

2009

Jospeh Billings v. Paul James Toscano : Brief of Appellant

Utah Court of Appeals

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Peter Guyon; attorney for respondent.

Joseph Billings; pro se.

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No. 20091000

IN THE UTAH COURT OF APPEALS

Joseph Billings,

appellant,

vs.

Paul James Toscano, Paul Toscano P.C., and
Does 1-50, inclusive,

respondents.

CASE NO. : 20091000

APPELLANT'S OPENING BRIEF

**Appeal from the Judgment of the
District Court of Utah, Third Judicial District, Salt Lake County
District Court Case No. 090907164
Honorable Denise P. Lindberg**

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I INTRODUCTION

This is an appeal by Joseph Billings (plaintiff and appellant) from the final judgment of the District Court of Utah, Third Judicial District, Salt Lake, County (Case No. 090907164) entered for defendants and respondents Paul James Toscano and Paul Toscano, P.C. The judgment disposed all of the claims alleged in this action on a motion for summary judgment filed by respondents. The clerk of the Third District Court filed the order granting summary judgment on October 27, 2009.

II STATEMENT OF APPEALABILITY AND APPELLATE COURT JURISDICTION

This appeal is taken from the foregoing judgment, which finally disposes all of the issues between the parties. Notice of Appeal was filed timely on November 23, 2009. [CT, Vol. II, 403]. The court of appeals notified the parties that a final order had not been prepared according to Utah Rule of Civil Procedure 7 (f) (2) and entered by the clerk of the court. Respondents (the prevailing parties) thereafter submitted a proposed final order pursuant to Utah Rule of Civil Procedure 7 (f) (2) on February 18, 2010. The district court entered final judgment on February 24, 2010. This court has jurisdiction over this appeal pursuant to Utah State Rules of Court 3 and 42.

III

ISSUES RAISED IN THE TRIAL COURT AND PRESENTED ON APPEAL AND STANDARD OF REVIEW

- 1. The District Court Erred in Granting Summary Adjudication of Count One of the First Cause of Action for Abuse of Process Because Appellant Controverted Respondents' Assertion of Prior Settlement of the Claim and Established Disputed Material Facts and Genuine Issues in Support of the Cause of Action.**

Issue Raised Before the Trial Court: [CT, Vol. II, 246] [CT, Vol. II, 209-224] [CT, Vol. II, 225] [CT, Vol. II, 234] [CT, Vol. II, 209-224; CT, Vol. II, 225; CT, Vol. II, 234]

- 2. The Federal Bankruptcy Court Order Approving Settlement of a Debtor's Estate Did Not Bar Count One of the First Cause of Action for Abuse of Process or Any Other Cause of Action Contained in First Amended Complaint Because Respondents Failed to Assert and Explicitly Waived the Affirmative Defenses of Res Judicata or Collateral Estoppel in the Trial Court.**

Issue Raised Before the Trial Court: [CT, Vol I, 209] [RT, 8, Lines 5-11] [CT, Vol. II, 209-224; CT, Vol. II, 225; CT, Vol. II, 234]

- 3. The Federal Bankruptcy Court Order Approving Settlement of a Debtor's Estate Did Not In Any Case Satisfy the Requirements of Res Judicata or Collateral Estoppel And Even if Respondents had not Waived these Affirmative Defenses, the Trial Court Should Have Denied Summary Judgment on the Basis of Appellant's Affidavits**

Issue Raised Before the Trial Court: [RT, 8, Lines 5-11] [CT, Vol. II, 398-402 (order after ruling)] [RT, 8, Lines 5-11] [CT, Vol. II, 398-402 (ruling after hearing)] [CT, Vol. II, 398-402 (ruling after hearing)] [CT, Vol. II, 366 (Affidavit of Disputed

Facts); CT, Vol. II, 378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules] [CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II, 378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules]

4. Respondents Failed to File a Statement of Undisputed Facts in Support of Summary Adjudication of Counts Two and Three of the First Cause of Action for Abuse of Process, the Second Cause of Action for Fraud, and the Third Cause of Action for Negligence Contained in the First Amended Complaint.

Issue Raised Before the Trial Court: [CT, Vol. II, 303] [CT, Vol. II 347, 349, n.2] [CT, Vol. II, 246-261] [CT, Vol. II, 303-346] [CT, Vol. II, 246; Vol. II, 303-346]

5. The Trial Court Should Have Denied Respondents' Motion for Summary Judgment of the First Amended Complaint Because Appellant Filed Sufficient Affidavits to Establish a Genuine Factual Dispute Concerning Claims that Toscano Asserted a Settlement Agreement Obtained by Fraud in Support of Summary Judgment.

Issue Raised Before the Trial Court: [CT, Vol. II, 366]

Review of the trial court order granting summary judgment is de novo. Simms v. Oklahoma 165 F.3d 1321, 1326 (10th Cir.), cert. denied, 528 U.S. 815, 120 S.Ct. 53 (1999). The appellate court views the facts and all reasonable inferences drawn from them in the light most favorable to the non-moving party (plaintiff and appellant). Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993). The applicability of the affirmative defenses of *res judicata* or *collateral estoppel* is a question of law, which appellate courts

also consider de novo. Proctor Gamble Corporation v. Amway Corporation 376 F.2d 496 (5th Cir. 2004).

IV

APPLICABLE RULES OF COURT ON APPEAL

1. Utah Rule of Civil Procedure 7 (c) (3) (A):

A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party. Utah Rule of Civil Procedure Section 7 (c) (3) (A).

2. Utah Rule of Civil Procedure 56:

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

V STATEMENT OF THE CASE

A. Procedural History

Appellant filed a complaint in the district court on April 30, 2009 containing a single cause of action for abuse of process against appellees Paul James Toscano and Paul Toscano P.C. The complaint alleged that appellees had filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code in behalf of a petitioner whom appellees knew did not qualify for relief under Chapter 7. The complaint further alleged that respondents did not file the petition for legitimate debt relief, but rather filed the petition solely for the ulterior purpose of circumventing a lawsuit pending in California Superior Court against the debtor for fraud and quiet title to real property. The complaint also alleged that respondents intentionally abused Chapter 7 within the meanings of 11 U.S.C. Section 707 (b) (2) (A) (1); 11 U.S.C. Section 707 (b) (2) (B) (I), and 11 U.S.C. Section

707 (b) (3) and that respondents therefore also violated Federal Rule of Bankruptcy Procedure 9011 [CT, Vol. I, 2].

Respondent Toscano deployed various efforts to evade and deny personal service of the complaint. Ultimately, respondents filed a motion on May 8, 2009 to dismiss the action alleging that the Utah District Court lacked personal and subject matter jurisdiction [CT, Vol. I, 11]. Appellant filed an Affidavit of Process Server on June 1, 2009 [CT, Vol. I, 99-101] and opposition to respondents' motion to dismiss on June 9, 2009 [CT, Vol. I, 102].¹

On August 21, 2009 respondents filed a motion for expedited summary judgment [CT, Vol. I, 136].² Respondents served notice of an expedited hearing set for September 1, 2009 by e-mail on August 22, 2009 [CT, Vol. I, 136]. Appellant quickly filed opposition to the motion for summary judgment on August 27, 2009, which incorporated a memorandum of points and authorities, a statement controverting respondents' statement of undisputed facts, and a statement of disputed facts and genuine issues [CT, Vol. II, 209-224]. On August 31, 2009 appellant filed a separate Memorandum of Points and Authorities in Support of Opposition to respondent's motion [CT, Vol. II, 225] and a Separate Statement of Disputed Facts and Genuine Issues [CT, Vol. II, 234].

On August 31, 2009 appellant also filed and served a First Amended Complaint alleging three causes of action: (1) Abuse of Process (three separate and distinct counts); (2) Fraud, and (3) Negligence. Count one of the First Cause of Action for Abuse of Process

¹ Respondent Toscano employs signature sharp practices. He appeared in this action essentially pro per through his law partner and did not serve the motion to dismiss for alleged lack of personal and subject matter jurisdiction until almost a month after filing it.

² Respondents have never filed an answer to the complaint.

re-alleged the single cause of action contained in the original complaint against respondents for intentionally abusing Chapter 7 of the United States Bankruptcy Code in 2008. But counts two and three of the First Cause of Action for *Abuse of Process*, the Second Cause of Action for *Fraud*, and the Third Cause of Action for *Negligence* contained in the First Amended Complaint alleged entirely new claims against respondents, which arose from conduct committed by respondents on April 15, 2009 and after appellant filed the original complaint on April 30, 2009. The two new and distinct counts of abuse of process and the additional claims for fraud and negligence had separate and different factual bases than the original complaint, which contained only a single cause of action against respondents for intentionally abusing Chapter 7 of the United States Bankruptcy Code in 2008 [CT, Vol. II, 246]. The district court nevertheless convened a hearing on September 1, 2009 on respondents' expedited motion for summary judgment of the *original* complaint. At the time of the expedited hearing (September 1, 2009), respondents had not yet had an opportunity (due to their own procedural strategies) to file a response to the First Amended Complaint (filed August 31, 2009). The court took the matter under submission after oral argument.

