

1989

Interstate Land Corporation v. R. D. Patterson : Brief of Appellant

Utah Court of Appeals

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Ronald C. Barker, Larry L. Whyte; attorneys for appellant.

Patrick J. O'Hara; Van Cott, Bagley, Cornwall & McCarthy; attorney for plaintiff.

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BRIEF

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DOCKET NO.

89-280 CA

IN THE SUPREME COURT OF THE STATE OF UTAH

INTERSTATE LAND CORPORATION,)

Plaintiff, Respondent)

vs.)

R. D. PATTERSON,)

Defendant, Appellant.)

(Supreme Court Appeal
No. 870020)

MELVIN E. INGERSOLL, MARIAN)
BEVERLY INGERSOLL, LELAND R.)
INGERSOLL and EVELYN E.)
INGERSOLL,)

Lower Court No C-85-0790

Plaintiffs in Intervention,)
and Appellants,)
vs.)

INTERSTATE LAND CORPORATION,)
and R. D. PATTERSON,)

Defendants in Intervention,)
and Respondents.)

89-0280-CA

BRIEF OF APPELLANTS

Ronald C. Barker, #0208
Larry L. Whyte, #4943
Attorneys for Appellants
Ingersolls and Patterson
2870 South State Street
Salt Lake City, Utah 84115-3692
(801) 486-9636

Patrick J. O'Hara, #3843
VAN COTT, BAGLEY,
CORNWALL & MCCARTHY
Attorney for Respondent
Interstate Land Corporation
50 South Main Street #1600
Salt Lake City, Utah 84145
(801) 532-3333

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Attorneys for Appellants
Ingersolls and Patterson
2870 South State Street
Salt Lake City, Utah 84115-3692
(801) 486-9636

Patrick J. O'Hara, #3843
VAN COTT, BAGLEY,
CORNWALL & MCCARTHY
Attorney for Respondent
Interstate Land Corporation
50 South Main Street #1600
Salt Lake City, Utah 84145
(801) 532-3333

LIST OF ALL PARTIES TO ACTION

APPELLANTS

Melvin E. Ingersoll, Marian Beverly Ingersoll, Leland R. Ingersoll and Evelyn E. Ingersoll ("INGERSOLLS") plaintiffs in intervention below in case no. C-85-0790. R-112, R-116, and filed a motion to intervene in the predecessor case of Salt Lake City Corporation v. Mountain Fuel Supply, C-78-7764.

R.D. Patterson ("PATTERSON") defendant and defendant in intervention below in case no. C-85-0790. R-2, R-112, R-116.

RESPONDENT

Interstate Land Corporation ("INTERSTATE LAND") plaintiff in intervention below in case no. C-85-0790. R-2. Interstate's sister company, Mountain Fuel Supply was the Defendant in the predecessor case of Salt Lake City Corporation v. Mountain Fuel Supply, C-78-7764.

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JURISDICTION

Appellants Ingersolls appeal an entry of final judgment denying their motion to intervene dated September 4, 1986. R-146.

Appellant Patterson appeals an entry of final judgment granting Respondent Interstate Land's motion for summary judgment against Appellant Patterson dated September 4, 1986. R-149.

Appellants Ingersolls and Patterson appeal from the "Memorandum Opinion and Order" by the Honorable Michael R. Murphy, District Judge, dated December 2, 1986, denying Appellants motions to correct the previous orders of September 4, 1986. R-177.

Notice of appeal was timely filed on December 30, 1986. R-187. Hence this Court has jurisdiction over this matter pursuant to Art. VIII, § 9 of the Utah Constitution, Rule 3, U.R.A.P., as well as Utah Code Ann. § 78-2-2 (1953) (amended 1987).

STATEMENT OF ISSUES

I. APPELLANTS' OWNERSHIP OF PROPERTY IN QUESTION

A. Whether each of the four Ingersolls and Patterson are the owners of an undivided 1/5 interest in and to said property in question?

B. Whether at all times from and after October, 1977 Appellants Ingersolls and/or Patterson have been in actual physical possession of and have visibly, openly, notoriously,

continually possessed and used the disputed property under a claim of title and ownership thereto?

C. Whether Appellants Ingersolls are "purchasers" within the meaning of § 78-12-13, UCA, 1953?

D. Whether the trial court's granting of summary judgment against in favor of Respondent Interstate Land and against Appellant Patterson was proper?

II. APPELLANTS' (INGERSOLLS) MOTION TO INTERVENE

A. Whether the trial court erred in not allowing Ingersolls to intervene in the action below?

B. Whether Ingersolls are necessary parties and/or whether their property rights are effected by the lower court's orders?

III. APPEAL OF ORDER GRANTING SUMMARY JUDGMENT

A. Whether Ingersoll's Rule 59 U.R.Civ.P motion was proper?

B. Whether the lower court erred in holding that a trial must be held before a Rule 59 U.R.Civ.P motion may be brought?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an action to establish title and ownership of certain real property. The disputed property is West half of Glendale Avenue and the South half of First South Street, West of 1100

West in Salt Lake City, Utah, dedicated streets located in Blocks 43, 44, 53 and 54 of Plat "C" of the Salt Lake County Survey in Salt Lake County, Utah, as vacated by the City of Salt Lake by an ordinance passed by the Board of Commissioners of Salt Lake City, Utah on October 5, 1977. (Copy of vacation ordinance 172 attached as Exhibit I; copy of vacation ordinance 173 attached as Exhibit II).

Respondent Interstate Land Corporation ("INTERSTATE LAND") brought this action seeking to quiet title to the disputed real property described above. R-2.

II. COURSE OF PROCEEDINGS BELOW

On December 14, 1978, Salt Lake City Corporation filed a complaint against Mountain Fuel Supply in case no. C-78-7764, a predecessor action to the case below. T-198. The lawsuit was filed as a result of Salt Lake City vacating the disputed property through Salt Lake City Ordinances 172 and 173 described above and then passing an ordinance to undo the said vacation, and was filed to determine ownership to the disputed property described above. T-197-198.

Appellants Ingersolls as well as the Lemel Corporation, filed a motion to intervene (Exhibit III) and Mountain Fuel filed a motion for summary judgment against Appellants as well as Salt Lake City Corporation. T-197 (Exhibit IV). On August 31, 1982 by minute entry Mountain Fuel Supply's motion for summary

judgment against interveners was granted. On September 13, 1982, the court granted Mountain Fuel's Motion for summary judgment against Appellants' Ingersolls and Lemel Corporation for failure to attend the hearing on Mountain Fuel's motion for summary judgment. (Exhibit V). On December 23, 1983, the court granted Mountain Fuel's motion for summary judgment against Salt Lake City, holding that Ordinances 172 and 173 which vacated the above-described property were valid and that title to the land described in each of the ordinances vested in the abutting landowners. (Exhibit VI).

Respondent Interstate Land brought the present action seeking to quiet title to the disputed vacated portions of the streets as described above. R-2. Interstate Land claims title to the vacated portions of the disputed property vested in it while, Appellants Patterson and Ingersoll allege that title to the vacated portions of the disputed property vested in them. R-4, R-116.

Respondent Interstate Land moved for summary judgment against Appellant Patterson. R-85. By minute entry dated July 28, 1986, Judge Fishler, granted Respondent Interstate Land's motion for Summary Judgment and summarily denied Appellants Ingersolls' motion to intervene. R-144. The respective orders representing the above holding were signed by Judge Daniels on September 4, 1986. R-146, R-149. Appellants Patterson and Ingersolls brought a motion to correct the order on September 13, 1986. R-154. Said

motion was denied by the "Memorandum Order and Opinion" of Judge Murphy dated December 2, 1986. R-177. (Exhibit VII). This appeal followed. R-187.

III. STATEMENT OF FACTS

The disputed property, ("VACATED STREET PROPERTY") used to be part of First South Street and part of Glendale street, a north-south street which intersects with First South between 1100 and 1200 West. R-86. Said property is more particularly described:

(a) in a copy of the trust deed attached as Exhibit "A" to Respondent's complaint in the action below; R-17.

(b) in the quit-claim deed of July 27, 1979 from Lemel Corporation ("LEMEL") to Appellant Patterson; R-125.

(c) as parcels # 8 and 9 in the Trustees Deed of June 3, 1982 from NACM International ("NACM") to General Brewing Company ("GENERAL BREWING"); R-126.

(d) also shown in the plot map. R-84, R-129.

The disputed property was the West half of Glendale Avenue and the South half of First South Streets, West of 1100 West in Salt Lake City, Utah, as vacated by the City of Salt Lake by ordinance passed by the Board of Commissioners of Salt Lake City on October 5, 1977. (Exhibits I & II). The predecessor case of Salt Lake City Corporation v. Mountain Fuel Supply, Case No. 78-7764 resolved the issue that the ordinances vacating the

vacated street property were valid and that title to said property vested in the abutting landowners.

At the time that said streets were vacated each of the four Ingersolls were the owners of an undivided 1/5 and and Lemel was the owner of an undivided 1/5 of the real property abutting ("ABUTTING PROPERTY") the disputed property. At all time from October, 1977, Ingersolls and Patterson have been in actual physical possession of and have visibly, openly, notoriously, continuously possessed and used the disputed property under a claim of title and ownership thereto, which claim has at all times been hostile and adverse to the claims of all persons and organizations, including the claims of Interstate and of the persons and organizations through whom Interstate claims to have derived its title. By operation of law when said streets were vacated fee title to an undivided 1/5 of the disputed property reverted to and vested in each of the four Ingersolls and Lemel. R-117. Lemel thereafter conveyed its undivided 1/5 ownership interest in and to the disputed property to Patterson by a quit-claim deed. R-125.

