

1998

J.V. Hatch Construction Inc., Plaintiff and Appellant, vs. Michael Kampros, Defendant and Appellee : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

980200-CA

J.V. HATCH CONSTRUCTION, INC.,)	
)	
Plaintiff and)	
Appellant,)	
)	
vs.)	No. 980200-CA
)	
MICHAEL KAMPROS,)	
)	Priority No. 15
Defendant and)	
Appellee.)	

REPLY BRIEF OF APPELLANTS J.V. HATCH CONSTRUCTION, INC.

APPEAL FROM AN AMENDED JUDGMENT
THE THIRD JUDICIAL DISTRICT COURT, DIVISION II
OF SALT LAKE COUNTY, UTAH
HONORABLE ROBERT K. HILDER
DATE OF AMENDED JUDGMENT: NOVEMBER 18, 1997
Case No. 950010438

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FILED

Utah Court of Appeals

SEP 23 1998

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

J.V. HATCH CONSTRUCTION, INC.,)	
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Plaintiff and)	
Appellant,)	
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vs.)	No. 980200-CA
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PARTIES BELOW:

A. J.V. HATCH CONSTRUCTION

B. MICHAEL KAMPROS

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CENTRAL ISSUE

The central issue before this court is whether giving notice pursuant to Section 38-1-7(3) is an element of plaintiff's prima facie case for attorney's fees under Section 38-1-18, or an "avoidance or affirmative defense" that must be raised by defendant.

OBJECTION TO DEFENDANT'S STATEMENT OF FACTS

1. Paragraphs 2 and 3 under defendant's "Statement of Facts" are inappropriate since plaintiff's first set of interrogatories and request for production of documents were not part of the trial record below. (See Addendum to Brief of Appellee, Michael Kampros, pp 2-7.) There was also no record below as to what documents were or were not produced pursuant thereto. Id.

2. Paragraph 17 under defendant's "Statement of Facts" is accurate. However, it should be noted that the Amended Judgment was paid and a Satisfaction of Judgment filed on stipulation of counsel that plaintiff's right to pursue this appeal would not be limited thereby.

ARGUMENT

I. A PRIMA FACIE CASE FOR ATTORNEY'S FEES UNDER 38-1-18 DOES NOT REQUIRE PROOF OF MAILING UNDER SECTION 38-1-7(3).

As developed in pages 7-12 of Appellant's Brief, a prima facie case for attorney's fees under Section 38-1-18 does not require proof of mailing under Section 38-1-7(3). A claim that

Section 38-1-7(3) was not complied with is an "avoidance or affirmative defense" that must be raised by defendant.

In response thereto, defendant alleges that 1) caselaw from other jurisdictions indicates otherwise, 2) the Utah cases of AAA Fencing Co. vs. Raintree Dev. & Energy Co, 714 P.2d 289 (Utah 1986) and Govert Copier Painting v. Van Leeuwen, 801 P.2d 163 (Utah App. 1990) indicate otherwise, and 3) the general rules for determining the elements of a prima facie case for statutory claims are different than for common law claims. In fact, none of these are true.

A. The Caselaw Cited By Defendant From Other Jurisdictions Is Inapposite.

Defendant cites cases interpreting notice requirements under mechanic's lien laws in Colorado, Oregon, Washington, Kansas and Arizona. None of those cases are applicable here. In the Colorado case, the court held that language specific to the Colorado mechanic's lien statute (not found in the Utah statute) required proof of mailing to establish a valid mechanic's lien in Colorado. In the other cases, unlike this case, the issue of notice was litigated at trial.

In Daniel vs. M.J. Development, Inc., 603 P.2d 947 (Colo. App. 1979), the Colorado Court of Appeals held that, under the Colorado mechanic's lien statute, proof of notice was required to establish a valid mechanic's lien. The Court based its holding on the language of Section 38-22-109(3) Colorado Revised

Statutes, which provides:

In order to preserve any lien for work performed or materials furnished, there must be a notice of intent to file a lien statement served upon the owner or reputed owner of the property or his agent...at least ten days before the time of filing the lien statement with the county clerk and recorder.

Id. at 948-49 (citing Section 38-22-109(3) Colorado Revised Statutes).

