

2008

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

Utah Court of Appeals

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Mark D. Bergman; Appellant/Pro Se.

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IN THE UTAH APPELLATE COURT

MARK D. BERGMAN)

Plaintiff & Appellant)

v)

CASE BRIEF

DEBBIE A. BURKE, DORENE R.)

BASUG, and FIRST AMERICAN)

TITLE Defendant(s) & Appellee(s))

DOCKET No. 20080751-CA

BRIEF OF THE APPELLANT

Appeal of the Trial Court's Ruling, Denying Plaintiff's Rule 60(b) Motion,
dated August 7, 2008, in the Second District Court for Weber County, State of
Utah, Honorable Parley R. Baldwin presiding.

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FILED
UTAH APPELLATE COURTS

DEC 03 2008

Published Opinion Requested – Oral Arguments Requested

Appellant's/Plaintiff's 60(b) Case Brief

IN THE UTAH APPELLATE COURT

MARK D. BERGMAN)	
Plaintiff & Appellant)	
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PARTIES

The names of the original parties to this action are contained in the caption of this brief. However, only Debbie A. Burke remains a Defendant in this instant action.

“Defendant,” hereinafter refers to Debbie A. Burke, the sole owner named on the fee simple title of the real property at issue.

“Plaintiff,” hereinafter refers to Mark D. Bergman, the carpenter/handyman hired by the Defendant and Vince Isbell (hereinafter “Defendant’s Agent”) to complete various projects to the interior and exterior of the Defendant’s real property and home thereon.

Others of Significant Interest

“Defendant’s Agent,” (as defined above) is the Defendant’s husband, a trial witness for the Defendant, wrote, endorsed, and cashed the check that is the foundation for the Plaintiff’s 60(b) motion. The Defendant's Agent was also charged with the oversight of the work performed by the Plaintiff for the Defendant.

Table of Contents

	Page
Table of Authorities.....	2
Table of Controlling Statutes and Rules.....	4
Controlling Statutes and Rules (Verbatim).....	(See Addendum)
Statement of Jurisdiction.....	5
Statement of Authority for Federal Case Law Reliance.....	5
Issues Presented for Review and Standard of Review.....	6
Statement of Case.....	12
Statement of Facts.....	15
<u>Kendall Insurance v. R&R Group</u>	26
Relevant Facts.....	28
Detail of the Argument.....	30
The Trial Court Retaliates	38
Conclusion and Statement of Relief Sought.....	42

TABLE OF AUTHORITIES

<u>12 Moore's Federal Practice</u> , ¶ 60.21[4][a], at 60-52 (3d ed. 2000).....	24,31
<u>AKJ v. State (In re DECJ)</u> 2008 UT App 341.....	9,22
<u>Baker v. Western Sur. Co.</u> , 757 P.2d 878 (Utah Ct. App. 1988).....	7,8,34
<u>Bulloch v. United States</u> , 763 F.2d 1115, 1121 (10th Cir. 1985).....	32
<u>Filice v. Biscardi</u> , 67 Utah 171, 246 P. 535.....	11
<u>Hazel-Atlas Glass Co. v. Hartford-Emprie Co.</u> , 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944)	30,34
<u>In re Four Seasons Sec. Laws Litig.</u> , 502 F.2d 834, 842 (10th Cir. 1974).....	23
<u>J.V. Hatch Constr., Inc. v. Kampros</u> , 971 P.2d 8, 15 (Utah Ct. App. 1998).....	11,41
<u>Kendall Insurance v. R&R Group</u> , 2008 UT App 235.....	26,39
<u>Larsen v. Collina</u> , 684 P.2d 52, 54 (Utah 1984).....	7,25
<u>Marks v. Marks</u> , 1940 UT, 100 P.2d 207.....	11
48 C.J. 680, “Payments,” § 176.....	11
judgments see 34 C.J. 694, § 1071.....	11
<u>Nat’l Advertising Co. v Murray City Corp. et al.</u> , 131 P.3d 872, 876 (Utah Ct. App. 2006).....	5,25
<u>Oseguera v. Farmers Ins. Exch.</u> , 2003 UT App 46.	7,25
<u>Ostler v. Buhler</u> , 957 P.2d 205, 206 (Utah 1998).....	7,25
<u>Robinson v. Audi Aktiengesellschaft</u> , 56 F.3d 1259, 1267 (10th Cir. 1995).....	33
<u>Rozier v. Ford Motor Co.</u> , 573 F.2d 1332, 1338 (5th Cir. 1978).....	32
<u>Scott v. Austin</u> , 47 Utah 248, 152 P. 1178.....	11
Appellant’s/Plaintiff’s 60(b) Case Brief	2

<u>State v. Rothlisberger</u> , 2004 UT App 226, P14, 95 P.3d 1193.....	5
<u>Stonger v Sorrell</u> 776 NE.2d 353, 358 (Ind. 2002).....	23,35
<u>United States v. Buck</u> , 2002 10CIR 260, 281 F.3d 1336	22,23,31,33
<u>Varian-Eimac, Inc. v. Lamoreaux</u> , 767 P.2d 569, 570 (Utah Ct. App. 1989).....	9,22
<u>Weese v. Schukman</u> , 98 F.3d 542, 552-53 (10th Cir. 1996).....	32,33
<u>Yapp v. Excel Corp.</u> , 186 F.3d 1222, 1231 (10th Cir.1999).....	33

TABLE OF CONTROLLING STATUTES AND RULES
SEE: ADDENDUM FOR STATUTES AND RULES VERBATIM

Utah R. Civ. P. Rule 59. New trials; amendments of judgment.....	39
Utah R. Civ. P. Rule 60. Relief from judgment or order(argued throughout)	
Utah R. Civ. P. Rule 62. Stay of proceedings to enforce a judgment.....	6,7
78A-2-223(1) Decisions to be rendered within two months.....	6,7,9,20
78A-2-223(2) Procedures for decisions not rendered.....	6,9,20
76-2-304. Ignorance or mistake of fact or law.....	8
78A-2-411. Crimes.....	8
78A-5-102 (Superseded 01/01/09). Jurisdiction -- Appeals.....	6

Chapter 12. Code of Judicial Conduct.

Canon 3. A judge shall perform the duties of the office impartially and diligently.

Canon 3. (5).....	10,11
Canon 3. (7).....	10
Canon 3. (8).....	10
Canon 3. C. (1).....	10

STATEMENT OF JURISDICTION

This appeal is within the general jurisdiction of Utah Code Ann. § 78A-4-103(2) (j) and does not involve any matter or issue within the exclusive jurisdiction of the Utah Supreme Court. After opinion the Utah Supreme Court, ordered this appeal transferred to this Utah Appellate Court by order dated September 29, 2008.

