

2008

# Mark D. Bergman v. Debbie A. Burke, Dorene R. Basug, First American Title : Brief of Appellee

Utah Court of Appeals

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**IN THE COURT OF APPEALS OF THE STATE OF UTAH**

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**MARK D. BERGMAN,**

Appellant/Cross-Appellee,

vs.

**DEBBIE A. BURKE, DORENE R.  
BASUG, and FIRST AMERICAN TITLE,**

Appellee/Cross Appellant.

**Civil No. 20080751-CA**

**Priority No. 15**

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**BRIEF OF APPELLEE**

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Appeal from a Judgment entered in the Second Judicial District Court,  
Weber County, State of Utah Honorable Judge Parley R. Baldwin Presiding

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Attorneys for Appellee



**FILED  
UTAH APPELLATE COURTS**

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### **STATEMENT OF JURISDICTION**

Pursuant to Utah Code Ann. §§ 78-2-2(3) and 78-2a-3 (1953, as amended) this civil appeal is within the jurisdiction of the Utah Supreme Court and Mr. Bergman's appeal (20080751-CA) was transferred to the Utah Court of Appeals pursuant to Utah Code Ann. §§ 78A-3-102 and 78A-4-103, on September 29, 2008.

### **PARTIES**

1. **Debbie A. Burke** ("Ms. Burke") was, at all times relevant, a resident of Ogden, Weber County and/or Duchesne, Duchesne County, Utah.
2. **Mark D. Bergman** ("Mr. Bergman") was, at all times relevant, a resident of Ogden, Weber County, Utah.
3. **Dorene R. Basug**, and **First American Title** have been dismissed from this case.

### **STATEMENT OF THE CASE**

Ms. Burke owned real property located in Weber County, Utah, described as: Lot 496, RON-CLARE VILLAGE NO. 5, Ogden City, Weber County, Utah (the "Property"). **Record at pages 4, 24, 74, and 81.** In order to sell the Property, Ms. Burke and her husband, Vince Isbell ("Mr. Isbell"), listed the Property with Laura Streble ("Ms. Streble"), who is Mr. Bergman's wife, through Val R. Iverson Realty ("VRIR") on a Multi State Listing. Prior to selling the Property, Ms. Burke and Mr. Isbell agreed to let Mr. Bergman perform some clean-up and repairs on the Property. At no time during Ms. Burke and Mr. Isbell's conversations with Mr. Bergman about the clean-up and repairs on the Property did either Ms. Burke and/or Mr. Isbell offer Mr. Bergman a full time job working on the Property. Ms. Burke and Mr. Isbell's discussions did not include an offer of employment for a specific number of hours, a specific amount of money per hour, or that they would pay any amount of Mr. Bergman's taxes.

On or about October 27, 2003, Mr. Bergman filed a lien on the Property in the amount of \$28,675.00 ("Lien"). Attached as Exhibit "A" to the Complaint. **Record at page 8.** On or about April 1, 2004, Mr. Bergman filed his complaint with the district court in Weber County, Utah ("Complaint"). **Record at pages 1 - 11.** Mr. Bergman also recorded a Lis Pendens on or about April 6, 2004. **Record at pages 12 - 13.** The Complaint is entitled "Complaint to Foreclose Mechanics's Lien." **Record at pages 1 - 11.** Mr. Bergman asserted a single cause of action in his Complaint claiming he was entitled to foreclose his mechanics' lien under Utah's mechanics' lien statute. *Id.* Ms. Burke was served with a summons and the Complaint on or about June 18, 2004. **Record at page 22.** Ms. Burke filed her Answer and Counterclaim on or about August 12, 2004. **Record at pages 23 - 28.** Mr. Bergman filed his Answer to the Counterclaim on or about August 25, 2004. **Record at pages 30 - 31.**

On or about January 23, 2004, Dorene R. Basug, purchased the Property from Ms. Burke, prior to the Complaint being filed **Record at pages 38 - 55**. First American Title, the title company for the sale, were dismissed from the case after depositing \$28,675.00 with the district court, based on a stipulation of the parties on or about October 21, 2004. **Record at pages 56 - 57**.

Mr. Bergman did not prosecute his case from October 2004, August of 2005. **See the Record**. Ms. Burke filed her Motion for Summary Judgment and supporting documents on or about August 4, 2005. **Record at pages 73 - 108**. Ms. Burke was asking the district court to determine that the Lien was invalid due to deficiencies in the Lien itself. **Record at page 8**. Mr. Bergman filed his Memorandum in Opposition to Defendant Debbie Burke's Motion for Summary Judgment and supporting documentation on or about August 22, 2005. **Record at pages 109 - 22**. Ms. Burke filed the Defendant Debbie A. Burke's Reply Memorandum in Support of Defendant Debbie A. Burke's Motion for summary Judgment. **Record at pages 123 - 35**. The court held a hearing on Ms. Burke's Motion for Summary Judgment on December 15, 2005. **Record at page 141**. Counsel for Ms. Burke sent a letter to the district court and opposing counsel concerning the Court of Appeals' decisions in *Pearson v. Lamb*, 2005 UT. App. 383) September 9, 2005, and *Sill v. Hart*, 2005 UT. App. 537 (December 15, 2005), a copy of the *Sill* decision and a copy of Utah Code Ann. § 38-11-102 were attached to the letter. **Record at pages 142 - 52**. Counsel for Mr. Bergman filed a letter dated December 20, 2005, discussing the *Pearson* and *Sill* cases. He also discussed Utah Code Ann. § 38-1-11(4)(a), Utah Code Ann. § 38-1-7(2)(h), and Utah Code Ann. § 38-11-102(16) and provided copies of those code sections. **Record at pages 153 - 55**. Counsel for Mr. Bergman also filed a letter dated

December 5, 2005, but was filed in the Record on January 12, 2006, including a copy of the *Pearson* case. **Record at pages 156 - 60.** On or about January 19, 2006, the court denied Ms. Burke's Motion for Summary Judgement. **Record at pages 161 - 65.** The order denying the Motion for Summary Judgement was filed on or about February 24, 2006. **Record at pages 166 - 69.** Once again, Mr. Bergman failed to prosecute his case, and the district court filed a Notice of Intent to Dismiss on or about December 7, 2006. **Record at pages 170 - 71.** Mr. Bergman filed his Statement of Plaintiff in Response to the Court's Notice of Intent to Dismiss and Request for Permission to hold Rule 26, Scheduling Conference of the Parties' on December 21, 2006. **Record at pages 172 - 75.**

At the telephonic conference held by the district court on February 28, 2007, in addition to scheduling the trial and dates associated there with, a discovery cut-off date, which was set for July 7, 2007. **Record at pages 179 - 83.** On or about June 13, 2007, Ms. Burke sent Debbie A. Burke's First Set of Interrogatories and Document Requests and Debbie A. Burke's First Set of Requests for Admission to Plaintiff to Mr. Bergman. **Record at pages and 184 - 85, 188 - 89.** Mr. Bergman failed to send any discovery of any type to Ms. Burke at any time during the case. Mr. Bergman filed his Certificate of Service of the Plaintiff's Answers to Defendant Debbie A. Burke's First Set of Interrogatories and Responses to Request for Production of Documents on July 31, 2007. **Record at page 190.** Mr. Bergman also filed his Certificate of Service of the Plaintiff's Responses to Defendant Debbie A. Burke's First Set of Requests for Admissions. **Record at page 191.** After trying to work out some discovery issues between the attorneys, Ms. Burke filed a Motion to Compel, and supporting documents, more complete answers and/or response to the discovery, on October 1, 2007. **Record at pages 192 - 93 and 197 - 272.**

