

1997

# John C. Sittner v. Karen H. Schriever, Trustee of The Karen H. schriever Family Trust; Bruce Gildea; Shirlynn Gildea; and Joy Hale : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

William D. Marsh, Attorney for Defendant/Appellee Karen H. Schriever; Grant W.P. Mossirson; Attorney for Defendats/Appellees Bruce and Shirlynn Gildea; Randall E. Grant; Grant & Grant, APC; Attorney for Defendant /Appellee Joy Hale.

Lynn Benson Mabey; Mabey & Coombs, LC; Attorney for Plaintiff/Appellant, John C. Sittner.

---

## Recommended Citation

Brief of Appellant, *Sittner v. Schriever*, No. 971759 (Utah Court of Appeals, 1997).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/1302](https://digitalcommons.law.byu.edu/byu_ca2/1302)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

JOHN C. SITTNER,

**Plaintiff/Appellant,**

**VS.**

**KAREN H. SCHRIEVER, Trustee of  
The Karen H. Schriever Family Trust;  
BRUCE GILDEA; SHIRLYNN GILDEA;  
and JOY HALE,**

**Defendants/Appellees.**

***BRIEF OF APPELLANT***

**Case No. 971759-CA**

(Priority No. 15)

***Appeal from Summary Judgment of The Third District Court, Salt Lake County  
Judge Homer Wilkinson***

**LYNN BENSON MABEY (#2035)**  
**MABEY & COOMBS, L.C.**  
 124 South 600 East, Suite 300  
 Salt Lake City, Utah 84102  
 Telephone: (801) 533-8505  
*Attorney for Plaintiff/Appellant*  
*John C. Sittner*

William D. Marsh, Esq. (#2094)  
One Utah Center, Suite 900  
201 South Main  
Salt Lake City, Utah 84111  
Telephone: (801) 535-4659  
*Attorney for Defendant/Appellee Karen H. Schriever*

Grant W.P. Morrison, Esq. (#3666)  
352 East 900 South  
Salt Lake City, Utah 84111  
Telephone: (801) 359-7999  
*Attorney for Defendants/Appellees Bruce & Shirlynn Gildea*

**Randall E. Grant (#1235)**  
**Grant & Grant, A.P.C.**  
**349 South 200 East, Suite 410**  
**Salt Lake City, Utah 84111**  
**Telephone: (801) 364-7777**  
*Attorney for Defendant/Appellee Joy Hale*

**FILED**  
**Utah Court of Appeals**

AUG 24 2000

**Julia D'Alesandro**  
Clerk of the Court

JOHN C. SITTNER,

**Plaintiff/Appellant,**

**VS.**

**KAREN H. SCHRIEVER, Trustee of  
The Karen H. Schriever Family Trust;  
BRUCE GILDEA; SHIRLYNN GILDEA;  
and JOY HALE,**

**Defendants/Appellees.**

***BRIEF OF APPELLANT***

Case No. 971759-CA

(Priority No. 15)

***Appeal from Summary Judgment of The Third District Court, Salt Lake County  
Judge Homer Wilkinson***

**LYNN BENSON MABEY (#2035)**  
**MABEY & COOMBS, L.C.**  
 124 South 600 East, Suite 300  
 Salt Lake City, Utah 84102  
 Telephone: (801) 533-8505  
*Attorney for Plaintiff/Appellant*  
*John C. Sittner*

**William D. Marsh, Esq. (#2094)**  
**One Utah Center, Suite 900**  
**201 South Main**  
**Salt Lake City, Utah 84111**  
**Telephone: (801) 535-4659**  
***Attorney for Defendant/Appellee Karen H. Schriever***

**Grant W.P. Morrison, Esq. (#3666)**  
352 East 900 South  
Salt Lake City, Utah 84111  
Telephone: (801) 359-7999  
*Attorney for Defendants/Appellees Bruce & Shirlynn Gildea*

**Randall E. Grant (#1235)**  
**Grant & Grant, A.P.C.**  
**349 South 200 East, Suite 410**  
**Salt Lake City, Utah 84111**  
**Telephone: (801) 364-7777**  
*Attorney for Defendant/Appellee Joy Hale*

## TABLE OF CONTENTS

<b><u>TABLE OF AUTHORITIES</u></b> .....	iii
<i>Cases</i> .....	iii
<i>Statutes</i> .....	v
<i>Rules</i> .....	vi
<i>Other</i> .....	vi
 <b><u>I. JURISDICTION OF UTAH COURT OF APPEALS</u></b> .....	1
 <b><u>II. ISSUES PRESENTED FOR REVIEW</u></b> .....	1
 <b><u>III. STANDARD OF REVIEW</u></b> .....	2
 <b><u>IV. DETERMINATIVE STATUTES</u></b> .....	3
 <b><u>V. STATEMENT OF THE CASE</u></b> .....	3
A. <i>Nature of the Case</i> .....	3
B. <i>Trial Court Proceedings and Disposition</i> .....	4
C. <i>Appellate Proceedings and Disposition</i> .....	7
D. <i>Statement of Facts</i> .....	8
 <b><u>VI. SUMMARY OF ARGUMENT</u></b> .....	12
 <b><u>VII. ARGUMENT</u></b> .....	14
A. <i>A DISCHARGE IN BANKRUPTCY EXTINGUISHES ONLY THE DEBTOR'S PERSONAL LIABILITY, BUT NOT THE JUDGMENT DEBT AND LIEN WHICH MAY STILL BE ENFORCED IN REM AGAINST THE LIEN PROPERTY.</i> .....	14
B. <i>A JUDGMENT LIEN ON REAL PROPERTY OF A DEBTOR IS A PROPERTY INTEREST THAT CAN ONLY BE AVOIDED BY AFFIRMATIVE RELIEF AUTHORIZED BY THE BANKRUPTCY CODE AND SITTNER'S JUDGMENT LIEN WAS NOT WAIVED OR AVOIDED, BUT WAS EXPRESSLY PRESERVED.</i> .....	19
C. <i>SITTNER'S JUDGMENT LIEN AND EXECUTION PROCEEDINGS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.</i> .....	29
D. <i>THERE IS NO BASIS IN LAW OR FACT TO SUPPORT AN AWARD OF ATTORNEY'S FEES UNDER UTAH CODE ANN. §78-27-56.</i> .....	39



<b>E. THE TRIAL JUDGE ABUSED HIS DISCRETION IN NOT GRANTING SITTNER’S MOTION TO STRIKE OTHER JUDGES’ OPINIONS AND IN CONSIDERING SUCH OPINIONS IN GRANTING DEFENDANTS’ SUMMARY JUDGMENT.</b>	45
<b>VII. <u>CONCLUSION</u></b>	48
<b><u>APPENDIX</u></b>	( i )
<i>Appendix 1 Complaint 8-3-93</i>	<i>Court Record 1-17</i>
<i>Appendix 2 Order Setting Aside &amp; Vacating Prior Summary Judgment for Defendants Schriever &amp; Gildeas and Granting Partial Summary Judgment 9-7-94</i>	<i>Court Record 458-464</i>
<i>Appendix 3 Order Staying Proceedings 10-10-95</i>	<i>Court Record 939-941 and Court Record 1000-1003</i>
<i>Appendix 4 Judgment 3-25-95</i>	<i>Court Record 1257-1258</i>
<i>Findings of Fact &amp; Conclusions of Law 3-25-97</i>	<i>Court Record 1250-1255</i>
<i>Appendix 5 Reporter’s Partial Transcript of Hearing on Sundry Motions: Court’s Ruling, February 25, 1997, p. 4</i>	<i>Court Record 1245-1249</i>
<i>Appendix 6 Sittner v. Schriever, et. al., 2000 UT 45</i>	
<i>Appendix 7 Proof of Claim 5-19-86</i>	<i>Court Record 95</i>
<i>Appendix 8 Stipulation 3-17-94</i>	<i>Court Record 98-99</i>

## **TABLE OF AUTHORITIES**

### ***Cases***

<b><i>Allen v. Prudential Property &amp; Casualty Ins. Co.</i></b> , 839 P.2d 798, 800 (Utah 1992) . . .	20
<b><i>APS v. Briggs</i></b> , 927 P.2d 670 (Utah App. 1996) . . . . .	35
<b><i>Baldwin v. Burton</i></b> , 850 P.2d 1188 (Utah 1993) . . . . .	44, 45
<b><i>Barlow Soc’y v. Commercial Sec. Bank</i></b> , 723 P.2d 398 (Utah 1986) . . . . .	18
<b><i>Belnap v. Blain</i></b> , 575 P.2d 656 (Utah 1978) . . . . .	37, 38
<b><i>Brown v. Felsen</i></b> , 442 U.S. 127, 60 L.Ed.2d 767, 99 S.Ct. 2205 (1979) . . . . .	29
<b><i>Butler v. Wilkinson</i></b> , 740 P.2d 1244 (Utah 1987) . . . . .	15, 18
<b><i>Cady v. Johnson</i></b> , 671 P.2d 149 (Utah 1983) . . . . .	39, 40
<b><i>Canyon Country Store v. Bracey</i></b> , 781 P.2d 414 (Utah 1989) . . . . .	40
<b><i>Capital Assets Financial Services v. Maxwell</i></b> , 2000 UT 9, 994 P.2d 201 (Utah 2000) . . . . .	15, 37
<b><i>Chandler Bank of Lions v. Ray</i></b> , 804 F.2d 577 (10th Cir. 1986) . . . . .	16
<b><i>Citicorp Mortgage, Inc. v. Hardy</i></b> , 834 P.2d 554 (Utah 1992) . . . . .	33
<b><i>Condas v. Condas</i></b> , 618 P.2d 491 (Utah 1980) . . . . .	22
<b><i>Conder v. Hunt</i></b> , 2000 Utah Ct. App. 105, 1 P.3d 558 . . . . .	20
<b><i>Cox Corp. v. Vertin</i></b> , 754 P.2d 938, 940 (Utah 1988) . . . . .	17
<b><i>Dewsnup v. Timm (In re Dewsnup)</i></b> , 87 B.R. 676 (Bkrcty D. Utah 1988); affirmed 908 F.2d 588 (10th Cir. 1990); affirmed 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992) . . . . .	25, 26, 30
<b><i>Dubois v. Grand Central</i></b> , 872 P.2d 1073 (Utah App. 1994) . . . . .	2

<b><i>Eastland Mortgage Co. v. Hart (In re Hart)</i></b> , 923 F.2d 1410 (10th Cir. 1991) . . . . .	22
<b><i>Ernst v. Sears Roebuck &amp; Co.</i></b> , 26 B.R. 959 (Bkrtcy S.D. Ohio, 1983) . . . . .	27
<b><i>Farrey v. Sanderfoot</i></b> , 500 U.S. 291, 114 L.Ed.2d 337, 11 S.Ct. 1825 (1991) . . . . .	16
<b><i>Free v. Farnsworth</i></b> , 188 P.2d 731 (Utah 1948) . . . . .	17, 37, 38
<b><i>Garbe Iron Works, Inc. v. Priester</i></b> , 99 Ill.2d 84, 457 N.E.2d 422 . . . . .	33
<b><i>Glen Core, Ltd. v. Ince</i></b> , 972 P.2d 376, 381 (Utah 1998) . . . . .	45, 46
<b><i>Harline v. Barker</i></b> , 912 P.2d 433 (Utah 1996) . . . . .	3, 46, 47
<b><i>Higgins v. Salt Lake County</i></b> , 855 P.2d 231 (Utah 1993) . . . . .	2
<b><i>In re APC Const., Inc.</i></b> , 112 B.R. 89 (Bkrtcy. D. Vt. 1990) . . . . .	33
<b><i>In re Harrison</i></b> , 987 F.2d 677 (10th Cir. 1993) . . . . .	22
<b><i>In re Meridith Hoffman Partners</i></b> , 12 F.3d 1549 (10th Cir. 1993) . . . . .	27
<b><i>In re Miller</i></b> , 133 B.R. 405 (Bkrtcy. S.D. Ohio 1991) . . . . .	33
<b><i>In re Morton</i></b> , 866 F.2d 561 (2nd Cir. 1989) . . . . .	32, 33, 38
<b><i>In re Padget</i></b> , 119 B.R. 793 (Bkrtcy D. Colo. 1990) . . . . .	28
<b><i>In re Sanders</i></b> , 39 F.3d 258 (10th Cir. 1994) . . . . .	16, 26
<b><i>In re Werth</i></b> , 54 B.R. 619 (Bkrtcy D. Colo. 1985) . . . . .	28
<b><i>Johnson v. Home State Bank</i></b> , 501 U.S. 78, 115 L.Ed.2d 66, 111 S.Ct. 2150 (1991) . .	16
<b><i>Major Lumber Co. v. G &amp; B Remodeling, Inc.</i></b> , 817 S.W.2d 474 (Mo. App. 1991) . . .	33
<b><i>Matter of Burger</i></b> , 125 B.R. 894 (Bkrtcy. D. Del. 1991) . . . . .	33
<b><i>Miner Corp. v. Hunters Run Ltd. Partnership</i></b> , 875 F.2d 1425 (9th Cir. 1989) . . . . .	33
<b><i>Moulton v. Morgan</i></b> , 202 P.2d 723 (Utah 1949) . . . . .	37

<i>Owen v. Owen</i> , 500 U.S. 305, 114 L.Ed.2d 350, 111 S.Ct. 1833 (1991) .....	16, 21
<i>Salt Lake City v. Silver Fork Pipeline Corp.</i> , 913 P.2d 731 (Utah 1995) .....	24
<i>Sittner v. Schriever, et. al.</i> , 2000 UT 45 .....	7
<i>Taylor Nat'l, Inc. v. Jensen Bros. Constr. Co.</i> , 641 P.2d 150 (Utah 1982) .....	15
<i>United States v. Ron Pair Enters., Inc.</i> , 489 U.S. 235, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989) .....	22
<i>Watkiss &amp; Campbell v. Foa &amp; Son</i> , 808 P.2d 1061 (Utah 1991) .....	40, 41, 43

### ***Statutes***

<i>11 U.S.C. §101</i> .....	15
<i>11 U.S.C. §108</i> .....	13, 32-34
<i>11 U.S.C. §323</i> .....	28
<i>11 U.S.C. §362</i> .....	13, 31, 33, 35
<i>11 U.S.C. §501</i> .....	23
<i>11 U.S.C. §502</i> .....	23
<i>11 U.S.C. §506</i> .....	22, 25
<i>11 U.S.C. §521</i> .....	24
<i>11 U.S.C. §522</i> .....	21
<i>11 U.S.C. §524</i> .....	15, 16
<i>11 U.S.C. §541</i> .....	20, 21, 31
<i>11 U.S.C. §547</i> .....	9, 26, 27
<i>11 U.S.C. §554</i> .....	24, 25, 31
<i>11 U.S.C. §704</i> .....	28

<i>Utah Code Ann. §78-2a-3(2)(j)</i> .....	1
<i>Utah Code Ann. §78-12-41</i> .....	33-35
<i>Utah Code Ann. §78-22-1(1992)</i> .....	3, 17, 18, 29, 34
<i>Utah Code Ann. §78-26-56</i> .....	6, 39
<i>Utah Code Ann. §78-27-56</i> .....	1, 4, 14, 40, 43, 45
<i>Utah Declaratory Judgments Act, Utah Code Ann. §78-33-1</i> .....	3, 12, 14, 41, 42, 45
<i>Utah Code Ann. §78-33-2</i> .....	41
<i>Utah Code Ann. §78-33-11</i> .....	41
<i>Utah Code Ann. §78-33-12</i> .....	41

## ***Rules***

<i>Bankruptcy Rule 3002</i> .....	23
<i>CJA 4-508</i> .....	47
<i>Utah R. Civ. P. 8(c)</i> .....	20
<i>Utah R. Civ. P. 52(a)</i> .....	20
<i>Utah R. Civ. P. 56(c)</i> .....	2
<i>Utah R. Civ. P. 56(e)</i> .....	6, 8
<i>Utah R. Civ. P. 58B</i> .....	18

## ***Other***

<i>28 Am. Jur. 2d “Estoppel and Waiver” §158 (1995)</i> .....	29
<i>46 Am. Jur. 2d “Judgments” §297 (1994)</i> .....	19
<i>3 Collier on Bankruptcy ¶524.02 (15<sup>th</sup> ed. Rel./1995)</i> .....	16

## **I. JURISDICTION OF UTAH COURT OF APPEALS**

The Utah Court of Appeals has appellate jurisdiction conferred by *Utah Code Ann. §78-2a-3(2)(j)* as a case transferred to the Court of Appeals from the Utah Supreme Court.

## **II. ISSUES PRESENTED FOR REVIEW**

Plaintiff/Appellant Sittner's appeal of the Third District Court's summary judgment presents the following issues for review:

1. Does a Utah judgment lien attached to a debtor's real property before he files bankruptcy and receives a discharge remain enforceable against the property following case closing and abandonment of the property back to the debtor?
2. Did Sittner's filing of a bankruptcy claim marked "*unsecured*," his signing of a stipulation with the bankruptcy trustee waiving any right to assert a secured claim in property or funds of the estate, but preserving his rights respecting property abandoned by the estate or not administered by closing, and his receiving a distribution from the estate to unsecured claims have the effect of waiving Sittner's judgment lien on property abandoned to debtor Gildea upon case closing?
3. Did the eight year statute of limitations for enforcing Sittner's Utah judgment expire during the pendency of this action?
4. Did the trial judge err in awarding Defendants attorney's fees under *Utah Code Ann. §78-27-56* for Sittner filing an action for declaratory relief?

5. Did the trial judge abuse his discretion in not granting Sittner's motion to strike portions of Defendants' memoranda that contained opinions of other judges, offered to support Defendants' third motion for summary judgment and in considering such opinions in reversing himself for the third time and granting summary judgment?

### **III. STANDARD OF REVIEW**

Sittner's appeal is from the trial court's grant of summary judgment of dismissal and awarding attorney's fees and accordingly the applicable standard of review for issues one through five is that summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Utah R. Civ. P. 56(c)*; ***Higgins v. Salt Lake County***, 855 P.2d 231, 235 (Utah 1993). Because entitlement to summary judgment is a question of law, no deference is accorded the trial court's resolution of legal issues presented. This court determines only if the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact. *Id.* In reviewing summary judgment, this court views the facts and all reasonable inferences therefrom in the light most favorable to the losing party [Sittner]. *Id.* at 233. Also applicable to Sittner's appeal of the summary judgment, the trial court should not make findings of fact in a summary judgment other than a restatement of the undisputed facts stated in favor of the non-moving party. ***Dubois v. Grand Central***, 872 P.2d 1073, 1076 (Utah App. 1994).

The standard of review for issue number six on the trial court's failure to grant Sittner's motion to strike and preclude consideration of the opinion of the bankruptcy court after the bankruptcy order was reversed and vacated by the U.S. District Court is equivalent to a

determination of the admissibility of evidence for purposes of a motion for summary judgment and is reviewed by an abuse of discretion standard. *Harline v Barker*, 912 P.2d 433, 441 (Utah 1996).

#### **IV. DETERMINATIVE STATUTES**

*Utah Code Ann. §78-22-1* (1992) provides in pertinent part:

(1) Judgments shall continue for eight years unless previously satisfied or unless enforcement of the judgment is stayed in accordance with law.

#### **V. STATEMENT OF THE CASE**

##### ***A. Nature of the Case.***

In November 1985, Sittner obtained a money judgment against Defendant Bruce Gildea. In December of 1985, Sittner had execution proceedings issue on the judgment and the county sheriff recorded a notice of real estate levy and set an execution sale on the judgment lien on Gildea's real property, which sale was suspended when Gildea filed bankruptcy in January 1986. In bankruptcy, Gildea received a Chapter 7 discharge of personal liability, elected and received his Utah homestead exemption on property other than the Sittner judgment lien property. The lien property was scheduled in the bankruptcy, but was neither sold nor administered for the benefit of the bankruptcy estate and Gildea continued to be in possession and an owner after the bankruptcy case closing in April 1992.

