

2008

# John F. Fay v. Global Travel Network, Inc., and Todd Rodgers : Brief of Appellant

Utah Court of Appeals

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**JOHN F. FAY,**

**Plaintiff and Appellant,**

**vs.**

**GLOBAL TRAVEL  
NETWORK, INC., and TODD  
ROGERS,**

**Defendants and Appellees.**

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**Case No. 2008-1012 CA**

**BRIEF OF APPELLANT JOHN F. FAY**

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**APPEAL FROM AN ORDER OF THE THIRD DISTRICT  
COURT, SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE ROBERT FAUST,  
CASE NO. 06-090014**

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## **JURISDICTION**

The Utah Supreme Court had original jurisdiction of this appeal pursuant to **Utah Code Annotated 78-2-2(3)(j)**. Subsequently, pursuant to **U.C.A. 78-2-2-4** and **Rule 42a** of the **Utah Rules of Appellate Procedure**, the Supreme Court transferred this appeal to the Utah Court of Appeals.

## **ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW**

The issues presented in this matter include:

- I. Whether the trial court erred in applying Rule 11, U.R.Civ.P. to sanction Plaintiff John F. Fay, where he based his Complaint's allegations on a reasonable enquiry. Fay preserved the issues in the trial court by means of his memoranda and arguments in opposition to defendants' Motion for Rule 11 Sanctions, his memoranda and arguments in opposition to Global Travel's Motion for Attorney Fees, and in his memoranda and arguments in support of his Motion to Amend and For New Trial. *See*, R. 414, 472, 494. The standard of review for evaluating the denial or imposition of Rule 11 sanctions involves a three-tiered approach: (1) the

findings of fact are reviewed under the clearly erroneous standard; (2) legal conclusions are reviewed under the correction of error standard; and (3) the type and amount of sanction to be imposed is reviewed under an abuse of discretion standard.” *Morse v. Packer*, 1999 UT 5, ¶ 10, 973 P.2d 422; *Barnard v. Sutiff*, 846 P.2d 1229, 1234 (Utah 1992).

II. Whether the trial court erred in failing to support its conclusions of law on Rule 11 sanctions with specific findings of fact as required by the rule. The standard of review for evaluating the denial or imposition of Rule 11 sanctions involves a three-tiered approach: “(1) the findings of fact are reviewed under the clearly erroneous standard; (2) legal conclusions are reviewed under the correction of error standard; and (3) the type and amount of sanction to be imposed is reviewed under an abuse of discretion standard.” *Morse v. Packer*, 1999 UT 5, ¶ 10, 973 P.2d 422; *Barnard v. Sutiff*, 846 P.2d 1229, 1234 (Utah 1992).

III. Whether, even if a sanction was warranted, the trial court erred in awarding the amount of attorney’s fees claimed by Defendant Rogers without considering an offset for the doctrine of avoidable consequences.



The trial court erred in not making any real findings on this issue, nor even addressing the Plaintiff's mitigation of damage claim. **R. 479-480, 488-489, 516** This is a question of fact-finding. The standard for *review of the factual errors* is from a clearly erroneous standard, that the contested ruling is so lacking in support as to be against clear weight of the evidence. **Rule 52a** of U. R. Civ. P., *Young v. Young*, 979 P2d. 338 (Utah 1999); *Pennington v. Allstate*, 973 P2d. 932, 937 (Utah, 1998).

### **STATUTES AND RULES**

Statutes and rules applicable herein are **Utah Code Annotated 78-2-2(3)(j), 78-2-2-4, and Rule 11, Rule 12, and Rule 52** of **Utah Rules of Civil Procedure**.

### **STATEMENT OF CASE**

#### **A. Nature of Case and Course of Proceedings**

1. Plaintiff John Fay filed a civil lawsuit in the Third District Court alleging causes of action in bad faith breach of contract and fraud, arising out of a fraudulent telephone solicitation and a subsequent, breached, settlement agreement. Record, 1-12.
2. Defendants Global Travel Network and Todd Rogers filed an Answer, which included affirmative defenses of "waiver", "estoppel", "accord and

satisfaction”, “tendered payment”, and “failure of **plaintiff** to mitigate his damages [emphasis added]”, but no motion to dismiss any defendant, nor motion for a more definite statement, nor any such procedural motion that would call to the court’s attention the belief of one party (Rogers) that he was not a proper defendant in the action, R. at 13-17.

