

1998

Vickie M. Nielsen v. The Estate of Mary Jane Hefferon : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VICKIE M. NIELSEN,

Plaintiff/Appellant,

vs.

THE ESTATE OF MARY JANE
HEFFERON,

Defendant/Appellee.

APPEAL No. 981711-CA

Priority No. 15

BRIEF OF DEFENDANT/APPELLEE THE ESTATE OF MARY JANE HEFFERON

APPEAL FROM FINAL JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

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Clerk of the Court

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STATEMENT OF JURISDICTION

This matter is an appeal from a final judgment and order of the Third Judicial District of Salt Lake County, State of Utah. An Order of Dismissal with prejudice was granted to the defendant and filed on July 25, 1998. (R. at 112-115.) The Utah Court of Appeals has jurisdiction over this matter pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure and Utah Code Annotated § 78-2a-3(2)(j). The Utah Supreme Court has jurisdiction over this matter pursuant to Utah Code Annotated § 78-2-2(3)(j).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Did the trial court err as a matter of law in granting defendant's motion for summary judgment when no genuine issues of material fact exist regarding the validity and authenticity of the signatures on the original Release?

Standard of Review: Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. V-1 Oil Co. v. Utah State Tax Comm'n, 942 P.2d 906, 910 (Utah 1996). When reviewing a grant of summary judgment, the Court of Appeals determines whether the trial court erred in applying governing law and whether it correctly held that there were no disputed

issues of material fact. Ferree v. State, 784 P.2d 149, 151 (Utah 1989).

2. Did the trial court abuse its discretion when it denied plaintiff's Motion to Amend her Complaint to add fraud and bad faith claims since she was unable to show that her altered Release reflected the agreement of the parties?

Standard of Review: A motion to amend should not be granted where the pleader does not set forth a legally sufficient claim. Timm v. Dewsnap, 921 P.2d 1381, 1389 (Utah 1996). The Court of Appeals will not overturn a trial court's denial of a motion to amend a pleading absent an abuse of discretion. Id.

3. Should damages be awarded to the defendant for having to defend a frivolous appeal?

Standard of Review: Pursuant to Rule 33 of the Utah Rules of Appellate Procedure, this Court may award damages upon the request of a party or upon its own motion. A frivolous appeal is "one that is not grounded in fact, not warranted by existing law, or not based on a good-faith argument to extend, modify or reverse existing law." Utah R. App. P. 33(b).

DETERMINATIVE STATUTORY PROVISIONS

1. Utah Code Ann. § 78-25-16 governs when parol evidence is admissible. This statute is known as the best evidence rule, which states that "[t]here can be no evidence of the contents of a writing, other than the writing itself" except for limited circumstances that do not apply to this case. In addition, the best evidence rule is also found in the Utah Rules of Evidence, Rule 1002, which reads:

To provide the content of a writing, recording, or photograph, *the original* writing, recording or photograph *is required*, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by Statute.

(Emphasis added.)

2. Utah Code Ann. § 78-25-17 governs writings that bear obvious alterations. It reads:

The party producing as genuine a writing which has been altered, or appears to have been altered after its execution in a part material to the question in dispute must account for the appearance of alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made,

For the text of Utah Code Ann. § 78-25-16, please see the Addendum to this Brief.

or that the alteration does not change the meaning or language of the instrument. If he does this, he may give the writing in evidence, but not otherwise.

(Emphasis added.)

3. Utah Rule of Civil Procedure 15(a) states in part:

(a) Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.²

4. Utah Code Ann. § 78-27-56 states that the court may award reasonable attorneys' fees to a prevailing party if the court determines that the action was without merit and not brought or asserted in good faith.³ In addition, Rule 33(a) of the Utah Rules of Appellate Procedure provides that a party may be awarded damages for having to defend a frivolous appeal.⁴

²The complete rule is set out in the Addendum to this Brief.

³For the full text of Utah Code Ann. § 78-27-56, please see the Addendum to this Brief.

⁴The complete rule is set out in the Addendum to this Brief.

