

1989

Knight Adjustment Bureau v. Robert J. Williams, James R. Williams : Brief of Appellant

Utah Court of Appeals

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Kathryn Denholm; Attorney for Respondents.

William H. Lindsley; Diument and Lindsley; Attorney for Appellant.

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BRIEF

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89-0418

IN THE UTAH COURT OF APPEALS

KNIGHT ADJUSTMENT BUREAU,

Plaintiff,

vs.

ROBERT L. WILLIAMS and
JAMES R. WILLIAMS,

Defendants.

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:
:

Case No. 890418-CA

Priority No. 14b

APPELLANT'S BRIEF

Appeal from the Judgment of the
Second Judicial District Court
In and For Davis County, State of Utah
The Honorable Douglas L Cornaby, Presiding

DEPOSITED BY THE
STATE OF UTAH
AUG 17 1990

William H. Lindsley
DIUMENTI & LINDSLEY
505 South Main Street
Bountiful, Utah 84010
Telephone: 292-0447
Attorney for Appellant

Kathryn Denholm
263 East 2100 South
Salt Lake City, Utah 84115
Telephone:
Attorney for Respondents

FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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William H. Lindsley
DIUMENTI & LINDSLEY
505 South Main Street
Bountiful, Utah 84010
Telephone: 292-0447
Attorney for Appellant

Kathryn Denholm
263 East 2100 South
Salt Lake City, Utah 84115
Telephone:
Attorney for Respondents

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IN THE UTAH COURT OF APPEALS

KNIGHT ADJUSTMENT BUREAU,

Plaintiff,

vs.

ROBERT L. WILLIAMS and
JAMES R. WILLIAMS,

Defendants.

:

:

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Case No. 890418-CA

Priority No. 14b

STATEMENT OF JURISDICTION

1. Jurisdiction. The Utah Court of Appeals has jurisdiction to consider and hear this appeal pursuant to the provisions of Section 78-2-2 Utah Code Annotated, as amended, and Rule 3 of the Rules of the Supreme Court of Utah, and pursuant to an Order of the Supreme Court of Utah the case was "poured-over to the Court of Appeals" the 29th day of June, 1989.

NATURE OF PROCEEDINGS

This appeal is from a judgment signed the 31st day of January, 1989, entered the 1st day of February, 1989, (signed by the Honorable Douglas L Cornaby, judge in and for the Second Judicial District Court) which judgment was granted pursuant to Plaintiff's Verified Motion for Entry of Judgment without hearing on defendant James Williams' objection to plaintiff's Motion, and which judgment was subsequently amended the 20th day of June, 1989,

pursuant to plaintiff's Rule 60(a) Motion to Amend. Appellants seek review of the judgment and the proceedings leading up to the granting of that judgment and the proceedings subsequent thereto resulting in the amendment of the judgment; the specific rulings of the court being appealed include the Judgment granted the 31st day of January, 1989; the Order granting plaintiff's motion to amend, entered by the trial court the 21st day of June, 1989; the Amended Judgment granted the 20th day and entered the 21st day of June, 1989; the trial court's ruling on defendant's motions subsequent to the entry of the Amended Judgment identified by the trial court as a "Ruling On Motion To Strike" dated the 27th day of July, 1989 and the Order based thereon dated the 16th day of August, 1989.

STATEMENT OF THE ISSUES

(1) Whether the Court abused its discretion, denied defendant due process or otherwise improperly compelled defendant James Williams to elect between the risk of contempt of court and a jail sentence, or stipulate that he had signed the questioned document.

(2) Whether the Court abused its discretion, denied defendant due process or otherwise improperly granted judgment on plaintiff's motion where the plaintiff had failed to reduce the agreement to writing or otherwise obtain a court order effecting the agreement, particularly where the oral agreement was incomplete

and where plaintiff continued to identify the defendant as Robert Williams.

(3) Whether the Court had jurisdiction to grant an order or judgment against Robert Williams.

(4) Whether the Court could amend a judgment as against a party that the original judgment was not sought against.

(5) Whether the Court abused its discretion in failing to consider defendants' response to plaintiff's motion to amend.

(6) Whether the Court abused its discretion in signing the amended judgment without considering the objections and the Rule 60 Motion filed relative thereto.

(7) Whether the Court abused its discretion or alternatively whether it is a denial of due process to deny a party against whom a final order is being sought an opportunity for oral argument and/or a public hearing.

(8) Whether the Court committed error in ruling that the "error" of the original judgment was clerical in nature when the original motion seeking judgment was directed to Robert Williams and not James Williams.

DETERMINATIVE CONSTITUTIONAL PROVISIONS OR STATUTES

(See Addendum for verbatim text)

(1) Casentini v. Hines, 625 P.2d 1174 (Nevada 1981)

(2) Dove v. Cude, 710 P.2d 170 (Utah 1985)

(3) Hiltsley v. Ryder, 738 P.2d 1024 (Utah 1987)

(4) Kinsman v. Kinsman, 748 P.2d 210 (Utah App. 1988)

(5) Olson v. Idaho Dept. of Water Resources, 666 P.2d 188 (Idaho 1983)

(6) Rizzo v. State, 497 N.Y.S.2d 417 (A.D.2 Dept. 1986)

(7) The Fifth Amendment to the Constitution of the United States of America.

(8) The Fourteenth Amendment to the Constitution of the United States of America.

(9) Article I Section 1 of the Constitution of the State of Utah.

(10) Article I Section 7 of the Constitution of the State of Utah.

(11) Rule 36 Utah Rules of Civil Procedure.

(12) Rule 37(c) Utah Rules of Civil Procedure.

(13) Rule 54 Utah Rules of Civil Procedure.

(14) Rule 60(a) Utah Rules of Civil Procedure.

(15) Rule 4-501 of the Utah Code of Judicial Administration.

(16) Rule 4-501(3) of the Utah Code of Judicial Administration.

(17) Rule 4-504 of the Utah Code of Judicial Administration.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The case below arose out of a claim against Robert L. Williams alleging that he was liable for the "open account" debt of the corporation "K & W Linoleum Shop, Inc." by virtue of an "agreement" Robert Williams had allegedly executed, which document plaintiff had attached to its original complaint (Record of proceedings in the trial court, at page 3; hereafter referred to as "Record at

3"). The case against Robert Williams was dismissed and plaintiff proceeded against the son of Robert Williams, James R. Williams, on the same claim. At the time for pretrial, James Williams and counsel were admonished and advised by the court that if James persisted in denying that he had signed the "agreement" and plaintiff proved at trial he had signed the agreement (which signature plaintiff had alleged initially was that of Robert Williams, which is illegible and was purportedly signed in 1979 some nine years earlier, which James Williams had already denied in responding to Requests For Admissions and which he told the court that he did not recall signing the subject document) the court "guaranteed" jail would be imposed (Transcript of April 25, 1988 pretrial, at page 11 lines 8-9; hereafter "Pretrial at 11, L 8-9").

Thereafter, at the time set for trial, a stipulation of sorts was reached. The documents formalizing the stipulation were never completed. Plaintiff submitted a motion seeking judgment based upon defendant "Robert L. Williams" default; defendant James Williams objected to judgment, denied being in default and tendered continued performance of the agreement even though plaintiff had failed to complete the documents; and without a hearing or notice that the matter was being submitted for decision, the court granted judgment against Robert L. Williams. Subsequent proceedings resulted in the trial court's amendment of the judgment to be against James R. Williams.

II. COURSE OF PROCEEDINGS

The case below was originally commenced by plaintiff's filing an action against Robert L. Williams; the complaint incorporated an "agreement" allegedly executed by Robert L. Williams titled "application for credit" and was apparently for the benefit of a corporation identified as K & W Linoleum Shop, Inc. The basis for plaintiff's cause of action was one based upon a debt allegedly incurred by the corporation (hereafter referred to as "K & W") pursuant to an open account, and one for which plaintiff alleged Robert L. Williams had given a personal guarantee (the "agreement" attached to plaintiff's complaint, hereafter referred to as "agreement"). Plaintiff alleged that Robert L. Williams was liable for the debt of "K & W" in a sum in excess of \$30,000.00.

The complaint was later dismissed and plaintiff's motion to amend to name James R. Williams as defendant was granted; substituting James R. Williams as the party plaintiff was claiming was liable for the open account debt of "K & W" based upon the same document, the "agreement" attached to the original complaint.

At the time set for trial, the parties discussed settlement and an understanding was arrived at, which settlement amounted to defendant James R. Williams' agreement to pay plaintiff the total sum of \$16,601.50 over a two year period, the unpaid balance to carry interest at 11% and monthly payments estimated to be \$500.00 per month (Transcript of proceedings on the 16th day of September, 1988, at page 3 lines 8 through 20; hereafter referred to as Trial-T at 3, L 8-20). Some details of the "stipulation" remained to be

worked out and there were multiple recesses wherein the trial court retired to permit the parties to negotiate further; i. e. at page 6 line 25 (Trial-T) the court states: "Let me get out of your negotiation. You chat with each other. Let me know when you're ready for me to come back in."

The September 16 proceeding concluded with plaintiff's counsel representing to the court that she would "draw the documents." (Trial-T at 7, L 24) Thereafter plaintiff's counsel submitted multiple drafts of a stipulation purportedly representing that reached in court; in addition to calculation errors (or, at the least, conflicts between counsel as to the correct amount of the monthly payments) plaintiff's drafts all incorrectly identified the defendant party as "Robert L. Williams" who is the father of James R. Williams. Even though James Williams had already tendered \$5,000.00 toward the settlement, for very obvious reasons counsel for defendants could not agree to or execute a stipulation binding Robert instead of James Williams.

Thereafter, plaintiff filed a verified motion seeking judgment against Robert L. Williams, defendant objected, the court granted plaintiff's motion and signed a judgment and both defendants joined in an appeal therefrom. Plaintiff subsequently moved the Supreme Court to amend the judgment based upon Rule 60(a) Utah Rules of Civil Procedure and the Supreme Court remanded the case to the trial court to allow plaintiff to seek the relief requested pursuant to Rule 60(a). In the meantime the Supreme Court caused the case to be poured over to the Court of Appeals.

On remand to the trial court, plaintiff filed the Rule 60 motion and defendants filed a response, asserting, inter alia, that the judgment should not be amended. (Record at 65-68) The trial court granted plaintiff's motion and signed an amended judgment against James Williams without hearing. Defendant submitted a Rule 60(b) Motion along with other pleadings seeking relief from the amended judgment and a hearing on the matters raised, which motions were denied.