The court also based its holding on legislative history that demonstrated a "clear legislative intent to require the statutory notice in order to perfect a valid lien." Id. at 949. The Colorado Court of Appeals held that "lien claimants must prove compliance with the statute upon remand in order to establish a valid lien." Id. at 949.

In this case, there is no such language in the Utah Statute. Judge Hilder found that plaintiff had a valid mechanic's lien, even though there was no proof of mailing. Defendant did not appeal that ruling. Furthermore, Section 38-1-7(3) is worded in the negative, unlike the Colorado statute:

Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

Utah Code Annotated, Section 38-1-7(3).

As discussed in Appellant's Brief, a defense under Section 38-1-7(3) must be raised by the defendant at trial or it is waived, just as any other statutory defense such as the statute of

frauds, statute of limitations or governmental immunity.

In all of the remaining cases cited by defendant from other jurisdictions the issue of notice was raised at trial and adjudicated on the merits. In Morse Bros. Contractors Inc. v. C.J.H. Construction Co., 675 P.2d 1122 (Or. App. 1984), the issue of notice under the Oregon mechanic's lien statute was raised at trial and both the trial court and appellate court held that the notice requirement had been complied with.¹

In Northlake Concrete Products, Inc. vs. Wylie, 663 P.2d 1380, 1381 (Wash. App. 1983), the defendant raised failure to give notice pursuant to the Washington mechanic's lien statute in

¹Defendant quotes the following language from that case out of context: "To entitle a lien claimant to costs and attorney's fees, compliance with the notice requirements must be pleaded and approved." (Brief of Appellee Michael Kampros, page 18.) This is simply a paraphrase of Oregon Revised Statutes 87.057(3), which states that "A plaintiff or cross-complainant seeking to foreclose a lien in a suit to foreclose shall plead and prove compliance with [the notice requirements]." Id. at 1123.

Defendant also misleads the court by only quoting part of Oregon Revised Statute, Section 87.057(3). The entire section is as follows:

A plaintiff or cross-complainant seeking to foreclose a lien in a suit to foreclose shall plead and prove compliance with [the notice requirements]. No costs, disbursements, or attorney's fees otherwise allowable as provided by ORS 87.060 shall be allowed to any party failing to comply with the provisions of this section.

Or. Rev. Stet. 87.057(3).
Corresponding language is not found in the Utah Mechanic's lien statute.

a motion for summary judgment. In Kopp's Rug Co., Inc. vs. Talbot, 620 P.2d 1167 (Kan. App. 1980), the defendant likewise raised the issue of compliance with the notice requirement under the Kansas mechanic's lien statute at trial. In that case, the court concluded that the "service of notice of the mechanic's lien sufficiently complied with" the applicable statute. Id. at 1170. Similarly, in Williams v. A.J. Bayless Markets, Inc., 476 P.2d 869 (Ariz. App. 1970), the issue of notice was raised at trial. Id. at 871. The court ruled that, although notice was given, the notice was not given "within a reasonable time" after recording the claim of lien, as required by Arizona statute. Id. at 874.

In this case, Mr. Kampros did not raise the notice issue until after the trial, arguing for the first time in his Motion for Reconsideration that it was part of plaintiff's "prima facie" case and that he had no duty to raise the issue at trial as an "avoidance or affirmative defense" to plaintiff's claim for attorney's fees. As set forth in plaintiff's Motion to Reopen for Limited Purpose, the notice requirement under Section 38-1-7(3) was complied with but because defendant did not raise the defense at trial, the issue was not adjudicated on the merits.

B. The Two Utah Cases Cited by Defendant Involve Lack of Jurisdiction.

Next, defendants rely on the Utah cases of AAA Fencing Company vs. Raintree Development, 714 P.2d 289 (Utah 1986) and

Govert Copier Painting vs. Van Leeuwen, 801 P.2d 163 (Utah App. 1990). The issue in those cases was whether the 12-month "statute of limitations" under 38-1-11 was a "statute of limitations" or "jurisdictional." In both cases, the Utah courts held it was jurisdictional.