The abutting property was pledged by Ingersolls and Lemel as security for an obligation owed by them to General Brewing by a trust deed executed in July, 1977. R-132. Said pledge was made before the vacating ordinances were determined to be valid. The disputed property was not pledged as security for said debt by said trust deed. After acquisition of title to the disputed

property (May, 1980) Ingersolls conveyed their interest in the abutting property to Lemel by quit-claim deed, R-137, and Lemel thereupon became owner of 100% of the abutting property. Ingersolls did not convey the disputed property to Lemel.

Lemel failed to pay the obligation secured by the trust deed, R-132, and General Brewing caused a notice of default of said trust deed to be filed about September, 1979, R-139. In said notice of default General Brewing asserted no claim to the disputed property.

Thereafter, Lemel filed a petition in bankruptcy in the United States District Court for the District of Utah, Central Division, case No. 80-00755. The disputed property was not listed as an asset of Lemel in the bankruptcy. (Exhibit VIII).

In that bankruptcy, NACM was appointed as trustee of Lemel. By a "Trustees Deed" R-126 NACM sold and conveyed the abutting property (parcels #1 through 7) and purported to sell the disputed property (parcels #8 and 9) to General Brewing. NACM appeared before the U.S. Bankruptcy Judge, representing that the vacated street property had been erroneously omitted from the legal description in the Trustee's Notice. Title to the vacated street property was never deeded to the bankruptcy Lemel, but rather was held by Appellants. Based upon NACM's representations, the Bankruptcy Court held that NACM could convey the vacated street property, which it allegedly did to General Brewing. R-46. The General Brewing then purported to convey

the disputed property to Interstate by a special warranty deed R-61.

Respondent claims as remote grantee under that trust deed foreclosure through the bankruptcy court and acquired no better title to the disputed parcel than the title of General Brewing. Since General Brewing never had a trust deed covering, or other interest in the disputed property, plaintiff acquired no interest in and to the disputed parcel and cannot now assert a quiet-title thereto. The first mention of the disputed property in plaintiff's chain of title is when the bankruptcy trustee added the disputed property to the description of the abutting property sold by the trustee. Since the bankrupt corporation had never acquired Ingersolls 4/5 interest in the property, and the corporation had deeded its 1/5 interest to Patterson, the bankrupt corporation did not have title to the disputed property the trustee acquired no title when he could convey to plaintiff. Accordingly, plaintiff acquired nothing by that conveyance.

Since Lemel did not have title to the disputed property R-126 conveyed nothing to General Brewing and the deed from General Brewing to Interstate R-61 conveyed nothing to Interestate. However, said deeds cloud Appellants' title to the disputed property.

STATEMENT OF RELIEF SOUGHT ON APPEAL

The Court should quiet title to a 1/5 interest in and to the

disputed property in the names of each of the Ingersolls and Patterson, and declare that Interstate has no right, title or interest therein. Further, the Court should rule that it is appropriate for Appellants to bring a Rule 59 U.R.Civ.P motion from an order granting summary judgment.

SUMMARY OF ARGUMENT

Appellants Patterson and Ingersolls contend that they hold title to the vacated street property and are the lawful owners thereof. Appellants contend that they have owned the adjoining and abutting property to the vacated street property when said property was vacated and that title to said property properly vested in them pursuant to § 78-12-13, UCA, 1953 as amended. In the alternative, Appellants allege title and ownership to the disputed vacated street property through the doctrine of adverse possession.

Appellants claim ownership of said property by adverse possession. Factual issues concerning adverse possession require a trial and cannot properly be determined on a motion for summary judgment. Ingersolls should be permitted to intervene and the summary judgment against Patterson should be reversed and they should be permitted to litigate their quiet-title claim against plaintiff.

Appellants Patterson and Ingersolls contend that the trial court erred in not allowing them to intervene in the actions below. Appellants further contend that they are necessary parties and that the disposition of this action impairs and impedes their property rights and interests.

Appellants Patterson and Ingersolls contend that a motion under Rule 59 U.R.Civ.P. is appropriate following an order granting summary judgment. Appellants finally contend that a full trial is not a necessary predicate act to bringing a motion under Rule 59 U.R.Civ.P.

ARGUMENT

POINT I. APPELLANTS OWN THE VACATED STREET PROPERTY

A. Appellants each owned 1/5 interest in vacated street property in 1977. The undisputed facts demonstrate that the Appellants and each of them owned an undivided 1/5 interest to and to said property in 1977, having purchased said property and giving a trust deed back to Backman Abstract & Title Company, as trustee on July 6, 1977. R-87

B. Utah is a lien not a title theory state. The trustee under the trust deed which described the abutting property (the trust deed did not include the disputed property in the description of the property pledged under the trust deed) was not the "owner of record" of the abutting property. The "owner" of

real property is the record owner. A trustee under a trust deed holds only a lien or security interest in the property by reason of the trust deed and is not the "owner" so as to vest ownership of the vacated street in the trustee under the trust deed. Bybee v. Stuart, 112 Utah 462, 189 P.2d 118 (1948); See generally, U.S. v. Loosley, 551 P.2d 506 (1976); Summary of Utah Real Property Law, Vol 1 § 9.36. Appellants recognize that these citations refer to mortgages and that no known Utah cases refer to Deeds of Trust, although it is believed that the same principal of law applies to trust deeds as to mortgages.

When the street was vacated ownership of said street vested in Ingersolls and Lemel, the record owners of the abutting property. Carrying the Court's decision to its logical conclusion, had the trust deed covering the adjacent property been paid and the trust deed released, the trustee would still be the "owner" of the vacated street, a completely illogical and incorrect result.

C. Ingersolls conveyance to corporation did not include conveyance of title to the vacated street. The Court erred in adopting as a finding of fact ¶ 14, R-89, thereof in that the Court improperly determined that Ingersolls "quit-claimed to Lemel Corporation whatever right, title or interest they may have had in the same real property described in the July 6, 1977 Trust Deed." Said quit-claim deed and trust deed did not include the disputed property in the legal description of the property

pledged or conveyed. See R-132. Accordingly, said finding of fact is incorrect and misleading, should be corrected, and as a consequence the holding of the court should be changed.

D. Bankruptcy Trustee did not own vacated street and attempt to convey same was a nullity. The Court erred in adopting ¶ 17 and 18, R-90, without adding thereto the finding and/or conclusion that since 4/5 ownership of the vacated street was not conveyed to Lemel by Ingersolls and since Lemel had conveyed its 1/5 interest in said vacated street to Patterson before the bankruptcy was filed, Lemel had no ownership in the vacated street and that the trustees' deed purporting to convey title to the vacated street was a nullity.

E. Appellants acquired title by adverse possession. In order to state a valid claim for quiet-title Respondent was required to, but failed to allege that plaintiff and/or its grantor were "seized or possessed of the property in question within seven years" as required by 78-12-5, 78-12-6, et seq., UCA, 1953. Plaintiff did not (and cannot truthfully) make such allegations and therefore is precluded from summary judgment quieting title.

Appellants claim adverse possession of the disputed property, and issues of fact with respect to said adverse possession preclude summary judgment.

F. Statute of limitations bars plaintiff's claims. Ingersolls' complaint in intervention (third defense) asserts

that plaintiff's claim is time barred. R-118. Issues of fact concerning that defense precludes summary judgment. The same issues are applicable to Patterson.

G. Waiver and estoppel Ingersolls' complaint in intervention asserts the defenses of waiver and estoppel. R-118. If for any reason the vacated street was included in the property pledged as security under the trust deed (which we deny), the holder of the trust deed waived its right to assert said claim by failing to include that property in the trust deed foreclosure and/or by reason thereof said trust deed holder and persons claiming through the trust deed holder are estopped to now assert a claim to said property. Fact issues concerning those matters precludes summary judgment. The same issues are applicable to Patterson.

POINT II. APPELLANTS SHOULD HAVE BEEN ALLOWED TO INTERVENE

A. Intervention as a matter of right.

Since Ingersolls claim an interest in the property in dispute they should have been permitted to intervene as provided in 24(a)(3), 24(b)(1), 24(b)(2), 24(c), URCP. See R-112. Ingersolls were unfairly taken by surprise at the hearing on the motion for permission to intervene by plaintiff's argument that their right to intervene might be affected by the holding in another case involving these parties.

B. Intervention is appropriate Appellants are

indispensible parties, their intervention involves identical issues of fact and law.

Finally, should this Court rule that intervention was properly denied, Appellants will be forced to file yet another lawsuit against Respondent's for a final resolution of this matter. Such an action would not result in judicial economy. Therefore, the matter should be resolved here and now.

To deny Appellants' motion to intervene under the circumstances was error which should be corrected by permitting them to intervene, requiring plaintiff to respond to their counterclaim, bring the matter to issue, then by making an appropriate determination in the usual fashion. To deny intervention is to deny procedural due process. When the application for intervention is made timely, this rule permits intervention as a matter of right when the applicant will be adversely affected by the trial court's disposition of property. Jenner v. Real Estate Services, 659 P.2d 1072 (Utah, 1983), particularly where intervenor's interests will not be adequately represented. Lima v. Chambers, 657 P.2d 279 (Utah, 1982) overruling, Kesler v. Tate, 28 U.2d 355, 502 P.2d 565 (Utah, 1972). Intervention was allowed when intervenor might gain or lose by direct legal operation and effect of judgment. Commercial Block Realty Co. v. United States Fidelity & Guaranty Co., 83 U. 414, 28 P.2d 1081.

