

1989

Helen Coleman v. Brian R. Florence, Florence & Hutchison, John Blair Hutchison, Felshaw King, King & King, and Does 1 through 10 : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Carmen E. Kipp; Shawn McGarry; Kipp & Christian; Thomas L. Kay; Paul D. Newman; Ray, Quinney .

Helen Coleman, Pro Se.

Recommended Citation

Brief of Respondent, *Coleman v. Florence*, No. 890380 (Utah Court of Appeals, 1989).
https://digitalcommons.law.byu.edu/byu_ca1/1984

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

TAH
DOCUMENT
F U

10
CKET NO. 890380 IN THE UTAH COURT OF APPEALS

-----oo0oo-----

HELEN COLEMAN,

:

Plaintiff and
Appellant,

:

:

v.

:

BRIAN R. FLORENCE, FLORENCE &
HUTCHISON, JOHN BLAIR HUTCHISON,
FELSHAW KING, KING & KING,
and DOES 1 through 10,

CASE NO. 890380-CA
Classification 14b

:

Defendants and
Respondents.

:

BRIEF OF RESPONDENTS FELSHAW KING AND KING & KING

Appeal from Judgment from Second Judicial District Court
for Davis County, State of Utah
Honorable Rodney S. Page, District Judge

HELEN COLEMAN
PRO SE
261 Marilyn Drive
Clearfield, Utah 84015

Plaintiff and Appellant

THOMAS L. KAY (A1778)
PAUL D. NEWMAN (A4889)
RAY, QUINNEY & NEBEKER
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145

Attorneys for Felshaw King and
King & King

CARMAN E. KIPP
SHAWN McGARRY
KIPP & CHRISTIAN, P.C.
City Centre 1, #330
175 East 400 South
Salt Lake City, Utah 84111-2314

Attorneys for Brian R. Florence,
Florence & Hutchison and
John Blair Hutchison

FILED

AUG 21 1989

COUNT OF APPEALS

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

HELEN COLEMAN,	:	
	:	
Plaintiff and	:	
Appellant,	:	
	:	
v.	:	
	:	
BRIAN R. FLORENCE, FLORENCE &	:	
HUTCHISON, JOHN BLAIR HUTCHISON,	:	
FELSHAW KING, KING & KING,	:	CASE NO. 890380-CA
and DOES 1 through 10,	:	Classification 14b
	:	
Defendants and	:	
Respondents.	:	

BRIEF OF RESPONDENTS FELSHAW KING AND KING & KING

Appeal from Judgment from Second Judicial District Court
for Davis County, State of Utah
Honorable Rodney S. Page, District Judge

HELEN COLEMAN
PRO SE
261 Marilyn Drive
Clearfield, Utah 84015

Plaintiff and Appellant

THOMAS L. KAY (A1778)
PAUL D. NEWMAN (A4889)
RAY, QUINNEY & NEBEKER
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145

Attorneys for Felshaw King and
King & King

CARMAN E. KIPP
SHAWN McGARRY
KIPP & CHRISTIAN, P.C.
City Centre 1, #330
175 East 400 South
Salt Lake City, Utah 84111-2314

Attorneys for Brian R. Florence,
Florence & Hutchison and
John Blair Hutchison

TABLE OF CONTENTS

	<u>Page</u>
I. JURISDICTION OF THE COURT OF APPEALS	1
II. ISSUES PRESENTED FOR REVIEW	1
III. STATEMENT OF THE CASE	1
A. NATURE OF THE CASE	1
B. STATEMENT OF FACTS	3
VI. SUMMARY OF ARGUMENT	6
V. ARGUMENT	7
A. THIS COURT LACKS JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER GRANTING THE KING DEFENDANTS' SUMMARY JUDGMENT BECAUSE OF PLAINTIFF'S DEFECTIVE AMENDED NOTICE OF APPEAL	7
B. PLAINTIFF CANNOT DISPUTE THE FACTS SUBMITTED BY DEFENDANTS IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT FOR THE FIRST TIME ON APPEAL	8
C. DEFENDANTS ARE ENTITLED TO JUDGMENT BECAUSE PLAINTIFF FAILED TO PRODUCE EVIDENCE ESTABLISHING THE ELEMENTS OF HER LEGAL MALPLRACTICE CLAIM.....	10
1. Plaintiff Failed to Establish that the King Defendants Breached Their Duty to Plaintiff	11
2. Plaintiff Failed to Produce Any Evidence Showing that the King Defendants' Alleged Negligence Was the Proximate Cause of Any Damages Suffered by Plaintiff	13
D. THE KING DEFENDANTS ARE ENTITLED TO JUDGMENT BASED ON THE ADMITTED FACTS	14
1. The Admitted Facts Show that Plaintiff Intended Only Kim Carlos to be Responsible and Liable for Payments After the Modification Agreement	14
2. The Admitted Facts Show that the King Defendants' Alleged Negligence Was Not the Proximate Cause of Damage to Plaintiff	16
CONCLUSION	17

