

2009

# Golden Meadows Properties LLC v. Michael Strand and Cari Allen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

<p>GOLDEN MEADOWS PROPERTIES L.C., aka GOLDEN MEADOWS PROPERTIES, LLC</p> <p>Plaintiff and Appellee,</p> <p>vs.</p> <p>MICHAEL STRAND and CARI ALLEN,</p> <p>Defendants and Appellants.</p>	<p>REPLY BRIEF OF APPELLANTS'</p> <p>District Court No. 070700488</p> <p>Appellate Court No. 20090867-CA</p>
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APPEAL FROM ORDERS CONCERNING MATTERS HEARD ON  
SEPTEMBER 1, 2009, IN THE SECOND DISTRICT COURT, DAVIS COUNTY,  
UTAH, THE HONORABLE THOMAS L. KAY PRESIDING

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UTAH APPELLATE COURTS  
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## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i-iii
------------------------	-------

TABLE OF AUTHORITIES.....	i-ii
---------------------------	------

### ARGUMENT

I. RESPONSES TO GOLDEN MEADOWS OBJECTIONS TO THE STATEMENTS OF FACT CONTAINED IN THE APPELLANTS OPENING BRIEF.....	1-2
--	-----

II. REPLY TO GOLDEN MEADOWS ARGUMENT THAT APPELLANTS’ HAD NO EVIDENCE.....	2-3
---	-----

III. REPLY TO GOLDEN MEADOWS ARGUMENT THAT IT’S RULE 11 MOTION CONTAINS THE FINDINGS OF FACT INTENDED, REQUIRED, AND/OR ENVISIONED BY RULE 11.....	4-7
---	-----

IV. OBJECTIONS TO “FACTS” STATED IN GOLDEN MEADOWS BRIEF.....	7-24
--	------

V. ATTORNEY FEES.....	24-25
-----------------------	-------

CONCLUSION.....	25
-----------------	----

## TABLE OF AUTHORITIES

Anderson v. Industrial Com’n of Utah, 696 P. 2d 1219 Utah (1985).....	10
Barnard v. Sutliff, 846 P. 2d 1229 (Utah 1992).....	25

Canfield v. Layton City, 2005 UT 60 ¶14, 122 P. 3d 622 (quoting Williams v. State Farm Ins. Co., 656 p. 2d 966, 971 (Utah 1982)).....	13
Griffith v. Griffith, 985 P. 2d 255 (Utah, 1999).....	25
Liljeberg v. Health Services Acquisition Corp., U.S., 108 S. Ct. 2194, 2202-03, 100 L. Ed. 2d 855 (1988).....	9, 22
Monson v. Carver, 928 P. 2d 1017 (Utah 1996).....	12, 23
Morse v. Packer, 2000 UT 86 ¶16, 15 P. 3d 1021 (quoting Morse v. Packer, 1995 UT 5 ¶10, 973 P. 2d 422).....	25
PP&T, LLC v. Brinar., 2008 WL 2224285 (Utah App.) (Unpublished)..... .....	12, 13, 14, 17, 18, 19, 20, 21
State v. Levin, 158 P. 3d 178 UT App. 2007 .....	4
State v. Sibert, 1957, 6 Utah 2d 198, 310 P.2d 388.....	19
Willey v. Willy, 951 P. 2d 226, 230 (Utah 1997).....	25
Code of Judicial Conduct Chapter 12 Rule 2.11 (A),(1), (6)(a), (b), and (c).....	7, 8,17
Code of Judicial Conduct Chapter 12 Rule 2.9 (A), (C) and (D).....	11, 17
Utah Rules of Civil Procedure Rule 11(b).....	1
Utah Rules of Civil Procedure Rule 11(c)(1)(A).....	4
Utah Rules of Civil Procedure Rule 11(c)(3).....	5, 23
Utah Rules of Civil Procedure Rule 7(d).....	1, 2
Utah Rules of Civil Procedure Rule 7(f)(2).....	1, 2
Utah Rules of Civil Procedure Rule 26(b)(1).....	14
Utah Rules of Civil Procedure Rule 63(b)(3).....	22
Utah Const. Article I, Section 11.....	3
Utah Rules of Evidence Rule 401.....	12,13
Utah Rules of Evidence Rule 612.....	13
Utah Rules of Evidence Rule 803.....	12,13

## ADDENDUM

PP & T, LLC v. Brinar, 2008 WL 2224285 (Utah App.)

Code of Judicial Conduct Chapter 12 Rule 2.11 (A), (1), (6)(a), (b), and (c)

Code of Judicial Conduct Chapter 12 Rule 2.9 (A), (C) and (D)

Utah Rules of Civil Procedure Rule 11(b), 11(c)(1)(A) and 11(c)(3)

Utah Rules of Civil Procedure Rule 7(d), 7(f)(2)

Utah Rules of Civil Procedure Rule 26(b)(1)

Utah Rules of Civil Procedure Rule 63(b)(3)

Utah Const. Article , Section 11

Utah Rules of Evidence Rule 401

Utah Rules of Evidence Rule 612

Utah Rules of Evidence Rule 803

Utah Rules of Evidence Rule 807

I. RESPONSES TO GOLDEN MEADOWS OBJECTIONS TO THE STATEMENTS OF FACT CONTAINED IN THE APPELLANTS' OPENING BRIEF

As an initial matter, all statements of fact and references to the proceedings contained in the Appellants' opening brief are relevant to the issues presented for review and supported by citations to the record in compliance with Utah Rules of App. P. Rule 24(a)(7) and (e) of this Rule. Appellants statements of fact and their references to the record are important as they demonstrate the issues that were raised in this case and on appeal, the courts management of these proceedings and, Golden Meadows non-compliance with Rule 11(b), Rule 7(d) and Rule 7(f)(2) of the Utah Rules of Civil Procedure:

a) Rule 11(b) violation: By filing the Rule 11 Motion, as is, without addressing the plain language contained in the Notice to Quit at paragraph 3 (R. 4 (in evidence R. 655)), without providing a collective review of the ancient documents attached to Strand's affidavit (R. 2963) and, without acknowledging that the 1985 lease at issue before Judge Dawson, then Mr. Dawson, in the 1989 IRS action (R. 2987, R. 2995, R. 3749 ¶4) is, the exact same 1985 lease at issue and in evidence before Judge Dawson in this case (R. 975); and/ or, without addressing Mr. Pitts references to the record, evidence, transcripts, his review of the file and court recordings, and/or his withdrawals and corrections; that were served on Golden Meadows and filed with the Court prior to the expiration of the 21 day safe harbor period. (R. 3173 and R. 3441). (See Appellants' opening brief at pages 5-6 ¶ 6, ¶8 and ¶9 and pages 15-43 and Addendum at 3);

b) Rule 7(d) violation: By filing a notice to submit the Rule 11 Motion for decision without reference to the Appellants Motion to Strike and Memorandum in Opposition and, prior to the close of briefing. (R. 4170). (*See* Appellants' opening brief at pages 6 - 8 ¶¶'s 10 through 16 and Addendum at 3;

c) Rule 7(f)(2) violation: By submitting the Rule 11 Order and Judgment to Judge Kay for his signature prior to its service on the Appellants (R. 4420). Although Golden Meadows said in their Certificate of Service that the proposed order was served on the Appellants and on attorneys Sidney Baucom, Andrew Stone and Mark Tolman at the law firm of Jones Waldo, neither of the Appellants or the attorney's at Jones Waldo received it as stated by the Appellants in their affidavits and by attorney Sidney Baucom. (R. 4430 (4431 ¶2), 4428 (4429 ¶2), 4423, 4427). (*See* Appellants' opening brief at page 9 ¶18 through ¶21 and Addendum at 3).