C. Order denying intervention appealable

Ingersolls believe that a review of said other case (Salt Lake City Corporation v. Mountain Fuel Supply, Case No. C-78-7764) shows that the decision in said case does not affect their right to intervene herein. The Court did not state a reason for denial of the motion to intervene, so it is uncertain as to whether or not that case was a consideration in such denial. (Exhibit V). Such a decision is appealable under the reasoning and holding of Tracy v. University of Utah Hospital, 619 P.2d 340 (Utah, 1980) as well as Commercial Block Realty Co. v. United States Fidelity & Guaranty Co., 83 U. 414, 28 P.2d 1081; See also Tripp v. District Court of Third Judicial Dist., 89 U. 8, 56 P.2d 1355.

D. Intervention proper and appropriate

Since Ingersolls claim ownership of the parcel of property, title to which is herein sought to be quieted, they should be entitled to intervene, the issues should be framed, and the Court would then be in a position to properly rule on those matters after affording Ingersolls the right to participate in discovery. Intervention is properly denied where interverner was not an indispensable party, intervention would unduly delay pending action or complicate issues, and his rights could be protected in independent action. Houston Real Estate Inv. Co. v. Hechler, 44 U. 64, 138 P. 1159; Dayton v. Free, 49 U. 221, 162 P. 614. None of those situations exist here, which would deny Appellants the opportunity to intervene.

POINT III. RULE 59 U.R.Civ.P MOTION IS PROPER FOLLOWING ORDER GRANTING SUMMARY JUDGMENT

A. Rule 59 U.R.Civ.P to be liberally construed

Federal Rule 59 differs substantially from URCP 59. FRCP 59(a)(1) speaks of a new trial following a jury trial and FRCP 59(a)(2) speaks of an action tried without a jury, which strongly suggest that under Federal Procedure Rule 59 may only apply after there has been a formal trial with live witnesses. Notwithstanding that limiting language, many Federal Courts have held that a FRCP 59 motion will lie following a summary judgment (see cases cited below). URCP 59(a) omits that language concerning a jury or non-jury trial, and simply states that:

"a new trial may be granted to all or any of the parties on all or part of the issues, for any of the following causes:"

B. Summary judgment is a "Trial. Unlike FRCP 59(a), URCP 59(a) does not suggest that its application is limited to situations where there has been a formal trial with live witnesses. A summary judgment is a URCP 59 "trial" based upon the record and is appropriate only where there are no disputed issues of fact which require live testimony. The resulting summary judgment has the same force and effect as a judgment after hearing live witnesses. URCP 59 should be construed in such a manner as to permit the court to review and correct its judgment, so as to avoid an unnecessary appeal, whether the

judgment resulted from summary judgment or from a trial, since such a decision is a final decision on the merits. See Ray E. Friedman & Co. v. Jenkins, 824 F.2d 657, 660 (8th Cir., 1987); In Vreeken v. Davis, 718 F.2d 343 (10th Cir., 1983), the 10th Circuit upheld Judge Jenkins' decision the Utah District Court concluding that regardless of how it is styled or construed, a motion filed within ten days of the entry of judgment questioning the correctness of a judgment is properly treated as a Rule 59(e) motion.

C. Federal cases relied upon by Judge Murphy are not persuasive. Judge Murphy cites Federal District Court decisions from Florida and Virginia, R-183, in support of his position that URCP 59 may not be used unless there has been a formal trial, but acknowledges that cases from the 6th and 9th Circuit Court of Appeals (cited on pages 7 and 8 of the Court's memorandum, R-183 to R-184) hold that FRCP 59 may be used in summary judgment situations where there has been no formal trial. Other federal cases holding that FRCP 59(e) is a proper procedural vehicle to be used by a party seeking to vacate summary judgment even though there has been not trial of the matter, include Parks v. "Mr. Ford", 678 FRD 305 (DC Pa, 1975); Samuel C. Ennis & Co. v. Woodmar Realty Co. 89 FRD 136 (ND Ill 1981) . The cases which permit a Rule 59 motion after summary judgment appear to be better reasoned and more persuasive.

D. Utah law allows a URCP 59 motion after summary judgment. Judge Murphy attempts to distinguish this Court's decision in Hume v. Small Claims Court of Murray, 590 P2d 309, 310-311 (Utah 1979), where this Court held that a URCP 59(a) motion may be used for the purpose of reversing a judgment denying a writ of mandamus, by stating that it is "instructive but not controlling in the context of a summary judgment". In Hume, supra, an action for a writ of mandate was filed in the District Court seeking to compel the small claims court to honor an appeal that had been filed within 5 days after Hume learned of the default judgment (arguing that the appeal time did not commence until notice of judgment), but after the 5 days specified in 78-6-10, UCA, 1953 for taking an appeal, after entry of the small claims judgment. The District Court denied the application for a writ of mandate and Hume filed a URCP 59 motion for a new trial or to alter or amend the judgment denying the application for the writ. The District Court also denied the URCP 59 motion on grounds that it was not the proper procedure. On appeal the Respondent argued (in the same manner as Respondents argue in support of their motion for summary disposition herein) that the URCP 59 rule did not extend the time for appeal on the merits, that the appeal on the merits was not timely, and that the only matter before the Supreme Court was the issue of denial of the URCP 59 motion. The Supreme Court disagreed, held that an appeal from small claims court could be made within 5 days after notice of judgment, and that a URCP 59 motion was properly used under those

circumstances, and stated that (590 P.2d 309 at 311):

"A timely motion under Rule 59 terminates the running of the time for appeal of a judgment. Time for appeal does not begin to run again until the order granting or denying such a motion is entered. The effect of denying such a motion is to reinstate the original judgment, and a timely appeal taken therefrom is in reality an appeal from that original judgment."

E. The decision in Hume allows URCP 59 motion following summary judgment. In Hume, supra there was no formal trial, but only a "hearing" where petitioner testified that she had received no notice of the default judgment. Whether such testimony is given in open court or by affidavit should not alter the rights of a party. URCP 1(a) provides: "That they (Rules) shall be liberally construed to secure the just, speedy, and inexpensive determination of every action." Permitting the District Court to review and correct its order following summary judgment instead of requiring an appeal to the Supreme Court to correct an error complies with the mandate of URCP 1. The same principal of law is applicable in our case as in Hume, supra. Under Utah law, a URCP 59 motion is not limited to cases where there has been a formal trial. To hold to the contrary would be contrary to the mandate of URCP 1(a) and would require reversal of the holding in Hume, supra. In a like manner, appellants URCP 59 motion in the present case terminated the running of the time for appeal, which time resumed when that motion was denied. Accordingly, this appeal, both on the merits of the case and based upon Judge

Murphey's denial of Appellants' URCP 59 motion, is properly before the Court and is timely.

F. Objection to a proposed order under local Rule 2.9 are limited to the form, not substance of the order. Judge Murphy argues that failure to object to the substance of an order somehow constitutes a waiver of the right to file a URCP 59 motion. We disagree. Local Rule 2.9(b) contemplates objections being made to proposed orders which differ from the Court's announced decision. There is nothing in Local Rule 2.9 which suggests that it may be used as a vehicle to contest the substance of the Court's decision, which more properly should be contested by a URCP 59 motion. Local Rule 2.9 does not contemplate objections going to the merits of the Court's ruling, the filing of memorandums, or oral argument. It is simply a procedure rule designed to assure that the court's decision is properly worded to accurately states the substance of the Court's ruling. If Local Rule 2.9 is to be expanded in such a manner it should be done by an amendment to the rule, not by a judicial decision.

G. The fact that other procedures might have been employed in effort to persuade court is not waiver of rights under URCP 59. The fact that Appellants might have filed further memorandums at an earlier time (page 9 of memo opinion, R-185) does not deprive Appellants of their right to move for a new trial or to correct the judgment under URCP 59. The purposes of

a URCP 59 motion is to give the Court an opportunity to correct errors to avoid the necessity of an appeal.

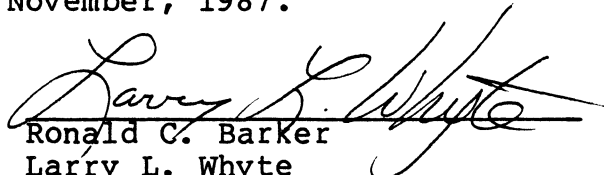
H. Resignation of Judge Fishler should not affect Appellants' rights. But for the resignation of Judge Fishler the URCP 59 motion would have been heard by him. Appellants are at a disadvantage over which they had no control because the case was transferred to a new judge who was less familiar with the case. Change of judges should not affect Appellants' right to file and argue their URCP 59 motion before taking an appeal or their right to appeal.

CONCLUSION

Meritorious issues remain for appeal. Respondent's conclusionary statement that because affidavits and/or memorandums were not filed in opposition to the motion for summary judgment there is allegedly no dispute in the record as to any material fact, is incorrect. Counter-affidavits are not necessary where the dispute is a matter of record. The issues raised by this appeal are meritorious, involving Appellants property rights to the vacated street property as well as their right to bring a Rule 59 Motion.

For the foregoing reasons, Appellants move this Court for an order remanding granting the relief prayed for.

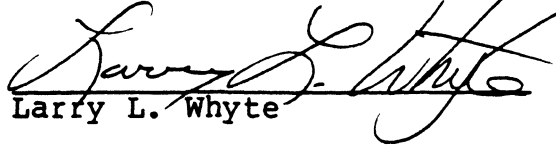
Dated the 17th day of November, 1987.