On September 17, 2009, in response to appellant's First Amended Complaint, respondents filed a motion, which urged the court to essentially ignore the First Amended Complaint, which superseded the original complaint. [CT, Vol. II, 246]. Respondents filed a novel motion on September 17, 2009 to "consolidate the claims made in the amended complaint with those in plaintiff's original complaint" [CT, Vol. II, 303]. The First Amended Complaint indeed re-alleged the single claim for abuse of process contained in

the original complaint *as count one* of the First Cause of Action for Abuse of Process. But the First Amended Complaint also contained two new and entirely distinct counts of abuse of process (counts two and three of the first cause of action) and additional causes of action for fraud (second cause of action) and for negligence (third cause of action). The First Amended Complaint also alleged facts entirely new, separate, and distinct from the facts alleged in support of the original complaint for a single count of abuse of process [CT, Vol. II, 246-261]. Respondents nevertheless moved the court to simply consider its original summary judgment motion as a motion for summary judgment of the entire First Amended Complaint [CT, Vol. II, 303-346]. Accordingly, respondents failed to file a Statement of Undisputed Facts in Support of summary adjudication of counts two and three of the First Cause of Action for Abuse of Process, the Second Cause of Action for Fraud, or the Third Cause of Action for Negligence contained in the First Amended Complaint [CT, Vol. II, 246; Vol. II, 303-346].³

³ Respondents eventually claimed that a settlement agreement (purportedly *effective as of March 30, 2009*) somehow barred every cause of action contained in the First Amended Complaint for conduct committed by respondents after *April 15, 2009*. But, with the sole exception of count one of the First Cause of Action for Abuse of Process, the First Amended Complaint alleged claims for abuse of process (two new counts), fraud, and negligence, which arose from respondents' separate and distinct misconduct newly committed on and after April 15, 2009. Respondents stopped short of alleging that appellant had actually entered into an agreement effective March 30, 2009 that waived claims against them for any and all acts, which might be committed by respondents in the future i.e. after March 30, 2009. And to be sure, even the sham settlement agreement, which respondents filed in support of their motion for summary judgment of the original complaint, does not contain any such provision. [CT, Vol. I, 142-208]. Hence, respondents failed to file a Statement of Disputed Facts in support of summary adjudication of the new claims alleged in the First Amended Complaint.

On September 23, 2009, appellant filed an affidavit, which again controverted respondents' Statement of Undisputed Facts (which pertained exclusively to count one of the First Cause of Action for Abuse of Process contained in the First Amended Complaint [CT, Vol. II, 358]), a Separate Statement of Disputed Facts and Genuine Issues as to Material Facts pertaining to all cause of actions contained in the First Amended Complaint [CT, Vol. II, 366], and a Memorandum of Points and Authorities in Support of Opposition to respondents' "consolidated" motion for summary judgment [CT, Vol. II, 347].⁴

Appellant also filed on September 23, 2009 a request for a hearing on respondents' "Motion to Consolidate 'the claims made in the amended complaint with those in plaintiff's original complaint' and for Summary Judgment" [CT, Vol. II, 380]. The district court did not convene a separate hearing on respondents' motions [CT, Vol. II, 398]. Nevertheless, the court entered an order on October 27, 2009 granting summary judgment of the entire First Amended Complaint for respondents [CT, Vol. II, 398].⁵

B. Statement of Facts

On or about June 9, 2008, appellant filed a cross-complaint in California Superior Court against an individual to Quiet Title to real property and for Slander of Title,

⁴ Inasmuch as respondents concluded that the First Amended Complaint was identical to the original complaint, respondents in essence failed to file a motion for summary judgment of the First Amended Complaint, or at least a motion that complied with the procedural requirements of Utah Rules of Court Instead, as respondent himself puts it, "Toscano essentially reassert[ed] its original summary judgment motion" [CT, Vol. II, 303, 304], which did not include a Statement of Undisputed Facts that was at all relevant to the new causes of action contained in the First Amended Complaint.

⁵ The court also denied respondents' motions to dismiss for lack of personal and subject matter jurisdiction. [CT, Vol. II, 398].

Cancellation of Instruments, Fraud, Resulting Trust, and Conversion.⁶ In response to the cross-claims, respondents filed a Chapter 7 petition in Federal Bankruptcy Court in Salt Lake City, Utah in behalf of the individual (hereinafter the “debtor”) to block and circumvent the debtor’s own California action. Yet at the time that respondents filed the voluntary petition, respondent Toscano (the debtor’s attorney) knew that the debtor did not qualify for relief under Chapter 7 and that the debtor’s filing abused Chapter 7 within the meanings of 11 U.S.C. Section 707 (b) (2) (A) (1); 11 U.S.C. Section 707 (b) (2) (B) (I), and 11 U.S.C. Section 707 (b) (3). [CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II, 378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor’s Chapter 7 Petition and Schedules].

Respondent Toscano is a bankruptcy law expert, and he knew that a presumption of abuse arises under 11 U.S.C. Section 707 (b) (2) (A) (1) if a debtor’s monthly income, reduced by allowance deductions and multiplied by sixty, is equal to or greater than twenty-five percent of the non-priority unsecured claims or \$6,575.00 (whichever is greater) or if the product is greater than \$10,950.00 (\$182.50 per month). 11 U.S.C. Section 707 (b) (2) (A) (1). To be sure, the debtor and respondent Toscano had completed Means Test Form B22 as required under 11 U.S.C. Section 707 (b) (2) *before* filing the petition for relief, and the results triggered the presumption that the debtor was abusing Chapter 7. Means Test Form B22 contains an objective formula. The Means Test is designed to separate debtors who are abusing Chapter 7 from legitimate debtors by identifying debtors who have the ability (means) to pay creditors as a matter of law and therefore do not

⁶ The property is located in California, and the defendant resided in California before moving to Utah.

qualify for Chapter 7 relief. Hence, respondent Toscano knew before he filed the Chapter 7 petition in behalf of the debtor that the debtor was not eligible for Chapter 7 relief. [CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II, 378, (Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules)].

Respondent Toscano also knew before he filed the petition that the debtor had the burden pursuant to 11 U.S.C. Section 707 (b) (2) (B) (I) to rebut the presumption that the debtor was abusing Chapter 7. Moreover, respondent Toscano knew that the debtor was obliged to rebut the presumption of abuse pursuant to 11 U.S.C. Section 707 (b) (2) (B) (I) exclusively by demonstrating "special circumstances" within the meaning of 11 U.S.C. Section 707 (b) (2) (B) (I), such as a serious medical condition or a call to active duty in the Armed Forces. Respondent Toscano also knew before he filed the petition that the debtor could not rebut the presumption that she was abusing Chapter 7 by demonstrating such "special circumstances" under 11 U.S.C. Section 707 (b) (2) (B) (I). [CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II, 378, (Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules)].

Accordingly, respondent Toscano was charged with knowledge before he filed the petition that the debtor, *as a matter of law*, had the ability to pay her creditors and that filing the petition would therefore be a flagrant, per se abuse of Chapter 7 under 11 U.S.C. Section 707 (b) (2) (A) (1) and 11 U.S.C. Section 707 (b) (2) (B) (I) (1). Nevertheless, respondent Toscano filed the petition in behalf of the debtor. [CT, Vol. II, 366].

Respondent Toscano and the debtor also admitted in their petition filed under penalty of perjury that the debtor's California Superior Court action (Case no. MCVMS

08151) to quiet title to real property (hereinafter the “property” or the “disputed property”), brought pursuant to an Affidavit of Joint Tenant fraudulently executed by the debtor, constituted a liability of the debtor for punitive damages to California attorney, Dee Davis (for malicious prosecution) and to appellant, Joseph Billings (for slander of title).

Respondent Toscano and the debtor openly sought to discharge these liabilities for punitive damages in their petition. Yet, at the same time, respondent Toscano duplicitously urged the Chapter 7 Trustee to seize the property (which was the target of the malicious action and the debtor’s fraud) as the debtor’s *legitimate* asset in order to liquidate the debtor’s small consumer debt. [CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II, 378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor’s Chapter 7 Petition and Schedules].

In light of the foregoing facts and circumstances, respondent Toscano misused court process by filing the Chapter 7 petition and causing a Notice of Chapter 7 Bankruptcy Case to be filed in California Superior Court Case No. MCVMS 08151 and enjoining its prosecution pursuant to 11 U.S.C. Section 362. Respondent Toscano committed these acts characteristically in pursuit of collateral litigation advantages, i.e., (1) to circumvent the California Superior Court quiet title and fraud actions against the debtor; (2) to cause the Chapter 7 Trustee to improperly seize the disputed property pursuant to the debtor’s false claims to be the exclusive owner of the property; (3) to cause the Chapter 7 Trustee to attempt to sell the property to liquidate the debtor’s consumer debt, and (4) to harass appellant, cause unnecessary delays, and escalate appellant’s litigation costs. Respondent Toscano also violated Federal Rule of Bankruptcy Procedure 9011 and Chapter 13, Rule

3.1, of the Utah Supreme Court Rules of Professional Practice when he ignored the results of the Means Test and filed the petition in the foregoing acts of sharp practice.⁷ [CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II, 378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules]. Therefore, on July 16, 2008, appellant amended the California cross-complaint against the debtor to include a cause of action for flagrant abuse of process against respondent Toscano. [CT, Vol. II, 366-377].

