

1997

## Miller v. Zellmer : Brief of Appellee

Utah Court of Appeals

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Gordon A. Madsen; Michael D. Cummings; Attorneys for Appellant.

Daniel S. Sam; Attorney for Appellee.

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IN THE [REDACTED]ALS OF THE [REDACTED]

JAMES J. MILLER, and MILLER,  
DIVING, INC.

Plaintiff,

vs.

MICHAEL D. ZELLMER, and P&M  
DIVERS, INC., a Utah corpora-  
tion

Defendants.

Case No. 970661-CA

MICHAEL WEYLAND and ATLANTIS  
DIVERS, INC., a Utah corpora-  
tion

Intervenors and Third  
Party Plaintiffs,

vs.

JAMES J. MILLER; MILLER DIVING,  
INC.; MICHAEL D. ZELLMER; P&M  
DIVING, INC.; and DIVE UTAH  
VERNAL a/k/a DIVE UTAH EAST, a  
Utah general Partnership, d/b/a  
ATLANTIS DIVERS,

Third Party Defendants.

BRIEF OF THE APPELLEE

Appeal from the Final Judgment of the  
Eighth Judicial District Court of  
Uintah County, State of Utah  
John R. Anderson, Presiding

GORDON A. MADSEN  
MICHAEL D. CUMMINGS  
1224 Chandler Drive  
Salt Lake City, Utah 84103

DANIEL S. SAM  
319 West 100 South, Ste A  
Vernal, Utah 84078

Attorney for Plaintiffs-  
Appellant

Attorney for Defendants-  
Appellee



IN THE COURT OF APPEALS OF THE STATE OF UTAH

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Plaintiff,	)	
vs.	)	
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MICHAEL D. CUMMINGS  
1224 Chandler Drive  
Salt Lake City, Utah 84103

Attorney for Plaintiffs-  
Appellant

DANIEL S. SAM  
319 West 100 South, Ste A  
Vernal, Utah 84078

Attorney for Defendants-  
Appellee

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BRIEF OF THE APPELLEE

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STATEMENT OF JURISDICTION

This court has jurisdiction of this appeal pursuant to the provisions of Section 78-2-2(j), Utah Code Annotated, and Rule 3(a), Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

A. The trial court correctly allowed appellee to amend his complaint. There was no prejudice to appellant as he had ample time to respond to appellee's supplement and amendment to his



verified complaint. And if it was error of the trial court to allow appellee to amend his complaint such error was harmless.

B. Appellant was already a party to the lawsuit pursuant to his intervention thus the statute of limitations on conversion and laches are inapplicable.

C. The trial court justly awarded prejudgment interest in this case as appellant was the cause of the delay and said prejudgment interest could be obtained with mathematical accuracy.

#### STANDARD OF REVIEW

Appellee is in substantial agreement with the standard of review as set forth in appellant's brief, and notes that appellee sets forth in the body of his brief cases that support his position on appeal.

#### STATEMENT OF THE CASE

##### **A. NATURE OF THE CASE**

This is an appeal from the final decision and judgment rendered in the Eighth Judicial District Court, Uintah County, State of Utah, on May 5, 1997. Said action was initiated by appellee as a partnership dissolution.

##### **B. COURSE OF PROCEEDINGS**

While Appellant's statement of the Course of Proceedings is correct in the particulars it describes, it is incomplete both in some events described and in failing to include other pertinent steps in this case's history, which are listed below.

At the open court stipulation on November 8, 1989, the original Defendant, Michael Zellmer (Zellmer hereafter) through his

counsel offered to post as collateral in lieu of bond the inventory of the partnership sought to be dissolved by Plaintiff James Miller's (Miller hereafter) Complaint. Zellmer also agreed to furnish a listing of that inventory to the court. Judge Draney asked Zellmer, who was present in court, if he had heard the statement made by his attorney. Zellmer responded in the affirmative. The court then asked: "Do you agree to be bound by it? he answered, "Yes sir." (R. 18, Trial Exhibit #1-P, R. 506)

After filing an Answer and Counterclaim on May 25, 1990, Zellmer without leave of the court, sold the inventory to Michael Weyland, (Weyland hereafter) about which more will be said in the Argument hereafter, (Trial Exhibits 2, 3, 4, R. 506)

Upon learning of the sale Miller filed on September 7, 1990 a Motion for Contempt against Zellmer for disregarding the Stipulation.

Following efforts by way of stipulation between counsel for Miller and Zellmer to place the inventory back under the court's jurisdiction, which efforts failed, Zellmer's counsel withdrew. (R. 44) Miller's counsel notified Zellmer (who had moved to California) to Appoint new counsel. Failing so to do the court pursuant to Motion struck Zellmer's pleadings and entered Judgment for Miller on March 26, 1991. On April 2, 1991 Execution on Judgment issued, and the Sheriff picked-up and delivered the inventory to Miller.

April 9, 1991 Weyland moved for leave to Intervene and to Set Aside the Judgment. Zellmer on May 3, 1991 moved to Set Aside

the Judgment and later moved for leave to amend his Answer and Counterclaim. As Appellant has observed the Motions were granted, and Miller (appellee) returned the assets to Weyland.

Contrary to assertions in Appellant's Brief that "no activity of any significance occurred in this matter" from October 1991 to May 16, 1996, the Index (R. 427-433) shows further discovery, Certificate of Service of Request for Production of Documents, Request for Trial Date by Zellmer's counsel, and a later motion of Zellmer's counsel to be permitted to Withdraw, and Order relating thereto, Request for Trial Date by Miller on April 7, 1993 and on April 30, 1993, an Objection to Request for Trial date by Weyland's counsel (R. 427-9) That Objection is significant for two reasons: first, in was Weyland, through counsel, who was delaying the proceeding of the case, and second, his basis for Objection was to plead the Bankruptcy of Zellmer, which is alleged therein as having been filed January 21, 1993 in California. It concludes: "Much discovery and motion work is necessary prior to this case being ready for trial." (R. 428) From April 30, 1993 to May 16, 1996 no discovery was undertaken nor was any motion filed by Weyland's counsel.

Also, while it is not a part of the record per se, Judge Draney died during this time frame. The record does disclose that as of January 18, 1994 the case had been assigned to Judge Anderson's Calendar. (R. 430)

The statements in Appellant's Course of Proceedings section covering the period from May 16, 1996 thereafter are

correct.

The references to the record in this Course of Proceedings section are set out in the order referred to herein as Addendum A attached.

### **C. DISPOSITION IN TRIAL COURT**

Appellee takes exception with only one statement in Appellant's Disposition in Trial Court and that is "2. ... to amend his complaint to add appellant as a defendant..." Whereas appellee holds that appellant was a party to this lawsuit from May 3, 1991, and thus did not add appellant by his motion to amend and supplement his verified complaint. Otherwise appellee does not quarrel with appellant's "Disposition in Trial Court" section of his brief.

### **STATEMENT OF THE FACTS**

Appellant's Statement of Facts is also incomplete in the following particulars:

In paragraph 1, appellant states that the action was initiated for the "enforcement" of a partnership agreement. The action was rather a judicial termination of a partnership. (See prayer of Verified Complaint, R. 3-9)

The open court stipulation of November 8, 1989 was not a "stipulation before the Court to settle this action." but rather a temporary agreement to allow Zellmer to retain the business assets during the pendency of the action on condition, as noted above, that he pledge those assets to the court, and furnish the court a written inventory of the partnership assets. (R. 18 and

Trial Exhibit 1-P, R. 506)

When Zellmer disregarded the Stipulation of November 8, 1989 and sold the partnership assets, together with whatever separate assets of his own and the business name "Atlantis Divers" possessed, to Weyland on June 6, 1990, he did not "promise the he, Zellmer, owed no responsibility to his former business partner, Appellee, for said property, and that he, Mr. Zellmer, would otherwise hold Appellant harmless should any claim arise" as claimed by Appellant. The language of the hold-harmless document does not so state. It says that the assets are "free of all liens. Any claims against those assets that may arrize (sic) from James Miller or Miller Diving, Inc. will be the sole responsibility of Michael D. Zellmer and/or P & M Diving, Inc." (emphasis added) (Trial Exhibit 3, R. 506)

Counsel for Miller and Zellmer attempted to obtain a Stipulation to bring the partnership assets under the supervision of the court. The Stipulation was prepared leaving the name of the purchaser of the assets blank. Zellmer's attorney was to ascertain the buyer's name, and insert it into the stipulation and have it executed by the buyer. (Trial exhibit 7) Both counsel signed it, but Weyland refused. At trial Weyland, when asked about the stipulation responded:

"A. Again, I read that this morning, and I don't remember seeing it.

"Q. When you said you read it this morning, what did you read this morning?

"A. That thing from Mr. Beaslin [Zellmer's then attorney] that you were speaking of, I believe.

"Q. Do you have a copy of it here? I hand you what's been marked Exhibit 7 and ask if that's the stipulation and order that we have been talking about?

"A. Yes sir. I read it this morning. And I just do not remember seeing it before. I don't know whether I have ever had [it] or not, I just don't remember." (Transcript of trial, R. 585)

He was then asked about his deposition given August 15, 1991, which he admitted giving, and the deposition was upon motion published (Transcript, R. 585). The pertinent questions and answers in the deposition were then reviewed, and he acknowledged them as being his. They are:

"Q. What I am getting at, the lawsuit itself started before your purchase. So the question is -- you knew that Mr. Miller was an ex-partner?

"A. That's correct.

"Q. Did Mr. Zellmer disclose to you at any time in your negotiations that litigation was then pending when the sale occurred?

"A. Not that I remember.

"Q. When did you first learn that there was litigation?

"A. Really not until I received the paperwork from Mr. Beaslin in October.

"Q. Had Mr. Zellmer at any time prior to October 1989 told you that the inventory was pledged to the court?

"A. No.

"Q. So your first understanding of that possibility came when you got the documentation from Beaslin?

"A. No sir.

"Q. In October?

"Q. The documentation I got from Beaslin, the way I understood it, was asking me to sign this stipulation, I believe it is called, that it would be pledged to the court at that time.

"Q. You had no indication from Beaslin or any other source that it had been previously pledged?

"A. That's correct." (published deposition of Michael Weyland pps. 20-21)

At Statement of Fact #5, Appellant, quotes the Ruling of Judge Draney of April 9, 1991 which permits Weyland's entry as Intervenor and Third Party Plaintiff, but he fails to quote some critical language. He does, however, put the whole Ruling at the back of his brief as Exhibit "F". The pertinent language is: "During the pendency of this action, Weyland shall account for all sales and rentals of the equipment and inventory purchased from Zellmer, and shall weekly deposit with the court the accounting and the proceeds of such sales and rentals." (R. 140)

When asked about that portion of Judge Draney's Ruling at trial, Weyland responded as follows:

"Q. Now, when you then had those assets taken by Mr. Miller and you hired an attorney to be allowed to intervene and to set aside the judgment and ask to be allowed to intervene as a party,

the court ultimately made a ruling on the 3rd of May, is that correct, of 1991?

"A. I believe so, yes.

"Q. And you were aware that [of the] provisions in that ruling, is that also correct?

"A. Yes.

"Q. And calling your attention to the last sentence of the next to last paragraph, the underlying [underlined?] language provides that you were to furnish the court weekly accountings as to what was to happen to those assets; is that also correct?

"A. Yes, I remember that.

"Q. Did you ever make any such accountings?

"A. No, I didn't.