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Atlas Corp. v. Clovis National Bank,</u> 737 P.2d 225 (Utah 1987)	10
<u>Bowen v. Riverton City,</u> 656 P.2d 434 (Utah 1982)	8
<u>Burgers v. Maiben,</u> 652 P.2d 1320 (Utah 1982)	8
<u>Busch Corporation v. State Farm Fire & Casualty Co.,</u> 743 P.2d 1217 (Utah 1987)	9
<u>Celotex Corp. v. Catrett,</u> 477 U.S. 317 (1986)	10
<u>Dunn v. McKay, Burton, McMurray & Thurman,</u> 584 P.2d 894 (Utah 1978)	13
<u>Franklin Financial v. New Empire Development Co.,</u> 659 P.2d 1040 (Utah 1983))	9
<u>Jennings v. Stoker,</u> 652 P.2d 912 (Utah 1982)	11
<u>Martin v. Mott,</u> 744 P.2d 337 (Utah App. 1987)	11
<u>Nelson v. Stoker,</u> 669 P.2d 390 (Utah 1983)	8
<u>Robinson v. Intermountain Health, Inc.,</u> 740 P.2d 262 (Utah App. 1987)	11
<u>Salt Lake City Corp. v. James Constructors, Inc.,</u> 761 P.2d 42 (Utah App. 1988)	9
<u>Williams v. Barber,</u> 765 P.2d 887 (Utah 1988)	11, 13
<u>Yost v. State,</u> 640 P.2d 1044 (Utah 1981)	7
<u>Young v. Bridwell,</u> 437 P.2d 686 (Utah 1968)	13
R. Mallen and J. Smith, LEGAL MALPRACTICE (3d ed. 1989) § 27.15, pp. 667-68	12
Utah Code Ann. § 57-1-32	16
Utah Code of Judicial Administration, Rule 4-501(5)	8
Utah Rules of Civil Procedure, Rule 56	8, 10

I. JURISDICTION OF THE COURT OF APPEALS

The Court lacks jurisdiction over this appeal as it relates to the King defendants because of plaintiff's defective notice of appeal.

II. ISSUES PRESENTED FOR REVIEW

(1) Whether this Court lacks jurisdiction to hear this appeal with respect to the King defendants as a result of plaintiff's defective notice of appeal.

(2) Whether plaintiff, despite the requirements of Rule 56 of the Utah Rules of Civil Procedure and Rule 4-501 of the Utah Code of Judicial Administration, can dispute factual issues for the first time on appeal and raise facts not contained in the record on appeal.

(3) Whether the King defendants are entitled to judgment as a result of plaintiff's failure to make a factual showing to establish the elements of her claim for legal malpractice in the face of defendants' motions for summary judgment.

(4) Whether the King defendants are entitled to judgment based upon the admitted facts.