Appellant entered into a settlement agreement with the debtor, the Chapter 7 Trustee, the U.S. Trustee, and respondent Toscano on January 28, 2009 (Amended March 30, 2009). According to the terms and conditions of the settlement agreement, the debtor was required to execute a grant deed transferring all rights and interests in the disputed property to appellant or his designate. In exchange for the debtor's execution of the grant deed transferring exclusive title to the disputed property to appellant, appellant agreed to dismiss his causes of action against the debtor for Slander of Title, Cancellation of Instruments, Fraud, Resulting Trust, Conversion, and the cause of action for Abuse of Process alleged against respondent Toscano for filing a Chapter 7 petition in 2008 in violation of 11 U.S.C. Sections 707 (b) (1), 707 (b) (2), and 707 (b) (3) of the United States Bankruptcy Code. The terms and conditions of the settlement agreement also required respondent Toscano to

⁷ The United States Trustee eventually conducted an independent and disinterested Comparative Analysis of the debtor's schedules, and the independent analysis also revealed that a presumption of abuse arose pursuant to 11 U.S.C. Section 707 (b) (2) (A) (1) that the debtor was abusing Chapter 7. [CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II, 378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules].

seek the bankruptcy court's approval of the January 28, 2009 settlement agreement (amended March 30, 2009) at a hearing ultimately set for August 20, 2009.

Pursuant to an agreement between respondent Toscano and appellant, appellant drafted the essential components of the agreement (nearly the entire agreement), and respondent Toscano was to submit the agreement to the bankruptcy court for approval pursuant to a motion under his signature. In reliance upon respondent Toscano's representation that he would seek the court's approval of the terms and conditions as prepared by appellant (and approved by respondent Toscano, the debtor, the Chapter 7 Trustee, and the U.S. Trustee), appellant agreed to be bound by the agreement and dismissed his causes of action against the debtor with prejudice after respondent Toscano, the debtor, the Chapter 7 Trustee, and the U.S. Trustee signed the agreement. [CT, Vol. II, 366-377].

In the meantime, a disgruntled potential claimant to the property threatened to file a complaint with the Utah State Bar against respondent Toscano for proceeding in the bankruptcy court with a conflict of interest with the debtor unless respondent Toscano abandoned the settlement. The claims for abuse of process had been filed against the debtor *and* respondent Toscano (the debtor's attorney), and they sprang primarily from respondent Toscano's negligence and malfeasance in abusing Chapter 7 of the bankruptcy code in overzealous representation of the debtor. Respondent Toscano is apparently vulnerable to state bar discipline inasmuch as he proposed settlement of the claims against *him* in exchange for his arrangement of the *debtor's waiver* of her own potential one-third interest in the disputed property in violation of Chapter 13, Rule 1.7, of the Utah Supreme

Court Rules of Professional Practice. Respondent Toscano himself contributed nothing to the settlement value. [CT, Vol. II, 366-377].

After receipt of the threat, respondent Toscano refused to seek the bankruptcy court's approval of the January 28, 2009 settlement agreement (amended March 30, 2009). [CT, Vol. II, 366-377]. Instead, on or about April 10, 2009 respondent Toscano altered the settlement agreement drafted by appellant to unilaterally provide (1) that the disgruntled claimant would receive an unconditional 50% interest in the property, (2) that the claimant (heavily saddled with creditor judgments) could take title to the property in his name pursuant to a *quit claim* deed to be executed by the debtor, and (3) omitting the requirement that the debtor transfer her interests in the property to appellant pursuant to a *grant deed* and adding that the debtor would transfer her interests in the property pursuant to a *quit claim* deed only. [CT, Vol. II, 366-377]. In light of the fact that respondent Toscano had wholly undermined the value of the parties' settlement agreement, appellant promptly notified respondent Toscano in writing on April 10, 2009 that (1) respondent Toscano had breached the parties' settlement agreement, (2) that appellant rejected the proposed unilateral changes to the legitimate settlement agreement, (3) and that appellant was no longer willing to dismiss or waive his pending claim against respondent Toscano for abuse of process (filing a Chapter 7 petition in per se abuse of Chapter 7 of the United States Bankruptcy Code in 2008).

In light of respondent Toscano's repudiation of the January 28, 2009 settlement agreement (as amended March 30, 2009), appellant re-filed in the Utah State District Court appellant's claim for abuse of process arising from respondents' filing of a Chapter 7

petition in violation of the United States Bankruptcy Code.⁸ In response to appellant's complaint, respondent Toscano deployed his signature strategy of abusing judicial proceedings for ulterior purposes. Respondent filed groundless motions *in the debtor's name* on April 30, 2009 to enjoin the state court action and to remove it to the federal bankruptcy court. [CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II, 378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules]. Yet the Utah State Court action was brought *exclusively against respondent Toscano* for abuse of process –not the debtor. [CT, Vol. I, 2]. As a bankruptcy law expert, respondent Toscano knew at the time that he brought his motion in the federal bankruptcy court *in the debtor's name* to enjoin the state action against *him* pursuant to 11 U.S.C. Section 362 that he had no standing to bring the motion and that 11 U.S.C. Section 362 applies only to actions against the debtor or for control or possession of the debtor's property. Additionally, respondent Toscano knew at the time that he brought his motion in the federal bankruptcy court in the debtor's name to remove the state action against him to federal bankruptcy court (1) that he had no standing to bring the motion, (2) that he had brought the motion long after the statutory time had expired for bringing removal motions, and (3) that the federal bankruptcy court has no subject matter jurisdiction over state law claims, which are not against the debtor, the debtor's property, or impact the debtor's estate. [CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II,

⁸ The April 30, 2009 complaint contained a single cause of action for abuse of process, which arose from respondent Toscano's filing the abusive Chapter 7 petition. This claim is re-alleged as count one of the First Cause of Action for Abuse of Process contained in the First Amended Complaint filed on September 31, 2009.

378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules].

Respondent Toscano nevertheless attempted to intimidate appellant (and the state court) by falsely and emphatically declaring (in violation of Chapter 13, Rule 4.1, of the Utah Supreme Court Rules of Professional Practice) that 11 U.S.C. Section 362 applied to the *debtor's attorney* as well as the debtor and that the federal bankruptcy court therefore had exclusive subject matter jurisdiction over plaintiff's abuse of process claims.

Appellant responded to respondent's false declarations by making several requests that respondent either provide citations to authorities in support of his motions or to withdraw them. Respondent Toscano replied: "No comment." Respondent Toscano also failed to reveal any authority in support of his claims at the hearing on his motions held on August 20, 2009. Respondent Toscano had simply filed the motions defiantly (1) in an attempt to secure a more favorable venue for litigation of the state law claims against him, (2) in an attempt to cause the bankruptcy court to issue improper rulings, which would cause appellant to incur the costs and time expenditures necessary to appeal the rulings, (3) to otherwise escalate appellant's litigation costs, (4) delay progress of the state court action, and (5) to harass appellant who resides in Shanghai, China with frivolous motions in an effort to discourage prosecution of the state court claims against him.⁹

⁹ Respondent Toscano's attempts to frustrate prosecution of the original April 30, 2009 complaint against him by filing groundless motions in federal bankruptcy court to enjoin and remove the action to federal bankruptcy court constitute the factual basis of count two of the First Cause of Action for Abuse of Process alleged in the First Amended Complaint filed on August 31, 2009. [CT, Vol.II, 246-261].

Then, respondent Toscano cut and pasted the parties' January 28, 2009 settlement agreement (as amended March 30, 2009), which appellant had initially drafted, and unilaterally altered it to (1) provide that the disgruntled claimant would receive an unconditional 50% interest in the property, (2) to provide that the claimant could take title to the property in his name despite crippling debt pursuant to a *quit claim* deed to be executed by the debtor, and (4) to omit the requirement that the debtor transfer her interests in the property to appellant pursuant to a *grant deed* and adding that the debtor would transfer her interests in the property pursuant to a *quit claim* deed only. [CT, Vol. II, 366-377]. Respondent Toscano presented the altered January 28, 2009 agreement (as amended March 30, 2009) as his own product to the bankruptcy court and filed the fraudulent document as the parties' true settlement agreement in the bankruptcy court on April 15, 2009. Respondent also falsely reported to the court in violation of Chapter 13, Rule 3.3 of the Utah Supreme Court Rules of Professional Practice [making false statements to a tribunal] that appellant had agreed to the unilateral changes. [CT, Vol. II, 347-357; 366-377]. In response to respondent Toscano's post-April 15, 2009 conduct, appellant filed a First Amended Complaint on August 31, 2009 in the Utah District court alleging new counts of Abuse of Process, Fraud, and Negligence.¹⁰

The bankruptcy court set August 20, 2009 for a hearing on respondents' motions to enjoin the Utah State Court proceedings, removal of the state court proceedings to federal

¹⁰ Respondent Toscano's preparation and filing of the sham settlement agreement in federal bankruptcy court constitute the basis of count three of the First Cause of Action for Abuse of Process, the Second Cause of Action for Fraud, and the Third Cause of Action for Negligence contained in the First Amended Complaint.

bankruptcy court, and settlement of the debtor's estate. The federal bankruptcy court denied defendant's motions to enjoin the state court action against him and to remove the state court action to federal bankruptcy court. The court declared that it could find no authority that "even remotely supports" defendant Toscano's motion to enjoin the state court action pursuant to 11 U.S.C. Section 362 since the action was brought exclusively against respondent and not the debtor. The court also ruled that the federal bankruptcy court had no subject matter jurisdiction over the state court claims against respondent because they were not alleged against the debtor nor did they impact the debtor's estate. [CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II, 378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules].¹¹

The bankruptcy court also approved settlement of the debtor's estate according to the terms and conditions contained in the sham settlement agreement. Respondents falsely represented to the court that appellant had agreed to the terms and conditions of the **unilaterally altered, unsigned agreement**, which respondents had submitted to the court in place of the agreement actually drafted and entered into by appellant.¹² The bankruptcy court granted the motion to settle the debtor's estate, but declined appellant's request to conduct an evidentiary hearing to (1) determine the terms and conditions of the settlement;

¹¹ In light of these rulings, *appellant* is actually entitled as a matter of law to summary judgment of at least count two of the First Cause of Action for Abuse of Process and the Third Cause of Action for Negligence contained in the First Amended Complaint.

