

1998

Macris & Associates, Inc v. Neways, Inc, Thomas E. Mower and Leslie D. Mower : Brief of Cross-Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

SOCKET NO.

980004-CA

MACRIS & ASSOCIATES, INC.,
Plaintiff/Appellee/Cross-Appellant,
vs.
NEWAYS, INC., THOMAS E. MOWER,
and LESLIE D. MOWER,
Defendants/Appellants/
Cross-Appellees.

Case No: 980004-CA
PRIORITY NO. 15
(oral argument requested)

**BRIEF OF CROSS-APPELLANT
MACRIS & ASSOCIATES, INC.**

APPEAL FROM THE ORDER OF THE FOURTH JUDICIAL DISTRICT COURT,
HONORABLE JUDGE HOWARD H. MAETANI, PRESIDING
UTAH COUNTY, STATE OF UTAH

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FILED

Utah Court of Appeals

MAY 14 1998

Julia D'Alesandro
Clerk of the Court

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

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I. LIST OF ALL PARTIES

All the parties to this action are listed in the caption.

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IV. REQUEST FOR ORAL ARGUMENT

This appeal arises from summary judgments in favor of both Macris & Associates, Inc. ("Macris") and Neways, Inc. ("Neways"), Thomas E. Mower and Leslie D. Mower. The appeal presents important issues of successor liability, which no Utah appellate court has addressed, and res judicata. Macris therefore respectfully requests oral argument.

V. STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Sections 78-2-2(4) and 78-2a-3(2)(j) of the Utah Code.

VI. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the trial court's grant of summary judgment and dismissal on the basis of res judicata of Macris' fraudulent transfer, successor liability and alter ego claims for relief beyond that awarded in a previous lawsuit erroneous because these claims are different from the breach of contract claims on which Macris prevailed in an earlier action? (R. at 276.) In reviewing a grant of summary judgment, "this court considers 'all of the facts and evidence presented and every reasonable inference arising therefrom, in a light most favorable to the party opposing the motion.'" Estate of Covington v. Josephson, 888 P.2d 675, 677 (Utah Ct. App. 1994) (quoting Katzenberger v. State, 735 P.2d 405, 408 (Utah Ct. App. 1987)). Furthermore, because summary judgment presents only questions of law, this Court accords no deference to the trial court's ruling and reviews it for correctness. Id.

2. Was the trial court's grant of summary judgment and dismissal on the basis of res judicata of Macris' claims for relief beyond that awarded in a previous lawsuit erroneous because these claims arose well after the prior suit was commenced

and after Macris' last pleading therein? (R. at 274.) The standard of review for this issue is the same as the standard of review for issue number 1 above.

3. Was the trial court's grant of summary judgment and dismissal on the basis of res judicata of Macris' claims for relief beyond that awarded in a previous lawsuit erroneous because Neways was not a party to the earlier action and Macris did not have a full and fair opportunity in the Images action to present its fraudulent transfer, successor liability and alter ego claims? (R. at 269-70.) The standard of review for this issue is the same as the standard of review for issue number 1 above.

4. Was the trial court's grant of summary judgment and dismissal on the basis of res judicata of Macris' claims for relief beyond that awarded in a previous lawsuit erroneous because none of the purposes for the res judicata doctrine are met by such ruling, and such purposes were actually thwarted. (R. at 268-69.) The standard of review for this issue is the same as the standard of review for issue number 1 above.

5. Did the trial court correctly find, on the basis of the uncontroverted facts before it, that because "Neways consists of substantially the same assets, products, officers, and employees as Images[, & Attitude, Inc.]," Neways is a "mere continuation" of Images and Attitudes, Inc. and is therefore liable under the doctrine of successor liability. (R. at 425.) In reviewing grants of summary judgment, an appellate court accords no deference to a trial court's legal conclusions and reviews them for correctness. Schurtz v. BMW of North America, Inc., 814 P.2d 1108, 1111-12 (Utah 1991). However, the appellate court will not consider factual matters raised for the first time on appeal. Schaer v. State, 657 P.2d 1337, 1341-42 (Utah 1983).

VII. DETERMINATIVE AUTHORITY

Utah Code Ann. § 25-6-2.

Utah Code Ann. § 25-6-5.

Schaer v. State, 657 P.2d 1337 (Utah 1983).

Badger v. Badger, 254 P. 784 (Utah 1927).

Estate of Covington v. Josephson, 888 P.2d 675 (Utah Ct. App. 1994), cert. denied, 910 P.2d 425 (Utah 1995).

VIII. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN COURT BELOW.

Macris & Associates, Inc. ("Macris") commenced this action on February 15, 1995, against Neways, Inc. ("Neways"), Thomas E. Mower, and his wife, Leslie D. Mower, asserting claims for fraudulent transfer, successor liability and alter ego. (R. at 1-12.) On October 19, 1995, Neways and the Mowers filed their motion for summary judgment, arguing that Macris' claims were barred by a judgment in a prior lawsuit against Images & Attitude, Inc. ("Images"), styled Macris & Associates, Inc. v. Images & Attitude, Inc. et al., Civil No. 910400358, in the Fourth Judicial District Court of Utah County for the State of Utah (hereinafter "Images action"). (R. at 182-83.) In that action, Macris was awarded \$487,638.87 plus interest on its breach of contract claims against Images. (R. at 263.) In this action, on November 14, 1995, Macris filed a cross-motion for summary judgment on its successor liability claim, arguing that Neways was liable to Macris as Images' successor. (R. at 284-85.) The trial court partially granted both motions. It ruled that all of Macris' claims for damages beyond those awarded in the Images action were precluded. (R. at 422.) The court also ruled

that Neways is the successor of Images and is therefore liable for the previous judgment against Images. (R. at 422.)

B. STATEMENT OF FACTS.

The events giving rise to this lawsuit occurred in August and September, 1992. Then, Neways, Inc. ("Neways") was formed and fraudulently succeeded to a multilevel marketing operation from Images & Attitude, Inc. ("Images"). (R. at 10, 11, 35, 171, 173, 259, 263, 239-40, 291-92, 323-24.) As a result, Macris was compelled to bring this lawsuit against Neways and its officers, directors and shareholders, Thomas Mower and his wife, Leslie Mower, to recover for obligations owed to it by Images and adjudicated by Judge Guy R. Burningham in the Images action. (R. at 1-12.)

1. The Images Action Arose Out of a 1989 Contract Between Macris and Images and Images' Breach of that Contract.

The multilevel marketing business which was transferred to Neways had as its object the sale of health and beauty products. (R. at 416.) Beginning in 1989, Macris was a distributor for Images. (R. at 256.) In September, 1989, Images, through its founder and president Thomas Mower, and Macris entered into an agreement (hereinafter "Autoqualification Agreement") whereby Macris was to be paid at the highest level provided for in the operation's marketing plan without having to meet any of the usual qualifications for being compensated at such a level. (R. at 31, 258, 259.) The amounts owed Macris were based on a portion of the profits of the monthly sales of health and beauty products. (R. at 249-51, 258.) The Autoqualification Agreement was part of a distributorship agreement between Macris and Images and was to endure "through out the life of Images[a]s long as [Macris] is [a]ctive in promoting Images and Images[' p]roducts." (R. at 31.)

On March 7, 1991, Images inexcusably and unjustifiably breached the Autoqualification Agreement by suspending it and later terminating Macris as a

distributor. (R. at 251-52.) As a result of this breach, Macris commenced the Images action on April 17, 1991. (R. at 214.) On or about June 9, 1992, Macris filed a Second Amended Complaint. (R. at 192, 203.)

In the Images action, all of Macris' claims revolved around two transactions: the formation of the Autoqualification Agreement and Images' breach of that contract. (R. at 192-214.) The only defendants to the Images action were Images and Thomas Mower. (R. at 203.) Neways was not named. Macris alleged that a valid distributorship agreement existed between Images and Macris and that Images breached that agreement. (R. at 192-203.) Macris sought reinstatement of the Autoqualification Agreement, a declaration that Macris was entitled to a continuation of such agreement and to sell or convey its distributorship, an accounting, and all "damages resulting from termination of the automatic qualification status and of the distributorship." (R. at 192-97.)

On June 6, 1995, the trial court entered a Memorandum Decision, ruling in favor of Macris. (R. at 134.) The court entered Findings of Fact and Conclusions of Law on September 14, 1995, concluding that Images had materially and unjustifiably breached the Autoqualification Agreement. (R. at 251-52, 260, 263.) In calculating damages, the trial court awarded Macris "damages for amounts which [Images] should have paid to [Macris] . . . from March 1991 through August 1992." (R. at 250.) The court limited Macris' recovery to damages incurred through August of 1992 because after that time, "Neways took over the multilevel marketing operation." (R. at 250.) The court awarded \$487,638.87 plus interest. (R. at 263.) This Court affirmed Judge Burningham's judgment in Macris & Associates, Inc. v. Images & Attitude, Inc., 941 P.2d 636 (Utah Ct. App. 1997).

2. During the *Images* Action, Macris Suffered Damages as a Result of Conduct Wholly Apart from Images' Breach of the Autoqualification Agreement.

Macris also suffered damages other than from Images' breach of the Autoqualification Agreement and which was not at issue in the Images action. The transfer of the multilevel marketing business to Neways involved corporate gamesmanship and chicanery and was perpetrated to limit Macris' recovery from Images. (R. at 7-8, 11, 35, 173, 239-40, 259, 263, 291-92, 323-24.) Macris also suspected that after the September 1, 1992 transfer, Images would be unable to satisfy a judgment awarded in the Images action. (R. at 6.)

More specifically, the September 1, 1992 transfer bore many indications of fraud;¹ the transfer was made to, at least partially, defeat Macris' valid claims in the Images action; and Neways became a mere continuation of Images. The transfer of the multilevel marketing business and other assets from Images to Neways occurred after Macris commenced the Images action. In August 1992, Neways was incorporated with Thomas Mower as president and his wife, Leslie Mower, as vice-president. (R. at 11, 173.) In fact, Neways' officers, directors and shareholders were the same members of Thomas and Leslie Mowers' family as were also the officers, directors and shareholders of Images. (R. at 11, 173, 292, 323-24.) On the eve of the first trial setting of September 28, 1992, the newly formed Neways succeeded to Images' multilevel marketing business. (R. at 259, 263.) Through this transfer, Neways acquired substantially all of the assets, including all tangible assets and inventory, of Images. (R. at 10, 35, 173.) All of the distributors in the multilevel marketing business,

¹ The Uniform Fraudulent Transfer Act lists the following as "badges of fraud": "(a) the transfer or obligation was to an insider; . . . (d) before the transfer was made or obligation incurred, the debtor had been sued or threatened with suit; [and] (e) the transfer was of substantially all the debtor's assets." Utah Code Ann. § 25-6-5(2); Dahnken, Inc. v. Wilmarth, 726 P.2d 420, 423 (Utah 1986).

with the exception of Macris, were invited to become distributors under Neways with the same rank and position. (R. at 35, 171, 239-40, 291, 323-24.) Also, Neways carried on the same business as Images using the same facilities, employees, equipment, furnishings and product formulations that Images had used before the transfer. (R. at 291, 323-24.) Only the name of the business was different. In short, the multilevel marketing business was the pea, and Images and Neways were the shells in a shell game perpetrated by Neways and the Mowers to defeat Macris' valid claims.

In their brief, Neways and the Mowers represent that "the majority of the . . . shareholders, and officers for Neways and Images are not the same," citing the Affidavit of Leslie Mower. (Brief of Appellant at 3.) Nothing in this affidavit, however, refers to the shareholders or officers of either Neways or Images. (R. at 351-52.) Moreover, this representation contradicts the uncontroverted factual record before the trial court. (R. at 292, 323-24, 425.)

Of course, after the multilevel marketing business took on the new name of "Neways," every effort was made during the Images action to erect a wall between Images and Neways. (R. at 262.) In the Images action, Images consistently maintained that Images and Neways were wholly separate corporations having little or no relationship. (R. at 262.) In reality, Neways and Images were essentially the same; only the name had been changed to the great detriment of Macris.

3. To Recover for the Damages Suffered as a Result of the September 1992 Transfer of Images' Multilevel Marketing Business and Assets to Neways, Macris Instituted the Neways Action.

Macris instituted this action against Neways and Thomas and Leslie Mower on February 15, 1995. (R. at 12.) In its Complaint in the Neways action, Macris alleged that the multilevel marketing business was still in operation after August of 1992 but

only under a different name, and that the name change from "Images" to "Neways" was perpetrated to defeat Macris' valid claims. (R. at 7-12.) Macris asserted claims for fraudulent transfer under the Uniform Fraudulent Transfer Act, Utah Code Ann. § 25-6-5, successor liability and alter ego. (R. at 2-11.)

Macris' fraudulent transfer claim alleged that Images' transfer of the multilevel marketing business to Neways was fraudulent and accomplished to hinder Macris from enforcing and collecting the obligation owed by Images. (R. at 7.) Macris sought "amounts owed pursuant to a ruling from the court [in the Images action] and any future judgment(s) against Images." (R. at 7.) Macris also alleged that the fraudulent transfer was carried out willfully, maliciously and intentionally and therefore requested punitive damages. (R. at 5.)

Macris' successor liability claim also arose out of the transactions that were the subject of its fraudulent transfer claim. (R. at 3-5.) Macris asserted that Neways' business is virtually identical to Images' former business, the multilevel marketing operation's name change was done to defeat Macris' judgment and claims, and that therefore Neways is the successor corporation to Images. (R. at 4-5.) Macris alleged it was entitled to all amounts due from Images. (R. at 4.)

Also arising out of the August and September 1992 formation of and transfer to Neways was Macris' alter ego claim. Macris alleged that Neways is the alter ego of Images and that Thomas and Leslie Mower are the alter ego of Neways. (R. at 3.) Macris alleged that these entities have wrongfully used the corporate shield of Neways to avoid liability to Macris. (R. at 7.)

For its causes of action based on the August and September 1992 formation of and transfer to Neways of Images' assets, including the multilevel marketing business,

Macris prayed for avoidance of the transfer and monetary damages, including punitive damages. (R. at 2.)

4. Neways and the Mowers Admitted that Macris Could Not Have Asserted Its Current Claims During the *Images* Action.

Macris could not have brought the causes of action it asserted in the Neways action in its pleadings filed in the Images action. The transfer of the multilevel marketing business from Images to Neways occurred on the eve of the first trial setting in the Images action. (R. at 259, 263.) This was seventeen months after Macris commenced the Images action and almost three months after Macris filed its last pleading therein. (R. at 192, 214.) Furthermore, the successor to the multilevel marketing business, Neways, was never a party to the Images action. Thus, Macris was unable to assert its causes of action against it.

Neways and the Mowers admitted that Macris could not bring its claims against them during the Images action. After Macris filed its Complaint in the Neways action and during the pendency of the Images action, Neways and the Mowers filed a Motion to Dismiss or Alternatively to Stay Proceedings, contending that Macris' causes of action against Neways and the Mowers were "Not Ripe for Decision and Therefor [sic] Should be Dismissed." (R. at 34 (emphasis in original).) Neways and the Mowers argued:

In the case at bar, [Macris'] claims for Fraudulent Transfer, Successor Liability and Alter Ego turn first upon a finding that [Images] has a liability to [Macris]. Since the determination has not been made, the claims asserted herein have not sharpened into an actual or imminent clash of legal rights and obligations between the parties and as such, the hypothetical application of [a rule of law] to a situation in which the parties might, at some future time, find themselves is unripe for adjudication under the ripeness doctrine

Further, continuation of this suit, prior to a final determination of liability in [the Images action] would waste judicial resources as well as subject the parties to unnecessary litigation expenses.

(R. at 34 (emphasis added) (quotations omitted).) In further support of their motion, Neways and the Mowers argued that

[Macris'] claims for breach of contract are against [Images]. At this time, [Macris'] right to payment against [Images] is being considered by this Court. Determination of the merits of [Macris'] claims will establish if there exists an actual or imminent clash of legal rights and obligations. It is this determination that will give rise to any potential claim [Macris] may have against Neways.

at 51-52 (emphasis added) (quotations omitted).²

5. In Contradiction to What Images, Neways and the Mowers Argued and Represented in Both the *Images* and *Neways* Actions, Neways and the Mowers Asserted a Res Judicata Defense, Arguing that Images and Neways Were in Privity and Macris' Claims Could and Should Have Been Brought in the *Images* Action.

In stark contrast to the arguments they made in their Motion to Dismiss or Alternatively Motion to Stay Proceedings, Neways and the Mowers asserted a res judicata defense in their Amended Answer³ and, on that basis, moved for summary judgment. (R. at 169, 183.) Instead of arguing that Macris' fraudulent transfer, successor liability and alter ego claims were not ripe until after the Images action ended, Neways and the Mowers did an about face and argued that these claims should have been brought in the Images action. (R. at 223.)

Also contrary to their prior position, Neways and the Mowers contended that, "[f]or purposes of [the] motion only, Neways . . . is in privy [sic] with Images." (R. at

² Neways and the Mowers' Motion to Dismiss or Alternatively Motion to Stay Proceedings was withdrawn on July 10, 1995. (R. at 61.)

³ Also in their Amended Answer, however, is the averment that the judgment in the Images action "is not binding upon these Defendants." (R. at 172.)

225.) In the Images action, Images and Thomas Mower had emphatically denied any relationship between Images and Neways. (R. at 262.) This position was critical to their strategy of attempting to defeat Macris' valid claims by shifting the multilevel marketing business from Images to Neways. In their motion for summary judgment, Neways and the Mowers essentially contended that their fervent denials of any relationship between Neways and Images was a ruse which Macris was required to foil in the Images action or lose the right to seek redress for the damages suffered from such gamesmanship.

Neways and the Mowers now present facts that completely contradict their assertions that Neways was in privity with Images. To prove the privity element of their res judicata defense to the trial court, Neways and the Mowers admitted that Neways was the successor to Images: "[i]f Neways is a successor in interest of property that is the subject of pending litigation to which his transferor [Images] is bound then Neways is entitled to the benefits of res judicata Images and its alleged successor, Neways, are thus protected by the doctrine of res judicata." (R. at 224 (quotations omitted) (alteration in original).) Partly on the basis of this admission, Macris moved for and the trial court granted summary judgment on Macris' successor liability claim. (R. at 285, 425, 427-28.) Neways and the Mowers now assert that Neways is not the successor in interest to Images. In their opening appellate brief, they assert that "Eclat, Inc. ('Eclat'), not Neways, is the successor company of Images." (Brief of Appellant at 1.)

The variety of Neways and the Mowers' statements regarding the relationship between Images and Neways and when Macris should have asserted its current claims highlights the lengths to which they will go to defeat Macris' valid claims and judgment. While Macris could have possibly amended its pleadings in the Images action to join

Neways and add its claims against it, Neways and the Mowers insisted that such claims were not ripe and their assertion during the Images action "would waste judicial resources as well as subject the parties to unnecessary expense." (R. at 34, 52.) Following the court's Memorandum Decision in the Images action, however, Neways and the Mowers asserted that Macris' current claims should have been included in the Images action. (R. at 223.)

Furthermore, the statements attributable to Neways and the Mowers regarding the relationship between Neways and Images have now come full circle. In the Images action, they consistently denied any relationship between Images and Neways so that they could limit Macris' recovery to damages incurred through August of 1992 and evade a judgment against Images. (R. at 262.) In the Neways action, their purpose changed, and so their representations regarding the connection between Images and Neways changed. They admitted that Neways was the successor to Images to prove that the two were in privity. (R. at 224.) Moreover, in their Answer and Amended Answer, Neways and the Mowers admitted that Eclat was merely another name for Images. (R. at 11, 95, 175.) Now that Macris has moved for and obtained summary judgment on its successor liability claim, however, Neways and the Mowers revert to the old ploy of erecting barriers between Images and Neways. Now, "Eclat, Inc. ('Eclat'), not Neways, is the successor company of Images." (Brief of Appellant at 1.)

6. Despite Neways and the Mowers' Admissions, Inconsistent Statements and Inequitable Conduct, the Trial Court, to a Great Extent, Granted Neways and the Mowers' Motion for Summary Judgment.