He was then asked about a letter, He then admitted that he received the assets back from Miller. Then returning to his duty to segregate and make accountings he was asked:

"Q. And did you commingle the assets in a sense that it would be impossible to really try to segregate and keep separate what was part of the old partnership and what part of your new involvement?

"A. Yes, it was commingled." (R. 581-582)

In Statement of Fact #9, and earlier in his Disposition in Trial Court section, Appellant asserts that Judge Anderson in granting Miller's Motion to Amend and claim Conversion, he says the court allowed Miller to "add Appellant as a defendant" as though Weyland was just then being inserted into the action. He further states that the court "did not address Appellant's statute of



limitations argument."

At trial, Judge Anderson explained specifically what he had in mind at the time he granted said Motion to Amend as follows:

"The Statute of Limitations question, although I have to admit when I ruled on the parties' Motion to Amend the Complaint to assert a cause of, a new claim for conversion, I take the position in the pleadings that Weyland was in the lawsuit from '91. Weyland reasonably anticipated what could have been asked for. It's one of those situations where the claim was not a complete surprise to him. I believe that if the parties are in the lawsuit, the pleadings could always be amended to conform to the evidence. The Motion to Amend was not made, was made in enough time to respond or be prepared for it. And I analyzed it and decided that I would grant the motion and allow that claim to be stated and that it wouldn't prejudice anyone unduly.

"And I had to be thinking at the time, and I rule now that the Statute of Limitations has not run because of his being in the lawsuit from '91, that the claim could have reasonably been asserted. Both parties were in this lawsuit. And I think the Statute would not have begin [sic] to run until the date of trial." (R. 609 - 610)

The references to the record in this Statement of Facts section are set out in the order referred to herein as Addendum B.

#### SUMMARY OF THE ARGUMENT

**I. APPELLEE'S SUPPLEMENT AND AMENDMENT TO PLAINTIFF'S VERIFIED COMPLAINT RELATES BACK TO APPELLEE'S ORIGINAL FILING AND IS NOT IN VIOLATION OF THE STATUTE OF LIMITATIONS NOR IS APPELLANT CONSIDERED A NEW DEFENDANT.**

This case began as a judicial partnership dissolution between appellee and Michael Zellmer. Appellant became involved in this matter upon his own motion to intervene. He claimed an

interest and ownership in the partnership assets as he wrongfully purchased the assets from Zellmer. Due to appellant's delay in not proceeding with the discovery he desired when he objected to appellee's notice of readiness for trial, appellee sought and was granted leave to amend his verified complaint.

Appellee amended his complaint to include a cause of action against appellant for conversion. Appellee then filed a notice of readiness for trial on September 3, 1996.

The statute of limitations on conversion has not run as appellant was a party to this lawsuit since his intervention and appellee did not by his supplement and amendment to his complaint add him as a new party.

**II. THIS CASE COULD HAVE BEEN SET FOR TRIAL WITHOUT APPELLEE'S MOTION TO AMEND, AND THEREFORE IF IT WAS ERROR FOR THE TRIAL COURT TO GRANT APPELLEE'S MOTION TO AMEND IT WAS HARMLESS ERROR.**

Trial could have been had without appellee's motion to amend and the pleadings would have been deemed conformed to the evidence. So if it was error for the trial court to grant leave to amend it was harmless error.

**III. LACHES IS AN EQUITABLE DOCTRINE AND WILL NOT RELIEVE APPELLANT OF HIS WRONGDOING AND HAS NO APPLICATION IN THIS LAWSUIT.**

Appellant's argument of laches is also without merit as it is an equitable doctrine allowing the trial court the discretion to allow or disallow laches as a defense. Laches requires meeting a two prong test, (1) lack of diligence and (2) that lack of

diligence caused an injury to the party claiming laches. It was appellant's objection to trial that resulted in the delay not appellee. And the delay did not cause injury to appellant in fact he benefited from the delay.

**IV. PREJUDGMENT INTEREST SHOULD BE AWARDED TO APPELLEE AS IT CAN BE ASCERTAINED WITH MATHEMATICAL CERTAINTY.**

The prejudgment interest as awarded by the trial court should be upheld because the loss can be fixed at a definite time and it can be shown with mathematical certainty what that damage involved.

**VI. ATTORNEY'S FEES ON APPEAL.**

Attorney's fees should be awarded as this appeal is meritless, and substantially reduces appellee's judgment. This appeal was instituted to further delay appellee's judgment in his favor.

**ARGUMENT**

**I. APPELLEE'S SUPPLEMENT AND AMENDMENT TO PLAINTIFF'S VERIFIED COMPLAINT RELATES BACK TO APPELLEE'S ORIGINAL FILING AND IS NOT IN VIOLATION OF THE STATUTE OF LIMITATIONS NOR IS APPELLANT CONSIDERED A NEW DEFENDANT.**

Appellant correctly set forth part of the Utah Rules of Civil Procedure regarding the provisions for amendment of a pleading. Said Rule fully states in pertinent part as follows:

(a) **Amendments.** .... [a] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires....

(c) **Relation back of amendments.** When ever

the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrence or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Utah Rules of Civil Procedure 15(a)(c)(d).

Utah has held that "[r]elation back [to the original pleading] is allowed under the rules even if a statute of limitations has run during the intervening time. *Citation omitted.* In considering motions to amend pleadings, primary considerations are whether parties have adequate notice to meet new issues and whether any party receives an unfair advantage or disadvantage." Ringwood v. Foreign Auto Works, Inc. 786 P.2d 1350, at 1359-1360. (Utah App. 1990). In Ringwood the court found that the facts upon which the amendment was based, namely the unauthorized selling of stock to third parties arose out of the same general transaction and that the defendants had adequate notice of the claim and were not prejudiced by the amendment.

The Supreme Court of Utah when addressing the issue of amending a pleading stated that "rule 15 should be interpreted liberally so as to allow parties to have their claims fully

adjudicated." Timm v. Dewsnup, 851 P.2d 1178 at 1183 (Utah 1993).

The Court in Timm went further to explain by citing Cheney v Rucker, 14 Utah 2d 205, 211, 381 P.2d 86, 91 (1963), that:

"[t]he rules of civil procedure must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute."

Timm at 1183. The Court also quoted Johnson v. Brinkergoff, 89 Utah 530, 538-39, 57 P.2d 1132, 1136 (1936) by stating that:

"[t]he policy of the law is toward liberality in the allowance of amendments and to regard them favorably in order that the real controversy between the parties may be presented, their rights determined, and the cause decided."

Timm at 1183. It is important to realize that this court placed grave importance on the ability of the other party to fully meet the new matter. The court explained in Thomas J. Peck & Sons v. Lee Rock Prods., Inc., 30 Utah 2d 187, 193, 515 P.2d 446, 449-50 (1973):

"Some tempest has been raised about the court allowing the plaintiff to make tardy amendments to the pleadings.... The pleadings are never more important than the case that is before the court.... There can be no prejudice in this case because we'll give ample time for an answer.... This is in harmony with what we regard as the correct policy: of recognizing the desirability of the pleadings setting forth definitely framed issues, but also of permitting amendment where the interest of justice so requires, and the adverse party is given a fair opportunity to meet it."

Timm at 1183.

In the Timm case, the matter was dormant for ten years before the appellants attempted to amend the pleadings. The opposing party stated that they would be prejudiced by any amendment that would come after such a long dormancy. The court observed that the dormancy of the case was occasioned by the fault of neither party but for bankruptcy proceedings. The court mentioned that the items brought up with the amendment would "involve only an interpretation of the loan documents, which would be unaffected by the passage of time." Timm at 1183. Of additional interest is that in Gillman v. Hansen, 26 Utah 2d 165, 486 P.2d 1045 (1971), the Utah Supreme Court found that a trial court had abused its discretion when it refused to allow a party to amend its pleadings. The court stated in Timm:

"this court has never upheld a trial court's refusal to grant leave to amend a pleading before a trial date has been set because at that point in the litigation, the opposing party will always have time to respond to the amended pleading.... Conversely [the court has] upheld a trial court's refusal to grant leave to amend only when the amendment was sought shortly before trial or at trial so that the opposing party did not have adequate time to respond."

Timm at 1183.

In the instant case, the motion to amend appellee's complaint was sought prior to a trial date being established. Appellant was given full opportunity to respond to appellee's amendment and cannot claim that he was prejudiced thereby. Much like the facts in Timm, all that was involved were documents which were all successfully produced at trial. Even getting the case to

trial was similar in facts to Timm as much of the delay was occasioned by Zellmer's bankruptcy proceedings and appellant's contention that the bankruptcy court must now be involved and more discovery needed to be completed. (R. 428). These objections were overcome by the time the actual trial date was set and trial was heard on the merits.

As outlined above, Rule 15(c) of the Utah Rules of Civil Procedure, provide for the contingency when the statute of limitations runs on a cause of action. In order to be effective, however, the cause of action must arise "... out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading..." Utah Rules of Civil Procedure 15(c). At issue in this matter has always been ownership of the partnership property. When appellant purchased the partnership assets in bad faith, knowing of appellee's interest therein, the act of conversion occurred and related back to the original verified complaint filed by appellee.

The statute of limitations on conversion was tolled by the relation back to the original pleading as appellant has been a party to this lawsuit from the date his motion to intervene was granted on May 3, 1991. (R. 140-141). Thus, appellant's contention that he was a new party, citing Doxey-Layton Co. v. Clark, 548 P.2d 902 (Utah 1976) and Vina v. Jefferson Ins. Co. of New York, 761 P.2d 581 (Utah App. 1988), do not address the real issue. Appellant cannot in good faith claim that he was not a party to all proceedings of this lawsuit.

The trial court, when explaining why he granted appellee leave to amend and add as a cause of action appellee's claim of conversion stated:

"...I have to admit when I ruled on the parties' motion to amend the complaint to assert a cause of action, a new claim for conversion, I take the position in the pleadings that Weyland [appellant] was in the lawsuit from '91. Weyland [appellant] reasonably anticipated what could have been asked for. It's one of those situations where the claim was not a complete surprise to him. I believe that if the parties are in the lawsuit, the pleadings could always be amended to conform to the evidence. The motion to amend that pleading ..., was made in enough time to respond or to be prepared for it. And I analyzed it and decided that I would grant the motion and allow that claim to be stated and that it wouldn't prejudice anyone unduly.

And I had to be thinking at the time, and I rule now that the statute of limitations has not run because of his being in the lawsuit from '91, that the claim could have reasonably been asserted both parties were in the lawsuit. And I think the statute would not have begin to run until the date of trial."

(Record 609 - 610).

Appellee has clearly met the requirements for a court to grant leave to amend its pleadings. The requirements are (1) timeliness of the motion; (2) justification given by movant for delay; and (3) no resulting prejudice to responding party. Kleinert v. Kimball Elevator Company, 854 P.2d 1025 at 1028, citing Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, at 1216 (Utah App 1989). Further, Utah courts have held that the decision to allow or disallow a motion to amend a pleading is discretionary with the trial court. Kleinert, 854 P.2d 1025, 1028 citing



Stratford v. Morgan, 689 P.2d 360, at 365 (Utah 1984) and Girard v. Applyby, 660 P.2d 245 at 248 (Utah 1983).