In AAA Fencing Company vs. Raintree Development, 714 P.2d 289 (Utah 1986), the court stated:

Properly framed, the issue before us is whether an untimely action under our mechanics' lien statute affects the rights or merely the remedies of the parties. We disagree with plaintiffs that it affects merely their remedies and is therefore subject to waiver and estoppel as are procedural statutes of limitations and hold instead that it is jurisdictional and forecloses their rights...

Id. at 290-91. (Emphasis added.)

[F]ailure to enforce a mechanic's lien within the statutory period is a jurisdictional question....

Id. at 291. (Emphasis added.)

[T]he Court is without jurisdiction to entertain such an action as this when the period of its availability has expired.

Id. at 292. (Emphasis added.)

Lack of jurisdiction may be raised at any time. Rule 12(h)(2), Utah Rules of Civil Procedure; Olson v. Salt Lake City Sch. Dist., 724 P.2d 960, 964 (Utah 1986) ("[A] lack of jurisdiction can be raised at any time by either party or by the court.")

In Govert Copier Painting v. Van Leeuwen, 801 P.2d 163 (Utah App. 1990), the court cited AAA Fencing Company in also holding that the 12-month "statute of limitations" under Section 38-1-11

is jurisdictional:

In AAA Fencing Co. v. Raintree Dev. & Energy Co., 714 P.2d 289 (Utah 1986) (per curiam), the Utah Supreme Court stated: "The time for enforcing mechanic's liens set out in section 38-1-11...limits a lienor's rights to twelve months after his work is completed. At that point, both his rights and his remedies under the statute are extinguished."

Govert at 173.

The notice requirement under section 38-1-7(3) is not jurisdictional.

C. The General Rules For Determining "Prima Facie" Elements Are the Same for Both Statutory Claims and Tort Claims.

Finally, defendant argues that the general rules for determining the prime facie elements of a claim are different for statutory claims than for tort claims. (Brief of Appellee Michael Kampros, page 20-22.) This is not true. For example, in Keller v. Southwood North Medical Pavilion, 959 P.2d 102 (Utah 1998), plaintiff brought a statutory claim for unlawful detainer pursuant to Section 78-36-1 et seq. Defendant failed to raise a statute of limitations defense under Section 78-12-29(2) or a defective summons defense under Section 78-36-8. The court held both were affirmative defenses that defendant had waived by failing to raise at trial:

Under rule 12 of the Utah Rules of Civil Procedure, "[a] party waives all defenses and objections which he does not present either by motion...or, if he has made no motion, in his answer or reply." Utah R.Civ.P. 12(h). A party waives a statute of limitations

defense by failing to raise it in a responsive pleading or by motion before submitting a responsive filing. [Citation Omitted.] Likewise, a party's failure to comply with section 78-36-8's indorsement requirement is a waive able defense. [Citation Omitted.] Because Youngblood failed to raise the statute of limitations and statutory compliance defenses before he submitted a response - in this case his trial brief - he waived those defenses.

Id. at 106.

In this case, defendant failed to raise noncompliance with Section 38-1-7(3) as a defense at trial and therefore waived it.

Section 38-1-7(3) is an "avoidance or affirmative defense" to a claim for attorney's fees under Section 38-1-18, and not an element of the prima facie case. Defendant failed to raise the issue of notice either in his pleadings or at trial and has waived that defense.

II. IN THE EVENT NOTICE UNDER SECTION 38-1-7(3) IS AN ELEMENT OF A PRIMA FACIE CASE FOR ATTORNEY'S FEES UNDER SECTION 38-1-18, THIS CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING ON WHETHER NOTICE WAS GIVEN UNDER SECTION 38-1-7(3).

In the event notice under Section 38-1-7(3) is an element of a prima facie case for attorney's fees under Section 38-1-18, then plaintiff's Motion to Reopen for Limited Purposes should be granted. The case should be remanded for an evidentiary hearing on whether the notice requirement under Section 38-1-7(3) was satisfied.