III. DISPOSITION AT TRIAL COURT

Judgment was entered against Robert L. Williams the 31st day of January, 1989 and subsequently amended to be against James R. Williams the 21st day of June, 1989.

IV. STATEMENT OF FACTS

(1) On or about May 21, 1986, plaintiff commenced the above entitled action against Robert L. Williams, alleging inter alia that Robert L. Williams had executed an agreement to "guarantee" the payment of the debts of a third-party K & W Linoleum Inc., to Robinson Distributing Co., Inc. (Record 1-2).

(2) On or about the 13th day of August, 1987 the Second Judicial District Court, per the Honorable Douglas L. Cornaby ordered the dismissal of plaintiff's causes of action against Robert L. Williams and granted leave to plaintiff to file an amended complaint against James R. Williams alleging that he had signed the "guarantee." (Both defendants have and continue to deny the document purportedly executed in 1979 constituted a guarantee

or agreement to pay the debts of K & W Linoleum, Inc.)(Record 9-11).

(3) That at pre-trial before the Honorable Douglas L Cornaby on the 25th day of April, 1988, the Court informed James R. Williams personally and his counsel that despite defendant's denial that he had executed the document that plaintiff alleges constitutes a "guarantee;" that if the defendant persisted in requiring the plaintiff to prove that the signature it had initially alleged was Robert Williams was that of James Williams, that "I want to guarantee that you, as counsel, you may go to jail..." (Transcript page 11, Line 9, April 25, 1988 pre-trial.)

(4) That based upon the Court's threatening contempt and jail if defendant failed to prevail on the issue of the identity of the person signing the subject document some nine years prior, defendant subsequently and reluctantly withdrew his denial relative thereto and by way of a pre-trial order stipulated that he signed the subject document.(Record 30-32).

(5) That at the time set for trial the parties then involved in the action, Knight Adjustment Bureau, Robinson Distributing Co., Inc. and James R. Williams reached an understanding described as a "stipulation," the general nature of which was put on the record orally in fragments broken by further discussion, modification and off-the-record negotiations. (Trial Transcript).

(6) That as a result of the understanding it was agreed that the case be settled upon terms and conditions that were

understood in theory but not in detail: i.e. an approximate monthly payment over a specific time period was to be made but the exact amount of the monthly payments was subject to calculation. (Trial Transcript).

(7) Plaintiff was to prepare the documents that would set forth with specificity the "stipulation" together with an appropriate order for the court. (Trial at 7).

(8) Plaintiff failed to accurately prepare a written stipulation consistent with the oral stipulation, including initially an error in calculating the payment amounts and most significantly identifying the subject defendant as Robert L. Williams who had been dismissed from the lawsuit more than a year prior, which errors were repeatedly pointed out to counsel for plaintiff. (Record 36-37, 40-41).

(9) Defendant James R. Williams made an initial payment of \$5,000.00 despite the failure of plaintiff to prepare an accurate written stipulation, to demonstrate a good faith effort to perform according to the agreement: (Record 36-37, 38-39).

(10) That despite the failure of plaintiff to prepare the documents as plaintiff had stipulated to preparing, and despite the lack of a written stipulation or other documentation setting forth payment amounts and due dates, plaintiff filed a "Verified Motion For Entry of Judgment" seeking entry of judgment for the amount prayed for in the complaint based on defendant's failure to timely pay pursuant to the "stipulation" reached in court. A copy of that motion is included in the addendum hereto. (Record 38-39).

(11) That defendant James R. Williams responded by filing an Objection to plaintiff's motion, filed the 27th day of January, 1989; defendant's objection is included in the addendum hereto. (Record 36-37).

(12) That the Court apparently granted plaintiff's motion and signed a judgment against Robert Williams the 31st day of January, 1989, and same was filed the 1st day of February, 1989.

(13) That plaintiff rejected further tender of payments pursuant to the oral stipulation.

(14) That plaintiff filed a Motion to amend judgment pursuant to Rule 60(a) Utah Rules of Civil Procedure, alleging that there was a "clerical" error in the original judgment. (Record 54).

(15) That defendants filed a Response to plaintiff's Motion to amend and objected to such amendment on the grounds, inter alia, that the "error" was not "clerical" but substantive, and that no verified motion had been filed against James Williams. (Record 56-58).

(16) That on May 26, 1989 the Court ruled that the "attorneys for the defendant, James R. Williams, do not object to the amendment" and granted the motion to amend. (Record 61).

(17) That defendants timely submitted, on June 15th, 1989, an Objection to the proposed judgment submitted by plaintiff's counsel; a Rule 60(b) Motion and a Memorandum in support of defendants' Objection and Motion were submitted concurrently with the Objection. (Record 63-68).

(18) That the Court executed the proposed judgment on the 20th day of June without further proceedings, hearing or notice to the parties. (Record 70).

(19) That no notice of entry of judgment thereafter was served in contradiction of Rule 58A of the Utah Rules of Civil Procedure and Rule 4-504 of the Rules of Judicial Administration.

(20) That defendants' Objection and Rule 60(b) Motion, together with defendants' Motion to Strike plaintiff's response to the objection and Rule 60(b) motion (as non-responsive), were denied pursuant to the trial court's ruling the 27th day of July 1989.

SUMMARY OF THE ARGUMENT

Defendant James R. Williams was denied due process of law at several stages of the proceedings below, his arguments were either ignored or overlooked, his pleadings were either ignored or disregarded, the trial court appears to have made some unfounded or unsupported conclusions about the merits of James Williams' defenses and accordingly denied James Williams an opportunity to be fairly heard. The trial court seemed at several stages of the proceedings to be unfamiliar with both the substantive and the procedural aspects of the case, including confusion as to the identity of parties involved at the April 1988 pretrial, the nature of plaintiff's claims (the court seemed to overlook that plaintiff was alleging an obligation to pay the debt of a third, corporate party) and the nature of the defenses raised. Commencing with the

court threatening the sanction of jail on issues that defendant James Williams might fail to prevail on at trial, the court conveyed to James Williams that it strongly favored the claims of plaintiff.

When plaintiff alleged that defendant Robert Williams was in default of a stipulation reached in court the day scheduled for trial, the trial court granted plaintiff's motion without reading or considering the objections raised by defendants, on the fourth day after defendants filed their response, without notice to defendants that the matter had been submitted for decision and without allowing defendants an opportunity to request a hearing.

When the matter was remanded to the trial court, to allow the plaintiff to request relief pursuant to Rule 60(a) to amend the judgment because of a "clerical" error, the trial court again either did not read or consider the response of defendants, granted plaintiff's motion without notice that the matter was submitted for decision and without opportunity for defendants to request a hearing. Pursuant thereto, the trial court granted judgment against James R. Williams based upon a verified motion against Robert L. Williams, which motion the trial court later describes also as a "clerical error."

At the time the parties appeared for trial and a "stipulation" was reached, the 16th day of September, 1988, law and motion practice was still governed by the former Rules of Practice; subsequent thereto and prior to the plaintiff's filing of a verified motion seeking judgment the rules set forth in the Utah

Code of Judicial Administration took effect, particularly Rule 4-501 and more specifically Rule 4-501(9) which allows the resisting party ten days in which to request a hearing after the clerk has been notified to submit the matter for decision.

ARGUMENT

POINT I: THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S VERIFIED MOTION FOR JUDGMENT

The parties appeared at the trial court the 16th day of September, 1988, at the time scheduled for trial. Counsel for the plaintiff represented to the court that the parties had reached a "settlement agreement" (Trial at 3, L 8) and outlined the terms to the court. Questions arose, however, and further discussions were held off the record (Trial at 4, L 2-3), the parties went back on the record and there were additional "misunderstandings" and again the court went off the record, stating "Let me get out of your negotiation." (Trial at 6, L 25, emphasis added) The parties subsequently stated, on the record, that they understood what the agreement contemplated and the court stated it accepted the agreement; counsel for plaintiff represented in closing (at 7, L 24) "I'll draw the documents, your Honor."

Rule 4-504 Utah Rules of Judicial Administration provides as follows:

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

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

Plaintiff failed to "draw the documents" within the time prescribed and then, at a later time, plaintiff drafted and submitted to counsel for defendants a "stipulation" that was not in conformity with the agreement (See Record at 40-41 and defendant's objection paragraphs 4, 5, and 6 at Record 36-37) but had substituted Robert Williams as the party responsible in place of James Williams (there were additional albeit minor discrepancies as to details like dates payments were due and their exact amount); for obvious reasons counsel for defendant would not execute plaintiff's drafted stipulation. In the meantime defendant James Williams had tendered \$5,000.00 to plaintiff toward the settlement.

Plaintiff subsequently submitted a Verified Motion For Entry of Judgment, as against Robert L. Williams, (Record at 38) alleging inter alia that defendant had defaulted and that plaintiff was entitled to judgment for \$52,050.77. Plaintiff's mailing certificate indicates that counsel for plaintiff caused a copy of said motion to be mailed to counsel for defendant the 17th day of January, 1989. (Record at 42) Defendant timely filed a response entitled Objection To Motion For Entry Of Judgment (Record at 36); defendant's response was brief and to the point, barely a page and a half in length, explicitly pointing out, inter alia, that plaintiff was pursuing the wrong defendant and that James Williams was ready and able to tender performance but for plaintiff's

failure to agree as to the responsible party and the specific terms (dates payments due and exact amounts, etc).

No notice to submit the matter for decision was submitted pursuant to Rule 4-501(8) Utah Rules of Judicial Administration, which provides, in part, "If a hearing is not requested by the Court, counsel shall notify the Clerk of the Court, in writing, to submit the motion to the Court for decision." On January 31, 1989, without allowing defendants an opportunity pursuant to Rule 4-501(9) Utah Rules of Judicial Administration to request a hearing and without defendant's waiver of the right to a hearing the trial court granted judgment against Robert L. Williams. (Record at 45)

Settlements and stipulations are, of course, encouraged by the courts pursuant to well worn principles of judicial economy and there is a presumption as to stipulations whose terms are definite and which are either made in writing or in open court upon the record, that such stipulations are enforceable absent their being set aside for justifiable cause. See Casentini v. Hines, 625 P.2d 1174 (Nevada 1981), Dove v. Cude, 710 P.2d 170 (Utah 1985), Hiltsley v. Ryder, 738 P.2d 1024 (Utah 1987), Kinsman v. Kinsman, 748 P.2d 210 (Utah App. 1988) and Rizzo v. State, 497 N.Y.S.2d 417 (A.D.2 Dept. 1986). Stipulations and settlements, however, are no more than a form of contract (Olson v. Idaho Dept. of Water Resources, 666 P.2d 188 (Idaho 1983)) and their enforcement is subject to applicable principles of contract law.