In an action for recovery of child support and alimony under a Nevada decree of divorce, the trial court allowed the plaintiff to amend the pleadings to conform to the evidence. The defendant argued that the supplemental complaint constituted a new and separate cause of action that cannot be allowed by the amendment. The Supreme Court of Utah stated that:

"This rule has give the courts considerable trouble in the past due to the different meanings and construction of the term "cause of action," but as pointed out in Hartford Accident & Indemnity Co. v. Clegg, 103 Utah 414, 135 P.2d 919, 922, this term cannot be taken literally but must be given a liberal construction, the term is broadly descriptive, its use purely practical, and its bounds as extensive as can be conveniently and efficiently handled as a single unit without injury to substantive rights. In the above case we held in effect that the test is not whether under technical rules of pleading a new cause of action is introduced, but rather the test is whether a 'wholly different cause of action' or 'legal obligation' is introduced, that is, an amendment will be allowed if a change is not made in the liability sought to be enforced against the defendant. The reader is referred to the above cited case for an able and extensive discussion of the term 'cause of action.'"

Wells v. Wells, 272 P.2d 167, 169-170 (Utah 1954).

It is clear that appellant could and should have been found liable under the pleadings as they existed before the amendment. Appellee out of an abundance of caution obtained leave to amend prior to the trial date being set. The amendment removed any possibility of doubt as to what appellee sought at trial, and

appellant had ample time to prepare and present any defense which he had. He clearly had none, and the lower court committed no error in allowing the amendment.

**II. THIS CASE COULD HAVE BEEN SET FOR TRIAL WITHOUT APPELLEE'S MOTION TO AMEND, AND THEREFORE IF IT WAS ERROR FOR THE TRIAL COURT TO GRANT APPELLEE'S MOTION TO AMEND IT WAS HARMLESS ERROR.**

This case could have been set for trial without appellee's motion to amend and tried on the basis of appellee's original pleading or upon appellant's Third Party Complaint.

Appellant's Third Party Complaint sets forth essentially the same issue, ownership of the partnership assets. Appellant in his first cause of action in his Third Party Complaint prays, "A. That Third-Party Defendants [Appellee and Zellmer] and all persons claiming under them be required to set forth any and all claims in or to the property; B. That said claims be determined by a decree of this Court; C. That said decree declare and adjudge that Intervenor owns absolutely and is entitled to the quiet and peaceful possession of the Property; and that Third-Party Defendants and all persons claiming under them, have no estate, right, title, lien or interest in or to the Property adverse to Weyland or ADI;..." (R. 174 - 175). Based upon this section of appellant's third party complaint alone, trial could have been had on the merits of the case without need for amendment as appellant put at issue ownership of the partnership assets.

Had this been set for trial without the benefit of appellee's amended pleadings, appellee would have been able to

pursue the same line of questioning regarding appellant's knowledge and involvement in the transaction that took place behind appellee's back and without his or the court's authorization as it was the same issue that was before the court at all times and from appellee's verified complaint: ownership of partnership assets.

This court has held that "[u]nder Rule 15 (b) of the Utah Rules of Civil Procedure, issues not raised by the pleadings may be tried by the express or implied consent of the parties. The Utah Supreme Court has observed that issues tried by express or implied consent shall be treated as if raised in the pleadings. Therefore, 'even failure to amend the pleading does not affect the result of the trial of these issues'" Coleman v. Coleman, 743 P.2d 782, citing General Insurance Company of America v. Carnicero Dynasty Corp., 545 P.2d 502, 506 (Utah 1976).

Although this discussion is not necessary as appellee rightfully amended his pleadings and trial was had on that basis, if this court finds there was error in said granting of the motion to amend it was harmless error as trial was still had on the merits of the lawsuit.

**III. LACHES IS AN EQUITABLE DOCTRINE AND WILL NOT RELIEVE APPELLANT OF HIS WRONGDOING AND HAS NO APPLICATION IN THIS LAWSUIT.**

Laches has been described as,

"a creation of equity and is a specie of equitable estoppel. Whether a party is guilty of laches primarily is a question of fact and therefore its determination is within the province of the trial court. The decision to apply laches is committed to the sound discretion of the trial court. Because application of laches is discretionary, the

standard of review on appeal is whether the trial court properly found (1) a lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."

Quintana v. Quintana, 802 P.2d 488, 491 (Idaho App 1990). "Laches bars a recovery when there has been a delay by one a party causing a disadvantage to the other party. *Citations Omitted*. Laches has two elements: (1) lack of diligence on the part of the claimant and (2) an injury to the defendant because of the lack of diligence. Plateau Mining Co. v. Utah Division of State Lands, 802 P.2d 720 (Utah 1990). See also: Leaver v. Grosse, 610 P.2d 1262, 1264 (Utah 1980).

Appellant cannot meet this standard. Although appellant states that he has been prejudiced by appellee's amendment to his complaint, appellant never sets forth what that prejudice is. No injury can be shown as a result of delay. In fact, just the opposite is true and appellant has been benefited by the delay. He has been able to run his business with property that was not rightfully his.

If appellant wished that this lawsuit would have been finished years ago, he had ample time to move it forward as well. At any point pursuant to his objection to appellee's first notice of readiness for trial, appellant could have participated in more discovery or made his own motions for disposition of this case.

Appellant had plenty of time to prepare for trial. There were no surprises and as shown by appellant's pleadings, he was able to defend the allegations of appellee. Appellant's laches

argument does not meet the standard Utah has established. Further, the trial court in addressing the issue of laches pointed out specifically that:

"Latches [sic]: again this is a situation where both parties were in here. Mr. Miller [appellee], from his testimony here today, and Mr. Weyland [appellant], both, must be a little distressed with the court's system with how long it takes to do things. As an officer of the court here, as the lawyers, as everybody's aware, due process does take time. But due to a series of events that were uncontrollable, in my opinion, by virtue of this case and what happened here, this is one of those cases that should have been resolved before now. I am trying to look at it and do what I think is a fair and adequate result."

Record at 609 - 610.

**IV. PREJUDGMENT INTEREST SHOULD BE AWARDED TO APPELLEE AS IT CAN BE ASCERTAINED WITH MATHEMATICAL CERTAINTY.**

This matter is not a matter of equity. The judgment rendered by the trial court was not equitable in nature. The judgment was based upon evidence proffered by appellee as to the value of the assets and the purchase price paid by appellant when he bought the assets without appellee's knowledge back in 1991. The trial court found that, "[a]fter commencement of this action [the partnership dissolution between appellee and Zellmer] and before the dissolution had been effected, Zellmer sold the business which he had renamed Atlantis Divers to Defendant-Third Party Plaintiff, Michael Weyland [appellant]. The sale occurred in June of 1990. The purchase price was \$15,388.21." (R.518). This is mathematical certainty and fulfills the test which Utah has established for the granting of prejudgment interest.

In First Security Bank of Utah v. J.B.J. Feedyards, 653 P.2d 591 (Utah 1982), a bank attached 342 head of cattle for a debt that was later discovered to partly belong to an intervenor. The bank was found to have wrongfully attached 266 head of cattle that belonged to the intervenor. Because of appeals the intervenor was not fully paid from the proceeds of a sale which was occasioned for the satisfaction of the debt. Regarding prejudgment interest:

"The trial court awarded prejudgment interest on all items of damage from May 16, 1975, the date when intervenor acquired the cattle sale proceeds, to July 26, 1980, the date of its judgment. The court properly granted such interest at the rate of 6 percent per annum on its award of excessive interest paid to Zions and on its attorney fee award, both of which were fixed as of the time of claimed damages.

First Security 653 P.2d 591, at 599-600.

The court explained by citing from Bjork v. April Industries, Inc., Utah, 560 P.2d 315 (1977):

"[T]he law in Utah is clear[:] ... where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of judgment. On the other hand, where *damages are incomplete or cannot be calculated with mathematical accuracy*, such as in the case of personal injury, wrongful death, defamation of character, false imprisonment, etc., the amount of the damage must be ascertained and assessed by the trier of the fact at the trial, and in such cases *prejudgment interest is not allowed*. [Emphasis added; footnote omitted.]

First Security, 653 P.2d 591, at 600.

Appellant cites Nielson v. Droubay, 652 P.2d 1293 (Utah

1982), and Bellon v. Malnar, 808 P.2d 1089 (Utah 1991), as authority that prejudgment interest should not be allowed. However, the court in Nielson, based its decision on whether or not to grant prejudgment interest in that long pending case as the delay was on the insistence of both parties. Here the only party which insisted on a delay was appellant when he objected to appellee's request for trial date in 1993. (R. 425-426 and 427-429). Thus, he cannot appear now and claim that it was appellee who insisted upon the delay.

In Bellon, the court also denied prejudgment interest. However, in appellant's citation of a section of the Bellon, opinion, he leaves out a critical section explaining the court's rational for said denial:

"A survey of our cases where prejudgment interest was awarded indicates that interest has been allowed in action for damage to personal property, in actions brought on a written contract, and in an action to recover a liquidated overpayment of water subscription charges. In many of these cases, we stressed that the loss had been fixed as of a definite time and the amount of the loss can be calculated with mathematical accuracy in accordance with well-established rules of damages. No case has been cited to us where we have allowed prejudgment interest in an action such as the instant case, which is for equitable relief. **"A suit of this nature involving the invocation of a forfeiture and/or the enforcement of a purchase contract invokes consideration of the principles of equity which address themselves to the conscience and discretion of the trial court."** *Fullmer v. Blood*, 546 p.2d at 610. In view of the highly equitable nature of this action where the court has discretion in determining the amount, if any, to be returned to the defaulting vendee, we find no error in the denial of prejudgment interest."

Bellon at 1097 *emphasis added*. It is ironic that appellant first claims that the judgment in the present case is for equitable relief but when said equitable relief is supposedly given to appellee, appellant claims foul and that the trial court is prohibited from giving such relief. The court in Bellon did not say that the court can't give prejudgment interest, it only stated that it leaves a determination of when it would be appropriate with the trial court in its sound discretion.

It is appellee's contention that the award of prejudgment interest was not an equitable award. The trial court was able to find the exact date at which appellee was injured, namely the date appellant purchased the partnership assets without the approval of appellee and to his detriment. This date of the sale occurred in June, 1990 and the purchase price was \$15,388.21. The trial court determined that appellee was entitled to half the amount of the sale, \$7,694.11, and interest at the judgment rate thereafter. (R.517-520) The trial court then awarded prejudgment interest to begin on April 9, 1991. (R. 517-520) April 9, 1991 is the date to which appellee was entitled to the property, namely that is the date that appellant filed his motion to intervene to set aside judgment and for order to return property. (R. 101-102). This process demonstrates that the trial court fixed with mathematical certainty the loss appellee suffered and was able to compensate him for his loss. It is noteworthy to point out that appellant has had uninterrupted use of appellee's property since he unlawfully purchased the partnership assets in June of 1990. Appellee has



seen no benefit therefrom. Additionally, as the trial court pointed out, appellant did not even fully pay Zellmer for the partnership assets and essentially obtained a wash of the amount he shortchanged Zellmer:

The bulk of that is memorialized by exhibit 2 and as agreed upon by the parties was 15,388.21. That's probably the best evidence of the value. That's the agreed upon price. I don't know how it would be broken down. But that's what he paid for and that's what he got.

The evidence is interesting too. He apparently didn't pay the entire amount. So if I give Mr. Miller [appellee] a judgment for half of that, Mr. Weyland [appellant] is still off the hook for the amount he didn't pay. So I guess, technically, that would belong to the bankruptcy trustee of Zellmer. I don't know.

(R. 512).

By its decision the lower court determined that the assets which appellant has been using belonged to appellee. By having the use of these assets in his business, appellant was spared the necessity of borrowing from the bank to buy replacement assets thereby saving interest on the loan. It would be wrong to allow appellant to retain this benefit at the expense of appellee who has had no use of assets or their value during that period of time.