AUTHORITY FOR FEDERAL CASE LAW RELIANCE

The Plaintiff's reliance on the State of Utah and U.S. Federal case law throughout this opinion is appropriate. *See* State v. Rothlisberger, 2004 UT App 226, P14, 95 P.3d 1193 ("In circumstances in which Utah courts have not definitively addressed an issue, it is appropriate to turn to decisions . . . that interpret related federal rules for guidance."), *cert. granted*, 106 P.3d 743 (Utah 2004) (quoting from Nat'l Advertising Co. v Murray City Corp. et. al., 131 P.3d 872 (2006 UT App)).

ISSUES PRESENTED FOR REVIEW

STANDARD OF REVIEW – DETERMINATIVE LAW

The primary issues to be determined on appeal include the following:

Issue (A) : Did the Trial Court abuse its discretion on or about May 12, 2008, when it moved sua sponte and stayed the Plaintiff's 60(b) motion?

Standard of review: We review rule 60(b) determinations under an abuse of discretion standard.

Determinative law: Utah R. Civ. P. Rule 62. Stay of proceedings to enforce a judgment. ~ (b) Stay on motion for a new trial or for judgment.

Utah Code Ann. § 78A-2-223. Decisions to be rendered within two months. ~

(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.

Utah Code Ann. § 78A-5-102 (Superseded 01/01/09). Jurisdiction -- Appeals.

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.

(4) The district court has jurisdiction over all matters properly filed in the circuit court prior to July 1, 1996.

"A trial court has discretion in determining whether a movant has shown [rule 60(b) grounds], and this Court will reverse the trial court's ruling only when there has been an abuse of discretion." Ostler v. Buhler, 957 P.2d 205, 206 (Utah 1998) (quoting Larsen v. Collina, 684 P.2d 52, 54 (Utah 1984)).

(quoting from Oseguera v. Farmers Ins. Exch., 2003 UT App 46.)

Baker v. Western Sur. Co., 757 P.2d 878 (Utah Ct. App. 1988), We further held that if the district court finds the motion to be without merit, it may enter an order denying the motion, and the parties may appeal from that order.

Issue (B) : 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?

Standard of review: We review rule 60(b) determinations under an abuse of discretion standard.

Determinative law: "Stay" As defined in Barron's Law Dictionary, Third Edition

~ STAY a judicial order whereby some action is forbidden or held in abeyance until some event occurs or the court lifts its order.

Utah R. Civ. P. Rule 62. Stay of proceedings to enforce a judgment.

~ (b) Stay on motion for a new trial or for judgment.

Utah Code Ann. § 78A-2-223. Decisions to be rendered within two months. ~

(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.

Baker v. Western Sur. Co., 757 P.2d 878 (Utah Ct. App. 1988), We further

held that if the district court finds the motion to be without merit, it may enter an order denying the motion, and the parties may appeal from that order.

Issue (C) : 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)?

Standard of review: We review rule 60(b) determinations under an abuse of discretion standard.

Determinative law: Utah Code Ann. § 76-2-304. Ignorance or mistake of fact or law.

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

Utah Code Ann. § 78A-2-411. Crimes:

Any violation of the provisions of this chapter, except Section **78A-2-404**, is a misdemeanor.

Baker v. Western Sur. Co., 757 P.2d 878 (Utah Ct. App. 1988), We further

held that if the district court finds the motion to be without merit, it may enter an order denying the motion, and the parties may appeal from that order.

Issue (D) : 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?

Standard of review: We review rule 60(b) determinations under an abuse of discretion standard.

Determinative law: Utah Code Ann. § 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.

"[T]he initial inquiry of any court should always be to determine whether the requested action is within its jurisdiction." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1989). "When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." *Id.*

(Quoting from AKJ v. State (In re DECJ) 2008 UT App 341)

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

Standard of review: We review rule 60(b) determinations under an abuse of discretion standard.

Determinative law: Canon 3.

(5). A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice

(7) A judge shall accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law. Except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceeding.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

C. (1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration,

Issue (F) : 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.”

Standard of review: We review rule 60(b) determinations under an abuse of discretion standard.

Determinative law: Canon 3.

(5) A judge shall perform judicial duties without bias or prejudice.

Our supreme court has defined "prima facie evidence" as follows: "Such evidence as, in the judgment of the law is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or depose, and which if not rebutted or contradicted, will remain sufficient." *State v. Asay*, 631 P.2d 861, 864 (Utah 1981) (citation omitted). (quoting from *J.V. Hatch Constr., Inc. v. Kampros*, 971 P.2d 8, 15 (Utah Ct. App. 1998))

It is well settled that payment is an affirmative defense, and that the party claiming payment has the burden of proving it. *Scott v. Austin*, 47 Utah 248, 152 P. 1178; *Filice v. Biscardi*, 67 Utah 171, 246 P. 535. See, also, 48 C.J. 680, “Payments,” § 176. And as to judgments see 34 C.J. 694, § 1071. (quoting *Marks v. Marks*, 1940 UT, 100 P.2d 207).

STATEMENT OF THE CASE

This case came for trial on November 13, 2007, before the Honorable Parley R. Baldwin, on the Plaintiff's single cause of action relating to the foreclosure of a mechanic's lien recorded upon the Defendant's real property, pursuant to which the Plaintiff claimed to have a legal interest in the Defendant's real property and the home thereon. After a two-day bench trial, Judge Baldwin requested the parties submit closing arguments in writing, due to lack of available time of the Court.

On or about January 16, 2008, the Trial Court entered its final Judgment pursuant to Utah R. Civ. P. Rule 54 on the record.

On or about January 24, 2008, the Plaintiff filed a motion pursuant to Utah R. Civ. P. Rule 59(a)(6), requesting the Trial Court to consider altering or amending its judgment of January 16, 2008.

On or about April 3, 2008, the Plaintiff filed a motion, memorandum, and affidavit with the Trial Court, pursuant to the Utah R. Civ. P. Rule 60(b), requesting relief from the Trial Court's judgment of January 16, 2008, due to fraud committed on the court.

On or about April 7, 2008, the Plaintiff filed a Notice of Appeal with the Trial Court (Utah Appeal Case No. 20080323-CA), taken from the entire judgment entered on January 16, 2008.

On or about April 21, 2008, the Plaintiff pursuant to Utah R. Civ. P. Rule 7(d), filed a Request to Submit for Decision with the Court Clerk. Additionally, whereas the computation of time had expired as per Utah R. Civ. P. Rule 7(c)(1), the Plaintiff requested the Trial Court consider the motion closed, and pleadings complete. The Defendant did not file a timely reply memorandum or oppose this motion.

On or about July 1, 2008, the Plaintiff discovered that, on or about May 12, 2008, counsel for the defense communicated ex-parte with the Trial Judge requesting the Trial Judge sign four (4) pending post trial court orders. The Plaintiff subsequently learned that a discussion transpired concerning the Plaintiff's pending 60(b) motion, and a decision was made by the Trial Court to remove the Plaintiff's 60(b) motion from under advisement, without any communication or notice to the Plaintiff.