On August 3, 1993, Sittner filed this action in the district court under the *Declaratory Judgments Act, Utah Code Ann. §78-33-1*, et. seq., for declaratory relief that his judgment lien was still attached to the real property, survived Gildea's bankruptcy, had an unsatisfied judgment balance in excess of \$30,000, that Gildea could not claim another homestead and



Sittner was entitled to direct the sheriff to complete the execution sale suspended by Gildea's prior bankruptcy, and for a determination of Defendants' rights, interests and priorities in the property. [*Complaint*, *Rec.* 1-17; copy *Appdx. 1*].

Gildeas' answer admitted Gildea's homestead exemption had been used on other property, that Gildea was still an owner in continuous possession, and that the property had been abandoned to him from the bankruptcy estate, but asserted that Sittner's lien claim was barred by Gildea's Chapter 7 bankruptcy and by the statute of limitations. [Gildeas' *Answer*, *Rec.* 30-33 ]. The other Defendants answered, admitted having an interest in the property, but asserted that Sittner's lien was discharged by Gildea's bankruptcy and barred by the statute of limitations. [See answers, *Rec.* 34-43].

***B. Trial Court Proceedings and Disposition.***

After some written discovery, cross-motions for summary judgment were filed and on May 18, 1994, Judge Wilkinson granted summary judgment for Defendants dismissing the action [*Rec.* 331] concluding that judgments do not survive a bankruptcy discharge [*Tr.* p.3, *Rec.* 273], and awarding Defendants attorneys' fees under *Utah Code Ann.* §78-27-56 saying that Sittner's "*suit is not well taken, is a frivolous suit, . . .*" with no mention of or finding of bad faith. [*Tr.* p. 3, 4, *Rec.* 273-274].

Subsequently on Plaintiff Sittner's motion, the court reconsidered its ruling and on September 7, 1994, the court entered an order vacating the prior summary judgment and granting partial summary judgment for Sittner that his judgment and lien survived the bankruptcy and remained enforceable *in rem* against the subject property, concluding that

a discharge does not render a judgment lien invalid but only precludes liability of the debtor personally, nor was the judgment avoided in the course of Gildea's bankruptcy or by the prior stipulation made between Sittner and Gildea's bankruptcy trustee which expressly preserved the judgment lien on the specific real property which was the subject of the action. The court reserved ruling on the statute of limitations and on the amount remaining due on the judgment. [See *Order*, *Rec.* 458-464; copy *Appdx.* 2].

On March 10, 1995, Sittner moved for partial summary judgment on the reserved issues of the statute of limitations and the balance due on the judgment, and requested the court to authorize the sheriff to complete the execution sale long suspended by Gildea's bankruptcy. [*Rec.* 469-488]. Schriever in response reasserted her entire first motion for summary judgment [*Rec.* 510-525], but after the motions were submitted for decision [*Rec.* 550], Gildea moved for a stay of proceedings so he could move to reopen his bankruptcy case and seek relief in the bankruptcy court and by *Minute Entry* of April 21, 1995, Judge Wilkinson granted the stay. [*Rec.* 567].

Gildea was successful in obtaining a bankruptcy order adverse to Plaintiff Sittner and based thereon on August 15, 1995 (the trial court) granted Defendants' summary judgment of dismissal and awarded them attorneys' fees. [*Rec.* 735]. However on October 10, 1995, Sittner obtained an order staying further proceedings pending review of the bankruptcy order by the U.S. District Court and providing that if the bankruptcy order was reversed that the trial court's judgment, findings and conclusions of August 15, 1995, that were based on issue

preclusion, would be automatically vacated and further proceedings could then ensue in the case. [Rec. 939-941 and Rec. 1000-1002; copy *Appdx. 3*].

On July 16, 1996, the U.S. District Court reversed and vacated the bankruptcy order. [Rec. 1042-1045]. Unfortunately the court's opinion included unnecessary commentary endorsing the bankruptcy's judge's conclusions.

On August 8, 1996, Sittner served requests for supplementation of prior discovery responses and after receiving no responses and sending inquiry letters to opposing counsel with no response; on October 24, 1996, Sittner moved to compel discovery and for an award of attorney's fees. [Rec. 945-970]. All such discovery motions were submitted for decision of the court by notice on November 14, 1996 [Rec. 1003] and December 10, 1996 [Rec. 1053].

On January 14, 1997, Schriever filed her third motion for summary judgment offering no new facts or analysis other than including the bankruptcy judge's opinion and federal district judge's endorsement of it, and based thereon asserted Defendants' right to have the prior summary judgment reinstated. [Rec. 1061-1126]. Gildea joined in the motion [Rec. 1141]. Sittner responded by objecting to and moving to strike the unfounded facts and improper conclusions under *Rule 56(e)* and the improper bankruptcy opinions and again moved for summary judgment on the reserved issues. [Rec. 1154-1237].

On March 25, 1997, the court granted summary judgment for Defendants dismissing Sittner's complaint with prejudice and awarding attorneys' fees under *Utah Code Ann. §78-26-56* in an amount to be determined. [*Judgment, Rec. 1257-1258, Findings and*

*Conclusions*, Rec. 1250-1255; copies *Appdx. 4*]. The court's third reversal of decision was brought about by the nullified bankruptcy opinion improperly included by Defendants in their brief, which was the only new ground asserted, which they argued strenuously [*Tr.* 1644, p.6,7], which Judge Wilkinson admitted considering in reaching his decision that Sittner's judgment was waived in Gildea's bankruptcy. [See *Tr.* p. 4, *Rec.* 1245-1249, copy *Appdx. 5*]. On October 21, 1997, judgment was entered awarding Defendants' attorneys' fees of \$37,250 [*Rec.* 1541-1543]. On November 14, 1997, Sittner filed a *Notice of Appeal* from the entire judgment and proceedings, including the March 25, 1997, summary judgment. [*Rec.* 1549].

***C. Appellate Proceedings and Disposition.***

In December of 1997, Schriever moved for summary dismissal of Sittner's appeal as untimely filed. In January of 1998, the Utah Supreme Court poured-over the appeal and pending motion to the court of appeals. On July 9, 1998, the court of appeals filed a memorandum decision [*Rec.* 1573] dismissing Sittner's appeal as untimely. Sittner filed a petition for rehearing and after the court called for and reviewed responses, rehearing was denied by order of September 30, 1998.

Sittner petitioned for certiorari which was granted by the Supreme Court and on May 19, 2000, the Supreme Court reversed the decision of the court of appeals and remanded this case back for a full review of the merits of Sittner's appeal. *Sittner v. Schriever, et. al.*, 2000 UT 45 [copy *Appdx. 6*].

**D. *Statement of Facts.***

Sittner responded to the statement of facts set forth in Schriever's third motion for summary judgment by objecting to certain unfounded facts and improper conclusions and moving to strike the same under *Rule 56(e)* [Rec. 1154-1164]. Some of these unfounded facts and improper conclusions are in the findings of fact adopted by the court [Rec. 1250-1255]. However because resolution was by summary judgment, Sittner ignores the findings and particularly the improper portions and asserts that the undisputed facts properly in the record for summary judgment are as follows:

1. On November 25, 1985, Sittner was granted judgment for recovery of approximately \$34,000 against Bruce Gildea, which was filed and docketed in the Third District Court, Salt Lake County, Utah. [*Exhibit "B" to Sittner's Complaint, Rec. 10; admitted in Gildea's Answer, ¶6, Rec. 31*].

2. Under Utah law, docketing the judgment created a lien upon Gildeas' real property in Salt Lake County, including a lien upon Gildeas' one-half ownership interest in property at 2400 East 3000 South (the "*subject property*") Gildea and his wife were purchasing from Defendant Hale under a uniform real estate contract. [Admitted Gildeas' *Answer* ¶5, Rec. 31; Rec. 1070, ¶1].

3. Sittner caused execution proceedings to issue on the judgment and on December 30, 1985, the county sheriff filed for record with the Salt Lake County Recorder a *Writ of Execution* and *Notice of Real Estate Levy* against Gildea's interest in the subject property and the sheriff served the *Writ* on Gildeas and posted and published notice of

execution sale. [*Exhibit “C”* to Plaintiff’s *Complaint*, *Rec.* 12-15; *Mabey Aff.* ¶3, *Rec.* 135-138].

4. On January 16, 1986, just before Sittner’s execution sale of the subject property, Bruce Gildea filed for bankruptcy protection in the U.S. Bankruptcy Court, District of Utah. [*Gillman Aff.* ¶2, *Rec.* 93].

5. As a result of Gildea’s bankruptcy filing, Sittner’s attorney received notice of the “*automatic stay*” preventing the execution sale of the subject property and he notified the sheriff to suspend further proceedings until the automatic stay was no longer in effect. [*Mabey Aff.* ¶4, *Rec.* 135-138].

6. Early in the bankruptcy case, Sittner filed a standard form “*Proof of Claim*” which attached a copy of Sittner’s judgment against Gildea as evidencing the debt and indicated the judgment was security for the claim, but marked the claim box as “*unsecured*” based upon Sittner’s belief that the security interest then had no recoverable value to satisfy the judgment. [*Gillman Aff.* ¶3, *Rec.* 93-95; copy *Proof of Claim*, *Rec.* 95 and *Appdx.* 7].

7. On December 14, 1987, Gildea received a Chapter 7 discharge [*Rec.* 99], and during his bankruptcy case, Gildea elected to use and receive the full benefit of his Utah homestead exemption on property other than the subject property. [Admitted in Gildeas’ *Answer* ¶10, *Rec.* 31].

8. In June of 1989, Gildea’s bankruptcy trustee commenced an adversary proceeding against Sittner seeking to avoid Sittner’s judgment lien as a preferential transfer under *11 U.S.C. §547*. The action was settled by written stipulation signed by Sittner and

the trustee on August 10, 1989, whereby Sittner agreed to waive any right to assert a secured claim in property or proceeds of the bankruptcy estate, and agreed he would have an unsecured prepetition claim for claims administration, but Sittner's rights under the judgment respecting property abandoned by the estate or not administered by closing would be preserved and unaffected. The stipulation was subject to court approval and was approved by a bankruptcy order. [*Gillman Aff.* ¶4, *Rec.* 94, copy *Stipulation*, *Rec.* 98-99 and copy in *Appdx.* 8; *Mabey Aff.* ¶'s 5, 6, 7, *Rec.* 135-138].

9. In December of 1991, Sittner received a check from the bankruptcy trustee for \$4,033 representing a distribution on Sittner's unsecured claim of \$36,228 [*Rec.* 1072 at ¶9; *Rec.* 1121]. After Sittner applied the distribution to the judgment debt, there still remained a balance owed in excess of \$30,000. [*Sittner Aff.* ¶5, *Rec.* 130-131].

10. The subject property and Gildea's interest in it was a scheduled asset of Gildea's bankruptcy estate [*Rec.* 1071 at ¶4] and throughout the case Gildea remained in possession and after closing Gildea continued to be an owner of the one-half interest in the subject property. [Admitted in Gildea's *Answer* ¶12, *Rec.* 32; and *Rec.* 1074 at ¶16].

11. The subject property was not sold by the trustee or otherwise administered for the benefit of the estate, since the trustee had determined that there was not sufficient equity available to benefit the estate and he intended to abandon the property, but no formal order of abandonment was made or entered and so it was deemed abandoned to Gildea upon bankruptcy case closing on April 24, 1992. [*Sittner Aff.* ¶'s 6 and 7, *Rec.* 130-132; *Mabey*

*Aff.* ¶8, *Rec.* 137-138; Gildea admitted property abandoned to him in Gildeas' *Answer* ¶11, *Rec.* 32].

12. Several months after the closure of Gildea's bankruptcy case, Sittner decided to complete the long-suspended execution sale on the subject property and thus obtained a search of the public title records and discovered a warranty deed recorded August 1992 from Defendant Hale as grantor conveying the subject property to Defendant Schriever, Shirlynn Gildea's sister, which made no reference to or exception from the warranties for Gildeas' ownership. Sittner investigated further and found that Gildeas were still in possession of the subject property. [See *Complaint* ¶13 and *Exhibit "A" (Warranty Deed)*, *Rec.* 4, 9; Schriever's *Answer* ¶'s 13, 19, *Rec.* 36].

13. Given the title uncertainty created by the Hale to Schriever warranty deed not conforming to the prior uniform real estate contract under which Gildeas were purchasing at the time Sittner's lien attached, Sittner deemed it prudent to file the present action on August 3, 1993, for declaratory relief and for the court to direct completion of the execution sale proceedings, joining Gildeas, Hale and Schriever who appeared to have an interest in the property and seeking a determination of their rights, interests and priorities. Sittner also included a "*Count II*" claim for fraudulent transfer declaratory relief in case Defendants claimed that Gildea had lost his ownership in the property by contract foreclosure or forfeiture [*Complaint*, *Rec.* 1-17; copy *Appdx. I*].



## **VI. SUMMARY OF ARGUMENT**

A. Under federal law, a debtor's bankruptcy discharge does not void a judgment lien attached to a debtor's real property but only extinguishes one mode of enforcing the judgment, namely personal liability of the debtor, leaving intact another mode the right to enforce the judgment *in rem* against the property. Thus generally liens that are not affirmatively avoided during a bankruptcy case pass through and are unaffected and remain enforceable. Continued enforcement of a judgment lien depends upon state law and under the *Utah Judgment Act* the judgment continues for eight years unless earlier satisfied by payment. A Utah judgment is not dependent upon the continuation of personal liability of the debtor for enforcement so the judgment is not voided or rendered unenforceable by a debtor's discharge, since the judgment lien stays with the property to which it is attached and may be enforced after transfer to a third party by execution to collect the judgment debt.

B.(1) Under the *Bankruptcy Code* a judgment lien is a property interest that does not become property of the estate and cannot be avoided except under a power conferred by the *Bankruptcy Code* and then only by affirmative relief in the case. Since no order voided Sittner's judgment lien, it was not extinguished in the bankruptcy.

(2) The *Bankruptcy Code* classifies claims as "*secured*" or "*unsecured*" based upon the value of the collateral securing the claim. So a creditor's claim can be unsecured though he has a security interest with little or no value and he can participate fully in distributions to unsecured claims and still retain his lien interest.

(3) When property of the bankruptcy estate is abandoned either by the trustee or by the *Bankruptcy Code* upon case closing, the property stands as if no bankruptcy petition had been filed and is encumbered by the liens attached prepetition which remain enforceable on the property.

(4) Under the *Bankruptcy Code* the trustee is empowered to avoid preferential transfers like judgment liens taken within ninety days of the petition, but only for property of benefit to the estate. The trustee filed an action to avoid Sittner's judgment lien, and by settlement stipulation the parties signed, Sittner agreed the lien was waived on property to be administered for the benefit of the estate while preserving the lien right on property later abandoned. The stipulation approved by court order had the effect of fully preserving Sittner's judgment lien on property abandoned by the estate back to the debtor.

C. Ordinarily a Utah judgment lien only continues for a period of eight years, but under *Bankruptcy Code §108(c)*, the limitation period on state judgments is suspended during the period enforcement is prevented by *§362(a)*, bankruptcy stay. Under the Utah judgment statute, the limitation period is suspended during the time enforcement is stayed in accordance with law, which also has the effect of tolling the life of the judgment while enforcement is prevented by the bankruptcy stay. Gildea's bankruptcy tolled Sittner's judgment for more than six years. Under Utah case law if enforcement of a judgment is restrained by a court or is prevented as a practical matter by the assertion of adverse claims in a judicial proceeding that could defeat the judgment lien, then there is equitable tolling of

the judgment limitation period during the period enforcement is restrained or prevented, including appeal of an adverse judgment.

D. An award of attorney's fees under *Utah Code Ann. §78-27-56* must be based on specific findings that the claims were unmeritorious meaning frivolous or without support in fact or law; and subjective bad faith. An action under the *Utah Declaratory Judgments Act*, which by statute is declared to be remedial, to settle controversies and is not open to objection; cannot support a finding of bad faith by merely commencing the action for to do otherwise would be repugnant to the legislative intent. The trial court failed to make a finding of subjective bad faith, instead merely stated a conclusion with no demonstration of the factual basis to support the conclusion, which is inadequate to establish bad faith. Nor is there any basis in law or fact for concluding that Sittner's declaratory action was unmeritorious. Therefore, the trial court erred in awarding attorney's fees.

E. The opinions of other judges are not admissible on a motion for summary judgment when they are not being offered or considered for issue preclusion or law of the case. It is an abuse of discretion for the trial judge to admit such opinions in evidence or to consider them for purposes of a summary judgment.

## **VII. ARGUMENT**

### ***A. A DISCHARGE IN BANKRUPTCY EXTINGUISHES ONLY THE DEBTOR'S PERSONAL LIABILITY, BUT NOT THE JUDGMENT DEBT AND LIEN WHICH MAY STILL BE ENFORCED IN REM AGAINST THE LIEN PROPERTY.***

“Under U.C.A., 1953, 78-22-1, a judgment automatically becomes a lien upon all nonexempt real property of the judgment debtor at the time it is docketed.” *Capital Assets Financial Services v. Maxwell*, 2000 UT 9, 994 P.2d 201, 206 (Utah 2000), quoting *Taylor Nat’l, Inc. v. Jensen Bros. Constr. Co.*, 641 P.2d 150, 155 (Utah 1982). A judgment lien attaches to a vendee’s beneficial ownership interest under a uniform real estate contract. *Butler v. Wilkinson*, 740 P.2d 1244, 1254, 1256 (Utah 1987). In this case, Sittner’s judgment against Bruce Gildea was docketed on November 25, 1995, in the Third District Court of Salt Lake County and automatically attached as a valid perfected lien on Gildea’s one-half ownership interest in the subject property. This is not disputed by Defendants.

Gildea's discharge order necessarily reflects the language of *11 U.S.C. § 524*, “*Effect of Discharge*”, which provides in pertinent part:

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the **personal liability of the debtor** with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt **as a personal liability of the debtor**, whether or not discharge of such debt is waived; . . . [Emphasis Added].

Under the plain language of *11 U.S.C. § 524*, a bankruptcy discharge only voids a judgment to the extent it is a determination of personal liability of the debtor and only enjoins the commencement or continuation of an action that seeks to collect or recover a discharged “debt” as a personal liability of the debtor. The *Bankruptcy Code*, *11 U.S.C. § 101(12)*, defines “debt” as “*liability on a claim*”, and a discharge extinguishes the debtor's liability.

In contrast, *11 U.S.C. § 101(37)* defines “*lien*” as a property interest and it is well settled that a discharge does not void liens which generally survive bankruptcy, nor prohibit lien enforcement by foreclosure or otherwise after case closing. *Johnson v. Home State Bank*, 501 U.S. 78, 115 L.Ed.2d 66, 111 S.Ct. 2150 (1991), holding that a bankruptcy claim secured by a lien on real property has two components, an *in rem* component and an *in personam* component, and the discharge extinguishes only the *in personam* mode of enforcing a claim, while leaving intact the other – namely an action against the debtor *in rem*. 115 L.Ed.2d at 74, 75. *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), holding that Congress did not intend to depart from the pre-Code rule that liens pass through bankruptcy unaffected, nor can liens be stripped off the property to benefit the discharged debtor, stating, “*We think, however, that the creditor’s lien stays with the real property until the foreclosure.*” 115 L.Ed.2d at 911, 112 S. Ct. at 778. See also *Owen v. Owen*, 500 U.S. 305, 114 L.Ed.2d 350, 111 S.Ct. 1833 (1991); *Farrey v. Sanderfoot*, 500 U.S. 291, 114 L.Ed.2d 337, 11 S.Ct. 1825 (1991); *In re Sanders*, 39 F.3d 258, 260 (10th Cir. 1994) (“*Secured debts, including judgment liens . . . generally survive bankruptcy.*”); *Chandler Bank of Lions v. Ray*, 804 F.2d 577 (10th Cir. 1986), bank's post-discharge and case closing action naming the debtor to obtain replevin of its collateral and related relief was an *in rem* action, and such actions by secured creditors are not precluded under *11 U.S.C. § 524*; and see *3 Collier on Bankruptcy* ¶524.02 (15<sup>th</sup> ed. Rel./1995), state court actions joining a discharged debtor for the purpose of *in rem* enforcement of a creditor’s lien are not prohibited by nor a violation of the discharge injunction.