#### **V. ATTORNEY'S FEES ON APPEAL.**

While the undersigned are well aware that the granting of attorneys' fees on appeal are discretionary with this court, Appellees wish to point out only that the court below didn't award attorneys fees either under the partnership statute or under the

bad faith defense statute (78-27-56, U.C.A., as amended), nevertheless Appellees contend that Appellant's appeal herein really is of so little merit that having to defend it works a hardship on Appellees. It in effect dilutes the Judgment and interest won in the court below. Accordingly, while we have not cross-appealed the awarding of no attorney's fees below, we respectfully request that this court grant them for having to defend this appeal.

#### VI. CONCLUSION

For the above reasons the decision of the court below in all particulars should be affirmed and appellee awarded attorney's fees and costs on appeal.

DATED this 10th day of December, 1997.

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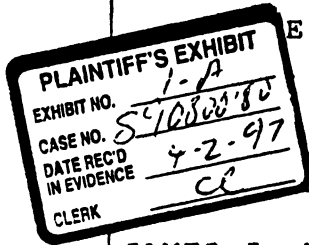
GORDON A. MADSEN  
MICHAEL D. CUMMINGS  
Attorneys for Appellee

#### CERTIFICATE OF MAILING

A copy of Appellee's brief on appeal was mailed to Daniel S. Sam, attorney for Appellant, at his address 319 West 100 South, Suite A, Vernal, Utah 84078, this \_\_\_\_\_ day of December, 1997.

---

GORDON A. MADSEN  
MICHAEL D. CUMMINGS  
Attorneys for Plaintiff



THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY  
STATE OF UTAH

JAMES J. MILLER, MILLER  
DIVING INC.,

PLAINTIFF,

VS.

MICHAEL D. ZELLMER, D & M  
DIVING,

DEFENDANTS.

)  
)  
)  
) REPORTER'S TRANSCRIPT  
) OF PROCEEDINGS  
)  
)  
) CIVIL NO.  
) 89-CV-108U  
)

) **CERTIFIED COPY**  
)

BE IT REMEMBERED, THAT ON NOVEMBER 8, 1989 THE  
ABOVE-ENTITLED MATTER CAME ON FOR HEARING IN THE COURTROOM  
OF THE UINTAH COUNTY COURTHOUSE VERNAL, UTAH; SAID CAUSE  
BEING HEARD BY THE HONORABLE DENNIS L. DRANEY, JUDGE IN  
THE EIGHTH JUDICIAL DISTRICT, STATE OF UTAH.

A P P E A R A N C E S

FOR THE PLAINTIFF:        GORDON A. MADSEN, ESQ.  
                             ATTORNEY AT LAW  
                             1130 WEST CENTER STREET  
                             NORTH SALT LAKE, UTAH 84054

FOR THE DEFENDENT:        JOHN C. BEASLIN, ESQ.  
                             BEASLIN & ANDERSON  
                             ATTORNEYS AT LAW  
                             185 NORTH VERNAL AVENUE  
                             VERNAL, UTAH 84078

\* \* \*

P R O C E E D I N G S

THE COURT: LET'S LOOK AT THE MATTER OF JAMES  
J. MILLER AND MILLER DIVING VERSUS ZELLMER AND D & M  
DIVING.

MR. MADSEN, IT'S NICE TO HAVE YOU WITH US  
AGAIN.

MR. MADSEN: THANK YOU, YOUR HONOR. IT'S  
NICE TO BE HERE.

MR. BEASLIN: WITH REFERENCE TO THIS MATTER,  
YOUR HONOR, THIS IS A PARTNERSHIP ACCOUNTING OF A  
BUSINESS BOTH IN SALT LAKE AND LOCATED HERE IN VERNAL.  
WE HAVE AGREED THAT THE CUT-OFF DATE WILL BE OCTOBER  
31ST AT MIDNIGHT OF THAT DAY, AND THAT ON OR BEFORE  
DECEMBER 10, 1989 MR. ZELLMER WILL SUBMIT A SPREAD SHEET  
OF THE ACCOUNTABILITY OF THE BUSINESS UP TO THE OCTOBER  
31ST TIME, AND HAVE THAT IN THE HANDS OF MR. MILLER BY  
THAT TIME. AND WE WILL ALSO THEN PUT UP AS A SECURITY  
AGREEMENT THE INVENTORY OF THE ITEMS HERE IN VERNAL AS  
OF APRIL 1, 1989.

THE COURT: IS MR. ZELLMER PRESENT?

MR. BEASLIN: HE IS.

THE COURT: MR. ZELLMER, HAVE YOU HEARD THE  
STATEMENT MADE BY YOUR ATTORNEY?

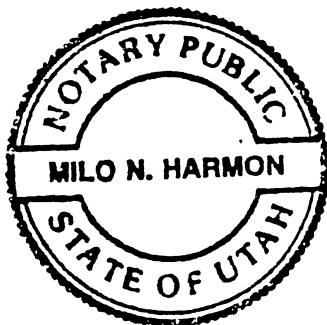
MR. ZELLMER: YES, SIR. I HAVE.

1 THE COURT: DO YOU UNDERSTAND IT?  
2 MR. ZELLMER: YES, SIR.  
3 THE COURT: DO YOU AGREE TO BE BOUND BY IT?  
4 MR. ZELLMER: YES, SIR.  
5 THE COURT: IS THIS AGREEABLE TO THE PLAINTIFF,  
6 MR. MADSEN?  
7 MR. MADSEN: MR. MILLER IS HERE AS WELL.  
8 THE COURT: MR. MILLER, HAVE YOU HEARD THE  
9 STATEMENT MADE BY COUNSEL IN THIS MATTER?  
10 MR. MILLER: I HAVE.  
11 THE COURT: DO YOU UNDERSTAND IT?  
12 MR. MILLER: I DO.  
13 THE COURT: AND DO YOU AGREE TO BE BOUND BY THE  
14 TERMS OF IT?  
15 MR. MILLER: YES, I DO.  
16 THE COURT: ALL RIGHT.  
17 COUNSEL, I WOULD LIKE MR. BEASLIN, IF YOU  
18 WOULD, TO REDUCE THAT TO WRITING AND WE CAN HAVE A CLEAR  
19 RECORD OF IT.  
20 MR. MADSEN: THANK YOU, YOUR HONOR. WE  
21 APPRECIATE THAT.  
22  
23 \* \* \*  
24  
25

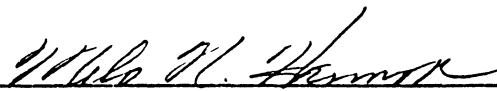
REPORTER'S CERTIFICATE

I, MILO N. HARMON, CERTIFIED SHORTHAND REPORTER FOR THE STATE OF UTAH, DO HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE BY ME STENOGRAPHICALLY REPORTED AT THE TIMES AND PLACES HEREIN SET FORTH; THAT THE SAME WAS SUBSEQUENTLY BY ME CAUSED TO BE REDUCED TO TYPEWRITTEN FORM CONSISTING OF PAGES 3 THROUGH 4, INCLUSIVE; AND THAT THE SAME CONSTITUTES A TRUE AND CORRECT TRANSCRIPTION OF TESTIMONY GIVEN.

TO WHICH CERTIFICATION I HEREBY SET MY HAND THIS 24TH DAY OF AUGUST, 1990, AT VERNAL, UINTAH COUNTY, UTAH.



MY COMMISSION EXPIRES  
AUGUST 1, 1991

  
MILO N. HARMON, CSR  
REGISTERED PROFESSIONAL REPORTER  
(UTAH CSR NO. 51)

## Bill of Sale

Transfer of Assets of Atlantis Divers  
including all rights to use of the  
name Atlantis Divers from P.E.M.  
Diving Inc. to Michael Weyland  
as of 6-16-90 including but not  
limited to the items listed  
below:

Cylinders serial # 8208, 222850,  
DL48044 & 2nd cylinder in cascade trailer.

Compressor - model # K1485 ser. # 7637  
Cascade trailer

Current inventory as verified by both parties  
on 6-16-90 (see attached)

## Terms of Sale:

Total price 15,388.21 \$8,000.00 Down  
\$5,000 in 30 days and 500.00 per  
month for 5 months or until balance  
is paid.

Michael Weyland 6/16/90  
Richard Gilmer 6-16-90  
sole stock holder P.E.M.  
Diving Inc.

Mike Gilmer 6/16/90

Witnessed by Echo Collier  
6-16-90

PLAINTIFF'S EXHIBIT	
EXHIBIT NO.	2
CASE NO.	890800/80
DATE REC'D IN EVIDENCE	6-2-90
CLERK	Ch



To Whom it May Concern,

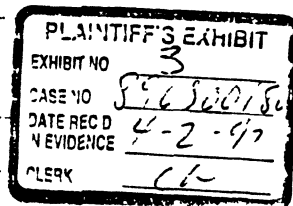
Michael D. Zellmer as  
President of P & M Diving Inc.  
has sold all assets of  
Atlantic Divers to Michael  
Weyland, free of all liens.

Any claims against  
those assets that may  
arise from James Miller  
or Miller Diving, Inc. will  
be the sole responsibility  
of Michael D. Zellmer  
and/or P & M Diving Inc.

6/16/90

Michael Zellmer

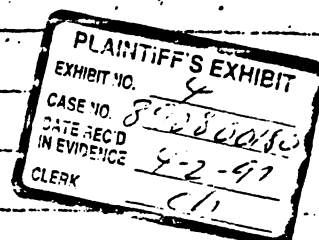
Witnessed by Dennis L. Cook



To Whom it May Concern,

P & M Diving, Inc. has  
relinquished all rights to the  
name of Atlantis Divers, a  
former D. B. A. of P & M Diving, Inc.  
and sold those rights to  
Michael Weyland.

Richard S. Miller  
sole stock holder P & M Diving Inc  
and Inc. Inc. 6-16-90



JOHN C. BEASLIN, 0258, of  
Beaslin & Anderson  
Attorney for Defendant  
185 North Vernal Avenue, Suite 1  
Telephone: 801/789-1201

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY  
STATE OF UTAH

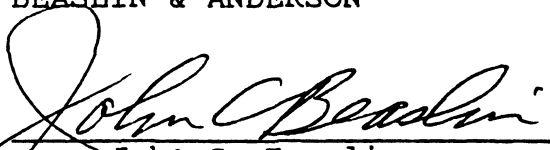
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JAMES J. MILLER, ET AL,	:	
Plaintiff,	:	
vs.	:	WITHDRAWAL OF COUNSEL
MICHAEL D. ZELLMER, ET AL,	:	Civil No. 890800180 CN
Defendant.	:	Judge Dennis L. Draney

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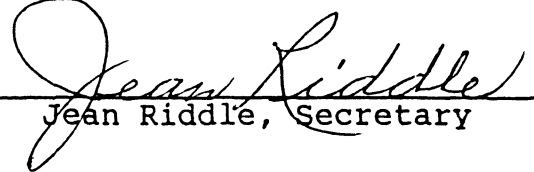
COMES NOW JOHN C. BEASLIN, of the firm of Beaslin & Anderson,  
and hereby withdraws as counsel for the above named Defendant, this  
26<sup>th</sup> day of November, 1990.

BEASLIN & ANDERSON

  
John C. Beaslin

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the  
foregoing Withdrawal of Counsel to Gordon A. Madsen, Esq., Attorney  
for Plaintiff, 1130 West Center Street, North Salt Lake, Utah  
84054, postage prepaid on the 26<sup>th</sup> day of November, 1990.