Furthermore, the Trial Judge also elected not to address the 60(b) motion, and stayed the Plaintiff's Request to Submit until there was a decision from the Supreme Court.

The Trial Court issued no memorandum decision, no court orders, and no documentation disclosing this action, the only evidence that such actions occurred is the entries on the case docket, as the case record discloses nothing.

THE TRIAL COURT DID NOT DISCLOSE

THE STAY TO THE PLAINTIFF.

When the Trial Judge learned that the Plaintiff had discovered the stay, months after it had been entered, and was communicating with the Utah Court Administration, the Utah Judicial Council, and the Utah Judicial Conduct Commission concerning the Trial Judge's violation of several Utah State Codes and Utah Court Rules, Judge Baldwin changed his position on or about August 7, 2008 (108 days after the Plaintiff filed the Request to Submit), seized the Plaintiff's 60(b) motion and denied it.

This appeal followed.

STATEMENT OF FACTS

The dates May 12 and May 13, 2008, play a very important role throughout the following brief, and the Plaintiff requests that such date be given special interest. One reason that May 12, 2008, is of interest to this action, the Plaintiff's primary Docketing Statement for Utah Appellate Court Case No. 200800323-CA became due on May 12, 2008 (SEE; Utah Supreme Court Order of April 29, 2008). All parties to the said appeal are the same parties to the present appeal at issue, and all parties are made aware of the filing deadlines by the Appeals court.

On or about July 1, 2008, the Plaintiff obtained a current copy of the case docket. Examination of the docket revealed that on or about May 12, 2008, counsel for the Defense communicated ex-parte with the Trial Judge, and such communication resulted in the following events, none of which was disclosed or communicated to the Plaintiff:

May 12, 2008

1. The Trial Clerk made two (2) separate entries stating that Judge Baldwin signed and filed four (4) court orders. The Trial Court received these orders twenty-five (25) days earlier on or about April 18, 2008, and the Plaintiff had inquired several times as to their status, and was told time and time again, when the Judge gets time he will sign them. The Plaintiff's efforts seemed to fall on deaf ears at the court.

May 12, 2008

2. The Trial Judge requested the Trial Clerk to make an entry on the docket
“Tracking ended for under advisement,” (removing the Plaintiff’s 60(b)
motion from under advisement).

May 12, 2008

3. The Trial Judge requested the Trial Clerk to make an entry on the docket
“Request to submit for decision is stayed until there is a decision from the
Supreme Court,” (the Trial Judge stayed the Plaintiff’s 60(b) motion). The
Trial Judge also elected not to issue a court order, memorandum, or any
documentation concerning this stay. The only record of this ever happening
is on the case docket.

May 12, 2008

4. The next entry on the case docket, Fee Account created: Total Due: \$2.00
Payment Received: \$2.00. (charge for a Court Clerk to make copies for
Defense Counsel).

May 13, 2008

5. The next entry on the case docket, Filed: Notice of Appeal (Defense Counsel
files Notice of Appeal on behalf of the Defendant).

The Plaintiff received by mail a copy of the Defendant's Notice of Appeal on or about May 14, 2008. Attached thereto as Defendant's Exhibit "B" is a copy of the four (4) court orders that are **STAMPED NOT SIGNED** on May 12, 2008.

An examination of the actual court orders on record at the court are in fact signed by the Trial Judge, only the handwriting is very different where ~~April~~ is scratched out and May is written in and the date 12th is also hand written, the real court orders carry a different page placement of the date stamps, and they carry a stamp on their face of the date filed on the record. The court orders on record with the court are NOT the same documents that Defense Counsel attached as Exhibit "B" to the Defendant's Notice of Appeal.

To examine the difference between the handwriting of the Trial Judge's and the handwriting on the fake court orders is very easy. Defendant's Exhibit "A" attached to the same Notice of Appeal is the Trial Judge's hand written 21 day of February.

Further evidence that makes this entire incident viable and a highly likely scenario of the actual events that occurred when the Plaintiff questioned the Chief Deputy Clerk of the Court. The Plaintiff was advised, after checking the Trial Judge's court log, that the Judge was not on the bench on May 12, 2008.

Other facts surrounding the STAMPED Court Orders that are attached to the Defendant's Notice of Appeal that are also significant:

Appellant's/Plaintiff's 60(b) Case Brief

1. The Trial Court did not mail copies of the stamped or signed orders to the parties. It is not possible that Defense Counsel could have received the orders by mail in Salt Lake City and subsequently have the Defendant's Notice of Appeal filed with the Weber County Trial Court less than a full day later at 1:36 PM on May 13, 2008. The U.S. Mail Carrier for the Defense Counsel's address has confirmed to the Plaintiff, the address listed for the Defense Counsel is in fact a late afternoon drop. The earliest possible time that Defense Counsel could have received a mailed notice was late afternoon of May 13, 2008.
2. There is not another entry on the court docket that copies were made again on or about the dates in question.
3. The only way for the Defense Counsel to have copies of the stamped orders, is if the Defense Counsel was at the Trial Court when the orders were stamped.
4. Regardless of motives, the Defendant in concert with its Counsel plotted to cause the Plaintiff harm during trial. It appears that Defense Counsel has involved an officer of the court based on the activity noted on the docket on May 12, 2008. Not only were these actions a violation of court rules and Utah law, the Plaintiff's case has been prejudiced and the impartial functions

of the court have been directly corrupted.

5. Who benefited by the Plaintiff's 60(b) motion being stayed? The Trial Judge does have some motives, as the Plaintiff's 60(b) motion attacks the very heart of the credibility of the Trial Court's credibility findings. However, the Defendant certainly had more to lose and the actions at issue here beg the Court's review for possible sanctions relating to fraud, subordination of perjury and submitting false evidence.

Upon discovery of these events, the Plaintiff became concerned as to the ethics of the Trial Judge. It is apparent from the docket that the Trial Judge willfully, knowingly and with intent violated court rules, broke the law, violated the sanctity and integrity of the bench, caused material harm to the Plaintiff and, engineered a break down of the judicial process to aid Defendant in the case.

This issue becomes apparent from a review of the docket, that the 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.

Upon learning the above the Plaintiff inquired of the Trial Clerk as to the background on the stay requesting documentation of the action. The Clerk advised the Plaintiff that "the court lacked jurisdiction because the case is under appeal," further advising that the Judge had instructed her to make the entries on the docket.

On or about July 16, 2008, after unsuccessfully pursuing answers from the Appellant's/Plaintiff's 60(b) Case Brief

Court Administrator, the Plaintiff also learned that its complaint to the Utah Judicial Conduct Commission was stalled because the commission was waiting for new appointments and three reaffirmations. The Plaintiff then contacted Mr. Brent Johnson, Lead Counselor for the Utah Judicial Council. The Plaintiff explained the situation to Mr. Johnson advising that he believed the Trial Court and the Judge appeared to be in violation of: Utah Code Ann. § 78A-2-223(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. (Underline added).