Defendant's argument that plaintiff's pleadings were legally insufficient is inaccurate. Attached hereto are the following:

1. Plaintiff's Motion to Reopen Plaintiff's Case for Limited Purposes, dated August 21, 1997.²

2. Plaintiff's Memorandum in Support of Motion to Reopen Plaintiff's Case for Limited Purpose, dated August 21, 1997.³

3. Affidavit of Russell A. Cline, dated August 21, 1997.⁴

4. Reply Memorandum in Support of Motion to Reopen Plaintiff's Case for Limited Purpose, dated September 10, 1997. Those pleadings were legally sufficient to present the issue to the trial court. Although the "plaintiff" J.V. Hatch Construction did not file an affidavit, plaintiff's counsel, Russell A. Cline, did file an affidavit. Furthermore, the specific grounds for the motion under Rule 59 were fully set forth in the reply memorandum.

Certainly plaintiff was "surprised" when the trial judge reversed his earlier decision that compliance with Section 38-1-7(3) was a defense that must be raised by defendant. "Ordinary prudence" could not have guarded against the trial judge later reversing his decision. Once the trial court reversed its earlier ruling and added a new element, it was an abuse of discretion to deny plaintiff's Motion to Reopen for the Limited

²Also set forth in Addendum to Brief of Appellee Michael Kampros, at pp. 58-59.

³Also set forth in Addendum to Brief of Appellee Michael Kampros, at pp. 60-61.

⁴Also set forth in Addendum to Brief of Appellee Michael Kampros, at pp. 55-57.

Purpose of demonstrating the truth of the matter -- that the mailing requirement was complied with.

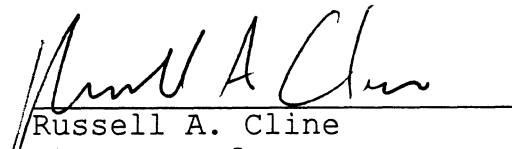
Defendant's claim that he is entitled to attorney's fees should he prevail is also inaccurate. A party is only entitled to attorney's fees on appeal if he was the successful party below. See R & R Energies vs. Mother Earth Industries, Inc., 936 P.2d 1068 (Utah 1997). Section 38-1-18 does not change the general rule. Section 38-1-18 awards attorney's fees to the successful party "in any action brought to enforce any lien under this chapter." The successful party in the action to "enforce the lien" was plaintiff, not defendant.

CONCLUSION

This court should reverse the lower court and find that a prima facie case for attorney's fees under Section 38-1-18 does not include proof of mailing. The Court should remand the case for a determination of attorneys fees for both the trial and for this appeal. In the alternative, this Court should remand for a determination as to whether Section 38-1-7(3) was complied with.

Dated this 22 day of September, 1998.


Michael W. Crippen


Russell A. Cline
Attorneys for
J.V. Hatch Construction Inc.

CERTIFICATE OF SERVICE

This is to certify that on this 22 day of September, 1998, two (2) true and correct copies of the foregoing Appellant's Reply Brief were mailed first class postage prepaid to:

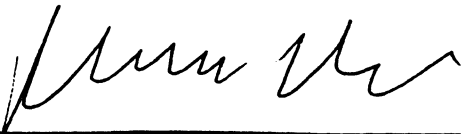
David Overholt
Richer, Swan & Overholt
6925 So. Union Park Center
Suite 450
Midvale, UT 84047

A handwritten signature in black ink, appearing to read "David Overholt", is written over a horizontal line.

APPENDICES

1. Plaintiff's Motion to Reopen Plaintiff's Case for Limited Purposes, dated August 21, 1997.
2. Plaintiff's Memorandum in Support of Motion to Reopen Plaintiff's Case for Limited Purpose, dated August 21, 1997.
3. Affidavit of Russell A. Cline, dated August 21, 1997.
4. Reply Memorandum in Support of Motion to Reopen Plaintiff's Case for Limited Purpose, dated September 10, 1997.

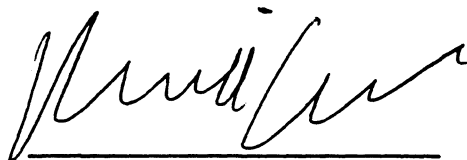
DATED this 21 day of August, 1997.



Russell A. Cline

CERTIFICATE OF SERVICE

The foregoing pleading was mailed, postage pre-paid to Randy
Ludlow, 311 South State Street, #280, Salt Lake City, UT 84111, on
this 21 day of August, 1997.