¹² Appellant had provided e-mail approval of the parties' original January 28, 2009 settlement agreement. Respondents falsely advised the bankruptcy court and the Utah District Court that the e-mail approval pertained to the unilaterally altered version of the parties' agreement.

(2) allow appellant an opportunity to introduce written evidence (pre-marked and lodged with the clerk) to demonstrate that respondents had altered the parties' original settlement agreement; and (3) to establish that appellant had withdrawn his offer to dismiss his claim for abuse of process against respondents (count one of the First Cause of Action for Abuse of Process) in writing because respondents refused to honor the terms and conditions of the parties original settlement agreement. Having asserted the bankruptcy court's lack of subject matter jurisdiction over this state court action, the bankruptcy court did not consider any of the claims currently alleged in the First Amended Complaint. [CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II, 378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules].

VI ARGUMENT

A. Summary of the Argument

1. It is well established that courts do not decide factual disputes on summary judgment motion; they simply decide whether there *is* a factual dispute or genuine issue of law. Respondents claimed in the district court that the original complaint filed on April 30, 2009 (which was ultimately re-alleged as count one of the First Cause of Action for Abuse of Process in the First Amended Complaint) was barred by a prior settlement agreement purportedly effective March 30, 2009. But appellant denied respondents' claim and filed an Affidavit Controverting Defendants' Statement of Undisputed Facts and an Affidavit of Disputed Facts and Genuine Issues to demonstrate that (1) *respondents* had actually repudiated the parties' legitimate January 28, 2009 settlement agreement (as amended

March 30, 2009); (2) that respondents unilaterally altered the legitimate agreement to create a sham, unsigned settlement agreement (which respondents filed in support of summary judgment); and (3) that appellant had rejected the unilateral changes and withdrew the original offer of settlement in writing. Appellant's affidavits were sufficient to refute, and establish disputed facts and genuine issues pertaining to, respondents' affirmative defense of "prior settlement" to count one of the First Cause of Action for Abuse of Process as alleged in the First Amended Complaint (and all other claims alleged in the First Amended Complaint). One good faith affidavit controverting the moving parties' assertion of undisputed facts is sufficient to overcome summary judgment. Therefore, the district court should have denied respondents' motion for summary judgment in light of the controverting affidavits.

2. Additionally, respondents failed to file a Statement of Undisputed Facts in support of their second "consolidated" motion for summary judgment of the First Amended Complaint, which alleged new causes of action with factual bases entirely distinct from the original complaint (counts two and three of the First Cause of Action for Abuse of Process, the Second Cause of Action for Fraud, and the Third Cause of Action for Negligence). The district court should have denied the "consolidated" motion for summary judgment on this ground alone.

3. Appellant, on the other hand, filed an Affidavit of Disputed Facts and Genuine Issues in support of each of the causes of action contained in the First Amended Complaint. Moreover, appellant demonstrated by affidavit that counts two and three of

the First Cause of Action for Abuse of Process, the Second Cause of Action for Fraud, and the Third Cause of Action for Negligence arose from acts committed by respondents after the effective date (March 30, 2009) of the sham settlement agreement filed by respondents. Accordingly, the affidavit demonstrated that even the sham settlement agreement filed by respondents in support of summary judgment of the original complaint (and “reasserted” against the First Amended Complaint) did not contain a provision that releases respondents from all future conduct committed after March 30, 2009. Hence, appellant’s affidavits and respondents’ own exhibit (the sham settlement agreement itself) were sufficient to establish disputed facts and genuine issues pertaining to all of the causes of action newly alleged in the First Amended Complaint. The district court, therefore, should have denied respondents’ “consolidated” motion for summary judgment of the First Amended Complaint.

4. Since the affidavits filed by appellant were facially sufficient to overcome a summary judgment motion, respondents had only one avenue left open to them to pursue summary judgment, namely to demonstrate that all of the causes of action alleged or issues contained in the First Amended Complaint had already been decided after an evidentiary hearing in a separate action such that each cause of action might be barred by the affirmative defenses of *res judicata* or *collateral estoppel*. But respondents not only failed to assert these affirmative defenses in support of their summary judgment motion, ***they actually insisted emphatically before the district court that neither affirmative defense was relevant to their motions.*** Hence, respondents are bound by this admission on appeal, and respondents cannot, in any case, assert affirmative defenses on appeal in

support of summary judgment (*res judicata* or *collateral estoppel*), which they failed to assert and in fact vigorously disclaimed and urged the trial court to ignore.

5. The trial court did in fact ignore the due process requirements of *res judicata* and *collateral estoppel*. The district court characterized appellant's opposition to the respondents' summary judgment motion as a collateral attack on the federal bankruptcy court judgment. But appellant did not attack the federal court judgment in the Utah District Court. That judgment stands and now controls disposition of the *debtor's* estate. But it does not control disposition of separate state court claims against *respondents* for damages, especially damages claimed against respondents for obtaining the judgment *itself* by fraud and malfeasance. Appellant simply contended that the federal bankruptcy court judgment cannot determine the claims or issues **in this separate action alleging state law claims for damages against respondents** because the order settling the debtor's estate did not satisfy the requirements of *res judicata* (prior determination of same causes of action after an evidentiary hearing) or *collateral estoppel* (prior determination of controlling issues after an evidentiary hearing) such that it might determine the claims or issues raised in this **separate action**. Lawlor v. National Screen Services Corporation 39 U.S. 322, 327. None of the causes of action or any controlling issue contained in this Utah State Court action was determined in the federal court after an evidentiary hearing. And even the sham "settlement agreement" approved by the federal bankruptcy court related exclusively to **count one** of the First Cause of Action for Abuse of Process contained in the First Amended Complaint. Appellant's second and third counts of abuse of process, the second cause of action for fraud, and the third cause of action for

negligence each arose from acts committed by respondents after the date of the approved sham settlement (filing groundless motions, sham documents, and securing settlement of the debtor's estate through fraud and malfeasance). None of these claims was even before the bankruptcy court, much less determined after an evidentiary hearing.

6. Moreover, the district court overlooked the fact that the bankruptcy court also declared that it had no subject matter jurisdiction over the claims alleged in the state court action and that it also lacked grounds to enjoin them. Hence, in light of all of the bankruptcy court orders, appellant--not respondent-- is ultimately entitled to summary judgment of at least count two of the First Cause of Action for Abuse of Process and the Third Cause of Action for Negligence, which arose from respondents' filing of frivolous motions (filed after even the sham settlement agreement was purportedly entered into by the parties) to enjoin the April 30, 2009 state court action and remove it to federal bankruptcy court.

7. Additionally, the court overlooked that count three of the First Cause of Action for Abuse of Process and the Second Cause of Action for Fraud allege that the bankruptcy court order (settling the debtor's estate) was *itself* obtained through respondents' fraud and malfeasance. These claims seek compensatory and punitive damages against respondents for (1) obtaining the order itself through malfeasance and (2) committing fraud against appellant by repudiating the parties' legitimate settlement agreement after appellant dismissed his claims against the debtor for punitive damages with prejudice. These claims have never been considered by any court. Accordingly,

they would not be subject to dismissal pursuant to *res judicata* or *collateral estoppel*, even if respondents had actually asserted (instead of disclaiming) these affirmative defenses in the district court.

B. The Argument

1. The District Court Erred in Granting Summary Adjudication of Count One of the First Cause Of Action for Abuse of Process Because Appellant Controverted Respondents' Assertion of Prior Settlement of the Claim and Established Disputed Material Facts and Genuine Issues In Support of the Cause of Action

Count one of the First Cause of Action for Abuse of Process contained in the First Amended Complaint alleges that respondent Toscano abused court process in 2008 by filing a Chapter 7 petition in behalf of an individual whom respondent knew did not qualify for Chapter 7 relief. [CT, Vol. II, 246]. Respondent Toscano claimed in the trial court that a January 28, 2009 settlement agreement (as amended March 30, 2009) constitutes a prior settlement of the claim and that the alleged settlement agreement therefore bars count one of the first cause of action for abuse of process.

In accordance with the rules of summary judgment practice, appellant (plaintiff) filed opposition to the motion for summary judgment on August 27, 2009, which incorporated a memorandum of points and authorities, a statement controverting respondents' statement of undisputed facts, and a statement of disputed facts and genuine issues [CT, Vol. II, 209-224]. On August 31, 2009 appellant filed a separate Memorandum of Points and Authorities in Support of Opposition to respondent's motion [CT, Vol. II, 225] and a Separate Statement of Disputed Facts and Genuine Issues [CT, Vol. II, 234].

