

1997

# John C. Sittner v. Karen H. Schriever, Bruce Gildea, Shirlynn Gildea, Joy Hale : Brief of Appellee

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.

L. Benson Mabey; Murphy, Tolboe, and Mabey; Attorneys for Appellant.

William D. Marsh; One Utah Center; Randall E. Grant; Grant and Grant; Grant W.P. Morrison; Morrison and Morrison; Attorneys for Appellees .

---

## Recommended Citation

Brief of Appellee, *Sittner v. Schriever*, No. 971759 (Utah Court of Appeals, 1997).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/1304](https://digitalcommons.law.byu.edu/byu_ca2/1304)

This Brief of Appellee 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.

# IN THE UTAH COURT OF APPEALS

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 APPELLEES  
: KAREN H. SCHRIEVER  
: AND JOY HALE

:

Case No. 971759-CA

:

: (Priority No. 15)

:

:

WILLIAM D. MARSH ESQ. (#2094)  
One Utah Center, Suite 900  
201 S. Main,  
Salt Lake City, Utah 84111  
Telephone: (801) 540-6976  
Attorney for Appellee  
Karen H. Schriever

RANDALL E. GRANT, ESQ. (#1235)  
GRANT & GRANT, A.P.C.  
349 S. 200 E. Suite 410  
Salt Lake City, Utah 84111  
Telephone: (801) 364-7777  
Attorneys for Appellee Joy Hale

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

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

**FILED**  
Utah Court of Appeals

OCT 31 2000

Paulette Stagg  
Clerk of the Court

## IN THE UTAH COURT OF APPEALS

---

JOHN C. SITTNER

:

Plaintiff/Appellant

: BRIEF OF APPELLEES  
: KAREN H. SCHRIEVER  
: AND JOY HALE

vs.

:

Case No. 971759-CA

KAREN H. SCHRIEVER, TRUSTEE OF  
THE KAREN H. SCHRIEVER FAMILY  
TRUST, BRUCE GILDEA, SHIRLYNN  
GILDEA, AND JOY HALE.

:  
:  
: (Priority No. 15)  
:

Defendants/Appellees

:

---

WILLIAM D. MARSH ESQ. (#2094)  
One Utah Center, Suite 900  
201 S. Main,  
Salt Lake City, Utah 84111  
Telephone: (801) 540-6976  
Attorney for Appellee  
Karen H. Schriever

RANDALL E. GRANT, ESQ. (#1235)  
GRANT & GRANT, A.P.C.  
349 S. 200 E. Suite 410  
Salt Lake City, Utah 84111  
Telephone: (801) 364-7777  
Attorneys for Appellee Joy Hale

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

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

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
<u>Cases Cited</u> .....	ii
<u>Statutes Cited</u> .....	iii
<u>Rules Cited</u> .....	iii
STATEMENT OF THE CASE.....	1
A. <u>Nature Of The Case</u> .....	1
B. <u>Trial Court Proceedings &amp; Disposition</u> .....	4
C. <u>Appellate Proceedings and Disposition</u> .....	9
D. <u>STATEMENT OF RELEVANT FACTS</u> .....	9
<u>ARGUMENT</u> .....	11
<u>Point I</u> APPELLANT HAS NO ENFORCEABLE JUDGMENT LIEN.....	11
A. <u>Sittner's Judgment Lien and Claim of a Secured Interest In Bruce Gildea's Bankruptcy Estate was waived during the Course of Bruce Gildea's Bankruptcy</u> .....	11
B. <u>A Discharge Of Judgment Debt In Bankruptcy Extinguishes The Judgment Lien</u> .....	14
C. <u>Appellant Is Estopped To Assert A Judgment Lien</u> .....	15
D. <u>The Statutory Period For Foreclosing Sittner's Judgment Lien Expired, Notwithstanding Any Tolling Period That Could Have Been Caused By Bruce Gildea's Bankruptcy</u> .....	16
<u>Point II</u> APPELLANT FAILED TO STATE A CAUSE OF ACTION UNDER THE UNIFORM FRAUDULENT TRANSFER ACT.....	18
A. <u>There Was No Transfer Of Gildea's Interest</u> .....	18
B. <u>An Action For Declaratory Relief Should Be Brought As A Separate Action</u> .....	21

<u>Point III</u>	APPELLEES ARE ENTITLED TO ATTORNEYS FEES FOR DEFENDING A FRIVOLOUS LAW SUIT AND A FRIVOLOUS APPEAL.....	23
A.	<u>Appellant's Action Is Without Merit And In Bad Faith.....</u>	23
B.	<u>Appellees Should Be Awarded Just Damages For Frivolous Appeal.....</u>	25
<u>CONCLUSION.....</u>		26
CERTIFICATE OF SERVICE.....		27

#### TABLE OF AUTHORITIES

##### Cases Cited

<u>Adams v. Bear</u> , 350 P.2d 751.....	16
<u>Baldwin v. Burton</u> 850 P2d 1188, 1199 (Utah 1993).....	23
<u>Condas v. Condas</u> , 618 P.2d 491, 496 (Utah 1980).....	16
<u>Cox Corp. v. Vertin</u> , 754 P.2d 938, 939 (Utah 1988).....	14
<u>Utah Dep't of Social Services v. Adams</u> , 806 P.2d 1193 (Utah Ct. App. 1991).....	25
<u>Federal Farm Mortgage Corp. v. Walker</u> , 115 Utah 461, 206 P.2d 146 (Utah 1949) .....	19
<u>Lord v. Lord</u> , 709 P.2d 338 (Utah 1985).....	9
<u>Roy S. Ludlow Investment Co. v. Salt Lake County</u> 551 P.2d 1259 (Utah 1976).....	16
<u>Sailes v. Jones</u> , 499 P.2d 721 .....	16
<u>Sittner v. Big Horn Tar Sands &amp; Oil</u> , Civil No. C-82-4804, Third District Court, Salt Lake County, Utah.....	2
<u>Smith v. Schwartz</u> , 60 P.305, (Utah 1899).....	18
<u>Taylor v. Hansen</u> , 342 Utah Adv. Rep. 41,(Utah Ct. App.1998). 9	

### Statutes Cited

11 U.S.C. §108.....	17
11 U.S.C. §547.....	,. 2
Utah Code Annotated 25-6-1.....	4
Utah Code Annotated 25-6-5.....	20
Utah Code Annotated 25-6-6.....	20
Utah Code Annotated 78-22-1.....	5, 19
Utah Code Annotated 78-27-56.....	7, 18

### Rules Cited

Rule 4-508, Code of Judicial Administration.....	13
Rule 33(a), Utah Rules of Appellate Procedure.....	25

## IN THE UTAH COURT OF APPEALS

---

JOHN C. SITTNER :  
 :  
 : BRIEF OF APPELLEES  
 Plaintiff/Appellant : KAREN H. SCHRIEVER  
 : AND JOY HALE  
 vs. :  
 : Case No. 971759-CA  
 KAREN H. SCHRIEVER, TRUSTEE OF :  
 THE KAREN H. SCHRIEVER FAMILY :  
 TRUST, BRUCE GILDEA, SHIRLYNN :  
 GILDEA, AND JOY HALE. : (Priority No. 15)  
 :  
 Defendant/Appellees :

---

Appeal from Summary Judgment of Dismissal and  
Award of Attorneys Fees in Third District Court,  
Salt Lake County, Judge Homer Wilkinson, Presiding.