Ronald C. Barker
Larry L. Whyte
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I caused 4 copies of the foregoing to be hand-delivered this 17th day of November, 1987, pursuant to Rule 26(b) Utah Rules of Appellate Procedure to:

Patrick J. O'Hara, Esq., Van Cott, Bagley, Cornwall & McCarthy,
50 South Main Street #1600, Salt Lake City, Utah 84144.


Larry L. Whyte

ADDENDUM

A. EXHIBITS

Ordinance Vacating Street, Bill no 172

Exhibit I

City and County of Salt Lake,

SS.

passed by the Board of Commissioners of Salt Lake City, Utah, October 5, . . . 19 77

as appears of record in my office.

City, this 21st day of December 1978.
(SEAL)

City Recorder

Published XXXXXXXXXXXXXXXXXXXXXXXX9XXXXXX

**AN ORDINANCE
VACATING First South Street be-
tween 1000 West Street and 1100
West Street located in Salt Lake
City, Utah.**

Be it ordained by the Board of
Commissioners of Salt Lake
City, Utah:

SECTION 1. That First South
Street between 1000 West Street
and 1100 West Street located in
Salt Lake City, Utah, more
particularly described as fol-
lows, be, and the same hereby
is, vacated and declared no
longer to be public property for
use as a street, avenue, alley or
pedestrian way:

Beginning at the Southeast
corner of Lot 1, Block 53, Plat
"C", Salt Lake City Survey,
said point also being the North-
west corner of 1000 West Street
and First South Street; and
running thence South 132.06
feet; thence West 660.00 feet;
thence North 132.09 feet; thence
East 660.00 feet to point of
beginning. Contains 87,169.5
square feet, or 2.001 acres.

Said vacation is made ex-
pressly subject to all existing
rights of way and easements of
all public utilities of any and
every description now located
on, in, under or over the
confines of the above described
property, and also subject to
the rights of entry thereon for
the purpose of maintaining,
altering, repairing, replacing,
removing or rerouting said
utilities and all of them.

SECTION 2. This ordinance
shall take effect 30 days after
its first publication.

Passed by the Board of Com-
missioners of Salt Lake City,
Utah, this 5th day of October,
1977.

**TED L. WILSON
MAYOR**

**MILDRED V. HIGHAM
CITY RECORDER
(SEAL)**

**BILL NO. 172 of 1977
Published October 13, 1977 (B-9)**

Ordinance Vacating Street, Bill no 173

Exhibit II

**AN ORDINANCE
VACATING Glendale and First South
Streets west of 1100 West Street
located in Salt Lake City, Utah.**

Be it ordained by the Board of
Commissioners of Salt Lake
City, Utah:

SECTION 1. That Glendale
and First South Streets west of
1100 West Street located in Salt
Lake City, Utah, more particu-
larly described as follows, be,
and the same hereby is, vac-
ated and declared no longer to
be public property for use as a
street, avenue, alley or pedes-
trian way:

Beginning at the Southeast
corner of Lot 1, Block 1, Jones'
Subdivision, Block 54, Plat "C",
Salt Lake City Survey, said
point also being the Northwest
corner of 1100 West and First
South Streets; and running
thence South 0° 2' 53" East
132.17 feet; thence West 334.00
feet; thence North 0° 00' 55"
West 214.63 feet to the North-
east corner of Lot 1, Block 2,
said Jones' Subdivision; thence
North 33° 42' East 59.48 feet;
thence East 36.00 feet to the
Northwest corner of Lot 2,
Block 1, said Jones' Subdivi-
sion; thence South 132.00 feet;
thence East 264.00 feet to point
of beginning. Contains 51,833.32
square feet, or 1.190 acres.

Said vacation is made ex-
pressly subject to all existing
rights of way and easements of
all public utilities of any and
every description now located
on, in, under or over the
confines of the above described
property, and also subject to
the rights of entry thereon for
the purpose of maintaining,
altering, repairing, replacing,
removing or rerouting said
utilities and all of them.

SECTION 2. This ordinance
shall take effect 30 days after
its first publication.

Passed by the Board of Com-
missioners of Salt Lake City,
Utah, this 5th day of October,
1977.

TED L. WILSON
Mayor

MILDRED V. HIGHAM
City Recorder
(SEAL)

BILL NO. 173 of 1977
Published October 15, 1977
(B-6)

Motion to Intervene Case No. 78-7764

Exhibit III

JAN 8 1979

W. STERLING, CLERK

BY W. Sterling
DEPUTY CLERK

David B. Boyce
of BACKMAN, CLARK & MARSH
Attorneys for Interveners
500 American Savings Building
61 South Main Street
Salt Lake City, Utah 84111
Telephone 531-8300

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

SALT LAKE CITY,	:	M O T I O N
Plaintiff,	:	
vs.	:	Civil No. 78-7764
MOUNTAIN FUEL SUPPLY CO.,	:	
Defendant.	:	
* * *	:	
LEMEL CORPORATION, MELVIN E.	:	
INGERSOLL, MARIAN INGERSOLL,	:	
his wife, LELAND R. INGERSOLL,	:	
EVELYN E. INGERSOLL, his wife,	:	
Applicants for Intervention.	:	

* * * * *

Come now Lemel Corporation, Melvin E. Ingersoll,
Marian Ingersoll, his wife, Leland R. Ingersoll and Evelyn E.
Ingersoll, his wife, Applicants for Intervention, and move the
Court for leave to intervene as parties plaintiff in this
action in order to assert their interests in the claims set
forth in the complaint of the plaintiff, which is adopted by the
Applicants for Intervention for the present time as complaint
of Applicants for Intervention, reserving the right to any
action Applicants for Intervention may have against plaintiff.

This motion is made pursuant to Rule 24 of the Utah
Rules of Civil Procedure and for the reasons that the represent-
ation of the Applicants' interest by existing parties may be
inadequate and the Applicants may be bound by a judgment in the

action and because the Applicants are so situated as to be adversely affected by a disposition of the matter and because the Applicants' claim and the main action have common questions of law and fact.

Dated this 5th day of January, 1979.

BACKMAN, CLARK & MARSH

David B. Boyce

David B. Boyce
Attorneys for Applicants for Intervention
500 American Savings Building
61 South Main Street
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of January, 1979, a copy of the foregoing instrument was mailed, postage prepaid, as follows:

James S. Lowrie
Thomas E. K. Cerruti
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendant
800 Walker Bank Building
Salt Lake City, Utah 84111

Yolanda M. Dick

Motion to Dismiss Case No. 78-7764

Exhibit IV

JAN 4 7 05 PM '79

W. S. K. M. S. L. V. S. C. L. E. R. K.

BY James S. Lowrie DEPUTY CLERK

James S. Lowrie, Esq., and
Thomas E. K. Cerruti, Esq., of
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendant
800 Walker Bank Building
Salt Lake City, Utah 84111
Telephone: 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

---ooo0ooo---

SALT LAKE CITY, :
Plaintiff, : MOTION TO DISMISS
vs. :
MOUNTAIN FUEL SUPPLY CO., : Civil No. C 78 7764
Defendant. :

---ooo0ooo---

The Defendant, Mountain Fuel Supply Co., by and
through its counsel, moves the Court pursuant to Rule 12(b)(6)
of the Utah Rules of Civil Procedure, to dismiss this matter
on the grounds that the Complaint fails to state a claim upon
which relief can be granted.

This Motion is based in part on two Salt Lake City
ordinances which were filed on December 28, 1978, and therefore
may properly be treated pursuant to Rule 12(b) of the Utah
Rules of Civil Procedure as a motion for summary judgment.

Defendant will seek, pursuant to its Motion to Shorten
Time for Hearing, to have this motion heard contemporaneously
with Plaintiff's Order to Show Cause Hearing which is in the nature
of a preliminary injunction.

DATED this 4th day of January, 1979.

JONES, WALDO, HOLBROOK & McDONOUGH

By James S. Lowrie

By Thomas E. K. Cerruti
Thomas E. K. Cerruti
Attorneys for Defendant

Order Dismiss inteverners Case No. 78-7764

Exhibit V

FILED

James S. Lowrie, and
Thomas E. K. Cerruti, of
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendants
Mountain Fuel Supply Company and
Latin America Assembly of God, Inc.
800 Walker Building
Salt Lake City, Utah 84111
Telephone: (801) 521-3200

Williams

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

---ooo0ooo---

SALT LAKE CITY, :

Plaintiff, :

vs. :

MOUNTAIN FUEL SUPPLY CO., :

LEMEL CORPORATION, and :

LATIN AMERICA ASSEMBLY :

OF GOD, INC., :

Defendants. :

O R D E R

LEMEL CORPORATION, MELVIN E. :

INGERSOLL, MARIAN INGERSOLL, :

his wife, LELAND R. INGERSOLL, :

EVELYN E. INGERSOLL, his wife, :

Interveners, :

Civil No. C-78-7764

vs. :

MOUNTAIN FUEL SUPPLY CO., :

and SALT LAKE CITY, :

Defendants and :

Cross-Defendants.