  
Jean Riddle, Secretary

**UPDATED INDEX**  
**James J. Miller and Miller Diving vs. Michael D. Zellmer and P&M Diving**  
**890800180**

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FILED  
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UINTAH COUNTY, UTAH  
NOV 21 1997  
BY JOANNE MOORE, CLERK  
DEPUTY

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Copy of Letter from Utah Supreme Court to 8th District Court	11/6/97	Page 642
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DATED this 21<sup>st</sup> day of November, 1997.

Theresa Winkler  
Deputy Clerk

#### MAILING CERTIFICATE

I hereby certify that on the 21st day of November, 1997, true and correct copies of the Updated Index were mailed, postage prepaid, or hand delivered to: Utah Court of Appeals, at 230 South 500 East, Suite 400, Salt Lake City, UT 84102, Mr. Daniel Sam, Attorney for Plaintiffs, at 319 West 100 South, Suite A, Vernal, UT 84078, and to Mr. Gordon Madsen and Mr. Michael D. Cummings, Attorneys for Defendants, at 225 South 200 East, Suite 150, Salt Lake City, UT 84111.

Theresa Winkler  
Deputy Clerk

LARRY A. STEELE, #3090  
STEELE & ASSOCIATES, P.C.  
Attorneys for Michael Weyland and  
Atlantis Divers, Inc.,  
Third-Party Plaintiffs  
319 West 100 South, Suite A  
Vernal, Utah 84078  
Telephone (801) 789-1301

---

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY  
STATE OF UTAH

---

JAMES J. MILLER and MILLER DIVING, )  
INC., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
MICHAEL D. ZELLMER and P & M )  
DIVING, INC., )  
 )  
Defendants. )

OBJECTION TO REQUEST FOR  
TRIAL DATE

---

MICHAEL WEYLAND and ATLANTIS )  
DIVERS, INC., a Utah corporation, )  
 )  
Intervenors & Third Party )  
Plaintiffs, )  
 )  
vs. )  
 )  
JAMES J. MILLER; MILLER )  
DIVING, INC.; MICHAEL D. )  
ZELLMER; P & M DIVING, INC.; and )  
DIVE UTAH VERNAL a/k/a DIVE UTAH )  
EAST, a Utah General Partnership, )  
d/b/a ATLANTIS DIVERS, )  
 )  
Third-Party )  
Defendants. )

---

Case No. 890800180 CN

Intervenors and Third Party Plaintiffs, Michael Weyland and Atlantis Divers, Inc., respectfully object to the Plaintiffs' Request for Trial Date upon the following grounds:

1. Clark Allred filed a Motion to Withdraw as Counsel on December 4, 1992.

2. Since Mr. Allred's withdrawal, no attorney has appeared on behalf of Defendants Michael D. Zellmer and P & M Diving, Inc.

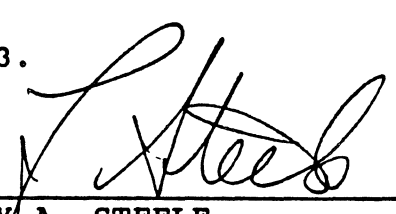
3. The Defendant, Michael D. Zellmer, has filed for bankruptcy on January 21, 1993, Case No. SA93-10600 JB, in the United States Bankruptcy Court, P. O. Box 12600, 34 Civic Center Plaza, Room 506, Santa Ana, CA. 92701-4025.

4. The Defendant, Michael D. Zellmer, is a necessary party and the case cannot be resolved without his participation. Bankruptcy issues are now involved and must be resolved by motion. Resolution may require the removal of this case to the Bankruptcy Court.

5. The real issues were between Miller and Zellmer and Mike Weyland purchased the assets in good faith.

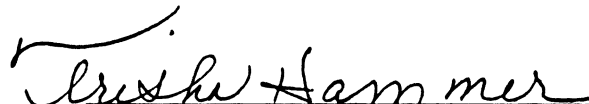
6. Much discovery and motion work is necessary prior to this case being ready for trial.

DATED this 29~~th~~ day of April, 1993.

  
\_\_\_\_\_  
LARRY A. STEELE

CERTIFICATE OF MAILING

I, Trisha Hamner, do hereby certify that I mailed first class, postage prepaid, a true and correct copy of the foregoing Objection to Request for Trial Date, on this 29th day of April, 1993, to: Michael D. Zellmer, 16761 Viewpoint Lane, #308, Huntington Beach, CA. 92647, Gordon A. Madsen, Attorney at Law, 1130 West Center Street, North Salt Lake City, Utah 84054.

  
Trisha Hamner, Secretary

mon zellmer.obj

IN THE EIGHTH JUDICIAL DISTRICT COURT

UINTAH COUNTY, STATE OF UTAH

---

MILLER, JAMES J.	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 890800180 CN
	:	DATE 01/18/94
VS	:	HONORABLE JOHN R. ANDERSON
	:	COURT REPORTER
ZELLMER, MICHAEL D.	:	COURT CLERK CJW
DEFENDANT	:	

---

TYPE OF HEARING: HEARING  
PRESENT:

P. ATTY.  
D. ATTY.

---

THE FILE IN THIS MATTER WAS ADDED TO JUDGE ANDERSON'S CALENDAR ON JANUARY 18, 1994 BUT THE COURT CAN FIND NO REASON WHY THE CASE SHOULD BE ON THE CLAENDAR. THE COURT STRIKES THIS MATTER FROM THE CALENDAR.



operated a Scuba Diving business at 50 South 1500 West, #31, Vernal, Utah. Defendant Zellmer was the principal operating officer who managed the business and kept the books of the business.

3. During the period of approximately August 1986 through March 1989, Defendant Zellmer submitted somewhat regular accountings to Plaintiff concerning the operations of the business. Thereafter such accountings stopped and the parties, following a discussion of several matters executed on May 23, 1989 an amendment or "addition" to the partnership agreement, which "addition" is attached hereto, marked Exhibit "A" and incorporated herein by reference as though set out in full.

4. On or about July 11, 1989 Plaintiff received by certified mail from Defendants a notice of intent to dissolve the partnership, accompanied with a proposal substantially out of accord with Exhibit "A". Plaintiff responded by mail on July 19, 1989 that such proposal was unacceptable and insisted that the May 23, 1989 "addition" (Exhibit "A") applied. Defendants have since refused to dissolve the partnership or render any accounting, notwithstanding repeated requests for the same made by Plaintiffs. Moreover, Defendants are in control of the partnership books and assets, and are carrying on the business at a new location in Vernal, Utah, whether in the partnership name or otherwise, which is a willful breach of the terms of Exhibit "A" and continuation



of a partnership business is not reasonable practicable.

5. Pursuant to the provisions of Sections 48-1-29 (c) and (d) Plaintiffs are entitled to a judicial dissolution and decree of distribution of partnership assets.

6. Plaintiffs have been required to obtain the services of an attorney to bring this action to obtain a judicial dissolution of the partnership and are entitled to reasonable attorneys fees therefor, as the court determines.

7. Plaintiffs are further reasonably apprehensive that unless the above entitled court issue an Order to Show Cause requiring Defendants to appear before it on a day and time certain to show cause, if any they have, why they should not be restrained from continuing to operate the business with partnership assets, or in the alternative post a good and sufficient bond for the protection of Plaintiff's interests, irreparable harm to Plaintiffs will result.

WHEREFORE, Plaintiffs pray:

1. That the court issue an Order to Show Cause requiring the Defendants to appear before it on a day and time certain, to show cause, if any they have, why they should not be restrained from continuing to operate the scuba diving business with the partnership assets, or in the alternative why they should not post a good and sufficient bond for the protection of Plaintiffs' interests during the pendency of this action.

2. For an Order requiring Defendants to render a full and correct accounting of the management and operation of the partnership business.

3. For an Order dissolving the partnership and distributing to the former partners the assets of the partnership as their interests appear and in compliance with the terms of Exhibit "A," and for reasonable attorneys fees.

4. For whatever other relief the court in the premises deems appropriate.

Dated this 30th day of August, 1989.

  
Gordon A. Madsen  
Attorney for Plaintiffs

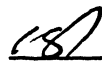
STATE OF UTAH       )  
                              ) ss.  
COUNTY OF DAVIS    )

James J. Miller, upon his oath deposes and says:

That he is one of the Plaintiffs in the above entitled action; that he has read the above Complaint and affirms that the contents thereof are true to his own knowledge and best information and belief.

151  
James J. Miller, Affiant

Subscribed and sworn before me a Notary Public this  
day of August, 1989.

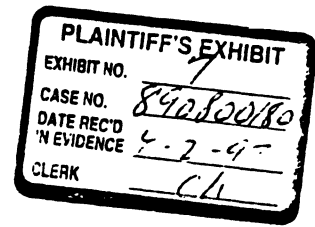


Notary Public

Residing in:

My commission expires:

GORDON A. MADSEN #2048  
Attorney for Plaintiffs  
1130 West Center Street  
North Salt Lake, Utah 84054  
Telephone: (801) 298-6610



IN THE EIGHTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

---

JAMES J. MILLER, ET AL,	:	
Plaintiffs,	:	
vs.	:	STIPULATION & ORDER
MICHAEL D. ZELLMER, ET AL,	:	Civil No. 890800180 CN
Defendants.	:	Judge Dennis L. Draney

---

Plaintiffs and Defendants by and through their respective counsel do Stipulate as follows:

1. That inasmuch as an earlier Stipulation entered in open court on November 8, 1989 in the above entitled action, wherein it was agreed that the assets of the partnership known as Dive Utah Vernal could be held as collateral or security in lieu of a bond to protect Plaintiffs' claims asserted herein, and the parties further agreed that no assets would be sold except in the ordinary course of business and orderly replaced,

2. And, since Defendant Zellmer has since said Stipulation sold all or most of said assets to a buyer now engaged in operating a scuba diving business in Vernal, Utah known as

Atlantis Divers, which is a sole proprietorship of


who is to be bound by the following stipulation, and executes this agreement individually and on behalf of Atlantis Divers.

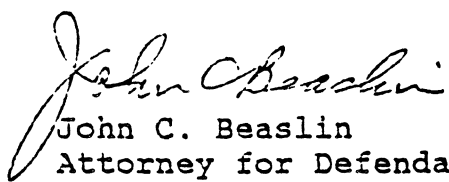
IT IS STIPULATED AND AGREED, that the assets of the scuba business comprising inventory, compressor, rental gear, fixtures and other personal property, formerly the assets of a partnership known as Dive Utah Vernal, now in the possession of

d/b/a Atlantis Divers may be and are, by this Stipulation made subject to the above-entitled litigation and held subject to the court's Order herein. It is further stipulated and agreed that any inventory, rental gear or other asset sold hereafter shall require the deposit of the money received therefor into a bank account No. , located in the

Bank, Vernal Utah, in trust, and that the same may not be disbursed except upon Order of the above-entitled court.

Dated this            day of October, 1990.

  
Gordon A. Madsen  
Attorney for Plaintiffs

  
John C. Beaslin  
Attorney for Defendants

✓  
and as sole proprietor of Atlantis  
Divers

ORDER

Based upon the Stipulation of the parties herein and good cause appearing,

IT IS HEREBY ORDERED that the assets referred to in the above Stipulation together with the bank account also identified above to be opened at Bank is hereby impressed with a lien and said assets and account shall not be removed, sold, disbursed or withdrawn EXCEPT upon written Order of this court.