Both Neways and the Mowers' and Macris' motions for summary judgment were orally argued to the trial court on January 22, 1997. (R. at 507, p. 1.) At this hearing, the attorney for Neways and the Mowers admitted that Macris' causes of action in the

Images action were different than the causes of action it asserted in the Neways action. Neways and the Mowers' attorney stated that Macris may present the issue of whether the Autoqualification Agreement was breached in the Neways action, but the issue of breach would not arise:

to me, that's a concession that has no meaning because, again, it won't be before this Court.

The issue that will be before this Court is by virtue of corporate reorganizations, transfers for consideration[,] whether or not we, Neways, has [sic] assumed that contract by virtue of the fraudulent conveyance statute, or whether or not it's the same entity by virtue of some common law theories.

(R. at 396, 507, pp. 23-24.)

Despite this and other admissions and Neways and the Mowers' inconsistencies regarding Neways' relationship to Images, the trial court filed a Memorandum Decision on September 19, 1997, granting, to a great extent, Neways and the Mowers' motion for summary judgment. (R. at 422.) Although the trial court found Neways liable for the judgment against Images in the Images action, it granted Neways and the Mowers' motion "as to any claim for new damages." (R. at 422.)

The trial court found that the Images and Neways actions arose "from a single breach of a single contract." (R. at 424-25.) It further found that Macris knew about the creation of Neways before the conclusion of the previous trial, and should have sought to include Neways as a party. (R. at 424.) In doing so, the trial court ignored Macris' argument that its claims and damages asserted in the Neways action arose out of the August and September 1992 formation of Neways and its succession to Images' assets and multilevel marketing business, not Images' breach of the Autoqualification Agreement. (R. at 270, 277, 422-25.) The trial court also ignored Macris' argument that in the Images action, it was not required to amend its pleadings to include Neways

and assert wholly different causes of action for fraudulent transfer, successor liability and alter ego. (R. at 271, 272, 274, 422-25, 507, p. 30.)

With respect to the identity of the parties element of res judicata, the trial court found that because Neways was a successor to Images, it was entitled to assert res judicata to the same extent as Images. (R. at 427.) The trial court rejected Macris' argument that under Utah law, a party may assert the res judicata defense only if the claims in the prior lawsuit could have been leveled against such party. (R. at 426-27, 507, p. 30, 33.) Because Macris' claims in the Images action could only have been asserted against Images and its claims in the Neways action could only have been asserted against Neways, Utah law prohibits their treatment as in privity with each other for purposes of whether Neways can assert the preclusive effect of the judgment in the Images action. (R. at 426-27, 507, pp. 30, 33.)

7. On the Basis of the Uncontroverted Facts Before It, the Trial Court Found that Neways Was Liable to Macris as Images' Successor.

The trial court did, however, correctly find that Neways was liable as Images' successor. (R. at 425.) This finding was made mainly on the basis of the unrefuted facts before the court. The court found that

[i]n early September, 1992, Images transferred substantially all its assets to Neways, discontinuing its multilevel marketing business, at which time Neways took over the multilevel marketing operation, using the same facilities, with the same employees, selling the same products through essentially the same network of distributors.

(R. at 431.) These facts were supported by Neways and the Mowers' admissions in the Amended Answer and were contained in Macris' statement of facts in its Memorandum in Support of Motion for Summary Judgment. (R. at 8, 10-11, 171, 172, 173, 174, 291-92.) In responding to Macris' motion, Neways and the Mowers failed to object or

otherwise attempt to controvert the facts later relied upon by the trial court. (R. at 323-24.)

On the basis of these facts, the trial court ruled that, "as Neways consists of substantially the same assets, products, officers and employees as Images, it would seem that Neways is in fact a mere continuation of the same corporation" and is therefore liable as Images' successor. (R. at 425.) Because of its ruling that res judicata bars Macris' claims for "new damages," however, the trial court limited Neways' liability to the judgment entered in the Images action. (R. at 422.)

On November 13, 1997, the trial court signed and entered its order partially granting and denying the parties' motions for summary judgment from which both sides appeal. (R. at 466-67.) Macris appeals from the part of the order that granted Neways and the Mowers' motion for summary judgment that any claim by Macris as to new damages beyond those awarded in the Images action is barred by the doctrine of res judicata. (R. at 490.) Macris also appeals the part of the trial court's order denying its motion for summary judgment concerning new damages. (R. at 490.) Neways and the Mowers, on the other hand, appeal the part of the trial court's order holding Neways liable to Macris for the judgment against Images in the Images action. (R. at 460.)

IX. SUMMARY OF ARGUMENT

The trial court erred in finding that res judicata bars any part of Macris' claims in this action. First, Macris' fraudulent transfer, successor liability and alter ego claims in this action are different from the breach of contract claims it asserted in the Images action. In order for res judicata to apply, both lawsuits must involve the same cause of action. The claims in the Neways action are different from the claims in the Images action because (a) they rest on a different state of facts; (b) they relate to completely different time periods; (c) they arise out of completely different transactions; (d) they

rely on completely different rights; (e) they seek redress for completely different wrongs; (f) a judgment in the Neways action will not impair rights or interests established in the Images action; and (g) Macris' claims in the Neways action could not have been asserted in the Images action because such claims required the presence of a different party.

Second, Macris was not required to amend its pleadings in the Images action to assert its current claims and join new parties or suffer the loss of such claims. It is universally held, by both courts and commentators, that the date of filing the pleading rather than the date of trial or judgment is the controlling date to determine if claims could and should have been asserted, and plaintiffs need not amend filings to include issues that arise after the pleadings have been submitted. See citations in Part X.A.2. Because Macris' fraudulent transfer, successor liability and alter ego claims did not arise until after the Images action was commenced and after its last pleading therein—Neways was not even in existence until after these events—res judicata judicata cannot bar such claims.

Third, res judicata is inapplicable because Neways was not a party in the Images action and should not be deemed to have been in privity with Images. Utah law requires that for a nonparty to assert a judgment entered in a prior action, the party against whom the judgment is asserted must have had a full and fair opportunity in the prior action to litigate the claims it levels against the nonparty. In this case, Images and Neways were not in privity because Macris could not have asserted its fraudulent transfer, successor liability and alter ego claims against Images and therefore did not have its day in court on such claims in the Images action.

Finally, the policies of judicial economy, fostering reliance on prior decisions, preventing inconsistent judgments and avoiding the burden of multiple lawsuits which support the doctrine of res judicata would not be furthered by its application against Macris in this case. This Court has ruled that where these policies are not advanced, res judicata does not apply. In this case, injustice would result from the application of res judicata. The true cause of the multiple litigation was the fraudulent transfer of Images' assets and multilevel marketing business to Neways. If Neways and the Mowers were truly concerned about judicial economy and the avoidance of litigation, they would not have forced Images to transfer its assets to Neways. Furthermore, Neways and the Mowers would not have taken their initial position in the Neways action that Macris' current claims were not actionable until the Images action concluded. The best way to promote the policies underlying the res judicata doctrine is to remand this action to the trial court to allow Macris to seek damages, including punitive damages, from Neways and the Mowers for the injuries caused by their attempts to evade liability.

The trial court was correct, however, in imposing liability upon Neways for Images' obligations to Macris. An entity which acquires the assets of a corporation and becomes a mere continuation or reincarnation of the corporation's business is liable for the corporation's debts. In this case, the trial court found, on the basis of the uncontroverted factual record before it, that Neways consisted of "the same assets, products, officers, and employees as Images." (R. at 425.) The trial court therefore correctly held Neways liable for the judgment against Images under the doctrine of successor liability.

The trial court's only error with respect to its successor liability ruling was in limiting Neways' liability to the judgment against Images in the Images action. This limitation was based on the trial court's decision that res judicata barred Macris'

recovery of damages beyond those awarded in the Images action. For the reasons set forth in summary above and more particularly below, this decision was incorrect.

X. ARGUMENT

A. RES JUDICATA DOES NOT BAR MACRIS' FRAUDULENT TRANSFER, SUCCESSOR LIABILITY AND ALTER EGO CLAIMS AGAINST NEWAYS AND THE MOWERS.

"In order for res judicata to apply, both suits must involve the same parties or their privies and also the same cause of action." Searle Brothers v. Searle, 588 P.2d 689, 690 (Utah 1978); see also Estate of Covington v. Josephson, 888 P.2d 675, 677 (Utah Ct. App. 1994). In addition, the first suit must have resulted in a final judgment on the merits. Josephson, 888 P.2d at 677. Res judicata is intended to "foster[] reliance on prior adjudication, prevent[] inconsistent decisions, reliev[e] parties of the cost and vexation of multiple lawsuits, and conserv[e] judicial resources." State in the Interest of J.J.T., 877 P.2d 161, 162 (Utah Ct. App. 1994). Res judicata is an affirmative defense and the party asserting it bears the burden of proving each and every one of its elements. Utah R. Civ. P. 8(c); see Gossner v. Dairymen Assocs., 611 P.2d 713, 717 (Utah 1980).

In this case, res judicata is inapplicable for four reasons. First, Macris' current claims did not arise out of the same cause of action at issue in the Images action. Second, Macris was not required to assert its current claims during the Images action because those claims did not arise until after the commencement of that action and after Macris' last pleading therein. Third, Neways should not be deemed to be in privity with Images because the claims asserted in the Neways action could not be asserted against Images and the claims asserted in the Images action could not have been asserted against Neways. Finally, the res judicata doctrine is inapplicable because its

purposes would go completely unfulfilled in this case and would actually be frustrated. The trial court therefore erred in holding that the doctrine of res judicata barred any part of Macris' claims in this case.⁴

1. Macris' Claims in the Neways Action Are Not Part of the Same Causes of Action on Which Macris Prevailed in the Images Action.

Under Utah law, res judicata may apply only if the causes of action in the current and previous lawsuits are identical: "[i]n order for res judicata to apply, both suits must involve . . . the same cause of action." Schaer v. State, 657 P.2d 1337, 1340 (Utah 1983) (emphasis in original) (quoting Searle, 588 P.2d at 690); see also Copper State Thrift and Loan v. Bruno, 735 P.2d 387, 389 (Utah Ct. App. 1987) (same). "Where the claim, demand, or cause of action is different in the two cases, then collateral estoppel is applicable." Id.; see Searle 588 P.2d at 690; Josephson, 888 P.2d at 677; Berry v. Berry, 738 P.2d 246, 247-48 (Utah Ct. App. 1987). If the claims, demands or causes of action differ in the two actions, the claims in the second action cannot be said to be ones that could and should have been litigated in the first action. See Schaer, 657 P.2d at 1340 n.2 (ruling that "before the rules enunciated in the Krofcheck [v. Downey State Bank], 580 P.2d 243, 244 (Utah 1978)] case [including that res judicata bars claims that could and should have been raised in the first action] may be applied, the appellants must first overcome the threshold determination of whether the claims, demands or causes of action of both cases are the same."); see also Doe v. Allied-Signal, Inc., 985 F.2d 908, 913 (7th Cir. 1993); Macko v. Byron, 555 F. Supp. 470, 479 (N.D. Ohio 1982); Restatement (Second) of Judgments § 24, comment h (1982); 18 Charles A. Wright et al., Federal Practice and Procedure § 4406 (1981).

⁴ Macris does not contend that the Images action did not result in a final judgment on the merits.

Various tests have been advanced to determine if a cause of action is the same as one asserted in a prior action. In Schaer v. State, the Utah Supreme Court held that res judicata was inapplicable where

[t]he two causes of action rest on a different state of facts and evidence of a different kind or character is necessary to sustain the two causes of action[, and where] the evidence of the two causes of action relates to the status of the property in two completely different time periods.

Schaer, 657 P.2d at 1340. Another test asks "what was the critical transaction in each case" and compares such transactions. Doe, 985 F.2d at 914 (7th Cir. 1993); c.f. Utah R. Civ. P. 13(a) ("A pleading shall state as a counterclaim any claim . . . if it arises out of the same transaction or occurrence that is the subject-matter of the opposing party's claim. . . ."). Other considerations include:

Is the same right infringed by the same wrong? Would a different judgment obtained in a second action impair rights under the first judgment. . . . This court has recognized that the principal test for comparing causes of action is whether the primary right and duty or wrong are the same.

Kemp v. Birmingham News Co., 608 F.2d 1049, 1052 (5th Cir. 1979); see also Julien J. Studley, Inc. v. Lefrak, 412 N.Y.S.2d 901, 907-08 (N.Y. App. Div.), aff'd, 401 N.E.2d 187 (N.Y. 1979); Pepper v. Zions First Nat'l Bank, N.A., 801 P.2d 144, 152 (Utah 1990); Nancy's Prod., Inc. v. Fred Meyer, Inc., 811 P.2d 250, 254 (Wash. Ct. App. 1991).

Finally, a cause of action must differ from one asserted in a prior action if it requires a different party for the claimant to obtain relief. Most courts and commentators maintain that "the claim or cause of action in a suit against one party is not the same as a claim or cause of action against a different party." 1B James W. Moore, Moore's Federal Practice ¶ 0.411[1] (2d ed. 1996); see New Crawford Valley, Ltd. v. Benedict, 877 P.2d 1363, 1368 (Colo. App. 1993). Thus, it stands to reason that

a cause of action which requires the presence of a party not present in the first suit must be a different cause of action. A similar conclusion was reached by the Colorado Court of Appeals in Quality-Med, Inc. v. Rocky Mountain Hospital and Medical Service, 914 P.2d 419 (Colo. App. 1995). There, the court ruled that there was no identity of claims for relief in the first and second actions because the claims for relief in the first action could be asserted only against a party not involved in the second action. Id. at 420-21.

In this case, consideration of each and every criterion listed above leads to the conclusion that Macris' claims in the Neways action are different from its claims in the Images action. First, the test applied in Schaer v. State, 657 P.2d 1337, 1340 (Utah 1983), favors finding the claims different. "The two causes of action rest on a different state of facts and evidence of a different kind or character is necessary to sustain the two causes of action. Moreover, the evidence of the two causes of action relates to . . . two completely different time periods." Id. The Images action arose out of the 1989 formation and Images' March 7, 1991 breach of the Autoqualification Agreement. In that action, Macris and Images litigated whether a valid agreement existed between Macris and Images, whether Images breached that agreement and whether such breach was excusable or justified.

In contrast, the Neways action arose out of the formation of Neways and Images' September 1, 1992 transfer of its assets, including the multilevel marketing business, to the new corporation. This action will deal with the formation of Neways, the relationship between Images and Neways, the circumstances around which Images' multilevel marketing business and other assets were transferred to Neways, and Neways' operation of the multilevel marketing business. As Neways and the Mowers admitted during the hearing on the parties' motions for summary judgment, the Autoqualification

Agreement "won't be before this Court. The issue that will be before this Court is by virtue of corporate reorganizations, transfers for consideration[,] whether or not we, Neways, has [sic] assumed [liability] by virtue of the fraudulent conveyance statute, or whether or not it's the same entity by virtue of some common law theories." (R. at 396, 507, pp. 23-24.)

Also, "the critical transaction[s] in each case" are different. Doe, 985 F.2d at 914; c.f. Utah R. Civ. P. 13(a). In the Images action, the critical transactions were the 1989 establishment of the Autoqualification Agreement as part of the distributorship agreement and its 1991 breach. In the Neways action, however, the critical transactions are the formation of Neways and the transfer of Images' assets, including the multilevel marketing business, to Neways in August and September of 1992. Under the transactional test, the causes of action in the Images action and the causes of action in the Neways action are different.

Other considerations also favor a finding that the causes of action are different. The right asserted in the Images action, the right to rely on a valid contract, is not "[t]he same right" on which the Neways action was based. See Kemp, 608 F.2d at 1052. In the Neways action, Macris bases its claims on the Uniform Fraudulent Transfer Act and similar common law doctrines which protect creditors from the "artifices and evasions" of debtors. See Butler v. Wilkinson, 740 P.2d 1244, 1260 (Utah 1987).

Also, the wrong for which redress was sought and awarded in the Images action is not the same wrong for which redress is sought in the instant action. See Kemp, 608 F.2d at 1052. The wrong asserted in the Images action was Images' breach of the Autoqualification Agreement and distributorship agreement. The wrong asserted in the Neways action, however, is the fraudulent transfer of, and Neways' succession to, the

multilevel marketing business and assets of Images accomplished to defeat Macris' valid claims and judgment in the Images action.

Furthermore, the two actions are not so similar that a different judgment in the second action would destroy or impair rights or interests established by the first. Id.; see also Pepper, 801 P.2d at 152 (Utah 1990) (holding claim not barred by res judicata partly because claim "does not constitute a collateral attack on [the prior] order."). The only rights or interests established in the Images action were Macris' termination of Macris' rights to damages flowing from Images' breach of the Autoqualification Agreement and termination of Macris' distributorship. These rights cannot be impaired even if the fraudulent transfer, successor liability and alter ego claims fail. Actually, Macris' rights and interests established in the Images action would be impaired if its current claims are barred. If such claims are held to be barred, Images, Neways and the Mowers' strategy of defeating Macris' valid claims and judgment through evasion and guile will have succeeded.

Finally, the causes of action in the Images and Neways actions must differ because Macris could not have obtained relief on its current claims in the Images action. Rather, the only way Macris can prevail on its fraudulent transfer, successor liability and alter ego claims is by asserting them against the transferee, the successor and the alter ego, Neways; not the empty shell of Images. Because Neways was not a party in the Images action, these claims could not have been asserted. Thus, they are different from the breach of contract claims that actually were asserted.

This same conclusion regarding the identity of breach of contract claims and later arising fraudulent transfer and successor liability claims has been reached by other courts. For example, in Magic Valley Radiology v. Kolouch, 849 P.2d 107 (Idaho 1993),

the Idaho Supreme Court held that a judgment on a plaintiff's breach of contract cause of action did not bar the plaintiff's fraudulent transfer, director liability and successor liability claims:

None of these claims arise out of the transaction that was the subject of [the prior lawsuits]. These claims address transactions that are alleged to have occurred after the alleged breach of the contractual arrangement that was the subject of the first case. . . . [I]t is clear that the issues raised by [the plaintiff's] claims for fraudulent transfers, for director liability, and for continuation of business, were not decided in the prior case. That case focused on the conduct of [the defendants] in breaching the contractual arrangement

Id. at 112.

In Julien J. Studley, Inc. v. Lefrak, 412 N.Y.S.2d 901 (N.Y. App. Div.), aff'd, 401 N.E.2d 187 (N.Y. 1979), the New York courts held that the plaintiff's prior breach of contract action against the defendant did not bar its later suit against the defendant for fraudulent transfer:

The prior litigation established the debts owing to [the plaintiff] from the corporations

In this litigation the enforcement of the judgments against corporate assets is the issue, and [the defendant] is sued because he is one of the transferees of those corporate assets. Hence, the gist of the two litigations is not the same and, clearly, the claims of the parties rest on different aspects of the transactions between the corporations and [the defendant]. Though in the first action [the plaintiff] could have sought to establish its debt and set aside the transfer at once, it chose not to do so, and it may not be faulted for the choice. The judgment in this litigation will not "destroy or impair rights or interests established by the first."

Id. at 904, 907-08 (emphasis added) (quoting Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, 307); Lefrak, 401 N.E.2d at 188.

Like the fraudulent transfer and successor liability claims in Magic Valley Radiology and Lefrak, Macris' claims in the Neways action did not arise out of the

breach of contract causes of action asserted in the Images action. The gist of the two litigations is not the same, and therefore res judicata is inapplicable.

In their opening brief, Neways and the Mowers argue that Macris' successor liability claim should have been asserted in the Images action because "if a plaintiff has knowledge of the facts to support a claim against a defendant or the defendant's privy, the doctrine [of] res judicata requires that the plaintiff bring these claims in the existing action." (Brief of Appellant at 14.) Neways and the Mowers could not be more wrong.

The doctrine of res judicata does not impose upon plaintiffs a rule requiring the mandatory joinder of claims. The doctrine merely calls upon a party to present all of his proof and assert all of his theories of recovery . . . when litigating a claim, as he will be prevented from doing so thereafter. The doctrine does not, as defendants assert, require a plaintiff to join in one action all of the separate causes of action which he may have against a particular defendant.