---

### I. STATEMENT OF THE CASE.

Appellees object to Appellant's characterizations made as a  
STATEMENT OF THE CASE and offer the following for clarification.

#### A. Nature Of The Case.

In February of 1981 appellee/defendant Joy Hale sold a house  
and lot under a title retaining contract to appellees/defendants  
Bruce and Shirlynn Gildea. The referenced property has since been  
the residence of the Gildeas. [Contract, Rec. 1109-1111]

On November 25, 1985 plaintiff/appellant John C. Sittner  
obtained judgment against Bruce Gildea and others, (not including  
appellee Shirlynn Gildea) in the amount of \$30,598.35 plus

attorney's fees of \$3,250.00 and interest at the rate of 20% per annum. Attorney L. Benson Mabey acted as Mr. Sittner's attorney. See, Sittner v. Big Horn Tar Sands & Oil, Civil No. C-82-4804, Third District Court, Salt Lake County, Utah. [Judgment, Rec. 1112,1113]

Sittner and Mabey sought to attach and sell Bruce Gildea's vendee interest in the residence to satisfy their judgment. On January 16, 1986 Bruce Gildea, filed for protection under Chapter 11 of the bankruptcy code voiding Sittner's execution efforts. On August 31, 1987 the Chapter 11 filing was converted to a Chapter 7 bankruptcy.

Appellant Sittner and attorney Mabey filed a Proof of Claim with the United States Bankruptcy Court as unsecured creditors citing the Sittner v. Big Horn Tar Sands & Oil judgment. [Proof of Claim, Rec. 1114].

The Sittner judgment fell within the 90 day preferential transfer period proscribed in 11 U.S.C. § 547. Bankruptcy Trustee, Duane H. Gillman, filed an Adversarial Complaint, under Section 547(c) of the Bankruptcy Code, to avoid Sittner's judgment lien. [Adversarial Complaint, Rec. 1115-1118]

The adversarial action was resolved by stipulation wherein appellant Sittner agreed 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. Defendant's rights respecting property abandoned by the estate or not



administered by closing are preserved and unaffected hereby." [Stipulation, Rec. 1119,1120]

Sittner and his attorney, L. Benson Mabey, thereupon secured payment of \$4,032.99 as their share of distribution to unsecured creditors on their claim of \$36,228.73 against Bruce Gildea. [Payment check, Rec. 1121].

On December 14, 1987, Judge Allen entered a DISCHARGE OF DEBTOR Order absolving Bruce Gildea of all of his debt. [Discharge of Debtor, Rec. 1122].

On February 19, 1988, Bankruptcy Judge John H. Allen issued an order vacating the Automatic Stay as to vendor Joy Hale and the subject residence leaving Mrs. Hale free to foreclose or otherwise dispose of the property. The subject real estate contract was seriously in default and amortizing negatively and there was no equity in the property. [Order Vacating Stay, Rec. 1113]

Although free of the Automatic Stay in February of 1988, Sittner brought no adversary proceeding seeking to value the subject real estate contract. At no time did he challenge Mrs. Hale's title nor assert a judgement lien interest in the property while the matter was in the Bankruptcy Court.

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

B. Trial Court Proceedings & Disposition.

Upon learning of Schriever's purchase of the property, Sittner and Mabey filed this action against, Schriever, Hale, and the Gildeas. The Complaint alleges that since Schriever is "related by blood or marriage to either Bruce Gildea or Shirlynn Gildea" the conveyance of the property to the Karen H. Schriever Family Trust "was for the benefit of the Gildeas" and the conveyance from Hale to Schriever "constituted fraudulent transfers or arrangements under the "Utah Uniform Fraudulent Transfers Act, Utah Code Ann. § 26-6-1 et seq."

Sittner's complaint further alleged that the Warranty Deed from Hale to Schriever was issued "with actual intent to hinder, delay or defeat" the judgment lien claimed by appellant Sittner and asked the trial court 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" and to have the subject property sold at execution sale to satisfy Sittner's Judgment." [Complaint, Rec. 6,7,8]

By affidavit, Sittner asserted the "judgment lien" had an "unpaid balance" of \$90,197.40 with interest accruing at the rate of 20% per annum. [Sittner Affidavit, Rec. 130-134]. Nowhere in the pleadings did Sittner acknowledge that his judgment had been fully discharged in Bruce Gildea's bankruptcy action.

Appellees Schriever answered Sittner's complaint asserting in part that "Plaintiff's Complaint is without merit and in bad faith"

and included a prayer for relief of dismissal and attorney's fees. [Answer, Rec. 37].

In March of 1994, appellee Karen H. Schriever moved for Summary Judgment asserting: (1) Sittner's judgment against Gildea had been satisfied and the lien avoided in Bruce Gildea's bankruptcy; (2) Appellant failed to state a cause of action under the Utah Fraudulent Conveyance Statute; and (3) the eight (8) year statutory period for foreclosing a judgment lien expired November 24, 1993 eight years after entry of the judgment. Plaintiff filed a counter Motion For Summary Judgment.

On May 18, 1994 the trial court entered judgment dismissing the action. However, on September 7th, 1994 the court vacated its order of dismissal reinstating Plaintiff's Complaint. The Court found that Appellant's judgment lien had somehow survived Bruce Gildea's bankruptcy action. The Court specifically declined to rule on other issues including Sittner's failure to state a cause of action under the Fraudulent Transfer Statute and whether the judgment lien had expired eight years after the date of judgment as provided in Utah Code Ann. 78-22-1.

On March 10, 1995 Sittner resumed prosecution of this action by filing a "Motion For Partial Summary Judgment to Permit Execution Proceedings to be Completed." [Rec. 469-470].

On March 24, 1995 appellee Schriever filed her second Motion For Summary Judgment alleging substantially the same defenses asserted in her first Motion. [Rec. 510].

Appellee Bruce Gildea petitioned the bankruptcy court and on May 8, 1995, U.S. Bankruptcy Judge John H. Allen granted his motion to reopen Gildea's 1986 bankruptcy. On June 13, 1995, Judge Allen entered an Order which states in part:

Debtor's Chapter 7 bankruptcy was discharged December 14, 1987, and that discharge enjoined all creditors and other parties from attempting to collect any debt that has been discharged. The action of John C. Sittner of suing in state court was a violation of the injunction, which is still in effect, and sanctions are appropriate against both John C. Sittner and his counsel L. Benson Mabey, for violation of the continuing injunction, in the amount of Eight Thousand Dollars (\$8,000.00), jointly and severally. [Order, Rec. 1096,1097, Addendum 4]

On October 10, 1995, Sittner and Mabey obtained an order from Judge Wilkinson, staying further proceedings in this action pending the outcome of Sittner's and Mabey's appeal of Judge Allen's Order to the U.S. District Court for the State of Utah. On July 16, 1996, U.S. District Judge Tena Campbell ruled the Third District Court is competent to make a ruling on the dischargeability issue and reversed Judge Allen's order reopening Mr. Gildea's bankruptcy.