Clearly then under federal bankruptcy law a discharge does not void or render unenforceable a prepetition judgment lien on a debtor's property, so it remains to be determined if Utah law on judgment liens would change the result. See *Cox Corp. v. Vertin*, 754 P.2d 938, 940 (Utah 1988) (Zimmerman, J., concurring), stating that federal law would have permitted the survival of a lien on the debtor's property despite the bankruptcy discharge, but noting that the continued existence of the lien was a question of state law. But Justice Zimmerman opined, "*Under Utah law, once a lien was in place, it continued through the bankruptcy proceeding and could have been executed upon at anytime until the end of its statutory eight-year life.*" *Id.* at 940.

*Cox* however involved an action to renew a judgment for an additional eight-year life which the court held impermissible given the discharge of the debtor. The court reasoned that a renewal judgment attaches only from the date of the new judgment and does not relate back to the original judgment date or extend the prior lien, citing *Free v. Farnsworth*, 188 P.2d 731 (Utah 1948), and since the renewal judgment under our judgment statute, *Utah Code Ann. §78-22-1*, creates a new lien upon all real property of the judgment debtor owned by him at the time or thereafter acquired during the existence of the lien, that given the effect of a bankruptcy discharge of liability of a debtor that a judgment could not be renewed. *Cox* at 939. Of course Sittner did not seek to renew his judgment lien, but only to enforce it against specific property to which it had attached pre-bankruptcy petition. Justice Zimmerman's concurring opinion in *Cox* is support for the continued enforceability of a Utah judgment despite the extinguishment of personal liability of the debtor.

*Utah Code Ann. §78-22-1(1)* provides, “*Judgments shall continue for eight years unless previously satisfied or unless enforcement of the judgment is stayed in accordance with law.*” Since it has already been established that a bankruptcy discharge does not stay enforcement of a judgment *in rem*, there is no express restriction in the statute that would prevent a judgment from continuing despite the extinguishment of personal liability of the debtor, unless the judgment is satisfied. The term “*satisfied*” with reference to a debt is commonly understood to mean “*payment*”, not termination without payment. This is consistent with the use of the term in *Utah R. Civ. P. 58B “Satisfaction of Judgment*”, which refers in subpart (b) to being “*fully paid*”. Discharge of personal liability is certainly not satisfaction then and since Sittner’s judgment lien was not satisfied and there is no other statutory restriction, the judgment lien continues.

Also, when a Utah judgment lien is attached to property owned by a debtor, the lien remains attached and enforceable even after the debtor sells and conveys the property to another. *Butler v. Wilkinson*, 740 P.2d 1244, 1258 (Utah 1987), once a judgment lien attached to the vendee’s interest, it continues to be a lien and is not destroyed or impaired by a vendee’s sale or transfer of his interest to a third person, since the judgment debt and lien follow the property; *Barlow Soc’y v. Commercial Sec. Bank*, 723 P.2d 398 (Utah 1986). Thus continuation of the judgment and enforceability of the lien on property to which it attached is not dependent upon collection from the judgment debtor personally, which is consistent with secured debts generally. Therefore Utah judgments are not dependent upon continued personal liability of a debtor for lien enforcement and a discharge would not alter

the result. This view of the continued enforceability of Utah judgments after a bankruptcy discharge harmonizes them with the result reached by a majority of states on post-bankruptcy enforceability of their judgments. See *46 Am. Jur. 2d "Judgments" §297*.

Accordingly, Sittner's judgment lien survived Gildea's bankruptcy discharge and remained enforceable against the property and Sittner was not barred by the discharge from bringing this action to determine the validity and priority of his judgment lien and for the court to direct execution sale proceedings on the subject property.

***B. A JUDGMENT LIEN ON REAL PROPERTY OF A DEBTOR IS A PROPERTY INTEREST THAT CAN ONLY BE AVOIDED BY AFFIRMATIVE RELIEF AUTHORIZED BY THE BANKRUPTCY CODE AND SITTNER'S JUDGMENT LIEN WAS NOT WAIVED OR AVOIDED, BUT WAS EXPRESSLY PRESERVED.***

When Judge Wilkinson granted Defendants' third motion for summary judgment, Sittner's attorney asked him the basis for the ruling, and he answered that he made a determination on the merits that Sittner's judgment was waived in the prior bankruptcy case, although he articulated no reasons for such holding [*Tr. p 4, Rec. 1248*].

The judgment does not disclose the basis for the decision and unfortunately even the improper findings of fact or the conclusions of law offer little additional help. Conclusion No.1 says that Sittner knew or should have known that his judgment lien was waived during Gildea's bankruptcy. This merely repeats the judge's statement without explaining the reasons for the decision. Conclusion No. 1 also states that Sittner stipulated to avoid the judgment lien in order to participate in the distribution to unsecured creditors.



Thus the conclusions of law suggest that Sittner's judgment lien was waived or avoided in the bankruptcy because he filed an unsecured claim, he entered into a settlement stipulation with the bankruptcy trustee agreeing he would have an unsecured claim for claims administration, though he expressly preserved his judgment on property abandoned by closing and because he received a distribution from the bankruptcy estate on his unsecured claim.

Therefore these acts must provide the basis under federal bankruptcy law for the court's summary judgment ruling that Sittner waived his judgment lien in Gildea's bankruptcy case. The failure of the trial judge to have complied with *Utah R. Civ. P. 52(a)*, which requires a brief written statement of the grounds for the summary judgment, unfairly burdens Sittner here. See *Allen v. Prudential Property & Casualty Ins. Co.*, 839 P.2d 798, 800 (Utah 1992). Of course Sittner will endeavor to defend the claim that he waived his judgment lien, but this Court should recognize that generally waiver is an affirmative defense under *Rule 8(c) U.R.C.P* (not plead here), and it is Defendants' burden to establish the grounds, and since it was summary judgment to establish them as a matter of law on the undisputed facts. *Conder v. Hunt*, 2000 Utah Ct. App. 105, 1 P.3d 558, 563.

**1. *A judgment lien on a debtor's real property is a property interest that can only be avoided by a power conferred in the Bankruptcy Code.***

Upon commencement of a bankruptcy case, under *11 U.S.C. §541*, only the interest a debtor has in real property is passed to and becomes property of the estate. A judgment lien that attached to a debtor's real property prior to the bankruptcy filing only passes to the estate the debtor's subordinate interest and the judicial lien remains valid and unaffected, unless the

lien is avoided during the bankruptcy case by a power conferred in the *Bankruptcy Code*. *Owen v. Owen*, 500 U.S. 305, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1991), “*Only where the Code empowers the court to avoid liens or transfers can an interest originally not within the estate be passed to the estate, and subsequently (through the claim of an exemption) to the debtor.*” 111 S.Ct. at 1836. In *Owen*, the debtor received a Chapter 7 discharge, and after case closing, moved to reopen to avoid a prepetition judgment lien remaining on the debtor's residence, under the authority of *11 U.S.C. § 522(f)(1)*, which permits avoidance of a judgment lien if necessary to protect a debtor's homestead exemption. *Id.* at 1835.

There is no dispute that Sittner's judgment became a lien on the subject property before Gildea's bankruptcy filing. Since the subject property was not sold or otherwise administered during the case, and Gildea used his full Utah homestead exemption on other property, and no bankruptcy court order avoided Sittner's lien, under *Code §541* and *Owen*, Sittner's judgment lien was not even brought into the estate and thus survived and remained enforceable *in rem* after case closing.

**2. *Sittner's proof of claim was accurate and under the Bankruptcy Code properly classified as “unsecured” and he was entitled to receive a distribution on his unsecured claim which did not waive or relinquish his judgment lien on property not sold to benefit of the estate***

Defendants argued to the trial court that the mere fact that Sittner filed a bankruptcy proof of claim as “*unsecured*” and received a distribution on his unsecured claim, was completely inconsistent with having or retaining a judgment lien security interest in any of the debtor's property and therefore works an estoppel or waiver of Sittner's judgment lien. Indeed Schriever asserted that Sittner had taken inconsistent positions and was barred by the

doctrine of judicial estoppel, citing *Condas v. Condas*, 618 P.2d 491 (Utah 1980), et. al., stating that a party is bound by its judicial declarations and may not contradict them in a subsequent proceeding involving the same parties and issues. In other words Schriever argues Sittner cannot have an unsecured claim in the bankruptcy and assert a right to a secured claim or interest in the present action.

This argument would have basic appeal if common parlance is used to define and distinguish between “*secured*” and “*unsecured*” bankruptcy claims. It seems reasonable that if you are unsecured that you have no security and if you are secured, then you must have some security, so viewed in this respect the terms may seem mutually exclusive.

However, the *Bankruptcy Code* classifies claims based on the value of the collateral securing the claim. 11 U.S.C. §506(a) classifies a claim for all purposes under the *Code* as “*secured*” only to the extent of the value of the property interest subject to the lien securing the claim, and as “*unsecured*” to the extent that the creditor's claim is greater than such value. This means that a debt can be secured by a lien and if the creditor's lien interest in the property has no recoverable value, then the claim is “*unsecured*” by *Code* definition and classification, even though it is secured by a lien. It also means that a single claim may be both “*secured*” and “*unsecured*” depending on the value of the collateral securing it. See *In re Harrison*, 987 F.2d 677, 681 (10th Cir. 1993), saying:

Subsection (a) of §506 provides that a claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured. *Eastland Mortgage Co. v. Hart (In re Hart)*, 923 F.2d 1410, 1413 (10th Cir. 1991) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235,238-39, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989).

Under *11 U.S.C. §501(a)* a creditor “*may*” file a proof of claim, but under *B.R. 3002(a)* an unsecured creditor must file a proof of claim if the creditor is to receive a distribution from a Chapter 7 estate. Under *Code §502(a)* a proof of claim is deemed allowed absent an objection by a party in interest. *Code §502(b)* makes provision for objections to claims, but does not authorize avoidance of liens, even if claims are disallowed.

Sittner filed a proof of claim on the standard bankruptcy form in May, 1986 (copy *Appdx. 7* ).<sup>1</sup> Because Sittner believed that there was no recoverable value to satisfy his judgment on Gildea's real property, he marked the unsecured claim box. With respect to the subject property, Sittner's belief that there was no recoverable value after allowing for the senior encumbrance, was consistent with debtor's schedules and opinion of value and the bankruptcy's trustee's stated intention to abandon the subject property.

In any event Sittner's proof of claim was completely accurate, not at all misleading and under the *Bankruptcy Code* classification of claims for administration, he was fully entitled to participate in estate distributions on unsecured claims, while retaining his judgment lien on the subject property which had no recoverable value at the time.

---

<sup>1</sup> Sittner's claim in ¶2 sets forth the principal amount of the judgment, the interest accrued to date and the judgment execution costs incurred in proceedings just prior to the bankruptcy. In ¶3 of the claim reference is made to the *Judgment* as the reason the debtor owes the money and a copy of the *Judgment* was appended, as requested in ¶4 of the form. Paragraph 5 of the form provides, “. . . *the only security interest (collateral) held for this claim is:*” and in the blank the term “*Judgment*” is inserted. In ¶6 of the claim form, Sittner placed an “X” in the box for “*unsecured*.” The form provides in ¶6 by a footnote to the “*secured*” box, “*the claim is unsecured except to the extent that the security interest has value sufficient to satisfy it.*”

Clearly then there is no judicial estoppel because the position Sittner took in the bankruptcy case with respect to the lien property and in this case are not inconsistent and certainly nothing in the record of this case suggests that his opinion that there was no recoverable value at the time he filed his bankruptcy claim was incorrect or inaccurate. In any event judicial estoppel does not apply except when a party knowingly makes a misrepresentation under oath or attempts to commit a fraud on the court by taking an inconsistent position from a prior case. *Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731, 734 (Utah 1995). Moreover Sittner has never been asked in this proceeding what his opinion of the value of Gildea's property was at the time of the prior bankruptcy case, so he certainly has not taken any position under oath or otherwise inconsistent with his view of the value in his bankruptcy claim. Also Gildea had better access to information on the value of his property than Sittner did and this defeats judicial estoppel as well. *Id.* at 734.

**3. *Property abandoned from the estate is treated as if no bankruptcy case had been filed and remains subject to the liens attached before filing.***

Under 11 U.S.C. §554(a), the bankruptcy trustee after notice and hearing is permitted to abandon any property of the estate that is burdensome or of inconsequential value and benefit to the estate. Section 554(c) provides, "*Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of closing of a case is abandoned to the debtor . . .*".

It is undisputed that the subject property was a scheduled asset in Gildea's bankruptcy, and although the trustee had expressed his intention to abandon the property before case

closing, since it had not been abandoned or sold or otherwise administered for the benefit of the estate by closing, it was abandoned to Gildea upon case closing under §554(c).

When property is abandoned from the bankruptcy estate pursuant to *Code* §554 it ceases to be property of the estate and stands as if no bankruptcy petition had been filed and is subject to the liens that encumbered it prior to the bankruptcy filing. ***Dewsnup v. Timm*** (***In re Dewsnup***), 87 B.R. 676 (Bkrtcy D. Utah 1988); affirmed 908 F.2d 588 (10th Cir. 1990); affirmed 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992).

In ***Dewsnup***, the Chapter 7 debtors' real property encumbered by a Utah trust deed was abandoned by the trustee under *Code* §554 and the debtors brought an adversary proceeding seeking to value the collateral pursuant to *Code* §506(a) to bifurcate the creditors claim into a secured portion equal to the value of the collateral and an unsecured portion for the excess and to then strip down the creditors lien under *Code* §506(d), so that debtor's could retain the property by merely paying the secured portion. The court held that property abandoned from the estate is returned to its pre-filing status respecting liens as though no bankruptcy case had been filed and §506(d) only applied if property is sold or administered to benefit the estate. ***Dewsnup***, 87 B.R. at 683. This result was affirmed by the 10th Circuit, ***Dewsnup***, 908 F.2d at 590, 591.

The U.S. Supreme Court in affirming did so on broader grounds saying, “. . . *no provision of the pre-Code statute permitted involuntary reduction of the amount of a creditors lien for any reason other than payment on the debt.*” ***Dewsnup***, 116 L.Ed.2d at 912. Congress enacted the *Code* with a full understanding of this practice and intended that

it continue. *Id.* at 912. The Court said that the creditor's lien stays with the real property until foreclosure and that this way any increase in value rightly accrues to the benefit of the creditor and not to the benefit of the debtor or other unsecured creditors. *Id.* at 911.

The Supreme Court in *Dewsnup* also considered the debtor's argument that failure to avoid or strip down the lien unfairly allowed the creditor to retain a security interest in real property and to participate fully in liquidation dividends as an unsecured creditor. In rejecting this argument the Court said:

It is true that his participation in the bankruptcy results in his having the benefit of an allowed unsecured claim as well as his allowed secured claim, but that does not strike us as proper recompense for what petitioner proposes by way of elimination of the remainder of the lien. *Dewsnup*, 116 L.Ed.2d at 911.

While *Dewsnup* dealt with a Utah trust deed lien rather than a judgment lien, no distinction on the type of lien was made in the court's opinion and the rationale does not appear susceptible to any different treatment or result for a judicial lien. See *In re Sanders*, 93 F.3d 258, 262 (10<sup>th</sup> Cir. 1994), bankruptcy protection does not permit a debtor to avoid a Utah judgment lien attached prepetition to property, since post-discharge and case closing appreciation in the property or even retirement of principal will remain subject to the lien and will enure to the benefit of the judgment lienholder, not debtor.

**4. *Sittner's judgment lien was expressly preserved by a stipulation made with the bankruptcy trustee approved by an order of the court and any attack based on claims administration is barred by the doctrine of res judicata.***

In June 1989, Gildea's bankruptcy trustee filed an adversary complaint seeking to avoid Sittner's judgment lien as a preferential transfer under 11 U.S.C. §547 made within ninety days of the bankruptcy petition; that enables such creditor to receive more than the

creditor would receive under a Chapter 7 case. The trustee must prove all elements of §547(b), including that the creditor would benefit financially over the amount the creditor would receive as a dividend from the Chapter 7 estate if the transfer is not avoided. *In re Meridith Hoffman Partners*, 12 F.3d 1549, 1556 (10th Cir. 1993). Therefore if avoiding a judgment lien taken on property, would result in the property having no benefit or value to the estate for liquidation purposes, then the requirement of §547(b)(5) has not been met and the trustee can't avoid the transfer. Indeed the trustee's lien avoidance power under §547 may not be asserted to generally avoid the affect of a judicial lien, but may only be asserted to avoid the lien in connection with the sale of properties beneficial to the estate. *Ernst v. Sears Roebuck & Co.*, 26 B.R. 959 (Bkrtcy S.D. Ohio, 1983).

Sittner's judgment was entered within ninety days of Gildea's bankruptcy petition and the creation of the judgment lien would constitute a transfer the trustee would be entitled to avoid under §547, upon any real property that would be of benefit to the estate. Therefore, Sittner and the trustee entered into a settlement “*Stipulation*” [copy *Appdx. 8*], which provided the following:

1. The Defendant, John C. Sittner, waives any right to assert a secured claim in and to any property of this estate or any funds which constitute proceeds of property of this estate and acknowledges that any and all claim he has is an unsecured, prepetition claim. **Defendant's rights respecting property abandoned by the estate or not administered by closing are preserved and unaffected hereby.** [Emphasis added].

2. This case will be dismissed with prejudice after Court approval of the Stipulation.



The trustee obtained court approval and an order dismissing the adversary proceeding with prejudice under the terms of the *Stipulation*.

Despite the contrary contentions of Defendants, the *Stipulation* is not ambiguous, it quite clearly waives Sittner's judgment lien against any property or proceeds of property of benefit to the estate, but preserves and leaves unaffected his judgment lien attached to property of no benefit to the estate and either abandoned from the estate or not administered by closing. The trustee had expressed an intention to abandon the subject property from the estate, and indeed this occurred upon case closing and the *Stipulation* and order of dismissal with prejudice operated directly to preserve Sittner's judgment lien on such property.

The bankruptcy trustee is the representative of the estate. *11 U.S.C. §323(a)*. It is the trustee's duty where a purpose would be served to examine proofs of claim and to object to the allowance of any claim that is improper. *11 U.S.C. §704(5)*. Therefore in the trustee's representative capacity for the estate, the trustee is the primary objecting and adverse party and other creditors and the debtor are not generally entitled to object to claims in the administration process. *In re Padgett*, 119 B.R. 793 (Bkrcty D. Colo. 1990). *In re Werth*, 54 B.R. 619 (Bkrcty D. Colo. 1985). The debtor has privity with the trustee on claims administration.

A settlement stipulation resulting in a consent decree or in dismissal with prejudice under the terms of a stipulation, as was done here, bars re-litigation of all grounds for or defenses to recovery between the parties or their privies on all issues that were or reasonably should have been litigated in connection with the matter, under the doctrine of *res judicata*.

***Brown v. Felsen***, 442 U.S. 127, 60 L.Ed.2d 767, 99 S.Ct. 2205 (1979). Therefore under the principles of *res judicata*, Sittner's *Judgment* lien can't be assailed by Gildea, it was unequivocally preserved and unaffected by case administration and survived and was capable of enforcement *in rem* following Gildea's bankruptcy closing.

In addition under common law principles, waiver is the voluntary and intentional relinquishment of a known right, claim or privilege and the intent to relinquish must be distinct and manifest. 28 *Am. Jur. 2d "Estoppel and Waiver"* §158 (1995). Certainly the *Stipulation* demonstrates that Sittner had no intention of waiving his *Judgment* lien on property abandoned subject to his lien.

**C. SITTNER'S JUDGMENT LIEN AND EXECUTION PROCEEDINGS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.**

The Utah judgment statute, *Utah Code Ann. §78-22-1(1)* provides: "*Judgments shall continue for eight years unless previously satisfied or unless enforcement of the judgment is stayed in accordance with law.*"

Therefore the judgment against Gildea entered and docketed November 25, 1985, ordinarily would have expired eight years later upon November 25, 1993. Sittner commenced this action on August 3, 1993, more than a few months prior to the expiration of the eight year period without regard to any tolling or suspension of the limitation period caused by the lengthy duration of Gildea's bankruptcy.