The district court conducted a two day bench trial on or about November 13, and 14, 2007. **Record at pages 312 - 14.** Due to time constraints, the district court requested the attorneys submit written closing arguments. On or about November 21, 2007, Mr. Bergman filed the Plaintiff's Closing Argument. **Record at pages 317 - 25.** Ms. Burke filed the Defendant Debbie A. Burke's Memorandum in Support of Motion to Dismiss on November 23, 2007. **Record at pages 326 - 51.** On or about November 23, 2007, Ms. Burke filed the Defendant Debbie A. Burke's Closing argument. **Record at pages 352 - 70.** Through a telephonic conference, the district court issued its Ruling on the trial. **Record at page 373.** The district court issued its Judgment on January 16, 2008. **Record at pages 374 - 78.** Counsel for Mr. Bergman signed off and approved the Judgment as to form and content. **Record at page 377.**

On or about January 24, 2008, Mr. Bergman filed the Plaintiff's Notice of Release of Counsel and Representing Pro Se. **Record at pages 379 - 80.** On the same day, Mr. Bergman filed a Motion to Alter or Amend a Judgment with the supporting documents. **Record at pages 381 - 86.** The district court issued it memorandum decision granting Plaintiff's motion to allow Michael F. Olmstead to withdraw as counsel and denied the Plaintiff's Motion to Alter or Amend the Judgment, on or about March 4, 2008. **Record at pages 408 - 09.**

Ms. Burke filed Burke's Motion for Attorneys' Fees and Costs and Affidavit of Attorneys' Fees and supporting documents on March 6, 2008, pursuant to Utah Code Ann. § 38-1-18(1). **Record at pages 410 - 60.** On or about March 13, 2008, Mr. Bergman filed his Motion Requesting Court to Classify and Seal Court Documents and his Memorandum in Opposition of Defendant's Motion for Attorney Fees and supporting documents. **Record at pages 471 - 89.** On or about April 3, 2008, Mr. Bergman filed his Motion Presenting New Conclusive Evidence

Relating to the Defendant Committing Fraud upon the Court and his Affidavit in Support of Motion Presenting New Conclusive Evidence and supporting documents. **Record at pages 514 - 31.**

On or about April 7, 2008, Mr. Bergman filed his Notice of Appeal and his Affidavit of Impecuniosity. **Record at pages 532 - 33.** The district court issued its Memorandum Decision denying Ms. Burke's Motion for Attorneys' Fees and Costs and Mr. Bergman's Motion Requesting the Court to Classify and Seal Court Documents on or about April 8, 2008. **Record at pages 539 - 40.** On or about April 25, 2006, Ms. Burke filed Burke's Objection to the Motion Presenting New Conclusive Evidence Relating to the Defendant Committing Fraud Upon the Court. **Record at pages 555 - 62.**

On or about May 12, 2008, the district court issued its decisions on Mr. Bergman's Order on Plaintiff's Notice of Release of Counsel and Representing Pro Se and Motion to Alter or Amend a Judgment and Order on Plaintiff's Motion Requesting the Court to Clarify and Seal Court Documents and Burke's Motion for Attorney's Fees and Costs. **Record at pages 564 - 69.** Ms. Burke filed her Notice of Appeal on or about May 13, 2008. **Record at pages 570 - 80.**

Mr. Bergman filed a Motion to Remove Stay on Judgment on or about August 1, 2008. **Record at pages 592 - 96.** On or about August 7, 2008, the district court issued its Ruling Denying Plaintiff's Rule 60 (b) Motion. **Record at pages 597 - 99.** Mr. Bergman filed his Notice of Appeal and his Affidavit of Impecuniously on or about September 2, 2008. **Record at pages 600 - 11.**

**DEBBIE A. BURKE'S RESPONSE**  
**MR. BERGMAN'S STATEMENT OF THE FACTS**

Ms. Burke will respond to the Mr. Bergman's "Statement of Facts" even though his statement of facts not in the normal format. First it should be pointed out that Mr. Bergman has failed to provide any evidence of the allegations contained in his Statement of Facts. He failed to cite to the record at all in his Statement of Facts.

First, Mr. Bergman asserts that May 12 and 13, 2008, "play a very important role throughout the following brief and the Plaintiff requests that such date be given special interest." *See* Appellant's/Plaintiff's brief at page 15. Mr. Bergman never claims that he has first hand knowledge of the events he asserts took place at the Weber County Courthouse on May 12, 2008. He has not provided this Court or any other court with any evidence that the series of events that he claims took place on May 12, 2008, ever happened and/or happen as he alleges. He has failed to provide an affidavit from anyone that was there to support his "Statement of Facts."

Mr. Bergman's statement that counsel for Ms. Burke has an improper ex parte communication with the Honorable Judge Parley R. Baldwin ("Judge Baldwin") is simply wrong. The claimed discussion between Ms. Burke's counsel and Judge Baldwin never took place. Since that communication never took place, any alleged outcomes from that communications are wrong and could not follow.

**May 12, 2008**

1. The trial court clerk's two entries correctly reflect what took place on that day according to her experience and direct from the trial court. The trial court executed the four orders on May 12, 2008. **Record at pages 564 - 69.** What Mr. Bergman did or did not do with respect to his inquiries about the order is unknown to Ms. Burke. Mr. Bergman failed to explain

whether he communicated directly with Judge Baldwin or with his clerk about the status of the orders. Since Ms. Burke's counsel did not have an ex parte communicate with Judge Baldwin, he is unaware of what if anything he was told or if his inquiries "fell on deaf ears at the court."

2. Once again, because Ms. Burke's counsel did not speak with Judge Baldwin, Ms. Burke and her counsel have no knowledge of what Judge Baldwin did or may have said to his clerk about any entries on the court docket. Unless otherwise proven, Judge Baldwin's clerk made the entries she was instructed to make.

3. Ms. Burke's counsel did not speak with Judge Baldwin, therefore, Ms. Burke and her counsel have no knowledge of what Judge Baldwin did or may have said to his clerk about any entries on the court docket. Unless otherwise proven, Judge Baldwin's clerk made the entries she was instructed to make.

4. The docket does not identify who requested the copies or paid for them.

May 13, 2008

5. Ms. Burke's counsel did file a Notice of Appeal and pay the filing fee on May 13, 2008. Ms. Burke's Notice of Appeal was sent to Mr. Bergman pursuant to the Utah Rules of Civil Procedures. Her Notice of Appeal did in fact have a copy of the trial court's order dated May 12, 2008.

The claimed "real court orders" are located at the **Record at pages 564 - 69**. Ms. Burke's Notice of Appeal can be found at the **Record at pages 570 - 80**. Ms. Burke only appealed the trial court's May 12, 2008, Order on Plaintiff's Motion Requesting the Court to Clarify and Seal Court Documents and Burke's Motion for Attorneys' Fees and Costs and was attached as Exhibit "B" to Ms. Burke's Notice of Appeal. **Record at pages 578 - 80**. The two copies are identical

except for the signature pages. The clerk stamped the copy of that Order and provided it to Ms. Burke's counsel.

The Order on Motion for Summary Judgment, was signed by Judge Baldwin on or about February 24, 2006. **Record at pages 573 - 76.** This Order is attached as Exhibit "A" to Ms. Burke's Notice of Appeal. *Id.* The court's file does not contain any "fake court orders." Mr. Bergman has not provided any evidence that any documents included in the district court's file are fake and/or were not executed by the trial court or stamped pursuant to the court's direction.

Mr. Bergman first alleges that there was an improper communication and/or collusion between Judge Baldwin and Ms. Burke's counsel and then he asserts that the same court's orders are fake.

Whether Judge Baldwin was on the bench on May 12, 2008, is of no consequence. Mr. Bergman insinuates that since Judge Baldwin was not on the bench that day that his interpretation of the "facts" is "viable and a highly likely scenario of the actual events that occurred." *See Appellant's/Plaintiff's brief at page 17.*

#### The "STAMPED Court Orders"

1. Ms. Burke's counsel did not receive the copies of the executed orders via U.S. mail. He received those orders from Judge Baldwin's clerk on May 12, 2008.

2. There are only eight entries on the court's docket between May 8, 2008 and May 15, 2008. All of the entries relate to the trial court's orders, copying of those orders and filing of Ms. Burke's Notice of Appeal.