The Plaintiff further explained that he contacted the Utah Judicial Council for assistance because of: Utah Code Ann. § 78A-2-223(2). The Judicial Council shall establish reporting procedures for all matters not decided within two months of final submission (underline added).

Mr. Johnson assured the Plaintiff that he would assist if he could. Thereafter, on or about July 30, 2008, Mr. Johnson informed the Plaintiff by phone, that he had contacted the Trial Judge and inquired as to the issue of the Trial Judge's refusal to issue a decision on the Plaintiff's 60(b) motion, Mr. Johnson stated that the Judge informed him that the court lacked jurisdiction over the motion because the case is under appeal. Mr. Johnson also told the Plaintiff that the Trial Judge said that if the Plaintiff would withdraw his appeal the Trial Court could then handle the 60(b) Appellant's/Plaintiff's 60(b) Case Brief

motion.

On August 4, 2008, the Plaintiff wrote a second letter to Mr. Johnson (the first letter presented Utah case law and the rules proving the court was in error), and copied the same to Ms. Pat Bartholomew, a Utah Supreme Court Clerk. (SEE: Exhibit "A" attached hereto). In such communication the Plaintiff states:

Page 1 ¶ 2

"I believe the rules and laws are clear, Judge Baldwin has made a major misstep. I believe Judge Baldwin's jurisdiction issue is clearly false ~"

Page 1 ¶ 4

"Last Friday, August 1 2008, I received my notice from the Appeals Court that I am to start writing my brief for my Appeal. With that notice, I also received a copy of the court record. Upon reviewing the record, I discovered that all mention of what has happened to my motion is missing from the record. Including any mention that my motion has been stayed, thus the appeals court will never know that it existed. Brent, **that is obstruction of justice**, and the Judge has no right to deny me justice."

Mr. Johnson forwarded the Plaintiff's letter to the Trial Judge on that same day, and the Trial Judge denied the 60(b) motion three (3) days later. This action leaves little doubt that the Trial Judge knew all along that the Trial Court retained jurisdiction over 60(b) motions while the case was under appeal, and that the Trial Appellant's/Plaintiff's 60(b) Case Brief

Court was operating with reckless disregard for the truth and justice. As further shown within the Trial Court's ruling; "The Court elected not to address the motion," (emphasis added), the Trial Judge was bias and abused its discretion, as it is a well-established that:

"[T]he initial inquiry of any court should always be to determine whether the requested action is within its jurisdiction." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1989). "When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." Id. (Quoting from AKJ v. State (In re DECJ) 2008 UT App 341)

Thus, the Trial Court had no authority or jurisdiction to elect not to address the motion. Therefore, on May 12, 2008, when the Trial Court determined that it lacked jurisdiction to rule on the Plaintiff's 60(b) motion, and took it out from under advisement, then stayed the Request to Submit (be it right or be it wrong), the Trial Court divested itself of jurisdiction over the motion. Hence, "When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." (Quoting from AKJ v. State (In re DECJ) 2008 UT App 341).

The Trial Court only retained the authority to dismiss the action therefore the ruling of August 7, 2008, is void. SEE: United States v. Buck, 2002 10CIR 260, 281 F.3d 1336, Appellants claim that the quiet title judgment should be set aside under Rule 60(b)(4) because the judgment is void. A judgment is void "only if the Appellant's/Plaintiff's 60(b) Case Brief

court which rendered it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law." In re Four Seasons Sec. Laws Litig., 502 F.2d 834, 842 (10th Cir. 1974).

As stated in United States v. Buck, 2002 10CIR 260, 281 F.3d 1336 "or acted in a manner inconsistent with due process of law." The Trial Court's improper actions divested itself of jurisdiction over the motion, making any ruling void.

Once the Trial Court started down that slippery slope with the Defense Counsel, there was no coming back. Thus, all the safeguards within the judicial system that have been put into place over the years became impaired and at risk. SEE: Stonger v Sorrell 776 NE.2d 353, 358 (Ind. 2002). Nevertheless, fraud may be found in the absence of an intent to defraud; indeed, fraud may be found even where representations are made with a good faith belief in their truth. Whether the deprivation of a party's rights by actions of the court are attributable to a willful intent to defraud or a reckless disregard of rules or statutory provisions, the court has the same duty to rectify the wrong. The mechanism for protecting an [sic] maintaining the decisional integrity of our judicial system is found in the statutes and rules which govern the procedures to be followed by parties, attorneys and judges. The purposeful or reckless disregard of those procedural safeguards which results in the deprivation of substantive rights constitutes an impermissible corruption of the court process.

12 Moore's Federal Practice, ¶ 60.21[4][a], at 60-52 (3d ed. 2000), provides:

“Fraud on the court” is defined in terms of its effect on the judicial process, not in terms of the content of a particular misrepresentation or concealment. Fraud on the court must involve more than injury to a single litigant; it is limited to fraud that “seriously” affects the integrity of the normal process of adjudication. Fraud on the court is limited to fraud that does, or at least attempts to, “defile the court itself” or that is perpetrated by officers of the court “so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases.”

Id. (footnote references omitted)(emphasis in original).

The Trial Court acted as if, and made statements to the effect, that it lacked jurisdiction over the Plaintiff's 60(b) motion. Yet, the jurisdiction issue proved not to be true as evidenced by the Trial Court's action on or about August 7, 2008, when the Trial Court acted without regard for jurisdiction, or to its violations of 78A-2-223(1), without explaining that the delays were beyond the judge's personal control, without notice to the parties, without removing the self imposed stay, without a hearing, abruptly moved again and denied the Plaintiff's 60(b) motion stating;

On April 3, 2008, Plaintiff filed a motion under rule 60(b) for relief from the Court's judgment of January 16, 2008. Having considered the affidavit of Mr. Bergman and his memorandum, the Court denies the motion.

*On April 7, 2008, only four days after the Plaintiff's 60(b) motion was filed, Plaintiff filed a notice of appeal, taken from the entire judgment. The Court elected not to address the motion, following "the general rule that the trial court is divested of jurisdiction over a case while it is under advisement on appeal," Nat'l Advertising Co. v Murray City Corp. et al., 131 P.3d 872, 876 (Utah Ct. App. 2006). The Court has learned, however, that the Utah Supreme Court acknowledges an exception to this rule, which is that "trial courts do have jurisdiction to consider rule 60(b) motions even though an appeal is pending." *Id.* at 877 Therefore, the Court now considers Plaintiff's rule 60(b) motion. (emphasis added).*

Wherefore, the Trial Court has exceeded its authority, abused its discretion, violated the Plaintiff's rights to due process and as such, it is the duty of this Court to reverse the ruling, SEE; Oseguera v. Farmers Ins. Exch., 2003 UT App 46. "A trial court has discretion in determining whether a movant has shown [rule 60(b) grounds], and this Court will reverse the trial court's ruling only when there has been an abuse of discretion." Ostler v. Buhler, 957 P.2d 205, 206 (Utah 1998) (quoting Larsen v. Collina, 684 P.2d 52, 54 (Utah 1984)).