Judge Tena Campbell's ruling includes the following specific finding:

"The court finds that the bankruptcy court's evaluation of the status of Sittner's judgment lien is correct in all respects. It seems clear that the judgment lien was waived in the course of bankruptcy proceedings, and the debt secured by that lien was fully discharged in bankruptcy". [Order, Rec. 1106, Addendum 5].

On October 23, 1996, more than eight years and eight months after the Automatic Stay had been lifted by the bankruptcy court allowing Mrs. Hale to sell or foreclose her security interest in

the subject property Sittner resumed efforts to foreclose his claimed judgment lien by filing a Motion For An Order Compelling Discovery. He asked the trial court to allow him to take the depositions of appellees Hale (then on an LDS Mission) and Schriever (a resident of Maryland) by telephone. [Rec. 946].

Thereafter, on January 14, 1997 appellee Schriever filed her Third Motion For Summary Judgment. [Rec. 1061].

On March 25, 1997, Judge Wilkinson granted Schriever's Third Motion For Summary Judgment dismissing appellant Sittner's complaint with prejudice and awarding all appellee/defendants costs and attorneys fees pursuant to Utah Code annotated 78-27-56. [Rec. 1257, Copy, Addendum 1].

The trial court issued Findings of Fact and Conclusions of Law detailing basis for its conclusion that "Plaintiff's claims are without merit and not asserted in good faith". [Rec. 1250-1255, Copy, Addendum 2].

Neither the Judgment nor the Findings of Fact and Conclusions of Law were contested by Appellant. No motion was filed pursuant to Rules 50(a) and (b), 52(b), 54(b), or 59, Utah Rules of Civil Procedure.

Appellees/defendants submitted itemized statements of attorneys fees incurred in defending this action. Appellant objected to the fees and the matter was set for hearing on June 11, 1997. The trial court asked the parties to try to reach an agreement without further litigation, expense and delay. The

parties compromised their claims and entered into the record the terms of a stipulation wherein appellee Karen H. Schriever was to be awarded \$17,500.00; appellees Bruce and Shirlynn Gildea were to be awarded \$16,000.00; and appellee Joy Hale was to be awarded \$3,750.00. [Transcript of Proceedings, Rec. 1496-1499].

On June 27, 1997 the trial court entered a "Supplemental Judgment for Award of Attorney's Fees" awarding appellee Schriever \$17,500.00; appellees Gildea \$16,000.00; and appellee Hale \$3,750.00 pursuant to stipulation of all parties. [Supplemental Judgment, Rec. 1400-1401]

On July 25, 1997, Appellant sought relief from the Supplemental Judgment pursuant to Rule 60(b)(3) and (7), Utah R. Civ. P. [Rec. 1412-1413].

On September 29, 1997, the trial court entered an Order pursuant to Appellant's Rule 60(b)(3) and (7) motion stating:

"...the supplemental judgment for attorney's fees signed and entered June 27, 1997 is vacated pending further consideration by the Court of Plaintiff's motion to vacate the stipulation, et. al, but reserving the right to re-instate the supplemental judgment as previously signed and entered, should the Court determine after further consideration that Plaintiff's motion is not well taken and should be denied." [Order, Rec. 1533-1535].

On October 21, 1997 the trial court entered a second Supplemental Judgment Awarding Attorney's fees. The judgment was prepared by Appellant's counsel and restated the terms of the previous judgment. [Supplemental Judgment Awarding Attorney's Fees, Rec. 1541-1542].

No motion was filed pursuant to Rules 50(a) and (b), 52(b),

54(b), or 59, Utah Rules of Civil Procedure.

C. Appellate Proceedings and Disposition.

On November 14, 1997, Appellant filed a Notice of Appeal of the "final judgment" entered October 21, 1997.

On July 9, 1998 this Court granted appellee Schriever's motion for summary disposition dismissing Appellant's appeal for failure to file a timely appeal. The court cited both Taylor v. Hansen, 342 Utah Adv. Rep. 41, (Utah Ct. App. 1998) and Lord v. Lord, 709 P.2d 338 (Utah 1985) as precedent. Appellant filed a Petition For Rehearing and appellee Schriever filed a response. On September 30, 1998, this Court entered an order denying the Petition For Rehearing. Thereafter, Appellant filed a Motion For Reinstatement of Appeal. This Court granted appellee Schriever's Motion to Strike Appellant's Motion For Reinstatement of Appeal holding it to be a successive Petition For Rehearing.

Appellant's petition for certiorari to the Utah Supreme Court was granted. The Supreme Court reversed the decision of the Court of Appeals and remanded this case back for a review of the merits of Appellant's appeal.

D. STATEMENT OF RELEVANT FACTS.

Appellant's characterizations made as a Statement of Facts are incomplete and intentionally misleading.

His representations in paragraphs 9 and 11, p. 10 of his brief are particularly disingenuous. In paragraph 9, Attorney Mabey

states:

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].

Nowhere in the Statement of facts does attorney Mabey disclose that on December 14, 1987, U.S. Bankruptcy Judge John H. Allen entered a DISCHARGE OF DEBTOR Order releasing appellee Bruce Gildea from all personal liability for debts existing on the date of commencement of his bankruptcy.

Appellant's assertion that after Sittner applied the distribution to the judgment debt, there still remained a balance owed in excess of \$30,000 is totally disingenuous and certainly not an undisputed fact as Mabey represents. There is no issue of fact. Sittner's judgment debt was fully discharged in Gildea's bankruptcy. See Bankruptcy Trustee Duane H. Gillman affidavit [Rec.93,94] stating:

4. Mr. Sittner, through his attorney L. Benson Mabey, entered into a stipulation with me as Trustee, wherein Mr. Sittner waived "...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."

5. Mr. Sittner was thereafter paid \$4,032.99 as his proportionate share of the debtor's estate. Mr. Gildea was fully discharged of any further liability under Mr. Sittner's claim.

Attorney Mabey was not finished attempting to manufacture facts more to his liking. In paragraph 11, page 10 of his Brief



Mr. Mabey blandly asserts:

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.

Appellant fails to disclose that the subject property was not in fact abandoned to Gildea on April 24, 1992 as he so "deemed." Four years and two months earlier, 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 leaving Mrs. Hale free to foreclose her security interest without further order of the court. [Rec. 1113].