STATEMENT OF THE CASE

This case arose from an automobile accident that occurred on or about September 23, 1990. Nine months later, Liberty Mutual Insurance Company, the liability carrier, and plaintiff reached a settlement and an original Release was signed by the plaintiff, Vickie M. Nielsen, at the advice of counsel. Ms. Nielsen's attorney also signed the agreement. This original Release released the defendant and her insurer from all personal injury and property damage claims arising from the automobile accident.

One-and-a-half years after the original Release was signed, Ms. Nielsen's counsel contacted Liberty Mutual Insurance Company's claims adjuster, Mr. David K. Gehris, notifying Mr. Gehris that there "may" be a claim made regarding personal injuries from this accident but that they had already settled the property damage dispute.

Due to the large volume of claims handled by Mr. Gehris, he took Ms. Nielsen's counsel at his word, and did not go back and review the original Release on file; instead, he began corresponding with Ms. Nielsen's counsel regarding the personal injury claim. When a new claims adjuster took over the

file in August of 1997, she reviewed the original Release, which plainly released the defendant and her insurer from any personal injury claim or property damage claim resulting from the automobile accident. She then informed defense counsel, who immediately informed plaintiff's counsel of the original Release and brought a Motion to Dismiss plaintiff's Complaint on the basis of the original Release.

Plaintiff's counsel admitted and the trial court found that the signatures on the original Release are the authentic signatures of Ms. Nielsen and her counsel, and that only one original Release existed. Plaintiff and her counsel had no reasonable explanation for the altered Release. After considering all the evidence presented by Ms. Nielsen, the trial court found that no ambiguous language existed in the original Release and that the parties' intent must be determined solely from the language of the original Release without result to parol evidence. The trial court granted the defendant's Motion to Dismiss and denied plaintiff's Motion to Amend her Complaint to add new claims.

STATEMENT OF THE FACTS

1. On or about September 23, 1990, an automobile accident involving plaintiff Vickie M. Nielsen and defendant Mary J. Hefferon occurred. Ms. Hefferon was killed in that accident. (R. 32.)

2. In January 1991, Ms. Nielsen retained legal counsel, Paul M. Halliday, Jr. (R. 57.)

3. On February 28, 1991, Ms. Nielsen's counsel contacted Liberty Mutual Insurance Company ("Liberty Mutual"), via a claims adjuster, Mr. David K Gehrig, to inform Liberty Mutual that Mr. Halliday had been retained to represent Ms. Nielsen's interests in the automobile accident that resulted in "personal property damage and injuries to our client." (R. 61, ¶ 1.)

4. On March 11, 1991, Liberty Mutual sent a check to Ms. Nielsen in the amount of \$1,000.00. (R. 123 4:8-10.) On this check is a note that says it is for the total loss of her vehicle. (R. 123 at 4:17-19.)

5. On May 30, 1991, Liberty Mutual settled the property damage on Ms. Nielsen's husband's vehicle and sent a

settlement draft of \$4,757.69 to him. The note on the draft that says that it is for the total loss of his vehicle. (R. 67.)

6. Finally, on June 5, 1991, Liberty Mutual issued a settlement draft to Ms. Nielsen for \$3,445.00. The note on the draft states "final settlement." (R. 76.) The day after this draft was issued, Ms. Nielsen signed, and her attorney witnessed by his signature, the original Release which discharged Ms. Hefferon and Liberty Mutual of any claims that arose from the automobile accident, including personal injuries and property damage. (R. 37.)⁵

7. Mr. Gehris of Liberty Mutual understood that the settlement was a release of all claims, including personal injury and property damage. (R. 30.)

8. Liberty Mutual did not hear from Ms. Nielsen or her attorney until a year and a half later, on December 15, 1992, when Ms. Nielsen's counsel wrote to Liberty Mutual:

"We settled the property dispute back in June 1991.

⁵Attached to this Brief in the Addendum is a color copy of the original Release. The trial court chose to return the original Release to defense counsel for safekeeping, so the original was not made part of the record. (R. 123 at 26:23-27:4.) It will be produced to the Court of Appeals at the appeal hearing or as directed by the Court of Appeals.

It appears that our client may need some back surgery to correct injuries she received from this accident. We are monitoring this matter and we are notifying you that there will be a claim made regarding personal injuries from this accident."

(R. 77, ¶ 2.)