Sittner could have completed execution sale proceedings within the time period remaining. But given the uncertainty created by the length of Gildea's bankruptcy, the chain

of title appearance of a deed to a party, Schriever, that had not previously been in the chain, without any exception for or reference to Gildea's contract ownership, it was prudent and reasonable for Sittner to resort to the court to seek declaratory relief to determine the validity of the judgment and the rights and priorities of the parties and to control or direct the completion of execution proceedings, rather than boldly executing and risking interference with the title or possessory rights of potentially bona fide purchasers.

So Sittner commenced this action and immediately Defendants asserted the invalidity and unenforceability of his judgment against the property. Early on Defendants obtained a ruling defeating Sittner's judgment and subsequently after the trial judge's reversal obtained another ruling defeating his title and ultimately obtained a final judgment defeating his judgment lien in March of 1997. But this time at their urging, the trial court included a decision that the statute of limitations had expired.

Indeed the judgment signed by the court on March 25, 1997, states in ¶2 that "*Plaintiff's complaint against all named Defendants herein is barred by the statutes of limitations*". But this is plainly incorrect, because the complaint was filed more than three and one-half months before the end of the normal eight year limitation period. Nevertheless Sittner must defend the statute of limitations and fortunately both federal and state law suspend the running of the eight year limitation period during the time enforcement of the judgment was stayed and prevented by Gildea's bankruptcy filing.

- 1. Federal law tolls the running of the state limitation period on a judgment during the time the debtor's bankruptcy protection prevents enforcement of the judgment.***

In this case, Sittner caused execution proceedings to be issued shortly after the judgment was entered. The sheriff had completed service of the writ, recording of the notice of levy on the subject property and a sale date was pending, when on January 16, 1986, Gildea filed for bankruptcy protection. His filing triggered the automatic stay provision of the *Bankruptcy Code*, 11 U.S.C. §362(a), which enjoins and prevents, “(2) *the enforcement against the debtor or against property of the estate, of a judgment obtained before the commencement of the case,*” and “(4) *any act to create, perfect or enforce any lien against property of the estate*”.

Unless the bankruptcy court grants specific relief from the stay, 11 U.S.C. §362(c)(1) provides that the stay of an act against property of the estate continues until such property is no longer property of the estate. 11 U.S.C. §541 defines property of the estate very broadly to include any legal or equitable interest the debtor has in property at the commencement of the case. Clearly then Gildea's interest in the subject property became property of the estate upon his bankruptcy filing and Sittner's execution proceedings were enjoined and stayed by the statutory injunction and no further enforcement of Sittner's judgment lien could be taken until the subject property was no longer part of the bankruptcy estate.

Gildea's bankruptcy case continued for more than six years to the date of closing in April of 1992, and at no time prior thereto was any relief from the automatic stay granted to Sittner, nor was the subject property abandoned from the bankruptcy estate by the bankruptcy trustee. Under 11 U.S.C. §554(c), any property scheduled in the bankruptcy case that is not otherwise administered at the time of closing is by operation of this subsection then

abandoned to the debtor. So the subject property was deemed abandoned to Gildea upon closing in April of 1992, which then terminated the stay since the property was only then no longer property of the estate.

If the eight year limitation period on Sittner's judgment continued to run during the bankruptcy case, then Sittner would be unfairly prejudiced having lost the right to enforce the judgement during the six year automatic stay period. Fortunately Congress did not intend such prejudice to occur and provided in *11 U.S.C. §108* for a suspension of state limitation periods during the time the automatic stay is in effect. *Section 108(c)* provides in pertinent part as follows:

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, ... fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, ... and such period has not expired before the date of the filing of the petition, then such period **does not expire until the later of--**

(1) the end of such period, **including any suspension of such period occurring on or after the commencement of the case**; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, ... of this title, ... [Emphasis added].

*11 U.S.C. §108(c)* is applicable to suspend the running of state judgment lien periods during the period that the bankruptcy stay prevents enforcement of a judgment lien. *In Re Morton*, 866 F.2d 561 (2nd Cir. 1989). The Second Circuit in *Morton* framed the issue and its holding as follows:

This appeal presents a question we first answered over fifty years ago, but which, because of our subsequent holdings and congress's amendment of the bankruptcy code, requires further attention today: Does a judgment lien, normally valid under New York law for a period of ten years, remain

enforceable after expiration of the ten-year period when during that period the property subject to the lien becomes part of a bankrupt estate protected by the automatic stay imposed by 11 U.S.C. §362(a)?

. . . We hold that 11 U.S.C. §108(c) tolls New York's ten-year period limiting judgment liens on real property until the automatic stay is terminated. Accordingly, we affirm. *Id* at 561, 562.

In accord with *In re Morton* that *Bankruptcy Code §108(c)* tolls the period for enforcement of a statutory lien during the period that enforcement is prevented by the bankruptcy stay, *Miner Corp. v. Hunters Run Ltd. Partnership*, 875 F.2d 1425 (9th Cir. 1989); *In re Miller*, 133 B.R. 405 (Bkrcty. S.D. Ohio 1991); *In re APC Const., Inc.*, 112 B.R. 89 (Bkrcty. D. Vt. 1990); *Matter of Burger*, 125 B.R. 894 (Bkrcty. D. Del. 1991); *Major Lumber Co. v. G & B Remodeling, Inc.*, 817 S.W.2d 474 (Mo. App. 1991); *Garbe Iron Works, Inc. v. Priester*, 99 Ill.2d 84, 457 N.E.2d 422.

Also in accord is *Citicorp Mortgage Inc. v. Hardy*, 834 P.2d 554 (Utah 1992), holding that Utah's three month limitation period on a trust deed deficiency action was tolled during the automatic stay in bankruptcy, saying:

Section 108(c) of the Bankruptcy Code provides in plain unequivocal language that a period of time fixed for commencing or continuing a civil action unrelated to the bankruptcy proceeding “**does not expire until the later of-- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice for termination or expiration of the stay ...**”

...

Utah Code Ann. §78-12-41 bears directly upon the issue presented, and its substance is wholly consistent with like provisions of the Bankruptcy Code. In similar plain and unequivocal language, the statute provides, “When the commencement of an action is stayed by injunction or statutory prohibition the time of the continuance or prohibition is not part of the time limited for the commencement of the action.” **Thus, under both the Bankruptcy Code and**

**our own statute**, plaintiff's deficiency action was timely filed. [Emphasis added] *Id.* at 557.

Because federal law created the automatic stay preventing the enforcement of Sittner's Utah judgment lien, Congress saw fit to prevent the unfairness and inequity that would result from shortening the life of the judgment when bankruptcy suspended enforcement. So under *Bankruptcy Code §108(c)*, the limitation period was suspended for more than six years and such period is tacked on to the normal expiration date which would have been November of 1993. Thus Sittner's judgment was enforceable until the end of 1999 by operation of federal law, well past the trial court's adverse ruling in March of 1997.

**2. *The limitation period on a judgment is suspended by the Utah judgment statute during the period enforcement was prevented by the Gildea bankruptcy stay.***

As already pointed out, the Utah judgment statute, *Utah Code Ann. §78-22-1(1)*, provides, “*Judgments shall continue for eight years unless previously satisfied or unless enforcement of the judgment is stayed in accordance with law.*” The concluding phrase is susceptible of no other meaning than the eight year period continues unless enforcement of the judgment is stayed, in which case the eight year period is tolled or suspended during the duration of a stay of enforcement. This interpretation is also consistent with the general statute of limitations tolling provision in *Utah Code Ann. §78-12-41*:

When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or the prohibition is not part of the time limited for the commencement of the action.

Defendants may argue that the meaning of *§78-22-1(1)*, “*judgment is stayed in accordance with law*” refers only to Utah law and not to the bankruptcy automatic stay. This

is incorrect of course, the term “*stayed in accordance with law*”, includes federal law as well as state law. In this regard, see *APS v. Briggs*, 927 P.2d 670 (Utah App. 1996), holding that the tolling statute for statute of limitations, *Utah Code Ann. §78-12-41*, which makes no reference to federal or state law, operated to toll and suspend the limitation period on foreclosure proceedings prevented by the bankruptcy stay under *11 U.S.C. §362(a)*.

Defendants acknowledged that this was the effect of the tolling language in the Utah judgment statute at oral arguments before the trial court on Schriever’s third motion for summary judgment [See *Tr.* 1644, p. 22-23]. But they argued strenuously and convinced the trial judge that the bankruptcy stay under *Code §362* is only in effect in a Chapter 7 case until the debtor is discharged, and since Gildea was discharged in December of 1987, they asserted that there was only two years of tolling and the statute of limitations had still expired. [*Rec. Tr.* 1644, p. 23-24]. See also *Finding of Fact ¶16* which states that the eight year statutory period for foreclosing Sittner’s judgment lien has expired notwithstanding any tolling periods that could have been caused by Gildea’s bankruptcy. However this is plainly wrong since *11 U.S.C. §362(c)* provides in pertinent part, “(1) *the stay of an act against property of the estate under subsection (a) continues until such property is no longer property of the estate;*”. Under subsection (2), the stay of any other act continues until the earliest of case closing; case dismissal; or in a case under Chapter 7 the time discharge is granted to the debtor.

In this case Sittner would be seeking to enforce his judgment lien by execution or foreclosure and that would clearly be against property of the estate and there is no doubt that



the statutory injunction then continued until the subject property was no longer property of the estate. Therefore, Sittner's analysis and argument was correct before the trial court as it is in this *Brief*, that the bankruptcy injunction tolled the limitation period on his judgment lien for more than six years. So there was more than two years remaining on the enforcement period when the trial court granted its summary judgment of dismissal with prejudice and extinguished any possibility of enforcement by its adverse decision which is now on appeal.

**3. *The Utah judgment limitation period is also tolled during a period when the lienholder is required to defend his title against adverse claims, thereby preventing enforcement or during the appeal of an adverse ruling defeating his title.***

In this case Defendants could still assert the bar of the statute of limitations on Sittner's judgment despite the tolling of the limitation period for more than six years by Gildea's bankruptcy, because even with such tolling the period expired at approximately the end of 1999, and Sittner has been appealing the trial court's adverse decision extinguishing his judgment and lien since 1997. It would be a most absurd result, if all Defendants had to do to prevail was to assert the invalidity of Sittner's judgment lien from the outset of this action which was commenced months before the expiration of the original eight year limitation period, and then remain steadfast in their assertion of defenses to enforcement of the judgment lien and to run over to the bankruptcy court and seek relief there if they get an adverse ruling in the state court until finally the statute of limitations expires. Then they need only assert the bar of the statute to prevail, thus taking the matter out of the hands of the court and undermining the judicial process. This would be a most odious result and one that is not sanctioned under Utah law.

The Utah Supreme Court recognized in *Capital Asset Financial Services v. Maxwell*, 2000 UT 9, 994 P.2d 201, 204, that once a judgment lien attaches, a judgment creditor may levy execution on the property or foreclose on the lien if called upon to defend against an action to cancel the lien interest, citing *Free v. Farnsworth*, 112 UT 410, 188 P.2d 731 (1948).

In *Free* the judgment creditor was sued in a quiet title action (an action seeking declaratory relief similar to the action involved in the case at bar) and by practical necessity was required to defend the validity of the judgment in the action. The court said:

Respondent corporation deemed it unsafe to proceed with a levy of execution while the judgment debtor's title was being defeated, and sought to have the court control the sale of the property after determining the priority of liens.

*Id.* at 733. In response to the argument that the suit was not a foreclosure action by the judgment creditor and that no restraining order or injunction prevented the creditor from levying execution during the pendency of the quiet title action, the *Free* court said that the practical effect was the same as an injunction. *Id.* at 734. The court held that this was equivalent to the judgment debtor preventing a levy of execution or sale of the property by injunction proceedings, so the creditor was entitled to the same period of time before expiration of the judgment as would have been permitted had the time period for enforcement not been lost. *Id.* at 735.

To the same effect is *Moulton v. Morgan*, 202 P.2d 723 (Utah 1949) which held that the judgment lien period was suspended by reason of the issuance of a restraining order preventing execution upon the judgment that lasted for a number of years. See also *Belnap*

*v. Blain*, 575 P.2d 656 (Utah 1978), holding that ordinarily execution proceedings on a judgment is the proper way of enforcement, but that the equitable powers of the court to foreclose on a judgment lien may be invoked when the judgment debtor has transferred the property and it is possible that adverse claims to the judgment may be asserted, then the court can control the sale of the property after determining the priority of the liens. *Id.* at 700.

*Free* and *Moulton* establish under Utah law that when execution or enforcement proceedings on a judgment are restrained or prevented by the successful assertion of adverse defenses then equitable tolling will extend the duration of the judgment lien until the infirmity or injunction is terminated. Under *Free* Sittner could not be expected to simply issue out execution proceedings in view of the uncertainty created by the transfer to Schriever and Gildea's long prior bankruptcy. Accordingly Sittner enlisted the equitable powers of the court for a declaration and determination of the validity of his judgment lien and for determination of the rights and priorities of the other parties and his judgment lien cannot now be defeated by Defendants obtaining an adverse ruling and hanging onto the adverse ruling until Sittner's judgment lien fully expires and is no longer enforceable.

Under *Free* there is equitable tolling of the limitation period which would be applicable here, particularly given the series of adverse rulings and the duration involved in the trial court proceedings. Sittner should not be prejudiced by the delay in the appeal process or the delay that was caused before the trial court and the limitation period should be suspended in accordance with *Free* throughout the course of the proceedings both in the trial court and on appeal.

**D.    *THERE IS NO BASIS IN LAW OR FACT TO SUPPORT AN AWARD OF ATTORNEY'S FEES UNDER UTAH CODE ANN. §78-27-56.***

*Utah Code Ann. §78-27-56* provides that in civil actions the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense was without merit and not brought or asserted in good faith. It is under this statute that Defendants' claim a right to an award of attorney's fees because Sittner didn't ultimately prevail after repeated cross-motions for summary judgment.

The Utah Supreme Court first interpreted the statute in *Cady v. Johnson*, 671 P.2d 149 (Utah 1983), and held that the statute was intended to be narrowly drawn and was not meant to apply to all prevailing parties in civil suits. To safeguard against improper application, two elements had to be established in addition to being the prevailing party. First the claim must be “*without merit*” which the court equated with “*frivolous*” or “*having no basis in law or fact.*” *Id.* at p. 151. The second element that the action was not in “*good faith*” requires that the trial court find conduct that is lacking in good faith. Thus the trial court must find that one or more of the following factors existed: (1) the party lacked an honest belief in the propriety of the activities in question; (2) the party intended to take unconscionable advantage of others; or (3) the party intended to, or acted with the knowledge that the activities in question would hinder, delay or defraud others. *Id.* at p.151. In addition, the bad faith finding must be supported by sufficient evidence that one or more of these factors existed. *Id.* at 152.

In *Cady*, the trial court found a lack of good faith because plaintiffs failed to research the legal issues as instructed at pretrial conference and had they done so they would have discovered that no valid claim existed which caused the other parties expense and the court a waste of valuable time. While the Supreme Court agreed with the trial court's view that it was improvident and unmeritorious and ultimately a waste of time, the Court rejected the trial court's conclusion that their conduct rose to the level of a lack of good faith. The Court repeated, that the evidence must affirmatively establish a lack of good faith and that it is not sufficient for an award of attorney's fees to show merely that the parties or their attorney were foolish in their claims. *Id.* at 153.

Even after the 1988 amendments to the statute which may have appeared to relax the standards required for awarding attorney's fees, the Supreme Court in *Canyon Country Store v. Bracey*, 781 P.2d 414 (Utah 1989), held that the statute was still to be narrowly construed and applied only occasionally, saying:

Proof of a breach of the covenant of good faith and fair dealing by an insurer does not show the bad faith necessary for an award under section 78-27-56. Notwithstanding the name given the covenant, breach of the covenant of good faith and fair dealing is an objective question. As is true of virtually all other contractual breaches, the intention of the breaching party is immaterial. See *Beck* 701 P.2d at 800. On the other hand, the existence of bad faith, which must be shown under section 78-27-56, is a subjective question of state of mind. Footnote 6. *Id.* at p. 421.

In *Watkiss & Campbell v. Foa & Son*, 808 P.2d 1061 (Utah 1991), the court reversed the trial court's award of attorney's fees under the statute because specific findings are required on each element to show that the award of attorney's fees was based upon the two

prong standard of meritless claim and the subjective standard of bad faith and not simply because the recovering party prevailed. The court again cautioned:

A party may bring a good faith action and not prevail. Failure of a cause of action or defense does not automatically require the losing party to pay costs. If we were to adopt such an approach, parties who had difficult but valid claims would be economically precluded from bringing suit. *Id.* at p. 1063.

Before applying these standards to Sittner's case, it is most important to note that he commenced this action under the *Utah Declaratory Judgments Act, Utah Code Ann. §78-33-1, et. seq.*, for declaratory relief. Specifically invoking *Utah Code Ann. §78-33-2* (see Sittner's *Complaint* ¶18), which authorizes an action by any person interested under a deed, will, contract or whose rights, status or other legal relations may be affected to have determined in a Utah court of law any question of construction or validity. *UCA §78-33-1* states, "*No action or proceeding shall be open to objection on the grounds that a declaratory judgment or decree is prayed for.*" *UCA §78-33-11* provides that when declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration. *UCA §78-33-12* specifically states:

This Chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

Given the stated salutary purpose of the *Declaratory Judgment Act, UCA §78-33-12*, that such actions and the right to relief thereunder are remedial and are to "*afford relief from uncertainty and insecurity*" with respect to the rights and legal relations, it appears impossible to reconcile the intended statutory purpose with a finding of subjective bad faith

for utilizing the *Act*. Indeed assessing attorney's fees against a party for seeking declaratory relief under the *Act* completely thwarts the benefit and protection of affording relief from uncertainty and insecurity and makes it ring hollow in light of the imposition of a penalty. In like manner, what could the legislature have meant in adopting §78-33-1 that says no action shall be open to objection, if the opposing party can merely object and the court will impose a penalty in the form of assessment of the other parties' attorney's fees that are not otherwise provided by contract or statute.

Sittner asserts that unless the trial court can point to some specific egregious conduct during the case engaged in by the party who brings the declaratory relief action that would justify an award of attorney's fees independent of bringing the action in the first place, that the Court should rule as a matter of law that a declaratory relief action in accordance with the *Act* cannot be equated with or give rise to either a finding of unmeritorious or subjective bad faith. Or stated differently, resort to declaratory relief should be equated with a demonstration that the party has an honest belief in the propriety of the action, doesn't intend to take unconscionable advantage of others and didn't intend to act to hinder, delay or defraud others as a matter of law.

In any event in this case resolved on summary judgment, there is no specific finding of bad faith by the trial judge. The trial judge did adopt a conclusion of law, ¶4 that states, "*Plaintiff claims are without merit and not asserted in good faith.*" This is just what it purports to be, a conclusion and not a finding and doesn't even suggest what conduct gave rise to the conclusion that the claims were not asserted in good faith. This does not meet the

standard for specific findings set forth in *Watkiss & Campbell*, 808 P.2d at 1068. Moreover the trial judge was disposed to grant attorney's fee to Defendants each time they won, as indicated by the transcript of the hearings without any mention of or regard to a finding of bad faith. The only thing the trial judge mentioned was that he believed the action was frivolous or not well taken, which cannot be equated with the subjective finding of bad faith.

In this case there is absolutely no evidentiary or legal basis for finding or concluding that Sittner lacked an honest belief that he had a valid judgment lien against specific real property that survived Gildea's long-term bankruptcy case and that he was entitled to have the priorities determined and join the necessary parties.

Of course Defendants contend that Sittner's judgment lien did not survive bankruptcy and was no longer capable of supporting execution proceedings to enforce the lien, based on an arcane and largely undisclosed theory of waiver during the bankruptcy case. How could Sittner anticipate this defense, Defendants didn't even assert it affirmatively in their answers and he still doesn't understand it. Nonetheless, as pointed out in *Argument*, Sections "A" and "B" herein, Defendants' theories are contrary to the weight of existing legal authority.