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

Plaintiff Helen S. Coleman ("plaintiff") commenced this legal malpractice action against defendants in April of

1988.¹ Pursuant to a stipulation of counsel, the district court dismissed defendant Glen T. Cella from the case with prejudice. (R. at p. 54).² In November of 1988, defendants filed motions for summary judgment. (R. at pp. 74 and 145). Shortly thereafter, plaintiff's counsel withdrew and plaintiff began representing herself. Because of the withdrawal of plaintiff's counsel, the district court postponed hearing defendants' motions until late January of 1989. (R. at p. 155). On January 24, 1989, the district court heard argument from plaintiff and counsel for defendants, and then took the motions under advisement. (Reporter's Transcript of January 24, 1989 Hearing Motion for Summary Judgment). On March 1, 1989, the Honorable Rodney S. Page issued a ruling granting defendants' motions and directing defendants to prepare findings and orders. (R. at p. 165). On April 3, 1989, the district court approved findings of fact and entered judgment in favor of the Florence defendants. (R. at pp. 185 and 198). On April 18, 1989, the district court approved

¹This action was initially filed by Oscar Howard Coleman and Helen S. Coleman. Plaintiff Oscar S. Coleman dismissed his claims against defendants. (R. at p. 161). However, many of the actions of plaintiff in this case were undertaken with Mr. Coleman, and for ease of reference, in those situations, reference is made to plaintiffs.

²"Defendants" shall refer to all defendants in this case. In some instances, a distinction is required between the defendants. When a distinction is required, defendants Felshaw King and King & King shall be referred to as the "King defendants" and defendants Brian R. Florence, John Blair Hutchison and Florence & Hutchison shall be referred to as the "Florence defendants."

findings of fact and entered judgment in favor of the King defendants. (R. at pp. 202 and 211). On April 28, 1989, plaintiff filed her Amended Notice of Appeal, in which she appealed the "judgment of the Honorable Rodney S. Page entered on the 3rd day of April, A.D., 1989." (R. at p. 213). On June 12, 1989, the King defendants moved to dismiss the appeal as to them based on plaintiff's failure to appeal the order entered by the district court on April 18, 1989. That same day, the Utah Supreme Court transferred this matter to the Utah Court of Appeals.

B. STATEMENT OF FACTS.³

On March 8, 1979, plaintiffs sold the property located at 354 East 200 South, Clearfield, Utah to Doyle and Goldie Logan (the "Logans") for a total sum of \$105,000.00 pursuant to a Uniform Real Estate Contract ("Real Estate Contract"). Plaintiffs received \$25,084.65 as a down payment on the purchase. On August 1, 1979, the Logans sold their interest in the property to Wayne and Kim Carlos pursuant to an Assignment of Escrow. Wayne and Kim Carlos assumed the \$83,642.58 balance due on principal, plus 11.5 percent interest, at \$1,072.23 per month. On June 8, 1983, Wayne and Kim Carlos were divorced and Kim Carlos was awarded the property. Plaintiffs were fully apprised and aware of

³The facts are all taken from the Memorandum of Points and Authorities in Support of Motion for Summary Judgment; R. at pp. 77-85.

the property purchase by Wayne and Kim Carlos, and of the subsequent divorce and distribution of the property to Kim Carlos.

In March of 1984, due to a history of late payments dating from August 1979 to March 1984, plaintiffs reached an agreement with Kim Carlos which modified the Real Estate Contract and Assignment of Escrow. The agreement extended the maturity of the debt, increased the interest rate from 11.5 percent per annum to 20 percent per annum, increased the monthly installment payments from \$1,072.23 to \$1,435.00, and added late fees on all delinquent payments of \$71.00 prior to the 15th of each month and \$142.00 subsequent to the 15th of each month. The terms of the agreement between the plaintiffs and Kim Carlos, along with a blank real estate form, were given to a secretary at King & King by plaintiff. Plaintiff asked a secretary at King & King to prepare a modification agreement by typing the terms of the agreement on the blank form. Pursuant to plaintiff's request, a modification agreement was drafted by Glen Cella under the supervision of defendant, Felshaw King. The final draft of the Modification Agreement did not include the Logans or Wayne Carlos as parties, and specifically states that Kim Carlos was the only party to the modifications, and was the only party responsible and liable for further payments. The Modification Agreement was signed by plaintiffs and Kim Carlos on March 29, 1984.

From March 29, 1984 until June 1, 1986, the date when Kim Carlos defaulted, plaintiffs received payments from Kim Carlos

under the terms of the Modification Agreement. Plaintiffs never contacted Wayne Carlos or the Logans regarding any delinquent payments under the contract and never made any demand that Wayne Carlos or the Logans make any additional payments for the property.