Macko, 555 F. Supp. at 479 (emphasis added); see also Doe, 985 F.2d at 931 ("[E]ven if a plaintiff is aware of the factual basis for a suit at the filing of another suit, he or she is not obligated to bring all claims together if they do not arise out of the same transaction."); Restatement (Second) of Judgments § 24, comment h (1982) ("There is no . . . compulsion on a plaintiff who has a number of claims against a defendant to join them in a single action; he may join them if he wishes, but he is not obliged to do so out of fear that he will lose any claims he omits to join. Joinder of multiple claims is permissive, not compulsory."); 18 Charles A. Wright et al., Federal Practice and Procedure § 4406 (1981) (same). Indeed, the Utah Supreme Court has ruled that before consideration of whether subsequent claims could and should have been raised in a prior action, "the appellants must first overcome the threshold determination of whether the claims, demands or causes of action of both cases are the same." Schaer, 657 P.2d at 1340 n.2; Krofcheck, 580 P.2d at 244.

Despite Neways and the Mowers' assertions, Masters v. Worsley, 777 P.2d 499 (Utah Ct. App. 1989), does not stand for a contrary rule. In Masters v. Worsley, the first action was a divorce proceeding in which Worsley was awarded custody of the children, and Masters was ordered to pay child support. During that action, Worsley falsely denied having had an amorous affair during the marriage. Following such false denial, Masters discovered the truth of the matter and that some of the children may have been fathered by Worsley's paramour. Masters filed an action for fraud, challenging the divorce court's award of child support. Id. at 500, 501.

Despite the fact that a challenge to the obligation of child support was or could have been litigated in the divorce proceeding, this Court found that res judicata, or claim preclusion, was inapplicable. Id. at 509. The Court's basis for this holding was not, as argued by Neways and the Mowers, solely that Masters had no knowledge of the facts supporting the fraud claim. This Court also found that the issues surrounding the fraud action were different from the issues litigated in the divorce proceedings: "Claim preclusion does not bar Masters's fraud claim because the issues have not been fully litigated in either the original divorce nor the petition for modification proceedings." Id. at 503. Masters v. Worsley is yet another case in a long line of Utah decisions holding that res judicata does not preclude a cause of action that is different from one asserted in a prior suit. Thus, it is not true, as Neways and the Mowers assert, that Macris was required to assert each and every separate cause of action it had during the Images action. As discussed above, Macris' claims in the Neways action are different from its claims in the Images action, and res judicata therefore cannot apply.

2. **Macris Was Not Required to Amend Its Complaint in the Images Action to Assert Its Current Claims Because Such Claims Did Not Arise Until After the Commencement of that Action and After Macris' Last Pleading Therein.**

In order for res judicata to preclude the assertion of a subsequent cause of action, not only must the cause of action be identical to one brought in the prior suit, but the party sought to be barred must also have been aware of the cause of action **at the time the first suit was commenced or the filing of the party's last pleading therein.**

Doe v. Allied-Signal, Inc., 985 F.2d 908, 915 (7th Cir. 1993); Manning v. City of Auburn, 953 F.2d 1355, 1360 (11th Cir. 1992); Prime Management Co., Inc. v. Steinegger, 904 F.2d 811, 816 (2d Cir. 1990); Balderman v. United States Veterans Admin., 870 F.2d 57, 62 (2d Cir. 1989); Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329, 1336 (10th Cir. 1988); Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 750 F.2d 731, 739 (9th Cir. 1984), cert. denied, 474 U.S. 919 (1985); Green v. Illinois Dept. of Transp., 609 F. Supp. 1021, 1026 (N.D. Ill. 1985); Whitley Constr. Co. v. Whitley, 213 S.E.2d 909, 911 (Ga. Ct. App. 1975); Bolte v. Aits, Inc., 587 P.2d 810, 812-13 (Haw. 1978); Durrant v. Quality First Marketing, Inc., 903 P.2d 147, 149 (Idaho Ct. App. 1995); Whitaker v. Bank of Newport, 836 P.2d 695, 699 (Or. 1992) (in banc); Ben C. Jones & Co. v. Gammel-Statesman Publishing Co., 99 S.W. 701, 703 (Tex. 1907); Kaiser v. Northwest Shopping Ctr., Inc., 587 S.W.2d 454, 457 (Tex. App. 1979); Restatement (Second) of Judgments § 24, comment d (1982); 18 Charles A. Wright et al., Federal Practice and Procedure § 4409 (1981). The rule has been stated as follows:

[W]e do not believe that the res judicata preclusion of claims that "could have been brought" in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation. Instead we believe that, for res judicata purposes,

claims that "could have been brought" are claims in existence at the time the original complaint is filed or claims actually asserted by supplemental pleadings or otherwise in the earlier action.

Manning, 953 F.2d at 1360 (emphasis in original); see also Whitaker, 836 P.2d at 699 ("Obviously, enough events to give rise to the second claim must have occurred before the first claim is brought so that the party against whom preclusion is asserted could have combined his or her claims with the earlier ones." (emphasis in original)); Kaiser, 587 S.W.2d at 457 ("[T]he date of filing the pleading rather than the date of trial or judgment is controlling."); 18 Charles A. Wright et al., Federal Practice and Procedure § 4409 (1981) ("The rules that expand the dimensions of a cause of action as time goes on require clear identification of a stopping point. Most cases assume that an action need only include the portions of the claim due at the time of commencing that action.") Thus, "plaintiffs need not amend filings to include issues that arise after the original suit is lodged." Doe, 985 F.2d at 915; see also Whitley, 213 S.E.2d at 911 ("The fact that [procedural rules] contain[] liberal provisions making it possible to amend the pleadings during the course of the trial [does] not require the plaintiff to so amend in every case in which he might amend. . . . It is more practicable to have a certain cutoff time" (emphases in original)).

The Utah Supreme Court adopted this rule long ago in Badger v. Badger, 254 P. 784, 787 (Utah 1927). In that case, the defendant twice petitioned for a modification of a decree of divorce. Her first petition sought modification on the ground that the property settlement on which the decree was based was induced by the plaintiff's false representations and omissions regarding his assets. The court modified the decree, ordering plaintiff to pay the defendant an additional amount. The defendant filed her second petition alleging that the plaintiff further misrepresented his assets. The plaintiff

moved to strike the petition on the grounds that the court's decision on the defendant's first petition barred relief on her second, and the trial court granted the motion. Id. at 785-86.

On appeal to the Utah Supreme Court, the court recited the general rule against splitting one's cause of action: "If . . . the pleader is in possession of the means of ascertaining the full extent of his claim, and his failure to do so is due to his own fault or neglect, it would seem that upon both principle and authority the general rule against splitting applies." Id. at 787. In its analysis, however, the court made clear that for res judicata to apply, the pleader must have the ability to ascertain the full extent of his claim "at the time the first petition was filed." Id. (emphasis added). The court found that the general rule against claim splitting applied because

[i]t affirmatively is made to appear that at the time the first petition was filed for a modification of the decree of divorce the defendant knew the contents of said decree and that she was to receive no property except that actually awarded to her. . . . [T]he [defendant] had as much knowledge about the plaintiff's property and income at the time she filed her first petition as she had at the time she filed the amended petition which was stricken.

Id. (emphasis added). The Court also emphasized that "[n]owhere in the amended petition is there any allegation to the effect that she was not fully advised of matters complained of by her in such amended petition at the time she filed her first petition for an amendment of the decree of divorce." Id. at 786, 787 (emphasis added). Thus, the Utah Supreme Court has decided that an action need include only the portions of a cause of action that have arisen at the time that action was commenced. Id. at 786, 787.

This rule is echoed in the Utah Rules of Civil Procedure. Rule 13(a) defines a counterclaim that must be asserted or be barred in another action as "any claim which

at the time of serving the pleading the pleader has against any opposing party"

Utah R. Civ. P. 13(a) (emphasis added). Thus, Utah law treats the time that the earlier suit was commenced or the filing of the party's last pleading therein as the time by which to determine if the party could and should have asserted a claim in that suit.

Contrary to Neways and the Mowers' contentions, Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah Ct. App. 1990), does not stand for the proposition that if a plaintiff learns of facts after the commencement of an action that give rise to a claim, he is required to amend his pleadings to assert such claim. In Ringwood, the plaintiff was barred from bringing a second action on a claim for breach of contract that arose before the first action was commenced. The plaintiff filed his first lawsuit on January 29, 1980, claiming the defendants had breached an October 1978 promissory note. Id. at 1353. Because the plaintiff did not base his claim on a November 8, 1978 agreement, which the court found controlling, the court dismissed his claim. Id. The second action asserted breach of the November 8, 1978 agreement. Id. Because plaintiff knew of the November 8, 1978 agreement and the breach before his January 29, 1980 lawsuit, his second action was dismissed. Id. at 1358. Thus, nothing in this case runs contrary to the rule adopted in Rule 13 of the Utah Rules of Civil Procedure, Badger v. Badger, and the majority of cases and commentators that an action need include only the portions of a cause of action that have arisen at the time the action was commenced or at the time of the party's last pleading in that action.

This rule is grounded in good sense. Any alternative time for evaluating whether a claim is precluded could lead to unfairness.

Substantial disruption could result from forced amendment at any time after significant discovery has been accomplished, and it is hard to justify any test relating to the progress of discovery or other pretrial events so clear that plaintiffs could afford to apply it without seeking explicit judicial guidance.

18 Charles A. Wright et al., Federal Practice and Procedure § 4409 (1981); see also Doe, 985 F.2d at 915 ("We would twist res judicata grotesquely out of shape by holding that a plaintiff must include not only all claims arising from the same transaction, but must anticipate future harms . . .); Manning, 953 F.2d at 1360 (holding that the rule that a lawsuit need only include claims that have arisen at time of commencement "avoids the 'potentially unworkable requirement that every claim arising prior to entry of a final decree must be brought into the pending litigation or lost.'" (quoting Los Angeles Branch NAACP, 750 F.2d at 739 n.9).

In this case, the trial court erred by dismissing Macris' fraudulent transfer, successor liability and alter ego claims for relief beyond that awarded in the Images action because such claims arose after the commencement of the Images action and after Macris' last pleadings therein. Macris commenced the Images action on April 17, 1991. On June 9, 1992, Macris filed its Second Amended Complaint, its last pleading in that suit. It is uncontroverted that Neways did not even exist before August of 1992, and Images' assets, including the multilevel marketing business, were transferred to Neways in September, 1992. Until these events, Macris could not assert its current claims. Even then, Macris would require time to discover the totality of facts giving rise to the fraudulent transfer, successor liability and alter ego claims. As the Idaho Court of Appeals explained with respect to a similar type of claim:

it is not enough that a party knows it might have a basis to sue to pierce the corporate veil at the time it brings an action against a corporation. Any time a party conducts business with a closely held corporation, that party is aware that the corporate principal with whom the party deals might be the alter ego of that corporation. Such knowledge is insufficient, however, for res judicata to bar that party from bringing a subsequent action to pierce the corporate veil.

Durrant v. Quality First Marketing, Inc., 903 P.2d 147, 150 (Idaho Ct. App. 1995) (citing Idaho R. Civ. P. 11 which requires that "a pleading be well grounded in fact" and stating that under Rule 11 "mere 'suspicion,' 'without factual foundation' is not a sufficient basis to sue an individual."); Whitley Constr. Co., 213 S.E.2d at 911 ("[I]t must also be remembered that [a new claim] also requires the requisite proof It is more practicable to have a certain cutoff time"). Thus, even after Neways' formation and succession to Images' business and assets, Macris' current claims were not immediately ripe for assertion. Because Macris was not required to amend its pleadings in the Images action to include the new claims or suffer their loss, the trial court erred in holding them barred by res judicata.

3. For Res Judicata Purposes, Neways Should Not Be Deemed to Be in Privity with Images; Macris Did Not Have a Full and Fair Opportunity in the *Images* Action to Litigate Its Current Claims Because Such Claims Could Not Be Asserted Against Images.

It is undisputed that for res judicata to apply in this case, Neways must be deemed Images' privity because it was not a party in the Images action. (Brief of Appellant at 9.) The concept of privity, however, has never been precisely defined. Various courts have commented that "[p]rivacy is essentially a conclusory term that describes the relationship between a party and a non-party that is deemed close enough to warrant the application of claim or issue preclusion to the non-party." Ditton v. Bowerman, 844 P.2d 919, 922 (Or. Ct. App. 1992); Motion Picture Indus. Pension Plan v. Hawaii Kona Coast Assocs., 823 P.2d 752, 757 (Haw. Ct. App. 1991) ("The concept of privity has moved . . . to merely a word used to say that the relationship between the one who is a party of record and another is close enough to include that other within the res adjudicata [sic]." (internal quotes omitted)). What is clear is that the

privity concept is inextricably connected with the basic concern that "[t]he party barred from litigating a claim in a subsequent action must have had a full and fair opportunity to litigate the same claim in the prior case." Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 733 (Utah 1995); 18 Charles A. Wright et al., Federal Practice and Procedure § 4448 (1982).

This concept is embodied in the Utah Supreme Court's and this Court's discussions of the identity of parties requirement of res judicata and the concept of privity. In International Resources v. Dunfield, 599 P.2d 515 (Utah 1979), the court stated that the identity of parties requirement of res judicata was founded on the concept that those barred by a prior action must have had an opportunity to assert its claims in that action:

One of the reasons that it is said that the parties must have been the same in both actions is that before the rights of a party are concluded by a judgment, he is entitled to due process of law and an opportunity to contest the issue if he so desires.

Id. at 517. Also, in determining whether an entity should be deemed in privity with a party for res judicata purposes, Utah courts "resolve[] all doubts in favor of permitting parties to have their day in court on the merits of a controversy." Baxter v. Utah Dept. of Transp., 705 P.2d 1167, 1169 (Utah 1985); Ruffinengo v. Miller, 579 P.2d 342, 344 (Utah 1978). Thus, the Utah Supreme Court has held that those whose only connections with previous actions were as witnesses or were shared legal rights with those who were parties are not in privity with parties to such action. Baxter, 705 P.2d at 1169; Ruffinengo, 579 P.2d at 344. This is also why the Utah Supreme Court has defined a person in privity as a representative of a party: "a person so identified in interest with another that he represents the same legal right." Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978). The "ability to control representation of rights is

'necessary to fulfill the function of privity to provide a day in court.'" State in the Interest of T.J., 945 P.2d 158, 163 (Utah Ct. App. 1997) (quoting State v. Ruscetta, 742 P.2d 114, 117 (Utah Ct. App. 1987)).

Viewed in light of its "function . . . to provide a day in court," id., it is apparent that the test of privity depends on whether a nonparty is sought to be bound by a previous judgment or whether the nonparty is seeking to take advantage of it.

The question whether a nonparty may take advantage of a judgment is now approached by most courts from a very different perspective than the question whether a party may be bound. . . . Once it is concluded that preclusion is asserted against a person who may be bound by the judgment, the inquiry shifts to ask whether there is some special reason for denying its benefits to a nonparty. Denial is most likely to rest on a broad conclusion that the first litigation did not afford a "full and fair opportunity" to try the issue offered for preclusion.

18 Charles A. Wright et al., Federal Practice and Procedure § 4448 (1982). When the issue is whether a nonparty should be bound as one in privity, the test is whether it had a full and fair opportunity to litigate the issues in the prior action by virtue of some control or representation in that action. Baxter, 705 P.2d at 1169; Ruffinengo, 579 P.2d at 344; State in Interest of T.J., 945 P.2d at 162-63; Ruscetta, 742 P.2d at 117.

Moreover, the analysis is performed irrespective of whether the nonparty had the opportunity to intervene in the prior action. Searle Bros., 588 P.2d at 692 ("The right to intervene as a party in the prior suit does not bind the party in the subsequent suit where he failed to so intervene.").

The test of privity to determine if a nonparty may take advantage of a prior judgment and preclude a party must also be applied with a view of "resolving doubts in favor of permitting parties to have their day in court on the merits of a controversy." Ruffinengo, 579 P.2d at 344. Therefore, the test of privity in this situation is whether

the party "had the 'full and fair opportunity' it is entitled to for an adjudication" on its later asserted claims. Dunfield, 599 P.2d at 517; see also Silver Fork Pipeline Corp., 913 P.2d at 733; Gossner v. Dairymen Assocs., 611 P.2d 713, 716-17 (Utah 1980). Moreover, just as a nonparty is not required to intervene, the "identity of parties" analysis with respect to whether a nonparty may take advantage of a judgment must be applied irrespective of whether the party could have amended its pleadings to join the nonparty. Serr v. Rick Jensen Constr., Inc., 743 P.2d 1202, 1203 (Utah 1987) (rejecting argument that "res judicata should bar plaintiff's suit against respondent because plaintiff could have amended her complaint in the original action to join respondent as a defendant. Plaintiff's failure . . . cannot bar the action."); Gossner, 611 P.2d at 716-17, 719 (rejecting dissent's argument that the identity of parties prong of res judicata is met because in the original action, the nonparty should have been joined). Thus, before a nonparty can assert the preclusive effect of a prior judgment, the party must have had its day in court on the merits of the claims against the nonparty even though the nonparty was not present.

In this case, a nonparty, Neways, seeks to take advantage of the judgment in Macris' favor in the Images action. Therefore, to ensure that Macris has had its day in court on its fraudulent transfer, successor liability and alter ego claims, the test of privity is whether Macris had a full and fair opportunity to litigate such claims during the Images action. In other words, when Macris litigated its claims against Images in the Images action, it must have also been litigating its fraudulent transfer, successor liability and alter ego claims. Clearly, Macris did not. Such claims can only be asserted against the transferee, the successor and the alter ego, Neways. Because Macris has not had its day in court with respect to these claims, Neways must not be held to be in privity with Images, and the trial court erred in holding that it was.

The trial court's privity analysis deprived Macris of a full and fair opportunity to litigate its current claims. First, the trial court found that if "Neways is a successor in interest of property that is the subject of pending litigation to which his transferor is bound then the transferee is" in privity with the transferor. (R. at 427.) Then, the trial court held that "as Neways is the successor in interest of property that Images would have used to pay damages to Macris, Neways is entitled to argue res judicata to the same extent as Images." (R. at 427.) The problem with the trial court's analysis is that it applied an inapplicable test of privity and then skewed the test to reach its result.

The test applied by the trial court is inapplicable because property was not the subject of the litigation in the Images action. The subject of the Images action was the formation of the Autoqualification Agreement and Images' breach of that contract. The fact that, as the trial court reasoned, property "would have [been] used to pay damages to Macris" does not make it the subject of the Images action. Otherwise, every action for damages becomes a property dispute.

The purpose of this test of privity makes clear that it would be unfair to apply it in this case. In the case of a nonparty successor to property seeking to take advantage of a prior judgment, the purpose is to provide repose with respect to the adjudicated status of property. See Restatement (Second) of Judgments § 44 (1980). In such a case, preclusion is justified because the claimant had a full and fair opportunity to litigate the status of the property. In the case of a nonparty successor who is sought to be bound by a prior judgment

[t]he compelling need for this rule is apparent. To deny preclusion would be to deny the victor any assurance of repose and expose every judgment to defeat by simple conveyance.

18 Charles A. Wright et al., Federal Practice and Procedure § 4462 (1981); see also

Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168, 179 (1973) ("We hold that a

bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor . . ."). In this case, the Images action was unconcerned with the status of property, and it would be unfair to preclude Macris from asserting completely different claims as if the Images action had been concerned with the status of property. Macris has not had its day in court on its current claims. Moreover, the test applied in this case would defeat its dual purpose to prevent the type of evasion perpetrated by Neways and the Mowers in this case. Thus, the trial court erred in applying a successive property interest test of privity and finding that, under such test, Neways was in privity with Images.⁵

4. Res Judicata Is Inapplicable in this Case Because the Policies Underlying the Res Judicata Doctrine Would Not Be Furthered, and Would Actually Be Frustrated.