It might even be reasonable to assume that since the trial judge had such difficulty resolving the legal issues, having first granted summary judgment for Defendants, then subsequently after further briefing and more careful analysis having granted summary judgment in favor of Sittner, that this would demonstrate that the merits of Sittner's action were not "*frivolous*" or of so little weight or without any basis in law or fact, within the enunciated standard for "*meritless*" required for U.C.A. §78-27-56.



Moreover, Sittner did not rush out and execute upon his judgment lien or take any other action to directly interfere with the ownership or possession of Gildeas' or Schriever in her claim to be a contract seller. Instead he commenced an action for declaratory relief so that the court could make such determinations and protect the parties and afford the appropriate relief. Indeed Sittner made an informed decision to choose an action for declaratory relief based upon the Supreme Court's admonitions in *Baldwin v. Burton*, 850 P.2d 1188 (Utah 1993).

In *Baldwin* the court had no difficulty affirming the trial court's determination that Burton's actions in executing upon property that was not owned by their judgment debtor, but instead was owned by a bona fide purchaser and they had notice of their interest before executing, was certainly unmeritorious and without legal basis. Further in response to Burton's claim that the *Fraudulent Transfer Act* permits them to execute and ask questions later, the court held that a fraudulent transfer should always be established by declaratory relief before executing or otherwise attempting to interfere with a transferee. But the court affirmed the finding that Burton had a lack of good faith only because the execution praecipe directed to the sheriff did not seek to levy merely upon the interest of the judgment debtor, but instead named specifically the innocent purchasers of the property. The court concluded this was wrong and that defendants had sufficient notice in advance of their wrongful act so they demonstrated a lack of good faith. *Id.* at P.2d 1191.

While Sittner based on the clear and persuasive weight of legal authority, still believes and maintains that his judgment and lien are valid and that execution proceedings would be

proper and be issued; nonetheless, Sittner chose the cautious and prudent method of commencing an action for declaratory relief as the Utah Supreme Court advised in **Baldwin v. Burton**. It therefore is totally nonsensical and absolutely repugnant to the policies set forth in the *Declaratory Judgment Act* and in **Baldwin** for the court to find or conclude that Sittner's action lacked good faith or was frivolous as necessary to support an award of attorney's fees under *U.C.A. §78-27-56* for Defendants. Accordingly the trial court must be reversed on this issue.

***E. THE TRIAL JUDGE ABUSED HIS DISCRETION IN NOT GRANTING SITTNER'S MOTION TO STRIKE OTHER JUDGES' OPINIONS AND IN CONSIDERING SUCH OPINIONS IN GRANTING DEFENDANTS' SUMMARY JUDGMENT.***

After Gildea was successful in obtaining a bankruptcy order adverse to Sittner, Defendants were granted summary judgment on August 15, 1995 of dismissal and an award of attorney's fees. But this judgment was based upon the collateral estoppel/issue preclusion of the bankruptcy order and indeed the trial court acknowledged that this was so in its October 10, 1995 order staying further proceedings pending appeal of the bankruptcy judge's decision, and providing that if the U.S. District Court reversed or vacated the order that the August 1995 summary judgment, findings and conclusions based thereon would be automatically vacated and further proceedings could ensue. (See *Order*, copy *Appdx. 3*).

One of the four essential requirements of collateral estoppel/issue preclusion is a final adverse judgment on the issue to be precluded. ***Glen Core, Ltd. v. Ince***, 972 P.2d 376, 381 (Utah 1998). Once the federal district judge reversed and vacated the bankruptcy order, there no longer was any adverse judgment that could create issue preclusion let alone a final

adverse judgment. Under the trial court's stay order, the effect of the reversal was for the August 1995 summary judgment to be automatically vacated and that left intact the September 7, 1994 summary judgment in Sittner's favor, that his judgment lien survived.

Nonetheless, Schriever ignored this and in January of 1997, filed a third motion for summary judgment offering no new facts or legal analysis other than including the bankruptcy judge's ruling and the federal district judge's endorsement of the conclusions, and based thereon asserted Defendants' right to have the prior summary judgment reinstated [Rec. 1061-1126]. Gildeas' joined in the motion [Rec. 1141], and Sittner responded by objecting to the inclusion and consideration of the opinions and moved to strike them as improper and not permissible [Rec. 1154, 1160, 1166]. Sittner cited *Harline v. Barker*, 912 P.2d 433, 440-42 (Utah 1996), holding that a trial court's consideration of a bankruptcy judge's ruling, even if treated as expert testimony, was improper inadmissible evidence that cannot be considered in ruling on a motion for summary judgment.

The *Harline* court said even likening the bankruptcy judge's ruling to expert testimony and weighing the admissibility against the prejudicial effect raises ethical and public policy concerns and the ruling would have little if any probative value and is substantially outweighed by prejudice, and accordingly each of the trial court's involved abused their discretion in considering the ruling. *Id.* at 441-442. See also *Glen Core Ltd. v. Ince*, 972 P.2d 376, 381 (Utah 1998), improper for the trial court to simply adopt the bankruptcy court's conclusions.

In this case the bankruptcy ruling and judge's endorsement were inadmissible as well. Moreover, including the opinions in Defendants' memoranda and the court's considering them was also improper under *Rule 4-508 CJA*, which provides in pertinent part:

(1) Unpublished opinions, orders and judgment have no precedential value and shall not be cited or used in the courts of this state, except for purposes of applying the doctrine of the law of the case, res judicata, or collateral estoppel.

Since the bankruptcy judge's ruling and opinion were reversed and vacated by the federal district judge, there was no collateral estoppel/issue preclusion applicable and the opinions were then merely unpublished opinions with no precedential value and improperly admitted and received and considered by the trial judge. The trial judge did not grant Sittner's motion to strike the offending opinions from the memoranda and did consider the bankruptcy judge's opinion. See *Transcript of Hearing* [Rec. 1245-49, p. 4; copy in Appdx. 5] where the judge says, "*Of course I've read the bankruptcy judge's decision and as I say that goes into the consideration. . .*". [Tr. p. 4].

Based on *Harline* and *Rule 4-508 C.J.A.*, the trial judge abused his discretion in considering the opinions which is err. However, such err may avail Sittner of nothing in view of this court's review of the merits of the summary judgment on this appeal for correctness as a matter of law. Still Sittner expects Defendants to again reproduce extensive portions of the bankruptcy ruling and federal district judge's gratuitous commentary and to include it in Appellees' brief in response hereto, and this would be improper and should not be tolerated and any attempt to do so should be stricken immediately.

## **VII. CONCLUSION**

The trial court's summary judgment and legal conclusions are erroneous and are not supported by the law and constitute error and must be reversed. Sittner's judgment and lien was not rendered unenforceable by Giledea's discharge and survived his bankruptcy case and was not waived by any action taken in the case, and it passed through the case and remained enforceable *in rem* against the subject property and it must be reinstated. The statute of limitations on Sittner's judgment was suspended during the period the bankruptcy stay in Giledea's case was in effect which was from the commencement of the case until the subject property was no longer a part of the estate, and that occurred on case closing in April of 1992, and accordingly Sittner's judgment did not expire until the end of 1999, well after the trial judge's adverse decision. Accordingly the limitation period should be reinstated so that Sittner has the additional two years following the conclusion of this case to complete execution proceedings, and this Court should direct that equitable tolling applies until the completion of the case on remand. Costs should be awarded to Sittner.

***RESPECTFULLY SUBMITTED*** this 24<sup>th</sup> day of August, 2000.



L. Benson Mabey

Mabey & Coombs, L.C.

Attorneys for Plaintiff/Appellee John C. Sittner

## **APPENDIX**

*Appendix 1 Complaint 8-3-93 Court Record 1-17*

*Appendix 2 Order Setting Aside & Vacating Prior Summary Judgment for Defendants Schriever & Gildeas and Granting Partial Summary Judgment 9-7-94 Court Record 458-464*

*Appendix 3 Order Staying Proceedings 10-10-95 Court Record 939-941 and Court Record 1000-1003*

*Appendix 4 Judgment 3-25-95 Court Record 1257-1258  
Findings of Fact & Conclusions of Law 3-25-97 Court Record 1250-1255*

*Appendix 5 Reporter's Partial Transcript of Hearing on Sundry Motions: Court's Ruling, February 25, 1997, p. 4 Court Record 1245-1249*

*Appendix 6 Sittner v. Schriever, et. al., 2000 UT 45*

*Appendix 7 Proof of Claim 5-19-86 Court Record 95*

*Appendix 8 Stipulation 3-17-94 Court Record 98-99*

## Appendices

## Appendix 1



FILED  
JUN 11 1964

100-443883

57.

*mf* *anc* *rough*

JOHN C. SITTNER

[illegible]

**VS.**

Civil No.

JUDGE 930904459cy

**JUDGE HOMER F. WILKINSON**

## PARTIES AND SUBJECT MATTER

2. Defendant Karen H. Schriever ("Schriever") is an individual believed to be residing in the State of Maryland and is joined in her capacity as trustee of the Karen H. Schriever Family Trust.

3. Defendants Bruce Gildea and Shirlynn Gildea

(collectively "Gildeas") are husband and wife and are residents of Salt Lake County, State of Utah.

4. Defendant Joy Hale aka Joy Hale Horsley ("Hale") is an individual residing in Salt Lake County, State of Utah.

5. The subject matter of this action is a judgment lien against certain real property ("subject property") which is lying and situated in Salt Lake County, State of Utah with a common address of 2400 East 3000 South and more particularly described in the Warranty Deed appended as Exhibit "A" hereto and incorporated herein.

**COUNT I**  
**(DECLARATORY RELIEF)**

6. On or about November 25, 1985, Plaintiff obtained a judgment against Defendant Bruce Gildea, et al. (the "Judgment") which was filed and docketed in the Third District Court of Salt Lake County, State of Utah in Book 202, No. 1286 on November 26, 1985 (copy of the Judgment is appended as Exhibit B hereto).

7. On or about December 30, 1985, Plaintiff caused a Writ of Execution to be issued for collection of the unpaid balance of the Judgment and in furtherance of the execution proceedings the Salt Lake County Sheriff attached and levied upon the right, title and interest of Defendant Bruce Gildea in the subject property, by filing for record with the office of the Salt Lake County Recorder a Writ of Execution and Notice of Real Estate Levy (copy of Writ of Execution and Notice of Real

Estate Levy with recording information appended as Exhibit "C").

8. At the time the Judgment was docketed in Salt Lake County, Defendants Bruce Gildea and Shirlynn Gildea owned the subject property as joint tenants and were purchasing the subject property under the terms of a Uniform Real Estate Contract from Defendant Hale, as seller and fee title holder (copy of the "Notice of Existing Uniform Real Estate Contract" filed for record with the Salt Lake County Recorder on February 20, 1981, appended as Exhibit "D").

9. Upon docketing, Plaintiff's Judgment lien attached to and became a valid and subsisting lien against the one-half ownership interest of Defendant Bruce Gildea in the subject property and execution was properly issued and levied upon the subject property by the Salt Lake County Sheriff, but such execution proceedings were suspended by the filing of a bankruptcy petition with the United States Bankruptcy Court for the District of Utah by Defendant Bruce Gildea on or about January of 1986.

10. As part of the Bruce Gildea bankruptcy proceedings, Defendant Gildea elected to use his homestead exemption under Utah law and Defendant Gildea for this purpose selected real property other than the subject property to be exempt and therefore said Defendant may not claim a homestead exemption to defeat or diminish Plaintiff's Judgment lien.

11. Defendant Bruce Gildea's bankruptcy case has now been

closed and on or before closing Defendant Bruce Gildea's interest in the subject property was abandoned to him from the bankruptcy estate, subject to and burdened by Plaintiff's Judgment lien.

12. From and after the date Plaintiff's Judgment lien attached to the subject property, Defendants Bruce Gildea and Shirlynn Gildea have been joint owners of the property each having a one-half undivided interest therein and they have been in possession continuously and remain in possession as of the date hereof.

13. Plaintiff now desires to direct the Salt Lake County Sheriff to complete the execution proceedings that were commenced in 1985, but Plaintiff in taking steps in furtherance thereof discovered the existence of a Warranty Deed dated August 3, 1992 (Exhibit "A" hereto) signed by Defendant Hale purporting to convey title to the subject property to Defendant Schriever.

14. Plaintiff believes that Defendant Hale was directed by Gildeas, as owners of the subject property, to convey title to Defendant Schriever in satisfaction of Defendant Hale's obligation under the Uniform Real Estate Contract she made with the Gildeas.

15. Plaintiff contends that a one-half undivided interest in the subject property was burdened by Plaintiff's Judgment lien at the time of the conveyance by Defendant Hale to Defendant Schriever and such one-half interest remains subject

to Plaintiff's Judgment lien which is a first lien subordinate only to general real property taxes securing the unsatisfied Judgment amount due to Plaintiff in excess of \$30,000.00 with interest accruing at the rate of twenty percent (20%) per annum.

16. Plaintiff further contends that Plaintiff is entitled to direct the Salt Lake County Sheriff to proceed with and to complete execution proceedings and to cause the one-half interest in the subject property to be sold at execution sale to satisfy Plaintiff's Judgment together with all costs and expenses thereof and additional attorney's fees necessitated thereby and by this action, the same being added to and augmenting the unpaid Judgement balance.

17. Defendant Hale, having conveyed title to the subject property with warranties, and Defendant Schriever, being the grantee under the purported Warranty Deed, may dispute Plaintiff's title, rights or claims under the Judgment lien or the Gildeas may dispute Plaintiff's claims and some or all of the Defendants may have rights or adverse claims to assert respecting the subject property.

18. Under Utah Code Ann. § 78-33-2, Plaintiff is entitled to declaratory relief to be granted by this court to determine the rights, claims or interests of the parties in and to the subject property.

**COUNT II**  
**(FRAUDULENT TRANSFER)**

19. Plaintiff incorporates and realleges paragraphs 1 through 18 herein.

20. On or about August of 1992 the date of the purported Warranty Deed, Defendant Bruce Gildea with actual intent to hinder, delay or defeat Plaintiff's Judgment lien claim, instructed and directed Defendant Hale as seller of the subject property under the Uniform Real Estate Contract to convey the subject property to Defendant Schriever.

21. Defendant is related by blood or marriage to either Defendant Bruce Gildea or Defendant Shirlynn Gildea and the arrangement for the conveyance of the subject property to Defendant Schriever was for the benefit of the Gildeas and was without any actual change in the ownership or possession of the subject property.

22. The conveyance or purported conveyance by Defendant Hale to Defendant Schriever and the arrangements corresponding thereto between Defendant Schriever and the Gildeas constituted fraudulent transfers or arrangements under the Utah Uniform Fraudulent Transfer Act, Utah Code Ann. § 25-6-1 et seq.

23. Plaintiff is entitled to declaratory relief that Plaintiff's Judgment lien is a valid and subsisting first lien against a one-half undivided interest in the subject property, which secures an unpaid balance due to Plaintiff in an amount to

be determined by the court which is in excess of \$30,000.00, together with interest accruing at the rate of twenty percent (20%) per annum and that any adverse claims asserted by Defendants or any of them, are void as against the claim and interest of Plaintiff, as fraudulent transfers and arrangements.

**WHEREFORE PLAINTIFF DEMANDS JUDGMENT UNDER COUNTS I AND II AS FOLLOWS:**

1. For declaratory relief:

(a) that Plaintiff's Judgment lien is a valid and subsisting lien against a one-half undivided interest in the subject property;

(b) Plaintiff's lien is a first lien subordinate only to general real property taxes, and secures an unsatisfied balance due and owing Plaintiff in an amount to be determined by the court in excess of \$30,000.00 together with interest accruing at the rate of twenty percent (20%) per annum, and;

(c) that any rights or adverse claims of the other Defendants are extinguished or are subordinate to Plaintiff's Judgment lien, and;

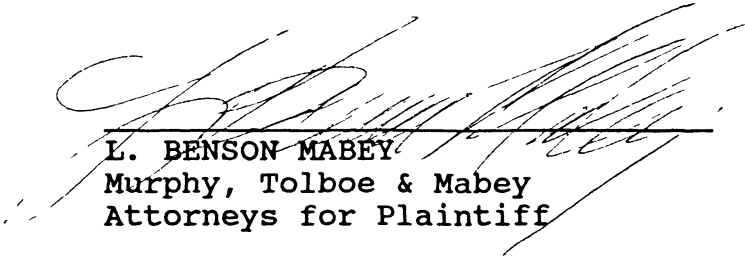
(d) that Defendant Bruce Gildea may not claim a homestead exemption to defeat or reduce Plaintiff's Judgment lien against the subject property;

(e) that Plaintiff is entitled to direct the Salt

Lake County Sheriff to proceed with and complete execution proceedings and to cause the one-half interest in the subject property to be sold at execution sale to satisfy Plaintiff's Judgment together with all costs and expenses of such proceedings and additional attorney's fees necessitated thereby and by this action, the same being added to and augmenting the unpaid Judgment balance.

2. For costs of this action and such other and further relief as the court deems just in the premises.

DATED this 29 day of June, 1993.

  
\_\_\_\_\_  
L. BENSON MABEY  
Murphy, Tolboe & Mabey  
Attorneys for Plaintiff

Plaintiff's Address:

John C. Sittner  
682 18th Avenue  
Salt Lake City, Utah 84103



# EXHIBIT A

5373841

Recorded at Request of \_\_\_\_\_  
at \_\_\_\_\_ M. Fee Paid \$ \_\_\_\_\_  
by \_\_\_\_\_ Dep. Book \_\_\_\_\_ Page \_\_\_\_\_ Ref.: \_\_\_\_\_  
M&D tax notice to GRANTEES Address 10833 Tuckahoe Hwy  
North Potomac Md. 20878

## WARRANTY DEED

JOY HALE AKA JOY HALE HORSLEY grantor  
of SALT LAKE CITY, County of SALT LAKE, State of Utah, hereby  
CONVEY and WARRANT to

KAREN H. SCHRIEVER, TRUSTEE OF THE KAREN H. SCHRIEVER FAMILY TRUST DATED  
JULY 20, 1992.

of grantee  
for the sum of  
DOLLARS.

TEN AND OTHER GOOD AND VALUABLE CONSIDERATION

the following described tract of land in SALT LAKE County,  
State of Utah:

Commencing at a point 1966.61 feet South and 599.48 feet East of the  
Northwest corner of the Northeast quarter of Section 27, Township 1 South,  
Range 1 East, Salt Lake Base and Meridian, and running thence South 300.88  
feet; thence South 82°10' East 231.96 feet; thence north 13°30' West 341.81  
feet; thence West 150 feet to the point of beginning.

TOGETHER WITH and subject to a right of way over:  
Commencing at a point 1941.86 feet South and 47.52 feet East from the  
Northwest corner of the Northeast quarter of said Section 27, and running  
thence South 49.5 feet; thence East 846.25 feet to the Brigham Young Ditch;  
thence North 27°06' West along said ditch 55.63 feet; thence West 821.10  
feet to the place of beginning.

WITNESS, the hand of said grantor, this 3rd day of  
AUGUST, A. D. 19 92

Signed in the Presence of

*Joy Hale Horsley*  
JOY HALE HORSLEY

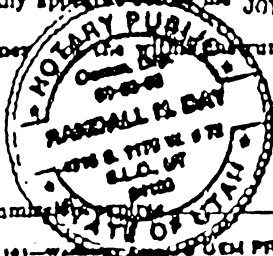
STATE OF UTAH,

County of SALT LAKE

ss.

On the 3RD day of AUGUST, A. D. 19 92  
personally appeared before me JOY HALE AKA JOY HALE HORSLEY

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



*[Signature]*  
Notary Public.