#### ARGUMENT

##### Point I APPELLANT HAS NO ENFORCEABLE JUDGMENT LIEN.

##### A. Sittner's Judgment Lien And Claim Of A Secured Interest In Bruce Gildea's Bankruptcy Estate Was Waived During The Course Of Bruce Gildea's Bankruptcy.

From the facts of record Judge Wilkinson's Conclusion of Law that "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" is inescapable. Sittner signed a stipulation with the bankruptcy court stating that he "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." [Rec. 1119,1120]

Sittner, through his attorney L. Benson Mabey, filed a PROOF OF CLAIM with the United States Bankruptcy Court listing himself as an unsecured creditor of Bruce Gildea. [Rec. 1114]. Sittner received payment of \$4,032.99 as his share of distribution to unsecured creditors on his claim of \$36,228.73 against appellee Gildea. [Rec. 1121]

The issue of Sittner's waiver of his judgment lien was litigated in the Bankruptcy and U.S. District Court and the opinions of Bankruptcy Judge John Allen and U.S. District Court Judge Tena Campbell should preclude further litigation of the matter under the doctrine of "Collateral Estoppel/Issue Preclusion." When the facts of this case were submitted to the bankruptcy court, Judge John H. Allen reopened Bruce Gildea's bankruptcy case and granted Bruce Gildea's Motion for Sanctions against L. Benson Mabey and John C. Sittner for bringing this action. Judge Allen's bench ruling, [Addendum 3] states in part:

Thus, my conclusion is that the actions of Mr. Sittner in this case in filing the proof of claim as an unsecured claim, participating in all respects as an unsecured creditor and stipulating that he was an unsecured creditor with a pre-petition claim had the effect of waiving that judgment lien. [Transcript Rec. 1092]

And the action of bringing an action in the state court to set aside a conveyance to other parties and to foreclose the lien that had been waived is an action in violation of the discharge injunction. There was no lien. There was no basis whatsoever for filing the suit in the state court. [Rec. 1093].

I find therefore, that Mr. Sittner waived the lien. There was no lien after the discharge. The action of suing in the state court was a violation of the injunction. Sanctions are appropriate against Mr. Sittner and counsel Mr. Mabey, who participated in all respects in the bankruptcy proceeding and had all the knowledge, in fact more knowledge probably than Mr. Sittner. [Rec. 1093].

On July 16, 1996, U.S. District Judge Tena Campbell ruled the Third District Court is competent to make a ruling on the dischargeability issue and reversed Judge Allen's order reopening Mr. Gildea's bankruptcy. However, as part of her decision Judge Campbell ruled:

"The court finds that the bankruptcy court's evaluation of the status of Sittner's judgment lien is correct in all respects. It seems clear that the judgment lien was waived in the course of bankruptcy proceedings, and the debt secured by that lien was fully discharged in bankruptcy". [Order, Rec. 1106, Addendum 5].

Judge Campbell's decision was never modified and should be the final authority on the matter. Appellant's claim that "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" is hollow indeed. Appellant, himself, used Judge Allen's opinion to obtain a stay of proceedings in this case to appeal Judge Allen's decision to the U.S. District Court.

The fact that Judge Campbell's opinion is unpublished does not preclude its use for precedential value in this case. Rule 4-508, Code of Judicial Administration specifically authorizes the use of unpublished orders "for purposes of applying the doctrine of the

law of the case, res judicata, or collateral estoppel."

B. A Discharge Of Debt In Bankruptcy Extinguishes The Judgment Lien.

When a judgment debt is satisfied the judgment lien is extinguished. Utah Code Ann. 78-22-1 provides that "Judgments shall continue for eight years unless the judgment is previously satisfied."

Bruce Gildea's bankruptcy fully discharged the judgment debt asserted by Appellant as the basis for this action, Appellant's bad faith contentions notwithstanding. By Affidavit [Rec. 130-134] Sittner asserts that the unpaid balance of the judgment lien after crediting all amounts received including the amount received from the bankruptcy estate of Bruce Gildea is \$90,197.40 together with interest accruing at the rate of 20% per annum.

Judgment liens don't have unpaid balances. A judgment lien is only a means for collecting a valid judgment debt.

"A judgment lien on land constitutes no property or property right in the land itself. It confers only a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment". Smith v. Schwartz, 60 P.305, 309 (Utah 1899)

In Cox Corp. v. Vertin, 754 P.2d 938, 939 (Utah 1988), the High Court ruled that Utah's "statutory scheme has no provision for the extension of a judgment lien independent of the judgement on which it is based". The Court in concluding that a discharge of judgment in bankruptcy precludes enforcement of a judgment lien even if the judgment lien was not avoided in bankruptcy stated as

follows:

[1] Appellant contends that since the judgment lien was not avoided in bankruptcy proceeding, it is renewable and the judgment should be renewed in some limited form to support the lien without reviving respondents' personal liability. This theory finds no support in our statutory scheme. A judgment lien is purely a creation of statute. It does not exist in common law; therefore, the rights of the parties must be determined within the statutory framework.

Accordingly, Sittner's judgment lien was voided when appellee Bruce Gildea obtained a discharge of indebtedness from the United States Bankruptcy Court for the State of Utah on December 14, 1987.

C. Appellant Is Estopped To Assert A Judgment Lien.

Appellant Sittner, through his attorney L. Benson Mabey, filed a PROOF OF CLAIM with the United States Bankruptcy Court listing himself as an unsecured creditor of appellee Bruce Gildea. Sittner received payment of \$4,032.99 as his share of distribution to unsecured creditors on his claim of \$36,228.73 against appellee Gildea. In order to participate as an unsecured creditor Sittner entered into a Stipulation with Trustee Gillman as follows:

"1. ... 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." [Rec.1119].

The Doctrine of Judicial Estoppel bars a litigant who has taken a position in prior litigation and has obtained relief on the basis of that position from maintaining the opposite position in a subsequent action. See Condas v. Condas, 618 P.2d 491, 496 (Utah

1980) and Roy S. Ludlow Investment Co. v. Salt Lake County, 551 P.2d 1259 (Utah 1976). A party is bound by his judicial declarations and may not contradict them in a subsequent proceeding involving the same parties and issues. See Sailes v. Jones, 499 P.2d 721 and Adams v. Bear, 350 P.2d 751.

Plaintiff Sittner is estopped by his prior actions. He can't have it both ways. He can't waive any right he may have to assert a secured claim in the bankruptcy court in order to receive payment as an unsecured creditor and thereafter assert that he is a secured creditor in the state courts and that his judgment lien was not avoided by the bankruptcy proceeding initiated for the very purpose of avoiding his lien.

D. The Statutory Period For Foreclosing Sittner's Judgment Lien Expired, Notwithstanding Any Tolling Period That Could Have Been Caused By Bruce Gildea's Bankruptcy.

Even if the claimed judgment lien had somehow survived lien waiver and satisfaction of judgment in the bankruptcy court, enforcement of the lien was barred by expiration of the limitation period for enforcing judgment liens. 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.

