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Mountain States Telephone and Telegraph Company dba Mountain Bell v. Gary L. Bentley, an individual and dba Bentley International; S.F. Trunzo Auctioneers, INC., a Utah Corporation and The Old Republic Insurance Company, a Corporation : Brief of Respondent

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, dba MOUNTAIN BELL,	:	
Plaintiff and Respondent,	:	Case No. 890232-CA
vs.	:	Argument Priority No. 14b
GARY L. BENTLEY, an individual and dba BENTLEY INTERNATIONAL; S.F. TRUNZO AUCTIONEERS, INC., a Utah corporation,	:	
Defendants,	:	
and THE OLD REPUBLIC INSURANCE COMPANY, a corporation,	:	
Defendant and Appellant.	:	

BRIEF OF RESPONDENT THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

Appeal from the Summary Judgment of the Third Judicial District Court in and For Salt Lake County, State of Utah, The Honorable David S. Young, District Court Judge, presiding.

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS BELOW

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(h) and the order of the Utah Supreme Court transferring this case to the Court of Appeals.

This is an appeal from a judgment based on an order granting Respondent's Motion for Summary Judgment against Appellant.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was Respondent entitled to summary judgment based upon the record before the Court at the time it submitted its motion for summary judgment for decision? In particular, did that record establish that there was no genuine issue of material fact regarding the agency of Defendant Gary L. Bentley to act for Defendant S.F. Trunzo Auctioneers, Inc. at the time of an auction sale of Respondent's personal property?

2. Did Appellant properly oppose Respondent's motion for summary judgment so as to create a genuine issue of material fact?

a. Was Appellant entitled to rely on its denials of Respondent's requests for admission to create a fact issue?

b. Were Appellant's second memorandum in opposition to the motion for summary judgment, and the affidavits that accompanied it, filed timely so as to become part of the record on which the motion for summary judgment could be decided?

c. Was the out-of-court statement by Frank Trunzo (that Bentley was solely responsible for the auction), reported in the affidavit of Harold L. Petersen, an admission by a party-

opponent within the meaning of Rule 801(d)(2), Utah Rules of Evidence, and hence admissible evidence?

3. Did the District Court abuse its discretion in denying Appellant's attorney's oral request, unsupported by any affidavit, to apply Rule 56(f), Utah Rules of Civil Procedure, to deny Respondent's motion for summary judgment?

DETERMINATIVE RULES

Rule 36, Utah Rules of Civil Procedure: See Addendum A.

Rule 56, Utah Rules of Civil Procedure: See Addendum B.

Rule 801(d)(2), Utah Rules of Evidence:

> **Statements which are not hearsay.** A statement is not hearsay if:
>
> . . . .
>
> (2) **Admission by party-opponent.** The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 4-501(2), Utah Code of Judicial Administration:

> The responding party shall file and serve upon all parties within ten (10) days after service of a motion, but no later than five (5) days before the date of hearing, a statement [sic] answering points and authorities and counter-affidavits.

STATEMENT OF THE CASE

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

Respondent The Mountain States Telephone and Telegraph Company ("Mountain Bell")[1] filed this action on January 28, 1988, to recover the net proceeds ($47,705.64) of an auction of its vehicles and equipment conducted by Defendants Gary L. Bentley ("Bentley") and/or S.F. Trunzo Auctioneers, Inc. ("the Trunzo Company")[2] pursuant to a written contract between Mountain Bell and the Trunzo Company (R. 2-28). It also sought to recover against Appellant Old Republic Insurance Company ("Old Republic") as surety on an auctioneer's license bond issued in favor of Mountain Bell as obligee, with the Trunzo Company as principal, in the penal amount of $45,000.00 (R. 2-28).

Although all defendants were served with process (R. 29-41, 43-45), only Old Republic filed an answer (R. 61-67); accordingly, default judgments were entered against Bentley (R. 46-47) and the Trunzo Company (R. 55-56).

Discovery consisted principally of a set of interrogatories

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[1] At all times material to this action, Appellant did business under the assumed name "Mountain Bell." In August, 1988, the assumed name was changed to "U S WEST Communications." However, for purposes of this case, the former name "Mountain Bell" will be used to maintain consistency with the use of that name in the record.

[2] To distinguish between Defendant S.F. Trunzo Auctioneers, Inc., a Utah corporation, and its president, Frank Trunzo, in this brief, the corporation will be referred to as "the Trunzo Company," and the president will be referred to as "Frank Trunzo." References in the record to "Trunzo" may mean either the Trunzo Company or Frank Trunzo, depending on the context.

and request for production of documents served by Old Republic on Mountain Bell on or about July 7, 1988 (R. 74-77), and a set of requests for admission, interrogatories, and request for production of documents served by Mountain Bell on each of the defendants on or about July 15, 1988 (R. 88-90, 117-46, 212-36, 237-61). Although Mountain Bell responded to Old Republic's discovery request (R. 94), no defendant responded to Mountain Bell's request.

On November 18, 1988, Mountain Bell filed a motion for summary judgment against Old Republic, based in part on the failure to respond to the requests for admission (R. 102-16). The motion was also supported by the affidavits of Walter Williams (R. 149-84) and Josephine Briggs (R. 95-101). In response to the motion, on November 29, 1988, Old Republic served its responses to Mountain Bell's request for admissions (R. 185-86), and filed a motion to withdraw or amend the admissions (R. 193-95, 187-92) and a memorandum in opposition to Mountain Bell's motion for summary judgment (R. 196-99), but failed to file any opposing affidavit.

Although Mountain Bell filed a memorandum in opposition to Old Republic's motion to withdraw admissions (R. 203-61) and a motion to strike the responses to Mountain Bell's requests (R. 201-02) on December 5, 1988,[3] the district court, sua sponte, had already entered a minute entry on the same date granting Old

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[3] Mountain Bell also filed a reply memorandum (R. 272-88) and a request to submit its motion for summary judgment for decision (R. 267-69), along with a supplemental affidavit of Walter Williams (R. 262-66), on the same date.

Republic's motion to withdraw the admissions and permitting Mountain Bell to "re-notice" its summary judgment motion following the amendment of the response to Mountain Bell's admissions (R. 200, 289, 290, 293-94).

On December 12, 1988, Mountain Bell filed a renewed request to submit its motion for summary judgment for decision (R. 291-92). On December 27, 1988, Old Republic filed a second memorandum in opposition to that motion (R. 299-319), together with the affidavits of Myrel G. Mitchell (R. 314-16) and Harold L. Petersen (R. 317-19, 323-26).[4] Mountain Bell filed a motion to strike the memorandum and affidavits on December 28, 1988 (R. 327-29).

Mountain Bell's motion for summary judgment was argued January 23, 1989. At the hearing, Old Republic's counsel orally requested the court to deny Mountain Bell's motion for summary judgment on the ground that it had been unable to locate Frank Trunzo, the president of the Trunzo Company (Tr. 17), but did not then or thereafter submit any affidavit to establish that fact. Following the oral argument, the court granted Mountain Bell's motion for summary judgment from the bench (R. 341, Tr. 18). Judgment was entered accordingly on February 6, 1989 (R. 347-48). Old Republic filed its notice of appeal on March 6, 1989 (R. 351-52).