## II. REPLY TO GOLDEN MEADOWS ARGUMENT THAT APPELLANTS' HAD NO EVIDENCE.

Golden Meadows argues as a basis for the sanctions the lower court imposed under rule 11 that the Appellants had no evidence for the assertions contained in the Appellants Rule 63 Motion to Disqualify at 2; Rule 60(b) Motion at 2, Rule 60(b) Memo at 2, 3, 4, 5, and 7, and; the Affidavit of Michael Strand in support these Motions at ¶¶'s 3, 5, 8, 9, 12, 17 and 43 (*See* Appellee's brief at pages 9 through 16) Golden Meadows also claims that Strand asserts, but never explains or establishes that the issue, property, participants and evidence in the 1989 IRS action were not the same. *See* Golden Meadows Brief pg 15,

last paragraph, 2<sup>nd</sup> sentence.

It is frustrating to the Appellants to respond to the argument that the record is devoid of any evidence supporting their statements of fact when Appellants, in their opening brief have cited to the record, page and lines where such evidence may be found and demonstrated to this Court that this information was within Golden Meadows knowledge and possession prior to November 18, 2008 (the date Golden Meadows filed the Rule 11 Motion). *See* Appellee's brief at pages 9 through 16 for arguing devoid of evidence and Appellee's arguments and/or statements of fact that fail to address or acknowledge that evidence.

Please compare the above with the Appellants opening brief at pages 15 through 16 and pages 19 through 43 where Appellants point to such evidence with specific citations to the record. It would have been much more meaningful if Golden Meadows had taken Appellants' statements and citations to the record and Strand's ancient documents and then shown how they were not evidence or that, somehow, they were inapplicable; but, of course, they could not. Each citation by the Appellants at pages 15 through 16 and 19 through 43 of their opening brief offered evidence supporting their assertions of which they have now been erroneously sanctioned under Rule 11. If "access to the courts" guaranteed by the Utah Constitution <sup>1</sup> is to have any meaning at all the Appellants should not be slammed with Rule 11 sanctions for attorney's fees just because they lose in the trial court.

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<sup>1</sup> Article I, Section 11. Attached hereto as Addendum at 4



III. REPLY TO GOLDEN MEADOWS ARGUMENT THAT IT'S RULE 11 MOTION CONTAINS THE EXPLICIT FINDINGS OF FACT INTENDED, REQUIRED, AND/OR ENVISIONED BY RULE 11.

In the Appellants' Opening Brief at pages 19 through 43 the Appellants' have quoted, verbatim, in indented single spaced quotes,<sup>2</sup> in chronological order and complete with citations to the record, the:

1) nineteen alleged initial "offending statements," contained in the Appellants Rule 63 Motion to Disqualify at 2; Rule 60(b) Motion at 2, Rule 60(b) Memo at 2, 3, 4, 5, and 7, and; the Affidavit of Michael Strand in support of those Motions at ¶¶'s 3, 5, 8, 9, 12, 17 and 43, filed on October 14, 2008. (R. 2963, 3013, 3018, 3026);

2) identical statements of fact contained in Golden Meadows Memorandum in Opposition to the Appellants Motion to Disqualify and Golden Meadows Rule 11 Motion that were served on the Appellants on October 21, 2008 (R. 3036 (3052) and 3747 (3762)), and;

3) Appellants former counsels rebuttals to those statements prior to the expiration of the 21 day safe harbor period in compliance with Rule 11(c)(1)(A) (R. 3173 and 3441); for a collective and impartial review by this Court that the statements of fact contained in Golden Meadows Rule 11 Motion are, without exception, clearly erroneous, against the clear and great weight of the evidence, and, do not meet the strict requirements of rule 11 required on motions for sanctions or findings of fact, objective review and reasoning required by a trial court in granting such motions. It is clear from

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<sup>2</sup> in this courts usual line and indention format (*See State v. Levin* 158 P. 3d 178 UT App. 2007 ¶2 (last sentence)).

the Appellants submission at pages 19 through 43 of their opening brief that the statements of fact contained in Golden Meadows Rule 11 Motion are *Not* supported with references or citations to page or line numbers to the record, pleadings or transcripts where such evidence may be found, that they contain arguments and not facts and, more importantly, do not address Strands ancient documents or the evidence, transcripts page and line, recordings of hearings, references and/or citations to the record, presented by Mr. Pitts on November 3<sup>rd</sup> and November 7<sup>th</sup>, 2008, that contradicts them and, in fact, proves quite the opposite. Judge Kay, the reviewing judge, could not accept the statements contained in Golden Meadows Rule 11 Motion as proof of facts, evidence, procedural matters, or proof of the legal services performed by Judge Dawson in 1989 without verification of their accuracy and without entering findings of fact, an objective review and reasoning with respect to that matter.(Rule 11(c)(3) This manifest injustice must be corrected.

It would have been more meaningful if Golden Meadows Rule 11 Motion (filed on November 18, 2008) had provided references and citations to the record by page and line that allegedly support its contentions and then shown how, with references to the record by page and line, that the Appellants' former counsels rebuttal facts and evidence (filed on November 3<sup>rd</sup> and November 7<sup>th</sup> 2008) and Strand's Affidavit and ancient documents (filed on October 14, 2008) do not demonstrate the existence of evidentiary support or a reasonable investigation of the facts; but, of course, Golden Meadows could not.

Additionally, Golden Meadows claims at page 2 of its brief (second to last

sentence) and at page 18 at ¶3 that the Appellants and their former counsel failed to withdraw or correct any of the 19 statements within the time permitted by Rule 11 and, that “At no time during the 21- day safe harbor period or thereafter did Strand and Allen withdraw a single one of their unfounded statements of facts,”. However, these claims by Golden Meadows are also false. As recited verbatim by the Appellants in their opening brief at page 21 ¶ 3 (b) and pages 23-24 at ¶5 (b) (for example), the Appellants and their former counsel, did, in fact, withdraw or correct statements for the record within that 21-days (R. 3176-3177 ¶3, R. 3443¶5).