On July 10, 1986, plaintiff contacted defendant, Brian R. Florence, for legal assistance with the default of Kim Carlos. A Verified Complaint for foreclosure was prepared and verified by plaintiffs on August 8, 1986. In the Verified Complaint, plaintiff stated under oath that they agreed to substitute Kim Carlos as the sole buyer of the property. In the foreclosure action, on March 11, 1987, Judge Page entered judgment for plaintiffs against Kim Carlos for \$60,497.35 in principal, interest and late fees; which included \$12,672.67 for the first and second mortgage, \$3,792.11 in delinquent property taxes, \$1,664.00 for plaintiffs' attorneys' fees, \$390.00 for attorneys' fees for First Security Bank and \$300.00 for attorneys' fees for Bank of Utah.

On May 12, 1987, after prior discussions with plaintiffs, Brian R. Florence bid \$67,975.61, which included the sum total of judgment plus interest, for the property at foreclosure. This amount was bid despite plaintiffs' continual representation to defendant Brian R. Florence, that the property in question was worth at least \$105,000.00, the amount it was sold for in 1979. Plaintiff was present at the foreclosure sale and did not object to the bid that was offered by defendant, Brian R. Florence.

VI. SUMMARY OF ARGUMENT

Plaintiff's Amended Notice of Appeal fails to indicate that plaintiff is appealing the judgment entered in favor of the King defendants on April 18, 1989. The Amended Notice of Appeal indicates that plaintiff is appealing the judgment entered on April 3, 1989. As a result of the defective notice, this Court lacks jurisdiction to review the judgment entered in favor of the King defendants.

Defendants properly filed motions for summary judgment supported by legal memoranda that recited the factual basis for the motions. The motions complied with the requirements of Rule 56 of the Utah Rules of Civil Procedure and Rule 4-501 of the Utah Code of Judicial Administration. Plaintiff failed to file or present any evidence contradicting the facts set forth in the memoranda supporting defendants' motions for summary judgment. Plaintiff cannot now ask this Court to reverse the district court based on factual disputes not raised below or on facts that are not contained in the record on appeal.

Based upon the admitted facts, the district court correctly granted judgment in favor of the King defendants. Plaintiff claims the King defendants were negligent by relieving the Logans and Wayne Carlos from liability under the Modification Agreement. However, by failing to oppose defendants' motions for summary judgment, plaintiff failed to produce any expert testimony as to the standard of care owed by the King defendants to plaintiff

in connection with drafting the Modification Agreement.

Plaintiff's failure in this regard is sufficient reason for entry of judgment under Rule 56 and the cases interpreting Rule 56.

Even if plaintiff had submitted the required expert testimony, the admitted facts show that plaintiff intended that Kim Carlos be the sole person responsible for payments under the Modification Agreement, and therefore, the district court properly concluded that the King defendants were entitled to judgment. In addition, plaintiff offered no evidence to show that the King defendants' alleged negligence was the proximate cause of any damage. The admitted facts show that even if the King defendants were negligent in failing to include the Logans and Wayne Carlos as responsible parties after the Modification Agreement, that negligence was not the proximate cause of any damage to plaintiff. For these reasons, the district court correctly entered judgment for the King defendants, and this Court should affirm the judgment on appeal.

V. ARGUMENT

A. THIS COURT LACKS JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER GRANTING THE KING DEFENDANTS' SUMMARY JUDGMENT BECAUSE OF PLAINTIFF'S DEFECTIVE AMENDED NOTICE OF APPEAL.

Rule 3(d) of the Rules of the Utah Supreme Court requires that a notice of appeal designate the judgment or order appealed from. Without a proper notice of appeal, the Court is without jurisdiction to hear the matter. Yost v. State, 640 P.2d 1044 (Utah 1981). In Yost, a multiple defendant case, the Utah Supreme

Court refused to take jurisdiction of an appeal from a summary judgment granted in favor of one co-defendant in connection with an appeal of other portions of the case because the appeal of the summary judgment was never perfected. Id. at 1047.

This Court also lacks jurisdiction over an untimely appeal. Burgers v. Maiben, 652 P.2d, 1320, 1322 (Utah 1982); Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982); and Nelson v. Stoker, 669 P.2d 390, 392 (Utah 1983).