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[4] The affidavit of Harold Petersen is attached as Addendum D.

B. STATEMENT OF FACTS

The procedural facts that are important to this appeal are set forth in the preceding section. Since the principal issues in this appeal revolve around what evidence was properly part of the record on which Mountain Bell's motion for summary judgment was based, this section will distinguish between the facts that it contends were properly established, and the additional facts that Old Republic has asserted but which Mountain Bell contends should not have been considered by the trial court.

At the time Mountain Bell resubmitted its motion for summary judgment for decision (the time for submission of opposing memoranda and affidavits having expired), the affidavits then on file[5] established the following pertinent facts:[6]

1. Mountain Bell had used the auctioneer services of the Trunzo Company, pursuant to a written contract, exclusively since 1982, including at least 10 auctions involving over $400,000.00 worth of equipment (Williams Aff. ¶¶ 3, R. 150, 155-70; Williams Supp. Aff. ¶ 6, R. 264). In all of the auctions since September,

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[5] Those affidavits consist of the original and supplemental affidavits of Walter Williams (R. 149-84, 262-66) and the affidavit of Josephine Briggs (R. 95-101), but do not include the affidavits of Harold Peterson (R. 323-26) and Myrel Mitchell (R. 314-16), which were filed at least fifteen days after Mountain Bell re-noticed its motion for decision (R. 291-92).

[6] Since the only substantive issue addressed by Old Republic in this appeal is the agency of Bentley to act for the Trunzo Company in the October 10, 1987 auction, only those facts that relate directly to that issue will be set forth in the text. Old Republic has apparently conceded that if Bentley is held to be the agent of the Trunzo Company, it is liable on the auctioneer's license bond that it, as surety, issued in favor of Mountain Bell, as obligee, with the Trunzo Company as principal.

1984, Bentley acted as the representative of the Trunzo Company (Williams Aff. ¶ 9, R. 151; Williams Supp. Aff. ¶¶ 4-6, R. 263-64). Mountain Bell's representative made all arrangements for the auctions through Bentley, and Bentley personally assisted in picking up the items to be auctioned and in conducting the auctions (Williams Supp. Aff. ¶ 4, R. 263). He also directed other employees of the Trunzo Company in connection with those auctions, executed receipts on behalf of the Trunzo Company, arranged for advertisements and other publicity for the auctions, and arranged for the accounting and record keeping with respect to the last two auctions (Williams Supp. Aff. ¶ 4, R. 263).

2. Not only did Bentley tell Mountain Bell's representative that he was the vice-president of the Trunzo Company[7] (Williams Supp. Aff. ¶ 5, R. 263), but Frank Trunzo, the president of the Trunzo Company, made like representations (Williams Supp. Aff. ¶ 7, R. 264). Furthermore, although Frank Trunzo met with the Mountain Bell representative on numerous occasions during the period from 1984 through 1987, he never indicated that Bentley was not authorized to arrange auctions for the Trunzo Company, although he obviously knew that Bentley was doing so (Williams Supp. Aff. ¶ 7, R. 264-65).

3. Bentley executed a license bond on behalf of the Trunzo Company, as principal, in favor of Mountain Bell, as obligee, which was countersigned by Old Republic's authorized agent, Myrel

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[7] Affidavits from other actions pending in the Third District Court confirmed that Bentley held himself out as a vice president of the Trunzo Company (R. 280-88).

G. Mitchell (Williams Aff. ¶ 8, R. 151, 181-82).

4. With respect to the auction in question, which was held on October 10, 1987, Mountain Bell's representative contacted Bentley, representing the Trunzo Company, and requested him to pick up the items to be auctioned, which he did (Williams Aff. ¶¶ 10, 11, R. 151). Not only did Bentley participate in conducting the auction, but Frank Trunzo did so as well (Williams Aff. ¶¶ 13-14, R. 152). The auction was held at the auction yard of the Trunzo Company, at which a sign appeared reading "S.F. Trunzo Auctioneers, Inc." (Williams Aff. ¶ 13, R. 152).

5. Both Bentley and Frank Trunzo assured Mountain Bell's representative that the Trunzo Company would conduct the auction, and that no sale or disposition of the Trunzo Company's assets would occur until after the auction (Williams Aff. ¶ 12, R. 151-52).

6. The unanswered requests for admission served on Bentley (R. 237-61) and the Trunzo Company (R. 212-236) establish conclusively, as to those parties, that Bentley was an officer and agent of the Trunzo Company, acting within the scope of his authority, when he conducted the auction of Mountain Bell vehicles and equipment on October 10, 1987 (R. 219-20, 244-45).

With respect to Bentley's agency, the late-filed memorandum, attachment,[8] and affidavits submitted by Old Republic, if

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[8] Attached to the memorandum was a copy of a purported contract of sale of some of the Trunzo Company's assets to Bentley. Old Republic did not provide any affidavit to authenticate the document, even after Mountain Bell moved to strike it for lack of authentication under Rule 901, Utah R. Evid.

considered, would tend to establish only the following:

A. The Trunzo Company, Frank Trunzo, and Bentley entered an agreement dated July 8, 1987, for the sale of some, but not all, of the Trunzo Company's assets (R. 299, 303-13). Those assets did not include the Trunzo Company's rights under the contract with Mountain Bell[9] (R. 303-04). There is no evidence that the sale was ever completed, nor that any attempt was made to obtain Mountain Bell's consent to assign the auction contract to Bentley.

B. Frank Trunzo told Harold Peterson, Old Republic's first attorney of record in this case, that "following the sale of the S.F. Trunzo Auctioneers, Inc. assets to Bentley, Bentley was not authorized to act as an agent for S.F. Trunzo Auctioneers."[10] (Peterson Aff. ¶ 5, R. 324). There is no indication whether Frank Trunzo told Mr. Peterson when or whether the sale was ever completed.

C. Frank Trunzo also told Harold Peterson that Trunzo had informed Mountain Bell's representative, Walter Williams, that "Mr. Trunzo was selling his business to Gary Bentley and further that Bentley was solely responsible for the October 10, 1987, auction where Mountain Bell's equipment was allegedly auctioned."

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[9] Only "assignable" auction contracts were to be purchased by Bentley (R. 303). Mountain Bell's contract with the Trunzo Company specifically prohibited assignment without the prior written consent of Mountain Bell (R. 163). There is no evidence that the Trunzo Company sought to assign the Mountain Bell contract to Bentley, much less that Mountain Bell consented to such an assignment.

[10] The agreement provided for the sale to be completed on July 8, 1988, some nine months after the auction of October 10, 1987 (R. 304-05).

(Peterson Aff. ¶ 6, R. 324). Again, there is no indication that Frank Trunzo told Mr. Peterson when or if the sale was completed, nor does the statement indicate whether Frank Trunzo made the alleged statement to Mountain Bell's agent before or after the auction.