Moreover, Golden Meadows brief reciting this Court’s decisions in case numbers 20080838-CA and 20090012-CA along with unsupported, offensive, and unwarranted personal attacks against the nature of the Appellants’ character and Strand’s memory have nothing to do with whether or not the trial court is required to make explicit findings of fact with respect to Strand’s Affidavit testimony and ancient documents (R. 2963), the statements and evidence presented by Golden Meadows in support of Rule 11 (R. 3747), the statements and evidence by Mr. Pitt’s made prior to the expiration of the Rule 11 twenty-one day safe harbor period (R. 3173, 3441), and, by the Appellants in opposition (R.4037, 4147, 4096), and; whether or not the trial court must clearly state its objective review of that evidence and information and its reasoning with a sanction under Rule 11. Clearly Judge Kay, the reviewing judge, could not accept the statements contained in Golden Meadows Rule 11 Motion as proof that that the Appellants made 19 factual contentions that were false and without evidentiary support or a reasonable investigation, without any verification of Golden Meadows facts and evidence whatsoever.

Again, as argued in Appellants' opening brief, the ruling in this case should be reversed as there are no real findings of fact, objective review or reasoning by the trial court on the relevant points on which the Appellants were sanctioned.

#### IV. OBJECTIONS TO "FACTS" STATED IN GOLDEN MEADOWS BRIEF

Appellants' object to various statements of "fact" contained in Golden Meadows Brief because they are untrue, not in evidence, mischaracterized, incomplete, misleading, constitute recitation of arguments, allegations, or claims, are derived from unverified or other sources not admitted or admissible in evidence, do not contain references to the record, do not acknowledge or address evidence that contradicts them or do not distinguish between facts or statements that were raised by Golden Meadows at the trial court level and those which Golden Meadows raises for the first time on appeal, as demonstrated below. References to page numbers in the following three sections apply to their Brief. In short, the "facts" stated by Golden Meadows are significantly unreliable and must be stricken or otherwise disregarded in their entirety.

##### A. Golden Meadows Statement of the Case

Page 1. The description that Strand and Allen attacked the trial court's decision by attacking the trial judge is derogatory, scandalous, misleading, argumentative and devoid of any evidence or references to the record. This alleged attack on the trial judge because they, and their counsel, in good faith (R. 3016), believe that Judge Dawson's previous employment with the US Attorney's office defending the Internal Revenue Service requires his recusal under Chapter 12 Code of Judicial Conduct Canon 2 Rule 2.11 (See Addendum at 2 and that Judge Dawson had a duty to make disclosure to the Appellants

at the onset of this case is, mischaracterized by Golden Meadows. Strands position throughout these proceedings is that ownership of the house and furniture in question in Petty entities names and the 1985 lease by Petty entity to him were a facade signed to protect Appellants home and furniture from creditors including the IRS and, to protect Petty's investment and Strands contribution in the 1982 Joint Venture Agreement.<sup>3</sup> In 1989 the IRS took the position identical to that of Strand in this case that, in fact, the Petty entity, Nupetco, was merely holding legal title and ownership of the home for the benefit of Strand and that the 1985 lease was not valid. On April 18, 1989, pursuant to a notice of levy on Strand and his MLK Investments entity (R. 2999 ¶3), the IRS executed on the Property located at 1199 South 1500 East Bountiful UT that is at issue in this case (R. 4 and R. 2987) and seized it's permanent fixtures and the furniture located inside (R. 2987). Neuman Petty (Golden Meadows agent in this case and Nupetco's General Partner) opposed the levy and requested that the fixtures attached and belonging to the Property and the furniture located inside the Property be returned pursuant to the exact same 1985 lease at issue and in evidence in this case (R. 2987, R. 2995 and R. 975). All of these items were scheduled for sale at an auction in spite of Petty's affidavit and in spite of the 1985 lease (R. 2978 paragraph 9). In 1989 the IRS and its counsel, Judge Dawson, then Mr. Dawson, took the position identical to that of Strand's in this case and refused to release the levy on the Property and return its fixtures or the furniture unless, Strand, (the owner), paid the taxes. (See R. 2978 at paragraphs 4 (last sentence,

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<sup>3</sup> See Strand's Deposition Testimony at R. 641 lines 9-14, R. 2192 (pg. 476) lines 16-25 and R. 2193 lines 4-25 and Answer to Admission at R. 659-670]

stipulation referenced therein R. 2975), paragraph 8 and paragraph 9 R. 2985 at ¶4, R. 4120 and R. 2999). Strand was required to pay these taxes before the levies were released and before the IRS would cancel the auction (R. 4120, R. 4121, R. 2999). Now, Judge Dawson has taken the opposite position that, in fact, Nupetco was, all along, legal owner of the house (R. 2702) and that there is a legitimate dispute regarding the ownership of the furniture (R. 4303(R. 4073) April 11, 2008 transcript pg. 9 lines 21-22) and, that was the basis for Appellants' motion to disqualify Judge Dawson and, for relief from the summary judgment order pursuant to Utah R. Civ. P. Rule 60(b).<sup>4</sup> The ancient documents attached to Strand's affidavit (referenced directly above) show that Judge Dawson was not qualified to act in this case and that Strand was the owner of the Property and the furniture in 1989 and *Not* Golden Meadows owner, Nupetco.

It is frustrating to the Appellants to respond to the argument that the record is devoid of any evidence supporting these statements of fact when Appellants, in their opening brief at pages 15-16, pages 22-23 at ¶4, pages 24-25 at ¶¶'s 6-7, and pages 38-41 at ¶¶'s 16 - 19, have cited to the record where such evidence may be found and further demonstrated to this Court that this information was within Golden Meadows knowledge and possession prior to November 18, 2008 (the date Golden Meadows filed the Rule 11

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<sup>4</sup> Authoritatively decided by the United States Supreme Court in Liljeberg v. Health Services Acquisition Corp., U.S., 108 S. Ct. 2194, 2202-03, 100 L. Ed. 2d 855 (1988) which holds that a party in a civil case can file a motion under Fed. R. Civ. P. 60(b)(6) to be relieved from a final civil judgment on the ground that the trial judge, was not qualified to act in the case and that "forgetfulness" of disqualifying facts which a district judge should have known is not deemed "the sort of objectively ascertainable fact that avoid the appearance of partiality."

Motion). It would have been more meaningful if Golden Meadows had amended its Rule 11 Motion to address Strand's ancient documents and Mr. Pitts rebuttals and his citations and references to the record and legal authority (*Liljeberg v. Health Services, supra*) and shown how this law and these references along with Strand's ancient documents and testimony were not evidence and /or that, somehow, they were inapplicable; but, of course, Golden Meadows could not.

Additionally, Golden Meadows misquotes Strand's deposition testimony at R. 2187 – 94.<sup>5</sup> Moreover, in the face of a record that is directly against them, Golden Meadows further suggests that Golden Meadows collectively demonstrated with objective information from the record that there was no bias or prejudice against Strand in this case, sans any reference to those parts of the record it allegedly relies on or, to the Appellants' former counsels rebuttals that contradicts them such as the October 24, 2007 transcript; the Feb. 13, 2008 transcript and, the fact that the Appellants were sanctioned by Judge Dawson for abusing the discovery process for attempting to discover information about the Notice to Quit at paragraph 3 and for requesting for more time to discover information about the validity of the 1985 lease. *See* Appellants opening brief at pages 19-20 at ¶1(b), page 32-33 at ¶11 (b) and page 38-40 at ¶16(b). However, in this case, prejudice is presumed. *See Anderson v. Industrial Com'n of Utah* 696 P. 2d 1219 Utah (1985).