3. Fay duly conducted discovery into his claims. During the course of discovery, the trial court found defendants in default, dismissed defendants, and sanctioned defendants twice and ordered them to pay Fay’s attorney’s fees, for deleterious conduct in refusing to respond to discovery, R. at 120-21, 277-78.
4. Defendants conducted NO discovery into issues relevant to potential defenses, counterclaims, or oppositions to Fay’s claims. *See* Record.
5. Approximately one month before the originally scheduled trial date, Rogers first raised his claim that he was not a proper party defendant, and he petitioned the court to be dismissed from the case, R. at 308-310.
6. For unrelated reasons the trial date was continued, and reset to a date approximately one month after the original trial date. R. 401
7. The trial court granted Rogers’ motion to dismiss approximately one month before the rescheduled trial date, R. at 377, 401.

8. The trial court, at defendant's urging, ordered plaintiff to 'elect a remedy' at trial, so trial proceeded on fraud claims against Global. The court found in favor of Global. R. 452.
9. Rogers made a motion for sanctions under U. R. Civ. P. rule 11. R. 404.
10. Global made a motion for attorney fees under statutory and contractual theories, R. at 458-462.
11. Fay opposed both motions, with affidavits. R. at 426-428, 472-481.
12. The trial court granted Rogers' Motion for Sanctions and denied Global's Motion for Attorney Fees. R. at 514-517.
13. Fay made a motion for new trial and motion to amend, R. at 493-511.
14. Defendants did not file any opposition to Fay's post-trial motions. *See* Record.
15. The trial court summarily denied Fay's post-trial motions, and entered Judgment on October 7, 2008. R. at 535.
16. Fay filed his Notice of Appeal November 5, 2008. R. at 537-538.

**B. Statement of Facts and Disposition**

1. This matter arose out of telemarketing calls in November 2005, in which an offer of a free trip from representatives of Defendant Global Travel was twice recorded on Fay's home telephone answering machine, R. at 1-12.

2. Fay contacted the number provided to claim his promised trip, and was informed there would be no free trip, despite the promises, R. at 1-12.
3. Fay complained to the Utah Attorney General. The Consumer Fraud Division investigated, and found Global Travel Network guilty of fraud, R. at 1-12.
4. Through Fay's contact with Utah A.G. office, it presented Todd Rogers as the figurehead and sole authority for resolution of claims against Global. R. 1-12.
5. Rogers made contact with Fay by telephone and written correspondence to discuss settlement of Fay's claims against Global Travel. R. 449
6. Throughout those discussions Rogers presented himself as Global Travel. *Id.*
7. Fay and Rogers arrived at an executory Settlement Agreement, which Rogers signed "for Global Travel". R. 40, 449-451.
8. Following a long delay in signing the agreement as requested, Rogers, through his attorney, David Maddox, submitted the agreement, with the date of his signature backdated, as evidenced by the date and textual references of the accompanying fax sheet from Maddox. R. at 373, 397-99, 430-33.
9. Fay attempted to rely on the agreement, conducting his duties under it, but defendants failed and refused to tender payment when due under the agreement. R. 1-17

10. Fay filed a civil suit in Third District Court based on the breach of the agreement, the fraud in entering the agreement, including the fraud in back-dating the signature on the Settlement Agreement, and the fraud in the original telephone solicitation. R. 1, *et. seq.*
11. Global, through counsel, tendered payment three weeks after suit. R. 13.
12. Rogers' response to the suit was to join in an Answer filed by counsel. R. 13.
13. Fay presented evidence at trial that Rogers backdated his signature on contract provision, acting in his personal capacity on behalf of company. R. 449.
14. Fay showed evidence that Rogers held himself out as the company, took responsibility for fraudulent acts of company agents, and promised to pay Fay for the company's wrongdoing. R. 494, 472
15. Fay presented evidence that counsel for Rogers, David Maddox, told Fay in writing that Rogers was Global Travel. Rogers made the same written representations. R. 499, 509-511.
16. Fay presented evidence that Utah State Attorney General's office, consumer fraud division settled code violation action with Rogers acting for Global. R. 449-451.

## **RELIEF SOUGHT ON APPEAL**

Appellant John Fay appeals to this Court for review of a Judgment of the Third District Court, J. Faust, dated October 7, 2008, and the related Minute Entry Order of April 15, 2008, from which the Judgment arose. (See Addendum). Fay submits that the Judgment must fail, as it is reliant on the M.E. of April 15, 2008, in which the trial court improperly uses Rule 11, U.R.Civ.P. to sanction Fay, fails to adequately find specific facts and state reasons for legal conclusions, and fails to address the issue plaintiff raised on the doctrine of avoidable consequences. Fay submits that the 4/15 M.E. is unwarranted on the facts herein, and the Judgment that flowed from it is void. Fay respectfully requests that this Court reverse the Judgment and remand this matter to the trial court for findings consistent herewith.

