ampex playback electronics equipment was in the station, a careful analysis shows that the great weight of the evidence was to the contrary. Steven Hope's testimony on pages 193-95 of the transcript (R. 617-19), for example, shows that the Ampex equipment which he used was a reel-to-reel recorder, not the Ampex playback electronics and pre-amplifiers. The testimony of George Culbertson set forth on page 277 of the transcript refers to the Ampex playback electronics, but does not unequivocally state that the equipment was there. Mr. Culbertson later testified as follows:

Q. Going to the next one the tape Preamps were not found?

A. That is true and now those are the Preamps that I am talking about with the Ampex PR 10 transports.

Q. Were not in use in any way?

A. No.

Q. The stereo heads were they found?

A. They had been installed in the Ampex PR 10 and I did not inspect any of them. I don't even know if they were still there.

R. 703-04 (emphasis added).

The testimony of Michael Pierce on page 302 (R. 727) of the transcript can only be read as referring to the Ampex reel-to-reel recorder or another recorder, because the Ampex playback electronics were not in use. (R. 702; Ex. 17 (marked with an asterisk indicating "not in use").)

Similarly, with respect to the noise and distortion meter, defendants claim that Mr. Neale testified that the noise and distortion meter was in the station, and cite to page 562 (R. 989) of the transcript. Mr. Neale's testimony is transcribed as follows: "The noise and distortion meter I do know about." This appears to be a transcription error because the sentence makes sense in the context of the paragraph only if Mr. Neale stated "the noise and distortion meter I do not know about." Even if the transcription is correct, the sentence does not state that the noise and distortion meter was in the station, but only that Mr. Neale "knew about it."

Plaintiffs' initial brief showed that one of the two oscilloscopes was missing. Defendants countered by stating that "Mr. Crawford recalled oscilloscopes in two locations, the transmitter room and the transmitter site on the mountain. (T. 478)" Brief of Respondent at 13. Mr. Crawford's actual testimony from page 478 (R. 905), however, is as follows:

This was a small fairly inexpensive oscilloscope. I think there were two of those. It was at least one. I remember one in the transmitter room and another one up on the mountain but I can't remember for sure whether it was one or two.

Mr. Lacy unequivocally testified that the items set forth on Exhibit 19 were not present in the station when he purchased it. The "evidence" cited by defendants in their brief does not contradict Mr. Lacy's testimony. Under these circumstances, the Court should hold that the great weight of the evidence is contrary to the findings of the trial court.

POINT II

NEALE BROADCAST WARRANTED THAT THE
EQUIPMENT WOULD BE IN "GOOD REPAIR AND
WORKING ORDER," NOT JUST THAT THE
EQUIPMENT WOULD BE "USABLE."

Point II of defendants' brief addresses plaintiffs' claim that the brain and two of the carrouseles were inoperable, and challenges plaintiffs' argument concerning the scope of the warranty applicable to those items. Plaintiffs established in their initial brief that the Asset Purchase Agreement contained two separate warranties: (1) all of the transmitting and studio equipment (the first three categories on Schedule 2) were

warranted to be in good repair and working order, regardless of whether the equipment was in active use, and (2) all other assets listed on Schedule 2 (comprising the personal property) were warranted to be in good repair and working order if in active use. Defendants do not challenge this interpretation of the contract, and indeed no other interpretation is possible. Defendants' only response is a claim that the argument is raised for the first time on appeal.

Contrary to Neale Broadcast's assertion, however, this construction of the Agreement was, and continues to be, the heart of plaintiffs' complaint against Neale Broadcast. From the beginning, plaintiffs have maintained that Neale Broadcast breached the warranty provided in paragraph 4.2.3 by failing to transfer the assets listed in paragraph 2.1.1 in good repair and working order. In their Complaint, for example, plaintiffs alleged that Neale Broadcast breached "paragraph 4.2.3 of the Asset Purchase Agreement [at] the closing date of said agreement." (Complaint, R. 1-2, paragraph 5.) Moreover, plaintiffs' counsel made a distinction between the warranty with respect to the personal property as compared with the studio and transmitting equipment in opening argument:

Paragraph 4.2.3 of the contract states as of the closing date all of the personal property listed in schedule 2 which is presently in the active use in the operation of the stations will be in good repair and working order unless otherwise noted on schedule 2. The transmitting and studio equipment for the stations which are [sic] in good repair and working order.