In this case, plaintiff's Amended Notice of Appeal does not designate the judgment entered in favor of the King defendants on April 18, 1989, and the time for taking such an appeal has run. Accordingly, plaintiff's appeal against the King defendants should be dismissed.

B. PLAINTIFF CANNOT DISPUTE THE FACTS SUBMITTED BY DEFENDANTS IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT FOR THE FIRST TIME ON APPEAL.

Rule 56 of the Utah Rules of Civil Procedure and Rule 4-501 of the Utah Code of Judicial Administration set forth in detail the procedure to be followed by a party who seeks to contradict evidence supporting a motion for summary judgment. When the procedure is not followed, the statement of facts of the party moving for summary judgment shall be "deemed admitted", and summary judgment, if appropriate shall be granted. Utah Code of Judicial Administration, Rule 4-501(5); Utah Rules of Civil Procedure, Rule 56(e). The deemed admission exists not only for

the district court, but also, through all reviews of the district court's actions by appellate courts. In Busch Corporation v. State Farm Fire & Casualty Co., 743 P.2d 1217 (Utah 1987), the Utah Supreme Court, in reviewing an appeal from a summary judgment, held that when an argument is not raised before the district court, it cannot be raised on appeal. Id. at 1219. Quoting from an earlier opinion, the Court stated:

[W]hen a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue. Without such a showing, the Court need only decide whether, on the basis of the applicable law, the moving party is entitled to judgment.

Id. (citing Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1044 (Utah 1983)); see also Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 46 (Utah App. 1988).

In this case, the record on appeal clearly shows that plaintiff failed to file an opposition to defendants' motions and made no attempt whatsoever to contradict the facts submitted by defendants in support of their motions. Under these circumstances, defendants' stated facts are "deemed admitted", and the district court and this Court are bound by the admitted facts. Accordingly, plaintiff's argument against the district court's findings of fact at pp. 12-30 of Appellant's Opening Brief

must be disregarded as they are not established from the record on appeal and are being raised for the first time on appeal.

C. DEFENDANTS ARE ENTITLED TO JUDGMENT BECAUSE PLAINTIFF FAILED TO PRODUCE EVIDENCE ESTABLISHING THE ELEMENTS OF HER LEGAL MALPRACTICE CLAIM.

Although the facts deemed admitted must be viewed in the light most favorable to plaintiff, Atlas Corp. v. Clovis National Bank, 737 P.2d 225, 229 (Utah 1987), this Court must affirm the district court's judgment because plaintiff failed to make any factual showing establishing the essential elements of her claim.

Rule 56 of the Utah Rules of Civil Procedure provides for summary judgment. In Celotex Corp. v. Catrett, 477 U.S. 317, (1986), the United States Supreme Court made the following statement regarding the comparable Rule 56 of the Federal Rules of Civil Procedure:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing of her case with respect to which she has the burden of proof.

Id. at 322-23 (emphasis added). See Robinson v. Intermountain Health, Inc., 740 P.2d 262 (Utah App. 1987). In other words, to avoid judgment, plaintiff was required to raise factual issues sufficient to establish the existence of all the elements necessary to recover on her claim for legal malpractice.

In order to establish a case of legal malpractice, plaintiff must prove each and every one of the following elements:

1. an attorney/client relationship;
2. a duty of the attorney to the client;
3. a breach of the duty;
4. damages suffered by the client; and
5. that the attorneys' negligence proximately caused the damage to the client.

Williams v. Barber, 765 P.2d 887 (Utah 1988).