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<sup>5</sup> Which deposition testimony by Strand at R. 2193 lines 4-25 actually states that Strand allowed Petty to direct his activities and make business decisions for him for the benefit of both Strand and Petty to protect Strand and Petty's interests without the input of Strand and that Strand was fine with that arrangement.

## B. Golden Meadows Statement of Facts

¶1. This paragraph should be stricken or disregarded entirely, since it contains argument, allegations or claims, and not facts. The issues concerning Judge Dawson's "jurisdiction" were investigated and resolved by the Court through ex parte contacts with Golden Meadows counsel and without notice to the Appellants (R. 2250 (09/18/07 entry (R. 3715) and R. 2263 (01/31/08 and 02/01/08 entries)). The Appellants had no knowledge of disqualifying facts until September 17, 2008 when they discovered the ancient documents (R. 2967 ¶14, R. 2968 ¶¶'s 15-16). Strand's Affidavit testimony at ¶43 is clearly different than what Golden Meadows claims. A complete recitation of Strands testimony at ¶43 is found in the Appellants opening brief at pages 41-42 ¶19. Disclosure to Strand and *Defendant Allen*<sup>6</sup> [emphasis added] by Golden Meadows and its agent (Neuman Petty) and by Judge Dawson was required. *See* Chapter 12 Code of Judicial Conduct Canon 2 Rule 2.11(A), (1), (6)(a), (b)and (c) and Rule 2.9 (A), (C) and (D) (attached hereto as Addendum at 2)

¶2. This paragraph should be stricken or disregarded entirely, since it contains argument, allegations or claims, and not facts. This paragraph is contradicted by a collective review of Strand's affidavit and ancient documents (R. 2963). Strand's affidavit testimony at ¶42 is clearly different than what Golden Meadows claims and is supported by Strand's medical records. A complete recitation of ¶42 can be found at R. 2972 - 2973.

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<sup>6</sup> Who did not participate in the 1989 IRS action and did not have knowledge of it's existence.



¶3. This paragraph should be stricken or disregarded entirely, since it contains argument, allegations or claims, and not facts. Golden Meadows objections are contradicted by Strand's September 29, 1989 letter (ancient document) to Mr. Vano Department of Treasury at paragraphs 1-4 (referencing the stipulation agreement (R. 2975), 6, 8 and 9. (R. 2978-2979) which are relevant and admissible pursuant to the Utah Rules of Evidence Rule 401 and 803(16). Thus the record is clearly different than what Golden Meadows claims.

¶4. This paragraph and its subparts should be stricken or disregarded in their entirety, since they contain objections to affidavit testimony raised for the first time on appeal, and not facts. Not one of these specific objections lodged by this paragraph or its subparts against Strand's affidavit testimony at ¶¶'s 9, 12, 16, 21, 25, 26, 27, 30, 31, 32-40 and 43 were raised before the trial court or contained in the Rule 11 Motion at issue here, and the record does not reveal any request by Golden Meadows that they be addressed. This Court will not address new issues and objections to affidavit testimony raised for the first time on appeal. *See PP&T, LLC v. Brinar* 2008 WL 2224285 (Utah App.) Unpublished (attached hereto as Addendum at 1). *See also, Monson v. Carver*, 928 P. 2d 1017 (Utah 1996) (noting general rule that "issues not raised at the trial cannot be argued for the first time on appeal").

A complete recitation of the actual statement of facts, evidence, reasoning, and objections, by Golden Meadows and by the Appellants, concerning the 19 factual contentions at issue in this appeal, can be found in the Appellants opening brief at pages 15 through 16 and pages 19 through 43.

The Appellants respond to Golden Meadows new objections to Strands affidavit testimony as follows and collectively state that Strand's testimony about this action and about the 1989 IRS action against him and his supporting ancient documents are relevant and admissible under the Utah Rules of Evidence Rule 401, 803(1), (3), (4), (6), (14),(15) and (16) along with 807, where applicable.

Strands Affidavit at ¶9 Golden Meadows did not raise these objections at the trial court level and therefore they should be stricken or disregarded. *See* PP & T, LLC, v. Brinar, *supra*, (Addendum at 1). More importantly, under Utah's liberal pleading standards<sup>7</sup>, the plain language contained in the Notice to Quit filed on August 31, 2007 at paragraph 3 gives the Appellants' and the Court notice that the furniture is an issue in this case based on the following language:

"Notice is hereby given that you are required to surrender and quit the Property, including the removal of all your belongings therefrom (but none of the furniture, furnishings and personal property belonging to Nupetco Associates) within five (5) calendar days after service of this Notice on you.... (Emphasis Added)

b) Golden Meadows Memorandum in Opposition to the Appellants'

Motion to Stay the Order of Restitution contains the following language that:

"While the issue of Nupetco's ownership of the furniture in the Property has not been litigated in this case and Nupetco is not a party, Plaintiff is aware that a large part of the furniture and furnishings in the Property were sold to Nupetco many years ago and remain its property. Thus, Defendants are under no compulsion to remove such items nor would it be proper for them to do so. This

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<sup>7</sup> That "The plaintiff must only give the defendant 'fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved'" *Canfield v. Layton City*, 2005 UT 60 ¶14, 122 P. 3d 622 (quoting *Williams v. State Farm Ins. Co.*, 656 P. 2d 966, 971 (Utah 1982))

state of affair significantly reduces the burden of Defendants of moving.” (R. 2355)

And;

c) Judge Dawson’s response to that argument at the April 11, 2008 hearing at page 9 lines 21-22 states “I guess there’s a dispute on whether or not the furniture even needs to be moved. . . .” (R. at 4303/R. 4073).

Thus, the record is clearly different than what Golden Meadows claims. Rather than claiming “There is not one scrap of evidence that ownership of furniture was ever made an issue in this case or that Judge Dawson “took issue” with respect to such ownership.”, it would have been more meaningful if Golden Meadows had simply addressed the Notice to Quit (R. 4) and Utah R. Civ. P. R. 26(b)(1) and/or Golden Meadows argument at R. 2355 and Judge Dawson’s response (R. 4303/R. 4073 page 9 lines 21-22) and explained why the Appellants were sanctioned for abusing the discovery process for asking for information about the furniture and then shown how the Notice to Quit, Golden Meadows argument and Judge Dawson’s response are not evidence or that, somehow, they were inapplicable; but, of course, Golden Meadows could not.