R. 442-43 (paragraph structure omitted).

This is the very distinction that plaintiffs argue on this appeal, and merely because Neale Broadcast has not perceived this subtle, yet critical, distinction until now does not mean that plaintiffs have just raised the argument for the first time.

Plaintiffs acknowledge that they have presented their arguments on appeal in a slightly different fashion than they had been presented before the trial court. There is nothing improper, however, in so doing. An appeal to this Court should not be limited to merely resubmitting the arguments in the same fashion in which they were submitted to the trial court. With the benefit of hindsight and having had an opportunity to read the transcript and to thoroughly consider why the trial court was not persuaded by the arguments, a party is expected on appeal to restructure its arguments and present them in a more persuasive fashion than was done below.

With the benefit of such hindsight and reflection, it is now apparent that both the trial court and defendants failed to properly understand the nature of the warranty contained in the Asset Purchase Agreement. Defendants argue on appeal, for example, that the trial court erred in finding that the warranty was breached with respect to the brain and two of the carrouseles, claiming the brain and carrouseles were "in use" at the time of the sale. Whether the items were "in use," however, is not relevant. The Asset Purchase Agreement required that the studio and transmitting equipment be in "good repair and working

order". The fact is that the brain and carrousel did not work.

For the reasons set forth in plaintiffs' initial brief, plaintiffs are entitled to an additional offset for the value of the cartel, the Magnecord recorder, and one additional carousel. These items were listed on Schedule 2 as being included in the purchase, but were not in good repair and working order at the time of the transfer.¹

Defendants further claim that the trial court's findings with respect to the brain and carrousel were not supported by the evidence. Defendants do not challenge the evidence cited in plaintiffs' initial brief to the effect that there were numerous problems with the brain and carrousel, but only claim that the equipment was in some form of "use" at the time of the transfer. For the reasons set forth above, the fact of "use" is irrelevant to the issue of whether the equipment was in good repair and working order. Plaintiffs' initial brief sets forth substantial evidence supporting the trial court's finding that the brain and

¹Defendants claim on page 16 of their brief that the cartel was in regular daily use up until the time of the transfer. As set forth above, the fact of daily use is not equivalent to "good repair and working order." In addition, the portions of the records cited by defendants do not refer specifically to the cartel, but only to the automation equipment generally. Plaintiffs demonstrated in their initial brief that the only record references specifically to the cartel established that the cartel was not in good repair and working order at the time of the transfer.

carrouseles were not in good repair and working order,² and that finding should be affirmed.

POINT III

PLAINTIFFS ARE ENTITLED TO AN OFFSET FOR THE COST OF REPLACEMENT OF THE BRAIN.

Point III of respondents' brief begins by rearguing the same issue addressed in Point II, i.e., the brain was used after the sale, therefore its condition did not breach the warranty set forth in the Asset Purchase Agreement. Plaintiffs have refuted that contention in Point II of this Reply Brief. That equipment can be coaxed and cajoled into some form of limited use does not mean that it is "usable" nor that it is in "good repair and working order." In any event, there was ample evidence that the brain did not work sufficiently to automatically run the station, which was what it was designed to do.

The second part of Point III of respondents' brief responds to plaintiffs' claim for the full replacement cost of the brain. Plaintiffs' initial brief asserted that there was no evidence to support the trial court's finding that it would cost \$3,000.00

²For example, Exhibits 12, 13, 14, and 15 detail ongoing complaints and comments from employees describing the problems they experienced with the brain. Exhibit 15, signed by Malcolm Crawford, stated that "the automation has died R.I.P." Exhibit 70, which is a letter by George Culbertson, a former owner and an expert called by the defendants, observed destruction and disposition of station equipment and maintenance by good technicians who were not experienced, "repairs with 'chewing gum, rubber bands and hair pins'", unwise modifications, unauthorized experimentation by non-technical people, theft by employees and unauthorized removal of station equipment, and this was the condition of the station purchased by the plaintiff.

to repair the brain, and argued that plaintiffs were entitled to an offset for the full replacement cost of the brain because the brain was not repairable.