SUMMARY OF THE ARGUMENTS

1. The record properly before the court established Mountain Bell's right to summary judgment. The Rule 36 constructive admissions of the Trunzo Company and Bentley conclusively established that Bentley was the Trunzo Company's agent, acting within the scope of his authority, when he conducted the auction in question. Williams' affidavits also establish both actual and apparent agency, by showing a long course of dealing with Bentley as the Trunzo Company's agent, representations by both the Trunzo Company and Bentley that he was an agent, and that Frank Trunzo, the Trunzo Company's president, participated with Bentley in the auction in question, which was conducted on the premises of the Trunzo Company.

2. Old Republic's opposition to the motion for summary judgment was insufficient to create a genuine issue of material fact. Reliance on denials of requests for admission is insufficient to oppose a motion for summary judgment. The affidavits filed by Old Republic were not timely, and no excuse was offered for their tardiness, nor was leave sought to permit them to be filed late or to be considered. Even if considered,

the affidavit of Harold Peterson does not raise a question of fact, because the out-of-court statement of Frank Trunzo, reported in the affidavit, is inadmissible hearsay. It does not constitute an admission by a party-opponent because it was not offered against the declarant.

3. The trial court did not abuse its discretion by rejecting Old Republic's verbal request to deny summary judgment on the basis of Rule 56(f), where no affidavit was filed stating the reasons why Old Republic could not procure counter-affidavits, and where Old Republic was not pursuing further discovery in the case.

ARGUMENT

I. MOUNTAIN BELL PROPERLY ESTABLISHED THE AGENCY OF BENTLEY TO ACT FOR THE TRUNZO COMPANY.

Under agency law, an agent can make its principal responsible for the agent's actions if the agent is acting pursuant to either actual or apparent authority. See generally Restatement (Second) of Agency §§ 26, 27 (1958). Actual authority may be express or implied. Id. at § 7, comment c. The admissible evidence properly before the court at the time Mountain Bell re-noticed its motion for summary judgment for decision established that Bentley had both actual and apparent authority from the Trunzo Company to conduct the auction of October 10, 1987.

A. Bentley had actual authority.

The evidence of Bentley's actual authority consisted of the following: (1) the unanswered requests for admission to Bentley

and the Trunzo Company,[11] and (2) the original and supplemental affidavits of Walter Williams, Mountain Bell's representative[12] (R. 212-36, 237-61, 149-84, 262-66). The requests for admission establish conclusively, as to Bentley and the Trunzo Company, that Bentley had actual agency to bind the Trunzo Company. The Williams affidavits establish that a long course of dealing existed between Mountain Bell and the Trunzo Company, with Bentley consistently acting as the Trunzo Company's agent; that Frank Trunzo, the undisputed president of the Trunzo Company, represented to Mountain Bell's agent that Bentley was authorized to conduct auctions on behalf of the Trunzo Company; and that Frank Trunzo also participated with Bentley in conducting the October 10, 1987 auction, which was held at the Trunzo Company's auction yard, where a sign identifying the Trunzo Company was prominently displayed.

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[11] The requests that are pertinent to the agency issue are as follows:

"13. Admit that Gary L. Bentley was authorized by Trunzo [the Trunzo Company] to sign the license bond on behalf of Trunzo.

14. Admit that Bentley signed the license bond on behalf of Trunzo.

. . . .

18. Admit that in conducting an auction of Mountain Bell vehicles and equipment on or about October 10, 1987, Bentley acted as an agent of Trunzo.

19. Admit that in conducting an auction of Mountain Bell vehicles and equipment on or about October 10, 1987, Bentley acted within the scope of his authority as an agent of Trunzo.

20. Admit that during the discovery period, Bentley was an officer of Trunzo.

21. Admit that during the time Bentley was an officer of Trunzo, he had authority to conduct auctions on behalf of Trunzo." (R. 219-20, 244-45).

[12] The affidavits of Walter Williams are attached hereto as Addendum C.

The unanswered requests for admission propounded to the Trunzo Company and to Bentley created a judicial admission by those parties that Bentley was acting as the Trunzo Company's agent at the time of the auction.[13] "This has the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of fact." D. McCormick, Law of Evidence § 262 (1972). A judicial admission is distinct from an evidential admission. "The judicial admission, unless it should be allowed by the court to be withdrawn, is conclusive, whereas the evidential admission is not conclusive . . . ." Id. Rule 36(b) provides that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." While Rule 36 admissions are only binding against the parties to whom they were directed, e.g., Riberglass v. Techni-Glass Industries, Inc., 811 F.2d 565, 566 (11th Cir. 1987); In re Leonetti, 28 B.R. 1003, 1009 (E.D. Pa. 1983), and hence are not conclusively binding on Old Republic, they do prevent the Trunzo Company and Bentley from contradicting the matters admitted. Furthermore, Rule 36 admissions may be used to support a motion

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[13] Rule 36(a) permits requests for admission to be served "upon any other party." A defaulted party is nonetheless a party. See Rule 55(a), Utah R. Civ. Proc. Therefore, Mountain Bell was entitled to serve requests for admission upon the Trunzo Company and Bentley, even though default had been entered against them. Rule 36(a) also provides:

> The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . .

Therefore, the unanswered requests to the Trunzo Company and Bentley were deemed admitted.

for summary judgment. See Rule 56(c), Utah R. Civ. Proc.; Schmitt v. Billings, 600 P.2d 516 (Utah 1979). Therefore, as far as the Trunzo Company and Bentley were concerned, it is conclusively established that agency existed. Since those parties constitute both the principal and the agent, their admissions constitute powerful evidence of the agency, even as to Old Republic.

Additional evidence also establishes that Bentley had actual authority from the Trunzo Company. The Utah Supreme Court has stated:

> "The actual authority of an agent may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question . . . . Whenever the performance of certain business is confided to an agent, such authority carries with it, by implication, authority to do collateral acts which are the natural and ordinary incidents of the main act or business authorized."

Bowen v. Olsen, 576 P.2d 862, 864 (Utah 1978). In the present case, Walter Williams' affidavits establish that the Trunzo Company had entrusted Bentley with authority to conduct and perform all auctions of Mountain Bell property for over three years. The Trunzo Company does not dispute that Bentley was an authorized agent for previous auctions, and the affidavit of Walter Williams, together with the admissions of the Trunzo Company, establish that actual authority existed for the auction in question.

B. Bentley had apparent authority.

The evidence before the court also established that Bentley had apparent authority. Apparent authority is shown by the conduct of the principal approving or ratifying the acts of the

agent. See Zion's First National Bank v. Clark Clinic Corp., 762 P.2d 1090, 1095 (Utah 1988). Frank Trunzo, as president of the Trunzo Company, created such an appearance of things that Mountain Bell could reasonably believe that Bentley had apparent authority to act for and on behalf of the Trunzo Company. Frank Trunzo knew that Bentley was conducting the auctions and allowed him to do so. His participation with Bentley in selling Mountain Bell's vehicles in the October 10, 1987 auction makes it reasonable to conclude that Bentley had proper authority. Furthermore, Frank Trunzo specifically told Mountain Bell's representative that the October 10, 1987 auction would be conducted by the Trunzo Company (R. 152). Thus the present case is distinguishable from the case cited by Old Republic. In City Electric v. Dean Evans Chrysler-Plymouth, 672 P.2d 89 (Utah 1983), the principal had absolutely no knowledge that his employees were charging personal supplies to the company's open account; hence there was no basis for finding apparent authority.