9. Liberty Mutual took Mr. Halliday at his word and did not double check the contents of the original Release it had on file until August 1997, when a new claims adjuster was assigned to the file. She reviewed the file and discovered the discharged claims in the original Release. She then notified defense counsel of this for the first time, and defense counsel informed plaintiff's counsel of defendant's intent to rely on the Release. (R. 123 at 6:22-7:8; 8:5-11.)

10. A hearing was held on the motions on February 26, 1998, where, for the first time, Ms. Nielsen's counsel requested to examine the original Release. (R. 123.)⁶ After he examined the original Release, and consulted with his client, Ms. Nielsen's counsel admitted to the court that their signatures were indeed, on the document. (R. 123 at 18:3-5.)

⁶Ms. Nielsen's counsel contended that "despite numerous requests [the defendant] failed to make the so-called "original" of the release available to plaintiff's counsel for inspection." (R. 97.) However, he **never once** requested to see the original Release. (R. 123 at 9:20-10:2.)

11. When asked by the court if Ms. Nielsen's counsel had an original release on file, Ms. Nielsen's counsel replied he did not, that he had only received "just that one, your Honor."
(R. 123 at 18:13-19.)

12. At the hearing on the Motion for Summary Judgment, the following exchange occurred between Judge Thorne and Paul M. Halliday, Jr.:

THE COURT: Doesn't the best evidence rule require, though, that I rely first on the original signatures as opposed to a photocopy of something that's been changed?

MR. HALLIDAY: Well, your Honor, I believe that we need to examine that document to see if it's a forgery. We have testimony that shows that that was not our understanding. We have a copy of what I had in my file.

THE COURT: Well, are you disputing, then, that these signatures are yours and your client's?

MR. HANSEN: May I examine that, your Honor?

THE COURT: Now, you're telling me these are a forgery, then that's . . .

[A lengthy delay while Ms. Nielsen and Mr. Halliday looked at the Release.]

MR. HANSEN: I think it's this document with the one attached to his affidavit as well.

THE COURT: If you're indicating that this is a forgery, then that's raising the stakes of this going both ways considerably.

Mr. Halliday?

MR. HALLIDAY: Your Honor, these appear to be our signatures, but I don't know how it got on this document.

THE COURT: And you don't have the other copy as an original that you photocopied?

MR. HALLIDAY: Your Honor, I have our copies where we crossed it out.

THE COURT: So you have what?

MR. HALLIDAY: We have the copy that we submitted to the Court.

THE COURT: Okay. But you don't have one with original signatures any place in your files or your client's?

MR. HALLIDAY: No, because we just received the one release.

THE COURT: You just received the one?

MR. HALLIDAY: Just that one, your Honor.

THE COURT: Okay. Well, how is it, then, that this doesn't have the interlineation that -

MR. HALLIDAY: I don't know anything about that.

THE COURT: All right.

MR. HALLIDAY: Because our copy has it. My affidavit and my client's affidavit is we crossed it out, plus my affidavit that

Mr. Gehris indicated that we didn't need to cross it out, that he understood it was only for property damage, not personal injury, and that - we crossed it out.

(R. 123 at 17:8-19:5.)

13. The court did not believe that the altered Release submitted by Ms. Nielsen's counsel was a genuine document. The original Release was a blue, pre-printed, standard Release form.⁷ Both Ms. Nielsen and her attorney signed the Release the day after the settlement draft was issued on June 6, 1991. The Release was sent back to Ms. Hefferon's insurer, who stamped it on the reverse that it was received on June 7, 1991. The original Release has no deletions through the personal injury language. The altered Release contains interlineations that plaintiff's counsel admits he made; however the overwhelming evidence establishes that he had no authority to do so.

14. The court held that the original Release was unambiguous and by its plain language settled a personal injury claim. (R. 123 at 26:10-22.)

15. After considering all of the evidence offered by Ms. Nielsen, the trial court granted the defendant's Motion to

⁷See color copy of the original Release attached in the Addendum.

Dismiss based on the best evidence rule and the impropriety of resorting to parol evidence because it found the original Release to be unambiguous. (R. 112-115.)

16. Since the court held that the original Release preempted any lawsuit that would arise out of the automobile accident, it properly denied Ms. Nielsen's Motion for Leave to Amend her Complaint. Id.