The trial court found that the Control Design brain was not in good repair and working order, and awarded plaintiffs a \$3,000.00 offset, representing the supposed cost of repair of the brain. Plaintiffs' initial brief challenged that finding, claiming there was no evidentiary support for the figure of \$3,000.00, and also asserting that there was no evidence that the brain could be repaired.

Defendants responded to this argument by asserting that Exhibit 68 provided evidentiary foundation for the trial court's finding as to repair cost. Brief of Respondent at 22. Exhibit 68, however, is a letter criticizing certain technical tests performed on the radio station, and does not address the necessity of nor cost of repair to the brain. It is believed that defendants intended to refer to Exhibit 10. Exhibit 10 is a proof of performance test which was offered into evidence for the purpose of showing that the station did not meet Federal Communications Commission regulations. (R. 479-82.) It was not offered as evidence of the cost of repair of the brain. Defendants, however, apparently reply on the following statement contained in Exhibit 10:

Brain will not work at all. Brain is missing cards. Amount of effort needed to repair cannot be determined at this time. Will probably require \$2,000-\$3,000 in labor by an engineer experienced with the equipment, plus approx. \$200-\$400 in parts on

carrousels and an unknown amount on the brain.

Even if this statement had been offered as evidence of the cost of repair, it would not have been admissible. There was no foundation showing that the persons who prepared the report had any knowledge concerning the cost of repairing similar equipment. More importantly, the quoted statement affirmatively states that the cost of repair cannot be determined. It was error for the trial court to rely on such avowedly inadmissible and speculative statements.

Plaintiffs' burden of proof was to establish that the brain was not in good repair and working order, and to provide proof of at least one of the possible measures of damages. Ault v. Dubois, 739 P.2d 1117 (Utah App. 1987). If defendants disagreed with the measure of damages selected by plaintiffs, the burden was on defendants to provide proof of that alternative measure of damages. Id.

In compliance with their burden of proof, plaintiffs presented admissible evidence that the brain was not repairable,³ and presented evidence that the cost of replacement of the brain was \$13,104.05. (T. 72, 189.) Defendants contest

³Defendants assert that "defendant is unaware of any evidence that the control brain was irreparable, only that Mr. Culbertson had been unable to repair it." (Brief of Respondent at page 21.) The distinction is specious. Mr. Culbertson testified that he, working together with a trained factory representative, had been unable to repair the brain. If the factory representative and Mr. Culbertson were unable to repair the brain, the only reasonable conclusion is that it was not repairable.

this argument, claiming that cost of replacement is not an appropriate measure of damages for damaged or destroyed items of property, citing as support the same case cited by plaintiffs in their initial brief, Ault v. Dubois, 739 P.2d 1117 (Utah App. 1987).

Ault involved claims of damage to sentimental personal property located in an old home which had been used as a residence for delinquent boys. The plaintiffs-owners had been awarded damages against the defendant-renter for damages to trees, window glass, oak tables, and other similar items. The defendant appealed from the judgment, asserting that the plaintiffs had only put on evidence of replacement cost, rather than lost value.

In response to the defendant's contentions in Ault, this Court noted that "[f]or personal property, such as the destroyed oak tables, damages are ordinarily based on market value at the time of taking or destruction." 586 P.2d at 1121 (citation omitted). This Court further noted, however, that "cost of replacement may have been the only evidence available for the jury in determining the fair market value of the destroyed items." 739 P.2d at 1121-22. Finally, this Court stated in footnote as follows:

Dubois [the defendant-renter], whose main attack throughout his discussion of the damage question is that loss of value rather than repair cost should apply, specifically argues that even insofar as repair cost might be germane, the Aults actually focused on replacement cost rather than repair cost. Our review suggests that much of the

replacement cost evidence was indistinguishable from evidence of repair cost. For example, a shattered window or a broken pipe is repaired by being replace. Replacement cost was clearly proper as to the dead trees, since the only way to effect restoration of dead trees is to plant new ones.

It is in the context of the damaged or destroyed items of personal property where evidence of replacement cost seems least appropriate, especially since many of the items were old, worn, or otherwise marginal to begin with, and the date of damage or destruction was unknown. . . .