3. Ms. Burke's counsel went to the District Court in Weber County on May 12, 2008, in order to check on the status of the orders that had been submitted for the trial court's

signature. Counsel arrived at the courthouse to learn that the order had already been signed by the court earlier that day. Ms. Burke's counsel requested copies of those orders and was provided those copies by the clerk. Counsel paid for those copies as indicated on the court docket. However, no communications took place between Judge Baldwin and Ms. Burke's counsel concerning this case.

4. Judge Baldwin, District Court Clerks, and/or Ms. Burke's counsel have **NOT** "plotted to cause the Plaintiff harm during trial." Mr. Bergman's claim that "Defense Counsel has involved an officer of the court" is simply a bare unsubstantiated allegation and is wrong and unsupported by any type of evidence. **NO** actions, during the entire course of Mr. Bergman's case, taken by Judge Baldwin, any of the District Court Clerks, and/or Ms. Burke's counsel were "a violation of court rules and Utah law." Nothing done by Judge Baldwin, any of the District Court Clerks, and/or Ms. Burke's counsel has prejudiced the impartiality of the court system or has corrupted the courts' functions as an independent arbitrator of facts in civil matters. Specifically, no actions by Judge Baldwin, District Court Clerks, and/or Ms. Burke's counsel improperly or legally compromised Mr. Bergman's case. Mr. Bergman's allegation are unsupported by any evidence of any form or by any citation to the court's record.

5. The Rule 60(b) motion filed by Mr. Bergman had no merit. The granting or denying of Mr. Berman's 60(b) motion is in the sound discretion of the trial court. The implication of Mr. Bergman's "Statement Fact" number 5 is that there was some improper collaboration between Judge Baldwin and Ms. Burke's counsel to deny Mr. Bergman's Rule 60(b) motion. Ms. Burke's counsel had no contact with the trial court clerks or judges after May 13, 2008, through the time Judge Baldwin ruled on Mr. Bergman's Rule 60(b) motion. Ms.

Burke, her counsel, and the witnesses that testified at the November 2007, trial, did **NOT** commit fraud, subordinate perjury, or submit false evidence. The district court and Ms. Burke's counsel did not and would not do anything improper as it relates to Mr. Bergman's case and/or the trial of his claim. Mr. Bergman presented no evidence, because there is none, to support his allegations and claims in any of his post-trial motions. In particular, Mr. Bergman did not provide any evidence that Judge Baldwin and Ms. Burke's counsel had any improper or inappropriate communications ever, let alone concerning his case. Mr. Bergman failed to demonstrate, with evidence, the Judge Baldwin and Ms. Burke's counsel exchanged anything in order for Judge Baldwin to take the actions theorized by Mr. Bergman. In other words, why or for what would Judge Baldwin gain for acting as alleged by Mr. Bergman? What would Ms. Burke's counsel offer or give to Judge Baldwin for his help in defeating Mr. Bergman's line foreclosure action. If Ms. Burke's counsel and Judge Baldwin were in league together, then why did Judge Baldwin deny Ms. Burke's Motion for Summary Judgment? It would have been easier to short cut Mr. Bergman's case at that point rather than going through a trial.

Judge Baldwin did not "willfully, knowingly, and with intent violate court rules, break the law, violated the sanctity of the bench" or cause "material harm to the Plaintiff" or engineer "a break down of the judicial process to aid the Defendant in the case." There is no evidence that Judge Baldwin violated any Utah Statute, Utah Rules of Civil Procedure, Code of Judicial Conduct, or Rule of Professional Conduct, which governs the administration of justice of any civil case. The only information Mr. Bergman offers to support his wild conclusions is the court's docket. He believes that there is only one explanation for the entries on the district court's docket, which he discusses at length in his brief. Mr. Bergman provides his interpretation

of the docket in order to reach his predetermined conclusions without any supporting information.

Mr. Bergman's claim that "Defense Counsel met with the Trial Judge ex-parte on May 12, 2008, and the Trial Judge made a decision concerning the Plaintiff's 60(b) motion." He reaches this conclusion simply by reading the court's docket. The claimed meeting between Ms. Burke's Counsel and Judge Baldwin did not take place on May 12, 2008, or any other day. Ms. Burke's counsel never met ex parte with Judge Baldwin before, during, or after Mr. Bergman's case was filed and prosecuted.

Ms. Burke is without any knowledge of Mr. Bergman's actions and/or communications with the district court clerks, Court Administrator, Brent Johnson, and/or the Utah Judicial Counsel. Counsel from Ms. Burke was unaware of any of Ms. Bergman's efforts until reading his appellate brief with its exhibit "A", which is the letter he wrote to Mr. Johnson and/or Pat Bartholomew. Mr. Bergman did not provide copies of his letter or other efforts to communicate with authorities concerning his case and Judge Baldwin contemporaneous with his actions.

Mr. Bergman attempts to bootstrap his argument from an ex parte meeting between Ms. Burke's counsel and Judge Baldwin to a denial of justice to him and his case. He asserts that the only reason that Judge Baldwin denied his Rule 60(b) motion was because of some sort of agreement between the Judge and Ms. Burke's counsel. He attempts to intermingle his wild allegations of an ex parte meeting with some legal authority concerning the damage such a meeting would cause to the judicial system in order to deflect the lack of factual and legal basis to support his claims in his case. His ultimate goal is have this Court set aside the trial court's judgment, which is the same subject of Mr. Bergman's first appeal, Court of Appeals case

number 20080323. Neither the trial court nor Ms. Burke's counsel intended to defraud Mr. Bergman. The results of the trial and all of Mr. Bergman's post-trial motions did not defraud him of anything. Judge Baldwin conducted the case in an impartial manner. The trial was prosecuted, presented, and decided on only the facts presented through witnesses and properly offered and admitted documentary evidence at that trial. The only information provided to Judge Baldwin concerning Ms. Burke's claims and defenses was through the witnesses, the exhibits admitted at trial, and the written closing arguments requested by the court. Each motion filed by Mr. Bergman was brief by both sides and decided on its merits by Judge Baldwin alone.

In his brief, Mr. Bergman alleges that Ms. Burke had something to gain if her counsel had communicated with Judge Baldwin in an ex parte manner. Ms. Burke and her counsel strenuously deny that any ex parte communications took place between counsel and the Judge. However, his argument that the motivation for the Judge's participation in this alleged conspiracy was to cover up some sort of defect in his administration of Mr. Bergman's case. Mr. Bergman cannot accept that he failed at extracting more money from Ms. Burke than the district court awarded him during the trial. Judge Baldwin determined that Mr. Isbell was the most credible witness during the trial and that this belief was the basis for his decision and awards to the parties. Mr. Bergman fired his attorney once the trial court issued its decision and the Judgment was signed and entered.

Mr. Bergman also argues that Ms. Burke's counsel committed fraud on the court. This allegation stems from his belief that in order to prove payments to him of cash by Ms. Burke, during the trial, that Ms. Burke was required to prove this fact only through documentary evidence and that oral testimony of two or three witnesses was inadequate. In the same breath,

Mr. Bergman failed to provide any documentary evidence of the number of hours he claimed to have worked on Ms. Burke's home. All he provided during the trial was an estimate of his time. He had no contemporaneous documents evidencing his time and what type of work was performed. Nevertheless, he seeks to impose one standard for Ms. Burke and one standard for himself.

Judge Baldwin and/or counsel for Ms. Burke did NOT purposefully or recklessly disregard of any procedural safeguards during Mr. Bergman's case, which would result in the deprivation of any of his substantive rights. No actions taken or not taken by Judge Baldwin and/or Ms. Burke's counsel during Mr. Bergman's prosecution of his case would constitute an impermissible corruption of the court process.

Mr. Bergman's factual, legal, and procedural claims are so intermingled as to make them nonsensical. Each of his arguments are circular in nature and depending on the others for support. Based on Mr. Bergman's arguments, he postulates that he does not require to marshal any evidence in support of his assertions. He believes that his claims are so plain and apparent that he does not need to provide any factual evidence of his positions. His beliefs should be enough for this Court to grant his wish.