The purposes of res judicata are defined as "fostering reliance on prior adjudication[s], preventing inconsistent decisions, relieving parties of the cost and vexation of multiple lawsuits and conserving judicial resources." State in the Interest of J.J.T., 877 P.2d 161, 162 (Utah Ct. App. 1994) (quotations omitted). In Estate v. Covington v. Josephson, 888 P.2d 675 (Utah Ct. App. 1994), cert. denied, 910 P.2d 425 (Utah 1995), this Court held that if these justifications are not present in an action "neither res judicata nor collateral estoppel precludes the . . . action." Id. at 678. Furthermore, res judicata is an equitable doctrine, and it should not be applied where it

⁵ The trial court also erred in assuming, without any basis or argument from Neways or the Mowers, that Thomas and Leslie Mower were in privity with Images. "[F]or purposes of the doctrine of res judicata, a corporation is treated as a legal entity separate from and independent of its officers, directors and stockholders. Therefore, a judgment against a corporation will not preclude the assertion of claims against that corporation's directors [or stockholders] . . ." New Crawford Valley, Ltd. v. Benedict, 877 P.2d 1363, 1368 (Colo. App. 1993); Ditton v. Bowerman, 844 P.2d 919, 922 (Or. Ct. App. 1992); Durrant v. Quality First Mktg, Inc., 903 P.2d 147, 149-50 (Idaho Ct. App. 1992).

would be inequitable to do so. Walsh v. International Longshoremen's Ass'n, 630 F.2d 864, 875 (1st Cir. 1980); Sweetheart Plastics v. Illinois Tool Works, 439 F.2d 871 (1st Cir. 1971); Bolte v. Aits, Inc., 587 P.2d 810, 814 (Haw. 1978); Pepper v. Zions First Nat'l Bank, N.A., 801 P.2d 144, 149 (Utah 1990); 1B James W. Moore, Moore's Federal Practice ¶ 0.405[12] (1996). This is especially so where the issue is whether the plaintiff, which prevailed in the prior suit, is attempting to split its cause of action rather than relitigate it. Bolte, 587 P.2d at 814 ("The rule against splitting should not be so rigidly applied . . . to produce injustice and thwart the policy upon which it was founded." 1B James W. Moore, Moore's Federal Practice ¶ 0.405[12] ("In cases involving the splitting of a cause of action, there is a certain amount of flexibility . . . and the decisions in this context show, perhaps, less rigidity."))

First, application of res judicata in this case would not foster reliance on the adjudication of the Images action. To the contrary, application of res judicata would defeat such reliance. In the Images action, Macris prevailed on its breach of contract causes of action and was awarded a substantial sum. If res judicata is applied in this case, Neways and the Mowers' artifice and evasion will defeat Macris' judgment as well as other damages Macris suffered as a result of their fraud. Thus, in order to foster reliance on the adjudication in the Images action, this Court should hold res judicata inapplicable and allow Macris to enforce its judgment and seek its damages from Neways and the Mowers.

Also, application of res judicata is not necessary to prevent inconsistent decisions. Macris prevailed in the Images action. The only rights or interests established in that suit were Macris' right to relief stemming from Images' breach of the Autoqualification Agreement. These rights cannot be impaired even if Macris'

fraudulent transfer, successor liability and alter ego claims fail. The rights and interests established in the Images action can only be impaired if Macris is precluded from enforcing its judgment and asserting its claims against Neways and the Mowers for attempting to evade liability.

Third, it is not Macris' conduct that has forced the parties to incur the cost and vexation of multiple lawsuits. That dubious distinction belongs solely to Neways and the Mowers. Neways and the Mowers forced Macris to bring its claims against them by causing Images to transfer its assets, including the multilevel marketing business, to Neways. Furthermore, Neways and the Mowers initially took the position in this suit that Macris' current claims were not ripe until the first suit was concluded. They took this position while the Images action was still pending and when an amendment of Macris' pleading may have been possible. If Neways and the Mowers were truly concerned about the cost and burden of multiple litigation, they should not have attempted to defeat the judgment and Macris' claims in the Images action and should not have taken the position that Macris' current claims were not ripe until the Images action concluded.

In the Images action, Macris did not pursue only part of its claims. Rather, Macris sought all "damages resulting from termination of the automatic qualification status and of the distributorship." (R. at 192-97.) The rule against splitting a cause of action should not apply where a claimant pursued all the relief to which it was entitled.

The rule against splitting a cause of action is based on the salutary policy of preventing a multiplicity of vexatious lawsuits and harassment of the defendant. The rule presupposes the fact that the plaintiff is consciously acting inequitably in suing for only part of his claim, knowing that he was unnecessarily bringing vexatious lawsuits against the defendant or careless as to whether he was causing such vexation. The rule against splitting should not be so rigidly applied, however, to produce an injustice and thwart the policy on which it was founded. Thus, where the

plaintiff is . . . not negligent or [the necessity of a subsequent action] was caused by the fraud or fault of the defendant, plaintiff's purpose will not be to consciously and unreasonably vex or harass the defendant. . . . Consequently, the rationale and rule against splitting a cause of action will be inapplicable.

Bolte, 587 P.2d at 814. Because in the Images action Macris was not consciously or carelessly suing for only part of its claim, the rule against claim splitting should not apply.

Finally, if anyone has caused a waste of judicial resources in this case, it is Neways and the Mowers, not Macris. After Images transferred its assets to Neways, Images and Thomas Mower made every effort to erect a wall between Images and Neways. Images and Mr. Mower consistently maintained that Images and Neways were wholly separate corporations having little or no relationship. Furthermore, when it was still possible for Macris to bring its current claims and join Neways in the Images action, Neways and the Mowers took the position that such claims were not actionable until the Images action ended. Macris should therefore not be faulted for bringing its claims against Neways and the Mowers in a separate action. Doe v. Allied-Signal, Inc., 985 F.2d 908, 914 (7th Cir. 1993) ("[A] critical piece of the puzzle [giving rise to plaintiff's later asserted claims] was [defendant's] change of tactics during the lawsuit. Without this information, [plaintiff] could not have known that she had a claim."); Pepper v. Zions First Nat'l Bank, N.A., 801 P.2d 144, 148-49 (Utah 1990) ("Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, . . . a new suit may be sustained. . . ."); Estate of Covington, 888 P.2d at 678 (holding that party was not barred by res judicata when in prior action it relied on opponent's representations that if true would have made further litigation unnecessary).

Neways and the Mowers' argument in their brief that Macris' failure to assert its current claims in the Images action has led to a waste of judicial resources and unnecessary expense cannot be taken seriously. (Brief of Appellant at 16.) In this very case, they also argued that judicial resources and funds would be wasted if Macris could bring their current claims during the Images action:

continuation of this suit, prior to a final determination of liability in [the Images action] would waste judicial resources as well as subject the parties to unnecessary litigation expenses.

(R. at 34 (emphasis added) (quotations omitted).) Such inconsistency is illustrative of Neways and the Mowers' litigation strategy which itself is the sole cause of unnecessary litigation expense and waste of judicial resources.

Judicial economy and the other policies underlying the res judicata doctrine should not be obtained at the price of injustice. The best way to promote the purposes underlying res judicata is to remand this case to the trial court and allow Macris the opportunity to seek damages from Neways and the Mowers for the additional injuries caused by their attempts to evade liability, including punitive damages for intentional and fraudulent transfers.

B. ON THE BASIS OF THE UNCONTROVERTED FACTS BEFORE IT, THE TRIAL COURT PROPERLY FOUND THAT NEWAYS WAS LIABLE TO MACRIS AS IMAGES' SUCCESSOR.

An entity which acquires the assets of a corporation will become liable for the debts of the transferor

"when the circumstances surrounding the transaction show that the new corporation was created for the purpose of succeeding to the business and acquiring the property of the old corporation and the manner of acquiring the business and property and the circumstances surrounding the transaction are of such a character as to warrant the conclusion that it is a mere continuation of the former corporation."

B&K Distr., Inc. v. Drake Building Corp., 654 P.2d 324, 326 (Colo. Ct. App. 1982) (quoting Oklahoma Title Co. v. Burrus, 44 P.2d 852 (Okla. 1935)); see also R. at 426 ("Under some circumstances, the transferee may be held liable for the debts of the transferor, to wit: . . . where the transferee corporation was a mere continuation or reincarnation of the old corporation." (quoting Ferdinand S. Tinio, Annotation, Similarity of Ownership or Control as Basis for Charging Corporation Acquiring Assets of Another with Liability for Former Owner's Debt, 49 A.L.R. 881, 883 (1973))).

In this case, the trial court correctly held Neways liable as Images' successor. In August, 1992, Neways was incorporated with Thomas Mower as president and his wife, *Leslie Mower*, as vice president. *Thomas Mower was the founder and president of Images.* In fact, Neways' officers, directors and shareholders were the same members of the Mowers' family who were also the officers, directors and shareholders of Images. On the eve of the first trial setting in the Images action, the newly formed Neways succeeded to Images' assets, including the multilevel marketing business, all of Images' inventory and all of its tangible assets. All of the distributors in the multilevel marketing business, with the exception of Macris, were invited to become distributors of the business under Neways with the same rank and position. Furthermore, Neways carried on the same business as Images using the same facilities, employees, equipment, furnishings and product formulations that Images had used the day before the transfer. On the basis of the foregoing, the trial court was correct in ruling that "as Neways consists of substantially the same assets, products, officers, and employees as Images, it would seem that Neways is in fact a mere continuation of the same corporation" and Neways is liable to Macris as Images' successor. (R. at 425.)

The trial court's only error with respect to its holding of successor liability was in limiting Neways' liability to the judgment against Images in the Images action on the

basis of res judicata. As discussed above, res judicata does not apply to any part of Macris' claims for relief. This Court should therefore affirm the trial court's holding that Neways is liable as Images' successor but reverse the trial court's order to the extent it limits Neways' successor liability to the judgment against Images.

Neways and the Mowers raise a number of arguments in opposition to the trial court's finding of successor liability. Each lacks merit.

First, Neways and the Mowers contend that res judicata bars Macris' successor liability claims. For the reasons stated in the preceding sections of this brief, res judicata does not bar any of Macris' claims, including its successor liability claim for relief. Moreover, res judicata is especially inapplicable where a party seeks to enforce a judgment against a different party. See New Crawford Valley, Ltd. v. Benedict, 877 P.2d 1363, 1367-68 (Colo. Ct. App. 1993); see also Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 51 (7th Cir. 1995) ("But a second chance is precisely the point of successor liability. . . ."); Julien J. Studley, Inc. v. Lefrak, 401 N.E.2d 187, 188 (N.Y. 1979) ("[T]he legislatively sanctioned enforcement proceeding contemplates a pre-existing judgment.").

Also, Neways and the Mowers assert that "Neways did not contractually agree to succeed to Images' obligation to Macris." (Brief of Appellant at 18.) The trial court, however, did not base its ruling on any contractual agreement. Rather it based its judgment on the ground that Neways is a mere continuation of Images' business. This ground is entirely adequate to sustain the trial court's finding of successor liability. Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128, 1131 (10th Cir. 1991); Koch v. Speedwell Motor Car Co., 140 P. 598 (Cal. Ct. App. 1914), modified, 140 P. 600

(Cal. Ct. App. 1914); B&K Distr., 654 P.2d at 326; Steel Co. v. Morgan Marshall Indus. 662 N.E.2d 595, 599 (Ill. App. Ct. 1996); Tinio, *supra*, 49 A.L.R. at 883.

This Court's decisions in Oquirrh Associates v. First National Leasing Co., Inc., 888 P.2d 659 (Utah Ct. App. 1994), and Hansen v. Green River Group, 748 P.2d 1102 (Utah Ct. App. 1988), do not stand for a contrary rule. Neither of these decisions dealt with whether a transferee was liable for the debts of a transferor because it succeeded to the business of the transferor. These cases are therefore inapposite.

Next, Neways and the Mowers contend, for the first time on appeal, that Eclat, Inc. is Images' true successor and the trial court failed to consider evidence as to whether Images or Eclat could satisfy the obligation to Macris. (Brief of Appellant at 19.) Neways and the Mowers should not be allowed to now present evidence that was not before the trial court regarding Eclat, Inc. A party may not raise a factual issue for the first time on appeal. Schaer v. State, 657 P.2d 1337, 1342 (Utah 1983).

Furthermore, Neways and the Mowers' new contentions are contrary to uncontested facts. In both their Answer and Amended Answer, Neways and the Mowers admitted that Eclat is simply another name for Images. Also, it is uncontroverted that Images transferred its multilevel marketing business, its inventory and all of its tangible assets to Neways. Thus, Eclat Inc. could not be the true successor of Images.

Also, the trial court most certainly did consider evidence as to whether Images could satisfy its obligations to Macris. Following the transfer of assets to Neways, Images had no remaining tangible assets. Furthermore, Neways and the Mowers now assert that "[t]he remainder of the assets and liabilities were transferred to another corporation known as Eclat." (Brief of Appellant at 3.) Thus, by their own assertions, Images had absolutely no assets to satisfy any judgment or obligation.

Neways and the Mowers also argue that the evidence does not support the trial court's finding that Neways consists of substantially the same assets, products, officers and employees as Images. This argument is another attempt to raise factual issues for the first time on appeal. These facts were supported by Neways and the Mowers' admissions in their Amended Answer and in Macris' statement of facts in its Memorandum in Support of Motion for Summary Judgment. In responding to Macris' motion, Neways and the Mowers failed to object or attempt to dispute the facts listed in support of Macris' motion. "Thus, because the appellant . . . failed to proffer any evidence at the trial level in contradiction to the plaintiff's Motion for Summary Judgment, [the appellant] will not be permitted to now raise the issue for the first time on appeal." Schaer, 657 P.2d at 1342; see Salt Lake City Corp. v. James Constr., Inc., 761 P.2d 42, 46 (Utah Ct. App. 1988).

Finally, Neways and the Mowers argue that a corporation must purchase all assets of the old corporation in order to be the successor corporation. (Brief of Appellant at 20.) This argument is not only wrong, it is ridiculous. Purchase of substantially all the assets of the predecessor is all that is required. Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128, 1131 (10th Cir. 1991); B&K Distr., Inc., 654 P.2d at 326. The rule advanced by Neways and the Mowers could lead to illogical and unfair results if, for instance, only a minuscule amount of assets remain with the transferor. Successor liability could too easily be defeated by such a tactic. C.f. Utah Code Ann. § 25-6-5(2) (directing that "actual intent to hinder, delay or defraud any creditor" may be inferred from "transfer . . . of substantially all the debtor's assets" (emphasis added)).

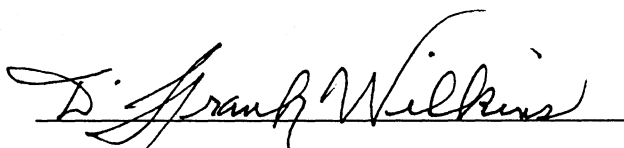
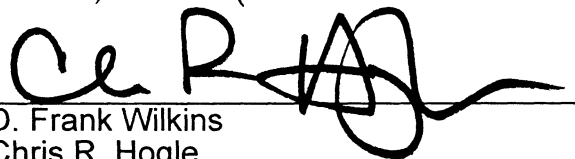
Because the trial court had ample uncontroverted evidence before it that Neways was a mere continuation of Images' business, this Court should affirm its imposition of successor liability upon Neways.

XI. CONCLUSION

On the basis of the foregoing, this Court should reverse the trial court's summary judgment in favor of Neways and the Mowers and affirm the trial court's summary judgment in favor of Macris. Res judicata is not applicable to bar Macris' claims against Neways and the Mowers for damages beyond those awarded in the Images action. In addition, although the trial court correctly found that Neways was liable to Macris as Images' successor, the trial court erred in limiting such liability to the judgment entered in the Images action.

DATED: May 14, 1998.

BERMAN, GAUFIN, TOMSIC & SAVAGE

A handwritten signature in cursive script, appearing to read "D. Frank Wilkins", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Chris R. Hogle", written over a horizontal line.

D. Frank Wilkins
Chris R. Hogle
Attorneys for Macris & Associates, Inc.
50 South Main, Suite 1250
Salt Lake City, Utah 84144

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on May 14, 1998, two true and correct copies of the BRIEF OF CROSS-APPELLANT MACRIS & ASSOCIATES, INC. were mailed via first class mail, postage prepaid, to the following:

Allen K. Davis
150 East 400 North
Salem, Utah 84653



XII. ADDENDUM

Tab A

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

MACRIS & ASSOCIATES, INC., Plaintiff, vs. NEWAYS, INC., THOMAS E. MOWER, and LESLIE D. MOWER, Defendants.	MEMORANDUM DECISION CASE NO. 950400093CN DATE: September 19, 1997 JUDGE: HOWARD H. MAETANI
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This matter came before the Court on Defendants', Neways, Inc., Thomas Mower, and Leslie Mower, Motion for Summary Judgment, pursuant to the Utah Rules of Civil Procedure Rule 56(b), filed on or about October 16, 1995, and on Plaintiff's, Macris & Associates, Inc., Cross Motion for Partial Summary Judgment, pursuant to the Utah Rules of Civil Procedure Rule 56(a), filed on or about November 14, 1995. The Honorable Howard H. Maetani, Fourth District Court Judge, heard oral arguments on January 29, 1996, and stayed rulings on the motions before the Court pending a ruling by the Utah Court of Appeals on the appeal of a judgment in favor of Macris & Associates and Michael Macris in their lawsuit against Images, Inc., the predecessor corporation to Neways, Inc. The Court of Appeals rejected every argument raised on appeal and affirmed the judgment against Images, Inc. Dennis K. Poole and Andrea Nuffer represent Defendants, Neways, Inc., Thomas Mower, and Leslie Mower. Plaintiff, Macris & Associates, Inc., is represented by Thomas R. Karrenberg, Nathan B. Wilcox, and Jon V. Harper. This matter has again come before the Court through Plaintiff's Notice to Submit for Ruling, filed on September 3, 1997, by Plaintiff's new counsel,

Stephen T. Hard of Giaque, Crockett, Bendinger & Peterson. The Court has reviewed the file, considered the memoranda of counsel, and heard oral arguments, and upon being advised in the premises, now makes the following:

MEMORANDUM DECISION

I STATEMENT OF FACTS

The plaintiff, Macris & Associates, Inc. ("Macris"), is a Utah Corporation and at one time was a distributor for Images & Attitude, Inc. ("Images"), a Utah Corporation formerly engaged in multilevel marketing. *See Complaint* ¶¶ 1, 7, 11.

On or about August 1989, Macris entered into a distributorship agreement with Images and the parties agreed to allow Macris to have automatic qualification of its distributorship, and attached this provision to the agreement through the Addendum to Distributor Application. *See Complaint* ¶ 12.

Pursuant to the Addendum Agreement, Macris agreed to use its time, marketing expertise and contacts to build a downline organization within Images' multilevel program. For this commitment, Images agreed to pay Macris at the highest level of Images' marketing program for product sales made by the distributors in the Macris downline. *See Complaint* ¶¶ 13, 14.

On or about March 7, 1991, Macris received a letter from Images claiming that Macris was not sufficiently active and suspended the Auto Qualification Agreement, and subsequently terminated Macris as an Images distributor. *See Complaint* ¶ 22.

On or about April 17, 1991, Macris filed a lawsuit (Civil Case No. 910400358) against

Images and Thomas E. Mower for breach of contract, seeking relief in the form of damages worth the payments it would have received from Images but for the termination of the distributorship agreement. *See Complaint* ¶ 23.

Neways, Inc. (“Neways”), a Utah corporation, engaged in multilevel marketing and sale of health and beauty products, was incorporated in Utah on or about August 1992, with Thomas E. Mower as president and Leslie Mower as vice-president. *See Complaint* ¶¶ 2, 9.

In early September, 1992, Images transferred substantially all its assets to Neways, discontinuing its multilevel marketing business, at which time Neways took over the multilevel marketing operation, using the same facilities, with the same employees, selling the same products through essentially the same network of distributors. *See Defendants’ Memorandum in Support of Motion for Summary Judgment* ¶ 10; *Plaintiff’s Memorandum in Opposition to Motion for Summary Judgment* ¶ 3; *Macris v. Images Findings of Fact and Conclusions of Law* ¶ 17.

On or about September 15, 1995, the Fourth District Court of Utah County, Judge Guy R. Burningham presiding, entered a Judgment against Images on Macris & Associates’ cause of action for breach of contract. An appeal to this decision was filed on or about February 12, 1996. *See Defendants’ Memorandum in Support of Motion for Summary Judgment* ¶ 14.

On or about February 15, 1995, Plaintiff filed a complaint with the court of Judge Boyd L. Park, alleging fraudulent transfer, successor liability, and alter ego. *See Complaint* ¶¶ 30, 38, 45.