739 P.2d at 1122 n.7 (emphasis in original).

Defendants in the instant case cite to the above footnote from Ault to support their argument that it would have been error for the trial court to award damages for the cost of replacing the brain. Defendants apparently claim that the brain was "old, worn, or otherwise marginal," and argue that replacement cost was therefore not an appropriate measure of damages.

Defendants' argument is misplaced for two reasons. First, defendants had warranted that the brain was in good repair and working order. The fact that the brain was in a damaged or inoperable condition was the very thing which was warranted against. Whether the brain was old was therefore irrelevant--defendants had guaranteed that it would be in good repair and working order. No such warranty existed in Ault.

Second, the evidence before the trial court established, without contradiction, that electronic equipment such as the brain did not materially depreciate, and that the current fair

market value of a used brain was the same as the replacement cost. (T. 69-72.)

In summary, there is no admissible evidence to support the Court's finding that the brain was repairable at the price of \$3,000.00, or at any other price. The uncontradicted evidence before the court established that the brain was not repairable. Plaintiffs were entitled to an offset for the fair market value of the brain, which in this particular instance is the same as the replacement cost of the brain.

POINT IV

PLAINTIFFS WERE ENTITLED TO RECOVER THE EXTRA PAYROLL EXPENSE INCURRED BY REASON OF THE INOPERABLE CONDITION OF THE BRAIN.

In response to plaintiffs' evidence and argument that they were entitled to the \$3,355.07 in extra payroll expense incurred by reason of the inoperable condition of the brain, defendants argue that plaintiffs' "decision to operate the radio station manually rather than by automation was determined by choice, rather than by necessity." (Brief of Respondent at page 22.) Defendants cite to testimony that the automation equipment was actually used, and also to testimony that at least one disk jockey preferred to work live.

Defendants also claim that the evidence would have supported a finding that the automation equipment worked and was used to keep KONI on the air. Brief of Respondent at 23. The fact is, however, that such a finding would have squarely contradicted the trial court's finding that the brain was not in

good repair and working order. The trial court discounted the testimony concerning the use of the brain, and found that the brain was not in good repair and working order.

Even if the brain had been "usable" in some sense of the word, the testimony established that it still required constant supervision. It did not work with that degree of reliability necessary for the operation of a radio station with only minimal human supervision. It did not work as it was represented that it would work. The brain would not control the various pieces of equipment and machines it was designed to do. Judge Park ruled that the brain did not work, therefore, the plaintiffs should be compensated for that value. The equipment not working is set forth on Exhibit 20.

With respect to the contention that at least one disk jockey preferred to work live, is irrelevant because he had no voice. The equipment would not work. The plaintiffs were under an order from Federal Communications Commission to divest themselves of one station and not to actively operate two AM stations which serve the same broadcast area.

Where the trial court found that the warranty was breached with respect to the brain, it was error to fail to allow an offset for all damages flowing from that breach. The trial court found that the brain was not in good repair and working order, and it follows that the extra payroll expense was necessary and not merely a matter of choice on the part of plaintiffs.

POINT V

THE AWARD OF COMPOUND INTEREST WAS IMPROPER.

Plaintiffs tendered the sum of the \$89,587.16 into court on May 9, 1983. This was tendered in connection with filing of the complaint. The plaintiffs were permitted to withdraw the check for \$89,587.16 and in exchange paid the sum of \$59,587.16 on May 27, 1983, to the defendants and redeposited the sum of \$30,000.00 with the court. Because that tender exceeded the amount then due, no award of interest should have been made. The point is that a tender was made on May 9, 1983, or at the latest the tender was made on May 27, 1983. This changes by thousands of dollars the math that is calculated in a handwritten document attached to the Findings of Fact and Conclusions of Law upon which the ultimate judgment was entered.

The law is set forth in 23 Am.Jur.2d Deposits in Court § 7 (1983): "It has been held that a debtor who deposits money in court pursuant to law is not, as a general rule, liable for interest on the fund during the time that it is in the court's custody" See also Potter v. Gardner, 30 U.S. 718 (1831); Himley v. Rote, 9 U.S. 313 (1809).