## **SUMMARY OF ARGUMENT**

- I. The trial court erred in applying Rule 11 to sanction John Fay. The clear mandate of Rule 11 requires that a trial court follow strict procedures to find violation of the rule only in specified limited circumstances. The trial court here did not follow those procedural guidelines, as set forth in the rule and in

case law interpreting and applying the rule, and applied the rule over-broadly to sanction John Fay on the facts of this matter.

- II. The trial court erred in failing to support its conclusions of law on Rule 11 sanctions with specific findings of fact. In failing to properly account for the bases of it's conclusions of law in the Minute Entry-Order, the court below failed again to follow the mandates of the rule, and cases interpreting the rule.
- III. The trial court erred in accepting the amount of Todd Rogers' alleged attorney fees in this case as the amount of the "sanction" under Rule 11, in that awarding the amount of attorney's fees claimed by Defendant Rogers without offsetting for his failure to mitigate damages following from the litigation, and without finding facts or stating conclusions in support of it's refusal to address the issue, is clear error, and requires reversal of the excessive sanction herein.

## I. ARGUMENT

### A. TRIAL COURT ERRED IN APPLYING RULE 11 TO SANCTION FAY WHERE HE BASED ALLEGATIONS ON A REASONABLE ENQUIRY

The trial court entered an Order in this matter, referring to Rule 11, U.R.Civ.P., as authority to sanction Plaintiff John F. Fay for his decision to include Todd Rogers as a defendant in the lawsuit that gives rise to this appeal. Not only did the trial court not follow the specific mandates of the rule itself, in reaching to apply the sanctions allowed by the rule to Fay in this matter, but the court also erred in erroneously interpreting and applying the standards of application of the rule set out in decisions of this Court and the Utah Supreme Court.

The Utah Supreme Court, in a case concerning erroneously ordered sanctions, held, that to avoid sanctions does not require perfect research but rather research that is “*objectively reasonable under all the circumstances*. ...(citation omitted). In other words, [Plaintiff] Barnard need not have reached the correct conclusion; he need only have made a reasonable inquiry”. ***Barnard v. Utah State Bar***, 857 P. 2d 917, 920 (Utah 1993). Continuing, the ***Barnard*** court found no sanction warranted where the inquiry is at least “*tenable*” or “*plausible*”.

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On the legal standard governing the consideration of **Rule 11** sanctions, a panel of this court stated that:

*This rule, ..... requires some inquiry into both the facts and the law before the paper is filed; the level of inquiry is tested against a standard of reasonableness under the circumstances.*

**Taylor v. Taylor**, 770 P.2d 163, at 171 (Ut. App. 1989)

In reviewing Fay's pre-Complaint conduct, the relevant question: was his inquiry into the facts "reasonable under the circumstances"? is answered affirmatively.

The related question: were his allegations and conclusions at least "tenable" or "plausible"? is also answered in the affirmative. His pre-litigation inquiry led him to these facts:

1- Following Fay's report of fraudulent telemarketing activity, the Utah Attorney General investigated Defendant Global for fraudulent telemarketing and fined it. Upon Fay's inquiry that office told him he could deal with Rogers "as Global" as it had so dealt with Rogers in its investigation. Rogers admitted to the AG that Global violated the law in its misrepresentations to Fay. Lastly, the AG's office also told Fay that Rogers signed the AG's office's monetary fine and punishment findings against Global.

2- Rogers contacted Fay and represented that he, Rogers was the person who was responding to Fay for his telemarketing complaints against Global, Rogers said he would make the "misrepresentations good."

3- Subsequently, Rogers always spoke for Global and entered into a settlement agreement for Global. During these negotiations, Rogers never said he was not Global.

4- At the time of the settlement agreement, Rogers back-dated his signature by 17 days, where the date of his signature was an operative provision of the contract.

5- During the settlement negotiations and pre-litigation, Rogers wrote Fay a letter wherein he referred to Global as “*my company*. ”

6- At or about this same time, Rogers’ counsel wrote to Fay, also indicating that Global was *Rogers’ company* and that he (Rogers) would satisfy the claim.

See Plaintiff’s Opposition to Defendant’s Motion, at **1 to 6**, and Fay’s Affidavit, **Record** at 426-428, the two letters referenced, **Record** at 499, 509-511.

It is apparent from facts on the record that Fay made a reasonable inquiry, and that he relied on plausible representations from various sources to the very same point, that Rogers *was* Global or, at least, the controlling force behind “Global Travel”.