Appellant's affidavits contained testimony that respondent Toscano repudiated and breached the January 28, 2009 settlement agreement (as amended on March 30, 2009) on April 10, 2009. The affidavits also contained testimony that appellant notified respondent Toscano in writing on April 10, 2009 that appellant had withdrawn his offer to waive claims for abuse of process committed by respondent Toscano in 2008 because Toscano had repudiated and breached the January 28, 2009 settlement agreement (as amended March 30, 2009) and demanded unilateral material changes to the parties' agreement. Appellant also plainly alleged that he had rejected in writing respondent's altered version of the parties' January 28, 2009 settlement agreement (as amended March 30, 2009). [CT, Vol. II, 209-224; CT, Vol. II, 225; CT, Vol. II, 234].

Since appellant controverted respondent Toscano's central claim that appellant is bound by an effective settlement agreement that obligates appellant to waive his claim for abuse of process committed by respondent Toscano in April 2008, the trial court should have denied respondent Toscano's motion for summary judgment. On summary judgment motion, courts do not decide factual disputes; they simply determine whether there *is* a factual dispute. Holbrook Company v. Adams 542 P.2d 191 (Utah 1975). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Adamson v. Multi Cmty. Diversified Services, Inc. 514 F.3d 1136, 1145 (10th Cir. 2008). And it takes only one sworn, good faith affidavit to create a genuine issue of fact in order to preclude summary judgment. Holbrook Company v. Adams 542 P.2d 191.

2. The Federal Bankruptcy Court Order Approving Settlement of a Debtor's Estate Did Not Bar Count One of the First Cause of Action for Abuse of Process or Any Other Cause of Action Contained in First Amended Complaint Because Respondents Failed to Assert and Explicitly Waived the Affirmative Defenses of *Res Judicata* or *Collateral Estoppel* in the Trial Court

Respondent Toscano filed a unilaterally altered and disputed settlement agreement in support of his first motion for summary judgment. In his first motion for summary judgment, respondent Toscano claimed that the disputed agreement barred appellant's claim against him for abusing Chapter 7 of the United States Bankruptcy Code in 2008. [CT, Vol I, 209]. [Respondent Toscano subsequently alleged in a "consolidated" motion for summary judgment that the bankruptcy court's approval of settlement of the debtor's estate according to the altered agreement barred appellant's new claims alleged against Toscano in the First Amended Complaint for seeking approval of settlement of the estate by committing fraud and submitting an "agreement" obtained by fraud]. Yet respondent Toscano was also adamant before the trial court that he was *not* asserting the affirmative defenses of *res judicata* or *collateral estoppel* and that he *in fact rejected the applicability of these affirmative defenses to his motion for summary judgment*. Respondent Toscano explicitly waived these affirmative defenses as follows during oral argument of his motion for summary judgment:

Paul Guyon (for defendant Toscano): "So, this is not a question of *res judicata*.

It's not a question of *collateral estoppel*, *it's a question that Mr. Billings bargained away, whatever claims he may have had*, and that boat sailed. Those claims are no

longer and for that reason he does not have a right to assert them in this case and that's why we're asking for summary judgment." [RT, 8, Lines 5-11].¹³

Collateral estoppel (and by analogy, *res judicata*) are affirmative defenses that must be raised by the party seeking their benefits in the trial court, or else they are waived. See, e.g., Kern Oil & Ref. Co. v. Tenneco Oil Co., 840 F.2d 730, 35 (9th Cir.), cert. denied, 488 U.S. 948 (1988).[Holding that *collateral estoppel* is an affirmative defense that must be asserted by the party seeking to benefit from it or it is waived]. Hence, respondent Toscano not only waived the affirmative defenses of *res judicata* and *collateral estoppel* by failing to assert them in the trial court, but he explicitly rejected them, urged the trial court to reject them, and he refused to satisfy his burden of proof that he was entitled to assert such affirmative defenses to any cause of action contained in the First Amended Complaint.

Respondent Toscano vigorously elected to disclaim the affirmative defenses of *res judicata* or *collateral estoppel* and to stand emphatically on his Statement of Undisputed Facts. Therefore, the trial court should have simply denied respondents' summary judgment motion on the basis of appellant's controverting affidavits in accordance with Holbrook Company v. Adams, *supra.*, Utah Rule of Civil Procedure 56, and Utah Rule of Civil Procedure 7 (c)(3)(A).

¹³ Appellant, of course, controverted respondent's claim and asserted that Toscano himself had repudiated the parties' only legitimate agreement, and that Toscano had submitted a fraudulent "agreement" in support of summary judgment. [CT, Vol. II, 209-224; CT, Vol. II, 225; CT, Vol. II, 234]. Hence, the parties had stated a well-framed genuine dispute of material facts.

3. The Federal Bankruptcy Court Order Approving Settlement of a Debtor's Estate Did Not In Any Case Satisfy the Requirements of Res Judicata or Collateral Estoppel And Even if Respondents had not Waived these Affirmative Defenses, the Trial Court Should Have Denied Summary Judgment on the Basis of Appellant's Affidavits

The trial court accepted respondents' express waiver of the affirmative defenses of *res judicata* and *collateral estoppel* without comment [RT, 8, Lines 5-11] and accordingly did not analyze the applicability of the affirmative defenses to respondents' summary judgment motion according to governing case law or legal principles of any sort. [CT, Vol. II, 398-402 (order after ruling)]. Hence, the trial court should have denied respondents' summary judgment motion on the basis of appellant's controverting affidavits in accordance with Holbrook Company v. Adams, *supra*. But the trial court erred by failing to follow Holbrook, and it compounded this error by essentially giving respondents the benefit of the affirmative defenses, which the court not only failed to analyze according to governing principles, but respondents themselves had refused to assert and expressly waived. [RT, 8, Lines 5-11].

The court under-analyzed and misanalyzed all of the claims alleged in the First Amended Complaint and the issues before it as follows:

“Plaintiff's claims in the First Amended Complaint can be categorized as either (a) claims that challenge what happened in the bankruptcy court in order to get that court's approval of the settlement agreement, or (b) claims that would be extinguished by the settlement agreement.” [CT, Vol. II, 398-402 (ruling after hearing)].

The ruling contains no analysis of the effect of appellant's controverting affidavits (which denied that appellant had entered into the settlement agreement), the law of summary judgment (e.g. Holbrook Company v. Adams, *supra.*, Utah Rule of Civil Procedure 56, and Utah Rule of Civil Procedure 7 (c)(3)(A).), or the requirements of *res judicata* or *collateral estoppel*. In fact, the ruling ignores all of appellant's citations to leading cases and does not contain a case citation or court rule in support of it. [CT, Vol. II, 398-402 (ruling after hearing)]. Moreover, the trial court also overlooked in its analysis the fact that the bankruptcy court also declared that it had no subject matter jurisdiction over the claims alleged in the state court action and that it also lacked grounds to enjoin them. Hence, in light of all of the bankruptcy court orders, appellant, not respondent, is ultimately entitled to summary judgment of at least count two of the First Cause of Action for Abuse of Process and the Third Cause of Action for Negligence, which arose from respondents' filing of frivolous motions (filed after even the sham settlement agreement was purportedly entered into by the parties) to enjoin the April 30, 2009 state court action and remove it to federal bankruptcy court.¹⁴

¹⁴ Curiously, the trial court declared that it was aware that the bankruptcy court had unequivocally rejected Toscano's motion asserting that the federal court had exclusive subject matter jurisdiction over the state law claims alleged him. And in light of the trial court's own incredulous view of the claims, respondent withdrew them.[RT. 4-5]. Hence, the trial court itself identified grounds in the bankruptcy court's rulings for granting summary judgment for *appellant* on at least count two of the First Amended Complaint for abusing process in light of Toscano's filing of specious motions, which he instantly withdrew in light of the trial court's dim view of them. Of course, Toscano withdrew the claims only after refusing to do so upon appellant's request and forcing appellant to travel from Shanghai, China to Utah to oppose the motions in federal bankruptcy court and the Utah state court at great expense and hardship.[CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II, 378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules]. Nothing in even the sham settlement

The trial court having ignored respondent Toscano's explicit waiver of the affirmative defense of *res judicata* and *collateral estoppel*, should, in any case, have followed Lawlor v. National Screen Service Corporation 349 U.S. 322 (1953) and denied respondents' summary judgment motion. The United States Supreme Court in Lawlor rejected a claim advanced there that is nearly identical to the claim, which the trial court appears to have advanced for respondent Toscano despite his explicit waiver and disclaimer of the affirmative defenses. In Lawler, petitioners brought an antitrust action against National Screen and three motion picture producers. Petitioners alleged in their 1942 action that defendants had conspired to establish a monopoly in the distribution of motion picture advertising inasmuch as the producers entered into exclusive licensing agreements with National Screen to manufacture and lease such material. The federal district court dismissed the 1942 lawsuit with prejudice pursuant to a settlement entered into by the parties before trial and ordered defendant National Screen to enter into proposed advertising licensing agreements with petitioners. However, the court made no findings of fact or conclusions of law concerning petitioners' causes of action or the validity of the licensing agreements envisioned by the parties' settlement agreement. 349 U.S. 322, 327.