Kendall Insurance v. R&R Group, 2008 UT App 235

A further example of how the Trial Court abused its discretion concerning the Plaintiff's 60(b) motion, would be to compare it to a similar case. Hence, SEE: Kendall Insurance v. R&R Group, 2008 UT App 235,

1. Exactly as in the Plaintiff's case, the same Judge presided (the Honorable Parley R. Baldwin),
2. Exactly as in the Plaintiff's case, a party filed a motion pursuant to Utah R. Civ. P. Rule 60(b) with the Trial Court (on or about May 26, 2006).
3. Exactly as in the Plaintiff's case, the same party that filed the 60(b) motion also soon after filed an appeal based on the entire final judgment (on or about June 16, 2006, case No. 20060570 - CA).
4. CONTRARY to the Plaintiff's case, in the Kendall Insurance v. R&R Group case, the Trial Court treats the 60(b) motion completely different. The Trial Court did not make-up any jurisdictional issues, nor did it stay the 60(b) motion before it ruled on the motion.

Therefore, what the Kendall Insurance v. R&R Group case proves in relation to the Plaintiff's case:

1. That the Trial Court knew that it was wrong staying the Plaintiff's motion as it tried an almost identical set of proceedings two (2) years earlier.

2. That when the Trial Court told the Plaintiff and Mr. Brent Johnson, “that it lack jurisdiction” to rule on the 60(b) motion, the Trial Court spoke with the knowledge that such was a complete falsehood,
3. That when the Trial Court stated in its ruling on the Plaintiff’s 60(b) motion, “*The Court has learned, however,*” (emphasis added) stated such with the knowledge that it was another falsehood,
4. As shown in the Kendall Insurance v. R&R Group case, the Trial Court knew it had jurisdiction over 60(b) motions while appeals are pending,
5. That the Trial Court has abused its discretion and has no credibility left,
6. The Trial Court has disparaged the judicial system in the eyes of the public.

Therefore, it is appropriate for this court to void all findings of facts, conclusions of law, judgments and rulings of this Trial Court and remand the entire case for a new trial and that a new judge be appointed to the case.

RELEVANT FACTS

EDITING THE TRIAL COURT'S CASE DOCKET

As one of the criteria of the Utah's Judicial Council performance compliance standards applies to the time that cases are held under advisement, the Trial Court Judge is aware of the importance of this issue. Therefore, when the Trial Court Judge ordered the Trial Clerk to enter changes on the case docket and produced no documentation for the parties or the record, the Trial Court abused its discretion.

Furthermore, just editing the case docket and doing it basically in secret, the Trial Court's actions are to avoid possible judicial reprimands and or to prevent from not meeting the minimum standards set by the judicial retention board. The Judge simply removed the motion from under advisement, and that tricked the court's motion tracker and the Judge's record is safe.

Please take notice that on 05-12-08 tracking is ended for under advisement

CASE NUMBER 040902444 Lien/Mortgage Fcls

Judge PARLEY R BALDWIN
Signed May 12, 2008

05-12-08 Tracking ended for Under advisement. debbieg
05-12-08 Note: Request to submit for decision is stayed until there is a decision from the Supreme Court debbieg
05-12-08 Fee Account created Total Due: 2.00 bonniejs
05-12-08 COPY FEE Payment Received: 2.00 bonniejs
Note: 5.00 cash tendered. 3 change given.
05-13-08 Filed: NOTICE OF APPEAL juanaq
05-13-08 Fee Account created Total Due: 205.00 juanaq
05-13-08 APPEAL Payment Received: 205.00 juanaq
Note: Code Description: APPEAL
05-16-08 Note: Mailed certified copy of notice of appeal to the Utah Supreme Court via interoffice mail. azurev
05-16-08 Filed: Mailing Certificate azurev
05-22-08 Filed: Supreme Court of Utah Letter azurev
05-22-08 Filed: Supreme Court of Utah Order azurev
05-27-08 Note: Record sent to the Court of Appeals via interoffice mail. azurev
06-02-08 Filed: Request for Transcript angeling
06-03-08 Note: Copy of Request for Transcript put in recorder's box. angeling
06-10-08 Filed: Utah Court of Appeals Letter azurev
06-10-08 Note: File received back from the Utah Court of Appeals. azurev
06-18-08 Filed: Utah Court of Appeals Letter azurev
06-23-08 Note: Record (1 file) sent to the Court of Appeals via interoffice mail. azurev
06-26-08 Note: File received back from the Court of Appeals azurev
-26-08 Filed: Utah Court of Appeals Letter azurev
-27-08 Tracking - Exhibit, changed to Review date Nov 20, 2008. juanaq

DETAIL OF ARGUMENT

DEFENDANT FAILS TO REPLY TIMELY

The Defendant has refused to respond timely. There has been four (4) post-trial motions filed and the Defendant has not met the filing time deadline once, including the motion at issue. Thus the Plaintiff has repeatedly insisted that the pleading was complete and the motion is closed.

Nevertheless, it is extremely ironic that the Trial Court's ruling reads as if it is from the Defendant's late reply. Even though, the Trial Court states that it only reviewed the Plaintiff's pleadings before making a decision on the motion. Which if the Trial Court reviewed the Plaintiff's pleadings, then it is the duty of the court to handle the crimes that happened right in front of it.

The Plaintiff also gave the Trial Court an alternative provision with how to handle the false evidence the Defendant provided, that being, do not allow the Defendant the use of cash payments as proof of payments. Which it should have never allowed in the first place.

The Trial Court's review is wrong, plain and simple, as it should be based solely on the merits of a motion. This applies to the court's unwillingness to see beyond the title of the motion and look to the substance of the plea. In Hazel-Atlas Glass Co. v Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). On appeal from that ruling the Supreme Court held the federal courts have Appellant's/Plaintiff's 60(b) Case Brief

inherent equitable power to grant relief in cases of after-discovered fraud regardless of the “end of the term rule,” and concluded that “every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments.” The Court noted that this was not simply a case of a judgment obtained with the aid of a witness who is believed possibly to have been guilty of perjury, but was “a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.” *Id.* At 245, 64 S.Ct. At 1001. The Court rejected suggestions that a lack of diligence by the aggrieved party could justify denial of relief, finding that tampering with the administration of justice in the manner shown here involved more than an injury to a single litigant and that the court's power to preserve the integrity of the judicial process did not depend on the diligence of the litigants. *Id.* At 246, 64 S.Ct. At 1001.