My commission expires \_\_\_\_\_ Residing in SALT LAKE CITY, UTAH

8K6556PG0158

# EXHIBIT B

FILED IN CLERKS OFFICE  
SALT LAKE COUNTY, UTAH

NOV 25 1985

At Large, District Clerk and Dist. Court

L. BENSON MABEY  
YANO, MURPHY, WEGGELAND & FRIEDLAND  
Attorneys for Plaintiff  
376 East 400 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 533-8505  
State Bar Number: A2035

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

JOHN C. SITTNER,

Plaintiff,

-vs-

BIG HORN TAR SANDS & OIL,  
INC., a Utah corporation,  
TARBO, INC., a Utah  
corporation, and OTS  
RESEARCH, a Utah general  
partnership, J. ROBERT  
BRIMHALL, ARNOLD E. BERNEY,  
BRUCE GILDEA, PETER E.  
BERNEY, DELL BRIMHALL, GARY  
BRIMHALL, BERNARD BERNEY, H.  
DELBERT WELKER and ARLO  
MILLER,

Defendants.

JUDGMENT

Bl. 202 NO. 1286  
11-26-85 9:53 AM.

Civil No. C-82-4804

Assigned to Judge  
Dennis Frederick

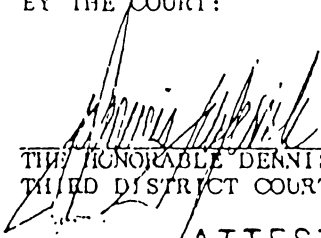
The above-entitled matter came on for trial on November  
8, 1985 before the Honorable Judge Dennis Frederick. The Court  
having taken evidence and having made and entered its Findings

of Fact and Conclusions of Law, does, based thereon, make and enter the following:


JUDGMENT IS HEREBY GRANTED: in favor of Plaintiff and against Defendants Peter Berney, Bruce Gildea, H. Delbert Welker and Gary Brimhall with joint and several liability in the sum of \$30,598.35 together with interest accruing thereon at the rate of twenty percent (20%) per annum from the date hereof until paid and together with attorney's fees in the sum of \$3250.00 and costs advanced in the amount of \$46.30.

DATED this 25 day of Nov., 1985.

BY THE COURT:

  
THE HONORABLE DENNIS FREDERICK  
THIRD DISTRICT COURT JUDGE

ATTEST  
H. DIXON HINDLEY  
Clerk

By   
Deputy Clerk

2: Benson, Mabel  
376 E. 400 S. # 300  
Salt Lake City, Utah 84111  
533-8506

# EXHIBIT C

20.60

20  
SL. CO SHERIFF  
DEP  
County Coroner

Dec 30 10 19 AM '85

SALT LAKE COUNTY,  
UTAH

4182347

## In the District Court, of the Third Judicial District In and for Salt Lake County, State of Utah

HON. JUDGES OF SAID COUNTY

Term. 19 85

John C. Sittner

Plaintiff

Big Horn Tar Sands & Oil, Inc.,  
et al.

Defendant

Execution

No. C-82-4804

Assigned to Judge Frederick

### THE STATE OF UTAH

To the Sheriff or Constable of Salt Lake County, State of Utah, Greetings:

WHEREAS, Judgment was rendered by this Court in said County, wherein is the judgment roll, on the 25  
day of November 19 85, for the sum of \$ 30,598.35 and \$ 46.30  
cost of suit and \$ 3250.00 attorney's fees and the amount actually due thereon is \$  
\$33,894.65 and interest at the rate of ~~eight~~ <sup>eight</sup> percent per annum from the  
25th day of November A.D. 19 85, until paid against said  
Defendant Bruce Gildea  
and in favor of said Plaintiff John C. Sittner

THESE ARE, THEREFORE, to command you to collect the aforesaid judgment and costs, together with the cost  
of this execution, and that you levy on and sell enough of the unexempted personal property, or if enough unexempted  
personal property cannot be found, then of the unexempted real property of the said  
Defendant Bruce Gildea

to satisfy the same with all legal costs accruing here on, and this shall be your sufficient return for so doing. And within  
sixty (60) days make due returns for this writ with your doings in the premises before the Court, WHEREOF FAIL NOT.

Given under my hand and the Seal of said Court this 12th day of December A.D. 19 85

H. B. [Signature]  
Clerk  
Deputy Clerk  
12

STATE OF UTAH )  
 )  
COUNTY OF SALT LAKE )

NOTICE OF REAL ESTATE LEVY

SS. Salt Lake County Sheriff's Office

Notice is hereby given, that under and by virtue of a writ of EXECUTION issued out of the DISTRICT Court of the State of Utah, of which the annexed is a true copy, I have this day attached and levied upon all the right, title, claim and interest of  
BRUCE GILDEA,

defendants,

or either of them, of, in and to the following described Real Estate, standing on the records of Salt Lake County, in the name of BRUCE GILDEA.

and particularly described as follows:

1. COMMENCING at a point 1986.61 feet South and 599.48 feet East of the Northwest corner of the Northeast quarter of Section 27, Township 1 South, Range 1 East, Salt Lake Base and Meridian, and running thence South 340.88 feet; thence South 82°10' East 231.08 feet; thence North 13°20' West 341.21 feet; thence West 180 feet to the point of BEGINNING.

TOGETHER with and subject to a right of way over: COMMENCING at a point 1841.38 feet South and 47.82 feet East from the Northwest corner of the Northeast quarter of said Section 27, and running thence South 49.3 feet; thence East 846.25 feet to the Brigham Young Ditch; thence North 27°00' West along said ditch 53.63 feet; thence West 821.10 feet to the place of BEGINNING.

2. COMMENCING 33 rods South and 307.66 feet West from the Northeast corner of the Northeast quarter of Section 25, Township 3 South, Range 1 West, Salt Lake Meridian, and running thence South 21.8 rods; thence West 40 feet; thence North 21.8 rods; thence East 40 feet to the place of beginning.

3. The East 38 1/2 feet of Lot 33, Block 2, CENTRAL PLACE,

4. Parcel 1: Beginning at a point 28 degrees 53 minutes East 66 feet from the Northeast corner of Lot 2, Block 1 Magna Addition, being in and part of Section 30, Township 1 South, Range 2 West, Salt Lake Base and Meridian; and running thence South 0 degrees 53 minutes East 25 feet; thence north 86 degrees 53 minutes East 124.6 feet; thence north 0 degrees 53 minutes West 25 feet; thence South 86 degrees 53 minutes West 124.6 feet to the point of beginning.

BOOK 5722 PAGE 510

Being the East 80 feet of Lot 22, Block 2, Garden Lot Addition, an unrecorded subdivision.

Parcel 2: The East 89 feet of Lot 23, Block 2, Garden Lot Addition, an unrecorded subdivision, and being more particularly described as follows:

Beginning at a point North 88 degrees 53 minutes East 86 feet from the Northeast corner of Lot 1, Block 1 Magna Addition, being a part of Section 30, Township 1 South, Range 2 West, Salt Lake Base and Meridian; and running thence South 0 degrees 52 minutes East 25 feet; thence North 88 degrees 53 minutes East 124.6 feet; thence North 0 degrees 52 minutes West 25 feet; thence South 88 degrees 53 minutes West 124.6 feet to the place of beginning.

5. BEGINNING at the Southwest Corner of Lot 2, Block 77, Plat "D", Salt Lake City Survey and running thence East 42.5 feet; thence North 27 feet; thence West 42.5 feet; thence South 27 feet to the point of beginning.

6. Beginning at a point which is South 724.25 feet and West 35.48 feet from the northeast corner of Section 35, Township 2 South, Range 1 West, Salt Lake Base and Meridian; and running thence South 105.00 feet; thence West 418.27 feet; thence North 105.01 feet; thence East 329.77 feet; thence South 89.00 feet; thence East 80.00 feet to the point of beginning.

Subject to an existing fence line running along the above described property more particularly described as follows:

book 5722 page 301

Beginning at a point on an existing fence line, said point being South 0 degrees 12 minutes 44 seconds West 724.25 feet and South 89 degrees 20 minutes 12 seconds West 33 feet and South 0 degrees 12 minutes 44 seconds West 105 feet and South 89 degrees 20 minutes 12 seconds West 262.21 feet from the northeast corner of Section 36, Township 2 South, Range 1 West, Salt Lake Base and Meridian; and running thence North 1 degrees 34 minutes West along said fence line 184.68 feet.

Lot 36 and the North 1/2 of Lot 27, Block 2,  
SUNSHED PLAT OF DENVER PLACE.

All of Lot 31, BOTH GARDENS

Book 5722 page 912

H. D. "Pete" Hayward  
Sheriff of Salt Lake County

*[Signature]*  
County Sheriff

# EXHIBIT D

ATC 12-01-15285

3536037

## NOTICE OF EXISTING UNIFORM REAL ESTATE CONTRACT

NOTICE IS HEREBY GIVEN that pursuant to the terms and provisions of a certain Uniform Real Estate Contract dated February 20, 1981 which was heretofore duly executed and which now continues to be in full force and effect, the undersigned parties are the seller and buyer of the following described tract of land situated in Salt Lake County, State of Utah, to-wit:

Refer to Exhibit "A" attached hereto and by this reference made a part hereof.

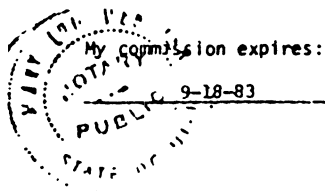
Joy Hale  
JOY HALE Seller

Bruce Gildea  
BRUCE GILDEA Buyer

Shirlynn Gildea  
SHIRLYNN GILDEA Buyer

STATE OF UTAH )  
COUNTY OF SALT LAKE ) ss

On this 20th day of February, 1981, personally appeared before me JOY HALE, as seller and BRUCE GILDEA and SHIRLYNN GILDEA,  
husband and wife, as joint tenants, as Buyers  
the signer of the within instrument, who duly acknowledged to me that they executed the same.



Mary Ann Smith  
Notary Public - residing at  
Salt Lake County, Utah

REC'D  
SALT LAKE COUNTY  
UTAH  
FEB 20 1 33 PM '81  
NOTARY PUBLIC  
MAY 20 1981



EXHIBIT "A"

COMMENCING at a point 1966.61 feet South and 509.48 feet East of the Northwest corner of the Northeast quarter of Section 27, Township 1 South, Range 1 East, Salt Lake Base and Meridian, and running thence South 300.88 feet; thence South 82°10' East 231.96 feet; thence North 13°30' West 341.81 feet, thence West 150 feet to the point of BEGINNING.

TOGETHER with and subject to a right of way over:  
COMMENCING at a point 1941.86 feet South and 47.52 feet East from the Northwest corner of the Northeast quarter of said Section 27 and running thence South 49.5 feet, thence East 846.25 feet to the Brigham Young Ditch; thence North 27°06' West along said ditch 55.63 feet; thence West 821.10 feet to the place of BEGINNING.

507/5215 PM 861

17

## Appendix 2

SEP 7 1994

L. BENSON MABEY (#A2035)  
MURPHY, TOLBOE & MABEY  
124 South 600 East, Suite 100  
Salt Lake City, Utah 84102  
Telephone: (801) 533-8505

SALT LAKE COUNTY  
By *[Signature]*

Attorneys for Plaintiff John C. Sittner

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

JOHN C. SITTNER	)	
	)	
Plaintiff,	)	ORDER SETTING ASIDE AND
	)	VACATING PRIOR ORDER GRANTING
vs.	)	PARTIAL SUMMARY JUDGMENT FOR
	)	DEFENDANTS SCHRIEVER & GILDEAS
	)	AND ORDER GRANTING PARTIAL
KAREN H. SCHRIEVER, TRUSTEE	)	SUMMARY JUDGMENT TO PLAINTIFF
OF THE KAREN H. SCHRIEVER	)	
FAMILY TRUST, BRUCE GILDEA	)	
SHIRLYNN GILDEA and JOY	)	Civil No. 930904459 CV
HALE,	)	
	)	JUDGE Homer F. Wilkinson
Defendants.	)	

Defendant Joy Hale's motion for summary judgment and Plaintiff John C. Sittner's motion to alter or amend the court's prior ruling and order granting partial summary judgment in favor of Defendants Karen H. Schriever and Bruce Gildea and Shirlynn Gildea, came on for hearing before the court on August 19, 1994 at the hour of 10:00 a.m. L. Benson Mabey appeared as counsel for Plaintiff, John C. Sittner; William D. Marsh appeared as counsel for Defendant, Karen H. Schriever; and, Grant W.P. Morrison appeared as counsel for Defendants, Bruce Gildea and Shirlynn Gildea. Randall E. Grant was unable to appear, but Grant W.P. Morrison acted with his permission on his

behalf with respect to the matters before the court.

### I. PROCEDURAL BACKGROUND

Plaintiff commenced this action contending that he held a judgment lien against certain real property, which Defendants Gildeas and Defendant Schriever have or claim an ownership interest in and seeking, inter alia, declaratory relief under Utah Code Ann. § 78-33-2 to determine the rights, claims or interest of the parties in the subject real property.

Both Defendants Schriever and Gildeas filed answers that affirmatively asserted, inter alia, that the judgment was extinguished by Bruce Gildea's prior Chapter 7 bankruptcy proceedings and discharge order. After Plaintiff sent out one set of interrogatories and request for documents to each of the Defendants and answers were received, Defendant Schriever filed a motion for summary judgment seeking dismissal of Plaintiff's Complaint and an award of attorney's fees and costs under § 78-27-56. In response Plaintiff filed a cross motion for partial summary judgment that the judgment and lien were valid and that execution proceedings should be completed. Defendants Gildeas responded by filing a cross motion for summary judgment seeking the same relief as Defendant Schriever.

On April 26, 1994, the court heard oral arguments and announced its ruling that the effect of Bruce Gildea's discharge in bankruptcy was to extinguish the debt which extinguished the

judgment and lien as well. The court also ruled that the suit was not well taken and was frivolous and therefore the court ruled that Defendants Gildeas and Schriever were entitled to reasonable attorney fees under Utah Code Ann. § 78-27-56.

Following the court's announced ruling, Defendant Joy Hale filed a motion for summary judgment also seeking an award of attorney's fees from Plaintiff under UCA § 78-27-56. Defendant Schriever's counsel prepared proposed findings of fact and conclusions of law and Plaintiff filed objections to the proposed findings and conclusions. However, at a hearing on May 18, 1994, the court declined to adopt the proposed findings and conclusions, but entered a partial judgment excluding the amount of attorney fees to be awarded Defendants.

Thereafter, Defendants submitted affidavits setting forth their claim for attorney's fees and Plaintiff submitted an opposing affidavit and objected to the entry of attorney's fees and filed a motion pursuant to Rules 54(b) and 59 U.R.C.P. to alter or amend the court's prior ruling and partial judgment and submitted a supporting memorandum. Defendants submitted opposing memorandum and the matter was heard before the court.

## **II. BASIS FOR COURT'S RULING AND ORDER**

The court determined that it was appropriate to reconsider it's prior ruling granting partial summary judgment in favor of Defendants Schriever and Gildeas. The court having reconsidered

such ruling and evaluated the memoranda of the parties in support and opposition thereto, determined that it's prior ruling was based upon an error in law and that the partial summary judgment based thereon should be set aside and vacated.

The court determined that Defendant Bruce Gildea's prior bankruptcy and bankruptcy discharge order did not render Plaintiff's Sittner's judgment lien invalid, nor was the judgment lien avoided in the course of the bankruptcy proceedings and the effect of the prior stipulation made between the Gildea bankruptcy trustee and Sittner's attorney reserved the judgment lien on the specific real property which is the subject matter of this action.

Since such judgment lien was not affirmatively avoided as a result of the bankruptcy proceedings, the court concludes that under applicable case law such judgment and lien survived the Gildea bankruptcy case and discharge order and is an enforceable lien against the specific real property, at least in rem, and that partial summary judgment should be granted in favor of Plaintiff Sittner that the judgment lien survived the bankruptcy and that execution proceedings could be completed or issued for purposes of such judgment lien as against the specific real property that the lien had attached to prior to the bankruptcy petition of Defendant Bruce Gildea.

The court expressly reserves and makes no ruling upon the statute of limitations period respecting such judgment lien and

reserves and makes no ruling upon any claims between the parties as to priority of the judgment lien as between the interests of Plaintiff and Defendant Schriever, nor upon the amount of the judgment secured by the lien.

**BASED ON THE FOREGOING**, the court does now make and enter the following orders:

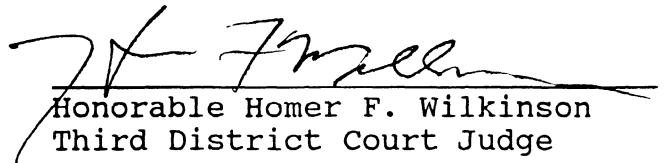
1. The court's prior order of partial judgment signed on May 18, 1994 is set aside and vacated and is of no further force and effect.

2. Plaintiff's judgment and lien were a valid and subsisting judgment lien against the specific real property involved in the subject action and such judgment and lien survived the bankruptcy case and discharge order of Defendant Bruce Gildea.

3. That further proceedings may be taken by the parties respecting the remaining issues and claims involved in the pending action in accordance with the court's above stated ruling and orders herein.

DATED this 7 day of Sept, 1994.

BY THE COURT:

  
Honorable Homer F. Wilkinson  
Third District Court Judge

L. BENSON MABEY (#A2035)  
MURPHY, TOLBOE & MABEY  
124 South 600 East, Suite 100  
Salt Lake City, Utah 84102  
Telephone: (801) 533-8505

Attorneys for Plaintiff John C. Sittner

---

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

---

JOHN C. SITTNER	)	
	)	
Plaintiff,	)	CERTIFICATE OF SERVICE
	)	
vs.	)	
	)	
KAREN H. SCHRIEVER, TRUSTEE	)	Civil No. 930904459 CV
OF THE KAREN H. SCHRIEVER	)	
FAMILY TRUST, BRUCE GILDEA	)	JUDGE Homer F. Wilkinson
SHIRLYNN GILDEA and JOY	)	
HALE,	)	
	)	
Defendants.	)	

---

I, the undersigned, hereby certify that on the date hereof,  
I mailed a true and correct copy of the: **proposed ORDER SETTING  
ASIDE AND VACATING PRIOR ORDER GRANTING PARTIAL SUMMARY JUDGMENT  
TO DEFENDANTS SCHRIEVER & GILDEAS AND ORDER GRANTING PARTIAL  
SUMMARY JUDGMENT TO PLAINTIFF**, by depositing the same in U.S.  
mails, postage prepaid, addressed to the following parties:

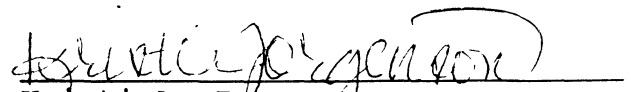
Grant W. P. Morrison  
Attorney for Defendants Bruce Gildea  
& Shirlynn Gildea  
1200 East 3300 South  
Salt Lake City, Utah 84106



William D. Marsh  
Attorney for Karen H. Schriever  
One Utah Center, Suite 900  
201 South Main  
Salt Lake City, Utah 84111

Randall E. Grant  
GRANT & GRANT, A.P.C.  
Attorneys for Defendant Joy Hale  
349 South 200 East, Suite 410  
Salt Lake City, Utah 84111

DATED this 19th day of August, 1994.

  
Kristi A. Jorgenson

## Appendix 3

Third Judicial District

OCT 9 1995

SALT LAKE COUNTY

L. BENSON MABEY (#A2035)  
MURPHY, TOLBOE & MABEY  
124 South 600 East, Suite 100  
Salt Lake City, Utah 84102  
Telephone: (801) 533-8505

Attorneys for Plaintiff John C. Sittner

---

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

---

JOHN C. SITTNER	)	
	)	
Plaintiff,	)	ORDER STAYING PROCEEDINGS
	)	
vs.	)	
	)	
KAREN H. SCHRIEVER, TRUSTEE	)	
OF THE KAREN H. SCHRIEVER	)	
FAMILY TRUST, BRUCE GILDEA	)	
SHIRLYNN GILDEA and JOY	)	Civil No. 930904459 CV
HALE,	)	
	)	JUDGE Homer F. Wilkinson
Defendants.	)	

---

Plaintiff John C. Sittner's objections to findings and conclusions and motion to alter or amend findings, conclusions and judgment and motion for a stay, came on for hearing before the Court on September 26, 1995 at the hour of 8:00 a.m. L. Benson Mabey appeared as counsel for Plaintiff, William Morrison appeared as counsel for Defendants Bruce and Shirlynn Gildea, William Marsh appeared as counsel for Defendant Karen H. Schriever and Randy Grant appeared as counsel for Defendant Joy Hale. The Court reviewed the moving and opposing memoranda submitted by the parties and heard oral argument from counsel for the parties and was then fully advised in the premises and

ready to rule.