The case of Bradshaw v. McBride, 649 P.2d 74 (Utah 1982), cited by Old Republic, which provides that one who deals with an agent has the responsibility to ascertain the agent's authority, is also inapplicable. The lengthy course of dealings between Mountain Bell and Trunzo is adequate proof that Mountain Bell had ascertained the question of Bentley's authority. A course of dealing which recognizes a person's agency is evidence of the agency relationship. See e.g., O'Day v. George Arakelian Farms, Inc., 540 P.2d 197, 199 (Ariz. App. 1975); Liberty Mutual Ins. Co.

v. Enjay Chemical Co., 316 A.2d 219, 222 (Del. 1974); Fox v. Morse, 96 N.W.2d 637, 640 (Minn. 1959).

Once apparent authority has been established, it continues as to a third party until the third party is put on notice that the agent's authority has been terminated.[14] As stated in Restatement (Second) of Agency, § 129:

> Unless otherwise agreed, if the agent properly begins to deal with a third person and the principal has notice of this, the apparent authority to conduct the transaction is not terminated by the termination of the agent's authority by a cause other than incapacity or impossibility, unless the third person has notice of it.

See also, Sorenson v. Shupe Bros. Co., 517 S.W.2d 861, 866 (Tex. Civ. App. 1974) (holding the acts of the apparent agent binding on the principal as against a third party who had no notice of the termination of agency as a result of the sale of the business). None of the evidence in the record of this case at the time the motion for summary judgment was re-noticed indicated that Mountain Bell had notice of the termination of Bentley's agency. Indeed, the Williams affidavit confirmed the agency, where Williams testified that Frank Trunzo told him that the Trunzo Company would conduct the October 10, 1987 auction and that no sale of assets would take place until after that auction (R. 151-52). Under those circumstances, Williams' knowledge that a sale of assets was contemplated cannot imply notice of termination of the agency.

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[14] The case quoted by Old Republic actually strengthens this position. In Walker Bank and Trust Company v. Jones, 672 P.2d 73 (Utah 1983), the court upheld summary judgment in favor of the bank, even though the defendant put the bank on notice that her husband was no longer authorized to use her credit card.

Finally, Old Republic argues that the question of apparent authority is not appropriate for summary judgment. The cases cited by Old Republic to support its contention are not applicable, because a factual issue had been properly raised in those cases. While Bailey v. Ness, 708 P.2d 900, 903 (Idaho 1985) correctly states that apparent authority is generally a question for the trier of fact "where the existence of agency is disputed" (emphasis added), another case cited by Old Republic illustrates that summary judgment on the issue of apparent authority is appropriate where the opposing party does not properly raise a genuine issue of material fact. Walker Bank & Trust Co. v. Jones, 672 P.2d at 73.

The record properly before the court conclusively establishes that Bentley had actual and apparent authority to act on behalf of the Trunzo Company. Mountain Bell was never given notice that Bentley might not have such authority on October 10, 1987. In fact, Williams was impliedly assured by Bentley and Trunzo that Bentley's authority would continue through the auction of the Mountain Bell equipment. Mountain Bell adequately established its right to summary judgment on the state of the record at the time it submitted its motion for decision.

II. OLD REPUBLIC FAILED TO CREATE A GENUINE ISSUE OF MATERIAL FACT ON THE QUESTION OF BENTLEY'S AGENCY.

A. Old Republic was not entitled to rely solely on its denial of Mountain Bell's request for admissions to defeat the motion for summary judgment.

Rule 56(e), Utah Rules of Civil Procedure, provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(emphasis added) At the time Mountain Bell submitted its motion for summary judgment for decision, Old Republic had filed no opposing affidavits, but relied solely on its denial of Mountain Bell's requests for admission relating to Bentley's agency.[15] However, the rule does not specify denials of requests for admission in its enumeration of items the court may consider on a motion for summary judgment. Rule 56(c) lists "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" as the materials the court is to consider in reviewing a motion for summary judgment. Rule 56(e) further provides that "[t]he court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Nowhere does the rule permit a party to rely solely on denials of requests for admission. Cf. Thornock v. Cook, 604 P.2d 934, 936 (Utah 1979)

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[15] Old Republic never filed its response to Mountain Bell's Request for Admissions, so it is not part of the record on appeal.

(opponent may not rely on denials of pleadings to avoid summary judgment.) Therefore, Old Republic's first memorandum in opposition to Mountain Bell's motion for summary judgment did not properly oppose the motion.

Old Republic also failed to file any counter-affidavit prior to the time that Mountain Bell originally submitted the motion for decision, nor did it do so prior to the time that Mountain Bell re-noticed its motion for decision. The Utah Supreme Court has frequently upheld summary judgment in similar cases where a party opposing the motion fails to file timely, proper affidavits. For example, in Brigham Truck & Implement Co. v. Fridal, 746 P.2d 1171 (Utah 1987), the court affirmed a summary judgment for a deficiency after sale of repossessed property, where the plaintiff submitted an affidavit describing the manner of sale, and the defendant filed no counter-affidavit to show that the sale was commercially unreasonable. After observing that it "was incumbent upon defendant to adduce whatever material defenses he had to the entry of a deficiency judgment as a matter of law," the court concluded: "However, bare contentions, unsupported by any specifications of facts in support thereof, raise no material questions of fact. Massey v. Utah Power & Light, 609 P.2d 937 (Utah 1980)." 746 P.2d at 1173.

In Franklin Financial v. New Empire Development Company, 659 P.2d 1040 (Utah 1983), the court affirmed a summary judgment in favor of a seller on a real estate contract, holding lienholders' interests to be subordinate. In that case, the seller filed

affidavits setting forth the terms of the contract, the circumstances of default, and the relative priorities of the lienholders, but the defendants filed no opposing affidavits. After rejecting the defendants' claims that the plaintiff's affidavits were defective, the court stated:

> The opponent of the motion, once a prima facie case for summary judgment has been made, must file responsive affidavits raising factual issues, or risk the trial court's conclusion that there are no factual issues. . . Thus, when a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue. Without such a showing, the Court need only decide whether, on the basis of the applicable law, the moving party is entitled to judgment.

659 P.2d at 1044. See also, Cowen and Company v. Atlas Stock Transfer Company, 695 P.2d 109, 113-14 (Utah 1984).

In Transamerica Title Insurance Company v. United Resources, Inc., 24 Utah 2d 346, 471 P.2d 165 (1970), the court affirmed a summary judgment granting full faith and credit to an Arizona judgment, rejecting defendant's argument that the assertion of lack of jurisdiction in its answer was sufficient to raise a question of fact precluding summary judgment. The court also noted that the defendant had not provided any factual information in response to the plaintiff's specific interrogatory asking for the basis of defendant's contention of no jurisdiction. In the present case, Mountain Bell submitted interrogatories to Old Republic which requested Old Republic to state the basis for any denials of Mountain Bell's requests for admission (Interrog. #1), and to state the basis for its denial of paragraph 8 of the

Complaint, which alleged that Bentley was the Trunzo Company's agent in conducting the auction (Interrog. # 16) (R. 126, 129). Additionally, Mountain Bell's interrogatories 17 and 18 specifically queried as follows:

> 17. Do you claim that Bentley was not the authorized agent for Trunzo with respect to any of the facts alleged in plaintiff's Complaint? If so, state the basis for such a claim.
>
> 18. Do you claim that Bentley, although an authorized agent for Trunzo, did not act within the scope of his authority with respect to any of the facts alleged in plaintiff's Complaint? If so, state the basis for such a claim.