Sittner's judgement was docketed November 25, 1985 and would expire November 25, 1993 unless "enforcement of the judgment is stayed in accordance with law." Appellant argues that under the

Bankruptcy Code §108(c), the limitation period was suspended for more than six years by the automatic stay and such period is tacked on to the normal expiration date in November of 1993. Mabey asserts that Sittner's judgment was enforceable until the end of 1999 by operation of the federal law.

Mabey fails to inform the court that the automatic stay was not in effect until April 24, 1992 as he represents to this court. 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 leaving Mrs. Hale free to foreclose her security interest without further order of the court. [Rec. 1113].

Factoring the truth into the equation, it can only be said that the automatic stay was in effect from January 16, 1986 when Gildea's bankruptcy was filed until February 19, 1988 when the stay was lifted, a period of two years and 33 days. If one adds two years and thirty three days to November 25, 1993 the expiration date for enforcing the lien would be extended to December 28, 1995.

This court should bear in mind that Appellant was under a self imposed stay of proceedings on December 28, 1995. On October 10, 1995 Sittner sought and obtained an order from Judge Wilkinson staying further proceedings in this case pending review of the bankruptcy order by the U.S. District Court. [Rec. 939-941].

On October 23, 1996, more than eight years and eight months after the Automatic Stay had been lifted by the bankruptcy court,

Sittner resumed efforts to foreclose his claimed judgment lien by filing a Motion For An Order Compelling Discovery. He asked the court to allow him to take the depositions of appellees Hale (then on an LDS Mission) and Schriever (a resident of Maryland) by telephone. [Rec. 946].

Thereafter, on January 14, 1997 appellee Schriever filed her Third Motion For Summary Judgment. [Rec. 1061]. On March 25, 1997, Judge Wilkinson granted Schriever's Third Motion For Summary Judgment dismissing appellant Sittner's complaint with prejudice and awarding all appellee/defendants costs and attorneys fees pursuant to Utah Code annotated 78-27-56. [Rec. 1257, Copy, Addendum 1].

Even if this Court accepts Appellant's argument that the eight year limitation for foreclosing a lien should be extended by the time the property was shielded by the automatic stay it is of no benefit to Appellant. The trial court's entry of Summary Judgment dismissing Appellant's action did not occur until fifteen months after the two year and 33 day extension would have expired.

In Smith v. Schwartz, 60 P.305, (Utah 1899) the Utah Supreme Court ruled that the lien of a judgment expires at the end of the statutory period established by the legislature and the courts are powerless to extend it beyond that time - even though the judgment creditor was wrongfully enjoined from levying execution upon the property until after his lien expired.

It matters not that Plaintiff Sittner's alleged lien expired



during the pendency of this action. In Federal Farm Mortgage Corp. v. Walker, 115 Utah 461, 206 P.2d 146 (Utah 1949) the trial court's entry of a judgment foreclosing a lien which had expired during the pendency of the foreclosure action was reversed citing Smith v. Schwartz.

Point II APPELLANT FAILED TO STATE A CAUSE OF ACTION UNDER THE UTAH UNIFORM FRAUDULENT TRANSFER ACT.

A. There Was No Transfer Of Gildea's Interest.

Upon purchase of the vendor's interest in the subject property appellee Schriever assumed Mrs. Hale's position as contract seller to the Gildeas. The transaction involved no conveyance or modification of Mr. Gildea's interest in the subject property. The Gildeas retain a vendees' interest under the installment purchase contract and continue to occupy the subject property as their family residence.

Appellant, asserts that appellee Joy Hale's sale of her vendor's interest in an installment land contract to appellee Schriever "constituted fraudulent transfers . . . under the Utah Uniform Fraudulent Transfer Act, Utah Code Ann. § 25-6-1 et seq." Plaintiff's complaint cites no specifics in support of this allegation other than to note that appellee Schriever is appellee Shirlynn Gildea's sister and to allege that appellee Bruce Gildea "directed" appellee Hale to transfer the property to appellee Schriever. Assuming all of Appellant's allegations to be true. Appellant's complaint fails to state a cause of action upon which

relief may be granted.

Appellant fails to note which section of the Utah Uniform Fraudulent Transfer Act he relies upon. Utah Code Ann. 25-6-5 and 25-6-6 appear to be the operative provisions of the act but each require a "debtor" and a "creditor" and a "transfer" by a "debtor" with the "actual intent to hinder, delay or defraud a creditor of the debtor" or a transfer made "without receiving a reasonably equivalent value in exchange" when the "debtor was insolvent at the time" or rendered insolvent by the transfer.

Appellant Sittner is unable to allege any of the above. He has no standing to bring an action under any portion of this statute. He is not a creditor of any named defendant. His judgment and judgment lien were satisfied and extinguished in Bruce Gildea's bankruptcy. Alleged debtor, Bruce Gildea made no transfer of any of his assets and was not rendered insolvent by Schriever's purchase of Hale's vendor's interest in the subject installment land contract. Appellee Schriever is a bona fide purchaser who paid valuable consideration and acted in good faith, without notice or knowledge of adverse claims and with no intent to defraud.

Sittner asked the trial court 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". Even if Sittner's judgment lien had somehow survived Bruce Gildea's bankruptcy it could not supersede appellee Hale's interest in the

property. A vendor's secured interest in an installment land contract protects the vendor's property from appropriation by creditors of the vendee. If such were not the case installment sales would not be a commercially viable alternative for selling land.

Joy Hale's title to the subject property was in no way impaired by Bruce Gildea's bankruptcy. She was a secured creditor. Her security was the title to the property.

The Gildea's owed Ms. Hale much more than the property was worth. The contract was seriously in default and amortizing negatively. The Trustee in Bankruptcy found it to be of no value to Mr. Gildea's bankruptcy estate. Bankruptcy Judge John H. Allen issued an order vacating the Automatic Stay as to appellee Joy Horsley (Hale) and the subject property leaving her free to dispose of her interest in the property as she pleased. [Rec. 1113].

Although free of the Automatic Stay in February of 1988, Sittner brought no adversary proceeding seeking to value the subject real estate contract or assert a judgement lien interest in the property while the Gildea bankruptcy was before the Bankruptcy Court.

B. An Action For Declaratory Relief Should Be Brought As A Separate Action.

Appellant contends that he should not be liable for attorneys fees for litigating an action which the trial court found to be without merit and brought in bad faith simply because he asserts the action is "commenced" under the Utah Declaratory Judgment Act,

Utah Code Ann. §78-33-1. This defense is indicative of the bad faith exhibited throughout this litigation.

The complaint alleges the conveyance from Hale to Schriever "constituted fraudulent transfers or arrangements under the "Utah Uniform Fraudulent Transfers Act, Utah Code Ann. § 26-6-1 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 appellant Sittner. Sittner asked the trial court 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" and to have the subject property sold at execution sale to satisfy Sittner's Judgment." [Complaint, Rec. 6,7,8]

By affidavit, Sittner asserted the "judgment lien" had an "unpaid balance" of \$90,197.40 with interest accruing at the rate of 20% per annum. [Sittner Affidavit, Rec. 130-134]. Nowhere in the pleadings did Sittner acknowledge that his judgment had been fully discharged in Bruce Gildea's bankruptcy action.