See: United States v. Buck, 2002 10CIR 260, 281 F.3d 1336 stating, “In this case no purpose would be served by denying Appellants relief on the ground that the motion misstated the plea for relief. The substance of the plea should control, not the label. We should construe the motion either as an independent action, see 12 Moore's § 60.64, at 60-197; 11 Wright & Miller § 2868, at 405, or, because “there are no formal requirements for asserting a claim of fraud on the court,” 12 Moore's § 60.21[4][f], at 60-60, as a pleading invoking the court's inherent power to grant Appellant’s/Plaintiff’s 60(b) Case Brief

relief for fraud upon the court.”

Nonetheless, the Plaintiff’s 60(b) motion is not a complicated issue, but it is founded on material conclusive prima facie evidence that proves the Defendant and Counsel collaborated to commit fraud upon the court. When it looked as if the Plaintiff discovered such treachery, the Defense Counsel went to the Trial Court and communicated ex-parte with the Trial Judge and hatched the scheme of May 12, 2008.

Fraud on the court . . . is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court. It is thus fraud . . . where the impartial functions of the court have been directly corrupted. Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985). As stated in Weese v. Schukman, 98 F.3d 542, 552-53 (10th Cir. 1996),

Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily [*12] rise to the level of fraud on the court.

(quoting Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978)) (emphasis Appellant’s/Plaintiff’s 60(b) Case Brief

deleted).

Moreover, "fraud on the court," whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests underlying finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing-what can properly be characterized as a deliberate scheme to defraud-before relief from a final judgment is appropriate Thus, when there is no intent to deceive, the fact that misrepresentations were made to a court is not of itself a sufficient basis for setting aside a judgment under the guise of "fraud on the court." Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1267 (10th Cir. 1995). Proof of fraud upon the court must be by clear and convincing evidence. See Weese, 98 F.3d at 552

Weese v. Schukman, 98 F.3d 542, 552-53 (10th Cir. 1996) (internal quotation omitted). See also, Buck, 281 F.3d at 1342 ("It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court.") These parameters are strictly applied because a finding of fraud on the court permits the severe consequence of allowing a party to overturn the finality of a judgment. Weese, 98 F.3d at 553. Intent to defraud is an "absolute prerequisite" to a finding of fraud on the court. Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1267 (10th Cir. 1995) (discussing the required intent element). See also, Yapp v. Appellant's/Plaintiff's 60(b) Case Brief

Excel Corp., 186 F.3d 1222, 1231 (10th Cir.1999) (same).

Nonetheless, it is not the Plaintiff's position that the 60(b) motion at issue may not have started out as a clear and convincing true case of fraud on the court, but what happened after the Plaintiff filed the motion, left little room for doubt about the truth of the Plaintiff's claims.

The Trial Court elected not to address the motion or issue a court order, thereby blocking the Plaintiff's rights to an appeal. The Trial Court's only grounds for such actions could only be placed upon the fact the Plaintiff's motion went to the heart of the credibility issue, in contradiction of the Trial Court's findings of fact, thereby the Plaintiff was trying to level the playing field when the Appeals court reviews the Plaintiff's challenge of the Trial Court's finding of facts.

The general rule that the Trial Court speaks of in its ruling has not been the general rule for more than twenty (20) years, as stated in: Baker v. Western Sur. Co., 757 P.2d 878 (Utah Ct. App. 1988), "We further held that if the district court finds the motion to be without merit, it may enter an order denying the motion, and the parties may appeal from that order."

Additionally, in Hazel-Atlas Glass Co., 322 U.S. at 246, the Supreme Court of the United States held that tampering with the administration of justice involves far more than an injury to a single litigant. "It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot

Appellant's/Plaintiff's 60(b) Case Brief

complacently be tolerated consistently with the good order of society.” Id. (quoting from Stonger v. Sorrell 776 NE. 2d 353, 358 (Ind. 2002))

During trial the Plaintiff objected and was overruled when the defense presented defense Exhibit D14 (as such exhibit lacked foundation and purports several payments without any supporting evidence), states on payment line #8, dated July 7, 2003, a Check from Golden West Credit Union Check #3348 for \$500, was paid to the Plaintiff. A copy of such check (amongst others), is not in evidence.

The 60(b) motion is the third time the Plaintiff brought a part of this same issue before the Trial Court. The first time was during trial, as the Plaintiff objected to D14 being admitted into evidence without evidence supporting all of the claims, other than testimony. The second time is in the Plaintiff’s closing arguments (page 7 ¶ 3), as the Plaintiff points out that the testimony of the Defendant and her husband (Mr. Vince Isbell) has inconsistencies as to the payments, amounts, start date of work, work authorized and that the Plaintiff was to be paid for the work performed on their Slaterville home.

Once the Plaintiff was able to get a copy of the check at issue, the Plaintiff discovered that it was not made payable to the Plaintiff.

BEFORE THE PLAINTIFF REFERS THE COURT TO PARTS OF THE
DEFENDANT’S LATE REPLY, THE PLAINTIFF RESERVES THE RIGHT TO
STRIKE THE ENTIRE REPLY AT A LATER DATE.

Had the Defendant's husband cashed the check and then brought the Plaintiff the cash (as stated in the Defendant's late response page 2 ¶ Response), then why did the Defendant not list it as a cash payment? Just like the seven (7) other cash payments the Defendant listed on Exhibit D14 and claimed to have paid to the Plaintiff. Because they were lying.

If the Trial Court had really been interested in justice and taken an extra minute, located the lawsuit mentioned on page 4 ¶ 15 in the Plaintiff's Affidavit in Support of Motion Presenting ~ (Plaintiff's 60(b)), it would have discovered that, In the United States District Court for the District of Utah, Case No. 2:03-CV-750 TC. On page 4 of the US Court's ORDER AND MEMORANDUM DECISION ¶ E. Declaration of Vince Isbell (as per the 180 paragraph declaration), stating: "Otherwise, unless specifically addressed in this Order, the portions of Mr. Isbell's Declaration are inadmissible for reasons set forth in the Defendant's briefs. Accordingly the court does not rely on them."

Mr. Vince Isbell (the Defendant's Agent, Husband, and trial witness), does not provide reliable testimony. Yet, this Trial Court found it as the most credible. Thus, as the Plaintiff attacked that fact with the evidence produced in the Plaintiff's 60(b) motion, the Trial Court did not want to discover anything else that might prove its findings concerning credibility were wrong.

Defense Exhibit D14 (titled - Payments made to Mark – see payment line No.8), confirms that the Defendant and the Defendant's (husband) witness both testified, under direct examination that on July 6, 2003, check #3348, issued in the amount of \$500, drawn on their joint account at Golden West Credit Union, was made payable to Mark Bergman.

The Trial Court overruled the Plaintiff's objection and allowed the Defendant to testify about such check, and the Trial Court relied upon the evidence, even-though the Defendant did not produce a copy of check #3348.