All allegations by Mr. Bergman concerning ex parte communications, fraud by Ms. Burke, fraud on the court by Ms. Burke, or fraud committed by officers of the court are bare allegations and unsubstantiated claims or beliefs. Mr. Bergman needs someone other than himself to blame for his case's outcome.

### **DEBBIE A. BURKE'S STATEMENT OF THE FACTS**

The following facts, taken from the lower court's record, are pertinent to the issues raised on appeal:

1. Ms. Burke owned real property located in Weber County, Utah, described as: Lot 496, RON-CLARE VILLAGE NO. 5, Ogden City, Weber County, Utah (the "Property").

**Record at pages 4, 24, 74, and 81.**

2. In order to sell the Property, Ms. Burke and her husband, Mr. Isbell, listed the Property with Laura Streble ("Ms. Streble"), who is Mr. Bergman's wife, through Val R. Iverson Realty ("VRIR") on a Multi State Listing. **Record at pages 74 and 81.**

3. Prior to trying to sell the Property, Ms. Burke and Mr. Isbell agreed to let Mr. Bergman perform some clean-up and repairs on the Property. *Id.*

4. Mr. Bergman had been employed in the construction industry, but was out of work during May and June, 2003. *Id.*

5. At no time during Ms. Burke and Mr. Isbell's conversations with Mr. Bergman about the clean-up and repairs on the Property did either Ms. Burke and/or Mr. Isbell offer Mr. Bergman a full time job working on the Property. *Id.*

6. Ms. Burke and Mr. Isbell's discussions did not include an offer of employment for a specific number of hours, a specific amount of money per hour, or that we would pay any amount of Mr. Bergman's taxes. **Record at pages 74 and 81 - 82.**

7. The clean-up and repairs of the Property were performed during May and June, 2003. **Record at pages 75 and 82.**

8. Mr. Bergman had been paid in full for all work authorized to be performed on the Property. *Id.*

9. During that conversation, I asked Mr. Bergman for an itemized list of his hours and the materials he was claiming as part of his demand, which he has never produced. **Record at pages 75.**

10. On or about October 27, 2003, Mr. Bergman filed a lien on the Property in the amount of \$28,675.00. **Record at page 8.**

11. On or about April 1, 2004, Mr. Bergman filed his single cause Complaint with the District Court in Weber County. **Record at pages 1 - 11**

12. A bench trial in this matter was held on or about November 13 and 14, 2007. **Record at pages 312 - 13.**

13. On or about January 9, 2008, the district court, through a telephone conference, issued its decision to the parties counsel and Mr. Isbell, who was with counsel or Ms. Burke. **Record at page 373.**

14. The district court issued its Judgment on or about January 16, 2008. **Record at pages 374 - 78.**

15. Mr. Bergman's counsel signed off on the Judgment, when he approved it as to "Form and Content." **Record at page 377.**

16. The parties did not reach a meeting of the minds. **Record at pages 374 - 78.**

17. The parties did not have a written contract. ***Id.***

18. The Court found that Mr. Isbell was the most credible witness during the trial. ***Id.***

19. Mr. Isbell is a licensed contractor and was at Ms. Burke's home almost on a weekly basis to review the work performed by Mr. Bergman. ***Id.***

20. Mr. Isbell provided the adequate supervision over Mr. Bergman for the work

performed by Mr. Bergman. *Id.*

21. Mr. Isbell estimated the cost for the work to be performed to improve the value of Ms. Burke's home was between \$5,000.00 and \$8,000.00. *Id.*

22. The court found that the total value of the labor and materials provided to Ms. Burke, by Mr. Bergman, was \$7,500.00. *Id.*

23. Ms. Burke paid Mr. Bergman almost on a weekly basis for the work and materials he provided to Ms. Burke's home. *Id.*

24. The total payments from Ms. Burke to Mr. Bergman, prior to the conclusion of the work performed, equals \$5,220.00. *Id.*

25. The balance owing to Mr. Bergman was \$7,500.00 (the total for the work and materials provided by Mr. Bergman) minus \$5,220.00 (the amount already paid by Ms. Burke) equals \$2,280.00. *Id.*

26. Mr. Bergman received \$2,280.00 of the \$28,675.00 that was deposited with the court. *Id.*

27. Ms. Burke received the balance of the \$28,675.00 deposited with the court, or \$26,395.00. *Id.*

28. The evidence of the payments to Mr. Bergman consisted of trial exhibits and direct testimony from Mr. Isbell, Ms. Burke, and Mr. Bergman's brother, Josh Bergman. **Record at page 313.** Mr. Bergman did not request a transcript of the trial to help him marshal the evidence in support of his positions and therefore, the record does not contain specific testimony of Mr. Isbell, Ms. Burke, and Mr. Bergman's brother, Josh Bergman.

29. The cash payments, including the two checks, which Mr. Bergman brought to the

court's attention after the trial, were identified in the trial exhibits and discussed in direct and cross examination of Mr. Isbell, Ms. Burke, and Mr. Bergman's brother, Josh Bergman. *Id.*

30. Mr. Bergman filed his Motion Presenting New Conclusive Evidence Relating to the Defendant Committing Fraud upon the Court ("Motion"), on or about April 3, 2008. **Record at pages 530 - 31.** His Motion was made pursuant to the Utah Rules of Civil Procedure 60(b).

31. Mr. Bergman filed his Request to Submit for Decision on Mr. Bergman's Motion Presenting New Conclusive Evidence Relating to the Defendant Committing Fraud upon the Court on April 21, 2008. **Record at pages 553 - 54.**

32. On August 1, 2008, Mr. Bergman filed his Motion to Remove Stay on Judgment and supporting memorandum. **Record at pages 592 - 96.**

33. The district court complied with Mr. Bergman's wish and issued its Ruling Denying Plaintiff's Rule 60(b) Motion on August 7, 2008 ("Ruling") **Record at pages 597 - 99.**

34. Mr. Bergman failed to propound any interrogatories, admissions, or request for production of documents to Ms. Burke during the prosecution of his lien foreclosure case. There are no certificates of service for any discovery in the whole file form Mr. Bergman. *See Record.*

35. To the best of Ms. Burke's counsel's knowledge, this is the only case he has ever been involved with that was assigned to Judge Baldwin.

36. Mr. Bergman has failed to marshal any evidence of his claims and allegations.

37. Mr. Bergman did not provide any citations to the record.

38. Mr. Bergman has failed to demonstrate how, if at all, that he was prejudiced by any delay in Judge Baldwin ruling on his Motion.

## **STATUTE AND RULES THAT ARE DETERMINATIVE**

### **78A-2-201 Powers of every court.**

Every court has authority to:

- (1) preserve and enforce order in its immediate presence;
- (2) enforce order in the proceedings before it, or before a person authorized to conduct a judicial investigation under its authority;
- (3) provide for the orderly conduct of proceedings before it or its officers;
- (4) compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in a pending action or proceeding;
- (5) control in furtherance of justice the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it in every matter;
- (6) compel the attendance of persons to testify in a pending action or proceeding, as provided by law;
- (7) administer oaths in a pending action or proceeding, and in all other cases where necessary in the exercise of its authority and duties;
- (8) amend and control its process and orders to conform to law and justice;
- (9) devise and make new process and forms of proceedings, consistent with law, necessary to carry into effect its authority and jurisdiction; and
- (10) enforce rules of the Supreme Court and Judicial Council.

### **78A-2-223 Decisions to be rendered within two months -- Procedures for decisions not rendered.**

(1) A trial court judge shall decide all matters submitted for final determination within two months of submission, unless circumstances causing the delay are beyond the judge's personal control.

(2) The Judicial Council shall establish reporting procedures for all matters not decided within two months of final submission.

### **76-2-304 Ignorance or mistake of fact or law.**

(1) Unless otherwise provided, ignorance or mistake of fact which disproves the culpable mental state is a defense to any prosecution for that crime.