Strands Affidavit at ¶12 Golden Meadows did not raise these objections at the trial court level and therefore they should be stricken or disregarded. *See* PP & T, LLC, v. Brinar, *supra*, (Addendum at 1). Golden Meadows provides no citation to the record that supports Golden Meadows footnote<sup>8</sup>. The Appellants were Not and have Not ever been sanctioned for any statement that Judge Dawson represented the IRS against

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<sup>8</sup> Golden Meadows counsel must direct this Court and the Appellants to the parts of the record which he believes support his statement. Utah R. App. P. Rule 24(a)(7) “All

Strand in 1989 regarding the furniture located inside the Property or that Judge Dawson gained personal knowledge of the 1985 lease<sup>9</sup> as part of that involvement. In fact, Golden Meadows makes the statement of fact in its Rule 11 Motion (no less than four times) that Judge Dawson was, in fact, involved in the April 18, 1989 IRS action against the furniture located inside the Property [R. 3758 at pg. 12 (second paragraph), R. 3749 at ¶4, R. 3749-3750 at ¶6, R. 3750-3751 at ¶9] and that there is evidence supporting the fact Judge Dawson gained personal knowledge about the furniture, the 1985 lease and Neuman Petty and Mike Strand's relationship as part of that involvement (R. 3749 ¶4). (See Appellants opening brief at page 22 ¶4 and ¶4 a)).

Moreover, Judge Dawson's, then Mr. Dawson's, positions taken when representing the IRS as a US Attorney ("in the matter on the furniture") was that the 1985 leasehold was invalid and that Petty/ Nupetco was merely holding the Property and a security interest in the furniture for the benefit of Mr. Strand. (R. 2978 ¶9, 4120, 4121 and 2999). In this case, Judge Dawson has taken a position directly contrary to that position and held that, all along, the leasehold was valid and that Petty/Nupeto was the owner of the Property (R. 2702) and that there was a legitimate dispute regarding the furniture (R. 4303 April 11, 2008 transcript pg. 9 lines 21-22 (R. 4073)), a position directly contrary to

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statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule."

<sup>9</sup> The validity of which was disputed by the IRS in the 1989 IRS action (R. 2978 ¶9 ) and by the Appellants in this action (R. 1496 (last paragraph)) and, (R. 1839 –1840 ¶¶'s 10-13, R. 1776-1777 ¶¶'s 20-21 and R. 1814 at ¶4 (Stricken from the record on March 3 and March 5, 2008 by Judge Dawson (R.4301 hearing transcript p. 50 lines 9-13, p. 57 line 9)(Order entered (03/17/08) (R. 2213))

his position in 1989 and the position of Appellants' in this case. The Affidavit of James Swindler filed on April 11, 2008 at R. 2250 (09/18/07 entry) (R. 3715) and R. 2263 (01/31/08 and 02/01/08 entries), makes it clear that the issues concerning a) Judge Dawson's jurisdiction to preside over this case and b) Appellants' motions to compel information about the Notice to Quit and Rule 56(f) motion requesting time to discover information about the validity of the 1985 lease, were, in fact, resolved by Mr. Swindler, the Court, and Wayne Petty, through *ex parte* contacts without notice to the Appellants.

Moreover, Neuman Petty's May 19, 1989 Affidavit to the IRS (and its counsel Judge Dawson) at R. 2987 and R. 2995 makes it clear that:

a) on April 18, 1989 the IRS executed on a levy on the exact same Property that is the subject of this case (1199 South 1500 East Bountiful, UT) and seized the fixtures attached to the Property and the same identical furniture located in the Property that Golden Meadows Notice to Quit (R. 4) required the Appellants to leave and;

b) that Neuman Petty used the exact same 1985 lease in 1989 as evidence to the IRS (and its counsel Judge Dawson) that Nupetco owned the Property and had a legitimate security interest in the exact same furniture at issue and in evidence here (R. 975), purporting the Appellants' and Judge Dawson that the lease was valid and binding and without challenge sans any reference to the 1989 IRS action that contradicts its position (*See* R. 970 ¶¶'s 7-9 and R. 603-604 ¶¶'s 7-10)

Thus the record is clearly different than what Golden Meadows claims. Again, it would have been more meaningful if Golden Meadows had acknowledged and addressed the Notice to Quit, the *ex parte* contacts, Neuman Petty's May 19, 1989 Affidavit, Strands letter to Mr. Vano at paragraphs 1-4, 6, 8, and 9, the 1985 lease at issue both in 1989 and in this action, the Escrow Agreement and the Subordination Agreement along with Strand's payments and then shown how they were not evidence or that, somehow, they were inapplicable; and/or explained how Utah Rule of Judicial Conduct Chapter 12 Canon 2 Rule 2.9 (A), (B), (C) and (D) and Rule 2.11 (A), (1), (6) (a), (b), (c) do not apply, but, of course, Golden Meadows could not.

Strand's Affidavit at ¶12 Golden Meadows did not raise these objections at the trial court level and therefore they should be stricken or disregarded. *See PP & T, LLC v. Brinar, supra*, (Addendum at 1). Golden Meadows Rule 11 Motion only objects to this testimony with a general complaint that "there is no basis whatsoever for this statement." (R. 3757 ¶17) (*See* Appellants opening brief at page 40 ¶17 and 17 a)). Strand's Affidavit and ancient documents were not stricken from the record and remain uncontroverted. Golden Meadows response does not satisfy their burden of rebutting Mr. Strand's affidavit on this point. Golden Meadows must respond with an affidavit by Neuman Petty or Judge Dawson that contradicts Strand's affidavit on this point.

Strands Affidavit at ¶16 Golden Meadows did not raise these objections at the trial court level and therefore they should be stricken or disregarded. *See PP & T, LLC, v. Brinar, supra*, (Addendum at 1). Golden Meadows provides no citation to the record that supports its footnote. Golden Meadows response does not satisfy their burden of

rebutting Mr. Strand's affidavit on this point. Golden Meadows objection is contradicted by Strand's September 29, 1989 letter to Mr. Vano at paragraphs 2, 4 (Stipulation R. 2975), 6, 8 and 9 (R. 2978-2979). Thus the record is clearly different than what Golden Meadows claims. It would have been more meaningful if Golden Meadows had addressed Strand's letter to Mr. Vano and then shown how it was not evidence or that, somehow, it was inapplicable; but of course, Golden Meadows could not.

Strands Affidavit at ¶21 Golden Meadows did not raise these objections at the trial court level and therefore they should be stricken or disregarded. *See PP & T, LLC, v. Brinar, supra*, (Addendum at 1). Golden Meadows response does not satisfy their burden of rebutting Mr. Strand's affidavit on this point. Golden Meadows objection is contradicted by the mast head and Judge Dawson's signature contained on Stipulation (R. 2975 ) as well as Strand's Letter to Vano at paragraphs 1, 2, 4 (Stipulation R. 2975), 6, 8 and 9 (R.2978 and 2979 ). Thus the record is clearly different than what Golden Meadows claims. It would have been more meaningful if Golden Meadows had addressed Strand's letter to Mr. Vano and then shown how it was not evidence or that, somehow, it was inapplicable; but of course, they could not.

Strands Affidavit at ¶25 Golden Meadows did not raise these objections at the trial court level and therefore they should be stricken or disregarded. *See PP & T, LLC, v. Brinar, supra*, (Addendum at 1). Golden Meadows response does not satisfy their burden of rebutting Mr. Strand's affidavit on this point. Golden Meadows objection is contradicted by Strand's Letter to Vano at paragraphs 4 (Stipulation R. 2975), 6, and 8 (R. 2978 and 2979). Thus the record is clearly different than what Golden Meadows

claims. It would have been more meaningful if Golden Meadows had addressed Strand's letter to Mr. Vano and then shown how it was not evidence or that, somehow, it was inapplicable; but of course, Golden Meadows could not.