Were Fay’s beliefs reasonable under the circumstances? Yes, given that the representations came from **1-** the Attorney Generals’ Office which was then

investigating Global, and 2- oral representations from Rogers, followed by, 3- Rogers' conduct in speaking and negotiating for Global with the Attorney General's Office, and in 4- Rogers' conduct in speaking and negotiating for Global with Fay, and in 5- Roger's written representation directly to Fay that Global was "*his company*" followed by, 6- Rogers' counsel's written representation to Fay that Global was *Rogers' company*. Points 1-6 **Record** at 426-428, 499, 509-511.

**Rule 11** requires that: "*allegations and other factual contentions have evidentiary support.*" **See Rule 11(b)(3)**. Here, the sources Fay relied upon in assessing whether to sue Rogers were persuasive on the subject, capable of offering competent evidence if called upon to do so, and further, the three sources related the very same information, to the effect that *Rogers was Global*. Finally, and equally important in this consideration, is the fact that the sources were independent of Fay and had no self-interest in the assertions. Clearly, Fay's *allegations and other factual contentions had evidentiary support* and, certainly, reliance on the sources met the standard of *reasonableness under the circumstances*. Thus, by plain language of Rule 11, sanctions were not warranted.

Cross referencing these facts and the circumstances surrounding the inquiry with case law interpretation of **Rule 11**, *supra*, shows that the law properly rejects any sanction on the facts here. But the trial court misinterpreted Rule 11.

The trial court misapplied the criteria for assessing the reasonableness of Plaintiff's inquiry. In *Barnard v. Utah State Bar*, 857 P.2d 917 (Utah 1992), the Utah Supreme Court found where an allegation or contention is "tenable" or "plausible," it does not deserve sanctions. Fay relied upon the Attorney General's office, the potential defendant, Rogers, and his counsel, which inquiry and resulting reliance led to allegations in the Complaint that were both "tenable" and "plausible."

In his Motion for Sanctions, Rogers argues that Plaintiff had no facts, nor reason to sue him, and bases his arguments on seven assertions – but, critically, all seven assertions were discovered **after** Fay filed his Complaint. *See* Defendant's Statement of Facts **Record** at 407-408. Fay noted this attempt by Rogers to build an argument for sanctions on hindsight arguments, in his Opposition to Defendant's Motion. **Record** at 419-420. How can Fay be sanctioned for having no grounds for filing his Complaint against Rogers, based upon arguments that are supported only by facts discovered after filing the Complaint?

Here, given the consistency of information that Fay's enquiry produced, from various, reliable sources, including representations by Rogers and his counsel, that reflected Rogers to be Global, the trial court's findings are clearly erroneous. Under the circumstances, Fay's pre-litigation inquiry was objectively reasonable, and no sanctions are warranted. Fay, therefore, respectfully requests that this

Court, on review, find the Order below in error, and reverse and remand the matter to the trial court for correction.

**B. TRIAL COURT ERRED IN FAILING TO SUPPORT ITS CONCLUSIONS OF LAW ON RULE 11 SANCTIONS WITH SPECIFIC FINDINGS OF FACT AS REQUIRED BY THE RULE**

The Order entered by the trial court (Addenda), is fatally defective in being conclusory, where the law mandates specific detail. Appellant here evaluates fatal deficiencies and erroneous material conclusions in the trial court's Order, *seriatim*:

1. *"The court finds that Mr. Rogers is an employee of Defendant Global Travel Network"*. This fact was certainly not apparent to Fay, pre-litigation, but was discovered long after the Complaint was filed, so cannot be the basis for a sanction as to Fay's conduct, or knowledge, at the time he filed the complaint.

2. *"He [Rogers] was involved in resolving the Plaintiff's complaints concerning Global Travel Network and signed a Settlement Agreement with Plaintiff on behalf of Global Travel Network"*. The court here ignores, however, the uncontested fact that Rogers back-dated his signature on the settlement agreement, as shown by text of the documents accompanying delivery of the signed settlement agreement to Fay, sent by counsel David Maddox. *See R. 373, 430-433, 397-399.*

3. However, the Court finds that there is absolutely no evidentiary support for the Plaintiff's claims he understood Mr. Rogers to be "Global for all intents and purposes." Indeed it is clear from Plaintiff's opposition and his affidavit that he understood throughout these proceedings that Mr. Rogers was merely representing Global Travel Network". Yet, this finding and conclusion is in direct contradiction to the points in Plaintiff's affidavits. **Record** at 426-428, 506-508. Fay's affidavit representations are "tenable" and "plausible".