---ooo0ooo---

The motion for summary judgment of Defendants Mountain Fuel Supply Company against Interveners, Lemel Corporation, Melvin E. Ingersoll, Marian Ingersoll, his wife, Leland R. Ingersoll and Evelyn E. Ingersoll, his wife, having come on to be heard pursuant to notice and the Court having heard

representations of counsel for Mountain Fuel Supply Company and no objections being lodged by the Plaintiff Salt Lake City Corporation and no one appearing on behalf of the Interveners and the Court having considered the matters on file and being of the opinion that the motion for summary judgment by Mountain Fuel should be granted,

IT IS HEREBY ORDERED that Mountain Fuel Supply Company is granted summary judgment against Interveners on their amended complaint and said complaint shall be dismissed with prejudice on the merits.

DATED this 10th day of September, 1982.

BY THE COURT:

Paul R. Fisher
District Judge

BY Dianne Williams CLERK
Deputy Clerk

Judgment Case No. 78-7764

Exhibit VI

H. DIXON, CLERK
BY Frederick
DEPUTY CLERK

James S. Lowrie, and
Thomas E. K. Cerruti, of
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendants
800 Walker Building
Salt Lake City, Utah 84111
Telephone: (801) 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

SALT LAKE CITY,

Plaintiff,

VS.

MOUNTAIN FUEL SUPPLY CO.,
LEMEL CORPORATION and
LATIN AMERICA ASSEMBLY OF
GOD, INC.

Defendants.

• • • • •

JUDGMENT

Civil No. C78-7764

The trial of the above-captioned matter came on before this Court on the 8th day of November, 1982, with plaintiff, Salt Lake City, represented by Judy F. Lever, Esq. and defendants, Mountain Fuel Supply Company and Latin America Assembly of God, Inc. represented by James S. Lowrie, Esq. and Thomas E. K. Cerruti, Esq. The Court has heretofore entered a Memorandum Decision and Findings of Fact and Conclusions of Law. The Court now enters its

JUDGMENT

1. Judgment is hereby entered in favor of the defendants on the Complaint of plaintiff, Salt Lake City, and

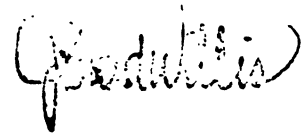
plaintiff's claims are hereby dismissed no cause of action and with prejudice on the merits.

2. Salt Lake City Ordinances 172 and 173 of 1977 are hereby declared to be valid and to have vested title to the land described in each of said Ordinances in the abutting land Owners.

DATED this 31 day of January, 1983.

BY THE COURT:


David B. Dee,
District Judge



Memorandum Opinion and Order C-85-0790

Exhibit VII

RONALD C. BARKER
Atty. At Law

DEC 4 1986

FILED

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

INTERSTATE LAND CORPORATION, a Utah corporation,	:	o
Plaintiff,	:	MEMORANDUM OPINION AND
vs.	:	ORDER
R. D. PATTERSON	:	CIVIL NO. C 85-790
Defendant.	:	

This matter came before the court on the motions of defendant R. D. Patterson and proposed Intervenor to correct previous orders. The motions are expressly premised on Rules 59(a)(6) and (7), 59(d), 59(e), 60(b), U.R.C.P., "or other applicable rules" and are directed at the following orders:

1. Order Denying Motion to Intervene Filed by Melvin E. Ingersoll, Marian Beverly Ingersoll, Leland R. Ingersoll, and Evelyn E. Ingersoll, dated September 4, 1986 (hereinafter referred to as the "order denying intervention").
2. Order Granting Plaintiff's Motion for Summary Judgment against Defendant, dated September 4, 1986 (hereinafter referred to as "summary judgment order").

The motions in question are contained in a single pleading dated September 13, 1986 and filed on September 15, 1986. It

was plaintiff, however, that caused the motions to be heard by the court on October 20, 1986, by its filing of a Notice of Hearing.

The court heard the arguments of counsel on October 20, 1986, at 2:00 o'clock p.m., and took the matter under advisement. Thereafter, the court reviewed the entire file, including specifically the plaintiff's original Motion for Summary Judgment and supporting papers, the original Motion to Intervene and Proposed Complaint in Intervention and the transcript of the hearing of May 5, 1986 on the plaintiff's Motion for Summary Judgment and proposed Intervenors' Motion to Intervene (hereinafter sometimes referred to as "the original motions"). The following procedural facts are significant:

1. The original motions were fully presented to the court and argued on May 5, 1986. No legal memoranda, brief or evidence were submitted by the defendant or the proposed Intervenors. At that hearing, counsel for the proposed Intervenors proposed to submit a post hearing memorandum (Tr. p. 13) but none was forthcoming.
2. The court, per Judge Fishler, took the matter under advisement and thereafter issued his ruling by means of a minute entry dated July 28, 1986.
3. Proposed written orders incorporating the court's ruling were mailed by plaintiff to opposing counsel on August 1, 1986. Defendant and proposed Intervenors did not object to

the form or substance of these proposed orders. Thereafter, on September 4, 1986, the order denying intervention and the summary judgment order were entered by the court per Judge Daniels, Judge Fishler having previously resigned his position on the court.

4. The tenth day following entry of the summary judgment order fell on a weekend and defendant filed the motions challenging the summary judgment order on September 15, 1986, the next succeeding day which was not a weekend or legal holiday. Consequently, if such motions were proper under Rule 59, U.R.C.P., they were timely filed under Rule 59(b).

The primary issue presented is whether the motions in question are truly Rule 59 motions. The resolution of this issue impacts not only the consideration of the motions by this court but, more significantly, the finality of the judgment in question and thus the timeliness of any appeal to the Supreme Court of Utah. For the reasons set forth below, this court deems the motions as not properly filed under Rule 59.

The motions in question are premised in part on Rule 59(a)(6) and (7) and 59(d). Each of these subdivisions expressly reference a "new trial" as the contemplated relief. Consequently, they are applicable only when a trial has preceded the motion. In summary judgment proceedings no trial takes place and, in accordance with Rule 52(a), findings and conclusions are

unnecessary. Thus, a challenge to the entry of the summary judgment order cannot be premised on subdivisions (a) or (d) of Rule 59. Additionally, Rule 52(b) is inapplicable to the summary judgment proceedings.

The remaining question under Rule 59 is whether subdivision (e) is a proper vehicle to challenge the rendering of a summary judgment. Depending on the resolution of this remaining question, a further issue may be whether Rule 59(e) is appropriate to challenge a summary judgment when no new evidence, fact or even legal argument is presented in support of the Rule 59(e) motion.

Rule 59(e), which is identical to Rule 59(e) of the Federal Rules of Civil Procedure, has been a part of the Utah Rules of Civil Procedure from their inception. Rule 59(e) was, however, an addition to the federal rules in the 1946 amendments. The Advisory Committee Notes to the federal rules indicate that subdivision (e) was "... added to care for a situation such as that arising in Boaz v. Mutual Life Ins. Co. of New York, ... 146 F.2d 321 [(8th Cir. 1944)] and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry." In Boaz the court held that the district court had inherent power to amend a judgment of dismissal without prejudice to a judgment of dismissal with prejudice. While such power of amendment inheres in the court rendering the judgment, the use of Rule 59(e) for amendment of

judgment is applicable in very limited situations such as those presented in Boaz. The Advisory Committee Notes themselves thus suggest that Rule 59(e) was not intended for the wholesale challenge of judgments when the other provisions of Rule 59 do not apply.

In the instant case, the Rule 59(e) motion does pose a wholesale attack on the summary judgment order. While cast as a Rule 59 motion, it is in fact a motion to reconsider. There are various specific rules which allow a party to seek reconsideration following a trial. Rules 50(b), 52(b) and Rule 59, U.R.C.P. The logical place for a similar rule upon which to premise a reconsideration of a summary judgment would be in a subdivision of Rule 56. No such rule, however, exists.

Provision of an express and specific mechanism to reconsider a final judgment, such as those prescribed in Rules 50(b), 52(b) and 59, is necessary so that a motion for reconsideration can stay the running of the time for filing a notice of appeal. To allow Rule 59(e) to be used as a catchall means to seek reconsideration of any final judgment merely provides a means to challenge the integrity and finality of this court's judgments and allows the moving party further time within which to file an appeal.

There are numerous thresholds in summary judgment proceedings in which a party opposing the motion may be heard. Quite obviously, the party may submit opposing papers, memoranda

and briefs and be heard at oral argument. Following any hearing and while the court has the matter under advisement, the party opposing the motion may make further submissions. Even if the matter is not taken under advisement, a signed judgment is always necessary under Rule 58A. Rule 2.9 of the District Court Rules of Practice requires service of a proposed judgment on opposing counsel and allows five days for objection. Only then can the final judgment be entered. Thus, Rule 2.9 provides the opposing party with an opportunity by means of objection to convince the court that its previously ruling was erroneous. No further mechanism for reconsideration is necessary or desirable.

The instant case is illustrative. The plaintiff originally presented this matter to the court on May 5, 1986, in a hearing on its Motion for Summary Judgment. Defense counsel had the opportunity to file papers, memoranda, and affidavits in opposition. No such items were filed. Counsel for the proposed Intervenor filed a Motion to Intervene and a Proposed Complaint in Intervention. At the hearing on plaintiff's Motion for Summary Judgment, defense counsel and counsel for the proposed Intervenor were heard.

The court thereafter had the matter under advisement for over two months during which time defendants and the proposed Intervenor made no filings or submissions. While counsel for the proposed Intervenor did propose to file a post hearing memorandum (Tr. p. 13), none was forthcoming. It is particularly

significant that at no time have defendant or the proposed Intervenor submitted affidavits or the like raising a genuine issue of material fact. Following the minute entry of July 28, 1986, which was mailed to all counsel, neither defendant nor the proposed Intervenor requested this court to reconsider its ruling. Moreover, no objections to the proposed judgment submitted by plaintiff's counsel were interposed under Rule 2.9 of the District Court Rules of Practice.