In the case now before the court, the "stipulation" was not specifically read into the record, but consisted of commentary,

representations, discussions and questions between the court and counsel for the parties, broken by at least two separate occasions where the parties and/or counsel had discussions and negotiations off the record. It was clearly contemplated that the "stipulation" would be reduced to writing. Given the piecemeal, and sometimes incomprehensible, manner in which the agreement was presented to the court, and recognizing that the parties had a firm understanding as to the total amount and total time period in which the payments were to be made (\$15,601.50 to be paid within two years), it is entirely reasonable to conclude that defendant not only could anticipate that the specific terms would be specified in a writing (that plaintiff's counsel was to prepare) but that he could have such a writing to refer to and rely upon in carrying out performance of the agreement, and that he could not be charged with failing to perform until those specific terms were set forth in a writing.

Rule 4-504(3) Utah Rules of Judicial Administration has an obvious purpose, inter alia, and that is to avoid exactly the difficulty that arose here: if and when the stipulation is timely reduced to writing, subsequent enforcement of the stipulation if necessary is simple and straight forward. In this case, however, the party charged with preparing the writing failed to do so and in fact prepared a draft inconsistent with the agreement in a particularly important detail: the identity of the party bound thereby, and then sought to enforce the agreement as it had been incompletely and piecemeal and with obvious contemplation that it

would be reduced to writing, presented in open court; the same party declined to accept James Williams' tender of performance.

A natural prerequisite to enforcement of an oral stipulation, particularly one that is not read into the record as an integrated whole but whose terms are broken by off-the-record negotiations, is compliance with Rule 4-504(3) Utah Rules of Judicial Administration; it is not contested that the fifteen day period specified in the rule is absolute, but before a party can seek enforcement, particularly the party charged with the obligation to comply with the rule, the stipulation should be reduced to writing and an order granted adopting the stipulation as binding upon the parties. The trial court herein erred in granting plaintiff judgment in these circumstances.

Additionally, and perhaps an even more aggravating denial of due process, as guaranteed by both the Fourteenth Amendment to the Constitution of the United States and by Article 1 Sections 1 and 7 of the Constitution of the State of Utah, the trial court erred in failing to allow defendants an opportunity to be heard prior to judgment being entered. Pursuant to Rule 4-501 Utah Rules of Judicial Administration defendant had (including time for mailing) until the 30th day of January 1989 to submit a response, then plaintiff would have five days to reply, after which one of the parties should give notice to submit for decision; defendant would have ten days from that notice to request a hearing. The defendant submitted his objection the 27th day of January, 1989. The court, however, proceeded to grant judgment against Robert L. Williams the

31st day of January 1989. Clearly, defendants were not given an adequate opportunity to be heard; simple due process demands an opportunity to appear before the court prior to the granting of a judgment in excess of \$50,000.00. The trial court committed error in failing to allow defendants an opportunity for a hearing before the court.

Finally, on this point, it is also clear that defendant's objection was either overlooked, ignored or disregarded. The record was absolutely clear, but for plaintiff's rendering of the stipulation and the identification of Robert Williams as the defendant in the verified motion, that Robert Williams was not an involved party at that time, and in precise, simple language defendant pointed out that error in his objection. Despite the explicit and absolutely accurate point of paragraph 3 of defendant's objection (Record at 36) the trial court granted judgment against Robert Williams! It is apparent that the trial court did not consider defendant's pleading and thereby denied defendant due process.

POINT II: THE TRIAL COURT ERRED IN
GRANTING PLAINTIFF'S MOTION TO AMEND
JUDGMENT

The trial court erred in granting judgment in the first instance, as is argued above in Point I, and therefore that judgment should not have been subsequently amended. Additionally, however, plaintiff's motion to amend was specifically based upon Rule 60(a) Utah Rules of Civil Procedure seeking correction of a

clerical error. Plaintiff's verified motion itself, together with the stipulation that plaintiff drafted, identified the defendant party as Robert Williams; Robert Williams had indeed been a party defendant previously dismissed from the lawsuit. Plaintiff did not seek judgment against James Williams in the verified motion. Perhaps counsel for James Williams is missing some intricacies of the law that counsel has not had experience with, but it seems incongruous on its face that a judgment granted based upon a verified motion against one party (i.e. Robert Williams) can subsequently be amended on the basis of a clerical error to be a judgment against another party (i.e. James Williams); that is, how can the Court grant a judgment against James Williams, by way of a Rule 60(a) motion or otherwise, when there was no motion against James Williams to begin with?

Obviously plaintiff juxtaposed the identities of the parties; defendant pointed that out in clear and unequivocal language before the original judgment had been granted. Was James Williams and his counsel charged with the duty to respond to the original motion as if it named James Williams? Was James Williams bound by the proceedings directed to his father, Robert Williams, as if they had been directed against him? It was error, clearly. It was plaintiff's error, clearly. It may have originated as a clerical mistake in plaintiff's office, but one cannot imagine a more substantive matter than the identity of a party, and as plaintiff persisted, despite being informed of the error, in proceeding against Robert Williams that does not put James

Williams on adequate notice. Plaintiff sought a judgment against Robert Williams and the court erroneously granted a judgment against Robert Williams; it was not a clerical error at that point: at the least it was an inadvertent oversight or the result of negligence; it may have been more deliberate than that, however, as the father, Robert Williams, was the party with assets and the financial ability to satisfy the claim.

The trial court effectively granted an amendment to plaintiff's verified motion to have it directed against James Williams and a judgment based upon that against James Williams. (See trial court's ruling dated July 27, 1989, Record at 90-92, where the court stated: "This court is convinced that plaintiff's 'verified Motion for Entry of Judgment' was a clerical error.") That alone is sufficient to demonstrate that the identification of parties in the judgment was not clerical error but arose from an error in plaintiff's motion! The result was to deny James Williams an opportunity to be heard on the merits!

POINT III: THE TRIAL COURT ERRED IN
COMPELLING DEFENDANT TO ELECT
BETWEEN THE RISK OF JAIL OR
STIPULATE THAT IT WAS HIS SIGNATURE
ON A SUBJECT DOCUMENT

Prior to the April 1988 pretrial, plaintiff had served requests for admissions upon the defendant James Williams, including a request that James Williams admit that he signed Exhibit A attached to plaintiff's complaint. The document had been allegedly signed by Robert Williams according to plaintiff's

first complaint. It appeared to have been executed some nine years previous. The document, while it speaks for itself, is in part illegible and contains blanks and portions not completed. There is no identification of the individual that apparently did sign the document. (A copy is included in the addendum hereto.)

James Williams denied that it was his signature. He did so after receiving instruction from his legal counsel as to his obligations in responding to the discovery, including advise that he should respond truthfully according to his knowledge and belief, that it was not necessary to speculate but that if he denied facts and plaintiff was able to prevail upon proving those facts at trial he was subject to various sanctions as provided for in Rule 36 and Rule 37 Utah Rules of Civil Procedure. Counsel for defendant reiterated at pretrial that James Williams contested the issue of whether the document amounted to a guarantee, contested the issue of whether it bore his signature and contested the issue of whether plaintiff had ever relied upon James Williams in extending "K & W" credit (particularly as plaintiff had initially alleged it relied upon Robert Williams in extending the credit).

Counsel for James Williams advised the court that the matter of sanctions had been reviewed with the defendant, "We reviewed that with Mr. Williams but we contest that issue." To which the court responded:

That's fine. But, you understand if he says it looks like my signature and it looks like all other signatures, I want to guarantee that you, as counsel, you may go to jail if you just waste our time in there. (Pretrial at 11, L 5-9)

The sanction of jail is not an appropriate sanction for the failure of a party to admit a fact that an opposing party may be able to prevail on at trial. The difficulty in this case was the fact that the court did not even recognize who the proper parties were at the beginning of the pretrial, the court wanted to know why James Williams was present and not Robert Williams (Pretrial at 2); the court was apparently not well familiar with status of the case and yet it wanted to put the defendant on trial there, in chambers. A cursory review of the subject document together with the fact that it was nine years old, together with the fact that plaintiff had alleged that another had signed the document initially, together with the defendant's good faith representation that he had no recollection of signing that document, should have been sufficient for the court to defer to the fact finding process (rather than interrogation with risk of incarceration) on that issue. It put counsel and his client in an awkward, difficult, if not impossible situation; James Williams left that pretrial with the distinct impression that the court was compelling him to agree that he signed the document whether he had or not.

It is not unusual for a trial court to express some assessment of various factual and legal issues in the course of a pretrial, particularly if it will assist in settlement negotiations; in this instance, however, the court went beyond the bounds of its discretion, gave an indication of its inclination even though little of the evidence had been presented or argued, and threatened

jail if defendant failed to prevail on an issue of fact. The court had apparently taken sides in the case and the defendant was apprehensive of the court and of what the court might do, including but not limited to possibly imposition of jail sentences. The court's demeanor, statements, and threats were inappropriate and constituted error. Defendant was coerced by the court's demeanor and threats into admitting what he challenged to be the truth. Defendant's right to a fair and impartial hearing were thus denied. Defendant's right to due process was thus denied.

CONCLUSION

The trial court below repeatedly denied James Williams an opportunity to be heard, from the coercion to stipulate that he had signed the credit application, to the failure to comply with Rule 4-501 Utah Rules of Judicial Administration and granting plaintiff's verified motion without hearing or an opportunity for defendant to request a hearing, to the trial court's sua sponte amendment of plaintiff's verified motion and granting of an amended judgment based upon that. The lack of a written stipulation or an order reflecting and adopting the oral stipulation was due to plaintiff's negligence, in part, and in plaintiff's persistence in placing Robert Williams name as the responsible party. James Williams had tendered performance which plaintiff rejected (see defendant's objection Record at 36). The totality of circumstances reflect a denial of due process and reversible error. The amended judgment should be reversed and ordered set aside.

Respectfully submitted this 14th day of November, 1989.