(2) Ignorance or mistake concerning the existence or meaning of a penal law is no defense to a crime unless:

(a) Due to his ignorance or mistake, the actor reasonably believed his conduct did not constitute an offense, and

(b) His ignorance or mistake resulted from the actor's reasonable reliance upon:

(i) An official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question;

or

(ii) A written interpretation of the law contained in an opinion of a court of record or

made by a public servant charged by law with responsibility for interpreting the law in question.

(3) Although an actor's ignorance or mistake of fact or law may constitute a defense to the offense charged, he may nevertheless be convicted of a lesser included offense of which he would be guilty if the fact or law were as he believed.

#### **Rule 60. Relief from judgment or order.**

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

#### **Rule 62. Stay of proceedings to enforce a judgment.**

(a) Delay in execution. No execution or other writ to enforce a judgment may issue until the expiration of ten days after entry of judgment, unless the court in its discretion otherwise directs.

(b) Stay on motion for new trial or for judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for

additional findings made pursuant to Rule 52(b).

(c) Injunction pending appeal. When an appeal is taken from an interlocutory order or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.

(d) Stay upon appeal. When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in favor of the state, or agency thereof. When an appeal is taken by the United States, the state of Utah, or an officer or agency of either, or by direction of any department of either, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Stay in quo warranto proceedings. Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed on an appeal.

(g) Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings or to suspend, modify, restore, or grant an injunction, or extraordinary relief or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of judgment upon multiple claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(i) Form of supersedeas bond; deposit in lieu of bond; waiver of bond; jurisdiction over sureties to be set forth in undertaking.

(i)(1) A supersedeas bond given under Subdivision (d) may be either a commercial bond having a surety authorized to transact insurance business under Title 31A, or a personal bond having one or more sureties who are residents of Utah having a collective net worth of at least twice the amount of the bond, exclusive of property exempt from execution. Sureties on personal bonds shall make and file an affidavit setting forth in reasonable detail the assets and liabilities of the surety.

(i)(2) Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a supersedeas bond under Subdivision (d).

(i)(3) The parties may by written stipulation waive the requirement of giving a supersedeas bond under Subdivision (d) or agree to an alternate form of security.

(i)(4) A supersedeas bond given pursuant to Subdivision (d) shall provide that each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served, and that the surety's liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.

(j) Amount of supersedeas bond.

(j)(1) Except as provided in subsection (j)(2), a court shall set the supersedeas bond in an amount that adequately protects the judgment creditor against loss or damage occasioned by the appeal and assures payment in the event the judgment is affirmed. In setting the amount, the court may consider any relevant factor, including:

(j)(1)(A) the judgment debtor's ability to pay the judgment;

(j)(1)(B) the existence and value of security;

(j)(1)(C) the judgment debtor's opportunity to dissipate assets;

(j)(1)(D) the judgment debtor's likelihood of success on appeal; and

(j)(1)(E) the respective harm to the parties from setting a higher or lower amount.

(j)(2) Notwithstanding subsection (j)(1):

(j)(2)(A) the presumptive amount of a bond for compensatory damages is the amount of the compensatory damages plus costs and attorney fees, as applicable, plus 3 years of interest at the applicable interest rate;

(j)(2)(B) the bond for compensatory damages shall not exceed \$25 million in an action by plaintiffs certified as a class under Rule 23 or in an action by multiple plaintiffs in which compensatory damages are not proved for each plaintiff individually; and

(j)(2)(C) no bond shall be required for punitive damages.

(j)(3) If the court permits a bond that is less than the presumptive amount of compensatory damages, the court may also enter such orders as are necessary to protect the judgment creditor during the appeal.

(j)(4) If the court finds that the judgment debtor has violated an order or has otherwise dissipated assets, the court may set the bond under subsection (j)(1) without regard to the limits in subsection (j)(2).

(k) Objecting to sufficiency or amount of security. Any party whose judgment is stayed or sought to be stayed pursuant to Subdivision (d) may object to the sufficiency of the sureties on the supersedeas bond or the amount thereof, or to the sufficiency or amount of other security given to stay the judgment by filing and giving notice of such objection. The party so objecting shall be entitled to a hearing thereon upon five days notice or such shorter time as the court may order. The burden of justifying the sufficiency of the sureties or other security and the amount of the bond or other security, shall be borne by the party seeking the stay, unless the objecting party seeks a bond greater than the presumed limits of this rule. The fact that a supersedeas bond, its surety or other security is generally permitted under this rule shall not be conclusive as to its sufficiency or amount.

## SUMMARY OF THE ARGUMENTS

Mr. Bergman's asserts in his appellate brief that the district court abused its discretion in several ways when it ruled on his Motion Presenting New Conclusive Evidence Relating to the Defendant Committing Fraud upon the Court, on or about April 3, 2008. **Record at pages 530 - 31.** He did not order a transcript of the trial or provide any transcript of any portion of the proceedings to this Court. Mr. Bergman has chosen to make his arguments without providing this Court with the trial testimony of any of the witnesses. The trial court was provided on a copy of a compact disc, which included the whole two day trial in audio form. He asked the trial court to listen to specific sections of trial in order to support his Motion. Further, Mr. Bergman did not make one citation to the Record at all in his brief. He also failed to marshal any evidence in support of his claims that the district court abused its discretion when it issued its Ruling Denying Plaintiff's Rule 60(b) Motion on August 7, 2008. **Record at pages 597 - 99.**

Simply put, Mr. Bergman has failed to carry his burden of demonstrate that the district court abused its discretion in any way as it related to the trial and/or his Motion. Additionally, Mr. Bergman did not demonstrate how if at all, he was prejudiced by any of the claimed abuses of discretion committed by the trial court. If there were errors committed by Judge Baldwin, those errors were harmless at best. Certainly none of the claimed errors caused Mr. Bergman any injury or prejudice.

Judge Baldwin conducted himself and directed the business of the district court properly under all applicable Utah Statutes, case, and Rules. He did not violate any of the Canons of the Utah Code of Judicial Conduct. Judge Baldwin and counsel for Ms. Burke never had an ex parte communication concerning this case or any other case. All communications between counsel and

Judge Baldwin were pursuant to all guidelines set forth in the Utah Code of Judicial Conduct and the Utah Rules of Professional Conduct. Neither Judge Baldwin or Ms. Burke's counsel violated any of the applicable Rules governing their conduct or the procedures set forth for the fair and unbiased prosecution of this case. All Rules were followed and all proprieties were observed. Neither counsel for Ms. Burke nor Judge Baldwin committed any inappropriate act or committed any crime as defined by the Utah Code during the course of this case or in dealing with Mr. Bergman and his case.

Ms. Burke and/or her counsel did not commit fraud of any type or on the court. Ms. Burke did not give false testimony concerning any aspect of her defense to Mr. Bergman's lien foreclosure action. Ms. Burke did not ask or solicit false testimony from any of the witnesses called on her half at the trial in this matter. Counsel for Ms. Burke did not ask or solicit false testimony from any of the witnesses called on her behalf at the trial in this matter. He is not aware of any evidence offered to the trial court that was false. All material information presented at trial was corroborated by more than one witness and by more than one exhibit. Ms. Burke's counsel did not violate any of the Utah Rules of Professional Conduct, Utah Rules of Civil Procedure, or any other rules governing the conduct of attorneys in the State of Utah. He has always been civil to Mr. Bergman and conducted himself with candor toward Mr. Bergman and the trial court.

The Judge Baldwin heard both the direct and cross examination of all witnesses. He also was able to assess the demeanor of those same witnesses as well as all of Mr. Bergman's witnesses. Judge Baldwin evaluated the credibility of each and every witness that testified the trial on November 13 and 14, 2007. He found that Mr. Isbell's testimony was the "most

credible” of all of the witnesses at the trial. **Record at pages 375 at paragraph 4.** Evaluating witnesses and determining credibility is one of the most important duties and/or responsibilities of a trial court. Judge Baldwin performed his job and responsibilities professionally and within the guidelines set forth in the State of Utah.