Defendant and the proposed Intervenor now, however, seek to have this court reconsider its final judgment by means of its Rule 59 motions. At the hearing of October 20, 1986, counsel for defendant and intervenors admitted on the record that there was nothing before the court, including new legal arguments, that had not previously been submitted and argued at the May 5 hearing on the original motions. The only thing different was that there was a new judge, Judge Fishler having resigned before the formal entry of the written judgment.

The courts which have addressed the issue are split, some holding that Rule 59(e) is not a proper vehicle to challenge a summary judgment and others holding to the contrary. E.g., compare Blair v. Delta Air Lines, Inc. 344 F Supp. 367 (S.D. Fla. 1972) and Durkin v. Taylor, 444 F. Supp. 879, 889-90 (E. D. Va. 1977) with Sidney-Vinstein v. A. H. Robins Co., 697 F. 2d 880, 885 (9th Cir. 1983) and Stephenson v. Calpine Conifers II, Ltd., 652 F. 2d 808 (9th Cir. 1981). See also Jetero Constr. Co.

v. South Memphis Lumber Co., 531 F. 2d 1348, 1351-52 (6th Cir. 1976).

Hume v. Small Claims Court of Murray City, 590 P. 2d 309, 310-311 (Utah 1979) addresses the issue from the standpoint of a denial of a petition for a writ of mandamus. To that extent it is instructive but not controlling in the context of a summary judgment. In the latter context many more opportunities are generally available for parties and advocates to present argument. Parties opposing summary judgment are also generally presented an opportunity by means of objections under Rule 2.9 to convince the court prior to entry of judgment that its ruling was erroneous.

Even if Rule 59(e) was generally deemed a proper mechanism to challenge a summary judgment, it should not be deemed a proper use of such mechanism when no new fact, piece of evidence or even legal argument is presented in support of a Rule 59(e) motion or when a party opposing summary judgment fails to object to a proposed judgment under Rule 2.9. Under such circumstances, the party opposing summary judgment should pursue their remedy by appeal rather than a motion for reconsideration under the guise of Rule 59(e).

For the reasons set forth above, defendant's Rule 59 motions are denied as being improperly premised on Rule 59. Proposed Intervenor's motion for reconsideration cannot even be deemed to be premised on Rule 59 since they were not parties to the

proceeding when summary judgment was granted. In the event this matter is appealed and this court's view of Rule 59 is correct, plaintiff might be able to avoid some of the additional delay by moving for summary disposition under Rule 10, U.R.A.P. on the grounds that the notice of appeal was filed more than thirty days following judgment.

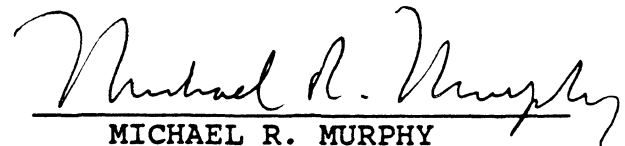
Because the Utah Supreme Court could disagree with the views expressed herein and to avoid any possible remand solely for this court to reconsider its judgment pursuant to the defendant's Rule 59 motions, the court has considered the entire record and finds no manifest error underlying the orders entered on September 4, 1986. The court particularly notes that it has not yet been presented with any matter by defendant or otherwise which tends to raise a genuine issue of material fact. For these reasons, even if defendant's motions should be deemed properly presented under Rule 59, the motions are denied.

The court further denies defendant's motion under Rule 60(b) for the reason that it is a motion to reconsider and is not properly premised on the grounds specified in Rule 60(b). See Blair v. Delta Air Lines, Inc., 344 F. Supp. 367 (S.D. Fla, 1972). The only surprise that has been asserted was expressly asserted at the May 5, 1986 hearing, over four months preceding the filing of these motions, and no further memorandum was filed after the May 5 hearing as promised.

It is therefore ordered, adjudged and decreed that

defendant's and proposed Intervenor's motions under Rule 59(a)(6) and (7), 59(d), 59(e), 60(b), U.R.C.P., "or other applicable rules" are hereby denied.

DATED THIS 2nd day of December, 1986.


MICHAEL R. MURPHY
DISTRICT COURT JUDGE

MAILING CERTIFICATE

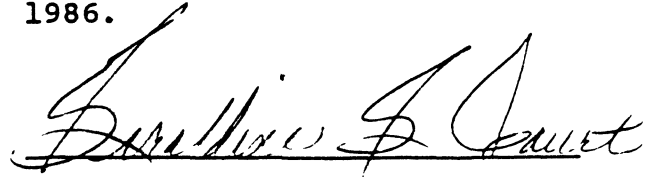
I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Opinion and Order, postage prepaid, to

Ronald C. Barker, Esq.
2870 South State Street
Salt Lake City, Utah 84115-3692

Patrick O'Hara, Esq.
P.O. Box 45340
Salt Lake City, Utah 84145

Ralph J. Hafen, Esq.
402 Kearns Building
Salt Lake City, Utah 84101

This 2nd day of December, 1986.



Notice of Automatic Stay Case No. 78-7764

Exhibit VIII

FILED

SALT LAKE COUNTY

JUL 31 10 43 AM '81

CLERK

[Signature]

David E. Leta
ROE AND FOWLER
Attorneys for LeMel Corporation
340 East Fourth South
Salt Lake City, Utah 84111
Telephone: (801) 328-9841

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

SALT LAKE CITY, a municipal)
corporation of the State of Utah,)
Plaintiff,)

vs.)

MOUNTAIN FUEL SUPPLY CO., et al.,)
Defendants.)

LEMEL CORPORATION, MELVIN E.)
INGERSOLL, MARIAN INGERSOLL,)
his wife, LELAND R. INGERSOLL,)
and EVELYN E. INGERSOLL, his wife,)
Intervenors.)

NOTICE OF
AUTOMATIC STAY

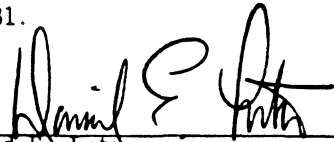
Civil No. 78-7764

PLEASE TAKE NOTICE that on January 5, 1981, LeMel Corporation filed a petition for relief under Chapter 11 of the United States Bankruptcy Code, Bankruptcy No. 80-00755, in the United States Bankruptcy Court for the District of Utah, Central Division.

The filing of the petition by the debtor operates as a stay of all judicial and quasi-judicial proceedings against the debtor and its property as provided in 11 U.S.C. § 362.

Furthermore, all actions taken after the date of the filing of the petition in violation of the stay are void and without affect.

DATED this 17 day of July, 1981.



David E. Leta
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for LeMel Corporation

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 1981, I served the foregoing Notice of Automatic Stay upon Judy F. Lever, attorney for Salt Lake City, by depositing a copy thereof in the United States mails, postage prepaid, addressed as follows:

Judy F. Lever, Esq.
Assistant City Attorney
100 City and County Building
Salt Lake City, Utah 84111



ADDENDUM

B. STATUTE TEXTS

Utah Code Annotated § 78-2-2

Utah Code Annotated § 78-12-13

Rule 24 Utah Rules of Civil Procedure (All portions)

Rule 59 Utah Rules of Civil Procedure (All portions)

Rule 59, Federal Rules of Civil Procedure (All portions)

District Court Local Rule 2.9(b)

three years. The current judicial council shall continue in existence with full authority until the election of the members of the council as provided in this section.

(2) The appellate court nominating commission established by Subsection 20-1-7.2(1) may not be convened initially prior to July 1, 1986 nor later than September 1, 1986.

(3) The provisions in this act for court jurisdictions may not be implemented until January 1, 1987. Courts then continue to have jurisdiction to dispose of any cases pending on that date.

(4)(a) Any justice or judge of a court of record, whose election to office was effective on or before July 1, 1985, shall hold the office for the remainder of the term to which he was elected. The justice or judge is subject to an unopposed retention election as provided by law at the general election immediately preceding the expiration of the respective term of office.

(b) Any justice or judge of a court of record whose appointment to office was effective on or before July 1, 1985, is subject to an unopposed retention election as provided by law at the first general election held more than three years after the date of the appointment.

(c) Any justice or judge of a court of record whose appointment to office was effective after July 1, 1985, is subject to an unopposed retention election as provided by law at the first general election held more than three years after the date of the appointment.

Chapter 2. Supreme Court

78-2-1. Number of justices - Term - Retirement - Chief justice and associate chief justice - Selection and functions.

78-2-1.5. Repealed.

78-2-1.6. Repealed.

78-2-2. (Effective through December 31, 1987). Supreme Court jurisdiction.

78-2-2. (Effective January 1, 1988). Supreme Court jurisdiction.

78-2-3. Repealed.

78-2-4. Supreme Court - Rulemaking, judges pro tempore, and practice of law.

78-2-5. Court always open for transaction of business.

78-2-6. Appellate court administrator.

78-2-7 through 78-2-10. Repealed.

78-2-11. Reporter - Deputy clerks - Assistants.

78-2-12. Postage and office supplies.

78-2-13. Bailiffs and assistant librarians.

78-2-14. Sheriffs to attend and serve.

78-2-1. Number of justices - Term - Retirement - Chief justice and associate chief justice - Selection and functions.

(1) The Supreme Court consists of five justices.

(2) A justice of the Supreme Court shall be appointed initially to serve until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a justice of the Supreme Court is ten years and until his successor is appointed and approved in accordance with Section 20-1-7.1.