Strands Affidavit at ¶26 Golden Meadows did not raise these objections at the trial court level and therefore they should be stricken or disregarded. *See* PP & T, LLC, v. Brinar, *supra*, (Addendum at 1). Golden Meadows response does not satisfy their burden of rebutting Mr. Strand's affidavit on this point. Strand was present and has the ability to testify that this statement was made. *State v. Sibert*, 1957, 6 Utah 2d 198, 310 P.2d 388. Thus the record is clearly different than what Golden Meadows claims.

Strands Affidavit at ¶27 Golden Meadows did not raise these objections at the trial court level and therefore they should be stricken or disregarded. *See* PP & T, LLC, v. Brinar, *supra*, (Addendum at 1). Golden Meadows response does not satisfy their burden of rebutting Mr. Strand's affidavit on this point. Golden Meadows objection is contradicted by Strand's letter to Vano at paragraphs 4 (Stipulation R. 2975), 6 and 8 (R.2978-2979). Thus the record is clearly different than what Golden Meadows claims. It would have been more meaningful if Golden Meadows had addressed Strand's letter to Mr. Vano and then shown how it was not evidence or that, somehow, it was inapplicable or provided an affidavit by Judge Dawson to refute this testimony; but of course, Golden Meadows could not

Strands Affidavit at ¶30 Golden Meadows did not raise these objections at the trial court level and therefore they should be stricken or disregarded. *See* PP & T, LLC, v. Brinar, *supra*, (Addendum at 1). Golden Meadows response does not satisfy their burden



of rebutting Mr. Strand's affidavit on this point. Golden Meadows' objection is contradicted by the Escrow Agreement (R. 4120), the Subordination Agreement (R. 2999), by Strands letter to Mr. Vano at paragraphs 6, 8 and 9 (R. 2978- 2979) and Strand's payment to the IRS to re-purchase the fixtures attached and belonging to the residence and the furniture located at 1199 So. 1500 East Bountiful Utah (R. 4120, R. 4121 and R. 2999) as the owner of that Property. Thus the record is clearly different than what Golden Meadows claims. It would have been more meaningful if Golden Meadows had addressed the ancient documents referred to directly above and then shown how they were not evidence or that, somehow, they were inapplicable and/or provided an affidavit by Judge Dawson or Neuman Petty or any other document to refute Strand's testimony; but, of course, Golden Meadows could not.

Strands Affidavit at ¶31 Golden Meadows did not raise these objections at the trial court level and therefore they should be stricken or disregarded. *See PP & T, LLC, v. Brinar, supra*, (Addendum at 1). Golden Meadows response does not satisfy their burden of rebutting Mr. Strand's affidavit on this point. Golden Meadows must respond with a document or affidavit that contradicts Strand's testimony on this point, but of course, Golden Meadows could not. Judge Dawson's memorandum response at paragraph 4 second sentence that he did not prepare this document is contradicted by his earlier paragraphs (paragraphs 2 and 3) that he has no memory of the matter whatsoever, moreover, Judge Dawson states that he has no memory of the stipulation even though his name appears on the mast head and his signature is executed thereon.

Strands Affidavit at ¶32-40 Golden Meadows did not raise these objections at

the trial court level and therefore they should be stricken or disregarded. *See* PP & T, LLC, v. Brinar, *supra*, (Addendum at 1). The Appellants were *Not* sanctioned for any of this testimony and *None* of this testimony was made part of the Rule 11 Motion and therefore, they are not at issue. (*See* Rule 11 Motion at R. 3747, transcript of the hearing R. 4498 and order R. 4420). Golden Meadows response does not satisfy their burden of rebutting Mr. Strand's affidavit on these points. Judge Dawson's memorandum response at paragraph 4 that he never appeared before Judge Swift is, contradicted by his earlier paragraphs (paragraph 2 and 3) that he has no memory of the matter whatsoever. Golden Meadows must respond with a document or affidavit by Judge Dawson that contradicts Mr. Strand's affidavit, but of course, Golden Meadows could not.

Strands Affidavit at ¶43 Golden Meadows did not raise these objections at the trial court level and therefore they should be stricken or disregarded. *See* PP & T, LLC, v. Brinar, *supra*, (Addendum at 1). Golden Meadows response does not satisfy their burden of rebutting Mr. Strand's affidavit on this point. Golden Meadows objections are contradicted by the Notice to Quit (R. 4), Strand's ancient Letter to Mr. Vano at paragraphs 4 (last sentence), 6, 8, and 9 (R. 2978 ) the 1989 Escrow Agreement (R. 4120), the 1989 Subordination Agreement (R. 2999), Strand's corresponding payment to the IRS as the owner in 1989 (R. 4121) and the contradicting summary judgment order entered by Judge Dawson R. 2702 that Nupetco was the owner of the residence at all times after 1985. Thus, the record is clearly different than what Golden Meadows claims. It would have been more meaningful if Golden Meadows had addressed the documents

referred to directly above and then shown how they were not evidence or that, somehow, they were inapplicable; but of course, Golden Meadows could not.

Lastly, Golden Meadows Statement of Facts at ¶¶'s 5-15 contain argument, allegations or claims, and not facts. They too should be stricken or disregarded entirely, since they are not based on evidence. Judge Dawson's response was filed after Golden Meadows drafted and served the Rule 11 Motion and was not made part of this Rule 11 proceeding by Golden Meadows or by the trial court. The Appellants respond as follows:

Judge Dawson's single spaced responsive memorandum was not taken under oath and does not constitute evidence. More importantly, it only refers to his lack of memory and contains irrelevant and inconsistent claims; Paragraphs 2 and 3 are irrelevant pursuant to the United States Supreme Court's holdings in Liljeberg v. Health Services Acquisition Corp. U.S., 108 S. Ct. 2194, 2202-03, 100 L. Ed. 2d 855 (1988) that disqualifying facts which a federal district judge should have know but which he had forgotten were sufficient to disqualify the judge under the federal statute and that Judge Dawson's forgetfulness and/or inability to remember does not avoid the appearance of partiality or satisfy Judge Dawson's burden of rebutting Mr. Strand's affidavit on this points, And; Paragraphs 4, 5 and 6 are contradicted by paragraphs 2 and 3 and do not satisfy Judge Dawson burden of rebutting Mr. Strand's affidavit on this points. Lastly, Judge Dawson did not file the mandatory affidavit required by Utah Rules of Civil Procedure Rule 63(b)(3) even though he was ordered to by Judge Kay's Rule 63(b)(3) request and was obligated to comply. (See R. at 3034 and Addendum at 3).