In 1949, petitioners brought a subsequent similar action against the same defendants alleging essentially that the settlement of the 1942 suit and that the agreements, which

agreement submitted by respondents waives appellant's claims for these abuses committed by Toscano after the effective date of the alleged settlement agreement. Even the sham settlement agreement refers exclusively to the abuse of process committed by Toscano in filing an improper Chapter 7 petition in 2008 and the debtor's liability for malicious prosecution for filing of a groundless complaint in California.

sprang from the settlement were merely bad faith devices, which defendants simply utilized to perpetuate anti-trust violations. Defendants filed motions to dismiss the subsequent action alleging that the 1942 settlement agreement barred the subsequent action according to the doctrines of *res judicata* and *collateral estoppel*. The district held that some features of the subsequent action were barred under principles of *res judicata*, but others were not barred under principles of *collateral estoppel*. The Supreme Court overruled the district court's finding that *res judicata* barred some causes of action contained in plaintiff's subsequent action and affirmed the district court's ruling that *collateral estoppel* did not bar any cause of action contained in the new complaint.

The Supreme Court concurred with the district court that the principles of *res judicata* bar a second trial on the **same causes of action** that were **adjudicated on the merits** in a prior lawsuit **involving the same parties**. However, the Supreme Court emphasized that a prior judgment is *res judicata* only as to suits involving the **same causes of action**, and the court disagreed that the subsequent lawsuit involved the same causes of action as the initial suit. 349 U.S. 322, 329, 330. The Supreme Court explained further that the settlement agreement entered into by the parties in the initial action did not otherwise *collaterally estoppe* plaintiff from bringing new actions pertaining to the same issues as the initial action because the action was not tried and the district court did not make findings of fact or conclusions of law binding the parties as to any issue, including the legality of the license agreements, which sprang from the settlement. 349 U.S. 322, 326, 327. The court below concluded that "no question of collateral estoppel by the former judgment (settlement) is involved, because the case was never tried, and there was not, therefore,

such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter,” and the Supreme Court affirmed 349 U.S. 323-330.

Under Utah law, res judicata (claim preclusion) does not apply unless three requirements are met: (1) [t]he subsequent action must involve the same parties, their privies, or their assigns as the first action, (2) the claim to be barred must have been brought or have been available in the first action, and (3) the first action must have produced a final judgment on the merits of the claim.” See Brigham Young Univ. v. Tremco Consultants, Inc., 110 P.3d 678 (Utah 2005); Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 733 (Utah 1995), and Macris & Assocs., Inc. v. Neways, Inc., 16 P.3d 1214 (Utah 2000). Collateral Estoppel (issue preclusion) does not apply, unless four elements are satisfied: (1) [t]he party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; (2) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (3) the issue in the first action must have been completely, fully, and fairly litigated; and (4) the first suit must have resulted in a final judgment on the merits. See Brigham Young Univ. v. Tremco Consultants, Inc., *supra*; Salt Lake City v. Silver Fork Pipeline Corp., *supra*, and Macris & Assocs., Inc. v. Neways, Inc. *supra*.

Here, there is no question that approval of settlement of the debtor’s estate did not constitute a judgment on the merits of any cause of action alleged in the First Amended Complaint. Indeed, the bankruptcy court declared its lack of subject matter jurisdiction over this state court action, and the bankruptcy court did not consider any of the claims currently alleged in the First Amended Complaint. [CT, Vol. II, 366 (Affidavit of Disputed

Facts); CT, Vol. II, 378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules]. Moreover, respondent Toscano was not a party in the bankruptcy court proceeding.

Similarly, there is no question that the bankruptcy court did not try or litigate any cause of action involving the same issues as any cause of action alleged in the First Amended Complaint; nor did the bankruptcy court issue any sort of findings of fact or conclusions of law binding the parties as to any issue relevant to any cause of action contained in the First Amended Complaint. Indeed, the bankruptcy court did not even conduct an evidentiary hearing on any issue pertaining to any cause of action contained in the First Amended Complaint. Presumably, this is precisely why respondent Toscano denied that his motion for summary judgment depended in the least upon principles of *res judicata* or *collateral estoppel* and he elected to disclaim these affirmative defenses and stand exclusively on the Statement of Undisputed Facts, which he filed in support of his motion for summary judgment of the original complaint.¹⁵

What's more, the second and third counts of the First Cause of Action for Abuse of Process, the Second Cause of Action for Fraud, and the Third Cause of Action for

¹⁵ Respondent Toscano filed a sham version of the January 28, 2009 settlement agreement (as amended on March 30, 2009) on April 15, 2009 for the court's approval. Appellant immediately filed objections. The court set August 20, 2009 for a hearing on the objections. But inexplicably the court refused to allow appellant to lay a foundation and to introduce documentary evidence (pre-marked and lodged with the court clerk) to demonstrate that respondent Toscano had repudiated and breached the January 28, 2009 settlement agreement (as amended March 30, 2009) and had submitted a sham document containing unilateral changes to the January 28, 2009 settlement agreement (as amended March 30, 2009) on April 15, 2009. [CT, Vol. II, 366 (Affidavit of Disputed Facts); CT, Vol. II, 378, Request for Judicial Notice of the United States Bankruptcy Code and the Debtor's Chapter 7 Petition and Schedules]

Negligence are each predicated upon misconduct committed by defendant Toscano after March 30, 2009 (the effective date of the alleged settlement agreement). Respondent Toscano failed to file a Statement of Undisputed Facts in support of his second motion for summary adjudication of the foregoing causes of action. But Toscano nevertheless appears to claim that the sham version of the January 28, 2009 settlement agreement (as amended March 30, 2009), which respondent submitted to the bankruptcy court on April 15, 2009 and filed in support of summary judgment of the original complaint, waives claims for acts committed by Toscano after the effective date of the alleged agreement (March 30, 2009) *and for any acts that he might still commit in the future*. But not even the sham settlement agreement, which defendant filed in the bankruptcy court on April 15, 2009 contains such an incredible provision. And Toscano did not even attempt to support this claim with a Statement of Undisputed Facts. Respondent simply asked the trial court to abandon even a semblance of due process of law and to dismiss the entire First Amended Complaint for post March 30, 2009 misconduct on a summary judgment motion without supporting evidence of any kind (much less undisputed evidence).

The trial court indeed violated due process of law when it acquiesced and granted summary judgment of claims, which appellant has never had an opportunity to fairly and fully litigate before any tribunal. The trial court should not have given res judicata and collateral estoppel effect to the bankruptcy court order settling the debtor's estate because respondent explicitly disclaimed these affirmative defenses and the order in any case did not satisfy the requirements of these special defenses. Therefore, the trial court should

have denied respondents' motion for summary judgment on the basis of appellant's controverting affidavits.

4. Respondents Failed to File a Statement of Undisputed Facts in Support of Summary Adjudication of Counts Two and Three of the First Cause of Action for Abuse of Process, the Second Cause of Action for Fraud, and the Third Cause of Action for Negligence Contained in the First Amended Complaint.

Appellant has demonstrated that respondents failed to file a Statement of Undisputed Facts in the trial court in support of their second "consolidated" motion for summary judgment of the First Amended Complaint. In response to appellant's First Amended Complaint, respondent Toscano simply filed a novel motion on September 17, 2009 to "consolidate the claims made in the amended complaint with those in plaintiff's original complaint" [CT, Vol. II, 303]. In light of respondents' foregoing failure, appellant objected in writing to the court's consideration of Toscano's second motion for summary judgment of the First Amended Complaint. [CT, Vol. II 347, 349, n.2].

Appellant has also demonstrated that the First Amended Complaint contained two new and entirely distinct counts of abuse of process (counts two and three of the first cause of action) and additional causes of action for fraud (second cause of action) and for negligence (third cause of action). The First Amended Complaint also alleged facts entirely new, separate, and distinct from the facts alleged in support of the original complaint for a single count of abuse of process. And each new cause of action alleged misconduct committed by respondent after the alleged effective date of the sham settlement agreement, which respondent filed in support of his motion for summary judgment of the original complaint [CT, Vol. II, 246-261]. Respondents, nevertheless,

simply moved the court to consider its original summary judgment motion as a motion for summary judgment of the entire First Amended Complaint [CT, Vol. II, 303-346]. Accordingly, respondents failed to file a Statement of Undisputed Facts in Support of summary adjudication of counts two and three of the First Cause of Action for Abuse of Process, the Second Cause of Action for Fraud, or the Third Cause of Action for Negligence contained in the First Amended Complaint [CT, Vol. II, 246; Vol. II, 303-346].

Utah Rule of Civil Procedure Section 7 (c)(3)(A) provides as follows:

A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party. Utah Rule of Civil Procedure Section 7 (c)(3)(A).

Moreover, on motion for summary judgment, the moving party "bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." Whitesel v. Sengenberger, 222 F.3d 861, 867 (10th Cir. 2000). Respondent Toscano failed to even attempt to satisfy this initial burden with respect to counts two and three of the First Cause of Action for Abuse of Process, the Second Cause of Action for Fraud, and the Third Cause of Action for Negligence. Therefore, the trial court should have denied Toscano's motion for summary adjudication of these claims in light of his failure to satisfy the prima facie and procedural requirements

of Utah Rule of Civil Procedure Section 7 (c)(3)(A) and Whitesel v. Sengenberger, 222 F.3d 861.¹⁶

5. The Trial Court Should Have Denied Respondents' Motion for Summary Judgment of the First Amended Complaint Because Appellant Filed Sufficient Affidavits to Establish a Genuine Factual Dispute Concerning Claims that Toscano Asserted a Settlement Agreement Obtained by Fraud in Support of Summary Judgment

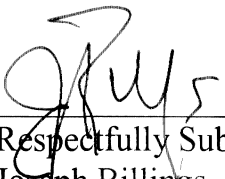
The trial court overlooked that count three of the First Cause of Action for Abuse of Process and the Second Cause of Action for Fraud allege that the bankruptcy court order (settling the debtor's estate) was *itself* obtained through respondents' fraud and malfeasance. These claims seek compensatory and punitive damages against respondents for (1) obtaining the order itself through malfeasance and (2) committing fraud against appellant by repudiating the parties' legitimate settlement agreement after appellant dismissed his claims against the debtor for punitive damages with prejudice. These claims have never been considered by any court. Accordingly, they would not be subject to dismissal pursuant to *res judicata* or *collateral estoppel*, even if respondents had actually asserted (instead of disclaiming) these affirmative defenses in the district court.