(3) The justices of the Supreme Court shall elect a chief justice from among the members of the court by a majority vote of all justices. The term of the office of chief justice is four years. The chief justice may not serve successive terms. The chief justice may resign from the office of chief justice without resigning from the Supreme Court. The chief justice

may be removed from the office of chief justice by a majority vote of all justices of the Supreme Court.

(4) If the justices are unable to elect a chief justice within 30 days of a vacancy in that office, the associate chief justice shall act as chief justice until a chief justice is elected under this section. If the associate chief justice is unable or unwilling to act as chief justice, the most senior justice shall act as chief justice until a chief justice is elected under this section.

(5) In addition to the chief justice's duties as a member of the Supreme Court, the chief justice has additional duties as provided by law.

(6) There is created the office of associate chief justice. The term of office of the associate chief justice is two years. The associate chief justice may serve in that office no more than two successive terms. The associate chief justice shall be elected by a majority vote of the members of the Supreme Court and shall be allocated duties as the chief justice decides. If the chief justice is absent or otherwise unable to serve, the associate chief justice shall serve as chief justice. The chief justice, where not inconsistent with law, may delegate responsibilities to the associate chief justice.

78-2-1.5. Repealed.

78-2-1.6. Repealed.

78-2-2. (Effective through December 31, 1987).

Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;
(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;

(c) discipline of lawyers;
(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in cases originating in:

- (i) the Public Service Commission;
- (ii) the State Tax Commission;
- (iii) the Board of State Lands;
- (iv) the Board of Oil, Gas, and Mining; and
- (v) the state engineer;

(f) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(g) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(h) appeals from the district court involving a conviction of a first degree or capital felony; and

(i) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except for the following matters:

- (a) first degree and capital felony convictions;

(b) election and voting contests;
(c) reapportionment of election districts;
(d) retention or removal of public officers;
(e) general water adjudication;
(f) taxation and revenue; and
(g) those matters described in Subsection (3)(a) through (h).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b). 1986

78-2-2. (Effective January 1, 1988). Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

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- (i) the Public Service Commission;
- (ii) the State Tax Commission;
- (iii) the Board of State Lands;
- (iv) the Board of Oil, Gas, and Mining; and
- (v) the state engineer;

(f) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

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(h) appeals from the district court involving a conviction of a first degree or capital felony; and

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(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Chapter 46b, Title 63, in its review

of agency adjudicative proceedings. 1987

78-2-3. Repealed. 1986

78-2-4. Supreme Court - Rulemaking, judges pro tempore, and practice of law.

(1) The Supreme Court shall adopt rules of procedure and evidence for use in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the rules of procedure and evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.

(2) Except as otherwise provided by the Utah Constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah.

(3) The Supreme Court shall by rule govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to the practice of law. 1986

78-2-5. Court always open for transaction of business.

The Supreme Court shall always be open for the transaction of business. Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time. 1953

78-2-6. Appellate court administrator.

The appellate court administrator shall appoint clerks and support staff as necessary for the operation of the Supreme Court and the Court of Appeals. The duties of the clerks and support staff shall be established by the appellate court administrator, and powers established by rule of the Supreme Court. 1986

78-2-7 through 78-2-10. Repealed. 1986

78-2-11. Reporter - Deputy clerks - Assistants.

The Supreme Court shall appoint a reporter of its decisions who shall hold office during the pleasure of the court, and may appoint, remove at pleasure, and fix the compensation for such deputy clerks and other assistants as may be necessary for the transaction of the business of the court. 1953

78-2-12. Postage and office supplies.

Stationery, postage and supplies necessary for the transaction of the business of the Supreme Court, including the printing of the court docket, shall be furnished by the purchasing department or officer of the state, on requisition therefor made through the clerk. 1953

78-2-13. Bailiffs and assistant librarian.

The court is hereby authorized to appoint and remove at pleasure the necessary bailiffs to attend the court, and to perform such other duties and execute such orders as may be directed or made by the court. The court may also appoint and remove at pleasure an assistant librarian, who shall perform such duties as the court may order or direct. 1953

78-2-14. Sheriffs to attend and serve.

The court may at any time require the attendance and services of any sheriff in the state. 1953

Chapter 2a. Court of Appeals

78-2a-1. Court of Appeals.

78-2a-2. Number of judges - Functions - Filing fees.

78-2a-3. (Effective through December 31, 1987). Court of Appeals jurisdiction.

78-2a-3. (Effective January 1, 1988). Court of Appeals

ounting to the sum of \$5 per acre. 1953

-12-12. Possession must be continuous, and taxes paid.

In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law. 1953

-12-12.1. Possession and payment of taxes - Proviso - Tax title.

In no case shall adverse possession be established under the provisions of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid the taxes which have been levied and assessed upon such land according to law. Provided, however, that payment by the holder of a tax title to all property or his predecessors, of all the taxes levied and assessed upon such real property after the delinquent tax sale or transfer under which he claims for a period of not less than four years and not less than one year after the effective date of its amendment, shall be sufficient to satisfy the requirements of this section in regard to the payment of taxes necessary to establish adverse possession. 1953

-12-13. Adverse possession of public streets or ways.

No person shall be allowed to acquire any right or title in or to any lands held by any town, city or county, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks or public squares, or for any other public purpose, by adverse possession thereof for any length of time whatsoever, unless it shall affirmatively appear that such town or city or county or the corporate authorities thereof have sold, or otherwise disposed of, and conveyed such real estate to a purchaser for a valuable consideration, and that for more than seven years subsequent to such conveyance the purchaser, his grantees or successors in interest, have been in the exclusive, continuous and adverse possession of such real estate; in which case an adverse title may be acquired. 1953

-12-14. Possession of tenant deemed possession of landlord.

When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of seven years from the termination of the tenancy, or, where there has been no written lease, until the expiration of seven years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord; but such presumption cannot be made after the periods herein limited. 1953

-12-15. Possession not affected by descent cast.

The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property. 1953

-12-16. Action to redeem mortgage of real property.

No action to redeem a mortgage [of] real property, with or without an account of rents and

profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained [an] adverse possession of the mortgaged premises for seven years after breach of some condition of the mortgage. 1953

78-12-17. When more than one mortgagor.

If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action, under the provisions of this article, any one of them who is entitled to maintain such an action may redeem therein a divided or undivided part of the mortgaged premises as his interest may appear, and have an accounting for a part of the rents and profits, proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises. 1953

78-12-18. Actions to recover estate sold by guardian.

No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship. 1953

78-12-19. Actions to recover estate sold by executor or administrator.

No action for the recovery of any estate sold by an executor or administrator in the course of any probate proceeding can be maintained by any heir or other person claiming under the decedent, unless it is commenced within three years next after such sale. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud or other lawful grounds upon which the action is based. 1953

78-12-20. Minority or disability prevents running of period.

The two preceding sections [78-12-18, 78-12-19] shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues but all such persons may commence an action within the time prescribed in the next succeeding section [78-12-21]. 1953

78-12-21. Disabilities enumerated - Time of not reckoned.

If a person entitled to commence an action for the recovery of real property or for the recovery of the possession of it, or to make any entry or defense, founded on the title to real property or to rents or services out of the property, is at the time the title first descends or accrues, either under the age of majority or mentally incompetent, the time during which the disability continues is not a part of the time in this article limited for the commencement of the actions or the making of the entry or defense. 1957

Article 2. Other Than Real Property

78-12-22. Within eight years.

78-12-23. Within six years - Meane profits of real property - Instrument in writing - Distribution of criminal proceeds to victim.

78-12-24. Public officers - Within six years.

78-12-25. Within four years.

78-12-25.5. Injury due to defective design or construction of improvement to real property - Within seven years.

78-12-26. Within three years.

78-12-27. Action against corporate stockholders or

sons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Compiler's Notes. — This rule is identical to Rule 23.1, F.R.C.P.

Cross-References. — Corporate stockholders or directors, limitation of action against, § 78-12-27

Corporation defined, Utah Const., Art. XII, Sec. 4; § 16-10-2.

Extraordinary writs, § 78-35-6 et seq.; Rule 65B.

Liability of corporate directors, § 16-10-44.

Liquidation of corporation, action by or against receiver, § 16-10-93.

Sue and be sued, power of corporation to, Utah Const., Art. XII, Sec. 4; § 16-10-4(b).

NOTES TO DECISIONS

ANALYSIS

Action barred.

—Plaintiffs not shareholders at time of wrongful act.

Class action distinguished.

Action barred.

—Plaintiffs not shareholders at time of wrongful act.

Shareholders' action against former corporate directors and officers for alleged conversion of corporate assets and for breach of fiduciary duties was barred by this rule where the shareholders did not acquire their stock until after the events complained of and the shares did not devolve on them by operation of law.

Noland v. Barton, 741 F.2d 315 (10th Cir. 1984).

Class action distinguished.

Action by corporate shareholders which alleged injury to the corporation only, and not to them as individuals, was a derivative action and could not be brought as a class action. Richardson v. Arizona Fuels Corp., 614 P.2d 636 (Utah 1980).

COLLATERAL REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d Corporations § 2250; 59 Am. Jur. 2d Parties § 77.

C.J.S. — 18 C.J.S. Corporations §§ 564 to 566.

A.L.R. — Communications by corporation as privileged in stockholders' action, 34 A.L.R.3d 1106.

Punitive damages, allowance of in stockholder's derivative action, 67 A.L.R.3d 350.