Sittner sued Hale and Schriever even though he had never been a creditor of either. Mabey filed a lis pendens against Schriever's property and filed two motions for Summary Judgment asking the court to allow execution and sale of the property all without a final determination that Sittner had a valid lien against the property and that there had been a fraudulent transfer by debtor Gildea.

An action for declaratory judgment should be a separate action

from an effort to impress a lien and foreclose and sell a property. Baldwin v. Burton 850 P.2d 1188, 1199 (Utah 1993) holds that before any relief is available under the Fraudulent Transfer Act there must first be a separate action to determine if there has been a fraudulent transfer. The remedy provided by the Fraudulent Transfer Act is the voiding of the conveyance.

Of particular relevance to this litigation is the Supreme Court's conclusion in Baldwin that:

Had the Burtons proceeded with an honest belief in the propriety of their activities they would have sought first to have the Wood to Wood conveyance set aside as fraudulent before attempting to wrongfully execute on Baldwin's interest in the property. Accordingly, we hold that Baldwin is entitled to an award of attorney fees under section 78-27-56.

Point III. APPELLEES ARE ENTITLED TO ATTORNEYS FEES FOR DEFENDING A FRIVOLOUS LAW SUIT AND A FRIVOLOUS APPEAL.

A. Appellant's Action Is Without Merit And In Bad Faith.

The problem of frivolous lawsuits is plaguing our legal system. In 1988 the Utah legislature amended section U.C.A. 78-27-56. The amendment makes the award of attorney's fee mandatory when a frivolous action is initiated. The legislature promulgated the Amendment with the hope that the courts will award attorney's fees more aggressively so that practitioners will refrain from filing actions which are frivolous.

Baldwin v. Burton 850 P.2d 1188, 1199 (Utah 1993) provides a recent interpretation of the amended statute. The Court stated:

For a party to be entitled to attorney fees under section 78-27-56, the trial court must determine that a claim is

"without merit" and that the party's conduct in bringing the suit was "lacking in good faith." In Cady, we defined both of these elements, stating that "without merit" means "frivolous" or "having no basis in law or fact." For purposes of section 78-27-56, we found the terms "lack of good faith" and "bad faith" to be synonymous. To establish bad faith, one or more of the following must be lacking: "(1) an honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; (3) no intent to, or knowledge of the fact that the activities in question will [sic] hinder, delay or defraud others."

Judge Wilkinson entered Findings of Fact and Conclusions of Law detailing the basis for his award of attorney fees. [Rec. 1250-1255, Addendum 2]. He concluded that "Plaintiff's claims are without merit and not asserted in good faith." To establish both lack of merit and bad faith, Judge Wilkinson's Conclusions of Law state:

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.

Judge Wilkinson's conclusions are supported by sixteen specific Findings of Fact.

Appellant protests the trial court's entry of Summary Judgment claiming there are issues of material fact which are unresolved but his Brief does not say what they are. This court should bear in mind that Appellant on two different occasions filed his own motions for summary judgement in effect alleging there are no

issues of material fact. Appellant failed to raise any relevant factual issues during the trial court's consideration of the cross-motions for summary judgment. All matters in dispute were questions of law.

Appellant filed no motion pursuant to Rules 50(a) and (b), 52(b), 54(b), or 59, Utah Rules of Civil Procedure contesting the trial court's Findings of Fact and Conclusions of Law made in support of its award of attorney fees.

B. Appellees Should Be Awarded Just Damages For Frivolous Appeal.

Rule 33(a), Utah Rules of Appellate Procedure provides for an award of just damages for frivolous appeal and delay including single or double costs and reasonable attorney fees against Appellant and/or Appellant's attorney, L. Benson Mabey.

An appeal brought from an action that was properly determined to be in bad faith is necessarily frivolous under Rule 33(a). Utah Dep't of Social Services v. Adams, 806 P.2d 1193 (Utah Ct. App. 1991).

Attorney Mabey has played fast and loose with pleadings throughout this case. He continues to misrepresent this action as brought under the "Utah Declaratory Judgments Act" when in fact he sued appellees under the Utah Fraudulent Transfers Act requesting foreclosure and sale of the subject property.

Mabey's penchant for misrepresentation and distortion of fact and law is clearly manifested in the Brief filed with this court.

His mischaracterization of facts and law include; (1) a refusal to acknowledge that Gildea's debt was fully discharged in bankruptcy, (2) a refusal to admit that the bankruptcy automatic stay relating to the subject property was in effect for no more than two years and thirty three days, not six years as he alleges and (3) a refusal to acknowledge that the life of judgment liens is governed by state law not federal law.

Mr. Mabey's ego is clearly bruised. He simply cannot accept the fact that he is not as clever as he fashions himself. His effort to outsmart, (1) the bankruptcy court; (2) the trial court; (3) the Supreme Court, and now the Court of Appeals is the root of his problems.

This appeal was filed for purposes of delay and not filed pursuant to a good faith belief in the merits of the appeal. Both Appellant Sittner and Attorney Mabey should be ordered to reimburse appellees for the cost of exposing the charade surrounding this frivolous litigation.

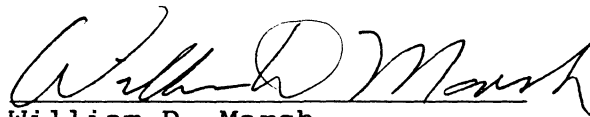
#### CONCLUSION

The trial court's Summary Judgment dismissing Appellant's complaint and its Supplemental Judgment awarding appellees attorney fees pursuant to Utah Code Ann. 78-27-56 should be affirmed. This Court should award Appellees attorneys fees and costs on appeal pursuant Rule 33(a), Utah Rules of Appellate Procedure and remand the case for the limited purpose of determining those



amounts.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of October, 2000.



William D. Marsh,  
Attorney for Appellee Karen H. Schriever



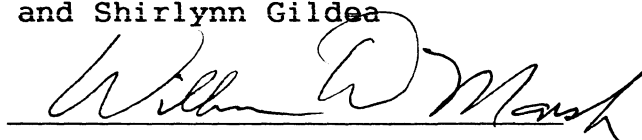
Randall E. Grant,  
Attorney for Appellee Joy Hale

#### CERTIFICATE OF SERVICE

I certify that on October 30<sup>th</sup> 2000 I mailed 2 true copies of the foregoing Brief of Appellees, postage prepaid, addressed as follows:

L. BENSON MABEY, ESQ. (#A2035)  
MURPHY, TOLBOE & MABEY,  
Attorneys at Law  
124 South 600 East, Suite 100  
Salt Lake City, Utah 84102

GRANT W.P. MORRISON, ESQ. (#3666)  
WILLIAM P. MORRISON, ESQ. (7587)  
MORRISON & MORRISON, L.C.  
352 East 900 South  
Salt Lake City, Utah 84111  
Telephone: (801) 359-7999  
Attorneys for Defendants  
Bruce and Shirlynn Gildea



## Addendum 1

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 [Signature] SALT LAKE COUNTY  
Deputy Clerk

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

## Addendum 2

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 SALT LAKE COUNTY  
*[Signature]*

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.