The first error is the Court's failure to understand that, even if, assuming *arguendo*, Fay knew, at the time, that Rogers was merely "representing" Global, this does not mean or infer that Rogers was simply an employee. In reality, an owner of a company, an officer or director of a company, could likewise be "representing" the company and yet still be the "company". Someone, some individual, has to represent a company, but to represent a company does not compel an understanding, or impart a belief to others, that the "representative" is only an employee especially in the face of that individual's representations to the effect that he is the company.

Despite the court's contention, it is not clear that Plaintiff understood throughout these proceedings that Mr. Rogers was merely representing Global Travel Network. Plaintiff's affidavit contradicts the court's conclusion in that it attests to:

- a. The Utah Attorney's General's Office told Fay to deal with Rogers. It did not say Rogers was "only an employee". It only directed Fay to Rogers in his dealings with Global.
- b. Rogers contacted Fay and represented that he would "make the [telemarketers'] representations good."
- c. Rogers always represented to Plaintiff that he was "Global."
- d. Rogers back-dated the settlement agreement.
- e. Rogers and his counsel made written representations that Global was "*Rogers' company.*" **Record** at 509-511.

Finally, in this regard, it is crucial to recall that in the Complaint Plaintiff alleged that he "*believes Defendant Rogers is a principal of Defendant Global.*"

**Complaint, Record** at 2.

4. "*In addition, while Plaintiff alleged breach of contract and fraud claims against Mr. Rogers, the Court can find no evidence to justify the assertion of these claims. As indicated above, Mr. Rogers was not a party to the contract at issue in this case.*"

*In addition, the plaintiff never alleged that Mr. Rogers was the alter ego of Global Travel Network or otherwise directly benefited from the telemarketer's alleged misrepresentations. Simply put, the Plaintiff has never demonstrated a link between Mr. Rogers and the fraud he alleged in the Complaint or even a reasonable belief that such a link existed. To the contrary, the Plaintiff clearly had no factual support for his claims against Mr. Rogers, but nonetheless asserted these claims in the apparent hope of discovering some down the road".* Here the court is only addressing the telemarketing contact. It simply ignores Rogers' deceit in back-dating the settlement contract where the date of his signature was a material provision of the contract. The court was aware of this deceit. **Record at 397-399, 417, 430-433.**

Rogers' counsel has agreed that a corporate "officer or director is liable for his own false representations", *citing Armed Forces Ins. v. Harrison, 2003 UT 14, 70 P.3d 35*, and again, *citing Reedeker v. Salisbury, 952 P.2d 577 (Ut. App.1998)* for the principle that a director is personally liable if he "acts in bad faith or commits a tort in connection with the performance of his corporate contracts." **Record at 410 - 11.** Instantly, when Rogers misrepresented Global as "his company" and when he back-dated the settlement agreement, he acted in bad faith and committed torts.



The trial court misinterprets Rule 11 when it imposes sanction on a finding that Fay asserted claims against Rogers in the apparent “hope” of discovering some “factual support down the road”. But, **Rule 11 (b) (3)** provides for allegations and factual contentions that are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Sanctions cannot properly be premised upon a type of allegation that is specifically permitted by Rule 11.

5. *“Overall, it is important to point out that the Court is not dealing with a simple case of factual errors or misstatements, which are clarified upon reflection or through the discovery process. Rather, this is a case where the Plaintiff had absolutely no legal or factual basis for involving Mr. Rogers in this action and asserting claims against him”*. Here, the trial court concludes that this is not a simple case of factual errors and misstatements. But the court does not say why this is not a case of simple factual errors or misstatements. We are left to guess. The trial court goes on to state it’s unsupported conclusion that Fay had absolutely no legal or factual basis for involving Mr. Rogers. This is manifest error because the court had before it Fay’s affidavit setting forth several objectively reasonable grounds why he had reason to sue Rogers. But the court failed to identify why these grounds were insufficient and why the court maintained the position that Fay “had absolutely no legal or factual basis for involving Mr. Rogers.” How and why

did the court rule out all of Fay's affidavit testimony? This conclusion is totally devoid of supportive facts or legal reasoning behind the court's leap to resolution.

A panel of this court held, that: "*to warrant rule 11 sanctions, factual errors or misstatements 'must be significant.'*" [citing] *Morse v. Packer*, 2000 UT 86 [28], 15 P.3d 1021 (quoting 5A *Charles Alan Wright & Arthur R. Miller*, Federal Practice and Procedure: Civil 2d Sec. 1335 (1990))", *K.F.K. v. T.W. & B.L.W.*, 2005 UT App 85 [4], 110 P.3d 162. But in the matter now before this Court, the trial court's Order failed to address this mandate of Rule 11 jurisprudence.