SUMMARY OF ARGUMENT

1. The trial court soundly held that the best evidence rule requires the use of an original writing to prove its content.

2. The trial court soundly dismissed Ms. Nielsen's Complaint with prejudice since she could not account for the deletions on her copy of the altered Release.

3. The trial court soundly dismissed Ms. Nielsen's Complaint with prejudice since parol evidence is not admissible to contradict the terms of an unambiguous contract.

4. The trial court did not abuse its discretion when it denied plaintiff's Motion to Amend her Complaint to add claims of fraud and bad faith since she could not establish legally sufficient claims on either theory.

5. The trial court did not abuse its discretion when it denied Ms. Nielsen's Motion to Amend her Complaint because she was unable to convince the trial court that her altered Release reflected the agreement of the parties.

6. Attorneys' fees and double costs should be awarded in this matter since Ms. Nielsen has brought a frivolous appeal.

ARGUMENT

POINT I

THE BEST EVIDENCE RULE REQUIRES THAT THE ORIGINAL WRITING BE USED TO PROVE ITS CONTENT.

Rule 1002 of the Utah Rules of Evidence requires that, to prove the content of a writing, the original writing is required in evidence. Its statutory counterpart, Utah Code Ann. § 78-25-16, also requires that "[t]here can be no evidence of the contents of a writing, other than the writing itself" except in a handful of cases that do not apply to this one.

At oral argument on the Summary Judgment Motion, Ms. Nielsen's counsel requested to see the original Release for the first time since it was discovered, saying he would like to examine it "to see if it's a forgery." (R. 123 at 17:12-14.) After reviewing the signatures that were affixed to the original Release more than six years earlier, Ms. Nielsen's counsel

admitted that the signatures on the face of the document were, indeed, the authentic signatures of his client and himself. (R. 123 at 18:3-5.)

The trial court held that since "the original Release bears the signatures of plaintiff and her counsel, the content and scope of the parties' agreement must be determined from the original Release." (R. 113.) The court went on to hold that the parties' agreement unambiguously encompassed personal injury claims later pursued by Ms. Nielsen. (R. at 114.)

The trial court correctly applied the law and determined that no genuine issue of material fact existed with respect to the use and authenticity of the original Release. Reasonable minds cannot differ that the original Release is the writing that must be used to prove its contents. Ms. Nielsen's counsel does not dispute that his and client's signatures are on the original Release. Nor does he dispute that only one original Release exists. No material fact exists which could make an issue of the original Release's authenticity.

POINT II

WHEN A PARTY ATTEMPTS TO PRODUCE AN ALTERED WRITING INTO EVIDENCE, SHE MUST ACCOUNT FOR THE APPEARANCE OF THE ALTERATION IF IT IS TO BE CONSIDERED GENUINE.

Utah Code Ann. § 78-25-17 requires:

The party producing as genuine a writing which has been altered, or appears to have been altered after its execution in a part material to the question in dispute must account for the appearance of alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration does not change the meaning or language of the instrument. If he does this, he may give the writing in evidence, but not otherwise.

(Emphasis added.)

At oral argument on the Summary Judgment Motion, the trial court asked Ms. Nielsen's counsel why the original Release did not bear any interlineation of the personal injury language, like Ms. Nielsen's copy did. Ms. Nielsen's counsel replied, "I don't know anything about that." (R. 123 at 18: 20-23.)

Ms. Nielsen's counsel offered no evidence to establish that the alteration was made by someone else without his concurrence because he made the deletion himself. He admits that "in the presence of my client, I crossed out the words" relating to personal injury claims. (R. 58, ¶ 10.) Nor did he offer any evidence that he made the deletion with the consent of the parties affected by it: he avers just the opposite--that Liberty Mutual's adjuster told him to ignore the personal injury language. Since he was skeptical about this, he says he decided to cross out the language. Id. However, the original Release proves this statement inaccurate; no interlineation was made on the original. Therefore, plaintiff's arguments constitute a misrepresentation to this Court.

Ms. Nielsen's counsel also does not claim that the deletion was properly or innocently made, or that the deletion does not change the meaning or language of the instrument. By deleting the personal injury language in his copy of the release, he must have intended to change the legal effect of the agreement and to create an opportunity to pursue a personal injury lawsuit. This alteration unilaterally renewed the obligations of Ms.