Appellant filed a detailed affidavit outlining the continuing fraud committed by respondent Toscano. [CT, Vol. II, 366]. Therefore, the trial court should have denied Toscano's motion for summary judgment inasmuch as it was predicated upon a fraudulent settlement agreement. Reliable Furniture Company v. Fidelity & Guarantee Insurance Underwriters 398 P.2d 685 (Utah 1965).

¹⁶ Appellant nevertheless filed exhaustive affidavits, which established genuine disputed facts as to each claim alleged in the First Amended Complaint. [CT, Vol. II, 209-224; CT, Vol. II, 225; CT, Vol. II, 234].

VII CONCLUSION

In light of the foregoing, appellant respectfully requests that the court reverse the trial court's order entering summary judgment of the First Amended Complaint on February 24, 2010. Appellant also respectfully requests that the court award costs of appeal.


Respectfully Submitted,
Joseph Billings
Appellant, In Pro Per

ADDENDUM

FILED DISTRICT COURT
Third Judicial District

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

OCT 7 2009

SALT LAKE COUNTY

Deputy Clerk

JOSEPH BILLINGS,

Plaintiff,

v.

PAUL TOSCANO, et al.,

Defendants.

RULING

Case No. 090907164

Judge Denise P. Lindberg

Date: October 27, 2009

This matter is before the Court on Defendants' Motions to Dismiss and Motion to Consolidate and for Summary Judgment and for Fees and Costs.¹ Having fully considered the Motions:

(1) Defendants' Motion to Dismiss is DENIED and

(2) Defendants' Motion for Summary Judgment is GRANTED in that claims are DISMISSED, but dismissal is WITHOUT PREJUDICE in the event Plaintiff prevails in his appeal to the U.S. District Court of Judge Boulden's August 29th Order.

1. Defendants' Motion to Dismiss for Lack of Jurisdiction and Improper Service

Defendants argued their Motion to Dismiss at the hearing on September 1, 2009. At the hearing, the Court indicated that the Motion to Dismiss lacked merit. The Court remains convinced that Motion to Dismiss should be denied. First, regardless of defects in the first service of process, it appears that Defendants have now been properly served. Second, the Court concludes, and Defendants concede, that this Court has subject matter jurisdiction over the action.²

¹ Defendants' original Motion for Summary Judgment discussed how the claims raised in the Complaint were extinguished by a settlement and order in Bankruptcy Court. Plaintiff has now filed a First Amended Complaint and Defendants responded with the present Motion for Summary Judgment. Because Defendants have reasserted the arguments from the first Motion that remain applicable to the First Amended Complaint, the second Motion for Summary Judgment supercedes the first and the Court will only address the second Motion.

²In any event, Mr. Toscano appeared in Court and filed motions seeking substantive relief. Therefore, the Court concludes that Mr. Toscano has submitted himself to the jurisdiction of this Court.

2. *Defendants' Motion for Summary Judgment*

In his First Amended Complaint,³ Plaintiff raises three claims for abuse of process, a claim for fraud, and a claim for negligence.

Defendants assert that Plaintiff's claims were extinguished by Judge Boulden's August 20, 2009 Order in Bankruptcy Court which accepted the parties' settlement agreement. The settlement agreement stated that "the Parties hereby mutually release each other from any and all claims, debts, obligations, actions, demands, . . . , including any actions for abuse of process or malicious prosecution, whether grounded in law or equity, whether known or unknown" Order Approving Settlement among Debtor Antoinette Billings, Debtor's Counsel, Joseph M. Billings, John H. Billings, and Chapter 7 Trustee Elizabeth R. Loveridge, Exhibit 1 at ¶ 4. Plaintiff asserts that he did not agree to the settlement which was approved by the Bankruptcy Court. Instead, he says that Defendants fraudulently presented the settlement to Judge Boulden. At the hearing on September 1, 2009, Plaintiff represented that he had attempted to raise the fraud issue to Judge Boulden, but was unsuccessful. Also on September 1, Plaintiff filed a notice of appeal challenging Judge Boulden's Order. Notably, Plaintiff did not request that either Judge Boulden or the U.S. District Court stay the effect of the Order pending appeal.

Plaintiff's claims in the First Amended Complaint can be categorized as either (a) claims that challenge what happened before the Bankruptcy Court in order to get that Court's approval of the settlement agreement, or (b) claims that would be extinguished by the settlement agreement.

³ The First Amended Complaint is properly before the Court because, although Defendants had filed motions for summary judgment and dismissal, the Court had not ruled on those motions when the First Amended Complaint was filed. Additionally, Defendants had not yet filed their responsive pleading. See Utah of Civil Procedure 15(a).

As the Court intimated at the September 1, 2009 hearing, Plaintiff cannot collaterally attack in this Court the Bankruptcy Court's decision to approve the settlement. Plaintiff's relief from that Order, if any, must come from the Bankruptcy Court or from the reviewing District Court.⁴ This Court must accept the Bankruptcy Court's ruling that the settlement is acceptable; it will not consider argument regarding the enforceability of a settlement agreement that another Court has ratified. Therefore, all of Plaintiff's claims that challenge the court-approved settlement itself must be dismissed. Those issues are reserved solely to the Bankruptcy Court or the District Court on appeal.

Moreover, as long as Judge Boulden's August 20, 2009 Order stands, it is also not appropriate for this Court to consider those claims by Plaintiff that are/were extinguished by the terms of the settlement agreement. Those claims must also be dismissed.

However, because there is an appeal pending of Judge Boulden's August 29, 2009 Order, the dismissal of the claims is granted without prejudice to Plaintiff in the event he prevails on his appeal to the District Court on those issues.

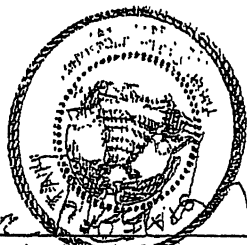

Finally, Defendants have provided no authority to support their claim of entitlement to attorney's fees and costs. Their request is denied.

⁴U.S. District Court No. 09-828 (Campbell, J.)

ORDER

- (1) Defendants' Motion to Dismiss is DENIED.
- (2) Defendants' Motion for Summary Judgment is GRANTED, and Plaintiff's claims are DISMISSED. However, because the matter is under appeal, DISMISSAL IS WITHOUT PREJUDICE in the event Plaintiff prevails on appeal to District Court of Judge Boulden's August 29, 2009 Order.
- (3) Defendants' request for fees and costs is DENIED.

DATED this 27 day of October, 2009.



Judge Denise P. Lindberg
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090907164 by the method and on the date specified.

MAIL: JOSEPH BILLINGS 1213 West Nanjing Rd Bldg 84, Apt 405
Shanghai, ~~GA~~ 200040 *Online*

MAIL: PETER W GUYON 614 NEWHOUSE BLDG 10 EXCHANGE PLACE SALT LAKE
CITY UT 84111

Date: 10/27/09

DLB

Deputy Court Clerk

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

JOSEPH BILLINGS,	:	Case No. 090907164
	:	
Plaintiff,	:	Appellate Case No. 20091000
	:	
v	:	
	:	
PAUL TOSCANO, PC., et al.,	:	
	:	
Defendants.	:	With Keyword Index

MOTION HEARING SEPTEMBER 9, 2009

BEFORE

THE HONORABLE DENISE P. LINDBERG

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

APPEARANCES

For the Plaintiff:

PRO SE

For the Defendant:

PETER W. GUYON
Attorney at Law

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SALT LAKE CITY, UTAH; SEPTEMBER 1, 2009

JUDGE DENISE LINDBERG

(Transcriber's note: speaker identification
may not be accurate with audio recordings.)

P R O C E E D I N G S

THE COURT: We're on the record on Case No.
090907164, Joseph Billings vs. Paul James Toscano and Paul
Toscano P.C. If I could have parties and counsel state your
appearances.

MR. GUYON: Thank you, Judge. Shall I argue my
motion?

THE COURT: Well, first state your appearance
please.

MR. GUYON: Oh, okay, I'm sorry. Peter Guyon
representing Mr. Toscano and Paul Toscano, a professional
corporation.

THE COURT: Thank you.
And you are Mr. Billings?

MR. BILLINGS: Yes, good morning Your Honor, Joseph
Billings, plaintiff.

THE COURT: All right, thank you. All right, Mr.
Toscano is also present.