Not only did Old Republic not object to these interrogatories, as did the defendant in Transamerica, but it filed no response whatsoever. Under these circumstances, the court may and should properly conclude that there was no evidential support for Old Republic's claim of lack of agency at the time Mountain Bell submitted the motion for decision.

B. Old Republic's second memorandum and affidavits in response to Mountain Bell's motion for summary judgment were untimely.

Rule 4.501(2) of the Code of Judicial Administration states, "[t]he responding party shall file and serve upon all parties within ten (10) days after service of a motion, but no later than five (5) days before the date of hearing, a statement answering points and authorities and counter-affidavits."[16] Old Republic did not file any affidavits in opposition to Mountain Bell's

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[16] Rule 4-501(2) of the Code of Judicial Administration superseded Rule 2.8(b) of the Rules of Practice on October 30, 1988. Although Mountain Bell cited to Rule 2.8(b) in its motion to strike, the substance of both rules is identical.

motion for summary judgment until forty days after the motion was filed.[17] Old Republic could not justify its delay in filing its affidavits, because all of the events reported in the affidavits occurred long before Mountain Bell filed its motion for summary judgment, and no explanation was given for the delay in procuring the affidavits. Old Republic did not move for leave to submit untimely affidavits, and Mountain Bell promptly moved to strike them.

In Marcus Daly Memorial Hospital Corporation v. Borkoski, 624 P.2d 997 (Mont. 1981), the court affirmed a summary judgment, rejecting the opponent's argument that the trial court erred in refusing to accept and consider his untimely affidavits and brief filed in opposition to the summary judgment motion. The court stated:

> The purchaser offered no compelling excuse for his untimely filing. When this untimely filing is considered with all the unwarranted delays already caused by the purchaser, it is clear that the trial court properly exercised its discretion in refusing to consider the affidavit.

Id. at 1000. In the present case, Old Republic has not offered

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[17] Mountain Bell's Motion for Summary Judgment was filed on November 17, 1988. Old Republic filed its first memorandum opposing the motion, without any affidavits, on November 29, 1988. Mountain Bell's Renewed Request to Submit Motion for Summary Judgment for Decision, filed on or about December 12, 1988, does not constitute the filing of a new motion for summary judgment, but rather a request to submit the original motion for summary judgment for decision. Even it were considered a new motion for summary judgment, Old Republic still failed to file its second memorandum in opposition within the 10 day period, but waited until December 27, 1988, which was the first date on which it filed opposing affidavits, some 40 days after the motion for summary judgment was filed and 15 days after Mountain Bell re-noticed the motion.

any excuse, much less a compelling one, for its untimely filing. Under these circumstances, the trial court was well within its discretion to refuse Old Republic's untimely affidavits.[18]

Old Republic cites Merrill v. Cache Valley Dairy Association, 750 P.2d 539, 540 (Utah 1988), which states that on appeal the court can only "sustain judgment if no issues of material fact which could affect the outcome can be discerned." Old Republic neglects to point out that on appeal the court can only consider the record that was properly before the trial court. In Pinckley v. Dr. Francisco Gallegos, M.D., P.A., 740 S.W.2d 529, 532 (Tex.App. 1987), the court held that because the record did not affirmatively show acceptance of late filed affidavits by the trial court, it must presume non-acceptance. The court also stated:

> It is not an abuse of discretion for the trial court to refuse to consider appellant's opposing affidavits which were not timely filed. . . . Because the appellant's controverting affidavits were not before the court, appellant cannot thereby raise fact issues on appeal to defeat the summary judgment.

Id. at 532. Since Old Republic's affidavits were not timely filed, this court must presume that the trial court properly rejected them.[19]

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[18] Old Republic has not even claimed on appeal that the trial court erred in not accepting its tardy affidavits, but rather assumes without discussion that the affidavits were properly before the court.

[19] "If, on a motion for summary judgment, an opposing party fails to move to strike defective affidavits, he is deemed to have waived his opposition to whatever evidentiary defects may exist." Franklin Financial v. New Empire Development Company, 659 P.2d 1040, 1044 (Utah 1983). Mountain Bell did not waive its

C. Even if considered, the affidavit of Harold Petersen does not create a genuine issue of material fact on the question of Bentley's agency.

Old Republic argues that the statements of Frank Trunzo, reported in the affidavit of Harold Petersen, to the effect that Bentley was not an authorized agent of the Trunzo Company at the time of the auction, should be construed as admissions by a party-opponent, under Rule 801(d)(2) of the Utah Rules of Evidence. Old Republic's reliance on that rule is misplaced.

Rule 801(d)(2) provides that a statement is not hearsay if it is "offered against a party and is (A) his own statement, in either his individual or a representative capacity . . . ." (emphasis added). The fundamental requirement of this rule is that the statement must be offered against the declarant's interest. "It is only when the admission is offered against the party who made it that it comes within the exception to the hearsay rule for admissions of a party opponent." C. Wright & A. Miller, 8 Federal Practice & Procedure § 2264, at 741 (1970). The statement of Frank Trunzo tends to exonerate both the Trunzo Company and Old Republic from any liability. It is conspicuously self-serving and does not constitute an admission by a party-opponent, because it was offered against Mountain Bell, not against the declarant.

The cases cited by Old Republic affirm the adverse interest

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opposition to Old Republic's affidavits, because it immediately filed a motion to strike them as untimely and not containing admissible evidence. Old Republic, on the other hand, waived any objections it may have had to Mountain Bell's affidavits, because it neither moved to strike nor filed an objection to them.

requirement of an admission by a party-opponent. In Kekua v. Kaiser Foundation Hospital, 601 P.2d 364, 370 (Hawaii 1979), the court distinguishes a party admission from a statement against interest. "[P]arty admissions, unlike statements against interests, need not have been against the declarant's interest when made . . . ." Id. (emphasis added) Although a party admission need not be against the party when uttered, the rule explicitly requires that it must ultimately be offered against his interest before it can be introduced as evidence.

Old Republic's quotation regarding out-of-court statements is also a distortion. In Jolley v. Clay, 646 P.2d 413, 417 (Id. 1982), the court explains that "out-of-court statements of parties to litigation are admissible in evidence against the party." (emphasis added). The Kekua court also clearly explains that "extrajudicial statements of a party-opponent, when offered against the same, are universally deemed admissible at trial ...." 601 P.2d at 371 (emphasis added). Because the statement of Frank Trunzo is not an admission by a party-opponent, it is no more than simple, inadmissible hearsay. Therefore, it fails the requirement of Rule 56(e) that affidavits set forth "such facts as would be admissible in evidence." Hence it does not create a genuine issue of material fact on the question of Bentley's agency and is insufficient to defeat summary judgment. See McCarthy v. Yempuku, 678 P.2d 11, 17 (Hawaii App. 1984).