Because Golden Meadows also presents its own unsupported opinions, claims and legal argument with respect to Judge Dawson's response and his state of mind that were also not raised by Golden Meadows at the trial court level in support of its Rule 11 Motion (*See* Rule 11 Motion R. 3747), such unsupported opinions, claims and legal arguments are also not properly included in a Utah R. App. P. Rule 24(a)(7) Statement. This court generally will not address issues raised for the first time on appeal. *See Monson v. Carver*, 928 P. 2d 1017 (Utah 1996) (noting general rule that "issues not raised at the trial cannot be argued for the first time on appeal").

That concludes the Appellants rebuttal to all 15 Statements of Fact / Objections, by Golden Meadows, found on pages 3 through 8 of Golden Meadows Brief. It would have been much more meaningful if Golden Meadows had complied with Appellate procedures and not raised new issues and objections in their Appellate brief or, at least shown why these new and different statements of facts and/or objections that are not contained in the Rule 11 Motion and not addressed in the transcript or the Rule 11 Judgment are, relevant to this Appeal and the trial courts requirement to enter specific findings of fact and clearly state its objective review and reasoning (Rule 11(c)(3)) but, of course, Golden Meadows could not.

C. Response to Golden Meadows Statements about B.I. Associates.

B.I. Associates is a Strand entity, and, a party to the 1982 joint venture agreement between Strand and his entities and Neuman Petty and his entities (R. 650). B.I. Associates is the owner of the 3.2 million dollars worth of production equipment referred to in the 1982 joint venture agreement (R. 650). And, B.I. Associates was a guarantor of

the \$390,000 loan with Citizen's Bank that is at issue in this action.<sup>10</sup> A collective review of Strand's affidavit in support of Rule 63 and 60(b) Motions and his ancient documents (R. 2963) reflect that the IRS, in 1989, took action against Strand and his entities B.I. associates and MLK Investments, as part of an ongoing collection action, all of which, Judge Dawson, then Mr. Dawson, was directly involved in as legal counsel to the IRS. (See Strand's letter to Mr. Vano at ¶¶'s 1-4 (stipulation R. 2975), 6, 8 and 9 (R. 2978).

#### V. ATTORNEY FEES

Golden Meadows presumably knew that the Motion to Disqualify would be referred to another judge unfamiliar with the procedural history of this case. It obviously attempted to improve its chances of success by grossly misrepresenting to the judge what had occurred in the course of the action. The Rule 11 Motion which contains those exact same misrepresentations by Golden Meadows was a highly dishonest, morally corrupt and despicable attack on the integrity of the Appellants and the judicial system. Its facts are erroneous and could not have resulted from a reasonable investigation. (See Appellants opening brief at pages 15 through 43). The only affidavit, under oath, filed by Golden Meadows in support of its Rule 11 Motion, is, by Mr. Swindler regarding his fees. This Affidavit appears to be a harbinger of his prior statement concerning Golden Meadows position that an honest man does not have to take an oath for Mr. Swindler's

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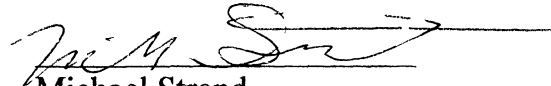
<sup>10</sup> (See Golden Meadows Memorandum in Support of Motion for Summary Judgment at R. 602 ¶3 and Appellants response at R. 1838-1839 ¶¶'s 5-6 along with Strand's Affidavit in Opposition to Summary Judgment at R. 1775 ¶16, R. 1793, R. 1794, R. 1795 stricken from the record by Judge Dawson on March 3 and March 5, 2008 (R.4301 hearing transcript p. 50 lines 9-13, p. 57 line 9)(Order entered (03/17/08) (R. 2213))).


affidavit is replete with lies and misstatements, for example, see, page 4 and 5 at paragraph d. (first sentence), paragraph e., paragraph f., and paragraph g. (R. 3796 and R. 3797) which magnifies his dishonesty. Golden Meadows position that the \$3600 sanction against the Appellants is such a modest amount that in the interest of judicial economy should not require this Court to require the trial court to enter specific findings of fact, objective review and reasoning is, contrary to Rule 11(c)(3) and the Utah Supreme Court's holdings in *Willey v. Willy*, 951 P. 2d 226, 230 (Utah 1997), *Griffith v. Griffith*, 985 P. 2d 255 (Utah, 1999), *Barnard v. Sutliff*, 846 P. 2d 1229 (Utah 1992), and *Morse v. Packer*, 2000 UT 86 ¶16, 15 P. 3d 1021 (quoting *Morse v. Packer*, 1995 UT 5 ¶10, 973 P. 2d 422), and, simply a red herring to ward off any further incursion into the true facts.

## CONCLUSION

The Appellants, did, in fact, act in good faith. Irrespective of Golden Meadows unsupported, offensive, and unwarranted personal attacks against the nature of the Appellants' character and Strand's affidavit testimony (and ancient documents,) the law remains the same: the trial court "*must*" review the Rule 11 Motion and the Appellants showing of information, facts, reasoning, evidence and law that they did *Not* commit a Rule 11 violation and "*must*" provide an objective review and the court's reasoning of that matter. *Griffith v. Griffith, supra*. The impartial review required by Rule 11 requires interpretation of the language contained in the Notice to Quit, transcripts, pleadings, orders, and ancient documents, etc.... The Appellants' are entitled to this relief as a matter of law. *Griffith v. Griffith, supra*. Reversal is therefore required.

Respectfully Submitted this 3 day of January, 2011

  
Michael Strand

  
Cari Allen

CERTIFICATE OF SERVICE

I hereby certify that I deposited in the U.S. Mail two true and correct copies of the Appellants' Reply Brief, postage prepaid, this 3 day of January, 2011 to:

James C. Swindler  
Prince Yeates & Geldzahler  
175 East 400 South #900  
Salt Lake City, Utah 84111

Wayne Petty  
Moyle & Draper  
175 East 400 South #900  
Salt Lake City, Utah 84111



## ADDENDUM

PP & T, LLC v. Brinar, 2008 WL 2224285 (Utah App.).....	1
Code of Judicial Conduct Chapter 12 Rule 2.11 (A), (1), (6)(a), (b), and (c).....	2
Code of Judicial Conduct Chapter 12 Rule 2.9 (A), (C) and (D).....	2
Utah Rules of Civil Procedure Rule 11(b), 11(c)(1)(A) and 11(c)(3).....	3
Utah Rules of Civil Procedure Rule 7(d), 7(f)(2).....	3
Utah Rules of Civil Procedure Rule 26(b)(1).....	3
Utah Rules of Civil Procedure Rule 63(b)(3).....	3
Utah Const. Article , Section 11.....	4
Utah Rules of Evidence Rule 401.....	4
Utah Rules of Evidence Rule 612.....	4
Utah Rules of Evidence Rule 803.....	4
Utah Rules of Evidence Rule 807.....	4



Not Reported in P.3d, 2008 WL 2224285 (Utah App.), 2008 UT App 198  
 (Cite as: 2008 WL 2224285 (Utah App.))

UNPUBLISHED OPINION. CHECK COURT  
 RULES BEFORE CITING.

Court of Appeals of Utah.  
 PP & T, LLC, Plaintiff and Appellee,  
 v.  
 John BRINAR, Defendant and Appellant.  
 No. 20070538-CA.