Based on these causes of action, Plaintiff asks to be awarded: punitive damages,

general damages from Thomas E. and Leslie Mower, an Order partially voiding the transfer from Images to Neways, and an Order making Thomas E. Mower, Leslie Mower, and Neways liable for commissions to Macris had its distributorship also been transferred to Neways. *See Complaint Prayer for Relief* ¶¶ 1, 2, 3, 4.

On or about October 17, 1995, Defendants filed *Defendant Neways, Inc. Motion For Summary Judgment* with an accompanying *Memorandum In Support Of Motion For Summary Judgment* filed on or about October 19, 1995, claiming that res judicata bars the plaintiff from recovering on its claims.

On or about November 13, 1995, Plaintiff, Macris & Associates, Inc., filed *Plaintiff's Memorandum In Opposition To Motion For Summary Judgment*.

On or about November 14, 1995, Defendants filed their *Reply Memorandum In Support Of Defendants' Motion For Summary Judgment*.

On or about November 14, 1995, Plaintiff filed *Plaintiff Macris & Associates, Inc. Motion for Summary Judgment* with an accompanying *Memorandum In Support of Motion For Summary Judgment*.

On or about November 24, 1995, Defendants filed *a Memorandum In Opposition To Plaintiff's Motion for Summary Judgment*.

On or about November 28, 1995, the current action was transferred from Judge Park to Judge Howard H. Maetani, pursuant to the 4th District Court's decision to reassign some cases.

On or about December 7, 1995, Plaintiff filed *a Reply Memorandum In Support Of*

Motion For Partial Summary Judgment.

Oral arguments were heard on the motions on or about January 29, 1996 in front of Judge Maetani.

A Stay of the Proceedings was entered on or about February 21, 1996, pending the completion of all appeals in the previous case.

On September 3, 1997, Plaintiff filed a *Notice to Submit for Ruling*, following the completion of all appeals in the previous case.

II STANDARD FOR MOTION FOR SUMMARY JUDGMENT

Under the Utah Rules of Civil Procedure, Rule 56(a) and (b), a party against whom a claim has been made, may at any time move for a summary judgment in his favor. The motion should be granted if “. . . the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” URCP Rule 56(c).

III ISSUES

Defendants argue that the current action is barred by res judicata, claiming that the three elements have been met, in that; the parties are the same, the claim was or could have been presented in the first suit, and that there was a final judgment on the merits. For the

sake of this argument, Defendants acknowledge that Neways is in privity with Images, but contend that this does not make Neways the alter ego of Images, and that there is no successor liability attached to the acknowledgment.

Plaintiff contends that the elements of res judicata have not all been met, that Neways and Images are not the same parties, the claims are such that they should not have been brought into the first action, and that as the previous decision is being appealed, there has not been a final judgment. However, as Defendants have acknowledged the privity between Neways and Images, Plaintiff argues that it is entitled to a judgment on its claim for successor liability as a matter of law.

IV ANALYSIS

Claims are barred from being litigated by res judicata when the following three elements are satisfied:

First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988).

A. PRIVITY BETWEEN NEWAYS AND IMAGES

“The legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right.” Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978). Neways has acknowledged that there is privity between itself and

Images for the purpose of proving res judicata, but denies that this in any way proves successor liability. Macris refuses to accept Neways' acknowledgment of privity for res judicata, but then uses it to claim successor liability as a matter of law.

If it is established that Neways is a "successor in interest of property that is the subject of pending litigation to which his transferor is bound" then the transferee is "entitled to the benefits of the rules of res judicata to the same extent as [its] transferor . . ."

Restatement (Second) of Judgments § 44 (1982); Golden State Bottling Co. Inc. v. National Labor Relations Board, 414 U.S. 168, 179 (1973). Thus, as Neways is the successor in interest of the property that Images would have used to pay damages to Macris, Neways is entitled to argue res judicata to the same extent as Images.

Although Utah has not yet addressed the issue of generally establishing successor liability of corporations, a number of jurisdictions have well established rules in common. See Williams v. Bowman Livestock Equipment Co., 927 F.2d 1128,1131 (10th Cir. 1991) (a creditor based his claim against a corporation on successor liability, but the court ruled against him because "a prerequisite for the imposition of liability against a corporation as a mere continuation of a predecessor is a sale or transfer of all, or substantially all, the assets of the latter to the former."); Kloberdanz v. Joy Manufacturing Co., 288 F. Supp. 817 (D. Co. 1968) (a company that purchased assets from a liable company was found to be not responsible because there was no hint of fraud, the transfer was made for a good consideration, and there was no connection between the two companies, such as officers or

stockholders); Koch v. Speedwell Motor Car Co., 140 P. 598 (Cal. App. 1914) (the court states that when a new corporation is merely a continuation of an old corporation, the new will be held liable for the debts of the old) ; Evanston Insurance Co. v. Luko, 783 P.2d 293 (Haw. App. 1989) (owners of a liable company formed a new company, but the new company was not liable as there was no transfer of assets; the court stated that successor liability presupposes a transfer of assets, and its intent is that the "rights of creditors are 'protected against a sale , transfer, or distribution of all the corporate property' in fraud of their rights. 18B Am. Jur. 2d *Corporations* § 2086 at 914 (1985).” A representation of what the common reasoning is behind successor liability is located in 49 A.L.R. 3d 881, 883:

The general rule seems to be that where a corporation sells or otherwise transfers all of its assets, its transferee is not necessarily liable for the debts and liabilities of the transferor. Under some circumstances, the transferee may be held liable for the debts of the transferor, to wit: (1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger; (3) where the transaction was fraudulent; (4) where some of the elements of a purchase in good faith were lacking, as where the transfer was without consideration and the creditors of the transferor were not provided for; or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation.

In the current action, it would seem that the transfer from Images to Neways would result in successor liability based on two of the exceptions. First, if as a result of the transfer, Images is unable to meet its obligation to Macris, it would indicate that some of the elements of a purchase in good faith were lacking in that the transfer was without consideration sufficient to provide for the creditors. In Malone v. Red Top Cab Co., 60 P.2d 543 (Cal.

App. 1936), the court held that in the case where one corporation takes all the assets of another corporation without passing any other property or cash to the selling corporation that could be used to meet any creditor's claim, the purchaser will be obligated to take responsibility for the seller's debts. Second, as Neways consists of substantially the same assets, products, officers, and employees as Images, it would seem that Neways is in fact a mere continuation of the same corporation. In G. P. Publications, Inc. v. Quebecor Printing--St. Paul, Inc., 481 S.E.2d 674 (N.C.App. 1997), the Court considered several factors in determining the applicability of successor liability, including whether there is identity of stockholders and directors between two corporations. "This...encompasses the situation where one corporation sells its assets to another with the same people owning both corporations." Id. at 680, quoting Ninth Ave. Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716, 724 (N.D. Ind. 1996) (citing U.S. v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992)).

Therefore, the court finds that Images and Neways are in privity with one another and that the element of res judicata has been met in barring a claim for further damages. However, the court finds that Neways does fall into the exceptions to the general rule on successor liability, and is responsible for meeting the obligation Images currently owes to Macris.

B. NEWNESS OF CLAIMS BROUGHT IN THE CURRENT ACTION

In both the previous and the current action, claims have arisen from a single breach of

a single contract, and in the first suit, Macris was awarded damages for that breach. Macris knew about the creation of Neways before the conclusion of the previous trial, and could have asked to include Neways in its earning projections if it felt such action was necessary to obtain sufficient relief from the breach of contract.

Basing a new claim for relief, from a previously adjudicated injury, on different issues, will not avoid res judicata. "Seeking the same or approximately the same relief but adducing a different substantive law premise or ground . . . does not constitute the presentation of a new claim when the new premise is related to the same transaction or series of transactions and accordingly the second action should be held barred." Berry v. Berry, 738 P.2d 246, 248 (Utah 1987) (quoting from the Restatement 2d of Judgments § 25 comment d (1982)).

As Macris knew of the transfer from Images to Neways before the conclusion of the previous action, Macris cannot now present a claim for new damages, based on the fact that there was a transfer of assets, when the injury is the same as before.

Typically, even when the injury caused by an actionable wrong extends into the future and will be felt beyond the date of judgment, the damages awarded by the judgment are nevertheless supposed to embody the money equivalent of the entire injury. Accordingly, if a plaintiff who has recovered a judgment against a defendant in a certain amount becomes dissatisfied with his recovery and commences a second action to obtain increased damages, the court will hold him precluded . . .

Restatement 2d of Judgments § 25 comment c (1982).

In National Finance Co. of Provo v. Daley, 382 P.2d 405 (Utah 1963), the Utah Supreme Court adopted this reasoning, saying:

In our judgment it better comports with the orderly processes of justice to require the plaintiff to bear the responsibility of pleading, proving and claiming the full benefit of whatever character of cause of action he possesses in the original action and of being bound thereby, than to allow another trial to come upon the same cause of action raising issues which could have been dealt with in the original action.

Because of Macris' knowledge of the transfer of Images' assets to Neways, the issue of damages in addition to those previously awarded should have been included in the first action.

Plaintiff argues that the claims brought forth in the current action are a result of a new injury, namely Neways failure to make payments to Macris under the terms of the agreement between Macris and Images. It would seem that it is plaintiff's contention that the distributorship agreement between the parties continued to exist beyond the date of the breach of the contract, and as such, was included in the transfer of assets from Images to Neways.

In fact, it would not be appropriate for plaintiff to receive damages, that are intended to make him whole, for a breached contract and then seek to have that same agreement performed.

Whenever there is a total breach of a contract by one party to it, the other is at liberty to treat the contract as broken and desist from any further effort on his part to perform it. In other words, he may abandon it and recover, as damages for the breach, the benefits he would have received by a full performance. . . . Where a contract is thus abandoned, the primary right to further performance of the promise of the other party is discharged and is replaced by a remedial right to damages for nonperformance.

17A AM. JUR. 2D *Contracts* § 726. In the suit between Macris and Images, Macris sought and was awarded damages for breach of contract. Because of this, Macris must be denied in its current attempt to claim that Neways has failed to perform under the same contract for

which there was already found to have been a breach.

Macris knew of the transfer from Images to Neways before the conclusion of the first action, and could have raised question regarding it in that suit. As such, the court finds that the second element of res judicata has been satisfied in that the issues in the current suit could and should have been brought forward in the previous action.

C. FINAL JUDGMENT ON THE MERITS

The plaintiff argues that as the first action is being appealed, there has not yet been a final judgment. In D'Aston v. Aston, 844 P.2d 345,351 (Ut. App. 1992), the court stated that “a judgment is final for purposes of res judicata until it is reversed on appeal, modified, or set aside in the court of rendition.” Because the judgment in the previous suit has not been reversed, this element of res judicata is satisfied.

V DECISION

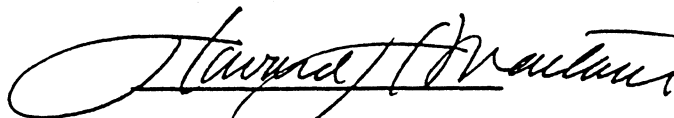
As discussed in the above analysis, the court finds that the elements of res judicata have been satisfied, thus barring Plaintiff's claims for further damages from Neways as a result of the breached contract with Images. However, the court also finds that Neways is the successor of Images and is liable for the previous judgment against Images.

Therefore, the court GRANTS Defendants', Neways, Inc., Thomas E. Mower, and Leslie D. Mower, Motion for Summary Judgment as to any claim for new damages.

The court also GRANTS a Partial Summary Judgment to the Plaintiff, Macris & Associates, Inc., making Neways, as Images' successor, liable for the previous judgment against Images.

Counsel for the Plaintiff, Macris & Associates, Inc., is instructed to prepare an Order consistent with this Decision.

Dated at Provo, Utah this 19th day of September, 1997.

A handwritten signature in black ink, appearing to read "Howard H. Maetani", written over a horizontal line.

HOWARD H. MAETANI
Fourth District Court Judge

cc:\ Dennis K. Poole, Esq.
Andrea Nuffer, Esq.
Roger D. Sandack
Stephen T. Hard

Tab B

CHAPTER 6

UNIFORM FRAUDULENT TRANSFER ACT

Section		Section	
25-6-1.	Short title.	25-6-7.	Transfer — When made.
25-6-2.	Definitions.	25-6-8.	Remedies of creditors.
25-6-3.	Insolvency.	25-6-9.	Good faith transfer.
25-6-4.	Value — Transfer.	25-6-10.	Claim for relief — Time limits.
25-6-5.	Fraudulent transfer — Claim arising before or after transfer.	25-6-11.	Legal principles applicable to chapter.
25-6-6.	Fraudulent transfer — Claim arising before transfer.	25-6-12.	Construction of chapter.
		25-6-13.	Applicability of chapter.

25-6-1. Short title.

This chapter is known as the “Uniform Fraudulent Transfer Act.”

History: C. 1953, 25A-1-1, enacted by L. 1988, ch. 59, § 1; recompiled as C. 1953, 25-6-1.

Uniform Laws. — Other jurisdictions that have adopted the Uniform Fraudulent Transfer Act are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Maine, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Washington, West Virginia, and Wisconsin.

Compiler’s Notes. — This chapter was enacted as §§ 25A-1-1 to 25A-1-13; it has been renumbered and all internal references corrected accordingly under instruction from the Office of Legislative Research and General Counsel.

Cross-References. — Defrauding creditors as a misdemeanor, § 76-6-511.

Statute of limitations, § 78-12-26(3).

Uniform Commercial Code — Bulk Transfers, § 70A-6-101 et seq.

Uniform Commercial Code — Sales, § 70A-2-101 et seq.

NOTES TO DECISIONS

Cited in Territorial Sav. & Loan Ass’n v. Baird, 781 P.2d 452 (Utah Ct. App. 1989).

25-6-2. Definitions.

In this chapter:

(1) “Affiliate” means:

(a) a person who directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole discretionary power to vote the securities; or

(ii) solely to secure a debt, if the person has not exercised the power to vote;

(b) a corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

- (i) as a fiduciary or agent without sole power to vote the securities; or
- (ii) solely to secure a debt, if the person has not exercised the power to vote;
- (c) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or
- (d) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.
- (2) "Asset" means property of a debtor, but does not include:
 - (a) property to the extent it is encumbered by a valid lien;
 - (b) property to the extent it is generally exempt under nonbankruptcy law; or
 - (c) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.
- (3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.
- (4) "Creditor" means a person who has a claim.
- (5) "Debt" means liability on a claim.
- (6) "Debtor" means a person who is liable on a claim.
- (7) "Insider" includes:
 - (a) if the debtor is an individual:
 - (i) a relative of the debtor or of a general partner of the debtor;
 - (ii) a partnership in which the debtor is a general partner;
 - (iii) a general partner in a partnership described in Subsection (7)(a)(ii);
 - (iv) a corporation of which the debtor is a director, officer, or person in control; or
 - (v) a limited liability company of which the debtor is a member or manager;
 - (b) if the debtor is a corporation:
 - (i) a director of the debtor;
 - (ii) an officer of the debtor;
 - (iii) a person in control of the debtor;
 - (iv) a partnership in which the debtor is a general partner;
 - (v) a general partner in a partnership described in Subsection (7)(b)(iv);
 - (vi) a limited liability company of which the debtor is a member or manager; or
 - (vii) a relative of a general partner, director, officer, or person in control of the debtor;
 - (c) if the debtor is a partnership:
 - (i) a general partner in the debtor;
 - (ii) a relative of a general partner in, a general partner of, or a person in control of the debtor;
 - (iii) another partnership in which the debtor is a general partner;
 - (iv) a general partner in a partnership described in Subsection (7)(c)(iii);

- (v) a limited liability company of which the debtor is a member or manager; or
- (vi) a person in control of the debtor;
- (d) if the debtor is a limited liability company:
 - (i) a member or manager of the debtor;
 - (ii) another limited liability company in which the debtor is a member or manager;
 - (iii) a partnership in which the debtor is a general partner;
 - (iv) a general partner in a partnership described in Subsection (7)(d)(iii);
 - (v) a person in control of the debtor; or
 - (vi) a relative of a general partner, member, manager, or person in control of the debtor;
- (e) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
- (f) a managing agent of the debtor.
- (8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.
- (9) "Person" means an individual, partnership, limited liability company, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.
- (10) "Property" means anything that may be the subject of ownership.
- (11) "Relative" means an individual or an individual related to a spouse, related by consanguinity within the third degree as determined by the common law, or a spouse, and includes an individual in an adoptive relationship within the third degree.
- (12) "Transfer" means every mode, direct or indirect, absolute or conditional, or voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.
- (13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

History: C. 1953, 25A-1-2, enacted by L. 1988, ch. 59, § 2; recompiled as C. 1953, 25-6-2; 1992, ch. 168, § 1.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, in Subsection (7),

added Subsections (a)(v), (b)(vi), (c)(v), and (d), redesignated the existing subsection designations accordingly and made other related changes and inserted "limited liability company" in Subsection (9).

NOTES TO DECISIONS

ANALYSIS

Construction and application.
Creditors.
Intent.

Construction and application.

This section should be construed with liberality so as to reach all artifices and evasions

designed to rob the act of its full force and effect in preventing debtors from paying the just claims of their creditors. *Butler v. Wilkinson*, 740 P.2d 1244 (Utah 1987).

Creditors.

Persons having claim in tort against grantor which was not reduced to judgment at time of alleged fraudulent conveyance held "creditors."

Tab C

COLLATERAL REFERENCES

A.L.R. — Imputation of insolvency as defamatory, 49 A.L.R.3d 163.

Key Numbers. — Fraudulent Conveyances
⇒ 57(1).

25-6-4. Value — Transfer.

(1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. However, value does not include an unperformed promise made other than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) Under Subsection 25-6-5(1)(b) and Section 25-6-6, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

History: C. 1953, 25A-1-4, enacted by L. 1988, ch. 59, § 4; recompiled as C. 1953, 25-6-4.

25-6-5. Fraudulent transfer — Claim arising before or after transfer.

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

(2) To determine "actual intent" under Subsection (1)(a), consideration may be given, among other factors, to whether:

(a) the transfer or obligation was to an insider;

(b) the debtor retained possession or control of the property transferred after the transfer;

(c) the transfer or obligation was disclosed or concealed;

(d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(e) the transfer was of substantially all the debtor's assets;

(f) the debtor absconded;

(g) the debtor removed or concealed assets;

(h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

History: C. 1953, 25A-1-5, enacted by L. 1988, ch. 59, § 5; recompiled as C. 1953, 25-6-5.

Cross-References. — Defrauding creditors, § 76-6-511.

NOTES TO DECISIONS

ANALYSIS

Assignments.
Badges of fraud.
Construction and application.
Constructive trust.
Conveyances between relatives.
Evidence.
Fair consideration.
“Good faith” transfer.
Mortgagor remaining in possession.
Parent and child.
Taxation.

Assignments.

Rule that sale or assignment of chattels, unaccompanied by change of possession, is fraudulent per se as to execution creditors of, or subsequent purchasers from, seller or assignor does not necessarily apply to assignments for benefit of creditors, but long delay in taking possession is circumstance from which fraud may be prima facie inferred. *Snyder v. Murdock*, 20 Utah 419, 59 P. 91 (1899).

Whether an assignment of an interest in an estate was in good faith and not to hinder, delay or defraud creditors depends upon the facts and circumstances surrounding the transaction, as gathered from the badges of fraud present. *Boccalero v. Bee*, 102 Utah 12, 126 P.2d 1063 (1942).

Badges of fraud.

Although actual fraudulent intent must be shown to hold a conveyance fraudulent, its existence may be inferred from the presence of certain indicia of fraud or “badges of fraud.” *Dahnken, Inc. v. Wilmarth*, 726 P.2d 420 (Utah 1986).

“Badges of fraud,” from which actual intent may be inferred, include, inter alia, a debtor’s (1) continuing in possession and evidencing the perquisites of property ownership after having formally conveyed all his interest in the property, (2) making a conveyance in anticipation of

litigation, and (3) making a conveyance to a family member without receiving fair consideration. *Dahnken, Inc. v. Wilmarth*, 726 P.2d 420 (Utah 1986).

Construction and application.

Statute was not intended to prevent debtor from paying or securing his honest debts, or from doing equity and exact justice to all of his creditors by placing his means at their disposal. *Billings v. Parsons*, 17 Utah 22, 53 P. 730 (1898).

Former § 25-1-11 applied to real and personal property alike. *McGoldrick v. Walker*, 838 P.2d 1139 (Utah 1992).