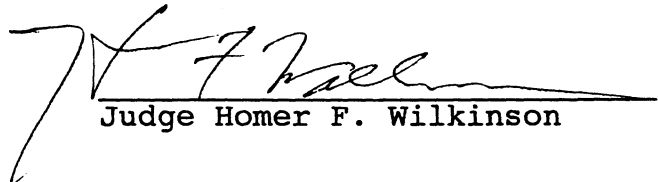
6. Defendant Karen H. Schriever's Third Motion for Summary Judgment should be, and is hereby, granted. Plaintiff's Motion for Partial Summary Judgment should be, and is hereby, denied. All other motions pending before the court, including motions to take

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

## Addendum 3

COPY

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

In re: )  
BRUCE GILDEA, ) 86A-20168  
 )  
Debtor. ) Court's Ruling

BEFORE THE HONORABLE JOHN H. ALLEN

May 12, 1995

Alpha Court Reporting Service  
P.O. Box 510047  
Salt Lake City, Utah 84151-0047  
Telephone (801)532-5645  
Fax No. (801)595-8910

Reported By: Karen Murakami, CSR, RPR  
File No. 512-95K

1           Salt Lake City, Utah, Friday, May 12, 1995, 9:00 a.m.

2                           \* \* \*

3           THE COURT: There is no question in my mind but  
4 what the law is that generally in a bankruptcy case a lien  
5 survives the bankruptcy case if there has been no action in  
6 the case contrary to that. I believe also that when a  
7 claimant files a secured claim in a bankruptcy case, the  
8 claimant is telling the creditors and the court and the  
9 debtor that the claimant intends to rely upon that security  
10 and will not participate in any dividends that are developed  
11 for unsecured creditors. By the same token when a claimant  
12 files an unsecured claim, the claimant is telling the  
13 creditors and the court and the debtor that the claimant  
14 claims nothing, and if that claimant has a lien the claimant  
15 is waiving that lien and intends to pursue that claimant's  
16 pro rata share of dividends collected for unsecured  
17 creditors.

18           In this case, the Court finds that the claimant,  
19 John C. Sittner, did file a proof of claim in the amount of  
20 \$36,228.73 and the claim designated that claim as an  
21 unsecured claim. The claim did recite that it was based on a  
22 judgment. But I think that fact alone is evidence of waiver  
23 of the claim, and that is consistent with the testimony of  
24 Mr. Mabey here today, that he felt there was no equity in the  
25 property at the time and there would be nothing gained from

1 pursuing the secured claim. Normally that would be all the  
2 evidence there would be and I think I could find or would  
3 find that the secured claim or the lien is waived based upon  
4 the proof of claim only.

5 In this case, there are other documents and other  
6 circumstances. The stipulation entered into between Mr.  
7 Sittner and the Bankruptcy Trustee recites that, among other  
8 things, it acknowledges that any and all claim he has, he  
9 Sittner, is an unsecured prepetition claim. In addition to  
10 that, Mr. Sittner participated and received dividends as an  
11 unsecured creditor, thus depriving other creditors of a  
12 larger distribution, if there were some equity to be claimed  
13 in the secured claim.

14 Thus, my conclusion is that the actions of Mr.  
15 Sittner in this case in filing the proof of claim as an  
16 unsecured claim, participating in all respects as an  
17 unsecured creditor and stipulating that he was an unsecured  
18 creditor with a prepetition claim had the effect of waiving  
19 that judgment lien. The judgment lien wasn't set aside by  
20 any order of this Court, but I think the conclusion is that  
21 it was waived is proper.

22 The next thing I have to find is whether there has  
23 been a violation of the injunction, that's the discharge  
24 injunction. The discharge was entered on December 14, 1987.  
25 That discharge enjoined all creditors and other parties from

1 attempting to collect any debt that has been discharged. The  
2 unsecured debt represented by the proof of claim was  
3 discharged. And the action of bringing an action in the  
4 state court to set aside a conveyance to other parties and to  
5 foreclose the lien that had been waived is an action in  
6 violation of the discharge injunction. There was no lien.  
7 There was no basis whatsoever for filing the suit in the  
8 state court.

9 I find, therefore, that Mr. Sittner waived the  
10 lien. There was no lien after the discharge. The action of  
11 suing in the state court was a violation of the injunction.  
12 Sanctions are appropriate against both Mr. Sittner and  
13 counsel Mr. Mabey, who participated in all respects in the  
14 bankruptcy proceeding and had all the knowledge, in fact more  
15 knowledge probably than Mr. Sittner.

16 The question I have is whether this was a willful  
17 violation justifying anything other than actual damages. Mr.  
18 Sittner didn't testify, so the Court has no way of knowing  
19 what he knew and why the case was filed or anything about his  
20 financial ability to respond to sanctions. And I can't tell  
21 from Mr. Mabey's testimony whether there was or was not any  
22 knowledge that this was, in fact, a violation of the  
23 discharge injunction.

24 My observations too are that the debtor could have  
25 come to this Court to receive a determination of a violation



1 of this injunction far earlier than he did. There's been a  
2 lot of litigation in the state court, and I'm not faulting  
3 the state court for that, but to get a determination of the  
4 violation of a discharge injunction, this is the Court that  
5 must make that determination.

6 And so my conclusion is that perhaps all of those  
7 attorney's fees would not have been spent had the parties  
8 come to this Court before. But on the other hand, creditors  
9 and counsel should be encouraged to avoid violation of the  
10 discharge injunction, violation of their own position taken  
11 in the bankruptcy court and that position is that they're  
12 unsecured.

13 I believe, therefore, that the violations were  
14 willful, not malicious but willful in the sense that they  
15 were knowing, knowing that the discharge injunction was there  
16 and knowing or should have known knowing that the law  
17 prohibited these actions.

18 With all that in mind, I don't think that sanctions  
19 justify \$25,000. I think the only thing that is justified  
20 under the circumstances is reimbursement of the attorney's  
21 fees, which I'm going to fix in the amount of \$8,000. So  
22 those are the sanctions that will be awarded against Mr.  
23 Sittner and Mr. Mabey, and that's the extent.

24 Mr. Morrison, would you prepare an order. You need  
25 not make all of the findings of fact and conclusions of law,

1 since they have been made on the record, but you can prepare  
2 the order concerning the sanctions.

3 MR. MORRISON: Point of clarification, that was a  
4 total of \$8,000.

5 THE COURT: Total.

6 MR. MORRISON: I've got it. Thank you, Your Honor.

7 THE COURT: If there are no questions then, Court  
8 will be in recess.

9 (Whereupon, the matter was concluded.)