William H. Lindsley
William H. Lindsley
Attorney for Defendants/Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing to
Kathryn S. Denholm, 263 East 2100 South, Salt Lake City, Utah
84115, this 14th day of November, 1989.

William H. Lindsley

ADDENDUM

ADDENDUM

TEXT OF DETERMINATIVE AUTHORITIES

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Utah, Article I Section 1

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Constitution of Utah, Article 1 Section 7

No person shall be deprived of life, liberty or property, without due process of law.

Rule 36. Request for admission.

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

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

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

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

Rule 37(c) Utah Rules of Civil Procedure

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) **Demand for judgment.**

(1) **Generally.** Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) **Costs.**

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3), (4) [Deleted.]

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket. (Amended effective January 1, 1985).

Rule 60(a) Utah Rules of Civil Procedure

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Rule 4-501. Motions.

Intent:

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for providing courtesy copies of motions and supporting documentation to the court.

To establish a uniform procedure for ensuring timely and adequate notice of matters placed on the law and motion calendar and set for hearing.

Applicability:

This rule shall apply to all district and circuit courts.

Statement of the Rule:

(1) All motions, except uncontested or ex-parte matters, shall be accompanied by a brief statement of points and authorities and affidavits relied upon in support thereof. Points and authorities supporting or opposing a motion shall not exceed five (5) pages in length exclusive of the "statement of material facts" as provided in paragraphs (4) and (5), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages. If a memorandum of points and authorities is filed in support of a motion, it must be served on the opposing party or counsel and filed with the court no later than ten (10) days before the date set for hearing.

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

(3) The moving party may serve and file reply points and authorities within five (5) days after service of the responding party's points and authorities. Upon the expiration of the five (5) day period to file reply points and authorities, either party may notify the Clerk to submit the matter for decision.

(4) The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the movant relies.

Rule 4-501. Motions. (continued)

(5) The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(6) A copy of the motion, supporting memorandum and documents shall be filed with the clerk's office as provided in the Rules of Civil Procedure. Motions based upon depositions or supported thereby shall not be heard unless the depositions are filed in the clerk's office at least two working days before the hearing unless otherwise ordered by the court upon good cause shown.

(7) A courtesy copy of the motion, memorandum of points and authorities and documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Courtesy copies of all affidavits shall be given to the judge within the time limits required by the Rules of Civil Procedure. Copies shall be clearly marked as courtesy copies and indicate the hearing date. Courtesy copies shall not be filed with the clerk of the court.

(8) Decision on a motion shall be rendered without a hearing unless requested by the Court, in which event the Clerk shall schedule a date and time for such hearing. If a hearing is not requested by the Court, counsel shall notify the Clerk of the Court, in writing, to submit the motion to the Court for decision. The notification shall contain a certificate of mailing to opposing counsel and parties.

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

(10) All motions for summary judgment or other dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

(11) The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

Rule 4-504. Written orders, judgments and decrees.

Intent:

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court.

Applicability:

This rule shall apply to all courts of record and not of record.

Statement of the Rule:

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

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

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

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

(5) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) Except where otherwise ordered, all judgments and decrees shall contain the address or the last known address of the judgment debtor and the social security number of the judgment debtor if known.

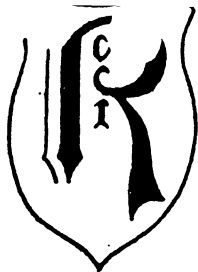
(7) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

ADDENDUM

PERTINENT PORTIONS OF RECORD IN TRIAL COURT



ROBISON DISTRIBUTING CO., INC.

WHOLESALE FLOOR COVERINGS

TELEPHONE 486-3511 • 1900 SOUTH 300 WEST
P.O. BOX 2309 • SALT LAKE CITY, UTAH 84110

FIRM NAME K & W LINOLEUM SHOP INC
ADDRESS 2196 So Orchard Drive Bountiful
ZIP CODE 84010 DATE BUSINESS STARTED 1945 TELEPHONE NUMBER 295-5537
☐ SOLE OWNER
☐ PARTNERSHIP
☒ CORPORATION
PREV. ADDRESS (if less than 2 yrs.) _____
FULL NAME OF OWNER(S) OR PRESIDENT ROBERT L. WILLIAMS

RESIDENCE ADDRESS OF OWNER(S) 446 EAST 2050 South Bountiful
RES. PHONE 295-9394

TYPE OF BUSINESS Floor covering

☒ We have a State Resale Permit Number. A60914 (NOTE: We are required to charge tax until signed card is in our possession.)
☐ We request you charge us Sales Tax on all our purchases.

BANK Utah Bank & Trust ACCT. NO. 81-01403-7
ADDRESS Five Points Bountiful

TRADE REFERENCES:

NAME <u>Rich</u>	TELEPHONE NUMBER _____
STREET NUMBER _____ CITY <u>S.L.C.</u>	STATE _____
NAME <u>W. H. am Walker</u>	TELEPHONE NUMBER _____
STREET NUMBER _____ CITY <u>S.L.C.</u>	STATE _____
NAME <u>Armsco</u>	TELEPHONE NUMBER _____
STREET NUMBER _____ CITY <u>S.L.C.</u>	STATE _____

Date _____ R. _____

GUARANTEE OF PAYMENT

To: ROBISON DISTRIBUTING CO., INC.

Dated 4/27 19 79

For value received, the receipt of which is hereby acknowledged, and in consideration of your advancing credit to _____

Debtor

I/we, the undersigned, hereby personally guarantee the prompt payment to Robison Distributing Co., Inc. all amounts now due and owing or which may hereafter become due and owing to Robison Distributing Co., Inc. from said debtor entity. Liability of the undersigned shall not be affected or prejudiced by the additional acceptance of a note or evidence of indebtedness, the extension of time, payment arrangement or other indulgence granted to debtor, or by agreement affecting said indebtedness, and the undersigned hereby waives notice of all the aforesaid. The filing of suit or exhaustion of collection or legal remedy against said debtor shall not be a condition precedent to the enforcement of this guarantee and the undersigned hereby expressly waives demand, presentment for payment, protest, notice of protest or diligence. ~~This guarantee shall terminate when you have received a notice of termination executed by the undersigned.~~ Should the undersigned elect to terminate this guarantee such termination shall not affect the liability of the undersigned as to accounts and amounts then owing from said debtor. In the event that suit is instituted on this guarantee the undersigned hereby agrees to pay all Court costs and such additional sum as the Court may deem reasonable as Attorney's fees.

GUARANTOR [Signature]
RESIDENCE ADDRESS 2186 So Orchard St Bountiful RESIDENCE PHONE 292-2742
7 295-9394
GUARANTOR _____ RESIDENCE ADDRESS _____ RESIDENCE PHONE _____

ATTORNEYS AND COUNSELORS AT LAW
SESSIONS PLACE
505 SOUTH MAIN STREET
BOUNTIFUL, UTAH 84010

DIUMENTI & LINDSLEY
D. Bruce Oliver #5120
Attorney for Defendant
505 South Main Street
Bountiful, Utah 84010
Telephone: 292-0447

REC JUN 27 PM 3:26

EX-100 AB

IN THE DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

KNIGHT ADJUSTMENT BUREAU,

Plaintiff,

vs.

JAMES R. WILLIAMS,

Defendant.

:

:

:

:

OBJECTION TO MOTION FOR
ENTRY OF JUDGMENT

Civil No. 86-39441

Comes now the defendant in the above entitled action, by and through counsel, and hereby objects to the plaintiff's Motion for Entry of Judgment and hereby requests that the Court deny the same based upon the following facts:

1. There has been no order signed by the Court which would reflect the terms and conditions of the stipulation.
2. Plaintiff's motion is not consistent with defendant's understanding of the stipulation.
3. Robert L. Williams (named defendant in plaintiff's motion) was dismissed from this action in August of 1987 and is not a party to the present action or any stipulation entered into between the parties.
4. There has been no written stipulation entered into between Knight Adjustment Bureau and James R. Williams which would comply with the terms and conditions of the oral stipulation.
5. Defendant James R. Williams understood that he would begin payments

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pursuant to the oral agreement upon receipt of an appropriate order or other written notice setting forth with specificity the payment terms and dates.

6. Defendant understood that plaintiff's counsel was responsible for preparation of the appropriate order.

7. Defendant has fully intended to comply with the oral agreement and has been prepared to tender payment consistent therewith, and has in fact tendered a sum that would render all payments current according to plaintiff's understanding.

Dated this 27 day of January, 1989.

D. Bruce Oliver
D. Bruce Oliver
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing this 27 day of January, 1989, to Kathryn Schuler Denholm, attorney for plaintiff, at 263 East 2100 South, Salt Lake City, Utah 84115.

B. Stuck

KATHRYN SCHULER DENHOLM 0866
Attorney for Plaintiff
263 East 2100 South
Salt Lake City, Utah 84115
Telephone: 484-0091

1988 FEB -1 11:33

IN THE SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY

STATE OF UTAH

KNIGHT ADJUSTMENT BUREAU	*	VERIFIED MOTION FOR
A Utah Corporation	*	ENTRY OF JUDGMENT
	*	
Plaintiff	*	
	*	
vs	*	
	*	
ROBERT L. WILLIAMS	*	Civil No. 86-39441
	*	
Defendant	*	

On September 16, 1988, Plaintiff appearing by counsel, Kathryn Denholm, and Defendant appearing personally and by counsel, Bruce Oliver, entered into a stipulation in the presence of the court wherein the Defendant agreed to pay to Plaintiff the sum of \$15,000.00 with a first payment of \$6,000 on or before October 16, 1988 together with other promises contained in the stipulation attached hereto and included herein by reference.


That Defendant failed to make the first payment but that he paid \$5,000 on or about November 17, 1988 and has made no payments thereafter.

WHEREFORE, Plaintiff prays for entry of judgment as follows: principal balance, \$31,987.30; prejudgment interest, \$23,687.07; court costs, \$101.40; attorney fees, \$1,275.00 for a total of \$57,050.77 minus one payment of \$5,000, judgment balance \$52,050.77 together with interest

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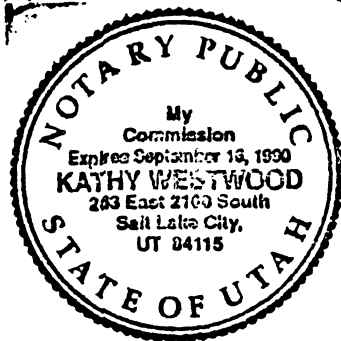
at the legal rate of 12%.