Even if Frank Trunzo's statement were otherwise admissible, the trial court properly disregarded it because it contradicted

the judicial admission of the Trunzo Company that Bentley was its agent with respect to the October 10, 1987 auction. Rule 36 admissions "conclusively" establish the matter requested, and cannot be circumvented by other evidence, unless leave is first obtained to withdraw or amend the admission. See W.W. & W.B. Gardner v. Park West Village Inc., 568 P.2d 734 (Utah 1977). In Gardner, the court held that an affidavit denying agency, which was filed three days before the hearing on a motion for summary judgment, was insufficient to create an issue of fact, where deemed admissions established the agency and no motion was made to withdraw the admissions.

In the present case, no effort was ever made by any defendant to withdraw the Trunzo Company's deemed admissions. The gratuitous, self-serving, out-of-court statement by its president, made after default judgment had already been entered against it, and reported by the attorney for the bonding company that is seeking to hold him personally liable for its obligation (R. 57-60), does not have any indicia of trustworthiness (see Rule 804(5), Utah R. Evid.) and should not be allowed to avoid the effects of Rule 36(b). Therefore, Harold Peterson's affidavit is insufficient to create a genuine issue of material fact to defeat Mountain Bell's motion for summary judgment.

III. OLD REPUBLIC DID NOT MEET THE REQUIREMENTS FOR APPLICATION OF RULE 56(f), UTAH RULES OF CIVIL PROCEDURE.

The trial court properly refused to apply Rule 56(f) of the Utah Rules of Civil Procedure to deny summary judgment. Rule 56(f) provides:

> (f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(emphasis added). Rule 56(f) is only applicable when an opposing party raises by affidavit reasons for his inability to oppose a motion by affidavit. Old Republic failed to file any such affidavit, either before, during, or after the hearing on Mountain Bell's Motion for Summary Judgment. Its sole basis for the request to apply Rule 56(f) was its attorney's statement at the hearing:

> We have not been able to locate Mr. Trunzo since the interview with Mr. Peterson. We have tried. We had an address and telephone for him in Pittsburgh.

Tr. 17. This statement, as well as the affidavit of Harold Peterson, shows that, in fact, Old Republic had been in direct contact with Frank Trunzo as early as May of 1988 (some six months before Mountain Bell filed its motion for summary judgment), when he was interviewed in Old Republic's attorney's office. Old Republic missed a golden opportunity to obtain an affidavit or deposition from Frank Trunzo at that time. Old Republic's attorneys should have recognized that since default judgment had

already been entered against the Trunzo Company, there was no incentive for Frank Trunzo to remain in the state or to make himself available for further discovery or the trial. Old Republic has offered no explanation why it did not obtain the sworn testimony of Frank Trunzo when it had the chance, either by affidavit or by deposition.

The case cited by Old Republic concerning Rule 56(f) is distinguishable. In Crutchfield v. Hart, 630 P.2d 124 (Hawaii App. 1981) the appellate court reversed the lower court's grant of summary judgment for the defendant because the time for discovery in that case was relatively short, the plaintiff had not yet completed discovery, and the plaintiff had asked the court for additional time to conduct discovery. In the present case, there was ample time for discovery, and Old Republic had apparently completed its discovery three months before Mountain Bell filed its motion for summary judgment. In Dybowski v. Ernest W. Hahn, Inc., 110 Utah Adv. Rep 53 (Utah App., filed June 9, 1989), this court affirmed a summary judgment under similar circumstances, where the opponent had not filed a Rule 56(f) affidavit, but claimed she had not been permitted to complete discovery. In that case, the court noted that the opponent had not conducted any discovery during the six months prior to the motion. See also, Jackson v. Layton City, 743 P.2d 1196, 1198 (Utah 1987) (court refused to consider an argument that additional discovery was necessary where no Rule 56(f) affidavit was filed); Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636, 639 (Utah App. 1988);

Callioux v. Progressive Ins. Co., 745 P.2d 838, 840-42 (Utah App. 1987). In the present case, the trial court did not abuse its discretion in refusing the oral request of Old Republic under Rule 56(f), unsupported by any affidavit.

CONCLUSION

Mountain Bell requests that the Utah Court of Appeals affirm the district court's summary judgment in favor of Mountain Bell. The evidence properly before the court established Bentley's agency, and hence Mountain Bell's right to judgment as a matter of law. Old Republic failed to create a genuine issue of fact, both by failing to file opposing affidavits timely, and by relying on inadmissible evidence in its tardy affidavits. The trial judge's decision was proper on the record and well within the bounds of his judicial discretion, and should not be disturbed.

RESPECTFULLY SUBMITTED this 30th day of June, 1989.

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY

By _____
Floyd A. Jensen, Attorney

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Brief of Respondent were mailed, postage prepaid, to the following on the 30th day of June, 1989:

Joseph J. Joyce, Esq.
Strong & Hanni
Sixth Floor Boston Building
Salt Lake City, Utah 84111

ADDENDA

A. Rule 36, Utah Rules of Civil Procedure

B. Rule 56, Utah Rules of Civil Procedure

C. Affidavit of Walter Williams Without Exhibits and Supplemental Affidavit of Walter Williams

D. Affidavit of Harold L. Petersen

E. Judgment

ADDENDUM A

Rule 36, Utah Rules of Civil Procedure

Rule 36. Request for admission.

(a) **Request for admission.** A party may serve upon any other party a written request for the admission, for purpose of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. The request for admission shall contain a notice advising the party to whom the request is made that, pursuant to Rule 36, the matters shall be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as the court may allow. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) **Effect of admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.
(Amended, effective Jan. 1, 1987.)

ADDENDUM B

Rule 56, Utah Rules of Civil Procedure

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of

ADDENDUM C

Affidavit of Walter Williams Without Exhibits and Supplemental Affidavit of Walter Williams

FILED IN CLERK'S OFFICE

FLOYD A. JENSEN, Esq. (Bar # 1672)
THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY
250 Bell Plaza, 16th Floor
Salt Lake City, Utah 84111
Telephone: (801) 237-6409

NOV 18 1988
C Porter

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, fdba MOUNTAIN BELL v. GARY L. BENTLEY, an individual and dba BENTLEY INTERNATIONAL; S.F. TRUNZO AUCTIONEERS, INC., a Utah corporation; and THE OLD REPUBLIC INSURANCE COMPANY, a corporation	Civil No. C88-534 AFFIDAVIT OF WALTER J. WILLIAMS HON. DAVID S. YOUNG

STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

Walter J. Williams, being first duly sworn, deposes and says:

1. I am and at all times material to this action was employed by U S West Business Resources, Inc., fka U S West Materiel Resources, Inc. ("U S West MRI"), an affiliate of Plaintiff The Mountain States Telephone and Telegraph Company, fdba Mountain Bell, in the position of Manager - Reclamation. My duties as such included the supervision of disposal of certain personal property of Mountain Bell under a contract between Mountain Bell and U S West MRI.