Constructive trust.

A constructive trust was properly imposed to prevent unjust enrichment, where the proceeds from the sale of fraudulently conveyed land, which were in excess of the purchase price, had been paid into court, and a subsequent conveyance to a third-party purchaser for value without notice could not be voided. *Butler v. Wilkinson*, 740 P.2d 1244 (Utah 1987).

Conveyances between relatives.

Conveyances between near relatives, calculated to prevent a creditor from realizing on his claim against one of such relatives, are subject to rigid scrutiny. *Paxton v. Paxton*, 80 Utah 540, 15 P.2d 1051 (1932).

The mere fact that the transaction is among close relatives does not necessarily mean that it is invalid, but the true facts are subject to proof. *Givan v. Lambeth*, 10 Utah 2d 287, 351 P.2d 959 (1960).

A note and mortgage executed by son in good faith to secure a preexisting obligation which the son owed his father was not a fraudulent conveyance. *Ned J. Bowman Co. v. White*, 13 Utah 2d 173, 369 P.2d 962 (1962).

Conveyances between close relatives are subject to rigid scrutiny, but the fact that close relatives are involved does not render the con-

Tab D

STEWART, HOWE, and DURHAM, JJ.,
and DOUGLAS L. CORNABY, District
Judge, concur.

OAKS, J., having disqualified himself,
does not participate herein.

CORNABY, District Judge, sat.



Harold G. SCHAER, Plaintiff
and Respondent,

v.

The STATE of Utah, By and Through the
UTAH DEPARTMENT OF TRANS-
PORTATION, Salt Lake County, Salt
Lake City Corporation, Utah Power &
Light Company and Lincoln T. Hanson,
Defendants and Appellants.

Harold G. SCHAER, Plaintiff
and Respondent,

v.

The STATE of Utah, By and Through the
UTAH DEPARTMENT OF TRANS-
PORTATION, Salt Lake County, Salt
Lake City Corporation, Utah Power &
Light Company and Lincoln T. Hanson,
Defendants and Appellants.

Nos. 18009, 18081.

Supreme Court of Utah.

Jan. 10, 1983.

Landowner instituted suit claiming
that certain grade road, commonly referred

to as the dugway road, was a public thor-
oughfare which would provide access to his
property. The Third District Court, Salt
Lake County, James S. Sawaya, J., entered
summary judgment in favor of plaintiff,
and the State and city appealed. The Su-
preme Court, Durham, J., held that: (1)
neither res judicata nor collateral estoppel
barred action; (2) because city failed to
proffer any evidence at trial level in contra-
diction to plaintiff's motion for summary
judgment, city would not be permitted to
raise issue whether road was a public thor-
oughfare for the first time on appeal; and
(3) genuine issue of material fact was raised
as to width of road, thereby precluding
summary judgment on this issue.

Affirmed in part, reversed in part, and
remanded.

1. Judgment ⇐585(3)

Since 1967 litigation ending in determi-
nation that no reasonable access existed to
plaintiff's property and present litigation
rested on a different state of facts and
evidence of a different kind of character
was necessary to sustain the two causes of
action and evidence of the two causes of
action related to the status of the property
in two completely different and separate
time periods, doctrine of res judicata did
not apply to preclude plaintiff from main-
taining present cause of action in which it
was claimed that a certain graded road was
a public thoroughfare which would provide
access to the plaintiff's property.

2. Judgment ⇐720

Because precise issue of whether dug-
way road was a public thoroughfare was
not actually raised and litigated in 1967
litigation, doctrine of collateral estoppel did
not apply to preclude plaintiff from main-
taining present cause of action in which he
claimed that dugway road was a public
thoroughfare which would provide access to
his property.

3. Appeal and Error ⇐170(1)

Because city failed to proffer any evi-
dence at trial level in contradiction to plain-

tiff's motion for summary judgment in action in which he claimed that dugway road was a public thoroughfare which would provide access to his property, city would not be permitted to now raise this issue for the first time on appeal.

4. Judgment ⇐181(15)

In action in which plaintiff claimed that a certain graded road, commonly referred to as the dugway road, was a public thoroughfare which would provide access to his property, genuine issue of material fact was raised as to width of road, thereby precluding summary judgment on this issue.

David L. Wilkinson, Stephen J. Sorenson, Ted L. Cannon, Kevan F. Smith, Roger F. Cutler, Judy Lever and Rosemary Richardson, Salt Lake City, for defendants and appellants.

Calvin L. Rampton and Lawrence J. Jensen, Salt Lake City, for plaintiff and respondent.

DURHAM, Justice:

This case arose because the plaintiff Harold G. Schaer and Salt Lake City Corporation (hereinafter "Salt Lake City") failed to reach an agreement regarding the purchase of the plaintiff's property for expansion of a proposed park. The dispute focuses on whether the doctrines of res judicata and collateral estoppel preclude the plaintiff from maintaining his present cause of action. The plaintiff instituted the present suit claiming that a certain graded road, commonly referred to as the "dugway road," is a public thoroughfare under U.C.A., 1953, § 27-12-89, which would provide access to the plaintiff's property. The trial court granted the plaintiff's Motion for Summary Judgment, holding that the dugway road is a public thoroughfare under

§ 27-12-89 and denied the State of Utah's (hereinafter "State") Motion for Summary Judgment based on the doctrines of res judicata and collateral estoppel. Subsequently, the plaintiff and Salt Lake City filed opposing Motions for Summary Judgment claiming, respectively, that the width of the dugway road is fifty and twenty-five and one-half feet. The trial court granted the plaintiff's motion and denied Salt Lake City's motion. Both the State and Salt Lake City appealed from those rulings, which appeals were consolidated for the convenience of the parties.¹ We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

Prior to 1967, the plaintiff owned approximately 22.8 acres of property located near the mouth of Parley's Canyon in Salt Lake County. At that time, there were several routes of ingress and egress to the plaintiff's land. In July of 1967, trial was held in the Third District Court in which the State condemned 4.6 of the approximate 22.8 acres of the plaintiff's property for construction of a highway system. The condemnation deprived the plaintiff of access to his remaining property from the north and the west, leaving only a possibility of access via the dugway road. Thus, in the 1967 litigation, the plaintiff contended that he was entitled to severance damages because his remaining property was effectively landlocked as a result of the condemnation. After trial, the Third District Court entered the following findings regarding the plaintiff's remaining property:

(a) There is no reasonable access to said remainder property which would permit the same to be economically and feasibly developed in the reasonably foreseeable future.

(b) That a sewage disposal system cannot be economically and feasibly designed.

1. The defendant Lincoln T. Hanson filed a disclaimer of any right, title or interest in the property or easement which is the subject of this litigation. The defendants Salt Lake Coun-

ty and Utah Power & Light Company have monitored the case but have taken no active part.

(c) That it has lost its advantages of annexation to Salt Lake City, potential development as part of the subdivision proximate to the Salt Lake Country Club and further, has lost its dedicated and reserved access way to the north and west.

(d) That it can no longer be reasonably and feasibly developed for residential use presently or in the foreseeable future.

(e) That the highest and best use of the remainder property is either speculative or as a public park.

Based on its Findings of Fact, the Third District Court granted the plaintiff \$30,000 as just compensation for the condemnation of the 4.6 acres and \$76,755 as severance damage to the plaintiff's remaining property.

In 1979, the State was involved in an inverse condemnation action brought by Harvey Hanson, an owner of property adjacent to the plaintiff's remaining property. In that action, the State claimed that the dugway road was a public thoroughfare. The State's assertion was based on an alleged public use of the dugway road sufficient to constitute a dedication to the public under U.C.A., 1953, § 27-12-89. However, that case was settled by the parties prior to a determination by the court of the State's assertion that the dugway road was a public thoroughfare.

The present suit was instituted after the plaintiff and Salt Lake City failed to reach an agreement regarding the purchase of the plaintiff's remaining property for the expansion of a proposed park. The disagreement between the parties focused on whether the plaintiff's property had access suitable for residential development by means of the dugway road. Thus, the plaintiff filed suit requesting a ruling by the trial court that the dugway road was a highway dedicated to the public use pursuant to U.C.A., 1953, § 27-12-89. The plaintiff then filed a Motion for Summary Judgment based on its assertion that the dugway road was a public thoroughfare under

§ 27-12-89. The State filed an opposing Motion for Summary Judgment which did not controvert the plaintiff's evidence on the issue of a public thoroughfare, but rather argued that the plaintiff's position in the 1967 litigation precluded him from maintaining his present cause of action by operation of the doctrines of res judicata and collateral estoppel. Salt Lake City orally joined in the State's motion at the time it was argued. The trial court denied the State's motion and partially granted the plaintiff's motion, thereby declaring the dugway road to be a public thoroughfare, but reserving for trial the issue regarding its width. The plaintiff subsequently filed another Motion for Summary Judgment claiming that the established width of the dugway road was fifty feet. Salt Lake City countered by filing a Motion for Summary Judgment claiming that the width of the dugway road did not exceed twenty-five and one-half feet. The trial court denied Salt Lake City's motion and granted the plaintiff's motion, establishing the width of the dugway road at fifty feet. Both the State and Salt Lake City appeal the denial of their Motions for Summary Judgment and the resulting granting of the plaintiff's motions.

On appeal, the State and Salt Lake City advance several points of error. They contend that the trial court erred in denying the State's Motion for Summary Judgment because of the applicability of the doctrines of res judicata and collateral estoppel. In addition, Salt Lake City argues that the trial court erred in granting the plaintiff's Motion for Summary Judgment that the dugway road is a public thoroughfare because (1) the finding of a public thoroughfare was based on controverted evidence which is improper for summary judgment and (2) the evidence fails to meet the elements of proof necessary under U.C.A., 1953, § 27-12-89. Salt Lake City also argues that the trial court erred in granting the plaintiff's Motion for Summary Judgment on the width of the dugway road because its ruling was not supported by the evidence.

The appellants, the State and Salt Lake City, assert that the district court's previous finding in the 1967 litigation, that no reasonable access existed to the plaintiff's property, implies a finding that the dugway road is not a public thoroughfare. Thus, the appellants argue that, because of that implied finding, the plaintiff's present cause of action is barred by the doctrines of res judicata and collateral estoppel. On this basis, the appellants contend that the trial court erred in denying the State's Motion for Summary Judgment.

There are certain distinctions to be made in the application of the doctrines of res judicata and collateral estoppel. In order to determine which doctrine is to be properly applied, one must focus on whether the second claim, demand, or cause of action is different from that of the first:

In order for res judicata to apply, both suits must involve the same parties or their privies and also the same cause of action; and this precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action

Collateral estoppel, on the other hand, arises from a different cause of action and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit.

Searle Bros. v. Searle, Utah, 588 P.2d 689, 690 (1978) (emphasis added) (citations omitted). See also *East Mill Creek Water Co. v.*

2. Both the State and Salt Lake City rely on *Krofcheck v. Downey State Bank*, Utah, 580 P.2d 243 (1978), as governing the application of the doctrine of res judicata. However, before the rules enunciated in the *Krofcheck* case may be applied, the appellants must first overcome the threshold determination of whether the claims, demands, or causes of action of both cases are the same.

3. Even though the parties use the terms "judicial estoppel" and "collateral estoppel" as if they are interchangeable, their arguments appear to be referring to the doctrine of collateral estoppel. In any event, the doctrine of judicial estoppel is not applicable to the present case.

Salt Lake City, 108 Utah 315, 159 P.2d 863 (1945); *Voyles v. Straka*, 77 Utah 171, 292 P. 913 (1930). Accord *Cromwell v. County of Sac*, 94 U.S. 351, 24 L.Ed. 195 (1876). Thus, it is important to recognize that although the doctrines of res judicata and collateral estoppel are closely related, they are usually mutually exclusive. Where the claim, demand, or cause of action is the same in both cases, res judicata applies. But where the claim, demand, or cause of action is different in the two cases, then collateral estoppel is applicable.

[1] Accordingly, we have determined that res judicata is not applicable to the present case because it is based on a different claim, demand, or cause of action than that of the 1967 litigation.² The two causes of action rest on a different state of facts and evidence of a different kind or character is necessary to sustain the two causes of action. Moreover, the evidence of the two causes of action relates to the status of the property in two completely different and separate time periods. Thus, the doctrine of res judicata does not apply to preclude the plaintiff from maintaining his present cause of action.

We next address the issue of whether collateral estoppel is applicable.³ After having determined the threshold issue, namely, that the present case is based on a different claim, demand, or cause of action than that of the 1967 litigation, we apply four tests which determine the applicability of the doctrine of collateral estoppel:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?

In reference to the general rule of "judicial estoppel" or "estoppel by oath," this Court has stated that "there is no estoppel where there was no reliance and the parties had equal knowledge of the facts." *Tracy Loan & Trust Co. v. Openshaw Inv. Co.*, 102 Utah 509, 515, 132 P.2d 388, 390-91 (1942) (citations omitted). The position advanced by the State in the Hansen litigation in 1979, clearly demonstrates that the State did not in any way "rely" on the position advanced by the plaintiff in the 1967 litigation. Thus, the absence of any reliance renders the doctrine of judicial estoppel or estoppel by oath inapplicable to the present case.

2. Was there a final judgment on the merits?

3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

... [4] Was the issue in the first case competently, fully, and fairly litigated?

Searle Bros. v. Searle, supra, at 691 (citations omitted).

The issues of the present case focus on whether the first and fourth tests are satisfied. "We [must, therefore,] determine whether the issues actually litigated in the first action are precisely the same as those raised in the present action." *Wilde v. Mid-Century Insurance Co.*, Utah, 635 P.2d 417, 419 (1981) (emphasis added). See also *In re Town of West Jordan*, 7 Utah 2d 391, 326 P.2d 105 (1958). The 1967 litigation was a condemnation action which focused on whether the plaintiff's remaining property was effectively landlocked. Despite vague and indirect references to the dugway road, the 1967 litigation never focused on the precise issue of whether the dugway road was a public thoroughfare under U.C.A., 1953, § 27-12-89.

The trial court's findings of fact, set forth earlier, do not purport to rule conclusively on the status of the dugway road "for all time." They simply express the trial court's finding that, in 1967, there was no "reasonable," "economical," or "feasible" access available for use or development, nor was there a likelihood of such in "the foreseeable future." One of the uses for the land noted by the trial court was "speculative," and there is nothing in its findings to preclude another court twelve years later, from finding that access is now reasonable, economical, and feasible by way of the dugway road. In any event, neither the findings nor the judgment entered in the 1967 case demonstrates that the court considered and ruled on the precise issue in this case, namely, whether the dugway road met the requirements of U.C.A., 1953, § 27-12-89.

[2] This Court has previously stated that the doctrine of collateral estoppel

"does not apply to issues that merely 'could have been tried' in the prior case, but operates only to issues which were actually asserted and tried in that case." *International Resources v. Dunfield*, Utah, 599 P.2d 515, 517 (1979) (emphasis added) (citations omitted). Thus, because the precise issue of whether the dugway road was a public thoroughfare was not actually raised and litigated in the 1967 litigation, the doctrine of collateral estoppel does not apply to preclude the plaintiff from maintaining his present cause of action. See *Wilde v. Mid-Century Insurance Co.*, *supra*; *International Resources v. Dunfield*, *supra*.

[3] Salt Lake City also claims that the trial court erred in granting the plaintiff's Motion for Summary Judgment on the question of whether the dugway road is a public thoroughfare because (1) the finding of a public thoroughfare was based on controverted evidence which is improper for summary judgment and (2) the evidence fails to meet the elements of proof necessary under U.C.A., 1953, § 27-12-89. Salt Lake City is correct in its contention that summary judgment is improper when the facts are controverted. See Utah R.Civ.P. 56(c). See, e.g., *Western Pacific Transport Co. v. Beehive State Agricultural Co-op*, Utah, 597 P.2d 854 (1979); *Frederick May & Co. v. Dunn*, 13 Utah 2d 40, 368 P.2d 266 (1962). However, neither the State nor Salt Lake City presented any evidence whatsoever to contest the facts as presented in the plaintiff's Motion for Summary Judgment. Rather, the State and Salt Lake City chose to rely exclusively on the State's Motion for Summary Judgment based on the doctrines of collateral estoppel and res judicata. Under similar circumstances, this Court has stated that:

[W]here the moving party's evidentiary material is in itself sufficient and the opposing party fails to proffer any evidentiary matter when he is presumably in a position to do so, the courts should be justified in concluding that no genuine issue of fact is present, nor would one be present at trial.

Upon a motion for summary judgment, the courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant's case or specify in an affidavit the reason why he cannot do so.

Where . . . the materials presented by the moving party are sufficient to entitle him to a directed verdict [as a matter of law] and the opposing party fails either to offer counteraffidavits or other materials that raise a credible issue [of fact] or to show that he has evidence not then available, summary judgment may be rendered for the moving party.

Dupler v. Yates, 10 Utah 2d 251, 269-70, 351 P.2d 624, 637 (1960) (citations omitted). See also *Olwell v. Clark*, Utah, 658 P.2d 585 (1982). Thus, because the appellant Salt Lake City failed to proffer any evidence at the trial level in contradiction to the plaintiff's Motion for Summary Judgment, Salt Lake City will not be permitted to now raise the issue for the first time on appeal. See, e.g., *Shayne v. Stanley & Sons, Inc.*, Utah, 605 P.2d 775 (1980). Because the trial court's ruling was supported by the uncontroverted facts, we affirm its granting of summary judgment on that issue.

Salt Lake City's final assertion of error focuses on Salt Lake City's and the plaintiff's opposing Motions for Summary Judgment regarding the width of the dugway road. Salt Lake City claims that the trial court erred in granting the plaintiff's motion because the evidence does not support the plaintiff's contention that the established width is fifty feet.

In granting the plaintiff's motion, the trial court apparently relied on the Revised Ordinances of Salt Lake City § 42-7-5 (1975), as establishing the width of the dugway road at fifty feet as a matter of law. This reliance was misplaced. That ordinance merely sets forth the minimum standards and requirements regarding the widths of streets in a proposed subdivision plan. It does not address the reasonable

and necessary width of a highway dedicated to the public under U.C.A., 1953, § 27-12-89. However, even though that ordinance does not establish the width of the dugway road as a matter of law, it may be offered as evidence of what is considered reasonable and necessary under the circumstances.

[4] Both Salt Lake City and the plaintiff cite the proper rule that: "[g]enerally, the width of a public road is determined according to what is reasonable and necessary under all the facts and circumstances." *Memmot v. Anderson*, Utah, 642 P.2d 750, 754 (1982) (citations omitted). However, both parties fail to agree as to what is reasonable and necessary. Salt Lake City offered evidence that the width did not exceed twenty-five and one-half feet. The plaintiff, on the other hand, offered evidence that the width was fifty feet. This Court has previously stated that: "[i]n controversies like this the width of the highway presents a question of fact" *Whitesides v. Green*, 13 Utah 341, 351, 44 P. 1032, 1033 (1896). See also *Leo M. Bertagnole, Inc. v. Pine Meadow Ranches*, Utah, 639 P.2d 211 (1981) (as illustrative of the factual nature of the width of dedicated highways). The parties offered conflicting evidence, which raises a genuine issue of material fact regarding the width of the dugway road and precludes summary judgment. See Utah R.Civ.P. 56(c). See, e.g., *Western Pacific Transport Co. v. Beehive State Agricultural Co-op*, *supra*; *Frederick May & Co. v. Dunn*, *supra*. Thus, the granting of summary judgment on this issue was error.

The judgment of the trial court is therefore affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. No costs awarded.

HALL, C.J., and STEWART, OAKS and HOWE, JJ., concur.



Tab E

is one of fact and not of law. *Robinson v. Salt Lake City*, 37 Utah, 520, 109 P. 817. Tested by these rules, we conclude that the defendants' evidence of payment was sufficient to be submitted to the jury, and that the court erred in directing a verdict for the plaintiff, for which the judgment must be reversed.