The law demands more than presumptions proffered as facts and legal conclusions completely void of legal reasoning demonstrating why the sanctioning court arrived at the opinions:

*We have said that a trial court is required to make explicit findings of fact in support of its legal conclusions. See Willey v. Willey, 951 P.2d 226, 230 (Utah 1997). This is particularly necessary in the Rule 11 area. The law requires that a trial court make a series of specific factual findings as a predicate for concluding that the rule has been violated, .... The trial court's findings and conclusions must reveal the court's reasoning clearly enough that an appellate court can apply the appropriate standard of review to each part of the trial court's ruling. Griffith v. Griffith, 1999 UT 78 [10], 985 P.2d 255.*

The trial court's Order herein has no *explicit findings of fact in support of its legal conclusions*. It's only two "factual findings" are in the first two sentences; both are

undisputed, and together, are much less than the *series of specific factual findings* required *for concluding that the rule has been violated*. Further, the Order reveals nothing of the court's reasoning. An appellant, or reviewing court, must guess at how the trial court reached its conclusions. But, Rule 11 demands that:

*When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and **explain the basis for the sanctions imposed**. Rule 11(c)(3) [emphasis added.]*

The trial court made two factual "conclusions", totally devoid of any detailed factual findings. The court then grafted on a host of legal conclusions. But the legal conclusions, in addition to being legal errors, are devoid of legal analysis.

Had the court engaged in the required factual finding in support of legal analysis, all explained with specificity required by Rule 11 and case holdings interpreting the rule, it would have found sanctions are not appropriate in the matter before it. Thus, the findings and conclusions of the Order cannot support Rule 11 sanctions. Fay submits that this Court should properly reverse the Order of the lower court.

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**C. TRIAL COURT ERRED IN AWARDING THE AMOUNT OF ATTORNEY'S FEES CLAIMED BY ROGERS WITHOUT CONSIDERING AN OFFSET FOR THE DOCTRINE OF AVOIDABLE CONSEQUENCES**

The trial court failed to consider an important legal principle, in awarding the amount of attorney's fees claimed by Rogers without considering a reduction for his initial failure to take simple measures to avoid most of the consequences of the lawsuit of which he complained. Variouslly called the "doctrine of avoidable consequences" or "mitigation of damages", the precept has a simple purpose: *"to prevent one against whom a wrong has been committed from recovering any item of damage arising from the wrongful conduct which could have been avoided or minimized by reasonable means. [Citation omitted]" John Call Engineering, Inc. v. Manti City Corp., 795 P.2d 678 (UT App. 1990).*

Thus, where Rogers could have, by a simple action, such as a motion to dismiss, under U.R.Civ.P. Rule 12 (b) (6), or a motion for more definite statement, under Rule 12 (e), achieved the desired result, of limiting his involvement in the legal action, it was his affirmative duty to take such action to avoid further harm, and if

he did not, he cannot complain of the cost to him. The Utah Supreme Court has stated that:

*under the doctrine of avoidable consequences the nonbreaching party has an active duty to mitigate his damages, and he "may not, either by action or inaction, aggravate the injury occasioned by the breach." Utah Farm Prod. Credit Ass'n v. Cox, 627 P.2d 62, 64 (Utah 1981); Angelos v. First Interstate Bank, 671 P.2d 772, 777 (Utah 1983); see also Anesthesiologists Assoc. v. St. Benedict's Hosp., 852 P.2d 1030, 1039 (Utah App. 1993); John Call Eng'g v. Manti City, 795 P.2d 678, 680 (Utah App. 1990); Restatement (Second) of Contracts § 350 (1981).*

***Mahmood v. Ross*, 1999 UT 104 [31], 990 P.2d 933.**

Further, a panel of this Court, held:

In order to satisfy the duty to mitigate damages, a non-breaching party must make "reasonable efforts and expenditures." *Madsen v. Murrey & Sons Co.*, 743 P.2d 1212, 1214 (Utah 1987) (quotations and citations omitted);

***Covey v. Covey*, 2003 UT App 380 [29], 80 P.3d 553.**

While many of the cases discuss the issue in terms of contractual relations, and often refer to the “plaintiff’s” duty to mitigate damages flowing from a breach, the logic of the doctrine of avoidable consequences has applied to both plaintiffs and defendants in property settlements, in marital or business dissolutions, and in other factual scenarios, and the reasoning is directly applicable to the instant circumstance of an award of a financial sanction, where the amount of the

monetary sanction awarded by the trial court is exactly equal to the amount of attorney fees claimed by the party who alleges damages caused by a legal action.