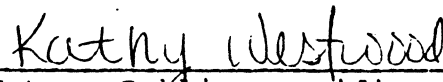
DATED this 13 day of January, 1989.


Kathryn Schuler Denholm

VERIFICATION

Appeared before me this 13th day of January, 1989,
Kathryn Schuler Denholm, who affirmed that she signed the
above Verified Motion for Entry of Judgment and that the
information contained therein is true and correct to her
knowledge and belief.




Notary Public, residing at:
Salt Lake County, Utah.

KATHRYN SCHULER DENHOLM 0866
Attorney for Plaintiff
263 East 2100 South
Salt Lake City, Utah 84115
Telephone: 484-0091

IN THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY
STATE OF UTAH

KNIGHT ADJUSTMENT BUREAU	*	STIPULATION
A Utah Corporation	*	
	*	
Plaintiff,	*	
	*	
-vs-	*	
	*	
ROBERT L. WILLIAMS,	*	Civil No. 86-39441
	*	
Defendant.	*	

This matter came for trial before the Honorable Douglas Cornaby on the 16th day of September, 1988. Plaintiff appeared by counsel, Kathryn Denholm; Defendant appeared personally and by counsel, Bruce Oliver. Based upon stipulation of the parties made in open court, it is agreed as follows:

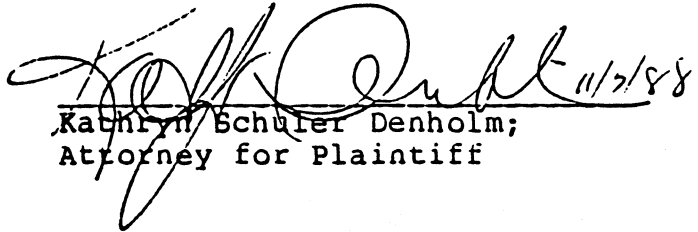
1. Defendant shall pay to Plaintiff, on or before October 16, 1988, the sum of \$6,000.00. In addition thereto, Defendant shall pay to Plaintiff an additional \$9,101.00 over a period of two (2) years with interest at the rate of 11%. Payment shall commence November 15, 1988, in the sum of \$424.18.

2. In the event Defendant becomes more than thirty (30) days in arrears of any payment, Plaintiff may, on it's

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ex-parte motion and affiavit, have judgment for the unpaid balance of the original prayer of the Complaint.

DATED this _____ day of _____, 1988.

 11/7/88
Kathryn Schuler Denholm;
Attorney for Plaintiff

Bruce Oliver
Attorney for Defendant

KATHRYN SCHULER DENHOLM 0866
Attorney for Plaintiff
263 East 2100 South
Salt Lake City, Utah 84115
Telephone: 484-0091

1989 FEB -1 11:32

IN THE SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY

STATE OF UTAH

KNIGHT ADJUSTMENT BUREAU
A Utah Corporation

Plaintiff

vs

ROBERT L. WILLIAMS

Defendant

*
*
*
*
*
*
*
*
*
*

JUDGMENT

Civil No. 86-39441

Plaintiff's Verified Motion for Entry of Judgment came before the Court, the Court being fully advised and good cause appearing, it is Ordered, Adjudged and Decreed:

Plaintiff is awarded a judgment against Defendant in the principal sum of \$31,987.30 together with pre-judgment interest in the sum of \$23,687.07, court costs in the sum of \$101.40 and attorney fees in the sum of \$1,275.00 for a total of \$57,050.77 minus one payment of \$5,000 for a judgment total of \$52,050.77 together with interest at the legal rate of 12%.

DATED this 31 day of JANUARY, 1989.

BY THE COURT:


JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing

JUDGMENT ENTERED

FILMED

Judgment to Bruce Oliver, Attorney for Defendant, at 505
South Main, Bountiful, Utah 84010 on this 17 day of
January, 1989.

K. W. Steward
Secretary

SUPREME COURT OF UTAH

332 STATE CAPITOL

SALT LAKE CITY, UTAH 84114

April 18, 1989

RECD APR 20 11:14:24

CLERK OF THE COURT

BY pm FILED

OFFICE OF THE CLERK

ALYSON BROWN
CLERK OF THE COURT
P. O. BOX 618
FARMINGTON, UTAH 84025

Knight Adjustment Bureau,
Plaintiff and Appellee,
v.

Dist. Ct. No. 86-39441
Supreme Ct. No. ~~890068~~

Robert L. Williams and James R.
Williams,
Defendants and Appellants.

Respondent's Motion to amend judgment denied. Case is removed to district court for the limited purpose of allowing appellee the opportunity of making a similar motion to amend in that court.

Geoffrey J. Butler
Clerk

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SESSIONS PLACE
505 SOUTH MAIN STREET
BOUNTIFUL, UTAH 84010

DIUMENTI & LINDSLEY
William H. Lindsley #1966
Attorney for Defendants
505 South Main Street
Bountiful, Utah 84010
Telephone: 292-0447

FILED
1988 MAY -8 PM 4:40
CLERK
BY *SG*

IN THE DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

KNIGHT ADJUSTMENT BUREAU,

Plaintiff,

vs.

ROBERT L. WILLIAMS and JAMES R.
WILLIAMS,

Defendants.

:
:
:
:
:

RESPONSE TO PLAINTIFF'S
RULE 60 MOTION TO AMEND

Civil No. 86-39441

Defendants in the above entitled matter respond to plaintiff's Rule 60 Motion to Amend as follows:

1. Plaintiff's acknowledge that the judgment was entered in error and have accordingly pursued an appeal to the final judgment; the matter has been remanded with the single purpose of addressing whether the error was "clerical."

2. Plaintiff's belated assertion that the error was "clerical" (see Rule 60(a) Utah Rules of Civil Procedure) is inconsistent with the history and record in this case:

(1) Plaintiff repeatedly drafted written stipulations referring to "Robert Williams" which were rejected specifically because, inter alia, the improper identification of defendant; numerous communications were had relative thereto. (It should be noted that Robert Williams is James Williams' father, and as plaintiff was well aware Robert has substantially

far more assets and is far more solvent than James.)

(2) The written stipulation plaintiff submitted to the court identified the defendant party as "Robert L. Williams."

(3) The verified motion submitted by plaintiff identified the defendant party as "Robert L. Williams."

(4) Defendant's objection, in paragraphs three and four, stated:

3. Robert L. Williams (named defendant in plaintiff's motion) was dismissed from this action in August of 1987 and is not a party to the present action or any stipulation entered into between the parties.

4. There has been no written stipulation entered into between Knight Adjustment Bureau and James R. Williams which would comply with the terms and conditions of the oral stipulation.

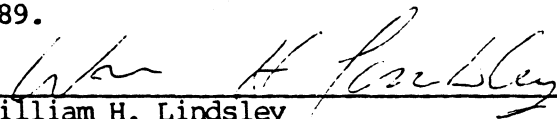
(5) To accept the error as having been "clerical" in nature it has to be the kind of error that a clerk or office worker would make, i. e. an error in a mathematical computation or an isolated typographical error. Herein, however, as paragraphs three and four of defendant's objection cited above illustrate, both plaintiff's counsel and the court were unequivocally and fully advised before the judgment was granted (assuming, of course, that either plaintiff's counsel or the court read or considered defendant's objection).

3. Defendant James Williams has tendered payment consistent with the oral stipulation even though plaintiff has failed or refused to prepare or submit a written stipulation in accordance with the oral stipulation, which plaintiff has rejected.

CONCLUSION

The only question before the Court is whether the judgment signed by the Court was a "clerical" error. Defendant's objections timely submitted to the court prior to the signing of the judgment unequivocally identified that Robert Williams has previously been dismissed from the lawsuit. Clearly the error was not merely "clerical" and although plaintiff should concur in setting aside the judgment it should not be amended pursuant to Rule 60(a) of the Utah Rules of Civil procedure.

Dated this 5 day of May, 1989.



William H. Lindsley
Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing this 8 day of May, 1989, to Kathryn Schuler Denholm, attorney for plaintiff, at 263 East 2100 South, Salt Lake City, Utah 84115.



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1989 MAY 30 PM 12:58
CLERK OF COURT
BY ab

In the Second Judicial District Court
in and for the
County of Davis, State of Utah

KNIGHT ADJUSTMENT BUREAU,)

Plaintiff,)

vs.)

ROBERT L. WILLIAMS, et al.,)

Defendants.)

RULING ON MOTION
TO AMEND JUDGMENT

Civil No. 39441

The plaintiff's motion to amend the judgment came before the court for ruling pursuant to Rule 4-501 of the Code of Judicial Administration. The plaintiff is represented by Kathryn Denholm and the defendant is represented by William H. Lindsley and D. Bruce Oliver.

The attorneys for the defendant, James R. Williams, do not object to the amendment but want us to know that both counsel for the plaintiff and the court were asleep since they objected to the naming of Robert L. Williams as the defendant in paragraph 3 of their document of objection dated January 27, 1989. The court acknowledges that both counsel and the court failed to correct the mistake. The court does not find any ill will or improper purpose in the use of the wrong name.

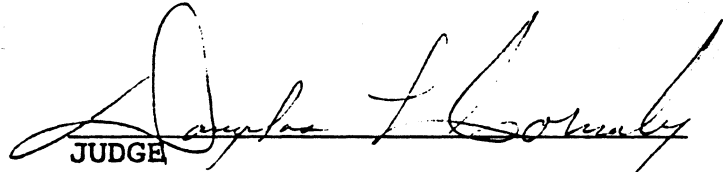
The motion to amend the judgment is granted pursuant to Rule 60(a) of the Utah Rules of Civil Procedure.

The plaintiff is ordered to draw a formal order consistent with this ruling together with an amended judgment.

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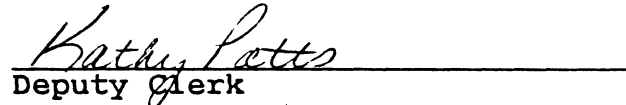
Dated May 26, 1989.

BY THE COURT:


JUDGE

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to Kathryn S. Denholm, 263 East 2100 South, Salt Lake City, Utah 84115; D. Bruce Oliver, 505 South Main Street, Bountiful, Utah 84010; and William H. Lindsley, 505 South Main Street, Bountiful, Utah 84010 on May 30, 1989.