[8, 9] As a new trial must be had, it is proper here to consider another question presented by appellant McCornick. The trial court sustained objections to McCornick's offer to prove that he delivered his assignment of the 80,000 shares of United States Fuel stock to Livingston upon condition that Livingston would deliver it to the plaintiff in payment of Livingston's personal obligations at the bank including the note sued upon, and upon which McCornick was also liable. It is not claimed that the plaintiff had knowledge or notice of this condition. In excluding the evidence we perceive no error. The only issue was payment. And whether or not the note in question was paid depends upon the contract between Livingston and the plaintiff, in the making of which McCornick did not participate at all. Assuming the excluded evidence to be true, it could not affect or control the agreement made by Livingston and the plaintiff as to what notes were to be discharged. Neither was the evidence admissible upon the theory that Livingston was the agent of the plaintiff in obtaining the assignment from McCornick. A debtor is not the creditor's agent in procuring security for the debt. *Campbell v. Murray*, 62 Ga. 86; *Helmes v. Wayne Agricultural Co.*, 73 Ind. 325, 38 Am. Rep. 147; *Wheeler v. Barr*, 7 Ind. App. 381, 34 N. E. 591; *Carter v. Goff*, 141 Mass. 123, 5 N. E. 471; *Hyatt v. Zion*, 102 Va. 909, 48 S. E. 1; *Woodward v. Bixby*, 68 N. H. 219, 44 A. 298.

[10, 11] The appellant McCornick urges the further question that, on account of the release by the bank of the shares of stock in the irrigation company which had been pledged to secure the payment of Livingston's notes to the plaintiff, he, as an indorser, who was only secondarily liable, was thereby discharged from liability. Assuming, but not deciding, that such claim is available to appellant under the Negotiable Instruments Law, the plea must fail, because there was no showing whatever of the value of the securities surrendered. It appears that in consideration of the release of the irrigation stock Livingston supplied additional securities consisting of his interest in the 80,000 shares of United States Fuel stock. There was no attempt to prove, and it cannot be inferred from the evidence, that McCornick suffered any injury from the transaction. This plea, when otherwise made out, only goes to a discharge pro tanto to the extent of the impairment of the securities. *State Bank, etc., v. Michel*, 152

Wis. 88, 139 N. W. 748, 1131; *Citizens' Bank & T. Co. v. Knox*, 187 N. C. 565, 122 S. E. 304; *Interstate Trust & Banking Co. v. Young*, 135 La. 465, 65 So. 611; *Frazier v. First Nat. Bank*, 2 Ohio App. 159.

The judgment is reversed, and the cause remanded for a new trial; appellants to recover costs.

THURMAN and STRAUP, JJ., concur.

GIDEON, J., did not participate herein.

FRICK, J., died before announcement of decision.

BADGER v. BADGER. (No. 4482.)

(Supreme Court of Utah. March 21, 1927.)

1. Divorce \S 245(3)—Wife, if dissatisfied with decree of property settlement, had remedy by motion for new trial or by appeal, not by new petition.

After decree for divorce, remedy of wife, if dissatisfied with court's determination of her petition to modify decree affecting property, was either by motion for new trial or appeal from decision; and hence she could not disregard judgment and proceed by new petition to again try issues theretofore heard and determined.

2. Action \S 53(1)—Party having one entire demand cannot split it into separate causes of action.

A party having one entire demand cannot split it up into separate causes of action.

3. Judgment \S 592—If party by accident, neglect, mistake, or fraud, splits single cause of action, adjudication thereon does not bar suit on the other.

While generally party cannot split single demand into separate causes of action, if by accident, excusable neglect, mistake, or fraud of his adversary, and without pleader's fault, he splits single cause of action, adjudication in respect to one will not bar suit on the other.

4. Divorce \S 245(3)—Rule against splitting of cause of action applies to petition, where single ground of complaint is relied on for modification or change in judgment.

Rule against splitting a cause of action in complaint held to apply to petition for modification of a divorce decree wherein single ground is relied on for modification or change in judgment entered.¹

5. Pleading \S 360(4)—Motion to strike a pleading will be granted only in clear case.

Courts do not look with favor upon the striking of pleadings, and motion to strike will be granted only in clear case.

6. Pleading \S 352—Generally, pleading should not be stricken if susceptible of amendment.

Generally, a pleading should not be stricken if it is susceptible of being amended so as to

¹ *Cody v. Cody*, 47 Utah, 456, 154 P. 952; *Chaffee v. Chaffee*, 63 Utah, 261, 225 P. 76; *Rockwood v. Rockwood*, 65 Utah, 261, 236 P. 457.

constitute either a cause of action or a defense.

7. Divorce \Leftrightarrow 245(3)—Wife's petition to modify decree held properly stricken, where she had had hearing on matters complained of therein.

Wife's petition for modification of divorce decree awarding property to her *held* properly stricken, where she had had hearing on matters complained of therein and pleaded no facts which constituted legal excuse for her failure to set them out in first petition for modification.

Appeal from District Court, Salt Lake County; Ephraim Hansen, Judge.

Action by Ralph A. Badger against Norma D. Badger. Decree of divorce for defendant on her cross-complaint. From order striking defendant's amended petition to modify decree, defendant appeals. Affirmed.

Willard Hanson and A. H. Hougaard, both of Salt Lake City, for appellant.

Badger, Rich & Rich, of Salt Lake City, for respondent.

HANSEN, J. The plaintiff brought this action against the defendant in the district court of Salt Lake county for the purpose of securing a decree of divorce from the defendant. The plaintiff and the defendant have been married a little less than two years and there are no children issue of the marriage. Various acts of cruelty are alleged by the plaintiff as a basis for the relief prayed. The defendant filed an answer denying any acts of cruelty on her part. She also filed a cross-complaint wherein she alleges that the plaintiff has been guilty of various acts of cruelty towards the defendant. She further alleges that the plaintiff owns real and personal property of the value of \$100,000 or more, that the property owned by plaintiff consists of the Oxford Apartments, situated at 119 West North Temple street, the Roselyn Apartments, situated at 853 South Fourth East street, a double house situated at Nos. 1072 and 1074 East Seventeenth South street, all in Salt Lake City, Utah, and also certain large acreage of land situated near Holden, in Millard county, Utah; that the personal property belonging to the plaintiff includes a large stock interest in various corporations, among them being Ralph A. Badger & Co. and the Mt. Nebo Marble Company. She also alleged in her cross-complaint that the plaintiff received a salary of \$300 per month and has a net income in excess of \$300 per month. In her cross-complaint she prays judgment against the plaintiff for a decree of separate maintenance and an equitable proportion of the property belonging to the plaintiff.

To this cross-complaint plaintiff filed a reply, wherein he denies all acts of cruelty alleged by the defendant, except such acts as

he alleges were justified under the circumstances.

After the issues were thus joined, the plaintiff and defendant entered into an agreement adjusting their property rights in the event the court in which the case was pending should grant a decree of divorce. Thereupon the defendant filed an amended cross-complaint, in which she omits some of the alleged acts of cruelty contained in her original cross complaint, and further alleges that a property settlement has been had between plaintiff and defendant, and she prays judgment that the property settlement theretofore agreed upon be ratified and affirmed by the court and that she be granted a decree of divorce. The plaintiff filed no answer or other pleadings to the cross-complaint of the defendant.

The defendant offered evidence in support of her cross-complaint, and the court, at the conclusion of her evidence, made findings of fact, conclusions of law, and entered a decree of divorce in favor of the defendant and against the plaintiff. In the decree she was awarded the property provided for in the agreement theretofore entered into between the plaintiff and defendant. The property so awarded to the defendant consisted of a contract for the purchase of the Roselyn Apartments on which there was a balance owing of \$6,630.97 as of February 1, 1926, also a vacant lot 37x822 feet adjoining the Roselyn Apartments; also, \$150 cash; rent due from a Mrs. Smith in the sum of \$25; a court allowance for the month of February, 1926, amounting to the sum of \$112; and an additional sum of \$300 as attorneys' fee for defendant's attorneys.

The decree of divorce was signed and filed on February 23, 1926, and four days thereafter, February 27, 1926, a notice of application to set aside the decree of divorce was served upon the attorneys for the plaintiff, to which was attached a copy of a verified petition stating the basis for said motion. This petition was filed on March 2, 1926. In the petition the defendant sets out that she had consented to take the Roselyn Apartments as the principal settlement of the property rights which she was to receive relying upon the representation of the plaintiff that the income from said property amounted to \$140 per month, but that this property would not rent for to exceed \$120 per month; that there was a balance due on the contract of purchase of said apartments in the sum of \$6,630.97, payable \$100 per month; and that if she is compelled to pay the taxes, repairs, and insurance, with a rental of only \$120 per month, she will be unable to pay for the apartment house, and the contract of purchase will be forfeited.

To this petition an answer was filed denying the alleged representations, and upon these issues a hearing was had, and the court

modified the decree of divorce to the effect that the plaintiff should pay to the defendant an additional \$120, but otherwise the decree of divorce would remain in full force and effect. The hearing was had on March 4, 1926, and the modification of the decree was signed by the trial judge on March 10, 1926, and filed with the clerk on the day following.

On March 16, 1926, the defendant filed another petition for a modification of the decree of divorce, in which other counsel appeared as her attorneys, and under date of May 22, 1926, by leave of court, an amended petition was filed by the defendant. This petition refers to and makes the original cross-complaint of the defendant a part of the petition and sets forth that the acts of cruelty alleged in such original cross-complaint are true. It is also alleged that at the time of filing the cross-complaint the plaintiff was the owner of the property therein mentioned and set out; that the Oxford Apartments were worth from \$30,000 to \$50,000; that the property situated at Seventeenth South and Eleventh East streets was of the value of \$10,000; the equity of the plaintiff in the Roselyn Apartments was of the value of \$1,500; the Millard county property was worth \$3,000; that the plaintiff was the owner of a large amount of stock in the Ralph A. Badger & Co., and the same was of great value; that he received a salary of at least \$300 per month; and that he was in receipt of at least the sum of \$800 per month and was able to provide for the defendant according to her station in life. It is also alleged that there was owing upon the contract for the purchase of the Roselyn Apartments \$6,600; that the rents derived therefrom did not exceed \$120 per month; that \$100 per month must be paid on the contract of purchase; that petitioner is unable to pay the sum of \$100 per month in addition to the expenses of repairs, insurance, taxes, and other items of expense; and that unless she is granted additional relief she will lose the apartment house by forfeiture of the contract of purchase. The defendant further alleged that at the time the property settlement was had the plaintiff gave to her then attorneys a statement of his financial condition and his property, from which it was made to appear that the plaintiff was not able to pay the defendant any alimony; that said statement was false, in that the plaintiff was the owner of the property above mentioned; that the plaintiff further represented that the rentals of the Roselyn Apartments amounted to the sum of \$140 per month and that they were in a good state of repair, and that the indebtedness owing on the contract of purchase was the sum of \$6,000, which said representations were false; that these false representations were so made with the intention that they should be acted upon by the defendant. It is also alleged that her then counsel, relying upon these false statements, informed her that they were un-

able to get a property settlement except the one that was later executed by the parties herein. It is also alleged that she informed her counsel that she would not consent to the proposed property settlement unless she received, in addition to the property mentioned, at least a few thousand dollars, and suggested \$5,000 in cash. It is also alleged that she signed the property settlement and the amended cross-complaint for a decree of divorce, but that she did so in the courtroom while in an excited and abnormal state of mind, and did not then and there fully understand or appreciate her rights in connection with said divorce proceedings and did not understand that she was not to receive an additional \$5,000. It is also alleged that the court was not fully advised of the cruel and inhuman treatment that she had received from the plaintiff, and if the court was fully advised in regard to such treatment the court should and would grant her a more favorable property settlement. Nowhere in the amended petition is there any allegation to the effect that she was not fully advised of the matters complained of by her in such amended petition at the time she filed her first petition for an amendment of the decree of divorce. The defendant in her amended petition prays judgment that the decree of divorce be vacated and set aside; that the alleged contract of property settlement be canceled and declared void; that the cause be set down for trial on her original answer and cross-complaint; that she be allowed a fair and reasonable amount of plaintiff's property, \$200 per month as permanent alimony, and a reasonable sum for counsel fees and suit money, and for general relief.

To the amended petition the plaintiff filed a general and special demurrer and also a motion to strike the amended petition upon the grounds, among others, that said petition is sham, irrelevant, and redundant, and that the amended petition is in all material respects the same as the petition filed on February 27, 1926, and upon the further ground that the court was without jurisdiction to entertain the petition.

After arguments of respective counsel on the demurrer and motion to strike, the court entered its order striking the amended petition on the ground that the cause of action set forth in said amended petition has in all essential particulars been heretofore presented and petitioner has had her day in court and should have presented at one time all of the grounds claimed by her at the time she filed her petition on February 27, 1926, and also that there are no new matters alleged in said petition as having occurred since the entering of the original decree herein. It is from this order striking the amended petition that the appeal to this court is prosecuted, and the appellant assigns as error the granting of the motion to strike the amended petition for a modification of the decree of

divorce and the denial of appellant's right to be heard upon the merits of her amended petition thus stricken.

[1] As to the Roselyn Apartments, the record shows that the same matters which are set out in the amended petition which was dismissed were also set out in the first petition filed for the purpose of securing an amendment of the decree of divorce, upon which first petition a hearing was had and a modification of the decree of divorce was granted, except that the first petition did not recite that the plaintiff misrepresented the amount of indebtedness upon the contract of purchase of the Roselyn Apartments. The contract of property settlement signed by the parties hereto, however, does set forth that there was \$6,630.97 still owing on the contract of purchase of the Roselyn Apartments as of February 1, 1926, and therefore the defendant must have known that this indebtedness existed against the property at the time the hearing was had and the divorce granted and also at the time she filed her first petition for an amendment of the decree of divorce. Defendant having had one hearing upon her grievances with respect to the Roselyn Apartments, she, of course, is not entitled to another hearing upon the same matter. If she were dissatisfied with the court's determination of these matters, her remedy was either by a motion for a new trial or by an appeal from the decision rendered. She, of course, could not totally disregard the judgment then rendered and proceed to again try by a separate pleading the issues theretofore heard and determined.

[2] It is a well-settled rule of law, under both common-law and the Code system of pleading, that a party having one entire demand cannot split the demand up into separate causes of action. 1 Sutherland, Code Prac. & Forms, § 218; Cooley v. Calaveras County, 121 Cal. 482, 53 P. 1075; U. S. v. Throckmorton, 98 U. S. 65, 25 L. Ed. 93; 1 C. J. 1006; 1 Van Fleet's Former Adjudications, 204. In fact, as stated, in the case of U. S. v. Throckmorton, supra:

"There are no maxims of the law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely: Interest reipublicæ, ut sit finis litium, and nemo [debet] bis vexari pro una et eadem causa."

[3] To this well-established general rule, however, there are exceptions. If a person by accident, excusable neglect, or mistake, or by fraud on the part of his adversary and without any fault of the pleader, splits a single cause of action, an adjudication in respect to one will not bar a suit upon the other. 1 Van Fleet's Former Adjudications, 206; 1 C. J. 1009, and cases there cited. If, however, the pleader is in possession of the means of ascertaining the full extent of his claim,

and his failure to do so is due to his own fault or neglect, it would seem that upon both principle and authority the general rule against splitting applies. Macon, etc., R. R. Co. v. Gerrard, 54 Ga. 327.

[4] In this case it is clear that the matters complained of by the defendant in her last amended petition constitute a single cause of action, namely, the alleged misrepresentation of the plaintiff as to his inability to make a more favorable property settlement with the defendant than the one actually entered into. It affirmatively is made to appear that at the time the first petition was filed for a modification of the decree of divorce the defendant knew the contents of said decree and that she was to receive no property except that actually awarded to her. In the amended petition which was stricken there is no allegation that she did not have the same knowledge about plaintiff's property and income at the time she filed her first petition that she had at the time she filed the stricken amended petition. Indeed, at the time she filed her first cross-complaint she alleges that the plaintiff was the owner of the same property and in receipt of the same salary and income as is again set out in the amended petition. Of course, it may be that the plaintiff by false and improper representations convinced the defendant that these claims made by her in her original cross-complaint were not true and that she is therefore entitled to have this matter again heard. In this case, however, in so far as is made to appear in the amended petition which was stricken, the appellant had as much knowledge about the plaintiff's property and income at the time she filed her first petition as she had at the time she filed the amended petition which was stricken. The reasons that form the basis for the rule against splitting the cause of action in a complaint must of necessity apply with equal force to a petition wherein a single ground of complaint is relied upon for the modification or a change in a judgment theretofore made and entered.

There is complaint made in the petition stricken that the appellant omitted from her second cross-complaint some of the acts of cruelty committed upon and towards her by the plaintiff, but she doubtless knew these at the time she filed her second cross-complaint and also at the time she filed her first petition for an amendment of her decree of divorce, and in any event it is very doubtful whether these matters have any bearing upon the amount of property to which she is entitled, in the absence of any claim that the omitted alleged acts of cruelty affected her health or earning capacity.

Counsel for appellant seems to contend that the well-recognized rule against splitting a cause of action does not apply to a divorce proceeding. We are unable to see any good reason why a husband and wife should be given any more latitude in continuing their

controversies in court than other litigants, except in those cases permitted by our statute and under facts showing changed conditions, as held by this court in the cases of *Cody v. Cody*, 47 Utah, 456, 154 P. 952; *Chaffee v. Chaffee*, 63 Utah, 261, 225 P. 76; *Rockwood v. Rockwood*, 65 Utah, 261, 236 P. 457. In this case there is no claim made that there are any changed conditions coming within the rules laid down in the above cases.

From what has been said it follows that the amended petition which was ordered stricken does not allege sufficient facts to warrant the trial court in granting the defendant any further or additional relief. It is conceivable, however, that the defendant might have alleged and shown sufficient facts to have entitled her to a hearing and relief in the trial court upon those matters that were not heard and determined upon the first petition for an amendment to the decree of divorce. This brings us to the question of whether or not the trial court committed prejudicial error in striking the amended petition.

[5-7] It is a well-settled rule of law in most, if not all, jurisdictions that courts do not look with favor upon the striking of pleadings, and a motion to strike a pleading will be granted only in a clear case. 31 Cyc. 616, and cases there cited. Generally, a pleading should not be stricken if it is susceptible of being amended so as to constitute either a cause of action or a defense. In this case we are not prepared to hold, and we do not hold, that the facts are such that the defendant as a matter of law could not properly have amended her amended petition in such a way as to entitle her to a further hearing upon the matters not disposed of in her first petition for a modification of the decree of divorce; but we do hold that the facts alleged in the amended petition ordered stricken did not entitle her to a further hearing, and for the reason that it affirmatively appears that the appellant has had a hearing upon some of the matters complained about in her amended petition, and upon other matters complained of, no facts are pleaded which constitute a legal excuse for her failure to set them out in her first petition for a modification of the decree of divorce. Had the appellant herein desired to further amend her petition in the trial court, she doubtless would have been granted leave to amend, or if such leave had been refused, such refusal may well have been prejudicial error. It is not made to appear, however, either in the trial court, or this court, that the appellant desires to amend the petition stricken or that the same could, under the facts, be amended to entitle the defendant to any further relief for the reasons above set forth. Upon the record in this case the appellant stands in the same position that she would have been in

had the general demurrer been sustained, and upon appellant refusing to further plead the petition dismissed. Such proceeding would have been more in accord with the practice of this and most other jurisdictions, unless indeed counsel for appellant stated to the trial court at the time of the argument that they did not intend to amend the petition which was stricken.

In any event, it is not made to appear that appellant was prejudiced by the striking of the amended petition, and therefore it follows that the order striking the amended petition of the defendant should be and the same is affirmed. Respondent to recover his costs.

THURMAN, C. J., CHERRY and STRAUP, JJ., and McCREA, District Judge, concur.

FRICK, J., absent on account of illness when submitted, and died before announcement of decision.

STATE v. ARREGUI. (No. 4704.)

(Supreme Court of Idaho. March 26, 1927.)

1. Criminal law ⚡394—Validity of warrant and search may be raised by motion to suppress evidence at trial (Const. U. S. Amend. 4; Const. Idaho, art. 1, § 17; C. S. Idaho, § 2637, and § 9456, subd. 6).

Validity of warrant and search, under Const. U. S. Amend. 4, and Const. Idaho, art. 1, § 17, may properly be tested by motion to suppress evidence at the trial, since, in view of C. S. § 2637, and section 9456, subd. 6, no independent action could be maintained to secure fruits of illegal search and seizure, and refusal to permit motion to suppress evidence would operate to deny raising question of violation of constitutional rights.