2. I have personal knowledge of the facts stated herein, and am competent to testify thereto.

000149

3. Mountain Bell and S.F. Trunzo Antiques and Auctions, Inc. (hereinafter "Trunzo") entered into a contract for auctioneer services on about September 6, 1982. A copy of the contract is attached hereto as Exhibit "A," and will be referred to hereinafter as the "Trunzo Contract." S.F. Trunzo Antiques and Auctions, Inc. later changed its name to "S.F. Trunzo Auctioneers, Inc." (See Exhibit "B" attached hereto, which is a certified copy of the records on file with the Utah Secretary of State's office relating to the corporation.)

4. In my position with U S West MRI, I was responsible for, and therefore actually did, administer the Trunzo Contract on behalf of Mountain Bell.

5. The Trunzo Contract remained in full force and effect through at least October 10, 1982, and was the only source of authority under which Trunzo was permitted to auction personal property of Mountain Bell during that period. Mountain Bell did not use or employ any other auctioneer of its personal property in Utah during that period.

6. To satisfy the security requirements of the Trunzo Contract, Trunzo furnished a bond to Mountain Bell.

7. Attached hereto as Exhibit "C" is a true copy of a bond executed by Frank Trunzo on behalf of Trunzo, and by Myrel G. Mitchell, as attorney in fact for the surety, Old

Republic Insurance Company, to provide security to Mountain Bell for Trunzo's performance under the Trunzo Contract.

8. Attached hereto as Exhibit "D" is a true copy of a bond executed by Gary L. Bentley on behalf of Trunzo, and by Myrel G. Mitchell, as attorney in fact for the surety, Old Republic Insurance Company, to provide security to Mountain Bell for Trunzo's performance under the Trunzo Contract.

9. As far as I knew and understood, Gary L. Bentley was an officer and agent of Trunzo, and in all transactions and arrangements involving the auction of Mountain Bell property, I always dealt with him in his capacity as such.

10. During the summer and early fall of 1987, I requested Gary L. Bentley, representing Trunzo, to pick up several vehicles and items of equipment belonging to Mountain Bell and to auction the same pursuant to the Trunzo Contract. Representatives of Trunzo did pick up the specified vehicles and equipment. For each item received, an authorized representative of Trunzo was required to sign a document entitled "Receipt of Vehicles and Equipment for Auction," a sample copy of which is attached hereto as Exhibit "E."

11. Pursuant to the Trunzo Contract, I arranged with Gary L. Bentley, representing Trunzo, for the vehicles and equipment to be auctioned by Trunzo on October 10, 1987.

12. In the weeks preceding the October 10, 1987 auction, Frank Trunzo and Gary Bentley informed me that the assets of Trunzo would be sold to Bentley International after

the auction was held. Both Frank Trunzo and Gary Bentley repeatedly assured me that the auction would be conducted by Trunzo and that no sale or disposition of Trunzo's assets would occur until after the auction.

13. The auction of Mountain Bell vehicles and equipment was held on October 10, 1987, on the premises of Trunzo at 388 Hartwell Avenue, Salt Lake City, Utah. At all times during the auction, a sign hung above the auction yard reading "S. F. Trunzo Auctioneers, Inc."

14. I attended the auction on October 10, 1987. I observed both Frank Trunzo and Gary Bentley auctioning the Mountain Bell vehicles and equipment.

15. Neither Mountain Bell nor U S West MRI received any proceeds from the October 10, 1987 auction within seven working days after the auction, as required by ¶ 3.D of the Trunzo Contract.

16. I made many verbal demands on Trunzo, through its representative Gary L. Bentley, to remit the proceeds of the auction of October 10, 1987. Gary L. Bentley assured me on several occasions that the proceeds would be paid shortly.

17. On or about October 29, 1987, I received a check for $47,705.64, representing the proceeds of the auction of October 10, 1987 after deducting the commission due Trunzo under the Trunzo Contract. The check was drawn on an account in the name of "Bentley International," and was signed by Gary L. Bentley. The check was dishonored upon presentment,

marked "Insufficient Funds," and was returned to me. A copy of the check is attached hereto as Exhibit "F."

19. To date, the check attached as Exhibit "F" has not been made good, nor has any payment of any part of the proceeds of the auction of October 10, 1987 been received by Mountain Bell or U S West MRI.

Further Affiant saith not.

DATED this 16th day of November, 1988.

Walter J. Williams

Walter J. Williams

Subscribed and sworn to before me this 16th day of November, 1987.

Notary Public residing in Salt Lake County, Utah

My commission expires:

2/9/90

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Affidavit of Walter J. Williams was mailed, postage prepaid, to the following on the 17 day of Nov., 1988:

Harold L. Petersen, Esq.
STRONG & HANNI
Attorneys for Defendant
Old Republic Insurance Company
Sixth Floor Boston Building
Salt Lake City, Utah 84111

S. F. Trunzo Auctioneers, Inc.
388 West Hartwell Avenue
Salt Lake City, Utah 84115

Gary L. Bentley dba
Bentley International aka
Bentley International Auction Company
388 West hartwell Avenue
Salt Lake City, Utah 84115

...ND OFFIC
...Utah

DEC 5 1988

C Porter ... Clerk

FLOYD A. JENSEN, Esq. (Bar # 1672)
THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY
250 Bell Plaza, 16th Floor
Salt Lake City, Utah 84111
Telephone: (801) 237-6409

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

Walter J. Williams, being first duly sworn, deposes and says:

1. I am and at all times material to this action was employed by U S West Business Resources, Inc., fka U S West Materiel Resources, Inc. ("U S West MRI"), an affiliate of Plaintiff The Mountain States Telephone and Telegraph Company, fdba Mountain Bell, in the position of Manager - Reclamation. My duties as such included the supervision of disposal of certain personal property of Mountain Bell under a contract between Mountain Bell and U S West MRI.

2. I have personal knowledge of the facts stated herein, and am competent to testify thereto.

3. I previously signed an affidavit herein, entitled "Affidavit of Walter J. Williams." The purpose of this affidavit is to supplement the statements made in that affidavit, relative to my knowledge and observations of the relationship between Gary L. Bentley and S.F. Trunzo Auctioneers, Inc. (hereinafter "Trunzo"), with which company Mountain Bell had a contract for auctioneer services, as detailed in my previous affidavit.

4. Commencing in September 1984, Gary L. Bentley was the principal point of contact between Mountain Bell and Trunzo with respect to all auctions conducted by Trunzo for Mountain Bell pursuant to the Trunzo Contract, as defined in my previous affidavit. I personally dealt with Bentley with respect to arrangements for and conduct of each of such auctions, and Bentley always appeared to be in charge of each such auction. He personally picked up items to be auctioned or directed other employees of Trunzo to do so, executed receipts for such items, and arranged for advertisements and other publicity for the auctions. He also delivered the net proceeds of such auctions to me. In addition, with respect to at least the last two auctions, he arranged for the accounting and record keeping with respect to the auction sales.

5. Gary L. Bentley told me on several occasions that he was the Vice President of Trunzo, and I believed him to be such.

6. Auctions of Mountain Bell property by Trunzo were held on the following days, resulting in net proceeds to Mountain Bell as indicated. In each instance, Gary L. Bentley was the representative of Trunzo who arranged for the auction as described in Paragraph 4 hereof, the auction was held at Trunzo's property at 388 West Hartwell Ave., Salt Lake City, Utah, and the revenue was paid over to Mountain Bell by means of checks drawn on Trunzo's bank account (with the exception of the last auction).