Rogers could have defended the action, at a significant financial savings, by means of a simple legal motion at an early stage. The burden is on him, and his counsel, to do so, and by so doing, limit, or mitigate, his damages and avoid the avoidable consequences of plaintiff's act. The Utah Supreme Court has stated that:

*Under the doctrine of avoidable consequences, "[o]ne need never take steps in advance to avoid the consequences of a future threatened wrong . . .," but rather, need only avoid or minimize damages that arise out of a wrong that has already been committed. C. McCormick, supra, § 37, at 137. Accord Restatement (Second) of Torts § 918(1) (1979) (barring recovery of damages that one could have avoided by reasonable efforts "after" the commission of the tort). Angelos v. First Interstate Bank of Utah, 671 P.2d 772 (UT 1983).*

Under these authorities, the "sanction" that the trial court awarded is unwarranted herein. The court merely adopted, as the monetary amount of the sanction, the attorney fees claimed by Rogers, without considering an offset or reduction for the doctrine of avoidable consequences, nor did the court discuss its reasoning for failing to accept Fay's request to consider this issue. *See R. 479-80, 488-9, 514-16, 454-456.*

It is undisputed that Rogers could simply have filed a motion to explore the option of terminating his involvement in the lawsuit at a very early stage, and with minimal expense. Rogers must bear responsibility for failure to take simple, reasonable measures to mitigate any potential damage following from the wrong he claims. Fay bears no responsibility for the extent of any such additional exposure to damage that Rogers allowed himself to accept by failure to file an appropriate motion at the earliest opportunity.

Fay respectfully requests that this Court review the Order of the trial court, below, in light of the doctrine of avoidable consequences, and remand the matter, for further consideration of an offset against any sanction award to account for the mitigation Rogers may have made of the damages he alleges.

#### **D. Exception to Usual Duty To Marshal Evidence**

Generally, a party who challenges a fact finding has a duty to marshal all record evidence that supports the challenged finding, and then proceed to show why the evidence, considered in its entirety, is insufficient to support the judgment. *See*

**Rule 24(a)(9), U.R.App.P.** This duty has been described as requiring that “*appellate counsel must play the devil’s advocate*” in gathering the evidence in support of the proposition that the party opposes. *See, Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc.*, 872 P.2d 1051 (Ut. App. 1994).

But, a critical exception to this usual heavy duty upon the party challenging factual findings of the trial court, is where the trial court’s findings are so inadequate that a meaningful understanding by the appellate court is impossible. In such a case, appellant need only show the court’s findings as legally insufficient: “*appellants need not engage in a futile marshalling exercise if they can demonstrate the findings, as framed by the court, are legally insufficient.* [Citations omitted].” **Campbell v. Campbell**, 896 P.2d 635 (Ut. App. 1995).

Such is the case here. The trial court’s findings are so incomplete, so conclusory, so lacking in requisite detail, that any effort to marshal the evidence in support of such limited findings would be futile. Hence, Fay submits that he has met his burden in challenging the trial court’s incomplete findings of facts.




## **CONCLUSION**

Plaintiff and Appellant John F. Fay respectfully requests that this Court review the Order of the Third District Court, the Honorable Robert Faust, dated October 7, 2008. Plaintiff submits that this Judgment and Order is defective in that it fails to follow the express mandate of Rule 11, U.R.Civ.P., and the controlling authorities interpreting the rule, where Fay conducted a reasonable inquiry upon which he based his tenable conclusions and allegations in the Complaint. Further, Fay submits that the Judgment and Order fails to follow the specific requirement of the rule and controlling authority by not containing a detailed findings of facts upon which the court may base conclusions of law. Finally, the Court neglected to take into account, nor explain the absence of reasoning based upon Fay's submitted arguments relating to avoidable consequences that Rogers may have taken to minimize his exposure to damages, if any. Therefore, Fay respectfully requests that this court reverse this Order and, in the alternative, to remand to the trial court to reconsider the amount, if any, and propriety of sanctions under Rule 11. Finally, in the event this Court finds, and orders, that the trial court erred as urged by Fay, that Rogers and his counsel are and should be jointly and severally liable to Fay for

his costs and attorney fees associated with prosecuting this appeal, and in  
defending against the Motion for Sanctions in the trial court.

SUBMITTED this 1 day of <sup>May</sup>~~April~~ 2009.