The Wyoming court in the case of Graves v. Burch, 26 Wyo. 192, 181 P. 354, 360 (1919) held that "[t]he defendants should not be required to pay interest upon the amount originally tendered and deposited in court"

An examination of the handwritten document attached to the judge's Findings of Fact and Conclusions of Law upon which

judgment was granted clearly shows that the calculations are wrong. Judge Park held that a credit should be given of \$6,000.00. Monthly payments were to be made at the rate of \$1,122.36. This would amount to almost five months of payments. The handwritten document shows that a credit was given but immediately interest is compounded monthly beginning with July 31, 1982. If the credit had been properly given as set forth by the judge assuming there was a delinquency, arguendo, there would be a credit at least until February of 1983.⁴ The court has allowed for interest to be compounded before there is even a delinquency therefore the defendants have had the use of the money plus now they are claiming it on a monthly basis. The defendants were ordered in paragraph 27 of the Findings of Fact and Conclusions of Law to recalculate the balance of the promissory note after giving credit for \$6,000.00 and this was not done accurately because this would constitute monthly payments for which no credit was given. In the memorandum decision of Judge Park, paragraph 27, the court concludes that if there was less than \$30,000.00 due on the promissory note as

⁴Plaintiffs received an offset of \$6,000.00, plus made payments of \$2,403.30 and \$1,201.65, for a total of \$9,604.95. Attached to this brief as Appendix "A" is an amortization showing that the offset and payments were the equivalent of eight regular payments, or through February, 1983. Interest should therefore not have been compounded, even under the trial court's rationale, until after February, 1983. The attached Appendix "B" shows the amortization with compounding commencing after February, 1983.

The error in the computations is even more pronounced when credit is given for the value of the brain and carrousel, as shown on the attached Appendix "C".

of January 5, 1984 then the plaintiffs shall be given a credit for such overpayment together with interest at the rate of 10% per annum. By not including interest as a delinquency when a credit should have been given, there would be no judgment in favor of the defendants.

The trial court found that the amount owing at the time of plaintiffs' tender in connection with filing their complaint was \$89,216.93. (R. 323.) Because that tender exceeded the amount then due, no award of interest should have been made.

The defendants rely upon the case of Jensen v. Liechtenstein, 45 Utah 320, 145 P. 1036 (Utah 1915). The language in the promissory note in the Jensen case is not the language in the promissory note that this Court is called upon to interpret. The promissory note in the case now before the Court states that interest will be paid at 10% per annum. The trial court interpreted this to mean compounding interest on a monthly basis. This was not provided for in the note. The Jensen promissory note provided for quarterly payments. Therefore, it is understandable why the Court reached this interpretation. For the reasons set forth in plaintiffs' initial brief, it was error to compound interest on a monthly basis where the note provided for annual simple interest.

POINT VI

DEFENDANTS WERE NOT ENTITLED TO AN AWARD OF ATTORNEYS FEES WHERE PLAINTIFFS WERE THE PREVAILING PARTIES.

Defendants argue that they are entitled to attorneys fees because they received the net judgment. This argument ignores the fact that the trial court only ordered plaintiffs to pay amounts which had been previously deposited with the court. These amounts had been tendered into court by personal check at the inception of the action, and later replaced with certified funds.

Defendants further argue that they have an absolute right to attorneys fees under the terms of the promissory note and the individual guaranty. Although defendants did file a counter-claim and asserted that plaintiffs had breached the terms of the promissory note, the bulk of the litigation in this case concerned plaintiffs' claim to an offset under the terms of the Asset Purchase Agreement. Defendants' attorneys fees were predominately incurred in defense of plaintiffs' claims under the Asset Purchase Agreement. Under the terms of that Agreement, attorneys fees are allowed only to the prevailing party. Under the law stated in plaintiffs' initial brief and under that stated in respondents' brief, plaintiffs must be considered the prevailing party on the issues relating to the Asset Purchase Agreement. The award of attorneys fees to defendants for defense of that action should be disallowed.

In any event, the fees awarded to defendants were more than double the fees awarded to plaintiffs, and were clearly unreasonable.

Defendants further claim that they are entitled to an additional award of fees, to include everything after the fees were calculated by the trial court. Plaintiffs dispute this claim for the reasons set forth above. In the event, however, that this Court determines that an award of additional attorneys fees is appropriate, those fees should not include any work performed prior to the date of the judgment, such as preparation of the proposed finds of fact and conclusions of law or the written closing arguments. The judgment must be deemed to have comprehended all matters occurring prior to the date thereof.