1. Plaintiff Failed to Establish that the King Defendants Breached Their Duty to Plaintiff.

In order to establish breach of duty, a plaintiff in a legal malpractice case, like a plaintiff in a medical malpractice case, must introduce expert testimony concerning the standard of care. Jennings v. Stoker, 652 P.2d 912, 914 (Utah 1982)

("[a]bsent a situation where the propriety of the treatment received is within the common knowledge and experience of the layman, the plaintiff in a medical malpractice case must prove the standard of care by expert medical testimony.") See also, Martin v. Mott, 744 P.2d 337 (Utah App. 1987) (Court affirmed summary

judgment in favor of medical malpractice defendants when plaintiff failed to produce competent expert testimony to show standard of care and breach of that standard by defendants.) In one of the leading treatises on legal malpractice, the need for expert testimony is explained as follows:

Whether an attorney has complied with the standard of care is an issue of fact, unless the evidence is so patent and conclusive that reasonable persons can reach only one conclusion. Thus, expert testimony is necessary to establish the standard of care since only an attorney can competently testify to whether the defendant comported to the prevailing legal standard. Without expert assistance, lay juries cannot understand litigation issues, local practices, or the broad spectrum of issues which influence how an attorney should act or advise.

R. Mallen and J. Smith, LEGAL MALPRACTICE (3d ed. 1989) § 27.15, pp. 667-68, and cases cited therein.

In this case, plaintiff claims that the King defendants were negligent in drafting the Modification Agreement. To determine whether plaintiff's claim has any validity, plaintiff would have to establish the standard of care owed to plaintiff by the King defendants and that the King defendants breached that duty. The duty of care owed to a person in plaintiff's position is not something that is within the common knowledge of the layperson and can only be established by expert testimony. Whether the Modification Agreement drafted by the King defendants meets the standard of care is also an issue beyond the common knowledge of the layperson. In this case, plaintiff failed to

present any expert testimony in opposition to defendants' motions for summary judgment concerning the standard of care or concerning breach of that standard, and by failing to do so, plaintiff failed to establish an essential element of her case.

2. Plaintiff Failed to Produce Any Evidence Showing that the King Defendants' Alleged Negligence Was the Proximate Cause of Any Damages Suffered by Plaintiff.

Proximate cause in legal malpractice actions embodies the concept of a case within a case. As the Utah Supreme Court noted in Williams v. Barber, "incurring liability through a breach of duty does not necessarily result in damages." 765 P.2d at 889. This is because in a legal malpractice action, "proximate cause embraces an assessment of the merits of the underlying cause of action." Id.; see also Dunn v. McKay, Burton, McMurray & Thurman, 584 P.2d 894, 895 (Utah 1978) (appropriate to inquire as to what the plaintiff's position would have been if attorney had performed the act properly); Young v. Bridwell, 437 P.2d 686, 689 (Utah 1968) (in order to make out a cause of action against an attorney for failing to advise plaintiff of right to appeal, it would have to be shown that there was a reasonable likelihood of reversing the judgment and that it would have benefited plaintiff). In other words, before a court can determine that a plaintiff has been damaged, there must be some evidence as to what the plaintiff's position would have been had the attorney performed properly.

In this case, for plaintiff to establish the element of proximate cause, she was required to produce some evidence showing that the omission of the Logans and Wayne Carlos from continuing liability after the Modification Agreement caused plaintiff damage. Plaintiff has produced no evidence in this regard. There is no evidence to show that had the Logans and Wayne Carlos been liable for payments after the Modification Agreement that additional payments would have been made. There is no evidence to show that had the Logans and Wayne Carlos been liable that plaintiff would have received more than she did through the foreclosure action. Without evidence of this type, plaintiff cannot raise any factual issues as to the proximate cause element of her legal malpractice claim, and judgment in favor of the King defendants must be affirmed.

D. THE KING DEFENDANTS ARE ENTITLED TO JUDGMENT BASED ON THE ADMITTED FACTS.

1. The Admitted Facts Show that Plaintiff Intended Only Kim Carlos to be Responsible and Liable for Payments After the Modification Agreement.

Not only did plaintiff fail to counter defendants' motions for summary judgment with the required expert testimony, but the admitted facts show that plaintiff cannot establish that there was a breach of the duty by the King defendants. In this case, plaintiff claims that the King defendants were negligent in omitting the Logans and Wayne Carlos from liability after the Modification Agreement. The admitted facts show that plaintiff

intended that Kim Carlos be the only person with continuing responsibility and liability for payments when plaintiff signed the Modification Agreement. The final draft of the Modification Agreement was signed by plaintiff and Kim Carlos in March of 1989. The definitions in the Modification Agreement clearly identify only Kim M. Carlos as the "Buyer." The language of the Modification Agreement clearly indicates that the Logans and Wayne Carlos were not liable for future payments, and that Kim Carlos alone would be responsible and liable for all future payments.