Hefferon's estate and its insurer to cover personal injuries asserted by Ms. Nielsen a year and a half after the release's execution. Ms. Nielsen cannot account for why her altered copy has uninitialed and unacknowledged deletions and the original Release does not. Since she cannot properly account for the alterations, her copy cannot be admitted into evidence because it is not genuine. The trial court would not permit the altered Release into evidence, and neither should the Court of Appeals.

POINT III

PAROL EVIDENCE THAT CONTRADICTS THE PLAIN LANGUAGE OF AN UNAMBIGUOUS AGREEMENT IS INADMISSIBLE.

On June 6, 1991, Ms. Nielsen executed the original Release (R. 37), a color copy of which is attached to the Addendum of this Brief. It states, in relevant part:

The undersigned hereby releases and forever discharges Mary Jane Hefferon and Liberty Mutual Insurance Company . . . from all claims and demands, rights and causes of action of any kind the undersigned now has or hereafter may have on account of or in any way growing out of **personal injuries existing or which may exist which are known or unknown to me at the present time and property damage** resulting or to result from an occurrence which happened on or about September 23, 1990, and do hereby covenant to indemnify and save harmless the said party or parties from and against all claims and demands whatsoever on account of or in any way growing out of

said occurrence or its results *both to person and property*. This release expresses a *full and complete SETTLEMENT of a liability claimed and denied . . .*

(Emphasis added.) Above the space for Plaintiff's signature, the Release states in large, bold capital letters, "YOU ARE MAKING A FINAL SETTLEMENT. THIS IS A RELEASE: READ BEFORE SIGNING." It is signed by plaintiff Vickie M. Nielsen and witnessed by her attorney, Paul M. Halliday, Jr.

Compromise and settlement agreements are contractual in nature and should be construed and enforced under general contract principles. Mascaro v. Davis, 741 P.2d 938 (Utah 1987). A party to a contract may not resort to parol evidence to attempt to vary or contradict the clear and unambiguous terms of a contract. Hall v. Process Instruments and Control, Inc., 890 P.2d 1024, 1026-27 (Utah 1995).

In Ward v. Intermountain Farmers Ass'n, 907 P.2d 264 (Utah 1995), the Utah Supreme Court explained that a court may consider a writing in light of surrounding circumstances in order to make a preliminary determination as to whether there is any ambiguity in the contract. Id. at 268. If, after considering all credible parol evidence offered to prove the intentions of the parties, the court determines that the language of the

contract is not ambiguous, then the parties' intentions must be determined solely from the language of the contract." Id.

After considering all the evidence presented, the trial court soundly held that the language of the original Release had no ambiguity, that there was no need to resort to parol evidence, and that the parties' intent would be solely determined by the plain terms of the agreement. (R. 113-114.)

Once she settled all her demands and the agreement was fully executed, Ms. Nielsen cannot now be heard to say that she did not really settle all demands but that, on the contrary, she reserved her personal injury claim. It is implausible that Ms. Nielsen misunderstood the force, effect and import of the agreement she signed and her attorney witnessed, or that she did not know that she discharged all claims and demands she had or might have against Ms. Hefferon or her insurer arising from the automobile accident. In exchange for a sum of money, Ms. Nielsen waived **all** her claims against the defendant. The terms of the original Release were plain and unambiguous. When she signed the original Release, she assumed the risk that she could develop personal injuries that would go uncompensated. Ms. Nielsen had the opportunity to exercise her freedom of choice as between

executing the agreement or not doing so. She consciously, and with legal advice, chose to execute the original Release; it cannot be said that this was not voluntary on her part. This is not a case where an adjuster shoved a release under the nose of a recently injured person; Ms. Nielsen had an attorney for several months who endeavored to secure a settlement for her.

In submitting parol evidence, Ms. Nielsen is asking the Court to hold that, although the original Release expressly includes known and unknown personal injuries and property damage, in fact it only applies to property damage. Even if parol evidence were permitted to vary the terms of the agreement, the credible parol evidence will still not alter the parties' intentions. Ms. Nielsen's reliance upon parol evidence to rewrite the original Release is misplaced, and it should be construed according to its clear and unambiguous language.