Application to derivative actions for breach

of fiduciary duty, under § 36(b) of Investment Company Act of 1940 (15 USCS § 80a-35(b)), of requirement, stated in Rule 23.1 of the Federal Rules of Civil Procedure that complaint in derivative actions allege what efforts were made by shareholders to obtain desired action or reasons for failure to do so, 65 A.L.R. Fed. 542.

Key Numbers. — Corporations ⇐ 206, 207.

Rule 24. Intervention.

(a) **Intervention of right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede

his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

Amended, effective Jan. 1, 1987.)

Amendment Notes. — The 1986 amendment combined former Subdivisions (a)(2) and (a)(3) into present Subdivision (a)(2) and reworded the contents thereof.

Compiler's Notes. — This rule is similar to Rule 24, F.R.C.P.

Cross-References. — Claims for relief and defenses, Rule 8.

Fee for filing complaint in intervention, 21-2-2.

Form for motion to intervene as defendant, Form 24.

Misjoinder and nonjoinder of parties, Rule 21.

Necessary joinder of parties, Rule 19.

Parties plaintiff and defendant; capacity, Rule 17.

Permissive joinder of parties, Rule 20.

NOTES TO DECISIONS

ANALYSIS

Appeal.

Order denying intervention.

Intervention of right.

Adverse effect.

—Court's disposition of property.

Insurer.

—Uninsured motorist coverage.

Jurisdiction.

Error by court clerk.

Postjudgment intervention.

Not Allowed.

Showing required.

Timeliness.

Individual facts.

Appeal.

Order denying intervention.

Order which denies with prejudice an application for intervention is appealable. *Tracy v. University of Utah Hosp.*, 619 P.2d 340 (Utah 1980).

Intervention of right.

—Adverse effect.

—Court's disposition of property.

When the application for intervention is made timely, this rule permits intervention as a matter of right when the applicant will be

(e) **Filing transcript of satisfaction in other counties.** When any satisfaction of a judgment shall have been entered on the judgment docket of the county where such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.

Compiler's Notes. — There is no federal rule covering this subject matter

Cross-References. — Fee not charged for filing satisfaction, § 21-2-2.

NOTES TO DECISIONS

ANALYSIS

Court.

—Duty.

—Attachment.

Effect.

—Acceptance of full payment.

Owner or attorney

—Vacation of satisfaction.

—Hearing.

Court.

—Duty.

—Attachment.

Court had duty to make order directing partial satisfaction of judgment to extent of money collected through attachment proceeding *Blake v. Farrell*, 31 U 110, 86 P 805

Effect.

—Acceptance of full payment.

When plaintiff voluntarily accepted full payment of a judgment in his favor, the satisfaction and discharge operated to satisfy and discharge everything merged in and adjudicated

by the judgment *Sierra Nevada Mill Co. v. Keith O'Brien Co.*, 48 U. 12, 156 P. 943.

Owner or attorney.

—Vacation of satisfaction.

—Hearing.

The recorded satisfaction of judgment signed by judgment creditor cannot be vacated without action and hearing in equity, and the lien of an attorney against the proceeds of the judgment does not include his personal right to execute against the judgment debtor *Utah C. V. Federal Credit Union v. Jenkins*, 528 P 2d 1187

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments § 979 et seq.

C.J.S. — 49 C.J.S. Judgments §§ 574 to 584

A.L.R. — Voluntary payment into court of

judgment against one joint tort-feasor as release of others, 40 A.L.R.3d 1181.

Key Numbers. — Judgment ⇌ 891 to 899.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes: provided, however, that on a motion for a new trial 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:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors

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

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice

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

(7) Error in law

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Compiler's Notes. — This rule is similar to Rule 59, F R C P

Cross-References. — Fee for filing motion for new trial § 21-2-2

Harmless error not ground for new trial, Rule 61

Juror's competency as witness as to validity of verdict or indictment. Rules of Evidence, Rule 606

NOTES TO DECISIONS

ANALYSIS

Abandonment of motion
 Accident or surprise
 Arbitration awards
 Caption on motion for new trial
 Correction of insufficient or informal verdict
 Correction of record

(Cir.1958), cert. denied, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959); *Beacon Fed. S. & L. Assn. v. Federal Home L. Bank Bd.*, 266 F.2d 246 (7th Cir.), cert. denied, 361 U.S. 823, 80 S.Ct. 70, 4 L.Ed.2d 67 (1959); *Ram v. Paramount Film D. Corp.*, 278 F.2d 191 (4th Cir.1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U. S. District Courts for the Eastern and Southern Districts of New York; *Ram v. Paramount Film D. Corp.*, supra, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b)(1) and (2) covering the subject of judgments by default.

Rule 59. New Trials; Amendment of Judgments

(a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial 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.

(b) **Time for Motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Time for Serving Affidavits.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either

case, the court shall specify in the order the grounds therefor.

(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule represents an amalgamation of the petition for rehearing of former Equity Rule 69 (Petition for Rehearing) and the motion for new trial of 28 U.S.C., § 2111, formerly § 391 (New trials; harmless error), made in the light of the experience and provision of the code States. Compare Calif.Code Civ.Proc., Deering, 1937, §§ 656-663a, 28 U.S.C., § 2111, formerly § 391 (New trials; harmless error) is thus substantially continued in this rule. U.S.C., Title 28, former § 840 (Executions; stay on conditions) is modified in so far as it contains time provisions inconsistent with **Subdivision (b)**. For the effect of the motion for new trial upon the time for taking an appeal see *Morse v. United States*, 1926, 46 S.Ct. 241, 270 U.S. 151, 70 L.Ed. 518; *Aspen Mining and Smelting Co. v. Billings*, 1893, 14 S.Ct. 4, 150 U.S. 31, 37 L.Ed. 986.

For partial new trials which are permissible under **Subdivision (a)**, see *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 1931, 51 S.Ct. 513, 283 U.S. 494, 75 L.Ed. 1188; *Schuerholz v. Roach*, C.C.A.4, 1932, 58 F.2d 32; *Simmons v. Fish*, 1912, 97 N.E. 102, 210 Mass. 563, Ann.Cas. 1912D, 588 (sustaining and recommending the practice and citing federal cases and cases in accord from about sixteen states and contra from three States). The procedure in several States provides specifically for partial new trials. Ariz.Rev.Code Ann., Struckmeyer, 1928, § 3852; Calif.Code Civ.Proc., Deering, 1937, §§ 657, 662; Smith-Hurd Ill.Stats., 1937, c. 110, § 216 (Par. (f)); Md.Ann.Code, Bagby, 1924, Art. 5, §§ 25, 26; Mich.Court Rules Ann., Searl, 1933, Rule 47, § 2; Miss.Sup.Ct.Rule 12, 161 Miss. 903, 905, 1931; N.J.Sup.Ct.Rules 131, 132, 147, 2 N.J.Misc. 1197, 1246-1251, 1255, 1924; 2 N.D. Comp.Laws Ann., 1913, § 7844, as amended by N.D.Laws 1927, ch. 214.

1946 AMENDMENT

Note to Subdivision (b). With the time for appeal to a circuit court of appeals reduced in general to 30 days by the proposed amendment of Rule 73(a), the utility of the original "except" clause, which permits a motion for a new trial on the ground of newly discovered evidence to be made before the expiration of the time for appeal, would have been seriously restricted. It was thought advisable, therefore, to take care of this matter in another way. By amendment of Rule 60(b), newly discovered evidence is made the basis for relief from a judgment, and the maximum time limit has been extended to one year. Accordingly the amendment of Rule 59(b) eliminates the "except" clause and its specific treatment of newly discovered evidence as a ground for a motion for new trial. This ground remains, however, as a basis for a motion for new trial served not later than 10 days after the entry of judgment. See also Rule 60(b).

movant's facts that are disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

(f) Decision shall be rendered without a hearing unless requested by the court, in which event the clerk shall set a date and time for such hearing.

(g) In all cases where the granting of a motion would dispose of the action or any issues thereof on the merits with prejudice, the party resisting the motion may request a hearing and such request shall be granted unless the motion is summarily denied. If no such request is made within ten (10) days of notice to submit for decision, a hearing on the motion shall be deemed waived.

(h) Provided, however, that any district court and any circuit court by order of the judge or judges of the court may exclude that court from the operation of this Rule 2.8 in which case an alternative procedure shall be prescribed by written administrative order or rule.

NOTES TO DECISIONS

Cited in Estate of Kay, 705 P.2d 1165 (Utah 1985)

Rule 2.9. Written orders, judgments, and decrees.

(a) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen (15) days, or within shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling.

(b) Copies of the proposed findings, judgments, and or orders shall be served on opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections thereto shall be submitted to the court and counsel within (5) days after service.

(c) Stipulated settlements and dismissals shall be reduced to writing and presented to the court for signature within fifteen (15) days of the settlement and dismissal.

NOTES TO DECISIONS

ANALYSIS

Applicability
Signature of court
—Timing
Cited

Applicability.

This Rule and its requirements are binding only upon counsel, not upon the trial court. *Tolboe Constr. Co. v. Staker Paving & Constr. Co.*, 682 P.2d 843 (Utah 1984).

Signature of court.

—Timing.

The fact that the court signed the documents

prior to plaintiff's submission of objections and prior to the expiration of five days from the service of the documents did not constitute a violation of this rule. *Tolboe Constr. Co. v. Staker Paving & Constr. Co.*, 682 P.2d 843 (Utah 1984).

Cited in *Larsen v. Larsen*, 674 P.2d 116 (Utah 1983).