Plaintiff once again evidenced this intent by signing the Verified Complaint in the foreclosure action that stated:

5. That on March 29, 1984, the plaintiffs entered into a modification of the original Real Estate Contract wherein they agreed to substitute Kim Carlos as the sole buyer of the premises and eliminate any further obligation or responsibility of the Logans, and further modified the terms of the payments that would be made by the defendant Kim Carlos in the future.

6. That by the terms of the modification agreement, Kim Carlos was to make monthly payments of \$1,435.00 beginning with the first day of April, 1984, said payments to be received on or before the 10th day of each month, after which late charges would be assessed.

7. That the documents of title were being held in escrow and all payments were to be paid through escrow.

8. That the defendant Kim Carlos has repeatedly been delinquent in her monthly payments and repeated demand letters have been made to the escrow agent.

9. That the defendant Kim Carlos failed to make the June, 1986 payment and after the appropriate demand letter was submitted to her,

all documents of title have been returned to the plaintiffs.

10. That the defendant Kim Carlos has also failed to pay the real property taxes as required by the Real Estate Contract for the 1983, 1984 and 1985 calendar years.

(R. at pp. 116-17). The Verified Complaint contains no allegations that the Logans or Wayne Carlos were in default and liable for payments. Based on this evidence, it is proper to conclude that plaintiff failed to create a factual issue concerning breach of the standard of care by the King defendants, and thus affirm the district court's entry of judgment in favor of the King defendants.

2. The Admitted Facts Show that the King Defendants' Alleged Negligence Was Not the Proximate Cause of Damage to Plaintiff.

The admitted facts show that at the time of the foreclosure sale, plaintiff was owed \$60,497.35 as a result of Kim Carlos' breach of the Modification Agreement. The admitted facts also show that at the foreclosure sale, plaintiff bid \$67,975.61, which sum included the total judgment plus interest. Under Utah law, plaintiff was not entitled to recover any amount from Kim Carlos in excess of the judgment amount. By bidding a sum equal to or greater than the judgment amount at the foreclosure sale, plaintiff was not entitled to seek any amount as a deficiency from Kim Carlos. Utah Code Ann. § 57-1-32. This would have also been true as to the Logans and Wayne Carlos if they had also been liable for payments after the Modification Agreement.

Accordingly, because the omission of the Logans and Wayne Carlos from liability after the Modification Agreement was not the proximate cause of any damage to plaintiff, judgment in favor of the King defendants must be affirmed.

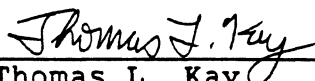
CONCLUSION

This Court does not have jurisdiction to review the judgment entered in favor of the King defendants because plaintiff's Amended Notice of Appeal does not appeal that judgment.

Plaintiff failed to produce any evidence in opposition to defendants' motions for summary judgment. Plaintiff's failure to do so prevents her from seeking to create factual issues for the first time on appeal. By failing to oppose defendants' motions for summary judgment, plaintiff failed to produce evidence sufficient to make a showing as to the essential elements of her claim for legal malpractice. Plaintiff's failure to make such a showing entitles defendants to judgment. In addition, the admitted facts establish that the King defendants are entitled to judgment. Accordingly, this Court should affirm judgment of the district court entered in favor of the King defendants.

DATED this 31st day of August, 1989.

RAY, QUINNEY & NEBEKER



Thomas L. Kay
Paul D. Newman

Attorneys for Defendants

9095n

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 1989, four (4) true and correct copies of BRIEF OF RESPONDENTS FELSHAW KING AND KING & KING were mailed by first-class mail, postage prepaid, to the following:

Carman E. Kipp
Shawn McGarry
KIPP & CHRISTIAN, P.C.
City Centre 1, #330
175 East 400 South
Salt Lake City, Utah 84111-2314
Attorneys for Brian R. Florence,
Florence & Hutchison and
John Blair Hutchison

Helen Coleman
261 Marilyn Drive
Clearfield, Utah 84015

9095n

Thomas J. Key