2. Constitutional law ⚡35—Rules of expediency must not be placed above Constitution.

Law and court made rules of expediency must not be placed above the Constitution.

3. Intoxicating liquors ⚡244—State law relative to search and seizure held applicable to search under federal warrant, where evidence was turned over to state officer (C. S. § 2637).

C. S. § 2637, providing for search and seizure under state prohibition laws, held applicable to search made under authority of purported federal search warrant, where evidence seized thereunder was turned over to state officers.

4. Intoxicating liquors ⚡248—Affidavit for search warrant, stating affiant had information that liquor was sold and knowledge of defendant's reputation as liquor dealer, insufficient (Const. U. S. Amends. 4, 5; Const. Idaho, art. 1, §§ 13, 17).

Affidavit by federal prohibition agent for search warrant to effect that he had been informed that liquor was sold on certain premises, and that he knew defendant had reputation of dealing in liquor, held insufficient, under

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trial court to award Industrial its reasonable attorney fees incurred on appeal.

BENCH and WILKINS, JJ., concur.



The ESTATE OF Douglas B. COVINGTON, By and Through its Co-Personal Representatives, Robert H. COVINGTON and Mary C. Whetman, Plaintiffs and Appellees,

v.

**John C. and Geraldine C. JOSEPHSON,
Defendants and Appellants.**

No. 930371-CA.

Court of Appeals of Utah.

Dec. 22, 1994.

Rehearing Denied Jan. 17, 1995.

Vendors sued purchasers, seeking repayment of property taxes and water assessments that vendors made on property in question. Purchasers moved for summary judgment, arguing that action was precluded by vendors' prior action against purchasers, which resulted in judgment awarding purchasers title to property. Vendors also moved for summary judgment. The Third Circuit Court, Salt Lake Department, Robin W. Reese, J., granted vendors' motion for summary judgment. Purchasers appealed. The Court of Appeals, Greenwood, J., held that: (1) neither res judicata nor collateral estoppel was applicable, and (2) vendors' attorney's undisputed affidavit supported award of attorney fees.

Affirmed.

Davis, J., issued opinion concurring in result.

1. Appeal and Error ⇨842(1)

Because summary judgment presents only questions of law, Court of Appeals accords no deference to trial court's ruling and reviews it for correctness.

2. Judgment ⇨634

Collateral estoppel, or issue preclusion, prevents relitigation of issues that have once been litigated even though claims for relief may be different.

3. Judgment ⇨634

Whereas res judicata prevents relitigation of identical causes of action or demands, collateral estoppel disallows relitigation of issues.

4. Judgment ⇨720

Vendors were not collaterally estopped from suing purchasers to recover taxes and water assessments vendors paid on property, even though purchasers had, in vendors' earlier suit against purchasers, asked for and received finding that contract for purchase of property in question had been paid in full; there was no evidence that taxes and assessments were actually litigated in prior action.

5. Judgment ⇨713(2), 739

Neither res judicata nor collateral estoppel precluded vendors' action against purchasers to recover taxes and water assessments that vendors paid on property conveyed, even though purchasers, in vendors' prior action against purchasers, asked for and received finding that contract for purchase of that property had been paid in full; vendors had no reason to bring claim for taxes or assessments in prior action, as purchasers represented during trial that they would pay any taxes and assessment regarding property, and any claim for reimbursement of taxes and assessments would not have been ripe for adjudication during prior action, as vendors did not pay taxes and assessments until well after completion of that action.

6. Appeal and Error ⇨241

Raising issue in posttrial motion does not preserve that issue for appeal.

7. Costs ⇨208

Trial courts are not required to make specific findings regarding attorney fees where all relevant facts are undisputed; undisputed relevant facts supporting such award include un rebutted affidavit.

8. Costs ⇨207

Plaintiffs' attorney's undisputed affidavit was sufficient to support award of attorney fees to plaintiffs.

Gordon A. Madsen, North Salt Lake, for appellants.

David K. Broadbent, Salt Lake City, for appellees.

Before DAVIS, GREENWOOD, and JACKSON, JJ.

GREENWOOD, Judge:

Defendants, John C. Josephson and Geraldine C. Josephson (the Josephsons), appeal the trial court's grant of summary judgment in favor of plaintiff, the Estate of Douglas B. Covington, by and through its co-personal representatives, Robert H. Covington and Mary C. Whetman (the Estate). We affirm.

BACKGROUND

This appeal arises from a second lawsuit involving a real property transaction. Douglas and Alice Covington sold a tract of real property located in Salt Lake County (the Property) and five shares of water stock to the Josephsons pursuant to a Uniform Real Estate Contract dated May 4, 1973 (the Contract).

Douglas Covington and John Josephson subsequently entered into a written addendum to the Contract granting the Josephsons a right-of-way to the Property across adjacent land owned by the Covingtons. Alice

Covington died in 1981 and Douglas Covington died in 1987, leaving Robert Covington and Mary Whetman as co-personal representatives of the Estate.

Sometime in 1989, a dispute arose between the Josephsons and the Estate regarding the right-of-way. As a result, the Josephson's recorded a Notice of Interest asserting their rights in the right-of-way. In May 1989, the Estate filed the first suit against the Josephsons in Third District Court of Salt Lake County seeking to quiet title to the right-of-way, for damages for slander of title and trespass, and for an injunction restraining the Josephsons from continued use of the right-of-way. The Josephsons counter-claimed requesting that the court quiet title in them to the right-of-way, award them the five shares of water stock, and declare that the Contract was "fully paid and performed by Josephsons, and Josephsons are entitled to conveyance" of the Property.

A bench trial was held before the Honorable Richard H. Moffat, who ruled in favor of the Josephsons and, in a judgment dated December 18, 1991 (Judgment), awarded the Josephsons title to the Property, including the claimed right-of-way, and awarded attorney fees.

Subsequently, on May 8, 1992, the Estate paid the property taxes and water assessments for the years 1989, 1990, and 1991 on the Property and the five shares of water stock consistent with the terms of the Contract.¹ After demand by the Estate, the Josephsons refused to repay the Estate for the taxes and assessments paid.²

On July 7, 1992, the Estate filed a second lawsuit in the Third Circuit Court for Salt Lake County, seeking to recover the amounts it paid for taxes and water assessments and attorney fees. Both sides filed motions for summary judgment, and, on February 16,

1. The Contract states that

In the event the Buyer shall default in the payment of any special or general taxes, assessments or insurance premiums as herein provided, the Seller may, at his option, pay said taxes, assessments and insurance premiums or either of them, and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand.

2. The Estate paid the taxes and assessments on the Property because it wished to sell real estate it owned adjacent to the Property. Since the Estate's and the Josephson's property were jointly assessed by Salt Lake County, taxes and assessments on both parcels had to be paid so that the Estate could deliver clear title to the purchaser of its property

1993, the trial court granted summary judgment in favor of the Estate. The trial court denied the Josephsons' subsequent Motion to Alter or Amend Judgment. This appeal followed.

ISSUES ON APPEAL

We address the following issues on appeal: (1) Is the Estate's action barred by the doctrines of res judicata or collateral estoppel? (2) Was the Contract terminated by the District Court action so as to preclude a claim under it? (3) Were the attorney fees awarded to the Estate excessive?³

STANDARD OF REVIEW

[1] Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R.Civ.P. 56(c). In reviewing a motion for summary judgment, this court considers "all of the facts and evidence presented, and every reasonable inference arising therefrom, in a light most favorable to the party opposing the motion." *Katzenberger v. State*, 735 P.2d 405, 408 (Utah App.1987). Further, because summary judgment presents only questions of law, this court accords no deference to the trial court's ruling and reviews it for correctness. *Pratt v. Mitchell Hollow Irrigation Co.*, 813 P.2d 1169, 1171 (Utah 1991); *Mumford v. ITT Commercial Fin. Corp.*, 858 P.2d 1041, 1043 (Utah App.1993).

ANALYSIS

Res Judicata and Collateral Estoppel

The Josephsons assert that the Estate's action is barred by the doctrine of res judicata and/or collateral estoppel.

In *Schaer v. State ex rel. UDOT*, 657 P.2d 1337 (Utah 1983), the Utah Supreme Court set forth the elements of res judicata. In *Schaer*, the court stated:

3. The Josephsons also raise additional issues including collateral attack and the existence of material facts precluding summary judgment. We find these claims lacking in merit and therefore do not address them. See *State v. Carter*,

"In order for res judicata to apply, both suits must involve the same parties or their privies and also the same cause of action; and this precludes the relitigation of all issues that could have been litigated as well as those that were in fact litigated in the prior action."

Id. at 1340 (quoting *Searle Bros. v. Searle*, 588 P.2d 689, 690 (Utah 1978)). In addition, "the first suit must have resulted in a final judgment on the merits." *In re J.J.T.*, 877 P.2d 161, 163 (Utah App.1994) (quoting *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988)).

[2, 3] Collateral estoppel, or issue preclusion, prevents the relitigation of issues that have once been litigated even though the claims for relief may be different. *Penrod v. Nu Creation Creme, Inc.*, 669 P.2d 873, 875 (Utah 1983). Thus, whereas res judicata prevents a relitigation of identical causes of action or demands, collateral estoppel disallows a relitigation of issues. *Schaer*, 657 P.2d at 1340. The elements of collateral estoppel include:

"(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?

(2) Was there a final judgment on the merits?

(3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

... [4] Was the issue in the first case completely, fully and fairly litigated?"

Id. at 1340-41 (quoting *Searle Bros*, 588 P.2d at 691).

The Josephsons argue that in the first suit, they asked for and received a finding from the District Court that the Contract had been "paid in full." The Josephsons assert that because of this finding, any claim for payments due under the Contract, including a claim for taxes and water assessments, has already been litigated and thus is barred by res judicata. Further, the Josephsons assert that even if res judicata does not apply,

776 P.2d 886, 888-89 (Utah 1989) (stating that appellate courts "need not analyze and address in writing each and every argument, issue, or claim raised").

collateral estoppel applies because the "paid in full" finding at least shows that identical issues were litigated.⁴

[4] However, res judicata and collateral estoppel only apply where the issue "was actually litigated" in the first action, *Aragon v. Clover Club Foods Co.*, 857 P.2d 250, 254 n. 6 (Utah App.1993), or the claim "could and should have been raised in the first action." *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988). The Josephsons have failed to produce any evidence to show that taxes and assessments were actually litigated in the District Court. Therefore, we find that the issue was not "actually" litigated in the prior action, thus precluding application of collateral estoppel.

[5] We must next determine if the claims "could and should have been raised" in the prior action. *Madsen*, 769 P.2d at 247. In their affidavits, David K. Broadbent, the Estate's counsel, and Mary C. Whetman, one of the Estate's co-personal representatives, state that prior to trial of the first suit, the Josephsons, through their attorney, represented to the Estate that they would pay any taxes and assessments regarding the Property. This representation was apparently made again during trial. In his affidavit, John C. Josephson denies that a "stipulation" regarding taxes and assessments was ever entered into at trial, but does not deny that such representations were made either prior to or during trial. Relying upon those undisputed representations, the Estate had no reason to bring a claim for the taxes or assessments in the prior action.

Moreover, the Estate didn't pay the taxes and assessments until May 8, 1992, well after the completion of the prior action. Any claim for reimbursement of the Estate's payment of those taxes and assessments was not "ripe for adjudication" at the time of the

4. It appears that the Estate concedes, and we agree, that the first action involved the same parties and that there was a final adjudication on the merits. Thus, the issue narrows to whether identical claims or issues were previously litigated.

5. We note that in *State v. Belgard*, 830 P.2d 264 (Utah 1992), the Utah Supreme Court held that issues raised and dealt with in post-trial evidentiary hearings are preserved for appeal. *Id.* at

District Court action and therefore could not have been brought. See *Andrews v. Utah Bd. of Pardons*, 836 P.2d 790, 794 (Utah 1992).

Taxes and water assessments were never addressed in the prior action. Further, because such claims were not then disputed, they were not ripe and should not be classified as ones that "could and should have been litigated." *Madsen*, 769 P.2d at 247. Thus, the purposes of res judicata and collateral estoppel to limit "parties to one fair trial of an issue or cause," and further to serve such "public interests as 'fostering reliance on prior adjudication, preventing inconsistent decisions, relieving parties of the cost and vexation of multiple lawsuits,' and 'conserving judicial resources,'" *J.J.T.*, 877 P.2d at 162 (quoting *Office of Recovery Servs. v. V.G.P.*, 845 P.2d 944, 946 (Utah App.1992)) are not present here. Therefore, neither res judicata nor collateral estoppel precludes the Estate's action.

Termination of Contract

The Josephsons assert that because the District Court ruled that the Contract was paid in full, it was thereafter terminated and no longer available to support a claim for taxes, water assessments, or attorney fees.

[6] The Josephsons did not raise this issue until their Motion to Alter or Amend Judgment submitted to the trial court after it granted summary judgment in favor of the Estate. Raising an issue in a post-trial motion—or as is the case here, post-summary judgment—does not preserve that issue for appeal. *Barson v. E.R. Squibb & Sons, Inc.*, 682 P.2d 832, 837 (Utah 1984); *Beehive Medical Elecs. v. Square D Co.*, 669 P.2d 859, 861 (Utah 1983); *LeBaron & Assocs. v. Rebel Enters.*, 823 P.2d 479, 484 (Utah App.1991).⁵

265-66. See also *State v. Matsamas*, 808 P.2d 1048, 1053 (Utah 1991) (holding that because trial judge took evidence on and ruled upon a challenge to hearsay evidence at trial—even though the objection was not timely raised—the issue was preserved for appeal). However, we believe *Belgard* and *Matsamas* are inapplicable to this case. Unlike the situation here, the trial court in both cases had the opportunity and chose to take evidence and fully hear the argu-

Thus, we find that this issue was not properly preserved and therefore decline to address it.⁶

CONCLUSION

Attorney Fees

The Josephsons next claim that issues of fact exist precluding summary judgment because the trial court failed to hold an evidentiary hearing on the reasonableness of the attorney fees awarded.

[7] In *Provo City Corp. v. Cropper*, 28 Utah 2d 1, 497 P.2d 629 (1972), the Utah Supreme Court stated that unless the parties agree otherwise, a trial court must take evidence of the reasonableness of attorney fees and make findings thereon. *Id.* at 630. See also Utah Code Jud.Admin. R4-505 (setting forth criteria for affidavits in support of attorney fees). However, trial courts are not required to make specific findings regarding attorney fees where all the relevant facts are undisputed. *Taylor v. Estate of Taylor*, 770 P.2d 163, 168-69 n. 6 (Utah App.1989). Undisputed relevant facts supporting an award of attorney fees includes an unrebutted affidavit. *Freed Fin. Co. v. Stoker*, 537 P.2d 1039, 1040 (Utah 1975).

[8] In this case, the attorney fees awarded are supported by the affidavit of David K. Broadbent, attorney for the Estate. Based on our review of the affidavit, we find that it complies with the requirements of Rule 4-505. Moreover, the Josephsons never disputed the affidavit. Therefore, we find that the trial court was not required to take further evidence regarding attorney fees.

ments raised. In *Belgard*, the trial court granted an evidentiary hearing on the issues. *Belgard*, 830 P.2d at 265. In *Matsamas*, the issues were heard and ruled upon during trial. *Matsamas*, 808 P.2d at 1053. The trial courts thus waived the requirements of Rule 12 of the Utah Rules of Criminal Procedure. *Belgard*, 830 P.2d at 266. However, in this case, the termination of contract issue was not raised until the Motion to Alter or Amend Judgment. The trial court did not take evidence or hold an evidentiary hearing on the issue, but instead simply denied the Motion to Alter or Amend. Thus, the trial judge did not "effectively waive[]" the Josephsons' requirement to preserve the issue for appeal. *Id.*

6. Even if the issue were properly before us, the Estate would still prevail. The Josephsons argue that the District Court's ruling that the Contract was "paid in full" terminated the Contract and

The Estate's action is not barred by res judicata or collateral estoppel. Further, the termination of contract issue is not properly before us. Finally, no issues of fact exist regarding the reasonableness of attorney fees. Therefore, we affirm the trial court's grant of summary judgment in favor of the Estate.

JACKSON, J., concurs.

DAVIS, Judge (concurring in the result):

I concur in the majority's result to the extent that defendants should be estopped to assert defenses of res judicata and/or collateral estoppel because of the representations of their counsel in the prior trial, and not because res judicata and/or collateral estoppel would not otherwise apply to the facts of this case.

It is well-settled in this jurisdiction that "[e]stoppel is an equitable doctrine which precludes parties from asserting their rights where *their* actions render it inequitable to allow them to assert those rights." *Dansie v. Anderson Lumber Co.*, 878 P.2d 1155, 1159 n. 10 (Utah App.1994) (quoting *Burrow v. Vrontikis*, 788 P.2d 1046, 1048 (Utah App. 1990) (quotation omitted)). The test for determining whether estoppel is present "is whether there is conduct, by act or omission, by which one party knowingly leads another party, reasonably acting thereon, to take

any rights under it. We disagree with the Josephsons' characterization of the District Court's ruling. In its Judgment, the District Court conveyed the Property, the five shares of water stock, and the right-of-way to the Josephsons. In its Findings of Fact and Conclusions of Law, the court stated that the Contract was "paid in full." However, the court did not explicitly state that the Contract was terminated. Indeed, it would have been improper for the District Court to do so since the court did not address other issues or provisions under the Contract such as the promise to pay "all taxes and assessments of every kind." The fact that some taxes and assessments were due and owing at the time of the Judgment is a strong indication that the District Court's ruling did not terminate the Contract, but rather was limited to the issues discussed.

some course of action, which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation." *J.P. Koch, Inc. v. J.C. Penney Co.*, 534 P.2d 903, 905 (Utah 1975) (footnote omitted); accord *Triple I Supply, Inc. v. Sunset Rail, Inc.*, 652 P.2d 1298, 1301-02 (Utah 1982). Moreover,

"[w]here, as here, the delay in commencing action was induced by the conduct of the party sought to be charged the latter may not invoke such conduct to defeat recovery. An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. To create an equitable estoppel, 'it is enough if the party has been induced to *refrain* from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss' 'It is well-settled that a person by his conduct may be estopped to rely upon these defenses. Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense.'"

Rice v. Granite Sch. Dist., 23 Utah 2d 22, 456 P.2d 159, 162 (1969) (quotation and footnote omitted).

Although the court's opinion does not contain an estoppel analysis, it correctly concludes that, based upon undisputed affidavits, representations were made by defendants to plaintiffs either prior to or during trial to the effect that defendants would pay any taxes and assessments regarding the property. In reasonable reliance on those representations, the Estate would have no reason to assert a counterclaim for the taxes or assessments in the prior action. Having induced the Estate to refrain from pursuing a counterclaim for taxes and assessments, defendants cannot now rely upon the defenses of res judicata and/or collateral estoppel.

In my view, the requirements for res judicata and collateral estoppel set out in the court's opinion are present here and, but for the equitable estoppel created by defendants, would be valid defenses to plaintiff's claim.

Having determined that those defenses are not available to defendant, there is no need to consider the issues of whether the court in

the prior proceeding determined that the contract was terminated or whether plaintiff's claims were ripe for adjudication.



Kirk W. DALL, Petitioner and Appellant,

v.

STATE of Utah, The Utah State Board of Pardons, and The Utah State Psychiatric Security Review Board, Respondents and Appellees.

No. 930722-CA.

Court of Appeals of Utah.

Dec. 27, 1994.

Patient at state hospital petitioned for extraordinary writ following decision of the Psychiatric Security Review Board (PSRB) to transfer his custody from state hospital to Board of Pardons, and the Third District Court, Salt Lake County, Leslie A. Lewis, . . . , denied petition. Patient appealed. The Court of Appeals, Orme, Associate P.J., held that the record did not support the PSRB's determination that patient had received the maximum benefit available from treatment at the hospital, and thus the transfer of custody to the Board of Pardons and resulting confinement at state prison were unlawful.

Reversed and remanded.

1. Administrative Law and Procedure ⇌701

Mental Health ⇌436.1

Psychiatric Security Review Board (PSRB) is exempt from the provisions of the Utah Administrative Procedures Act, so there is no statutory right of direct appeal from its decisions. U.C.A.1953, 63-46b-1(2)(c).