However, when the Plaintiff obtained the check and presented it by means of the 60(b) motion, the Trial Court could clearly see that such check was not made payable to the Plaintiff, but rather it is made payable to CASH and endorsed by the Defendant's husband, who cashed such instrument.

THE TRIAL COURT RETALIATES
REFUSES TO EXAMINE EVIDENCE

On or about April 7, 2008, the Trial Court Clerk telephoned the Plaintiff and requested the Plaintiff come to the courthouse and pick-up the CD the Plaintiff had attached to the 60(b) motion as an exhibit. The Plaintiff informed the Clerk the CD contained the Trial Court's video and audio footage of the Defendant and the Defendant's witness actual trial testimony. Because the Plaintiff had a pending motion before the Trial Court, the Plaintiff requested that the Trial Clerk retain the CD as there might not be any further form of transcripts from the trial.

The Trial Clerk insisted regardless, well that maybe, and maybe you can use it at a trial or hearing but no one at the court is going to put a CD in a computer and watch it, and the Trial Court refuses to hold the CD in their evidence as an Exhibit to the Plaintiff's motion, SEE: case docket April 7, 2008, Note: CD RETURNED TO MARK BERGMAN. HE SET IT ON THE COUNTER AND REFUSED TO TAKE IT AND LEFT IT ON THE COUNTER.

Because the Plaintiff refused to take the CD (as noted on the docket) and filed a Notice of Appeal, the Trial Court retaliated (even though it was in violation of the Utah Judicial Council Rules of Judicial Administration Rule 4-202.04(2)(D)) against the Plaintiff and denied the said pending motion before the close of court on April 7, 2008. The main violation involved with this decision is, Rule 4-202.04(2) Appellant's/Plaintiff's 60(b) Case Brief

(D) requires that the court SHALL hold a hearing, and after which the court SHALL write a findings.

The Plaintiff's motion met all the requirements and the Plaintiff requested a hearing. Only, this was not the first time the Trial Court retaliated and denied the Plaintiff the right to be heard. On March 4, 2008, two (2) days after the Plaintiff was finally granted access to copies of the Trial Exhibits, and the day after the Plaintiff informed the Trial Clerk that evidence was missing from Exhibit D13, the Trial Court denied the Plaintiff's motion pursuant to Utah R. Civ. P. Rule 59(a)(6).

Thus, the Plaintiff finds that the Trial Court is bias and has been retaliating for no just cause, and is abusing its discretion, when the Trial Court denied the 60(b) motion stating it found: *“The reasons applicable to the Plaintiff's motion include “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)” ~ “Plaintiff does not allege or show that the evidence could not have previously been discovered.”* (emphasis added).

Furthermore, the Trial Court knew why the Plaintiff could not have produced the evidence in time for a Rule 59(b) motion, one reason being the Trial Judge would not approve the Plaintiff's access to copies of exhibits for three (3) weeks, another being the Plaintiff had moved timely pursuant to Rule 59 requesting the court to consider altering or amending the judgment, and it was denied. Not to Appellant's/Plaintiff's 60(b) Case Brief

mention, it is standard knowledge that a subpoena has to grant the subject a minimum of fourteen (14) days to comply. A motion pursuant to Rule 59 has to be done within ten (10) days from the date of final judgment.

Within the Plaintiff's pleadings, the Plaintiff explains each step taken, the reason, and the time-line needed to produce the missing evidence. Nonetheless, as per the Trial Judge, the Kendall Insurance v. R&R Group case proves that the Trial Judge's statements and rulings cannot be relied upon. Hence, had the Trial Judge read the pleadings as implied, reviewed all the evidence (exhibit "B"), then the Trial Court would have known that the Plaintiff did show that the evidence could not have previously been discovered, and the Defendant, the Defendant's witness and the Counsel for the defense all committed perjury and submitted false evidence.

The Plaintiff finds that the Trial Court abused its discretion, when the Trial Court found; *"Plaintiff alleges that the witnesses for Defendant lied at trial. And provides as "newly discovered" evidence of this a copy of a check. However, Plaintiff's evidence fails to prove that Defendant's witnesses gave false testimony"* (emphasis added).

The Trial Court has failed to recognize what is basic prima facie evidence. The Plaintiff provided a check as evidence, the Defendant has admitted to writing and cashing the check and that the check is not made payable to the Plaintiff.

Therefore, the said check at question is PRIMA FACIE EVIDENCE and as Appellant's/Plaintiff's 60(b) Case Brief

such, Our supreme court has defined "prima facie evidence" as follows: "Such evidence as, in the judgment of the law is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or depose, and which if not rebutted or contradicted, will remain sufficient." State v. Asay, 631 P.2d 861, 864 (Utah 1981) (citation omitted). (quoting from J.V. Hatch Constr., Inc. v. Kampros, 971 P.2d 8, 15 (Utah Ct. App. 1998)). Therefore, it is not within the Trial Court's discretion to dispute something that is prima facie evidence, thus the Trial Court has abused its discretion.

Conclusion and Statement of Relief Sought

For the foregoing reasons, the Trial Court's final judgment and rulings should be found as an abuse of its discretion and are void, thereby nullifying all findings of facts, conclusion of law, rulings and judgments.

That this court finds that the use of unconfirmed payments made with cash are to be disallowed and not entered into evidence.

That this court finds that the defendant is to replace the escrowed funds into the court upon remand, and that failure to do such shall result in findings of contempt of court, and ordered to show cause.

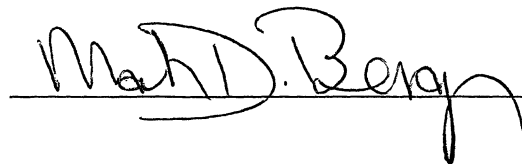
That this court finds that the Defendant, the Defendant's witness Mr. Vince Isbell, and Defendant's counselor are to be brought before the court for matters relating to fraud on the court.

That the Plaintiff has prevailed on appeal.

That any and all just matters found by this court be applied.

Wherefore, this court reverses this present action and remands the entire matter for a new trial before a new judge, consistent with the opinion of this court.

Respectively submitted,

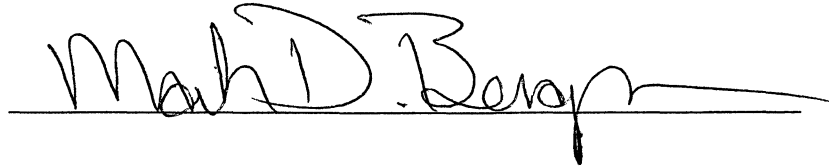
A handwritten signature in black ink, appearing to read "Mah D. Berg", written over a horizontal line.