Ms. Burke requests that this Court deny Mr. Bergman’s appeal. She also asked this Court to grant her fees and costs on appeal pursuant to the Appellate Rule.

## ARGUMENT

Mr. Bergman did not order a transcript of the trial. He has chosen to make his arguments without providing this Court with the trial testimony of any of the witnesses. Mr. Bergman did not make one citation to the Record at all in his brief. He also did not provide a transcript to the trial court to support his Motion. He failed to marshal any evidence in support of his claims that the district court abused its discretion. Rather, Mr. Bergman presents his argument that he did not need to marshal any evidence in support of his claims, because the district court's findings are "legally insufficient." *See Campbell v. Campbell*, 896 P.2d 635, 638 (Utah Ct. App. 1995). Mr. Bergman continues to ignore the Record.

In essence, Mr. Bergman's Motion argue the same points and facts as his Motion to Alter or Amend a Judgment pursuant to Rule 59. **Record at pages 381 - 86.** He has failed to provide this Court with any additional or adequate information or evidence to support his motions for relief from the Judgment.

Mr. Bergman's argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. Particularly, "[b]riefs must contain reasoned analysis based upon relevant legal authority. An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court." *State v. Sloan*, 2003 UT App 170, P 13, 72 P.3d 138 (citing *Smith v. Smith*, 1999 UT App 370, P 8, 995 P.2d 14).

### **A. Standard of Review under Rule 60(b).**

A district court has broad discretion to rule on a motion to set aside a default judgment

under rule 60(b) of the Utah Rules of Civil Procedure. *See Lund v. Brown*, 2000 UT 75, P 9, 11 P.3d 277; *Russell v. Martell*, 681 P.2d 1193, 1194 (Utah 1984); *State Dep't of Soc. Servs. v. Musselman*, 667 P.2d 1053, 1055 (Utah 1983). The appellate courts in Utah review a district court's decision on a Rule 60(b) motion to set aside a judgment under an abuse of discretion standard. *See Menzies v. Galetka*, 2006 UT 81, PP54-55, 150 P.3d 480; *Lund*, 2000 UT 75, P 9, 11 P.3d 277; *Gillmor v. Wright*, 850 P.2d 431, 434 (Utah 1993); *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986); *Russell*, 681 P.2d at 1194; *see also Airkem Intermountain, Inc. v. Parker*, 30 Utah 2d 65, 513 P.2d 429, 431 (1973) (“The trial court is endowed with considerable latitude of discretion in granting or denying a motion to relieve a party from a final judgment under Rule 60(b)(1), . . . and the [appellate] court will reverse the trial court only where an abuse of this discretion is clearly established.”). “An appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief,” and thus “is narrow in scope.” *Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT App 110, P19, 2 P.3d 451 (“An appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief. . . . [and] does not, at least in most cases, reach the merits of the underlying judgment from which relief was sought.” (quoting 12 James Wm. Moore et al., *Moore's Federal Practice* § 60.41[1][a] (3d ed. 1999))). When reviewing a decision under Rule 60(b), the court should not address the merits of the underlying judgment from which the appellant seeks relief. *See Franklin Covey Client Sales, Inc.*, 2000 UT App 110, P19, 2 P.3d 451 (“An appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief. . . . [and] does *not*, at least in most cases, reach the merits of the underlying judgment from which relief was sought.” (internal quotation marks omitted)). However, the court can “reach the merits of the underlying judgment from which relief was

sought,” *id.*, to determine whether the district court abused its discretion. *See Lund*, 2000 UT 75 at P9 (“A decision premised on flawed legal conclusions, for instance, constitutes an abuse of discretion.”). The “court’s ruling must be ‘based on adequate findings of fact’ and ‘on the law,’” thus, “[a] decision premised on flawed legal conclusions . . . constitutes an abuse of discretion.” *See Lund*, 2000 UT 75, P9, 11 P.3d 277.

### **B. Mr. Bergman’s right to relief under Rule 60(b).**

The Utah Rules of Civil Procedure make it possible to gain relief from a judgment under certain circumstances. Rule 60(b) of the Utah Rules of Civil Procedure states:

(b) On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . .; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . .; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Utah R. Civ. P. 60(b)(3), (2), and (6). The only claim in Mr. Bergman’s Motion was that Ms. Burke committed fraud on the court. **Record at pages 530 - 31.** Therefore, Mr. Bergman’s Rule 60(b) Motion was made under subsection 3 for fraud and none of the other subsections. His Motion also included claims against Ms. Burke’s counsel for allegedly helping her commit fraud on the court or engaged in misrepresentation or other misconduct.

During the trial, Mr. Bergman’s counsel did not object to any of the exhibits offered by Ms. Burke. The trial court received all of the exhibits and followed along with those exhibits as

testimony was given by both parties witnesses. It should be remembered that Mr. Bergman had no contemporaneous records for the testimony he gave concerning the 1,200 hours he alleged and estimated to have worked on Ms. Burke's real property. Therefore, he failed his own standard of proof. He only had his oral testimony to support his claimed hours.

In support of his 60(b) motion Mr. Bergman filed his Affidavit in Support of Motion Presenting New Conclusive Evidence "(Bergman Affidavit)". **Record at pages 518 - 29.** In the Bergman Affidavit at paragraph 9 on page 2, Mr. Bergman claims that there were two checks missing from Exhibit D13. **Record at pages 519.** After he received the check from his subpoena, he recognized that check number 3311 had been written to him and he had endorsed that check. *See* Bergman Affidavit at paragraph 10 on page 3. **Record at pages 520.** In other words, check number 3311 was acceptable to Mr. Bergman. Ms. Burke claimed in Exhibit D14 that checks were paid to Mr. Bergman. On that Exhibit were several payments to Mr. Bergman in cash rather than by check. A mistake was made as to check number 3348, which was not identified as a payment in cash to Mr. Bergman. Mr. Isbell testified that he wrote the check and cashed it in order to get \$500.00 in cash to give to Mr. Bergman at his request. Mr. Isbell also wrote a check to Josh Bergman, Mr. Bergman's brother in order for Josh to cash the check and provide the cash to Mr. Bergman. Both Josh Bergman and Mr. Isbell testified to this transaction. Mr. Bergman received payments by check, cash transfers from Ms. Burke's account to Mr. Bergman's account, in cash. Payments depended on the specific circumstances and the requests of Mr. Bergman. The fact that check number 3348 was not included in Exhibit D13 does not change the fact that Mr. Isbell testified to the transaction and the copy of the check would not have changed the fact that Mr. Bergman received \$500.00 from Mr. Isbell on June 7, 2003. The

statements provided in Exhibit D12 also showed the transaction. There was not fraud on the trial court with respect to check number 3348. The bank statements corroborated the testimony of Mr. Isbell and were consistent with the fact set forth in his testimony. Ms. Burke testified as to the true and correct nature of the bank statements. It should be remembered that the Plaintiff propounded no discovery to Ms. Burke in this case. No interrogatories, no admissions, and no request for production of documents were ever submitted to Ms. Burke. During the course of the litigation of this case. Even in the Plaintiff's Motion, he asked the trial court to listen to the CD he provided of the trial. He did not have those sections transcribed. Mr. Bergman has the duty to marshal all of the evidence to support his allegations and identify where in the Record, the trial court abused its discretion, he has not even attempted to cite the Record. Now he asked this Court to seek out any facts that may tend to support his wild and bare allegation in his Motion. This Court should decline to perform Mr. Bergman's job of identifying any errors in the Record or trial. There were no errors to locate.

However, if this Court chooses to consider Mr. Bergman's claims that the evidence is "new conclusive evidence" which he discovered after the trial, then it should be noted again, that Mr. Bergman conducted no discovery during the course of prosecuting his case. He failed to ask any admission, interrogatories, or requests for production of documents to Ms. Burke during any time during the litigation. Mr. Bergman could have discovered all documents pertinent to Ms. Burke's defense had he conducted any discovery. Mr. Bergman is not entitled to the requested relief pursuant to Rule 60(b)(2). *See Promax Dev. Corp. v. Mattson*, 943 P.2d 247, 253 (Utah Ct. App. 1997) (stating that newly discovered evidence must be material and "substantial enough that with the evidence there is a reasonable likelihood of a different result").