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Telefax (801) 322-1054


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

J.V. HATCH CONSTRUCTION INC.	:	MEMORANDUM IN SUPPORT OF
	:	MOTION TO REOPEN PLAINTIFF'S
Plaintiff,	:	CASE FOR LIMITED PURPOSE
	:	
vs.	:	
	:	
MICHAEL KAMPROS,	:	CIVIL NO. 950010438
	:	JUDGE: ROBERT K. HILDER
	:	
Defendant.	:	

Inasmuch as defendant has filed a Motion for Reconsideration of whether compliance with the mailing requirement is an affirmative defense, plaintiff should be allowed to reopen its case for the limited purpose of demonstrating that in fact the mailing requirement was complied with. Defendant's maneuvering is a matter of form over substance. Defendant knows that the mailing requirement was complied with. Rather than allowing defendant to

raise by innuendo the implication that mailing did not occur, Plaintiff should have the opportunity of introducing evidence that it did.

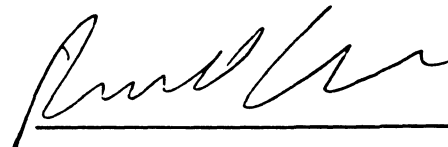
DATED this 21 day of August, 1997.



Russell A. Cline

CERTIFICATE OF SERVICE

The foregoing pleading was mailed, postage pre-paid to Randy Ludlow, 311 South State Street, #280, Salt Lake City, UT 84111, on this 21 day of August, 1997.



returned. It shows that the date of delivery was September 2, 1995 and the date of return was September 5, 1995.

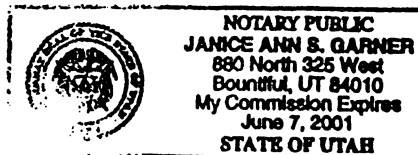
3. I understood Michael Kampros to be the "reputed owner" after his mother's death as personal representative of his mother's estate. As it turns out, he was the actual owner.

Dated this 21 day of August, 1997.



Russell A. Cline

Sworn and subscribed before me this 21st Day of August, 1997.





Notary Public

SENDER:
 Complete item 1, 2, or 3 for additional services.
 Print your name and address on the reverse of this form so that we can return this card to you.
 Attach this form to the front of the mailpiece, or on the back if space is not available.
 Write "Return Receipt Requested" on the mailpiece below the article number.
 The Return Receipt will show to whom the article was delivered and the date delivered.

2. If also wish to receive the following services (for an extra fee):
 1. ☐ Addressee's Address
 2. ☐ Restricted Delivery
 Consult postmaster for fee.

3. Article Addressed to:
 Michael Kampros, as
 personal administrator
 of the estate of Valamas
 Kampros
 9065 South Monroe Street,
 Sandy, Utah 84070

4a. Article Number
2105882894

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☒ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery
9-23

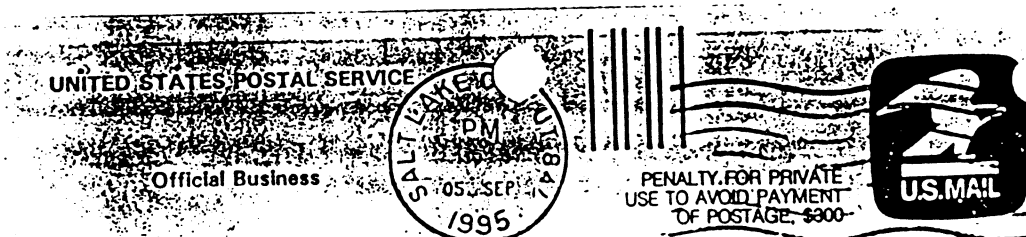
8. Addressee's Address (Only if requested and fee is paid)

Signature (Addressee)
[Signature]

Signature (Sender)
[Signature]

PS Form 3817, December 1991 U.S. GPO: 1993-55-714

DOMESTIC RETURN RECEIPT



Print your name, address and ZIP Code here

• Russell A. Cline
 CRIPPEN & CLINE

310 South Main, Suite 1200
 Salt Lake City, UT 84101

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Telefax (801) 322-1054

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

J.V. HATCH CONSTRUCTION INC.	:	PLAINTIFF'S REPLY MEMORANDUM IN
	:	SUPPORT OF MOTION TO REOPEN
Plaintiff,	:	CASE FOR LIMITED PURPOSE
	:	
vs.	:	
	:	
MICHAEL KAMPROS,	:	CIVIL NO. 950010438
	:	JUDGE: ROBERT K. HILDER
	:	
Defendant.	:	