Deputy Clerk

KATHRYN DENHOLM 0866
Attorney for Plaintiff
P.O. Box 520308
Salt Lake City, Utah 84115

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

JUN 21 8 35 AM '89

CLERK, 2ND DIST. COURT

IN THE SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY, STATE OF UTAH

DEPUTY CLERK

KNIGHT ADJUSTMENT BUREAU
A Utah Corporation
Plaintiff

*

AMENDED JUDGMENT

*

vs

*

JAMES R. WILLIAMS
Defendant

*

Civil No. 86-39441

Plaintiff's Verified Motion for Entry of Judgment came before the Court, the Court being fully advised and good cause appearing, it is Ordered, Adjudged and Decreed:

Plaintiff is awarded a judgment against Defendant in the principal sum of \$31,987.30 together with pre-judgment interest in the sum of \$23,687.07, court costs in the sum of \$101.40 and attorney fees in the sum of \$1,275.00 for a total of \$57,050.77 minus one payment of \$5,000 for a judgment total of \$52,050.77 together with interest at the legal rate of 12%.

DATED this 20 day of June, 1989.

BY THE COURT:

JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Judgment to D. Bruce Oliver, 505 South Main Street, Bountiful, Utah 84010 and William H. Lindsley, 505 South Main Street, Bountiful, Utah 84010, Attorneys for the Defendant, on this 20 day of June, 1989.

Secretary

Defendants address:

35 East 2200 South
Bountiful, Utah 84010

JUDGMENT ENTERED

BY

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

JUL 31 9 23 AM '89

CLERK OF DISTRICT COURT

BY _____

In the Second Judicial District Court
in and for the
County of Davis, State of Utah

KNIGHT ADJUSTMENT BUREAU,)	RULING ON MOTION
)	TO STRIKE
Plaintiff,)	
vs.)	Civil No. 39441
ROBERT L. WILLIAMS, et al.,)	
Defendants.)	

This matter comes before this court on defendant's motion to strike with William H. Lindsley representing the defendant and Kathryn S. Denholm representing the plaintiff. The defendant is requesting oral argument.

The defendant is not entitled to oral argument on this motion pursuant to Rule 4-501 of the Code of Judicial Administration. The defendant's motion is simply an extension of the argument the defendant made prior to May 26, 1989, wherein the court granted the plaintiff's motion to amend. The court granted the motion to amend the judgment pursuant to Rule 60(a) of the Utah Rules of Civil Procedure.

On August 13, 1987, the court signed an order allowing the plaintiff to file an amended complaint wherein the defendant would be James R. Williams and not Robert L. Williams. On August 26, 1987, the court signed an order amending the complaint and an amended complaint was filed on August 27, 1987. Thereafter, all court documents showed the defendant to be James R. Williams until the plaintiff submitted the motion for entry of judgment which was filed on February 1, 1989. The defendant, James R. Williams, appeared for pre-trial on April 25, 1988, and again on May 23, 1988. He was also present for trial on September 16, 1988. At each appearance he was represented by counsel. On

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September 16, 1988, rather than proceed to trial the parties stipulated to a settlement before the court. The court has reviewed the stipulation. The defendant, James R. Williams, personally stated to the court that he was agreeing to the stipulation as stated. There can be no question about who the proper defendant was.

Rule 60(a) provides:

"Clerical mistakes in judgments, orders or other parts of the record...may be corrected by the court at any time of its own initiative or on motion of any party...

The defendant's conclusion to his May 5, 1989, brief stated:

"The only question before the Court is whether the judgment signed by the Court was a 'clerical' error..."

This court is convinced that plaintiff's "Verified Motion for Entry of Judgment" was a clerical error. Based on that judgment the court ruled on the motion to amend on May 26, 1989, and recognized that both counsel for the plaintiff and the Court had failed to correct the error.

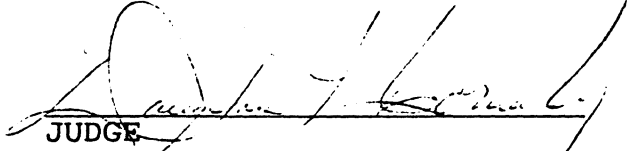
In the motion to strike the defendant still denies clerical errors, but also raises other issues. He claims the oral stipulation by the defendant "did not contain the precise details of the agreement, which plaintiff was to prepare and submit to defendant's counsel and then to the Court." This is contrary to the stipulation itself. The stipulation was clear. The parties personally and through counsel stated that they understood the agreement and that it would be binding on them. It made no reference to a writing or a future approval of that writing. The court did instruct the plaintiff to draw a judgment, which was not done. This does not mean that it cannot be done later without the agreement of the defendant.

The defendant's motion to strike is denied. The judgment will stand.

The plaintiff is ordered to draw a formal order consistent with this ruling.

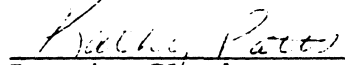
Dated July 27, 1989.

BY THE COURT:


JUDGE

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to Kathryn Denholm, P. O. Box 520308, Salt Lake City, Utah 84152 and William H. Lindsley, 505 South Main Street, Bountiful, Utah 84010 on July 28, 1989.


Deputy Clerk

ADDENDUM

Transcript of Pretrial April 25, 1988

1 IN THE SECOND JUDICIAL DISTRICT COURT

2 IN AND FOR DAVIS COUNTY

3 STATE OF UTAH

4 -000-

5
6 KNIGHT ADJUSTMENT BUREAU,
a Utah corporation,

7 Plaintiff,

8 vs.

9 ROBERT L. WILLIAMS,

10 Defendant.

:

:

:

:

:

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Civil No. 39441

11
12 BE IT REMEMBERED that on Monday, April 25, 1988, the
13 above-entitled matter came on for PRETRIAL in the Second
14 Judicial District Court in and for Davis County, State of
15 Utah, before the HONORABLE DOUGLAS L. CORNABY, Presiding.

16 * * * *

17 A P P E A R A N C E S:

18 For the Plaintiff:

KATHRYN DENHOLM
Attorney at Law
660 South 200 East
Suite 100
Salt Lake City, Utah 84111

21 For the Defendant:

22 WILLIAM H. LINDSLEY
Attorney at Law
505 South Main Street
Bountiful, Utah 84010

1 THE COURT: Record can show we are meeting in the
2 matter of Knight Adjustment Bureau versus Robert L. Williams.
3 Counsel, identify yourself for the record.

4 MISS DENHOLM: Kathryn Denholm appearing for the
5 plaintiff.

6 MR. LINDSLEY: William Lindsley appearing with
7 James Williams, your Honor.

8 THE COURT: And you are Robert Williams?

9 MR. LINDSLEY: No. James Williams.

10 THE COURT: What does he have to do with it?

11 MISS DENHOLM: Robert Williams has been dismissed
12 out and James has been substituted.

13 THE COURT: Let's go to the plaintiff, first, and
14 you tell me what the issues are from your client's point of
15 view.

16 MISS DENHOLM: Your Honor, this is an account on a
17 contract for materials and goods purchased for use by Williams
18 operating at this time as K and W Distributing. We have a
19 personal guarantee on contract that was dated April of 1979
20 and the account continued for several years thereafter. There
21 is a principal balance of approximately \$33,000 on the
22 account. That's based on the invoices.

23 THE COURT: Is that the only issue?

24 MISS DENHOLM: There would also be attorney fees.

25 THE COURT: Mr. Lindsley.

1 MR. LINDSLEY: That is the issue, your Honor. The
2 only additional matters would be the affirmative defenses that
3 we set out in our Answer to the Amended Complaint.

4 THE COURT: Meaning what?

5 MR. LINDSLEY: Well, No. 2, that's a general denial.
6 No. 3, is that the statute of limitations has been barred by
7 that. We claim it's barred by--

8 THE COURT: Well, statute of limitations--this is a
9 fairly clear open account. What's the date of the last charge
10 on that?

11 MR. LINDSLEY: Well, I am not prepared to argue the
12 motion today.

13 THE COURT: What motion? I don't have any motions.

14 MR. LINDSLEY: Well, to argue the defenses.

15 THE COURT: Oh, you must. This is the time when we
16 do it. This is the time when I put you up against your task
17 to know exactly why you are going to trial. That's what a
18 pretrial is for, not just for me to get, you know, to write
19 down information.

20 MR. LINDSLEY: Well, I'm not prepared to present the
21 defenses today, your Honor. Plaintiff hasn't even presented
22 its case in chief.

23 THE COURT: But, you don't understand. That's what
24 a pretrial is. I want to know really the differences between
25 you two. When you come to pretrial I want to say, what is

1 your claim. I want to look at plaintiffs and say, what's your
2 claim and if they say--and they have said it. They said
3 things. You owe us about \$33,000 on a personal guarantee and
4 I say to myself, oh, personal guarantee. That means it's for
5 corporate or some business entity. They are guaranteeing they
6 are going to pay. What's the defense to it, and you say to
7 me, the defense is the statute of limitations and I say, all
8 right, to myself, well, and on an open account it's six years
9 on a written account and it's four years on an open account
10 and six years on a written account, you see, on a written
11 notice.

12 So, I'm going to force you right into every single
13 issue because I want to know what is really at issue here. We
14 don't wait to trial. We find out right now. If we wait until
15 we go to trial, you see, then we draw sanctions against you,
16 if we find out we wasted everybody's time.

17 Now, that's the reason I'm asking. That's why you
18 have to be prepared to answer the questions today.

19 MISS DENHOLM: Your Honor, the last time that the
20 defendants charged against anything on the account was October
21 of 1984. The business was involuntarily dissolved by the
22 Secretary of State in December of 1984.

23 THE COURT: Okay. Now, the last property delivered
24 was October of '84.

25 MISS DENHOLM: That's right.

1 THE COURT: It was filed in May of '86. It's only
2 two years. What's the defense to that?

3 MR. LINDSLEY: Well, your Honor, we haven't--our
4 defense goes to the--we don't believe plaintiff is going to be
5 able to prove the deliveries in '84 or '83.

6 THE COURT: Well, tell me why not. Tell me why they
7 can't prove that. You know, to me, it's fairly simple. There
8 either is or there isn't. If they are falsifying records to
9 try to get it in under the statute of limitations, I want to
10 know about that, too, you see.