Dated this            day of October 1990

BY THE COURT

District Judge

1           A       AGAIN, I READ THAT THIS MORNING, AND I DON'T  
2       REMEMBER SEEING IT.

3           Q       WHEN YOU SAID YOU READ IT THIS MORNING, WHAT DID  
4       YOU READ THIS MORNING?

5           A       THAT THING FROM MR. BEASLIN THAT YOU WERE SPEAKING  
6       OF, I BELIEVE.

7           Q       DO YOU HAVE A COPY OF IT HERE? I HAND YOU WHAT'S  
8       BEEN MARKED EXHIBIT 7 AND ASK IF THAT'S THE STIPULATION AND  
9       ORDER THAT WE HAVE BEEN TALKING ABOUT?

10          A       YES, SIR. I READ IT THIS MORNING. AND I JUST DO  
11       NOT REMEMBER SEEING IT BEFORE. I DON'T KNOW WHETHER I HAVE  
12       EVER HAD OR NOT, I JUST DON'T REMEMBER.

13          Q       WELL, LET ME -- DO YOU HAVE A COPY OF YOUR OWN  
14       DEPOSITION THAT WAS TAKEN IN AUGUST OF 1991?

15          A       I MAY HAVE. BUT I DON'T BELIEVE SO.

16          Q       HAVE YOU LOOKED AT IT LATELY?

17          A       NO.

18          Q       I AM GOING TO BE READING. MAY WE HAVE IT  
19       PUBLISHED, YOUR HONOR? IF I CAN APPROACH THE WITNESS, YOUR  
20       HONOR?

21                 THE COURT: YOU MAY. THIS IS THE DEPOSITION OF  
22       MICHAEL WEYLAND. IT MAY BE PUBLISHED ON REQUEST. I'LL KEEP  
23       THAT ENVELOPE IF YOU WANT.

24                 MR. MADSEN: ALL RIGHT. CALLING YOUR ATTENTION TO  
25       PAGE 20, THESE WERE THE QUESTIONS AND THE ANSWERS, I BELIEVE.

2-14-17

1 Q I just want your best estimate at this point.  
2 It will be reflected in your books, I am assuming; is that  
3 right?

4 A Yes. Eight to ten classes.

5 Q And income from the classes as it's been going into  
6 the business along with the sales of inventory, I take it?

7 A Yes.

8 Q When did you first learn of the initiation of this  
9 lawsuit between Mr. Miller and Mr. Zellmer?

10 A I received a call from Mr. Zellmer, and he said  
11 that he had been contacted -- bear with me, I have not slept  
12 within the last 24 hours and I am trying to get my mind to  
13 work here.

14 Q What I am getting at, the lawsuit itself started  
15 before your purchase. So the question is -- you knew that Mr.  
16 Miller was an ex-partner?

17 A That's correct.

18 Q Did Mr. Zellmer disclose to you at any time in your  
19 negotiations that litigation was then pending when the sale  
20 occurred?

21 A Not that I remember.

22 Q When did you first learn that there was litigation?

23 A Really not until I received the paperwork from Mr.  
24 Beaslin in October.

25 Q Had Mr. Zellmer at any time prior to October 1989



1 told you that the inventory was pledged to the court?

2 A No.

3 Q So your first understanding of that possibility  
4 came when you got the documentations from Beaslin?

5 A No, sir.

6 Q In October?

7 A The documentation I got from Beaslin, the way I  
8 understood it, was asking me to sign this stipulation, I  
9 believe it is called, that it would be pledged to the court at  
10 that time.

11 Q You had no indication from Beaslin or any other  
12 source that it had been previously pledged?

13 A That's correct.

14 Q Did you make any independent inquiry of the court  
15 at the time you received the material from Beaslin to see what  
16 the status really was?

17 A I didn't make an independent inquiry of the court,  
18 but my son contacted the Department of Commerce to see if  
19 there was any liens on any properties or whatnot, and there  
20 was none at that time.

21 Q Well, that has to do with any recorded lien  
22 pursuant to a contract? Did you explore any other possible  
23 encumbrance or lien or anything other than going to the  
24 Department of Commerce?

25 A We did not.

1 BILL OF SALE, THE PURCHASE PRICE WAS \$15,233; IS THAT CORRECT?  
2 A YES.  
3 Q AND THAT'S WHAT YOU IN ARM'S LENGTH AGREED TO PAY  
4 FOR THAT BUSINESS; IS THAT CORRECT?  
5 A I MISSED THAT PART OF THAT LAST STATEMENT.  
6 Q THAT'S WHAT YOU BARGAINED TO PAY FOR THE BUSINESS?  
7 A YES.  
8 Q THAT'S WHAT YOU THOUGHT WAS ITS FAIR MARKET VALUE;  
9 IS THAT CORRECT?  
10 A YES.  
11 Q AT THAT TIME?  
12 A YES. THE PORTIONS THAT I PURCHASED, YES.  
13 Q NOW, WHEN YOU THEN HAD THOSE ASSETS TAKEN BY  
14 MR. MILLER AND YOU HIRED AN ATTORNEY TO BE ALLOWED TO  
15 INTERVENE AND TO SET ASIDE THE JUDGMENT AND ASK TO BE ALLOWED  
16 TO INTERVENE AS A PARTY, THE COURT ULTIMATELY MADE A RULING ON  
17 THE 3RD OF MAY, IS THAT CORRECT, OF 1991?  
18 A I BELIEVE SO, YES.  
19 Q AND YOU WERE AWARE THAT PROVISION'S IN THAT RULING,  
20 IS THAT ALSO, CORRECT?  
21 A YES.  
22 Q AND CALLING YOUR ATTENTION TO THE LAST SENTENCE OF  
23 THE NEXT TO THE LAST PARAGRAPH, THE UNDERLYING LANGUAGE  
24 PROVIDES THAT YOU WERE TO FURNISH THE COURT WEEKLY ACCOUNTINGS  
25 AS TO WHAT WAS TO HAPPEN TO THOSE ASSETS; IS THAT ALSO

1 CORRECT?

2 A YES, I REMEMBER THAT.

3 Q DID YOU EVER MAKE ANY SUCH ACCOUNTINGS?

4 A NO, I DIDN'T.

5 Q AND, IN THAT CONNECTION, LET ME NOW SHOW YOU

6 EXHIBIT NO. 6 AND ASK IF THE COPY OF THAT WAS EVER FURNISHED

7 TO YOU BY YOUR ATTORNEY, IF YOU CAN REMEMBER?

8 A OKAY. YOUR QUESTION AGAIN, SIR?

9 Q THE QUESTION IS, DO YOU REMEMBER EVER GETTING THAT

10 LETTER OR DISCUSSING THE SUBSTANCE THEREOF WITH YOUR ATTORNEY?

11 A I BELIEVE WE DISCUSSED THE SUBSTANCE OF IT. I

12 PROBABLY HAVE A COPY OF THE LETTER.

13 Q ALL RIGHT. YOU HAVEN'T SEEN IT BEFORE, COUNSEL.

14 AND I WON'T MOVE TO INTRODUCE IT UNTIL YOU TELL ME YOU HAVE

15 HAD A CHANCE TO CONTINUE. ALL RIGHT. IF I CAN CONTINUE.

16 FOLLOWING THAT MAY 3RD, '91 ORDER, DID YOU EXAMINE

17 THE RETURN OF THE MERCHANDISE, THE BUSINESS ASSETS TO YOU?

18 DID YOU CONTINUE TO DO BUSINESS UNDER THE NAME ATLANTIS DIVING

19 AT THAT LOCATION IN VERNAL?

20 A YES.

21 Q AND DID YOU COMMINGLE THE ASSETS IN A SENSE THAT IT

22 WOULD BE IMPOSSIBLE TO REALLY TRY TO SEGREGATE AND KEEP

23 SEPARATE WHAT WAS PART OF THE OLD PARTNERSHIP AND WHAT WAS

24 PART OF YOUR NEW INVOLVMENT?

25 A YES. IT WAS COMMINGLED.

1       IMPORTANT, AND I EVALUATE THE ATTORNEY'S FEES THIS WAY:  I  
2       THINK THAT THE ATTORNEY'S FEES WOULD BE ASSESSED IN A  
3       PARTNERSHIP, A TRUE PARTNERSHIP DISSOLUTION.  BUT WEYLAND GOT  
4       INTO THIS CASE AS AN OUTSIDER AND PROBABLY SHOULDN'T BE  
5       OBLIGATED TO PAY ANY ATTORNEY'S FEES.  I THINK THE REVERSE IS  
6       TRUE.  I DON'T THINK THERE IS A DEMONSTRATION OF GOOD FAITH OR  
7       BAD FAITH SUFFICIENT ENOUGH HERE TO ASSESS ATTORNEY'S FEES IN  
8       THIS CASE ON EITHER PARTY.

9               I DO THINK THAT MR. MILLER'S ENTITLED TO INTEREST  
10       FROM APRIL 9TH OF '91.  I DON'T KNOW IF 10% IS THE FIGURE.  I  
11       THINK IT SHOULD BE THE JUDGMENT RATE.  AND MAYBE BY STATUTE  
12       THAT WAS THE JUDGMENT RATE UNTIL WHAT, THREE YEARS AGO?  I'LL  
13       HAVE COUNSEL FIGURE THAT OUT.

14              MR. MADSEN:  DO YOU WANT ME TO USE A JUDGMENT RATE  
15       PATHER THAN THE LEGAL RATE, YOUR HONOR?

16              THE COURT:  YES.

17              MR. MADSEN:  ALL RIGHT.  FROM APRIL 9TH?

18              THE COURT:  THAT'S THE AMOUNT YOU WOULD BE ENTITLED  
19       TO ON A TORT CLAIM; ISN'T THAT RIGHT?

20              MR. MADSEN:  YES.  FROM APRIL 9TH, '91, YOUR HONOR?

21              THE COURT:  YES.

22              MR. MADSEN:  ALL RIGHT.

23              THE COURT:  THE STATUTE OF LIMITATIONS QUESTION,  
24       ALTHOUGH I HAVE TO ADMIT WHEN I RULED ON THE PARTIES' MOTION  
25       TO AMEND THE COMPLAINT TO ASSERT A CAUSE OF ACTION, A NEW

1 CLAIM FOR CONVERSION, I TAKE THE POSITION IN THE PLEADINGS  
2 THAT WEYLAND WAS IN THE LAWSUIT FROM '91. WEYLAND REASONABLY  
3 ANTICIPATED WHAT COULD HAVE BEEN ASKED FOR. IT'S ONE OF THOSE  
4 SITUATIONS WHERE THE CLAIM WAS NOT A COMPLETE SURPRISE TO HIM.  
5 I BELIEVE THAT IF THE PARTIES ARE IN THE LAWSUIT, THE  
6 PLEADINGS COULD ALWAYS BE AMENDED TO CONFORM TO THE EVIDENCE.  
7 THE MOTION TO AMEND THAT PLEADING WAS NOT MADE, WAS MADE IN  
8 ENOUGH TIME TO RESPOND OR TO BE PREPARED FOR IT. AND I  
9 ANALYZED IT AND DECIDED THAT I WOULD GRANT THE MOTION AND  
10 ALLOW THAT CLAIM TO BE STATED AND THAT IT WOULDN'T PREJUDICE  
11 ANYONE UNDULY.