May 30, 2008.

Third District, Salt Lake Department, 060905872;  
 The Honorable Vernice S. Trease.  
 John Brinar, Pearlinton, Mississippi, Appellant  
 Pro Se.

Jared L. Bramwell and Steven M. Kelly, Salt Lake  
 City, for Appellee.

Before Judges THORNE, BENCH, and ORME.

MEMORANDUM DECISION (Not For Official  
 Publication)

PER CURIAM:

\*1 John Brinar appeals the district court's judgment entered on June 5, 2007. We affirm.

On appeal, Brinar first asserts that PP & T members filed affidavits consisting of perjured testimony. As a general rule, "claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 14, ¶ 11, 10 P.3d 346. To preserve the issue for appeal, a party "must enter an objection on the record that is both timely and specific." *State v. Rangel*, 866 P.2d 607, 611 (Utah Ct.App.1993). "The objection must 'be specific enough to give the trial court notice of the very error' of which [the party] complains." *State v. Bryant*, 965 P.2d 539, 546 (Utah Ct.App.1998). Fur-

thermore, in order to permit meaningful appellate review, a party's brief must specify where in the record such alleged error occurred or was preserved. See *State v. Garner*, 2002 UT App 234, ¶ 8, 52 P.3d 467.

Brinar has failed to preserve this issue for appeal. Brinar did not appear for the evidentiary hearing that he had requested. Had he done so, Brinar would have had the opportunity to present evidence challenging the affidavits that allegedly consisted of fraudulent testimony. By failing to attend the evidentiary hearing, Brinar waived his opportunity to properly object and preserve this issue for appellate review.<sup>FN1</sup>

FN1 The record does not reflect that a proper motion to strike the allegedly fraudulent affidavits was ever filed. Thus, this issue was not preserved by the denial of a pretrial motion.

Brinar next asserts that the trial court denied him due process by failing to telephone him when he did not appear at the March 5, 2007, pretrial conference. Brinar asserts that he was not given adequate notice of this hearing. The essential elements of due process mandate that a person whose rights are to be affected by court action must be given adequate notice and an opportunity to have the court review the issue raised by such party. See *Chen v. Stewart*, 2004 UT 82, ¶ 68, 100 P.3d 1177. A party asserting a violation of his due process rights must demonstrate that the alleged violation was harmful. See *Lucas v. Murray City Civ. Serv. Comm'n*, 949 P.2d 746, 755 (Utah Ct.App.1997). In this context, a party must demonstrate that the alleged error was harmful because had the error otherwise not occurred, the trial court would have reached a different ruling. See *id.* Assuming that Brinar did not receive notice of the March 5, 2007 pretrial conference, the trial court remedied any harm by holding a second pretrial conference on March 19, 2007, solely for Brinar's benefit.

The record also demonstrates that Brinar was given multiple opportunities to have the trial court review his claims in an evidentiary hearing and that he also received adequate notice of the evidentiary hearing dates. Brinar attended the pretrial conference on March 19, 2007, wherein it was reiterated that the evidentiary hearing would be held on May 23, 2007. Thus, Brinar received adequate notice of the evidentiary hearing and had an opportunity to present his claims at that time. Accordingly, the record demonstrates that Brinar's due process rights were not violated.

\*2 Brinar next asserts that opposing counsel acted unethically and that this court should impose sanctions under rule 11 of the Utah Rules of Civil Procedure. The basis for this assertion is that opposing counsel did not inquire whether the trial court had attempted to telephone Brinar at the March 5, 2007 pretrial conference. This claim also fails for lack of preservation and is not properly before this court. Rule 11 of the Utah Rules of Civil Procedure governs sanctions and requires that parties comply with specific procedures for initiating rule 11 sanctions at the trial court level. Brinar did not comply with rule 11 procedure. See Utah R. Civ. P. 11(c)(1)(A).

Lastly, PP & T asserts that there are alternative grounds entitling it to an award of attorney fees on appeal and that it may also be entitled to an award of double costs. PP & T's primary basis for seeking attorney fees and costs on appeal is under Utah Code section 38-9a-205(3) (2008). Section 38-9a-205(3) provides "[a]fter a hearing with notice to the affected party, the court may enter an order requiring any party to pay the costs of the action, including reasonable attorney's fees." *Id.* If the trial court determines that a party is entitled to an award of attorney fees by law, the party may also recover its attorney fees on appeal. See *Coates v. American Economy Ins. Co.*, 627 P.2d 979 (Utah 1981). The trial court held a hearing on May 22, 2007, and notice was given to the affected parties. As requested in PP & T's petition for a civil wrongful lien injunction, the trial court awarded PP & T its attorney

fees and costs under Utah Code section 38-9a-205(3). Thus, PP & T is entitled to its attorney fees and costs on appeal. Accordingly, we do not reach PP & T's alternative grounds for awarding it attorney fees and costs. However, we must address PP & T's request for double costs. Brinar's appeal was not frivolous. Thus, PP & T is not entitled to double costs under rules 33 and 34 of the Utah Rules of Appellate Procedure.

Accordingly, the trial court's judgment is affirmed and this matter is remanded to the trial court to determine PP & T's attorney fees on appeal.

Utah App, 2008  
PP&T, LLC v Brinar  
Not Reported in P 3d, 2008 WL 2224285 (Utah App ), 2008 UT App 198

END OF DOCUMENT

## **CH 12. CODE OF JUDICIAL CONDUCT**

### **CANON 2**

**A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY,\* COMPETENTLY, AND DILIGENTLY.**

#### **RULE 2.9**

##### ***Ex Parte Communications***

**(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending\* or impending matter,\* except as follows:**

**(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.**

**(D) A judge shall make reasonable efforts to ensure that the judge does not receive inappropriate ex parte communications through or from court staff, court officials, and others subject to the judge's direction and control.**

#### **RULE 2.11**

##### ***Disqualification***

**(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality\* might reasonably be questioned, including but not limited to the following circumstances:**

**(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge\* of facts that are in dispute in the proceeding.**

**(6) The judge:**

**(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;**

**(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;**

**(c) was a material witness concerning the matter;**

## **Utah Rules of Civil Procedure**

### **Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.**

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(f) Orders.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

### **Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.**

(b) Representations to court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. .

(c)(1)(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(c)(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

**Rule 26. General provisions governing discovery.**

(b)(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence

**Rule 63. Disability or disqualification of a judge.**

(b)(3)(B) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion and affidavit an affidavit responsive to questions posed by the reviewing judge.

**Utah Constitution Article I, Section 11. [Courts open -- Redress of injuries.]**

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

**Utah Rules of Evidence**

**Rule 401. Definition of "relevant evidence."**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**Rule 612. Writing used to refresh memory.**

If a witness uses a writing to refresh the witness' memory for the purpose of testifying, either

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

**Rule 803. Hearsay exceptions; availability of declarant immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms,

pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

#### **Rule 807. Other Exceptions.**

A statement not specifically covered by Rule 803 or Rule 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.