POINT IV

**THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S
MOTION TO AMEND HER COMPLAINT TO ADD
CLAIMS OF FRAUD AND BAD FAITH SINCE
SHE COULD NOT ESTABLISH LEGALLY SUFFICIENT
CLAIMS ON EITHER COUNT.**

Fraud is never presumed, and a contract should not be adjudged void for fraud unless the allegations and proofs of

fraud are clear, precise, and indubitable if it is to reach a jury. Kelley v. Salt Lake Transp. Co., 116 P.2d 383 (Utah 1941). "It has been more than once held that it is error to submit a question of fraud to the jury upon *slight parol* evidence to overturn a written instrument." (Citation omitted, emphasis added.) 116 P.2d 385. The issue is not for the jury when reasonable minds cannot find the facts to support material and fraudulent alteration of documents. Zions First Nat'l. v. Rocky Mt. Irr., 795 P.2d 656, 662 (Utah 1990).

To show successfully that the trial court abused its discretion in denying Ms. Nielsen's Motion to Amend her Complaint to add claims of fraud and bad faith, Ms. Nielsen had the burden to prove that the release was procured by fraud and bad faith and that she could legally establish these sufficient claims. Lamb v. Bangart, 525 P.2d 602, 608 (Utah 1974). However, if in fact fraud or bad faith occurred here, it is obvious that it was not on the part of the defendant or its insurer.

To show that her fraud claim was legally sufficient, Ms. Nielsen must have stated with particularity the circumstances supporting each element of fraud. Otsuka Elec. v. Imaging

Specialists, 937 P.2d 1274, 1278 (Utah App. 1997). The elements of fraud are:

1. That a representation was made;
2. Concerning a presently existing material fact;
3. Which is false;
4. Which the representor either (a) knew to be false or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation;
5. For the purpose of inducing the other party to act upon it;
6. That the other party acting reasonably and in ignorance of its falsity;
7. Did upon rely upon it;
8. And was thereby induced to act;
9. To his injury and damage.

Otsuka, 937 P.2d 1278, citing Pace v. Parrish, 247 P.2d 273, 274-75 (1952); accord Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060, 1066-67 (Utah 1996).

The only representation that Ms. Nielsen claims was made to her was that Mr. Gehris of Liberty Mutual allegedly told her attorney that, in spite of the fact that the original Release contained language that included the release of personal injury

claims, she should go ahead and ignore that language and pretend it wasn't there. (R. at 58.) However, it cannot be said that Ms. Nielsen and her attorney acted reasonably and in ignorance of this falsity, when they have each provided affidavits to the effect that they did not trust Mr. Gehris's statements and that they wanted the personal injury language out of the release. (R. 58, § 10; R. 53, § 6.) They did not rely upon Mr. Gehris's representations nor were they induced to act by them.

In order to proffer a legally sufficient claim of bad faith, Ms. Nielsen needed to show that Ms. Hefferon or her insurer acted in bad faith. A finding of bad faith is a mixed question of law and fact that turns on a factual determination of a party's subjective intent. Valcarce v. Fitzgerald, 961 P.2d 305, 316 (Utah 1998), citing Taylor v. Estate of Taylor, 770 P.2d 163, 171 (Utah App. 1989). The trial court is given relatively broad discretion in concluding whether bad faith has been sufficiently shown. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

Ms. Nielsen had the burden to show that one or more of these bad faith factors existed: 1) the party lacked an honest belief in the propriety of the activities in question; 2) the

party intended to take unconscionable advantage of others; or 3) the party intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others. Valcarce, 961 P.2d 316, citing Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983).

Ms. Nielsen asserted none of these bad faith factors to the court below. She could not support such assertions because she had counsel who was negotiating a settlement for her and it could not be said that the Liberty Mutual claims adjuster was operating with any advantage over Ms. Nielsen. Indeed, Ms. Hefferon and her insurer were the ones who were compromised by the proffer of Ms. Nielsen's altered Release and her assertions of fraud and bad faith. The trial court's concluding remarks to defendant Ms. Hefferon's counsel are worth repeating here:

The record should reflect, counsel, that I'm going to return the original release to you. At some point in the future, it may become important as to whether this document is in existence. I don't want it in the court files to disappear or get lost someplace. The party who has the most at stake ought to guard this, and I return it to you.