The Court acknowledged that its ruling at the hearing on June 28, 1995 granting summary judgment for Defendants of dismissal with an award of attorney's fees against Plaintiff, was based upon the order entered by the United States Bankruptcy Court on June 14, 1995 in Case No. 86A-20168, and that since the entry of the bankruptcy order, Plaintiff moved the U.S. District Court for a stay of the effect of the bankruptcy order and the U.S. District Court entered an order on August 31, 1995 in Case No. 2:95CV664C (consolidated with Case No. 95-CV-613C) that stayed the effect of the bankruptcy court's order during the pendency of the appeal and review by the U.S. District Court. The Court determined that the effect of the stay order prevents issue preclusion based on the bankruptcy order until the completion of the U.S. District Court's review and accordingly serves as a sound and proper basis for staying further proceedings in this action pending the outcome of such appellate review. Based thereon and good cause appearing:

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:**

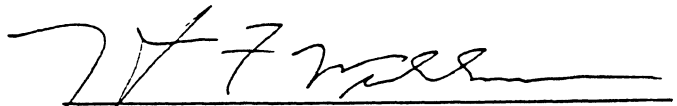
1. The findings of fact and conclusions of law and judgment signed by this court on August 15, 1995 are suspended and fully stayed as to any effect and all further proceedings in this case are stayed pending the completion by the U.S. District Court of its appellate review of the bankruptcy court's order of June 14, 1995, such review taking place under the case caption

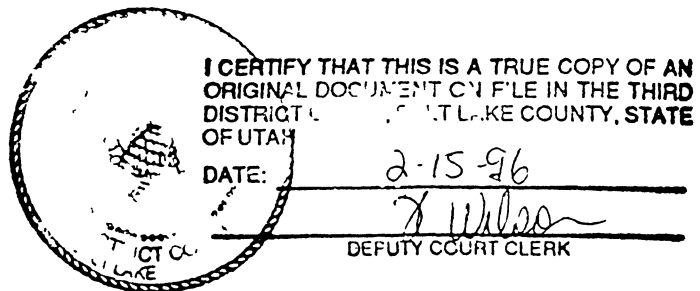
John C. Sittner v. Bruce L. Gildea, Case No. 2:95CV664C  
(consolidated with Case No. 95-CV-613C).

2. The Court directs that if the U.S. District Court affirms the bankruptcy judge's order, then the parties shall confer upon Plaintiff's objections to the proposed findings of fact and conclusions of law and if the parties are unable to agree upon them then further proceedings before the Court may be taken. If the U.S. District Court reverses or otherwise vacates the bankruptcy court's order, then the findings of fact, conclusions of law and judgment based thereon shall also be vacated and the parties may then apply for further proceedings in this case.

DATED this 10 day of Oct., 1995.

BY THE COURT:

  
Honorable Homer F. Wilkinson  
Third District Court Judge



## Appendix 4

Grant W. P. Morrison 3666  
Morrison & Morrison, L.C.  
352 East 900 South  
Salt Lake City, Utah 84111  
Telephone: (801) 359-7999  
Facsimile: (801) 359-1774

FILED DISTRICT COURT  
Third Judicial District

MAR 25 1997

SALT LAKE COUNTY

IN THE THIRD DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

JOHN C. SITTNER,	:	
Plaintiff,	:	JUDGMENT
vs.	:	
KAREN H. SCHRIEVER, TRUSTEE	:	
OF THE KAREN H. SCHRIEVER	:	
FAMILY TRUST, BRUCE GILDEA	:	
SHIRLYNN GILDEA and JOY	:	
HALE,	:	Civil No. 930904459cv
Defendants.	:	Judge Homer F. Wilkinson

---

The above entitled matter came on for hearing on defendant Karen H. Schriever's Third Motion for Summary Judgment, defendants Bruce and Shirlynn Gildea's Motion to Reinstate Findings of Fact, Conclusions of Law and Judgment entered August 15, 1995, and on plaintiff John C. Sittner's Motion for Partial Summary Judgment, on the 25th day of February, 1997, at the hour of 8:00 a.m., before the Honorable Homer F. Wilkinson in Room 502, Courts Building, 240 East 400 South, Salt Lake City, Utah. L. Benson Mabey appeared as counsel for plaintiff John C. Sittner. William D. Marsh appeared as counsel for Defendant Karen H. Schriever. Grant W. P. Morrison appeared as counsel for Defendants Bruce and Shirlynn Gildea, and Randall E. Grant appeared as counsel for Defendant Joy Hale. The

court having heard and considered oral arguments of counsel and having read and considered the pleadings, affidavits, memoranda of authority, exhibits and all other documents on file in this action and being fully apprised in the premises and having read into the record the basis for its opinion, and having entered its FINDINGS OF FACT AND CONCLUSIONS OF LAW, and good cause appearing, NOW HEREBY ORDERS, ADJUDGES, AND DECREES:

1. Plaintiff's complaint against all named defendants herein is hereby dismissed on its merits and with prejudice.

2. Plaintiff's complaint against all named defendants herein is barred by the statute of limitations.

3. Defendants are herewith awarded their costs and reasonable attorney fees pursuant to Utah Code Ann. 78-27-56. The amounts of attorney fees is preserved for later determination by this Court and are to be limited to proceedings in this case and are not to include any fees incurred in other actions before the U.S. Bankruptcy Court or U.S. District Court.

DATED this 25 day of March, 1997.

BY THE COURT:

  
\_\_\_\_\_  
Judge Homer F. Wilkinson



Grant W. P. Morrison 3666  
Morrison & Morrison, L.C.  
352 East 900 South  
Salt Lake City, Utah 84111  
Telephone: (801) 359-7999  
Facsimile: (801) 359-1774

FILED DISTRICT COURT  
Third Judicial District

MAR 25 1997

By Salme SALT LAKE COUNTY

IN THE THIRD DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

JOHN C. SITTNER,	:	
Plaintiff,	:	FINDINGS OF FACT AND
vs.	:	CONCLUSIONS OF LAW
KAREN H. SCHRIEVER, TRUSTEE	:	
OF THE KAREN H. SCHRIEVER	:	
FAMILY TRUST, BRUCE GILDEA	:	
SHIRLYNN GILDEA and JOY	:	
HALE,	:	Civil No. 930904459cv
Defendants.	:	Judge Homer F. Wilkinson

---

The above entitled matter came on for hearing on defendant Karen H. Schriever's Third Motion for Summary Judgment, defendants Bruce and Shirlynn Gildea's Motion to Reinstate Findings of Fact, Conclusions of Law and Judgment entered August 15, 1995, and on plaintiff John C. Sittner's Motion for Partial Summary Judgment, on the 25th day of February, 1997, at the hour of 8:00 a.m., before the Honorable Homer F. Wilkinson in Room 502, Courts Building, 240 East 400 South, Salt Lake City, Utah. L. Benson Mabey appeared as counsel for plaintiff John C. Sittner. William D. Marsh appeared as counsel for Defendant karen H. Schriever. Grant W. P. Morrison appeared as counsel for Defendants Bruce and Shirlynn Gildea, and Randall E. Grant appeared as counsel for Defendant Joy Hale. The

court having heard and considered oral arguments of counsel and having read and considered the pleadings, affidavits, memoranda of authority, exhibits and all other documents on file in this action and being fully apprised in the premises and having read into the record the basis for its opinion, and good cause appearing, DOES HEREBY MAKE AND ENTER THE FOLLOWING:

FINDINGS OF FACT

1. On or about February 20, 1981, Defendant Joy Hale, as seller, entered into a Uniform Real Estate Contract with Defendants Bruce Gildea and shirlynn Gildea, as buyers. Under the terms of the contract Ms. Hale agreed to sell and the Gildeas agreed to buy a house and lot located in Salt Lake County at 2400 East 3000 South.

2. On November 25, 1985, Plaintiff John C. Sittner obtained judgment against Defendant Bruce Gildea and others in the amount of \$30,598.35 together with an award of costs, attorney's fees of \$3,250.00 and interest at the rate of 20% per annum.

3. In January of 1986 Defendant Bruce Gildea, filed bankruptcy proceedings in the United States Bankruptcy Court for the District of Utah.

4. Plaintiff Sittner and his attorney L. Benson Mabey filed a claim with the United States Bankruptcy Court as unsecured creditors based upon Sittner's judgment.

5. During the course of Defendant Bruce Gildea's bankruptcy, Bankruptcy Trustee, Duane H. Gillman, filed an Adversarial Complaint, under Section 547(c) of the Bankruptcy Code, to avoid the judgment lien asserted by Plaintiff Sittner alleging the same

constituted a preferential transfer in violation of the Bankruptcy Code. Plaintiff through his attorney L. Benson Mabey thereupon entered into a stipulation with Trustee Gillman agreeing to the following terms:

"1. The Defendant, John C. Sittner, waives any right to assert a secured claim in and to any property of this estate or any funds which constitute proceeds of property of this estate and acknowledges that any and all claim he has is an unsecured, pre-petition claim. Defendants rights respecting property abandoned by the estate or not administered by closing are preserved and unaffected hereby."

6. Plaintiff John C. Sittner thereupon secured payment of \$4,302.99 from Trustee Gillman as Sittner's share of distribution to unsecured creditors on his claim of \$36,228.73.

7. On December 14, 1987, U.S. Bankruptcy Judge John H. Allen entered a DISCHARGE OF DEBTOR Order discharging Defendant Bruce Gildea from all personal liability under Plaintiff Sittner's judgment.

8. On February 19, 1988 Bankruptcy Judge John H. Allen issued an order vacating the Automatic Stay as to secured creditor Joy Horsley (Hale) and the subject property.

9. In January of 1992, Defendant Joy Hale sold her interest in the subject Uniform Real Estate Contract to Defendant Karen H. Schriever for the unpaid balance of the contract as discounted for cash.

10. On August 3, 1992 Defendant Hale Conveyed and Warranted clear title to the property to Karen H. Schriever, Trustee of the Karen H. Schriever Family Trust, dated July 20, 1992. Upon purchase

of the vendor's interest in the subject property Defendant Schriever assumed Mrs. Hale's position as contract seller to the Gildeas.

11. On June 28, 1993 Plaintiff Sittner brought action to impress the subject realty with a judgment lien "as a valid and subsisting first lien against a one-half undivided interest in the subject property", asserting said judgment lien had an "unpaid balance" of \$90,197.40 with interest accruing at the rate of 20% per annum.

12. In a companion cause of action Plaintiff Sittner alleged that Defendant Schriever's purchase, from Defendant Hale, of the vendor interest in the subject Uniform Real Estate Contract "constituted fraudulent transfers or arrangements under the Utah Uniform Fraudulent Transfer Act, Utah Code Ann. Section 25-6-1 et seq" and that the Warranty Deed from Hale to Schriever was issued "with actual intent to hinder, delay or defeat" the judgment lien claimed by Plaintiff Sittner.

13. There has been no conveyance of any sort by Defendant Bruce Gildea, of his one half interest in the subject property. The Gildeas retain a vendee's interest under the installment purchase contract and continue to occupy the subject property as their family residence.

14. Defendant Bruce Gildea is not insolvent and he has no indebtedness to Plaintiff John C. Sittner.

15. Plaintiff Sittner's judgment was entered November 25, 1985. Enforcement of the judgment has at no time been stayed by/on

appeal and no action to renew the judgment has been undertaken.

16. The eight (8) year statutory period for foreclosing Plaintiff's judgment lien has expired, notwithstanding any tolling periods that could have been caused by Bruce Gildea's bankruptcy.

#### CONCLUSIONS OF LAW

1. Plaintiff Sittner knew, or should have known, that his judgment lien and claim of a secured interest in Bruce Gildea's estate was waived during the course of Bruce Gildea's bankruptcy. Mr. Sittner stipulated to avoidance of the judgment lien in order to participate in the distribution to unsecured creditors.

2. Plaintiff is not a creditor of any named defendant and has no basis in law to contest any transfer of property by any of them. Plaintiff had no grounds for suing defendants Hale and Schriever for fraudulent transfer of property.

3. Had the claimed judgment lien survived the Gildea bankruptcy, enforcement of the lien would have been barred by the statute of limitations for foreclosing judgment liens.

4. Plaintiff's claims are without merit and not asserted in good faith.

5. There are no genuine issues of material fact and defendants are entitled to judgment as a matter of law.

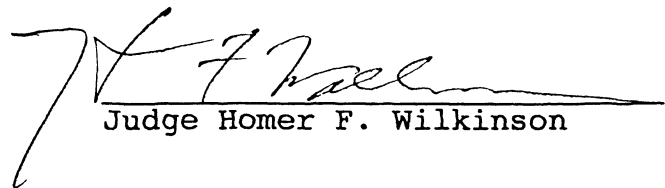
6. Defendant Karen H. Schriever's Third Motion for Summary Judgment should be, and is hereby, granted. Plaintiff's Motion for Partial Summary Judgment should be, and is hereby, denied. All other motions pending before the court, including motions to take

depositions and compel further discovery, are rendered moot.

7. Judgment should be granted against Plaintiff dismissing this action with prejudice and awarding all defendants reasonable attorney fees incurred in the defense of this action as provided under Utah Code Ann. 78-27-56, as amended. Attorney's fees are to be limited to proceedings in this case and are not to include any fees incurred in other actions before the U.S. Bankruptcy Court or U.S. District Court.

DATED this 25 day of March, 1997.

BY THE COURT:

  
Judge Homer F. Wilkinson

## Appendix 5

FEB 23 1997

8789  
SALT LAKE COUNTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN C. SITTNER, : REPORTER'S PARTIAL  
Plaintiff, : TRANSCRIPT OF HEARING  
vs. : ON SUNDRY MOTIONS:  
KAREN H. SCHRIEVER, : COURT'S RULING  
TRUSTEE OF THE KAREN H. SCHRIEVER  
FAMILY TRUST, BRUCE GILDEA, : Case No. 930904459  
SHIRLYNN GILDEA, AND JOY HALE, : Hon. Homer F. Wilkinson  
Defendants. :

BE IT REMEMBERED that on the 25<sup>th</sup> day of February,  
1997, the above-entitled matter continued in hearing session in Courtroom No.  
502 of the Courts Building, Metropolitan Hall of Justice, 240 East 400 South, Salt  
Lake City, Utah before the Honorable Homer F. Wilkinson, Judge in the Third  
Judicial District, State of Utah.

APPEARANCES

L. Benson Mabey, Attorney-at-Law, Murphy, Tolboe &  
Mabey, 124 South 600 East, Suite 100, Salt Lake City, UT 84102 Telephone  
533-8505 appearing on behalf of the Plaintiff.

William D. Marsh, Attorney-at-Law, One Utah Center, Suite  
900, 201 South Main Street, Salt Lake City, UT 84111 Telephone 535-4659  
appearing on behalf of Defendant Karen H. Schriever.



1                    Grant W.P. Morrison, Attorney-at-Law, 1200 East 3300  
2 South, Salt Lake City, UT 84106 Telephone 485-7999 appearing on behalf of  
3 Defendants Gildea.

4                    Randall E. Grant, Attorney-at-Law, 349 South 200 East,  
5 Suite 410, Salt Lake City, UT 84111 appearing on behalf of Defendant Joy  
6 Hale.

7

8

9

10                    (Whereupon, the following proceedings continued in open  
11 court : )

12                    THE COURT: Counsel, I've spent considerable time on this  
13 case in the last weeks in going over what has taken place, and my actions in it.  
14 It appears this court has waived somewhat as far as its decision in the case,  
15 and maybe caused some concern.

16                    Of course I don't think that what Mr. Mabey says as far as  
17 collateral estoppel is the only condition under which I granted the summary  
18 judgment of August 15<sup>th</sup>, although there's no question that the bankruptcy court  
19 had taken a stand on the case, and I felt they had more jurisdiction than this  
20 court did.

21                    It appears that the federal district judge who dealt with the  
22 question said the state court should make the decision on it, and that's fine; I  
23 have no problem with that. It's before me.

24                    I'm going to make a decision, and this is notwithstanding the  
25 other decision that may have been made in this case.

1 I'm going to grant to the defendant their third motion for  
2 summary judgment. I think it is well-taken. It was the way the court reasoned  
3 earlier, and the court reversed itself. I'm persuaded, as I pulled the cases and  
4 looked at them, and I'm also persuaded – and I did not rule on the statute of  
5 limitations before – that what counsel has said, counsel for the defendant, as far  
6 as the statute of limitations, the limitation has run on this, and the court is  
7 granting the motion for summary judgment on the merits of the case as well as  
8 the statute of limitations, and also awarding attorneys fees and costs to the  
9 defendant.

10 Now, with this ruling, I know that there are four, five, six  
11 other motions, as far as motions to take depositions and motions to compel and  
12 motions for further discovery and so forth. I think all of those become moot.

13 Now, if you think I have to go down each one of those, and  
14 rule on them, I will. I don't think it's necessary. I think all the other motions are  
15 moot in the case and I think that disposes of the case as far as this level is  
16 concerned.

17 Now, as I say, I have awarded attorneys fees. I remember  
18 the last time we talked about them, but I'm going to award a reasonable  
19 attorneys fee, and I expect counsel to be reasonable. I want attorneys fees only  
20 for what has taken place in this case, not the case in the federal district court.  
21 Those are not attorneys fees awardable by this particular court.

22 Now, I would anticipate that the attorneys fees are going to  
23 be higher than they should be because of the fact that they have been back and  
24 forth in this court, and that concerns me. I'm sorry for it, but that's the way it falls  
25 at this point. Any questions?

1 MR. MABEY: Your Honor, did you state the reason for your  
2 granting was – not the statute of limitations; I understand that – but you also  
3 granted the third motion for summary judgment for other reasons?

4 THE COURT: I'm sorry?

5 MR. MABEY: I take it that you're basing that on the opinion  
6 of the bankruptcy judge?

7 THE COURT: No, no. I'm basing that on the merits of the  
8 case. Of course I've read the bankruptcy judge's decision, and, as I say, that  
9 goes into the consideration, but no, I have gone back, I have pulled this matter  
10 and looked at the cases, and I'm ruling on the merits.

11 MR. MABEY: And that judgment was waived in the prior  
12 bankruptcy case.

13 THE COURT: Yes, yes.

14 MR. MABEY: Okay.

15 MR. GRANT: Your Honor, you mentioned "the defendants."  
16 You're including Joy Hale in that.

17 THE COURT: I am. Who's going to prepare the pleadings?

18 MR. MORRISON: I'll prepare it, excuse me, your Honor.

19 THE COURT: Thank you, counsel.

20 MR. MORRISON: Thank you, your Honor.

21 (Whereupon, at the approximate hour of 8:40 a.m., the  
22 instant proceedings came to a close.)

23

24

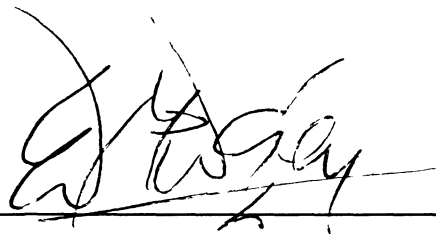
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

REPORTER'S CERTIFICATE

I, Ed Midgley, Official Court Reporter in the Third Judicial District, State of Utah, do hereby certify that the above and foregoing proceedings were, by me, stenographically reported at the times and places herein set forth; that said report was, by me subsequently reduced to printed form, consisting of the enumerated pages hereinbefore appearing; and that said report so transcribed constitutes a true and correct transcription of testimony given, evidence adduced and/or proceedings had as in the foregoing transcript hereinabove appended; portion only of entire proceedings being herein transcribed, pursuant to requested transcript content.

To which certification I hereby set my hand this 26<sup>th</sup> day of February, 1997, at Salt Lake City.