11 MR. LINDSLEY: Well, your Honor, if you give me 15
12 minutes maybe to round up our witnesses and we can put on our
13 case before plaintiff even puts on their case.

14 THE COURT: No. You are missing the point of the
15 pretrial. The point of a pretrial is--I want to take those
16 matters that are not honestly disputed and I want to get them
17 out so that when we go to trial, if you say you have statute
18 of limitations, I want to know that it's statute of
19 limitations and then I am prepared to look for statute of
20 limitations. And if you say accord and satisfaction, then
21 when I go to court I'm looking for accord and satisfaction.
22 You didn't say that. I am using an example.

23 So, we won't waste everybody's time, you see, by
24 going to court and saying--I can read the Complaint. I can
25 see the Answer. I can see this and this and this and this.

1 I can see that you say those things, but, you know, 95 percent
2 of the cases, by the time I get to the point we are at now,
3 then they will tell me what really--after they have done their
4 research, after they have done discovery, they can tell me
5 what the real defenses are.

6 Now, if you are not prepared to do that today, let's
7 put a new pretrial. Give them their attorney fee and we will
8 come back and do it a month.

9 MR. LINDSLEY: We are prepared to go to trial today.

10 THE COURT: Then be prepared to answer my questions
11 today.

12 MR. LINDSLEY: I am prepared to answer your
13 questions. First thing is, we dispute each and every
14 allegation of the Complaint.

15 THE COURT: I understand. Tell me what your
16 evidence is going to be about the statute of limitations since
17 that is the question that we are on.

18 Let me switch it to you. You claim there's a
19 purchase in 1984 under this agreement.

20 MISS DENHOLM: That's correct, your Honor.

21 THE COURT: What evidence do you have?

22 MISS DENHOLM: We have a corresponding invoice.

23 THE COURT: Okay. Pull one out and let's look at
24 it. Now, you have access to this, I assume, haven't you,
25 Mr. Lindsley?

1 MR. LINDSLEY: We could have through discovery if we
2 wanted to. We tried to limit the attorney fees.

3 MISS DENHOLM: This isn't the '84 one, but--

4 THE COURT: What's the date on that one?

5 MISS DENHOLM: This is November of '83.

6 THE COURT: Still within the four-year period.

7 Okay.

8 MISS DENHOLM: We have the signature.

9 THE COURT: What's the signature?

10 MISS DENHOLM: James R. Williams signed as vice
11 president. The agreement, as being a separate document.
12 There's a list of items and it's signed as having been
13 received.

14 THE COURT: Now, what's the defense, then, for the
15 statute of limitations? Will we be wasting our time with that
16 defense?

17 MR. LINDSLEY: I am not prepared to look at that at
18 this moment, your Honor. My point is this. That there's a
19 corporate entity that had an open account with the plaintiff
20 for a period of time. Sometime prior--and I am not certain of
21 the date, but the statute of limitations has expired. The
22 corporate entity went to a cash on delivery.

23 THE COURT: Now, you have a guarantee.

24 MISS DENHOLM: Yes, we do.

25 THE COURT: Was there ever a cancellation of the

1 guarantee?

2 MISS DENHOLM: No.

3 THE COURT: You are claiming this is a cancellation,
4 then, of the guarantee.

5 MR. LINDSLEY: We are claiming, as a matter of fact,
6 there was a cash on delivery relationship that occurred prior
7 to 1983 between the corporate entity and the plaintiff.

8 THE COURT: Doesn't make any difference, does it?
9 Does it make any difference to a guarantee if you leave the
10 guarantee in effect?

11 MR. LINDSLEY: Well, first of all, first defense is
12 that there's no guarantee from James Williams.

13 THE COURT: Okay. Let me see the guarantee. Okay.
14 Show it to counsel. Does it have his name on it?

15 MR. LINDSLEY: I am not sure that does.

16 THE COURT: Well, you show it to me. Does it have
17 his name on it?

18 MISS DENHOLM: Yes. Well, we believe it does.
19 Signature is identical to other signatures.

20 THE COURT: Okay. Simple matter. Is that your
21 signature on there?

22 MR. WILLIAMS: It could be. I don't recall signing
23 that ever.

24 THE COURT: Doesn't matter. Look at it and tell me
25 if that's your signature.

1 MR. WILLIAMS: It could be my signature.

2 THE COURT: Does it look to be somebody else's
3 signature?

4 MR. WILLIAMS: Probably not.

5 THE COURT: Then that's not a defense, is it?

6 MR. LINDSLEY: In the admissions we denied that
7 that's a personal guarantee.

8 THE COURT: That doesn't matter. What I'm trying to
9 keep you, counsel--you are going to wind up with sanctions.
10 You know, if you tell me--I don't mind--if you honestly tell
11 me that's a defense and that's not his signature and we go to
12 court on that basis--but if we go to court and I find out you
13 are just pulling my leg when I get there, somebody is going to
14 be in contempt of court because we are not going to waste our
15 time in court on things that are really not contested.

16 We have got past the age in trying cases where we
17 just say, you know, I am not going to pay this thing. You
18 know, if we honestly believe that is not your signature, you
19 see, then we want to try that. We are going to say to that
20 other party, you are going to have to prove that that is his
21 signature so what they are going to do, they are going to pull
22 a bunch of other signatures out and maybe even have an expert.
23 I don't know. We are going to make them prove it. We are
24 going to make them have whatever experts they need to prove.

25 But, if they come and prove it or bring their

1 people to prove and they say, well, that's really not a
2 contention, then we are going to turn around--we are not going
3 to put sanctions against you, but one of you may be in
4 contempt of court for it because we are not here to play
5 games. We are here to find out the truth, what the
6 relationship is between the parties and if you don't owe them
7 a dime, then that's the way this case is going to come out.

8 On the other hand, if you owe them \$33,000, then you
9 are going to pay \$33,000 without all of the necessity of
10 playing games.

11 MR. LINDSLEY: Well, I don't believe Mr. Williams is
12 capable of paying anywhere near 33,000.

13 THE COURT: Doesn't matter.

14 MR. LINDSLEY: There may be a judgment.

15 THE COURT: It doesn't matter if he can't pay a
16 dime. That's not what we are here for; do you understand
17 that, Mr. Williams? A trial is not to decide what you can
18 pay, only what you contracted to pay since this is a contract.

19 MR. LINDSLEY: Our office has reviewed exhaustively
20 Mr. Williams. What the Court was looking at is a guarantee
21 that was allegedly signed nine years ago and--

22 THE COURT: I understand.

23 MR. LINDSLEY: And we deny that that is a personal
24 guarantee and we can test that issue. We reviewed it with
25 Mr. Williams. That under the Rule of Civil Procedure that

1 if, in fact, because we denied, pursuant to the request for
2 admissions, if the plaintiff is put to having to prove it and
3 does prove that, that the Court could impose sanctions,
4 plaintiff's costs, additional costs. We reviewed that with
5 Mr. Williams but we contest that issue.

6 THE COURT: That's fine. But, you understand if he
7 says it looks like my signature and it looks like all other
8 signatures, I want to guarantee that you, as counsel, you may
9 go to jail if you just waste our time in there. You cannot
10 waste time just because you want to waste time.

11 MR. LINDSLEY: We are not prepared to admit that is
12 a personal guarantee signed by Mr. Williams, your Honor. We
13 recognize sanctions are provided for by Rules of Civil
14 Procedure. If the Court is advising me that I will be in
15 contempt of court because we are not prepared to admit, with
16 sanctions of contempt of court, possibly we ought to continue
17 this pretrial hearing and get an interlocutory appeal.

18 THE COURT: You will not get any interlocutory
19 appeal. There is no such thing on a matter of this nature.

20 MR. LINDSLEY: Your Honor--

21 THE COURT: No. Listen to me. Now, I run these
22 pretrials and I am going to run them the way I am supposed to
23 run them. These pretrials are not a game. These pretrials
24 are for me to find out what the issues are and when I ask you
25 if that's an issue, you just tell me--you tell me it's

1 honestly an issue.

2 MR. LINDSLEY: I am telling you it's an issue and
3 I am not going to be sitting here and be threatened with going
4 to jail.

5 THE COURT: Yes, you will.

6 MR. LINDSLEY: Because we deny and we do not admit
7 the contention--

8 THE COURT: Yes, you will.

9 MR. LINDSLEY: Well, I will not, your Honor. Excuse
10 me. May I be excused?

11 THE COURT: No. Have the Bailiff come in here. You
12 sit down.

13 (Whereupon, the Bailiff entered the Court's
14 chambers.)

15 THE COURT: Bailiff, come in here a minute, will
16 you? Sit down there and if Mr. Lindsley needs to go to jail
17 you can go right away. You are not going to walk out of any
18 pretrial.

19 MR. LINDSLEY: Your Honor, I would ask to be
20 excused.

21 THE COURT: You cannot be excused. You are going to
22 sit through this pretrial and we are going to find out what
23 the issues really are.

24 MR. LINDSLEY: Your Honor, at this point, your
25 Honor, having been threatened with going to jail because I

1 contest an issue in this case, I don't believe that I am
2 emotionally in a state of mind to continue the pretrial.

3 THE COURT: Okay. Let's do it this way. You want
4 to pay her a hundred and fifty dollars? Is that a fair and
5 reasonable attorney fee for coming?

6 MISS DENHOLM: That would be reasonable, your Honor.

7 THE COURT: Now, you come from where?

8 MISS DENHOLM: Salt Lake.

9 THE COURT: It took you how long to get here?

10 MISS DENHOLM: About 40 minutes.

11 THE COURT: And it's about the same period of time
12 back.

13 MISS DENHOLM: Yes.

14 THE COURT: And you work at what amount? We have
15 been here for only 20 minutes now, so that makes roughly, oh,
16 almost two hours.

17 MISS DENHOLM: I bill at \$85 an hour.

18 THE COURT: Okay. One hundred and fifty dollars is
19 a fair amount, then. You want to pay her \$150 for an attorney
20 fee, we will continue it for a month and you can come back
21 prepared to pre-try it. That's the option.

22 MR. WILLIAMS: That is what I would like to do.

23 THE COURT: When you come back, I'm going to ask you
24 exactly the same questions and I want answers to them, you
25 see. I won't let you out. What I am objecting to is coming

1 to a pretrial and just saying that is an issue, but I don't
2 have an answer for her. That's an issue but I don't have an
3 answer. I denied it's so, so it makes it so.