(R. 123 at 26:23-27:4.)

The trial court's denial of Ms. Nielsen's Motion to Amend her Complaint was clearly not an abuse of discretion since

Ms. Nielsen could not remotely establish legally sufficient claims of fraud or bad faith.

POINT V

THE TRIAL COURT PROPERLY DENIED MS. NIELSEN'S
MOTION TO AMEND HER COMPLAINT BECAUSE SHE WAS
UNABLE TO PERSUADE THE COURT THAT THE ALTERED RELEASE
REFLECTED THE AGREEMENT OF THE PARTIES.

As stated above, the trial court found that the original Release was authenticated and signed by Ms. Nielsen and her attorney. The court was not persuaded that the altered Release with the deleted terms was a genuine writing that was admissible evidence.

Since the altered Release was inadmissible, the court had no basis upon which to grant Ms. Nielsen's Motion to Amend her Complaint. The altered Release did not reflect the agreement of the parties; it only reflected the desires of Ms. Nielsen that she be able to present a personal injury claim she discovered a year-and-a-half after the automobile accident at issue. Had the court been persuaded that a reasonable juror might believe Ms. Nielsen's altered Release was genuine, then it would have permitted new claims to be brought. The trial court was not fooled by Ms. Nielsen's deletions and neither should the Court of Appeals be misled by such.

POINT VI

MS. NIELSEN'S APPEAL IS FRIVOLOUS AND ATTORNEYS' FEES AND DOUBLE COSTS SHOULD BE AWARDED TO THE DEFENDANT FOR HAVING TO DEFEND IT.

When an appeal is not grounded in fact, not warranted by existing law, nor based on a good faith argument to extend existing law, it is deemed frivolous. Utah Rule of Appellate Procedure, 33(b). The overwhelming evidence shows that Ms. Nielsen's challenge to the original Release was unfounded, because her attorney admits that he made the interlineations on the altered copy (R. 58 ¶ 10), but he had utterly failed to show any permission to do so. Specifically, the original Release contains no interlineations, so it is apparent that plaintiff's counsel made changes only to a copy of the Release and only after the unaltered original Release was signed. Ms. Nielsen lacked a scintilla of credible evidence to establish a fraud or bad faith claim, so her appeal is unfounded and has caused the defendant a substantial loss of time and expense in having to meet these groundless allegations. It is appropriate and just in this case to award attorneys' fees and double costs for the defense of this matter.

In the face of the obvious fact that the original Release is legitimate and contains no alterations or interlineations to the personal injury language, counsel for plaintiff has persisted in making such outlandish allegations as fraud and misconduct. He has attempted to paint both Liberty Mutual and defense counsel with that brush. (R. 48, 49, and 95.) This is improper and unprofessional in any event, but it is made much worse by plaintiff's counsel's own conduct herein, and his complete inability to substantiate his claims.

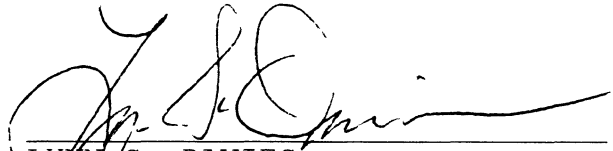
The facts have established by clear and convincing evidence that only one original Release existed, that the signatures affixed to the agreement are, in fact, those of Ms. Nielsen and her attorney, and that - although there is no eyewitness proof - the only source of the deletion of the personal injury terms was Ms. Nielsen's attorney. These clear-as-crystal facts had to have been obvious to Ms. Nielsen's counsel, and he should have advised her of the frivolity of the appeal. Sanctions, including those beyond the scope of this appeal, are undoubtedly warranted, but at least this Court should use Rule 33 to make plaintiff and her attorney think twice before bringing such an unwarranted, bad faith appeal.