Mr. Bergman also filed a Memorandum Supporting Plaintiff's Motion Relating to Conclusive Evidence that Defendant Committed Fraud upon the Court ("Memorandum"). **Record at pages 514 - 17.** The Memorandum simply asked that the trial court disallow all cash payments to Mr. Bergman, despite the oral testimony to the contrary. Ms. Burke, Mr. Isbell, and Josh Bergman all testified to one or more of the cash payment to Mr. Bergman. Mr. Bergman's counsel cross examined all of these witnesses. The trial court heard both the direct and cross examination of all witnesses. The trial court also was able to assess the demeanor of those same witnesses as was all of Mr. Bergman's witnesses. Judge Baldwin evaluated the credibility of each and every witness that testified the trial in November 2007. The trial court found that Mr. Isbell's testimony was the "most credible" of all of the witnesses. **Record at pages 375 at paragraph 4.** Mr. Bergman has once again failed to marshal any evidence to support his naked allegations that Ms. Burke and her counsel perpetrated a fraud on the trial court. This Court should deny Mr. Bergman's appeal.

**C. Did the Trial Court abuse its discretion on or about May 12, 2008, when it moved sua sponte and stay the Plaintiff's 60(b) Motion?**

Mr. Bergman argues that when the district court stayed his Request to Submit for Decision until there was a decision from the Utah Supreme Court was an abuse of the court's discretion. It should be remembered that Mr. Bergman did not provide a transcript to this Court or even cite to the Record in either of his appeals. He has failed to supply any evidence to support the claimed errors or abuse of discretion he attributes the trial court.

To support his claims that Mr. Bergman was improperly denied the relief he requested in his Motion, he had the burden to provide this Court with an adequate record on appeal. *See State*

*v. Wulffenstein*, 657 P.2d 289, 293 (Utah 1982), *cert. denied*, 460 U.S. 1044, 103 S. Ct. 1443, 75 L. Ed. 2d 799 (1983) (stating when "a defendant predicates error to [an appellate court], he has the duty and responsibility of supporting such allegation by an adequate record"; an appellate court "simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record"). Mr. Bergman failed to provide an adequate record. He did not order a transcript of the proceedings or even cite to the Record. Accordingly, this Court must presume the regularity of the district court proceedings. *See State v. Rawlings*, 829 P.2d 150, 152-53 (Utah Ct. App. 1992) (upholding trial court's order because "in the absence of an adequate record on appeal, this Court cannot address the issues raised and presume the correctness of the disposition made by the trial court"). An abuse of the trial court's discretion may be found where the court's determination of reasonableness is unsupported by evidence in the record as explained in the court's findings of fact. *Id.*, *Quinn v. Quinn, Jr.*, 820 P.2d 282 (Utah Ct. App. 1992).

Mr. Bergman argues that the trial court erred in ruling on and denying his Motion after more than two months in violation to Utah Code Ann. § 78A-2-223. Even if Mr. Bergman is correct in his assertion that the trial court abused its discretion by making this ruling, his argument fails to demonstrate how this alleged error was harmful or prejudicial to him in any way. "Harmless error is defined . . . as an error that is sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings." *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 796 (Utah 1991) (quotations and citations omitted); *see also State v. Verde*, 770 P.2d 116, 120 (Utah 1989) ("Errors we label harmless' are errors which . . . are sufficiently inconsequential that we conclude there is no

reasonable likelihood that the error affected the outcome of the proceedings.”). “Put in other words, an error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine our confidence in the verdict.” *Id.* “On appeal, the appellant has the burden of demonstrating an error was prejudicial--that there is a reasonable likelihood that the error affected the outcome of the proceedings.” *Steffensen v. Smith's Mgmt. Corp.*, 820 P.2d 482, 489 (Utah Ct. App. 1991) (quotations and citation omitted), *aff'd*, 862 P.2d 1342 (Utah 1993). Mr. Bergman argues that when the district court stayed ruling on his Motion until there was a decision from the Utah Supreme Court was an abuse of the court’s discretion. Because Mr. Bergman has failed to carry his burden under the harmless error analysis by demonstrating that the alleged error committed by the trial court was prejudicial, his argument is without merit and this Court should affirm the ruling of the trial court.

**D. Did the Trial Court abuse its discretion when it elected to not inform the Plaintiff or issue a court order detailing the grounds for the stay?**

Mr. Bergman argues that when the district court stayed ruling on his Motion until there was a decision from the Utah Supreme Court was an abuse of the court’s discretion. The trial court is responsible for its own calendar and managing its case load. The trial court was well within its discretion to delay its ruling on Mr. Bergman’s Rule 60(b) Motion. District courts typically do not inform parties of the reasoning behind, they take motions and other procedural issues under advisement. Assuming that Mr. Bergman is correct in his assertion that the trial court abused its discretion in failing to “not inform the Plaintiff or issue a court order detailing the grounds for the stay,” his argument fails to demonstrate how this alleged error, if it is an

error, was harmful or prejudicial to him. “Harmless error is defined . . . as an error that is sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings.” *Crookston*, 817 P.2d 789, 796. “On appeal, the appellant has the burden of demonstrating an error was prejudicial--that there is a reasonable likelihood that the error affected the outcome of the proceedings.” *Steffensen*, 820 P.2d 482, 489.

Mr. Bergman failed to provide this Court with any information and/or evidence that he was prejudiced by any abuse of discretion by Judge Baldwin’s not providing Mr. Bergman with notice of the “stay” or issuing a court order “detailing the grounds for the stay.”

**E. Did the Trial Court abuse its discretion and/or commit a crime and/or divest its jurisdiction over the 60(b) motion when the Trial Court violated Utah Code Ann. § 78A-2-223(1)?**

Mr. Bergman claims that since the district court did not rule on his Motion within the two month window as provided by Utah Code Ann. § 78A-2-223, that the trial court losses jurisdiction to issue a decision or ruling on Mr. Bergman’s Motion and/or committed a crime. He has failed to point to any Utah Statute, Utah case law, or Utah Rule which divests the trial court on jurisdiction for no ruling on a motion submitted to it for more than two months. The trial court’s not ruling on his Motion for more than two months may have been inconvenient or caused some delay, but was certainly not a crime under any legal authority in Utah. The penalty to a district court for not making its ruling in a timely fashion is to be required to report to the Judicial Council and/or the Utah Supreme Court that he was not following the proscribed procedures.

The Court should remember that there was never any ex parte communications between Ms. Burke’s counsel and Judge Baldwin as asserted by Mr. Bergman. He reaches the conclusion

that there must of have been an ex parte discussion between Ms. Burke's counsel and Judge Baldwin through his analysis of the district court's docket. The court's docket and his interpretation of the docket is the only information he provides to this Court to support his wild claims.

Mr. Bergman has failed to demonstrate to this Court that Judge Baldwin's decision or ruling on his Motion would have been different if the decision had been made within the two month window as proscribe by Utah Code Ann. § 78A-2-223. Mr. Bergman filed his Motion Presenting New Conclusive Evidence Relating to the Defendant Committing Fraud upon the Court ("Motion"), on or about April 3, 2008. **Record at pages 530 - 31.** His Motion was made pursuant to the Utah Rules of Civil Procedure 60(b). Mr. Bergman filed his Request to Submit for Decision Mr. Bergman's Motion Presenting New Conclusive Evidence Relating to the Defendant Committing Fraud upon the Court on April 21, 2008. **Record at pages 553 - 54.** On August 1, 2008, Mr. Bergman filed his Motion to Remove Stay on Judgment and supporting memorandum. **Record at pages 592 - 96.** The district court complied with Mr. Bergman's wish and issued it decision on August 7, 2008. **Record at pages 597 - 99.** Had the district court followed Utah Code Ann. § 78A-2-223 to the letter, it would have issued its decision on the Mr. Bergman's Motion would have been issued on or about June 20, 2008. Instead, the trial court issued its Denying Plaintiff's Rule 60(b) Motion on August 7, 2008, 48 days after the end of the two months. The total time between Mr. Bergman filing his Request for Decision and the trial court's Ruling Denying Plaintiff's Rule 60(b) Motion was only 108 days. Mr. Bergman claims that Judge Baldwin committed a crime by the delay of issuing his Ruling. He however, does not provide any legal authority to support this position. This Court should deny Mr. Bergman's appeal and should affirm the Ruling of the trial court.