4 What I'm trying to get you to do is recognize that a
5 pretrial has a purpose and it just isn't to go through a list
6 of things. If that's all we are going through, I can read
7 your papers and I can jot all this down here and when I get
8 through with the list I can say, all right, now, that's what
9 we are going to try.

10 My experience tells me that's not what happens. My
11 experience tells me that when I get to trial, if I do that, in
12 reality, that's not an issue and that's not an issue and
13 that's not an issue.

14 The purpose of a pretrial is for counsel to come in,
15 you know, you had time for discovery. You had a chance to
16 look at that document and if that is really, Mr. Williams, not
17 your signature on that document, that's fine, if that's not
18 your signature. If that's your signature and you don't
19 remember putting your signature on there, that's all right,
20 too, but there's still the question to be answered, is it your
21 signature on there.

22 We forget a lot of things we do nine years ago and
23 if I ask you about the statute of limitations and he tells me,
24 here's a document and this is filed within the four-year
25 statute of limitations and this is probably six because it

1 appears to be in writing.

2 So, we are talking about a six-year statute of
3 limitations. So, we go back six years prior to the time that
4 it's filed. We are talking about May 27th of 1980. Then we
5 back off to that particular date and if I don't do these kind
6 of things, pretrials are worthless. If I ask you questions
7 about them and you seem to just not be giving me an answer--
8 just, well, that's the way I said it so that's the way it has
9 got to be, then that's not satisfactory to the Court.

10 So, with that explanation, give us another date for
11 the pretrial.

12 THE CLERK: May 23rd at 10:45.

13 THE COURT: May 23rd at 10:45.

14 MISS DENHOLM: Is that Monday morning?

15 THE COURT: That's a Monday. We will put it on the
16 calendar then.

17 MISS DENHOLM: Your Honor, may we make payment of
18 attorney fees conditional upon continuing with their defense?

19 THE COURT: Conditioned on what?

20 MISS DENHOLM: Would you want to impose sanctions
21 if--

22 THE COURT: I want it to be paid before we come back
23 to pretrial.

24 MISS DENHOLM: And if they fail to pay it--

25 THE COURT: We will take care of that matter. Okay.

1 You have your continuance. That's all today.

2 MISS DENHOLM: Okay. Thank you.

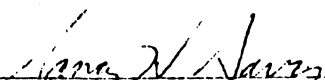
3 (Whereupon, the proceedings were concluded.)
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REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF DAVIS)

I, Nancy H. Davis, Certified Shorthand Reporter,
State of Utah, do hereby certify that the foregoing transcript
consisting of 16 pages, were stenographically reported by me
at the time and place hereinbefore set forth; that the same
was thereafter reduced to typewritten form, and that the
foregoing is a true and correct transcription of those
proceedings requested to be transcribed.



Nancy H. Davis

My Commission Expires:

9/20/88

ADDENDUM

Transcript of Proceedings September 16, 1989

COPY

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

KNIGHT ADJUSTMENT BUREAU,)

Plaintiff,)

vs.)

ROBERT L. WILLIAMS,)

Defendant.)

Case No. 39441

BEFORE THE HONORABLE DOUGLAS L. CORNABY

September 16, 1988

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Reported by: KELLY BROWN HICKEN,
CSR, RPR

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APPEARANCES OF COUNSEL:

For the Plaintiff:

**KATHRYN DENHOLM
Attorney at Law
660 South 200 East, Suite 100
Salt Lake City, Utah 84111**

For Defendant:

**DIUMENTI & LINDSLEY
BY: BRUCE OLIVER
Attorney at Law
505 South Main Street
Bountiful, Utah 84010**

1 FARMINGTON, UTAH, FRIDAY, SEPTEMBER 16, 1988

2 * * * * *

3 THE COURT: The matter on the calendar this morning is
4 Kinght Adjustment Bureau versus James R. Williams, Civil
5 Number 39441.

6 Who is going to make the presentation?

7 MS. DENHOLM: I will, your Honor.

8 Your Honor, we have reached a settlement agreement
9 in this matter. We have agreed that the defendant will pay
10 to my client the sum of \$15,000 plus court costs \$101.50 and
11 a \$500 attorney fee that will be on the following terms:

12 He will pay \$6,000 principal within 30 days. He
13 will also pay the \$500 attorney fee and \$101.50 court costs
14 within 30 days. The balance of \$9,000 will be paid over
15 two years plus 11-percent interest. We estimate the payments
16 to be about \$500 a month.

17 In the event the defendant is in default of any
18 payment by more than 30 days, the plaintiff will be entitled
19 to entry of a judgment as prayed in the complaint upon
20 affidavit.

21 THE COURT: Less everything that's already been paid, of
22 course.

23 MS. DENHOLM: That's right.

24 THE COURT: Is that your understanding of it, Counsel?

25 MR. OLIVER: With one exception, if I can just speak

1 with Ms. Denholm for one second, your Honor.

2 (Discussion held off the record between
3 counsel.)

4 MR. OLIVER: Your Honor, just one minor adjustment on
5 that. That is with regard to the relief of pray for
6 complaint. We would be confessing to a judgment as to the
7 principal amount only and not to any interest or otherwise
8 that is claimed there.

9 THE COURT: Okay. When you say principal, are you
10 talking about the amount stated at \$31,987.30.

11 MR. OLIVER: That's correct, your Honor.

12 MS. DENHOLM: We would anticipate as well that a
13 reasonable attorney fee might be awarded in the default.

14 MR. OLIVER: We have no objections.

15 THE COURT: Attorney fees of these kind are continuing.
16 We used to give them an attorney fee that was really far more
17 than what's currently done justified with the thought that
18 there's going to be work in the future.

19 But now we've tried to slow that down and let you
20 supplement that from time to time on an attorney fee basis so
21 that you're being paid ultimately but not any more than what
22 you have done.

23 MS. DENHOLM: Okay.

24 THE COURT: All right. You're with Knight Adjustment, I
25 assume?

1 MS. DENHOLM: It's Mr. Carlson. He's a representative
2 of Knight's assignor.

3 THE COURT: Of what?

4 MS. DENHOLM: Robinson Distributor, who is the assignor.

5 THE COURT: Well, we normally ask: Is he the one that
6 can make the decision here?

7 MS. DENHOLM: Yes. He has the authority to approve the
8 settlement.

9 THE COURT: Do you want to state your name?

10 MR. CARLSON: Douglas S. Carlson.

11 THE COURT: You understand what counsel has stated to
12 the Court?

13 MR. CARLSON: In terms of the interest that --

14 THE COURT: Everything. You heard the agreement, didn't
15 you?

16 MR. CARLSON: Yeah. We decided that we were going to
17 waive the interest?

18 MS. DENHOLM: Uh-huh (affirmative).

19 MR. CARLSON: My understanding was that he will not
20 default. And so the fact that we keep the interest or not is
21 not really -- I mean, I think it should stay because he's not
22 going to default on this.

23 MS. DENHOLM: Okay. I misunderstood what you said
24 previously, then. You're not agreeing to waive the interest?

25 MR. CARLSON: The interest, I mean, 31,000 or 50,000,

1 it's all relative to his ability to meet his agreement with
2 us and so....

3 MS. DENHOLM: Yeah. Uh-huh (affirmative).

4 Apparently, your Honor, I misunderstood my client's
5 statement earlier. He's not approving the discount of the
6 interest. That's a matter we didn't discuss before we came.

7 THE COURT: Do you want me to leave again and let you
8 talk some more, or do you want to start trial? I don't care
9 which.

10 MR. OLIVER: Your Honor, in discussing this this morning
11 between counsel, and I represented to my client -- She had
12 indicated that they take a confession of judgment or take a
13 judgment on the 31,000 in the event of default with the
14 30-days grace period. And that's what I represented to my
15 client. I had no problem with that. He accepted that.

16 When she indicated that they would take judgment
17 based upon the complaint, of course, the complaint asks for
18 interest, and I think it's something that we could probably
19 talk about and probably resolve in just a matter of a couple
20 of minutes. But I don't see where interest is provided for
21 in the contract initially. And the contract, indeed, was
22 valid, but I still don't see where it provides for interest.
23 It provides for attorney fees, but I don't see where interest
24 is included.

25 THE COURT: Let me get out of your negotiation. You

1 chat with each other. Let me know when you're ready for me
2 to come back in.

3 (Recess.)

4 THE COURT: Anything different?

5 MR. OLIVER: No, your Honor. We'll go as we stated by
6 Ms. Denholm, to the degree that judgment can be granted as
7 prayed for in the complaint.

8 THE COURT: What about the interest problem?

9 MR. OLIVER: That's part of what's stated in the
10 complaint, so we're conceding and going with her statement.

11 THE COURT: Okay.

12 Is that your understanding of what the agreement
13 is?

14 MR. CARLSON: Yes.

15 THE COURT: Is that your agreement?

16 MR. CARLSON: Yes, your Honor.

17 THE COURT: Mr. Williams, is that as stated according to
18 your agreement?

19 MR. WILLIAMS: Yes, Your Honor.

20 THE COURT: And that is your agreement?

21 MR. WILLIAMS: Yes, your Honor.

22 THE COURT: The Court will adopt that as a stipulation
23 of the parties. Who is going to draw the judgment?

24 MS. DENHOLM: I'll draw the documents, your Honor.

25 THE COURT: That's all, then. Thank you.
(Whereupon, the proceedings were concluded.)

1 STATE OF UTAH)
 : ss.
2 COUNTY OF SALT LAKE)

3 I, KELLY BROWN, C.S.R., R.P.R. and Notary Public for the
4 State of Utah, residing in Salt Lake County, certify:

5 That the proceedings were taken before me at the
6 time and place herein set forth;

7 That all proceedings had of record at the time of t
8 proceeding were recorded stenographically by me and were
9 thereafter transcribed into typewritten form by me, and I here
10 certify that the foregoing typewritten transcript as typed by
11 is a full, true and correct record of my stenographic notes so
12 taken;

13 I further certify that I am neither counsel for
14 nor related to any party to said action nor in anywise
15 interested in the outcome thereof.

16 IN WITNESS WHEREOF, I have subscribed my name and
17 affixed my seal this 14th day of February 1989.

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Kelly Brown Hicken
KELLY BROWN HICKEN, C.S.R., R.P.R.,
Notary Public. Notary Commission
Expires on May 5, 1992