POINT VII

ANY JUDGMENT ON REMAND SHOULD BE ENFORCEABLE AGAINST STERRETT NEALE PERSONALLY.

Plaintiffs established in their initial brief that the trial court erred in release the funds on deposit to Sterrett Neale, personally, without allowing plaintiffs an opportunity to respond to defendants' motion for an amendment of the judgment. Defendants respond by arguing that the time for response to the motion was governed by Rule 2.9 of the Rules of Practice, and that plaintiffs' response was untimely when measured by the time parameters of that rule. Defendants also argue that the trial court's action merely corrected a clerical error.

The fallacy with defendants' argument is that defendants did not proceed under Rule 2.9. Rule 2.9 governs the submission of proposed orders and judgments after the court has already ruled that the party is entitled to the order or judgment. In this case, the trial court had already ruled, but had also already entered a judgment. Defendants then sought to amend that judgment to change the payee and to add a social security number. Whereas Rule 2.9 should have governed the proceedings after the court had ruled on defendants' motion to amend, the rule should have had no application prior to the trial court ruling on the motion.

Defendants elected to seek an amendment of the judgment by motion. Having elected that procedure, defendants and the court should have followed the rules governing responses to motions, particularly Rule 2.8. Plaintiffs' initial brief established, and defendants do not dispute, that plaintiffs made a timely response in accordance with Rule 2.8.

The defendants filed a Motion pursuant to Rule 2.8 and then proceeded pursuant to Rule 2.9.

The action of the trial court unfortunately cannot be undone. The money has already been disbursed, and probably spent. Equity demands, however, that where the money was paid to Sterrett Neale, any judgment on remand should be enforceable against Mr. Neale to the extent of the funds he received.

Plaintiffs were awarded judgment against defendants in an amount of \$8,088.75 but yet the defendants were not required to

post any bond. The defendants were allowed to take the money out of the court contrary to Rule 2.8. Plaintiffs are now in a position where Neale Broadcast Alliance is no longer a viable corporation and Sterrett Neale has been dismissed from the case but was allowed to take the money personally from the court. For these reasons a bond should be posted by the defendants and judgment should be rendered against Sterrett Neale personally.

CONCLUSION

The findings of the trial court with respect to certain items were contrary to the great weight of the evidence. The trial court's findings were further conflicting, in that the court found that the brain did not function properly and thus breached the warranty in the Asset Purchase Agreement, but failed to award the damages, including extra payroll expense, flowing from that breach.

No interest should have been awarded where the plaintiffs had tendered the amount due into court, and the interest should not have been compounded monthly. The defendants should not be awarded interest until the credits and offsets were properly accounted for. There is over \$9,000.00 that should be accounted for before interest would be due.

The attorneys fees awarded to defendants were unreasonable, and should not have been allowed where plaintiffs were the prevailing party on the predominate cause of action.

Finally, any judgment on remand should be enforceable against Sterrett Neale personally, where he was the recipient of

funds which were improperly released by the trial court. The plaintiffs have an unsatisfied judgment of over \$8,000.00.

The judgment of the trial court should be reversed, and this case remanded for entry of judgment for the cost of replacement of the brain and the other items as detailed in plaintiffs' initial brief, and for the extra payroll expense, or in the alternative, for a new trial.

DATED this 31st day of May, 1988.

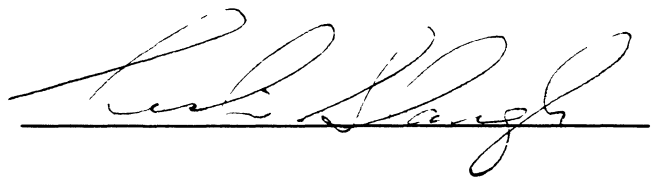


DON R. PETERSEN, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiffs

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 31st day of May, 1988.