Dated December 3, 2008

CERTIFICATE OF SERVICE

I CERTIFY THAT ON THE 3 DAY OF DECEMBER, 2008 THE
FOREGOING **CASE BRIEF** WAS SERVED ON THE DEFENDANT/ Appellee
BY MAILING A TRUE AND CORRECT COPY VIA FIRST-CLASS U.S. MAIL,
POSTAGE PREPAID TO THE FOLLOWING ADDRESS;

Respectfully,

A handwritten signature in black ink, appearing to read "Michael E. Bostwick", is written over a horizontal line. The signature is fluid and cursive.

Atty. For the Defendant/ Appellee
Michael E. Bostwick (7037)
6776 South 1300 East
Salt Lake City, UT. 84121

Addendum A

FACSIMILE TRANSMITTAL SHEET

To:

Brent Johnson / cc Pat Bartholomew

From:

Mark D. Bergman

FAX NUMBER:

801-578-3843 / 801-578-3999

Date:

August 4, 2008

COMPANY:

Judicial Council / Utah Supreme Court

TOTAL NO. OF PAGES INCLUDING COVER:

3

PHONE NUMBER:

801-578-3884

SENDER'S REFERENCE NUMBER:

Case #04092444 - Judge Baldwin

Re:

Jurisdiction & Signature Stamp

YOUR REFERENCE NUMBER:

[Click here and type reference number]

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Dear Brent

Please contact me or have someone from your office keep me informed as to what is your decision. Thank you for your time.

Respectively

Mark D. Bergman

August 4, 2008

RE: Jurisdiction and Signature Stamp

Mr. Brent Johnson
Judicial Counsel Legal Depart.
S.L.C., Utah

Dear Mr. Johnson,

I hope that you have received my fax and voice messages concerning the signature stamp issues and the court's jurisdiction. I am sorry that these issues are taking up so much of your time but, I did not create the problem, I am just trying to set matters back on track. Speaking of which, I want you to understand my intent is only so I might get justice in my case. I am not looking for more people to sue. Believe me; I know what kind of complaint I could file against the Judge and his in-court clerk, but who needs the headache.

Nonetheless, I believe the rules and laws are clear, Judge Baldwin has made a major miss-step. I believe Judge Baldwin's jurisdiction issue is clearly false and the improper stamping of the orders is a violation of the rules. However, if the Judge can prove otherwise, I will go away quietly. I feel I have tried everything I could think of to give the Judge a way out, but he has refused repeatedly. At least I was trying until I discovered this fake stay. I know that my motion changes everything about the findings of fact and the final judgment, but that kind of thing can and does happen. I am sure Judge Baldwin never thought that I could prove conclusively that the defendant committed perjury and that their Attorney subordinated the same.

For me, it was easy, because as I listened to the defendant and her husband testify about the alleged payments, they paid to me, and that they could not produce a copy of one of the checks that they made out to me. I knew right where to go, only I tried everything first. I called the defendants Attorney and asked for a copy of the missing check, I brought it to the attention of the court that one of the checks was not in evidence. Then, being left with no other choice, I issued a subpoena, had the Sheriff serve it, and then I waited. When I received the defendant's banks records, I knew the Judge could not deny documented proof of the fraud committed by the defendant. Sure, the defendant had lied about a lot of things while the defendant and her husband were on the stand, but there is no walking away from this one.

Last Friday, August 1 2008, I received my notice from the Appeals Court that I am to start writing my brief for my Appeal. With that notice, I also received a copy of the court record. Upon reviewing the record, I discovered that all mention of what has happened to my motion is missing from the record. Including any mention that my motion has been stayed, thus the appeals court will never know that it existed. Brent, that is obstruction of justice, and the Judge has no right to deny me justice.

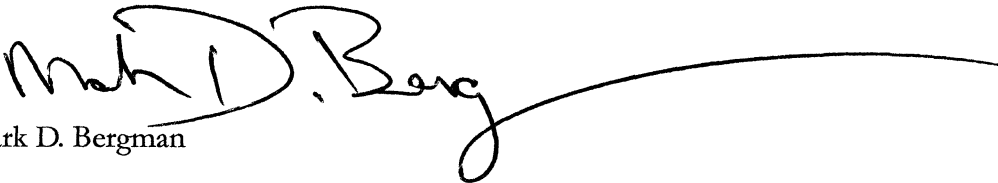
CONCLUSION

Therefore, this is what I will settle for. First, I believe you have grounds to put Judge Baldwin's in-court clerk, Debbie, on administrative leave and the court orders she improperly used the signature stamp on to be withdrawn. That will also require that the defendant's appeal be withdrawn too, as there will be no final judgment or order, the appeals court will have no jurisdiction to hear the appeal. Once the matter is cleared up the defendant can refile if they so wish.

Judge Baldwin to set a hearing for tomorrow or the next day, starting at 10:00am will be fine. I do not care if he has court scheduled; he brought this thing on himself. Now he is going to fix it. Judge Baldwin is to order that the defendant be contacted and informed that they are required to attend, or they will be held in contempt.

We will hold a hearing on my motion of which I do not think it should take us past lunch. One last thing, I would like you to attend, if you can. I believe Judge Baldwin will do what is required by law and I will feel much better about the whole thing just knowing that I can talk to you afterwards. After that, I do not care what the Judicial Counsel decides to do with the Judge and his Clerk.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Bergman". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Mark D. Bergman

CC: Pat Bartholomew

Exhibit A

ADDENDUM

CONTROLLING STATUTES AND RULES VERBATIM

The controlling provision relating to the issues of the Trial Court's abuse of discretion when it denied the Plaintiff's 60(b) motion, are as follows:

Utah R. Civ. P. Rule 59. New trials; amendments of judgment.

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Utah R. Civ. P. Rule 60. Relief from judgment or order.

(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.

Utah R. Civ. P. 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.

Utah Code Ann. § 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.

Renumbered and Amended by Chapter 3, 2008 General Session

Utah Code Ann. § 78A-5-102 (Superseded 01/01/09). Jurisdiction -- Appeals.

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.

(4) The district court has jurisdiction over all matters properly filed in the circuit court prior to July 1, 1996.

Renumbered and Amended by Chapter 3, 2008 General Session

Amended by Chapter 115, 2008 General Session

Utah Code Ann. § 76-2-304. Ignorance or mistake of fact or law. ~

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

Amended by Chapter 32, 1974 General Session

Utah Code Ann. § 78A-2-411. Crimes.

Any violation of the provisions of this chapter, except Section 78A-2-404, is a misdemeanor.

Renumbered and Amended by Chapter 3, 2008 General Session

Chapter 12. Code of Judicial Conduct.

Canon 3. A judge shall perform the duties of the office impartially and diligently.

(5). A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice

(7). A judge shall accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law. Except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceeding.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

C. (1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration,

Rules of Professional Conduct. Rule 3.3. Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(a)(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(a)(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(a)(3) offer evidence that the lawyer knows to be false. ~