Pursuant to Rule 59 of the Utah Rules of Civil Procedure, there are ample grounds to reopen this case for the limited purpose of demonstrating that the mailing requirement was complied with. Rule 59 of the Utah Rules of Civil Procedure provides that the Court may "take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions" for a number of reasons, including 1) "[a]ccident or surprise, which

ordinary prudence could not have guarded against," and 2) "[i]nsufficiency of the evidence to justify the verdict or other decision:"

The court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

...
(3) Accident or surprise, which ordinary prudence could not have guarded against.

...
(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

In this case, plaintiff has treated this issue as an affirmative defense and if this Court reconsiders and reverses its prior ruling, there is sufficient "accident or surprise" to justify plaintiff's introduction of evidence demonstrating compliance with the mailing requirement. Similarly, to the extent that this court reconsiders and reverses its prior ruling, there is "insufficiency of the evidence" as to whether the mailing requirement was actually complied with.

In a similar case, In Re Logan River, 780 P.2d 1241 (Utah 1989), the Court reopened the case to admit into evidence exhibits that were attached to post-trial memorandum. The Court stated as follows:

In an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. The basis for a motion made for the purpose of so amending a judgment are delineated in the rule, those pertinent to this proceeding being accident, surprise, newly discovered evidence, or insufficiency of the evidence to justify the decision... [I]t lies within the sound discretion of the court to reopen the case.

Id. at 1245.

Similarly, in this case, plaintiff has attached a copy of the return receipt demonstrating compliance with the mailing requirements as an exhibit to a post-trial memorandum for consideration by the Court. This should be introduced into evidence.

Defendant's assertion that "a case may not be reopened for presentation of evidence which was in a parties control at the time of trial" is absolutely false. The case cited by defendant, Powers v. Gene's Building Materials, 567 P.2d 174 (Utah 1977), involves a motion for a new jury trial, not a motion to reopen a bench trial to take limited additional testimony. In Powers, after a jury rendered a verdict against defendants, defendants moved for a new jury trial on the basis of newly discovered evidence. The Court denied that motion on the grounds that the "new evidence" was "subject to discovery and could have been obtained by the exercise

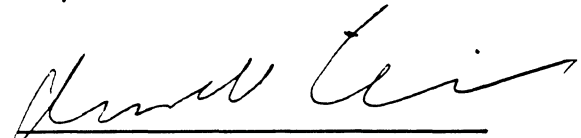
of ordinary diligence."

This case does not involve a motion for a new jury trial, but a motion to open a bench trial for the limited purpose of demonstrating that the mailing requirement was complied with. As stated in Logan River, "In an action tried without a jury, the Court may open the judgment if one has been entered, to take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions... and it lies within the sound discretion of the court to reopen the case."

Mr. Kampros seeks reconsideration of a ruling based on the assertion that the mailing rule was not complied with, but asks the Court to deny a motion to introduce evidence to demonstrate the truth of the matter. Mr. Kampros cannot have it both ways. If this Court reconsiders the issue of whether the compliance with the mailing requirement is an affirmative defense, then the Court should also allow evidence demonstrating that the mailing requirement was complied with.

For the foregoing reasons, plaintiff's Motion to Reopen for Limited Purpose should be granted.

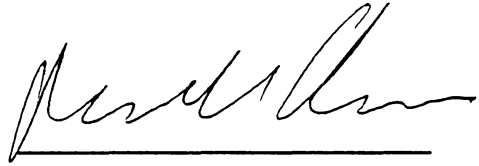
DATED this 10 day of September, 1997.



Russell A. Cline

CERTIFICATE OF SERVICE

The foregoing pleading was mailed, postage pre-paid to Randy Ludlow, 336 South 300 East, Suite 200, Salt Lake City, UT 84111, on this 10 day of September, 1997.

A handwritten signature in cursive script, appearing to read "Randy Ludlow", is written above a solid horizontal line.