12 AND I HAD TO BE THINKING AT THE TIME, AND I RULE  
13 NOW THAT THE STATUTE OF LIMITATIONS HAS NOT RUN BECAUSE OF HIS  
14 BEING IN THE LAWSUIT FROM '91, THAT THE CLAIM COULD HAVE  
15 REASONABLY BEEN ASSERTED BOTH PARTIES WERE IN THIS LAWSUIT.  
16 AND I THINK THE STATUTE WOULD NOT HAVE BEGIN TO RUN UNTIL THE  
17 DATE OF TRIAL.

18 LATCHES: AGAIN, THIS IS A SITUATION WHERE BOTH  
19 PARTIES WERE IN HERE. MR. MILLER, FROM HIS TESTIMONY HERE  
20 TODAY, AND MR. WEYLAND, BOTH, MUST BE A LITTLE DISTRESSED WITH  
21 THE COURT'S SYSTEM WITH HOW LONG IT TAKES TO DO THINGS. AS AN  
22 OFFICER OF THE COURT HERE, AS THE LAWYERS, AS EVERYBODY'S  
23 AWARE, DUE PROCESS DOES TAKE TIME. BUT DUE TO A SERIES OF  
24 EVENTS THAT WERE UNCONTROLLABLE, IN MY OPINION, BY VIRTUE OF  
25 THIS CASE AND WHAT HAPPENED HERE, THIS IS ONE OF THOSE CASES

1        THAT SHOULD HAVE BEEN RESOLVED BEFORE NOW.    I AM TRYING TO  
2        LOOK AT IT AND DO WHAT I THINK IS A FAIR AND ADEQUATE RESULT.  
3        AND THOSE ARE MY FINDINGS.    IS THERE ANYTHING I HAVE NOT RULED  
4        ON THAT I NEED TO?

5                    MR. MADSEN:    JUST ONE RELATED ISSUE, YOUR HONOR.  
6        AND I THINK I WOULD LIKE, IF THE COURT IS WILLING, TO HAVE THE  
7        COURT RULE THAT THE FAILING TO RESPOND AND DO THE ACCOUNTING  
8        AND SO ON BY MR. WEYLAND WAS DELIBERATE IN THAT SENSE, THAT IT  
9        WAS A DELIBERATE RATHER THAN JUST NEGLIGENCE IN EFFECT.    THIS  
10        ISN'T JUST SOME ORDINARY JUDGMENT DEBT.    HE HAD A FIDUCIARY  
11        DUTY IN THIS INSTANCE THAT HE DIDN'T COMPLY WITH.    I AM NOT  
12        ASKING THE COURT TO FIND HIM IN CONTEMPT, BUT I AM ASKING THE  
13        COURT TO RULE THAT IT WAS DELIBERATE.    AND ON THAT BASIS WE  
14        SHOULD HAVE A FINDING TO THAT EFFECT.

15                    THE COURT:    OKAY.    WELL, I THINK FROM THE EVIDENCE,  
16        ADDUCED, AND MY ATTITUDE, MY RESPONSE TO MR. WEYLAND'S  
17        RESPONSE FROM THIS RECORD IN TERMS OF THAT WAS THAT HE DID NOT  
18        RESPOND.    THERE IS ADEQUATE EVIDENCE IN THE RECORD THAT IT WAS  
19        CONFUSING TO BOTH PARTIES WHERE THERE WAS AN INVENTORY  
20        FURNISHED, THE LETTER TO THE JUDGE REGARDING THE QUESTIONS  
21        ABOUT THAT OR -- IT WAS KIND OF A DIFFICULT SITUATION TO BOTH.  
22        I THINK THAT I WOULD MAKE A FINDING THAT HIS FAILURE TO  
23        ACCOUNT FOR SALES OR TO DO ANYTHING FURTHER WAS NOT TOTALLY  
24        EXCUSED, BUT I WOULD NOT GO AS FAR AS TO FIND THAT HE WOULD BE  
25        IN CONTEMPT, BECAUSE EVERYBODY WAS CONFUSED AND MISUNDERSTOOD

## STATE OF UTAH

Case No. 890800180CN

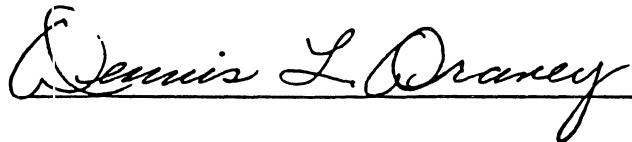
Having considered the evidence now available, and reviewed the arguments of counsel, the court finds that there are reasonable grounds to believe that the partnership was in the winding up phase of its affairs. Thus, the partnership may be bound by the acts of Zellmer in entering into the sales agreement. Additionally, the court notes that Plaintiff has been well aware of Weyland's involvement in these matters, and has attempted to obtain a stipulation from him, but apparently made no effort to join him in this action. Also, there is evidence that the Plaintiff by his execution seized property and inventory which was purchased by Weyland, and in which Defendant and Plaintiff had no interest or right.

Based upon those findings, the motion of Weyland to intervene is granted, and the judgment is set aside. The default of Defendant Zellmer is not set aside. Plaintiff is ordered to return to Weyland by May 10, 1991, all of the property seized under the execution, and to designate specifically the items which he claims were purchased by Weyland under the sales agreement of June, 1990. During the pendency of this action, Weyland shall account for all sales and rentals of the equipment and inventory purchased from Zellmer, and shall weekly deposit with the court the accounting and the proceeds of such sales and rentals.

Weyland shall file appropriate pleadings in furtherance of his motion to intervene within ten (10) days. The other parties shall then have twenty (20) days in which to respond.

DATED this 3<sup>rd</sup> day of May, 1991.

BY THE COURT:

  
\_\_\_\_\_

cc: Gordon Madsen  
Clark Allred  
Larry Steele



sales over this period of time.

FIRST CAUSE OF ACTION

QUIET TITLE TO PERSONAL PROPERTY

For a First Cause of Action, Intervenor's claim and allege against Third-Party Defendants as follows:

22. Intervenor's reallege and incorporate herein by reference each and every allegation of paragraphs 1 - 21 above.

23. Intervenor's own and are entitled to sole possession of all Sold Property, all Weyland's property and all other personal property located at 27 West Main, #8, City of Vernal, County of Uintah, State of Utah, which property was seized by Plaintiffs on March 29, 1991, and all or some of which has now been returned.

24. Defendants do not claim an interest in the Property adverse to Intervenor's. Plaintiffs do not claim an interest in the Weyland property. Plaintiffs claim an interest in the Sold Property adverse to Weyland. Zellmer, for himself and for the Third-Party Defendants sold all Property to Weyland on June 16, 1990. At this time, Plaintiffs' claims are without any right whatever, and Plaintiffs have no estate, right, title, lien or interest in or to the Property or any part thereof.

WHEREFORE, Weyland prays:

A. That Third-Party Defendants and all persons claiming under them be required to set forth any and all claims in or to the

Property;

B. That said claims be determined by a decree of this Court;

C. That said decree declare and adjudge that Intervenor owns absolutely and is entitled to the quiet and peaceful possession of the Property; and that Third-Party Defendants and all persons claiming under them, have no estate, right, title, lien or interest in or to the Property adverse to Weyland or ADI;

D. That said decree permanently enjoin Third-Party Defendants, each of them, and all persons except Intervenor claiming under them, from asserting any claim whatever in or to the Property adverse to Intervenor;

E. For costs of this action and reasonable attorney's fees;

F. For such other and further relief as the court deems just and property.

SECOND CAUSE OF ACTION

TRESPASS TO PERSONAL PROPERTY

As a Second Cause of Action, Intervenor claim and allege against Plaintiffs and Dive Utah Vernal as follows:

25. Intervenor reallege and incorporate herein by reference each and every allegation paragraphs 1 - 24 above.

26. On or about March 29, 1991, Intervenor were the owners and in possession of the Property of a reasonable value of

GORDON A. MADSEN #2048  
Attorney for Plaintiffs  
1130 West Center Street  
North Salt Lake, Utah 84054  
Telephone: (801) 298-6610

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH

---

JAMES J. MILLER, ET AL,	:	
Plaintiffs,	:	REQUEST FOR TRIAL DATE
vs.	:	
MICHAEL D. ZELLMER, ET AL,	:	Civil No. 890800180 CN
Defendants.	:	Judge John R. Anderson

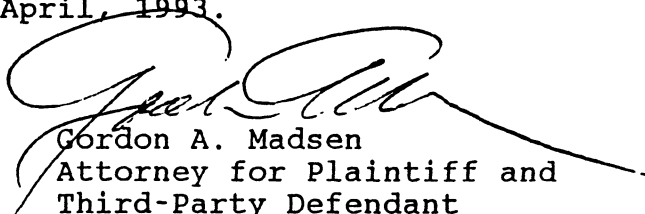
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Plaintiff and Third Party-Defendant James J. Miller, by and through his counsel of record, hereby certifies that in his judgment this case is ready for trial and represents as follows:

1. That pleadings have come to a close in this matter.
2. Discovery has been completed.

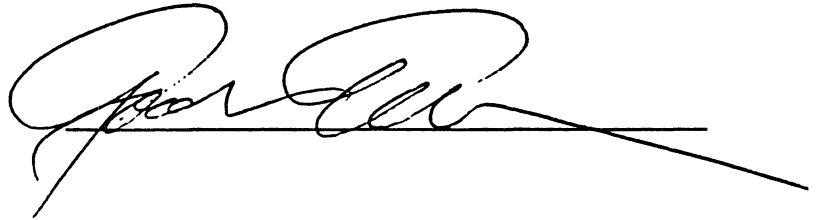
3. That no motions are presently pending other than a motion from Defendant Michael Zellmer to be permitted to withdraw on grounds that his clients were filing bankruptcy. The remaining parties' pleadings are at issue and in the undersigned's opinion, settlement is not possible.

Dated this 7th day of April, 1993.

  
Gordon A. Madsen  
Attorney for Plaintiff and  
Third-Party Defendant

CERTIFICATE OF MAILING

Mailed a copy of the foregoing Request for Trial Date to  
Larry Steele, Attorney for Defendant and Third-Party Plaintiff,  
Michael Weyland, 319 West 100 South, Vernal, Utah 84078 this 7th  
day of April, 1993.

A handwritten signature in black ink, appearing to be "R. Steele", written over a horizontal line.

GORDON A. MADSEN, #2048  
Attorney for Plaintiffs  
1130 West Center Street  
North Salt Lake, Utah 84054  
Telephone: 298-6610

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY  
STATE OF UTAH

---

JAMES J. MILLER, ET. AL.,	:	
Plaintiffs,	:	JUDGMENT
vs.	:	Civil No. 890800180
MICHAEL D. ZELLMER, ET. AL.,	:	Judge: Dennis L. Draney
Defendants.	:	

---

Plaintiffs' Motion to Strike came on for hearing before the above court on Tuesday, March 26, 1991 at the hour of 10:00 a.m., Plaintiff Miller being present and represented by Gordon A. Madsen, and Defendant was not present nor represented by counsel, and the court having received evidence that Defendant had been given due Notice of this hearing by registered mail, and having received evidence on behalf of Plaintiffs, and being fully advised in the premises

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Defendants' pleadings are stricken, and their default is entered herein, and Plaintiffs are granted JUDGMENT against Defendants in the principal sum of \$9,000.00, together with interest thereon from and after May 23, 1989 at the legal rate of 10% until Judgment, and at the rate of 12% from Judgment until paid, plus Plaintiffs costs of court.