10 \* \* \*

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

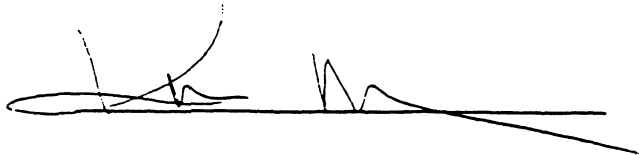
STATE OF UTAH

COUNTY OF SALT LAKE

I, Karen Murakami, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that the foregoing transcript of proceedings was taken before me at the time and place set forth herein and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 16<sup>th</sup> day of May, 1995.



KAREN MURAKAMI, CSR, RPR

My commission expires:

January 14, 1997

## Addendum 4

Grant W. P. Morris #3666  
Attorney at Law  
3300 East 3300 South  
Salt Lake City, Utah 84106  
Telephone: (801) 485-7999

IN THE UNITED STATES BANKRUPTCY COURT  
JUN 6 4 03 PM '95  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION  
WIL

---

IN RE:	:	Bankruptcy No. 86A-00168 MB
	:	(Chapter 7)
	:	
	:	
	:	
	:	
BRUCE L. GILDEA,	:	ORDER
	:	
	:	
	:	
Debtor.	:	Judge: John H. Allen

---

THIS MATTER having come before the Court on debtor's Motion for Sanctions for Violating Bankruptcy Discharge and for Finding that Claim of John C. Sittner was Unsecured and Discharged and for Attorney's Fees, on the 12th day of May, 1995, and Grant W. P. Morrison appearing for debtor and L. Benson Mabey appearing for John C. Sittner, and testimony having been taken and exhibits admitted, and argument have been heard, and the Court having read Findings of Fact and Conclusions of Law into the record, the Court, for good cause appearing, hereby ORDERS, ADJUDGES AND DECREES,

1. The actions of John C. Sittner in this case in filing the proof of claim as an unsecured claim, participating in all respects as an unsecured creditor and stipulating that he was an unsecured creditor with a prepetition claim had the effect of waiving the

gment lien again the property of debtor ted at 2400 East  
1000 South, Salt Lake City, Utah 84109, and it is so ordered.

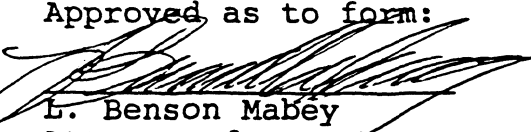
2. Debtor's Chapter 7 bankruptcy was discharged December 14, 1987, and that discharge enjoined all creditors and other parties from attempting to collect any debt that has been discharged. The action of John C. Sittner of suing in state court was a violation of the injunction, which is still in effect, and sanctions are appropriate against both John C. Sittner and his counsel L. Benson Mabey, for violation of the continuing injunction, in the amount of Eight Thousand Dollars (\$8,000.00), jointly and severally.

DATED this 13 day of June, 1995.

BY THE COURT:

  
\_\_\_\_\_  
John H. Allen  
U. S. Bankruptcy Judge

Approved as to form:

  
\_\_\_\_\_  
L. Benson Mabey  
Attorney for  
John C. Sittner

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

Dated: 01/16/95  
Attest:

  
\_\_\_\_\_  
Deputy Clerk

## Addendum 5

FILED  
DISTRICT COURT

16 JUL 95 AM 11:15

DISTRICT OF UTAH

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JOHN C. SITTNER,

:

Appellant,

:

ORDER

vs.

:

BRUCE L. GILDEA,

:

Civil No. 2:95-CV-664C

Appellee.

:

This case is an appeal from the bankruptcy court's order dated June 14, 1995, which found that appellant Sittner's judgment lien on property owned by the debtor, appellee Gildea, was waived by Sittner in the course of Gildea's bankruptcy proceeding, and that Gildea's discharge order on December 14, 1987, enjoined all creditors, including Sittner, from suing to recover debts which had been discharged. The bankruptcy court found that Sittner and his counsel L. Benson Mabey had violated the discharge injunction by filing an action in state court on the judgment lien which had been waived. The bankruptcy court imposed sanctions of \$8,000.00 as "reimbursement of the attorney's fees" against Sittner and Mabey.

The court finds that the bankruptcy court's evaluation of the status of Sittner's judgment lien is correct in all respects. It seems clear that the judgment lien was waived in the course of the bankruptcy proceedings, and that the debt secured by that lien was fully discharged in bankruptcy.



However, the issue of the dischargeability of this debt was properly presented to the state court first, and the state court had jurisdiction to rule on this issue. In the state court action, Gildea raised the bankruptcy discharge as a defense, and the state court found that the lien had survived Gildea's bankruptcy and the debt was not subject to the discharge order. It was only after the state court had made this adverse ruling<sup>1</sup> that Gildea went to the bankruptcy court to seek another ruling on the same issue. The issue of whether a debt has been discharged in bankruptcy can be decided either in state court or bankruptcy court, both courts having concurrent jurisdiction over such issues. See In re Carter, 156 B.R. 768 (E. D. Va. 1993); In re Brice, 79 B.R. 310 (S. D. Ohio 1987). The state court was therefore competent to make a ruling on the dischargeability issue, and the state court's ruling stands unless reconsidered or overturned on appeal. As in In re Coppi, 75 B.R. 81, 82 (S.D. Iowa 1987), appellee is simply attempting to "relitigate the issue of dischargeability and effectively overturn the state court ruling in a bankruptcy forum." Such grounds are insufficient to justify reopening the bankruptcy case, and the reopening of this case was an abuse of discretion. Although in this case the state court is apparently willing to follow the bankruptcy court's lead in deciding the dischargeability issue,<sup>2</sup> the issue has been properly presented to that court, and it is improper for the federal court to make a ruling on an issue which has been fully litigated in state court.

---

<sup>1</sup> The state court originally ruled in favor of Gildea on the dischargeability issue, deciding that the lien had not survived the bankruptcy action and that Sittner's action should be dismissed. Sittner requested that the court reconsider its ruling, and the court then ruled that the lien was valid, and entered judgment for Sittner.

<sup>2</sup> Following the bankruptcy court's order finding that the debt was discharged, the state court reconsidered its ruling again, and on August 15, 1995, entered an order dismissing Sittner's claim based on the bankruptcy court's findings.

Accordingly, the bankruptcy court's order reopening this case and imposing sanctions<sup>3</sup> is hereby reversed.

IT IS SO ORDERED.

DATED this 16 day of July, 1996.

BY THE COURT:

A handwritten signature in black ink that reads "Tena Campbell". The signature is written in a cursive, flowing style.

TENA CAMPBELL  
United States District Judge

---

<sup>3</sup> Although this court does not disagree with the bankruptcy court's finding that appellant's violation of the discharge order was "willful," an award of attorney fees, such as the bankruptcy court made in this case, is available as a sanction in the state court proceeding. The court notes that, in fact, the state court's August 15, 1995 order awards appellee attorney fees.