Stephen L. Henriod
Marilynn P. Fineshriber
NIELSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111



APPENDIX "A"

MOUNTAIN STATES BROADCASTING CORPORATION
VS
NEALLE BROADCAST ALLIANCE

AMORTIZATION SCHEDULE - Court ordered \$6,000.00 offset

ORIGINAL AMOUNT OF LOAN: \$90,929.99

MONTHLY PAYMENT: \$1201.65 TERM OF LOAN 120 Months

INTEREST RATE 10 % (Compounded Monthly in Default)

Date	Interest	Principal	Balance
7 - 1982	757.75	443.90	90486.09
8 - 1982	754.05	447.60	90038.49
9 - 1982	750.32	451.33	89587.16
10 - 1982	746.56	455.09	89132.07
11 - 1982	742.77	458.88	88673.19
12 - 1982	738.94	462.71	88210.48
1 - 1983	735.09	466.56	87743.92
2 - 1983	731.20	470.48	87273.47
3 - 1983	727.28		86800.75
4 - 1983	733.34		86734.09
5 - 1983	197.20		86931.29
	(8 days interest)		
5-9-83		89587.16	(655.87)

ANNUAL INTEREST ON OVERPAYMENT OF NOTE by Mountain States
Broadcasting Corporation at 10% per annum

To 5-9-84	65.59	(721.46)
To 5-9-85	72.15	(793.61)
To 5-9-86	79.36	(872.97)
To 2-24-87	69.84	(942.81)

APPENDIX "B"

MOUNTAIN STATES BROADCASTING CORPORATION
VS
NEALLE BROADCAST ALLIANCE

AMORTIZATION SCHEDULE - Court ordered \$6,000.00 offset

ORIGINAL AMOUNT OF LOAN: \$90,929.99

MONTHLY PAYMENT: \$1201.65 TERM OF LOAN 120 Months

INTEREST RATE 10 % Per Annum
(Interest Compounded Monthly only in default)

Date	Interest	Principal	Balance
6 - 1982		6000.00	84929.99
7 - 1982	707.75		85637.74
8 - 1982	707.75		86345.49
9 - 1982	707.75		87053.24
10 - 1982	707.75		87760.99
10 - 1982		2403.30	85357.69
11 - 1982	707.75		86065.44
12-1-1982		1201.65	84863.79
12 - 1982	707.20		85570.99
1 - 1983	707.20		86278.19
2 - 1983	707.20		86985.39
3 - 1983	724.88		87710.27
4 - 1983	730.92		88441.19
5 - 1983	196.56		88637.75
	(8 days interest)		
5-9-83		89587.16	(949.41)

ANNUAL INTEREST ON OVERPAYMENT OF NOTE by Mountain States
Broadcasting Corporation at 10% per annum

To 5-9-84	94.94	(1044.35)
To 5-9-85	104.44	(1148.79)
To 5-9-86	114.88	(1263.67)
To 2-24-87	101.85	(1365.52)

APPENDIX "C"

MOUNTAIN STATES BROADCASTING CORPORATION
VS
NEALLE BROADCAST ALLIANCE

AMORTIZATION SCHEDULE - Offset \$ 3,000.00 for Carousels
and Offset \$ 13,104.06 for Automation Brain

ORIGINAL AMOUNT OF LOAN: \$90,929.99

MONTHLY PAYMENT: \$1201.65 TERM OF LOAN 120 Months

INTEREST RATE 10 % (Compounded Monthly in Default)

Date	Interest	Principal	Balance
7 - 1982	757.75	443.90	90486.09
8 - 1982	754.05	447.60	90038.49
9 - 1982	750.32	451.33	89587.16
10 - 1982	746.56	455.09	89132.07
11 - 1982	742.77	458.88	88673.19
12 - 1982	738.94	462.71	88210.48
1 - 1983	735.09	466.56	87743.92
2 - 1983	731.20	470.45	87273.47
3 - 1983	727.28	474.37	86799.10
4 - 1983	723.33	478.32	86320.78
5 - 1983	191.84	128.64	86192.14
(8 days principal and interest)			
5-9-83		89587.16	(3395.02)
5-9-83 Remainder of offset		7372.03	(10767.05)
ANNUAL INTEREST ON OVERPAYMENT OF NOTE by Mountain States Broadcasting Corporation at 10% per annum			
To 5-9-84	1076.71		(11843.76)
To 5-9-85	1184.38		(13028.14)
To 5-9-86	1302.81		(14330.95)
To 2-24-87	1158.18		(15489.13)