CONCLUSION

The trial court soundly decided that the only original Release that bore the authentic signatures of Ms. Nielsen and her attorney was a genuine document and was the best evidence of the parties' intentions. Any use of parol evidence would have been improper since the document is plain and unambiguous. Ms. Nielsen, with the advice of counsel, contracted away any potential claims she might have had against Ms. Hefferon or her insurer. The altered Release she produced was not genuine and was inadmissible. Her legally empty claims of fraud and bad faith were dismissed by the trial court and she was denied the ability to Amend her Complaint. Because Ms. Nielsen's attorney knew her claims were completely groundless and her appeal far-fetched, she should be required to bear the fees and costs of Ms. Hefferon and her insurer in their defense of this appeal.

RESPECTFULLY SUBMITTED this 7th day of May, 1999.

RICHARDS, BRANDT, MILLER
& NELSON




LYNN S. DAVIES
Attorneys for
Defendant/Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 7th day of May, 1999, to the following:

Paul M. Halliday, Jr.
Paul M. Halliday
HALLIDAY, WATKINS & HENRIE
376 East 400 South, Suite 300
Salt Lake City, Utah 84111



8871-363
251146

ADDENDUM

RELEASE AND SETTLEMENT OF CLAIM

AL 667-013587-05

(File No.)

For the sole consideration of FOUR THOUSAND ^{Four} NINE HUNDRED ^{Forty Five} NINETY SIX AND 50/100 (to include any and
all liens)-----

----- dollars (\$ ⁴⁴4,996.50)

the undersigned hereby releases and forever discharges MARY JANE HEFFERON AND LIBERTY MUTUAL INSURANCE CO.

and all other persons, firms and corporations from all claims and demands, rights and causes of action of any kind the undersigned now has or hereafter may have on account of or in any way growing out of Personal Injuries existing or which may exist which are known or unknown to me at the present time and Property Damage resulting or to result from an occurrence which happened on or about

23 SEPTEMBER 19 90, and do hereby covenant to indemnify and save harmless the said party or parties from and against all claims and demands whatsoever on account of or in any way growing out of said occurrence or its results both to person and property. This release expresses a full and complete SETTLEMENT of a liability claimed and denied, regardless of the adequacy of the above consideration, and the acceptance of this release shall not operate as an admission of liability on the part of anyone nor as an estoppel, waiver or bar with respect to any claim the party or parties released may have against the undersigned. Witness my hand and seal.

(1) Dated June 6, 19 91 X

(4) Paul M. Hattaday Jr. X
(Witness' Signature)

376 E. 400 S. #300 X
(Address)

(5) _____
(Witness' Signature)

(Address)

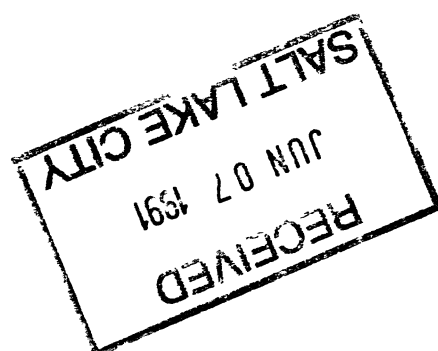
YOU ARE MAKING A FINAL SETTLEMENT

THIS IS A RELEASE: READ BEFORE SIGNING.

(2) WE VICKIE NIELSON

X (3) Vickie M Nielson (S)
(Signature)

(3) _____ (L.S.)
(Signature)



78-25-16. Parol evidence of contents of writings - When admissible.

There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

(1) when the original has been lost or destroyed, in which case proof of the loss or destruction must first be made;

(2) when the original is in the possession of the party against whom the evidence is offered and he fails to produce it after reasonable notice;

(3) when the original is a record or other document in the custody of a public officer;

(4) when the original has been recorded, and the record or a certified copy thereof is made evidence by this code or other statute;

(5) when the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

Provided, however, if any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law; and such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not, an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

In the cases mentioned in Subsections (3) and (4), a copy of the original, or of the record, must be produced; in those mentioned in Subsections (1) and (2), either a copy or oral evidence of the contents must be given.

Rule 15. Amended and Supplemental Pleadings.

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) *Damages for delay or frivolous appeal.* Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) *Definitions.* For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) *Procedures.*

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

78-27-56. Attorney's fees - Award where action or defense in bad faith - Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court, or

(b) the court enters in the record the reason for not awarding fees under the provision of Subsection (1).