- F. Did the Trial Court abuse its discretion (after it violated 78A-2-223(1) when it issued a ruling upon the 60(b) motion?**
- a. without showing that it had jurisdiction?**
  - b. without showing that the circumstances causing the delay were legally beyond the judge's personal control?**
  - c. without receiving procedures from the Utah Judicial Council?**

As discussed earlier in this Brief, Judge Baldwin did not lose jurisdiction to rule on Mr. Bergman's pending Motion. Since the trial court did not lose its jurisdiction, then there would be no reason that the district court would set forth any details of its jurisdiction, it still had jurisdiction to rule on Mr. Bergman's Motion. The trial court also did not need to "showing that the circumstances causing the delay were legally beyond the judge's personal control" or it need to receive "procedures from the Utah Judicial Council." None of Mr. Bergman's claimed errors was an abuse of the trial court's discretion.

Mr. Bergman did not marshal any evidence in support of his allegations of the alleged "violation" of Utah Code Ann. § 78A-2-223(1). Further, he has completely failed to provide any direction in the record to back up his claims. He has not cited to the Record even one time. He has given this Court precious little to review in order to evaluate his assertions of error by Judge Baldwin. Mr. Bergman has presented no evidence of violation of any Utah Statute, Rule or case law by any of the district court personnel. His claims are bare allegations without any factual support in the Record and he has failed to present any "new" information that would support his beliefs. Mr. Berman's appeal should be denied and the trial court's Ruling dated August 7, 2008, should be affirmed.

**G. Did Trial Court exceed the bounds of sound discretion in denying Plaintiff's 60(b) motion, without reviewing all evidence, without a hearing or without considering any argument from the opposing party?**

The trial Court issued its Ruling Denying Plaintiff's Rule 60 (b) Motion on or about August 7, 2008. It should be noted that Mr. Bergman's Rule 60(b) Motion was evaluated under subsection (b)(2) "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)," and subsection (3) "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." In the Ruling, the district court reasoned that:

Plaintiff alleges that witnesses for the Defendant [Ms. Burke] lied at trial, and provides "newly discovered" evidence of this [sic] a check of a check. However, Plaintiff's evidence fails to prove that Defendant's witnesses gave false testimony. Further, Plaintiff does not allege or show that the evidence could not have previously been discovered.

Ruling at **Record 598**. Mr. Bergman did not provide a transcript of the appropriate portions of the trial, which he attempts to challenge through his Motion filed with the district court. He neglected to meet the standard for a court granting a Rule 60(b) motion. There is nothing in the Ruling that suggests that the trial court did not review the file and its not of the trial, or that it did not review all relevant materials to making it decision, including Ms. Burke's opposition to that Motion. The trial court did not abuse its discretion, even if it did decide the Ruling "without reviewing all evidence, without a hearing or without considering any argument from the opposing party." Mr. Bergman has furnished no evidence, information, or citations to the Record, which would demonstrate that the district court's Ruling was made, "without reviewing all evidence, without a hearing or without considering any argument from the opposing party." "Unstated findings can be implied if it is reasonable to assume that the trial court actually

considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to note on the record the factual determination it made.” *Hill v. Hill*, 869 P.2d 963, 965 (Utah Ct. App. 1994) (internal quotation marks omitted).

Based on Mr. Bergman’s failure, the district court did not abuse its discretion. Therefore, this Court should deny Mr. Bergman’s appeal and affirm the trial court’s Ruling of August 7, 2008.

**H. Did the Trial Court abuse its discretion when it found, “However, Plaintiff’s evidence fails to prove that the Defendant’s witnesses gave false testimony.”**

The trial court did not abuse its discretion when it found that, “Plaintiff’s evidence fails to prove that the Defendant’s witnesses gave false testimony.” Mr. Bergman did not provide a transcript to the trial court along with his Motion. The district court was at the trial in November 2007, and was able to observe the witnesses’ demeanor and assess their credibility. The testimony and evidence received by the trial court was not false. Mr. Isbell, Ms. Burke, and Josh Bergman all testified to payments made to Mr. Bergman via checks, bank transfers, and cash. By way of corroboration, Ms. Burke offered as evidence at the trial copies of her bank statements showing each one of the transactions claimed to be a payment to Mr. Bergman. The bank statements clearly showed checks that were written to cash, the bank transfers, and the checks paid to Mr. Bergman. That evidence was received by the trial court without objection by Mr. Bergman.

The “newly discovered evidence” by Mr. Bergman could have been discovered through the Utah Rule of Civil Procedure. Mr. Bergman failed to conduct any discovery pursuant to

those Rules. No interrogatories, request for production of documents, or admissions were ever served on Ms. Burke by Mr. Bergman. Most if not all of the trial witnesses were identified in Ms. Burke Initial Disclosures. She identified all trial witnesses in her witness list provided to the trial court and Mr. Bergman's counsel. Mr. Bergman attached two checks that had been invariably left out of the trial exhibit. One of the checks confirmed a payment to Mr. Bergman and included his endorsement on the back of that check. The second check showed a check written to cash and endorsed by Mr. Isbell. Ms. Isbell testified that he wrote the check for cash and cashed that check in order to comply with Mr. Bergman's request to receive a cash payment rather than have to cash the check himself. As was seen from the exhibits and the testimony of Ms. Burke's witnesses, Mr. Bergman often either requested cash or accepted cash as a payment for his work on Ms. Burke's property. There was nothing unusual about Mr. Bergman receiving or requesting cash as payment during the course of the work on Ms. Burke's property.

Without anymore information or "evidence" to support his Motion, Mr. Bergman claims that he should have prevailed on his Motion and because he did not, that constitutes an abuse of discretion by the trial court. Simply put, Mr. Bergman was not happy with the outcome of the trial or of any of his post-trial motions. His appeals both lack enough specificity to allow this Court to set aside the trial court's ruling or the Judgment entered by that court. Therefore this Court should deny his appeal and affirm the trial court's Ruling on Mr. Bergman's Rule 60(b) Motion.

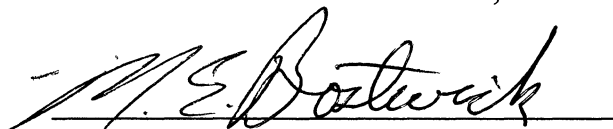
### **CONCLUSION**

In view of the facts and arguments set forth herein, Ms. Burke hereby request that this Court dismiss Mr. Bergman's appeal in it's entirety for failing to marshal all of the evidence

challenging the trial court's decision on his Rule 60(b) Motion. Ms. Burke asked this Court to grant her fees and costs on appeal pursuant to the Appellate Rule and grant all other relief this Court deems just and appropriate.

Respectfully Submitted this 4<sup>th</sup> day of February 2009.

**M.E. BOSTWICK'S LAW OFFICES, P.C.**



Michael E. Bostwick  
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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on the 4<sup>th</sup> day of February 2009, I caused two (2) true and correct copy of the foregoing Brief of Appellant to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Utah Rules of Appellate Procedure and the Utah Rules of Civil Procedure, to the following persons:

Mark D. Bergman  
545 East 1100 North  
Ogden, Utah 84404

U.S. Mail	<u>X</u>
Facsimile	<u>    </u>
Hand delivered	<u>    </u>
Overnight Mail	<u>    </u>

*Pro Se*