A handwritten signature in dark ink, appearing to read 'Ed Midgley', is written over a horizontal line.

Ed Midgley, Official Court Reporter

Utah CSR No. 22-104249-7801

## Appendix 6

*This opinion is subject to revision before final  
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo0oo-----

John C. Sittner,  
Plaintiff and Petitioner,

No. 981776

v.

Karen H. Schriever, Trustee of  
the Karen H. Schriever Family  
Trust; Bruce Gildea; Shirlynn  
Gildea; and Joy Hale,  
Defendants and Respondents.

F I L E D

May 19, 2000

---

Third District, Salt Lake County  
The Honorable Homer F. Wilkinson

Attorneys: L. Benson Mabey, Salt Lake City, for Sittner  
William D. Marsh, Salt Lake City, for Schriever  
Grant W. P. Morrison, Salt Lake City, for the Gildeas  
Randall E. Grant, Salt Lake City, for Hale

---

On Certiorari to the Utah Court of Appeals

RUSSON, Associate Chief Justice:

¶1 Plaintiff John Sittner seeks review of the court of appeals' denial of his petition for rehearing of a decision that dismissed Sittner's appeal as untimely.

#### BACKGROUND

¶2 This case arises from a judgment that John Sittner obtained against Bruce Gildea in November 1985 and a judgment lien Sittner thereafter filed upon Gildea's real property. In January 1986, Gildea filed a bankruptcy petition, which suspended the execution sale of his property. After the bankruptcy proceedings concluded, Gildea remained in possession of the property.

¶3 Sittner then filed a declaratory judgment action in the district court against Gildea and others (collectively, "defendants") who allegedly possessed an interest in the subject property. Sittner sought a declaration that his judgment lien was still attached to the property and that he was entitled to complete the execution sale. Defendants argued that Sittner's lien did not survive Gildea's discharge in bankruptcy. Sittner and defendants filed motions for summary judgment, which resulted in a series of judgments not pertinent to this appeal.

¶4 On March 25, 1997, the trial court granted summary judgment in favor of defendants. Concluding that Sittner's judgment lien did not survive the bankruptcy, the court dismissed Sittner's complaint and ordered Sittner to pay defendants' costs and reasonable attorney fees. The court expressly reserved the amount of attorney fees for later determination.

¶5 At a fee hearing on June 11, 1997, the parties submitted to the trial court that they intended to stipulate to the amount of attorney fees. Sittner would not stipulate, however, to defendants' entitlement to attorney fees. The trial court requested that defendant Karen Schriever's counsel, William M. Marsh, prepare an appropriate stipulation along with a judgment to supplement the original March 25 judgment, incorporating the stipulated amount of attorney fees to be awarded to defendants. Marsh prepared the stipulation and presented it to Sittner's counsel, Lynn Benson Mabey, for review. Mabey made and initialed handwritten changes to the stipulation and signed the appended signature page.

¶6 Thereafter, Marsh created a revised typewritten copy of the stipulation that incorporated some, but not all, of Mabey's handwritten changes and included additional material that was not present in the original stipulation. Marsh then appended to the second stipulation the signature page from the original stipulation that Mabey had signed and filed it with the court along with a corresponding supplemental judgment specifying the amount of attorney fees to be awarded. Marsh did not provide a copy of this second stipulation to Mabey. The trial court signed the supplemental judgment specifying the fee award on June 27, 1997.

¶7 On July 25, 1997, Sittner moved, pursuant to rule 60(b) of the Utah Rules of Civil Procedure,<sup>1</sup> to vacate the stipulation

---

<sup>1</sup> This rule states in pertinent part:

Rule 60. Relief from judgment or order.

(Continued on next page.)

and the June 27 supplemental judgment that proceeded from it. Sittner alleged as the basis for his rule 60(b) motion that Marsh had fraudulently altered the stipulation. On the same basis, Sittner also moved for sanctions against Marsh pursuant to rule 11 of the Utah Rules of Civil Procedure.

¶8 While Sittner's rule 60(b) motion was pending, Sittner requested from the trial court two fifteen-day extensions of the time for filing a notice of appeal from the June 27 supplemental judgment.<sup>2</sup> The court granted both requests, on July 28 and August 11, respectively, and extended the time for filing an appeal to August 26, 1997. Sittner did not file a notice of appeal before the August 26 deadline.

¶9 On August 25, 1997, the day before the time for filing an appeal was to expire, the court held an informal hearing with Mabey and Marsh in the form of a telephone conference. Marsh conceded that the original stipulation with Mabey's handwritten revisions was the stipulation to which the parties had agreed. The court stated that, prior to making a decision on the rule 60(b) motion, it would be necessary to compare the original stipulation including the handwritten revisions with the second stipulation filed by Marsh. The court directed Mabey to submit a redlined copy of the stipulation highlighting the differences between the two stipulations. The court concluded in the course of the hearing that it would be appropriate to vacate the June 27 supplemental judgment pending further consideration of Sittner's rule 60(b) motion, and requested that Mabey prepare an appropriate order. On September 29, 1997, this order was

---

<sup>1</sup> (Footnote continued.)

. . . . .  
(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: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party . . . .

Utah R. Civ. P. 60(b).

<sup>2</sup> Utah Rule of Appellate Procedure 4(e) permits the trial court, upon a showing of excusable neglect or good cause, to extend the time for filing a notice of appeal up to an additional thirty days.



entered, vacating the June 27 supplemental judgment, which fixed the amount of attorney fees, but leaving intact the March 25 judgment dismissing Sittner's complaint and awarding attorney fees.

¶10 On October 21, 1997, after considering Sittner's rule 60(b) motion, his motion for rule 11 sanctions, and his submission of the changes made to the stipulation, the court entered an order (1) denying the motion to set aside the stipulation, provided that the stipulation be corrected to conform with the language to which the parties originally agreed, and (2) denying the motion for rule 11 sanctions.<sup>3</sup> In addition, the court issued a new supplemental judgment awarding attorney fees. This October 21 supplemental judgment, based on the corrected stipulation, fixed the amount of attorney fees to be awarded to defendants.

¶11 Finally, on November 14, 1997, Sittner filed a notice of appeal in which he stated that his appeal was from "the entire judgment, including the Summary Judgment entered March 25, 1997." Sittner's appeal was transferred to the court of appeals, which filed a memorandum decision dismissing Sittner's appeal as untimely. The court of appeals based its dismissal upon Taylor v. Hansen, 958 P.2d 923 (Utah Ct. App. 1998), which held that an order is final "even though the issue of the amount of fees to be awarded [is] still pending before the trial court as of the date the notice of appeal was filed." Id. at 928. The court of appeals reasoned that under Taylor, Sittner was precluded from appealing the March 25 judgment because he did not file a separate notice of appeal within thirty days of that judgment. Additionally, the court of appeals concluded that Sittner was not entitled to appeal the June 27 supplemental judgment because his rule 60(b) motion did not toll the time for filing an appeal from that judgment. After the court of appeals dismissed, Sittner filed a petition for rehearing which the court of appeals denied.

¶12 Before this court on certiorari, Sittner seeks reversal of the court of appeals' ruling. He argues that (1) this court should expressly overrule Taylor; (2) the notice of appeal was properly filed from the October 21 supplemental judgment; (3) this court can now reach the merits of this case; and

---

<sup>3</sup> In this order, the trial court also "affirmed" the September 29 order vacating the June 27 supplemental judgment, apparently upon the belief that it was necessary to do so because the September 29 order was entered "pending further review" of Sittner's rule 60(b) motion.

(4) sanctions should be imposed against Marsh and damages awarded to Sittner.

¶13 Defendants contend that (1) under Taylor, Sittner failed to timely appeal from the March 25 judgment; (2) even disregarding Taylor, Sittner's appeal was untimely because he failed to file a separate notice of appeal from the June 27 supplemental judgment; (3) Sittner failed to preserve below the issues he raises on appeal; (4) defendants are entitled to damages because Sittner's appeal is frivolous; and (5) sanctions should be imposed against Mabey for making false representations.

#### STANDARD OF REVIEW

¶14 "'On certiorari, we review the decision of the court of appeals, not the decision of the trial court.'" Bear River Mut. Ins. Co. v. Wall, 1999 UT 33, ¶4, 978 P.2d 460 (quoting State v. Harmon, 910 P.2d 1196, 1199 (Utah 1995)). We review the court of appeals' legal conclusions for correctness and grant them no deference. See Reese v. Reese, 1999 UT 75, ¶10, 984 P.2d 987.

#### ANALYSIS

##### I. PRESERVATION OF THE ISSUES

¶15 Before we examine the court of appeals' decision, we must resolve whether Sittner failed to preserve below the issues he now raises on appeal. Defendants contend that to preserve the right to appeal from the March 25 judgment or the June 27 supplemental judgment, it was necessary for Sittner to file post-judgment motions with the trial court specifically objecting to those judgments. We disagree.

¶16 Defendants correctly state the general rule that failure to raise an argument before the trial court precludes a party from raising that argument on appeal. See Malibu Inv. Co. v. Sparks, 2000 UT 30, ¶34, 388 Utah Adv. Rep. 3. However, this rule does not require a party to file a post-judgment motion before the trial court as a prerequisite to filing an appeal. See, e.g., Dugan v. Jones, 724 P.2d 955, 956 (Utah 1986) (per curiam) ("It is settled that . . . a rule 59 motion is [not] a condition precedent to appeal from final judgment." (quoting Nature Conservancy v. Nakila, 671 P.2d 1025, 1035 (Haw. Ct. App. 1983))).

¶17 The primary issue in the instant case is whether Sittner's notice of appeal was timely filed. It would be absurd to require Sittner to raise such an issue of appellate procedure before the trial court, which would have lacked authority and

jurisdiction to decide the issue. Moreover, the merits of Sittner's appeal, which we do not address today, can be summarized as two issues: (1) whether the trial court properly granted summary judgment in favor of defendants, and (2) whether defendants are entitled to attorney fees. Sittner's arguments on these two issues are fully briefed in his own summary judgment memorandum, his memoranda in opposition to defendants' motions for summary judgment, and other pleadings filed below. He therefore preserved below the issues he now raises on appeal.

## II. TIMELINESS OF THE NOTICE OF APPEAL

¶18 We now turn to the primary issue in the instant case: whether Sittner's notice of appeal was timely filed. Specifically, we must determine whether Sittner is entitled to appeal the March 25 judgment when he did not file his notice of appeal until after the October 21 supplemental judgment was entered.

¶19 We first examine whether it was necessary for Sittner to file a notice of appeal within thirty days of the March 25 judgment. The court of appeals held that it was necessary and dismissed Sittner's appeal on this ground. The court of appeals cited Taylor v. Hansen, 958 P.2d 923, 927-28 (Utah Ct. App. 1998), which held that the time for filing an appeal begins to run from the entry of judgment even if the amount of attorney fees to be awarded has not been decided. The court of appeals' reliance upon Taylor is nullified by our recent decision in ProMax Development Corp. v. Raile, 2000 UT 4, 386 Utah Adv. Rep. 27. We held in ProMax that "in the interest of judicial economy, a trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for the purposes of an appeal." Id. at ¶15. We thus overrule Taylor and hold that under ProMax, Sittner's appeal is not precluded by his failure to file a notice of appeal within thirty days of the March 25 judgment because that judgment--which failed to fix the amount of attorney fees to be awarded--was not final for purposes of appeal.

¶20 We next must determine whether it was necessary for Sittner to file a notice of appeal from the June 27 supplemental judgment. The trial court extended the deadline for filing a notice of appeal from the June 27 supplemental judgment to August 26, 1997. Sittner did not file a notice of appeal before that deadline, but instead filed a motion pursuant to rule 60(b) of the Utah Rules of Civil Procedure. The court of appeals held that Sittner's rule 60(b) motion "did not toll the appeal period" and that, even if Taylor did not apply, the period for appealing

the March 25 judgment or the June 27 supplemental judgment expired on August 26. We disagree.

¶21 The court of appeals correctly observed that a motion filed pursuant to Utah Rule of Civil Procedure 60(b) "does not extend or toll the thirty-day period in which appeals in the original action must be filed." Fackrell v. Fackrell, 740 P.2d 1318, 1319 (Utah 1987); see also Lord v. Lord, 709 P.2d 338, 338 n.1 (Utah 1985) (per curiam) ("Rule 60(b) motions do not toll the time for appeal."); Utah R. Civ. P. 60(b) ("A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation."). Indeed, it has been noted:

An application for relief from a judgment under Rule 60(b) . . . does not extend the time for taking an appeal. Even if the court hears and denies the motion before the appeal time would have run, the appeal must be taken with the prior period measured from the date of the judgment, not from denial of the motion.

11 Charles Alan Wright et al., Federal Practice and Procedure § 2871, at 421 (2d ed. 1995).

¶22 However, the period in which to appeal a final judgment is measured differently when the trial court grants the rule 60(b) motion. Specifically, "[i]f . . . the court grants the [rule 60(b)] motion and enters a new judgment, the time for appeal will date from the entry of that judgment." Id. at 421-22. Indeed, a final, appealable order results "when the court not only relieves a party of judgment, but enters a corrected judgment so that there is nothing further to be decided by the district court." 12 Moore's Federal Practice § 60.68[2] (3d ed. 1997).

¶23 In the instant case, the trial court informed the parties at the August 25 hearing that the court was vacating the June 27 supplemental judgment. Indeed, that judgment was vacated within the appeal period, leaving no final disposition of the amount of attorney fees, and under ProMax, no final judgment from which to appeal. Sittner's only course of action was to wait until the trial court entered a new supplemental judgment that conclusively determined the amount of attorney fees. When the trial court entered the October 21 supplemental judgment, the amount of attorney fees was finally decided and the time for filing an appeal began to run. Thus, Sittner's notice of appeal, filed within thirty days of the October 21 supplemental judgment, was timely. On appeal, Sittner is entitled to seek review of the

merits of both the March 25 judgment dismissing his complaint and awarding attorney fees and the October 21 supplemental judgment fixing the amount of attorney fees, which together constituted a final appealable judgment.

### III. SANCTIONS AND DAMAGES

¶24 Both Sittner and defendants have requested sanctions and damages. Sittner requested before the trial court that sanctions be imposed against Marsh for filing the revised stipulation without Mabey's consent and without giving Mabey a copy. Defendants now argue that Mabey should be sanctioned for making allegedly false representations in his appellate brief, and seek damages for an allegedly frivolous appeal. In turn, Sittner argues that defendants' claim of a frivolous appeal is itself frivolous and requests attorney fees and costs incurred in responding thereto.

¶25 Because we review only the court of appeals' decision on certiorari, we do not address whether it was proper for the trial court to deny Sittner's request for sanctions against Marsh for filing the altered stipulation. Moreover, we deny Sittner's and defendants' additional requests for sanctions, damages, attorney fees, and costs, to the extent their requests derive from Sittner's writ of certiorari before this court.

### CONCLUSION

¶26 We reverse the decision of the court of appeals which dismissed this appeal as untimely, and remand to the court of appeals for review of the merits of Sittner's appeal and other appropriate action.

---

¶27 Chief Justice Howe, Justice Durham, Justice Durrant, and Justice Wilkins concur in Associate Chief Justice Russon's opinion.

## Appendix 7

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

In re

Bruce L. Gildea,

Debtor(s).

Bankruptcy Case No. 86A-00163

PROOF OF CLAIM

Please print or type. Attach additional pages if needed.

1. Claimant's name and address: John C. Sittner

350 South 400 East, Suite 110

Salt Lake City, Utah 84111

2. The debtor was on the date the bankruptcy petition was filed, and still is, indebted to this claimant in the sum of \$ 36,228.73, which includes:

\$ 33,894.65 principal (if applicable)

\$ 965.77 earned interest (if applicable) \$18.57 interest per diem

\$ 1,368.31 other (explain) post judgment execution costs and attorneys fees

3. The debtor owes this money because: \_\_\_\_\_

Judgment entered November 25, 1985

4. A copy of any writing upon which this claim is based is attached.

5. The only security interest (collateral) held for this claim is:

Judgment

\_\_\_\_\_. (attach writing, if any)

☒ X Unsecured \$ 36,228.73 plus \$18.57 per diem interest

6. The claim is ☐ Secured\* \$ \_\_\_\_\_

☐ Priority\*\* \$ \_\_\_\_\_

\$ 36,228.73

TOTAL AMOUNT CLAIMED

\*The claim is unsecured except to the extent that the security interest has value sufficient to satisfy it.

\*\*If priority is claimed, state basis under bankruptcy law: \_\_\_\_\_

DATED: 5-19-86

Signature: \_\_\_\_\_

Title: L. Benson Mabey, Attorney for Creditor  
(if not signed by claimant personally)

Claim Number  
(for office use only)

8

WARNING: Presenting a fraudulent claim in a bankruptcy case is a federal crime, bearing a penalty of a \$5,000 maximum fine and imprisonment of up to five years. 18 U.S.C. §152

## Appendix 8



Duane H. Gillman  
Janet A. Goldstein  
MCDOWELL & GILLMAN, P.C.  
8 East Broadway Suite 500  
Salt Lake City, Utah 84111  
Telephone: (801) 359-3500  
Attorneys for Plaintiff

Aug 21 4 54 PM '86

BY \_\_\_\_\_

BY \_\_\_\_\_

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

In re:

BRUCE L. GILDEA,

Debtor.

Bankruptcy Case Number  
86A-00168

[Chapter 7]

DUANE H. GILLMAN, TRUSTEE,

Plaintiff,

vs.

JOHN C. SITTNER,

Defendant,

Adversary Proceeding Number  
89PA-0220

STIPULATION

The Plaintiff, Duane H. Gillman, Trustee of the estate of the above-named Debtor, and the Defendant, John C. Sittner, by and through their respective counsels of record, hereby stipulate to dismissal of this action under the following terms:

1. The Defendant, John C. Sittner, waives any right to assert a secured claim in and to any property of this estate or any funds which constitute proceeds of property of this estate and acknowledges that any and all claim he has is an unsecured, pre-petition claim. Defendant's rights respecting property

abandoned by the estate or not administered by closing are preserved and unaffected hereby.

2. This case will be dismissed with prejudice after Court approval of the Stipulation.

DATED this 10 day of August, 1989.

hereby certify that the annexed and foregoing  
a true and complete copy of a document on  
in the United States Bankruptcy Court  
the District of Utah

Dated: 8-26-93  
Attest:

M. Wind

Deputy Clerk

Duane H. Gillman

Duane H. Gillman  
Attorney for Trustee

L. Benson Mabey

L. Benson Mabey  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

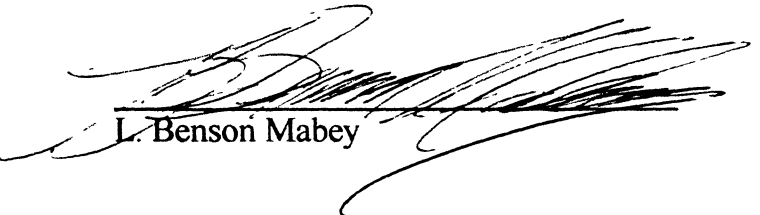
I hereby certify that I mailed a true and correct copy of ***BRIEF OF APPELLANT***, through the U.S. Mail, postage prepaid, to the following parties:

WILLIAM D. MARSH, ESQ. (#2094)  
One Utah Center, Suite 900  
201 South Main  
Salt Lake City, Utah 84111  
Telephone: (801) 535-4659  
***Attorney for Defendant/Appellee Karen H. Schriever***

GRANT W.P. MORRISON, ESQ. (#3666)  
352 East 900 South  
Salt Lake City, Utah 84111  
Telephone: (801) 359-7999  
***Attorney for Defendants/Appellees Bruce & Shirlynn Gildea***

RANDALL E. GRANT (#1235)  
GRANT & GRANT, A.P.C.  
349 South 200 East, Suite 410  
Salt Lake City, Utah 84111  
Telephone: (801) 364-7777  
***Attorney for Defendant/Appellees Joy Hale***

***DATED*** this 24<sup>th</sup> day of August, 2000.

  
L. Benson Mabey