Auction Date	Net Proceeds of Sale
Sept. 15, 1984	$ 118,776.18
Feb. 16, 1985	$ 56,785.62
June 15, 1985	$ 14,713.25
Oct. 9, 1985	$ 25,541.50
Nov. 16, 1985	$ 19,794.50
Mar. 26, 1986	$ 14,306.67
Aug. 9, 1986	$ 49,665.09
Dec. 16, 1986	$ 55,132.42
June 4, 1987	$ 15,522.18
Oct. 10, 1987	($ 47,705.64)

7. Throughout the period indicated in the previous paragraph, I also met on numerous occasions with Frank Trunzo, the president of Trunzo, who told me that Bentley was the Vice President of Trunzo. Frank Trunzo never indicated that Bentley was not authorized to arrange auctions for

Trunzo, although he obviously knew that Bentley was doing so, at least with respect to Mountain Bell property.

Further Affiant saith not.

DATED this 1 day of December, 1988.

Walter J. Williams

Walter J. Williams

Subscribed and sworn to before me this 1 day of December, 1988.

Notary Public residing in Salt Lake County, Utah

My commission expires:
12-25-91

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Supplemental Affidavit of Walter J. Williams was mailed, postage prepaid, to the following on the 22 day of December, 1988:

Joseph J. Joyce, Esq.
STRONG & HANNI
Attorneys for Defendant
Old Republic Insurance Company
Sixth Floor Boston Building
Salt Lake City, Utah 84111

S. F. Trunzo Auctioneers, Inc.
388 West Hartwell Avenue
Salt Lake City, Utah 84115

Gary L. Bentley dba
Bentley International aka
Bentley International Auction Company
388 West hartwell Avenue
Salt Lake City, Utah 84115

ADDENDUM D

Affidavit of Harold L. Petersen

DEC 23 1988
Clerk, Third Dist. Court
Deputy Clerk

Joseph J. Joyce, #4857
STRONG & HANNI
Attorneys for Defendant
Old Republic Insurance Co.
Sixth Floor Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, dba MOUNTAIN BELL, Plaintiff, vs. GARY L. BENTLEY, an individual and dba BENTLEY INTERNATIONAL; S.F. TRUNZO AUCTIONEERS, INC., a Utah corporation; and THE OLD REPUBLIC INSURANCE COMPANY, a corporation, Defendants.	AFFIDAVIT OF HAROLD L. PETERSEN Civil No. C88-534 Judge David S. Young

STATE OF WEST VIRGINIA)
:
COUNTY OF HENRICO)

HAROLD L. PETERSEN, being first duly sworn, deposes and says:

1. I am an attorney licensed to practice law in the states of Utah and Virginia.

2. Up until July of 1987, I was the attorney of record in this matter for defendant The Old Republic Insurance Company.

I was employed at the law firm of Strong & Hanni and was the attorney primarily responsible for the defense of The Old Republic Insurance Company.

3. I have personal knowledge of the facts stated herein, and am competent to testify thereto.

4. On or about May 17, 1988, I interviewed Frank Trunzo personally in my offices at Strong & Hanni in Salt Lake City. The interview was tape recorded and a transcript of the interview was prepared.

5. During said interview, Mr. Trunzo told me of the sale of S.F. Trunzo Auctioneers to Gary Bentley. Mr. Trunzo further told me that following the sale of the S.F. Trunzo Auctioneers, Inc. assets to Bentley, Bentley was not authorized to act as an agent for S.F. Trunzo Auctioneers.

6. Mr. Trunzo also told me that he had informed Walter Williams on more than one occasion that Mr. Trunzo was selling his business to Gary Bentley and further that Bentley was solely responsible for the October 10, 1987, auction where Mountain Bell's equipment was allegedly auctioned.

Further affiant sayeth naught.

DATED this 22nd day of December, 1988.

Harold L. Petersen

Subscribed and sworn to before me this 22nd day of

December, 1988.

Notary Public - Residing at:
Virginia Beach VA

In Virginia, no seal is required.

My Commission Expires:
12/2/91

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing document was mailed, first class postage prepaid, this 23rd day of December, 1988, to the following:

Floyd A. Jensen, Esq.
Mountain States Telephone & Telegraph Co.
250 Bell Plaza, 16th Floor
Salt Lake City, Utah 84111

S. F. Trunzo Auctioneers, Inc.
P. O. Box 520082
Salt Lake City, Utah 84152

Gary L. Bentley dba
Bentley International aka
Bentley International Auction Company
388 West Hartwell Avenue
Salt Lake City, Utah 84115

Wendy H. Smart
Wendy H. Smart; Secretary

ADDENDUM E

Judgment

FILED DISTRICT COURT
Third Judicial District

FEB 6 1989

SALT LAKE COUNTY
By _____
Deputy Clerk

FLOYD A. JENSEN, Attorney Bar #1672
THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY
250 Bell Plaza, 16th Floor
Salt Lake City, Utah 84111
Telephone: (801) 237-6409

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, dba MOUNTAIN BELL,	:	**JUDGMENT**
Plaintiff,	:	
vs.	:	Civil No. C88-534
GARY L. BENTLEY, an individual and dba BENTLEY INTERNATIONAL; S. F. TRUNZO AUCTIONEERS, INC., a Utah corporation and THE OLD REPUBLIC INSURANCE COMPANY, a corporation,	:	HONORABLE DAVID S. YOUNG
	:	2145664
Defendants.	:	2-6-89-807 am.

IT IS ORDERED that plaintiff be awarded Judgment against said defendant **THE OLD REPUBLIC INSURANCE COMPANY** in the amount of:

$45,000.00 - Principal

$ 4,962.50 - Accrued prejudgment interest from Dec 13, 1987 to date of Judgment

$ 93.75 - Accrued costs to date of Judgment

$ 50,056.25 - TOTAL JUDGMENT,

with interest on the total Judgment at twelve percent (12%) per annum as provided by law from the date of this Judgment until

paid, plus after-accruing costs.

DATED this 23 day of ~~January~~ February, 1989.

BY THE COURT:

David S. Young
District Court Judge

CERTIFICATE OF HAND DELIVERY

I hereby certify that on this 23d day of January, 1989, I caused to be hand delivered a true and correct copy of the foregoing Judgment to:

Joseph J. Joyce, Esq.
Strong & Hanni
Attorneys for Defendant
Old Republic Insurance Company
Sixth Floor, Boston Building
Salt Lake City, Utah 84111

MAILING CERTIFICATE

I hereby certify that on this 23d day of January, 1989, I caused to be mailed a true and correct copy of the foregoing Judgment by first-class mail, postage prepaid, to:

Gary L. Bentley &
dba Bentley International
P.O. Box 201077
Salt Lake City, Utah 84120

Frank Trunzo
S. F. Trunzo Auctioneers, Inc.
388 Hartwell Avenue
Salt Lake City, Utah 841115