Execution may issue on said Judgment against the assets of P. & M. Diving, now known as Atlantis Diving, and Plaintiff, James J. Miller is designated as the Sheriff's agent to hold said assets subject to Order of this Court for a period of thirty days from the date

of execution thereon, in order for Michael Weyland, the putative party in possession of said assets presently to petition this court to assert whatever claim of interest in said assets he may assert. Failing to so petition within said thirty days shall make said Judgment and execution final.

The Court reserves the issue of Attorney Fees until final disposition.

DATED THIS 26th day of March, 1991.

BY THE COURT

District Judge

GORDON A. MADSEN #2048  
Attorney for Plaintiffs  
1130 West Center Street  
North Salt Lake, Utah 84054  
Telephone: (801) 298-6610

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY  
STATE OF UTAH

---

JAMES J. MILLER, ET AL,	:	
Plaintiffs,	:	EXECUTION
vs.	:	
MICHAEL D. ZELLMER, ET AL,	:	Civil No. 890800180 CN
Defendants.	:	Judge Dennis L. Draney

---

THE STATE OF UTAH

To the Sheriff of Uintah County, State of Utah,  
Greetings:

WHEREAS, Judgment was rendered by this Court in said County, wherein is the judgment roll, on the 26th day of March, 1991 in favor of Plaintiffs for the principal sum of \$9,000.00 and \$88.25 costs of suit, and interest from May 23, 1989 at the legal rate of 10% per annum to date of Judgment in the amount of \$1,658.99, and from Judgment until paid at the rate of 12% per annum, with Attorney's Fees held under advisement until final disposition.

THESE ARE, THEREFORE, to command you to collect from P & M Diving and/or Atlantis Diving the aforesaid Judgment, Costs and Interest, together with costs of this Execution, and that you levy on and sell enough of the assets of said entities to satisfy the

same with all legal costs accruing hereon, and this shall be your sufficient warrant for so doing; PROVIDED HOWEVER, pursuant to said Judgment, Plaintiff James J. Miller is designated your agent to hold said assets subject to Order of this Court for a period of thirty days to enable Michael Weyland, the party putatively in present possession of said assets to petition this Court to assert whatever claim of interest in said assets he may have.

Within sixty days make due returns for this writ with your doings in the premises hereon endorsed. WHEREFORE FAIL NOT.

Given under my hand and Seal of said Court this \_\_\_\_\_ day of March, 1991.

\_\_\_\_\_  
Clerk

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



GORDON A. MADSEN #2048  
Attorney for Plaintiffs  
1130 West Center Street  
North Salt Lake, Utah 84054  
Telephone: (801) 298-6610

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY  
STATE OF UTAH

---

JAMES J. MILLER, ET AL,	:	
Plaintiffs,	:	PRAECIPE
vs.	:	
MICHAEL D. ZELLMER, ET AL,	:	Civil No. 890800180 CN
Defendants.	:	Judge Dennis L. Draney

---

THE STATE OF UTAH

To the Sheriff of Uintah County, State of Utah,  
Greetings:

In connection with the Execution issued in the above cause, be instructed that you are to levy and take possession of all the trade fixtures, inventory, stock in trade, records and equipment of said P & M Diving or Atlantis Diving located at 27 West Main Street #8, Vernal, Utah, including, but limited to:

Wet suits, gear bags, masks, snorkels, fins, boots, buoyancy compensators, lycra skins, spear poles, tips, guns and spear accessories, goodie bags, weight belts, ankle weights, and miscellaneous related gear and inventory.

Compressors, and their accessories, hoses, hook-ups, etc., trade fixtures, display cases, racks and other display mountings, etc., desks, file cabinets, and records, cash drawer,

audio-visual and T.V., V.C.R. diving books and literature, classroom equipment, etc.

Rental equipment, wet suits, snorkels, boots, fins, weights and rental bags, regulators, tanks, and related rental equipment, etc.

All back-room inventory or equipment not on display or belonging to said business(es) whether located on the premises or elsewhere.

Gordon A. Madsen, Plaintiffs'  
Attorney

GORDON A. MADSEN, #2048  
MICHAEL D. CUMMINGS, #7177  
Attorneys for the Plaintiff  
1224 Chandler Drive  
Salt Lake City, UT 84103  
Telephone 364-3431

IN THE EIGHTH JUDICIAL DISTRICT COURT  
OF UINTAH COUNTY STATE OF UTAH

---

JAMES J. MILLER, and MILLER, DIVING, INC.	)	
	)	FINDINGS OF FACT AND
Plaintiff,	)	CONCLUSIONS OF LAW
vs.	)	
MICHAEL D. ZELLMER, and P&M DIVERS, INC., a Utah corpora- tion	)	CIVIL NO. 890800180 CN
	)	
Defendants.	)	Judge John R. Anderson

---

MICHAEL WEYLAND and ATLANTIS DIVERS, INC., a Utah corpora- tion	)	
	)	
Intervenors and Third Party Plaintiffs,	)	
	)	
vs.	)	
	)	
JAMES J. MILLER; MILLER DIVING, INC.; MICHAEL D. ZELLMER; P&M DIVING, INC.; and DIVE UTAH VERNAL a/k/a DIVE UTAH EAST, a Utah general Partnership, d/b/a ATLANTIS DIVERS,	)	
	)	
Third Party Defendants.	)	

---

The above captioned matter came on for trial on the 2nd day of April, 1997, before the Honorable Judge John R. Anderson, Judge of the above entitled court. Plaintiff James J. Miller appeared in person and by and through his attorneys Gordon A. Madsen and Michael D. Cummings. Defendant-Third Party Plaintiff

Michael Weyland appeared in person and by and through his attorney Daniel S. Sam. The court having heard and considered the testimony and evidence presented by the parties now makes and enters the following

FINDINGS OF FACT

1. That prior to April, 1991 Plaintiff and former Defendant Michael D. Zellmer operated a partnership scuba diving equipment and training business in Vernal, Utah known as Dive Utah, Vernal.

2. This action was brought to effect a judicial dissolution of the partnership.

3. After commencement of this action and before the dissolution had been effected, Zellmer sold the business which he had renamed Atlantis Divers to Defendant-Third Party Plaintiff, Michael Weyland. The sale occurred in June of 1990. The purchase price was \$15,388.21.

4. Weyland had some knowledge of the partnership interest of Miller, and demanded and received a hold-harmless writing from Zellmer, but did nothing further by way of investigation of Miller's interest. Zellmer subsequently moved to California and received a discharge in Bankruptcy.

5. Weyland's purchase was not a purchase in ordinary course of business, but the purchase of a going business in whole.

6. Neither Miller nor Weyland filed a claim in the Zellmer bankruptcy.

7. Miller had, pursuant to Order of this court

repossessed the assets of the business, and on April 9, 1991 Weyland moved this court for leave to intervene as Third-Party Plaintiff and to set aside the original Judgment against Zellmer. The motions were granted, and Weyland has been a party to this action from that date to the present.

8. Miller was ordered to return the assets to Weyland and Weyland was ordered to account to the court for the rental and sale of those assets on a weekly basis. No accounting was ever rendered.

9. Some confusion appeared from the evidence to show what assets were to be accounted for excusing Weyland in the court's mind from liability for being held in contempt.

From the foregoing Findings of Fact, the court makes and enters the following

#### CONCLUSIONS OF LAW

1. Defendant-Third Party Plaintiff Weyland was not a purchaser for value without notice. The sale to Weyland was both with notice, and in the nature of a bulk sale, rather than in the ordinary course of business.

2. Since Weyland has been a party to this action continuously since April, 1991, neither Laches nor any Statute of Limitations applies herein, since amendment to pleadings, as allowed herein, to conform to the facts could have been granted at any time until Judgment.

3. Weyland has converted partnership assets to his own purposes without ever accounting to this court therefor.

4. Plaintiff Miller is entitled to Judgment for one half of the \$15,388.21 purchase price of the assets, or \$7,694.11.

5. Plaintiff Miller is further entitled to interest at the Judgment rate from April 9, 1991 through date of trial, April 2, 1997, as follows:

1991 = 12.0%	= \$	682.21
1992 = 12.0%	=	936.11
1993 = 5.72%	=	446.21
1994 = 5.61%	=	437.64
1995 = 9.22%	=	719.25
1996 = 7.35%	=	573.37
1997 = 7.45%	=	146.49

TOTAL                      \$3,941.28

6. Neither party should be awarded attorney's fees.

7. Plaintiff should be awarded his costs incurred herein.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1997.

BY THE COURT:

\_\_\_\_\_  
JOHN R. ANDERSON  
DISTRICT COURT JUDGE

Approved as to Form:

\_\_\_\_\_  
DANIEL S. SAM  
Attorney for Michael Weyland

**CERTIFICATE OF MAILING**

A copy of the foregoing Findings of Fact and Conclusions of Law were mailed to Daniel S. Sam, attorney for Defendant-Third Party Plaintiff, Michael Weyland, at his address 319 West 100 South, Suite A, Vernal, Utah 84078.

---

GORDON A. MADSEN  
MICHAEL D. CUMMINGS  
Attorneys for Plaintiff

GORDON A. MADSEN, #2048  
MICHAEL D. CUMMINGS, #7177  
Attorneys for the Plaintiff  
1224 Chandler Drive  
Salt Lake City, UT 84103  
Telephone 364-3431

IN THE EIGHTH JUDICIAL DISTRICT COURT  
OF UINTAH COUNTY STATE OF UTAH

---

JAMES J. MILLER, and MILLER, DIVING, INC.	)	
	)	JUDGMENT
Plaintiff,	)	
vs.	)	
MICHAEL D. ZELLMER, and P&M DIVERS, INC., a Utah corpora- tion	)	CIVIL NO. 890800180 CN
Defendants.	)	Judge John R. Anderson

---

MICHAEL WEYLAND and ATLANTIS DIVERS, INC., a Utah corpora- tion	)	
	)	
Intervenors and Third Party Plaintiffs,	)	
vs.	)	
	)	
JAMES J. MILLER; MILLER DIVING, INC.; MICHAEL D. ZELLMER; P&M DIVING, INC.; and DIVE UTAH VERNAL a/k/a DIVE UTAH EAST, a Utah general Partnership, d/b/a ATLANTIS DIVERS,	)	
Third Party Defendants.	)	

---

The above captioned matter came on for trial on the 2nd day of April, 1997, before the Honorable Judge John R. Anderson, Judge of the above entitled court. Plaintiff James J. Miller appeared in person and by and through his attorneys Gordon A. Madsen and Michael D. Cummings. Defendant and third party



plaintiff Michael Weyland appeared in person and by and through his attorney Daniel S. Sam. The court having heard and considered the testimony and evidence presented by the parties and having made and entered its Findings of Fact and Conclusions of Law,

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

The plaintiff James Miller is awarded a judgment against Michael Weyland Defendant Third-Party Plaintiff in the amount of \$7,694.11 together with interest in the amount of \$3,941.28, plus costs of court.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1997.

BY THE COURT:

\_\_\_\_\_  
JOHN R. ANDERSON  
DISTRICT COURT JUDGE

Approved as to Form:

\_\_\_\_\_  
DANIEL S. SAM  
Attorney for Michael Weyland

**CERTIFICATE OF MAILING**

A copy of the foregoing Judgment was mailed to Daniel S. Sam, attorney for Defendant-Third Party Plaintiff, Michael Weyland, at his address 319 West 100 South, Suite A, Vernal, Utah 84078.

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**GORDON A. MADSEN  
MICHAEL D. CUMMINGS  
Attorneys for Plaintiff**