James L. Mouritsen  
Attorney for John F. Fay

**CERTIFICATE OF SERVICE**

I attest that on this 1 day of <sup>May</sup>~~April~~ 2009, I caused to be delivered, by U.S.  
mail, postage prepaid, a true and correct copy of APPELLANT'S OPENING  
BRIEF addressed to:

David Maddox  
1108 W. South Jordan Pkwy, # A  
South Jordan, UT 84095

  
JAMES L. MOURITSEN

## **ADDENDA**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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JOHN F. FAY, an individual,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 060900141
vs.	:	
GLOBAL TRAVEL NETWORK, TODD	:	
RODGERS, and DOES 1-10, inclusive,	:	
Defendants.	:	

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The Court has before it Defendant Todd Rodgers' Motion for Sanctions under Rule 11. Having reviewed the moving and responding Memoranda concerning this Motion, the Court determines that the Plaintiff violated Rule 11 of the Utah Rules of Civil Procedure in bringing claims against Defendant Todd Rodgers and that sanctions in the form of attorney's fees and costs are warranted.

The Court finds that Mr. Rodgers is an employee of Defendant Global Travel Network. He was involved in resolving the Plaintiff's complaints concerning Global Travel Network and signed a Settlement Agreement with the Plaintiff on behalf of Global Travel Network. However, the Court finds that there is absolutely no evidentiary support for the Plaintiff's claims that he understood Mr. Rodgers to be "Global for all intents and

purposes." Indeed, it is clear from the Plaintiff's opposition and his Affidavit that he understood throughout these proceedings that Mr. Rodgers was merely representing Global Travel Network.

In addition, while the Plaintiff alleged breach of contract and fraud claims against Mr. Rodgers, the Court can find no evidence to justify the assertion of these claims. As indicated above, Mr. Rodgers was not a party to the contract at issue in this case. In addition, the Plaintiff has never alleged that Mr. Rodgers was the alter ego of Global Travel Network or otherwise directly benefitted from the telemarketer's alleged misrepresentations. Simply put, the Plaintiff has never demonstrated a link between Mr. Rodgers and the fraud he alleged in the Complaint or even a reasonable belief that such a link existed. To the contrary, the Plaintiff clearly had no factual support for his claims against Mr. Rodgers, but nonetheless asserted these claims in the apparent hope of discovering something down the road.]

Overall, it is important to point out that the Court is not dealing with a simple case of factual errors or misstatements, which are clarified upon reflection or through the discovery process. Rather, this is a case where the Plaintiff had absolutely no legal or factual basis for involving Mr. Rodgers in this action and asserting claims against

him. Under these unique circumstances, the Court concludes that the Plaintiff directly violated Rule 11 and that sanctions are warranted.

In reaching this conclusion, the Court notes that the Plaintiff is himself an attorney and initially represented himself. Further, while he subsequently engaged counsel, it appears to the Court that he continued to direct this action in most respects. Consequently, the Court declines to rule that the Plaintiff's counsel also violated Rule 11 or to hold counsel jointly liable to Defendant Rodgers for his attorney's fees and costs. The Court instead holds the Plaintiff liable under Rule 11 for such fees and costs.

This Minute Entry decision will stand as the Order of the Court, granting Mr. Rodger's Motion for Sanctions.

Dated this 15<sup>th</sup> day of April, 2008.

15

ROBERT P. FAUST  
DISTRICT COURT JUDGE

OCT - 7 2008

By PL SALT LAKE COUNTY  
Deputy Clerk

DATE 10/10/08

Civil No.: 060900141  
Judge: Robert Faust

**Judgment @J**



JD27181181

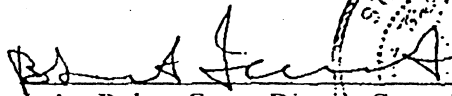
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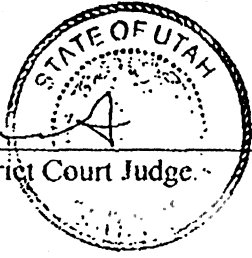
060900141 FAY,JOHN F

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Todd Rogers recover Judgment against plaintiff in the principal amount of \$\$6,301.10. The Judgment shall bear interest at the Judgment rate of 6.99% until paid.

DATED this 14 day of ~~September~~ <sup>October</sup>, 2008.

BY THE COURT

  
Judge Robert Faust, District Court Judge.



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served this 2 day of August, 2008, by U.S. mail, postage pre-paid, upon the following:

James L. Mouritsen  
Gregory & Swapp  
2976 W. Executive Parkway, #200  
Lehi, UT 84043

☒ (X) U.S. Mail, postage prepaid  
☐ ( ) Hand Delivered  
☐ ( ) Overnight Mail  
☐ ( ) Facsimile (801) 990-1976