All right. We have several motions, the latest of
which was filed as a request for an expedited - well, let me
go back. We first had the issues about whether

1 or not the present motion should be dismissed for lack of
2 personal jurisdiction and I have subject matter jurisdiction
3 and then most recently then there was a memo and motion filed
4 for an expedited hearing on the Motion for Summary Judgment,
5 the response to which I only received this morning from Mr.
6 Billings but I have reviewed it. I don't know when you
7 received that response?

8 MR. GUYON: I just received it about 10 minutes
9 ago, Judge.

10 THE COURT: Do you need additional time to -

11 MR. GUYON: No, I'd be happy to argue the summary
12 judgment motion. I'm prepared to do so.

13 THE COURT: All right. These are your motions, so
14 you can proceed to the podium.

15 MR. GUYON: Thank you, Judge. I'd like to, if I
16 may with leave of the Court, I'd like to discuss the issue of
17 jurisdiction, personal jurisdiction first and there's a
18 number of facts which I believe are undisputed. On April 30,
19 2009 a gentleman appeared at Mr. Toscano's office and
20 attempted apparently to serve him -

21 THE COURT: Let me shorten this whole discussion
22 because I've looked at that and whether or not the first
23 service was deficient which it appears it might have been,
24 the second service which was made, although I have a second
25 affidavit from Mr. Toscano, I also have an affidavit from the

1 constable that is entitled to a strong presumption of
2 regularity and clearly states that Mr. Toscano was served
3 personally with not only the complaint but the summons as
4 well. So, this is not obviously an evidentiary hearing but
5 that's, you know, that presumption of regularity that
6 attaches to the constable's return of service is something
7 that I want to address there. I don't think we need to worry
8 about the first service.

9 MR. GUYON: Okay. And thank you for the
10 opportunity to respond to that. In the first place, I have
11 not been served with a copy of the affidavit of the constable
12 which I believe is Mr. Billings responsibility to serve upon
13 me, so I have not seen that.

14 THE COURT: Oh, I did not realize that you hadn't
15 seen that.

16 MR. GUYON: Right. So, from our standpoint, that
17 is not before the Court because it wasn't served on opposing
18 counsel which Mr. Billings is obliged to do if he intends to
19 utilize that in connection with his arguments.

20 THE COURT: It was filed by the process server in
21 this matter.

22 MR. GUYON: Right, but certainly Mr. Billings would
23 have control of his process server and should have served it
24 on me, but did not. And I don't believe that there's any
25 kind of a certificate of service showing service upon me.

1 THE COURT: Let me see.

2 MR. GUYON: So I don't think that's properly before
3 the Court.

4 THE COURT: Okay. Yeah, I do not see a certificate
5 of service attached to these documents. All I have is the
6 file date of June 1 in my court's file.

7 MR. GUYON: I'd be happy to move onto the Motion
8 for Summary Judgment if that's agreeable with the Court.

9 THE COURT: Go ahead.

10 MR. GUYON: Judge, you'll notice in our summary
11 judgment motion we have filed an order from the United States
12 Bankruptcy Court -

13 THE COURT: I'm sorry, before we leave the issue of
14 service and your initial Motion to Dismiss, you also had an
15 argument that was not terribly persuasive but I'm assuming
16 you've abandoned about subject matter jurisdiction.

17 MR. GUYON: Right. I think it probably would be
18 best to withdraw that because the United States Bankruptcy
19 Judge wouldn't rule on the issue and -

20 THE COURT: Well, she did more than not rule on it.
21 She did rule that she didn't have jurisdiction.

22 MR. GUYON: She took the position contrary to mine.
23 So I'll withdraw that motion.

24 THE COURT: Yeah, which (inaudible), yeah. Okay
25 cancels yours.

1 MR. GUYON: I have no problem withdrawing that,
2 withdrawing that motion -

3 THE COURT: Okay.

4 MR. GUYON: - at the present time.

5 THE COURT: It would have been denied anyway on
6 that basis but that's all right.

7 MR. GUYON: I understand and I don't want to take
8 up the Court's time just for -

9 THE COURT: I just want to make sure we've dotted
10 the 'i's and crossed the 't's.

11 MR. GUYON: Right. Now, should I proceed on the
12 Motion for Summer Judgment?

13 THE COURT: You may, I'm sorry.

14 MR. GUYON: Now, the reason, the reason this was
15 brought and the reason it was done when it was done is that
16 we didn't know these facts until the Bankruptcy Court had
17 ruled on August 20 and you'll notice all my pleadings were
18 filed on August 21st. So that was the first opportunity I
19 had to bring this to the Court's attention that on the
20 merits, the complaint, there is no claim because Mr. Billings
21 agreed that there was no claim and that was decided by the
22 U.S. Bankruptcy Court and I have a certified copy of the
23 amended order if I could, if the Court would like that. I
24 didn't have time to file a certified order with the motion,
25 but I have one. If I could approach I'd give it to the

1 Court. Thank you.

2 THE COURT: Have you premarked it?

3 MR. GUYON: Pardon me?

4 THE COURT: Have you premarked it?

5 MR. GUYON: Oh, I didn't mark it.

6 THE COURT: And this includes the attachment of the

7 Settlement Agreement that Judge Boulden had attached to her -

8 in her draft order I thought she had indicated she was

9 incorporating by reference the agreement of the parties.

10 MR. GUYON: Right.

11 THE COURT: Yes, it's here.

12 MR. GUYON: And the agreement itself as I have

13 pointed out in the Motion for Summary Judgment is very very

14 specific about the claims that - excuse me, I should have

15 marked this and I didn't - in my memorandum in support of

16 summary judgment I've drawn the Court's attention to a couple

17 of items of language from the -

18 THE COURT: What page are you at?

19 MR. GUYON: - that are pertinent to this motion.

20 One is that Mr. Billings -

21 THE COURT: I'm sorry. What page are you on?

22 MR. GUYON: I'm on Page 2 of my memorandum in

23 support of defendant's motion for summary judgment.

24 THE COURT: Okay.

25 MR. GUYON: At Paragraph 3, that is that Mr.

1 Billings, pro se, was clearly a party to that agreement and
2 "that the parties release each other against the others and
3 any and all claims and causes of action extend among them"
4 and this specifically says "including claims and causes of
5 action for malicious prosecution and abuse of process against
6 the debtor and debtor's counsel." And that's the second
7 paragraph.

8 And I'd also point out to the Court that right
9 under that, "for good and valuable consideration, (inaudible)
10 sufficiency which are acknowledged, including the exchange of
11 mutual releases and all claims and causes of action including
12 claims and causes of action for malicious prosecution and
13 abuse of process against the debtor and debtor's counsel."

14 And then the agreement says as I pointed out on
15 Page 2, "This agreement is subject to approval by the United
16 States Bankruptcy Court for the District of Utah" and then
17 the last paragraph on that page clearly states, "effective
18 upon the performance of the obligations in Paragraphs 2 and 3
19 above, the parties hereby mutually release each other." I
20 won't read all of that but down near the middle it says
21 "including any action, (cough) excuse me, for abuse of
22 process or malicious prosecution." And I'd simply point out
23 to the Court that the complaint on file here is styled as one
24 against Mr. Toscano and his corporation for abuse of process.

25 So my argument is that those claims and causes of

1 action that Mr. Billings asserts in the complaint in this
2 case were clearly and unequivocally given away, resolved,
3 settled by him in the Bankruptcy Court and the Bankruptcy
4 Court confirmed that which is evidenced by the certified
5 order that I've given you. So, this is not a question of res
6 judicata. It's not a question of collateral estoppel, it's a
7 question that Mr. Billings bargained away, whatever claims he
8 may have had and that boat sailed, those claims are no longer
9 and for that reason, he does not have a right to assert them
10 in this case and that's why we're asking for summary
11 judgment.

12 Does the Court have any questions of me?

13 THE COURT: No.

14 MR. GUYON: Thank you.

15 THE COURT: Mr. Billings.

16 MR. BILLINGS: Thank you, Your Honor. I guess with
17 respect to the jurisdiction issues, it seems to me that even
18 putting aside the constable's affidavit, that the appearance
19 and the motions brought by counsel today pretty much make all
20 that moot. In other words, he submitted to the jurisdiction,
21 so therefore, that question is decided. I've actually never
22 seen the affidavit other than an email copy. So I was under
23 no obligation to serve it to him. I never even had the
24 document. It's evidence that he was served and as the Court
25 properly notes, it's entitled to a presumption of

1 correctness. So I don't think there's any question in the
2 first place that Mr. Toscano was properly served.

3 But in any case, even despite the overwhelming
4 evidence that he was properly served, here he is and now
5 they're moving the Court for affirmative relief. So the two
6 positions are absolutely inconsistent. So I think the Court
7 is obliged at this point to simply acknowledge that there's
8 proper service and the Court has personal jurisdiction over
9 the defendant.

10 As far as the summary judgment motion goes, if the
11 Court is at all inclined to even consider that motion or to
12 grant that motion now, I would request a continuance -

13 THE COURT: Why?

14 MR. BILLINGS: Well, it seems -

15 THE COURT: You've taken the time to respond -

16 MR. BILLINGS: Yes, yes.

17 THE COURT: You've had the opportunity to respond.
18 So I'm not seeing how you would be - how your - the basis for
19 why you would need a continuance.

20 MR. BILLINGS: The basis would be so I could clean
21 it up. I mean, I've had almost no notice of this, email
22 notice and it wasn't even properly served. I mean, I'm
23 willing to go ahead and proceed here and make certain
24 arguments but what I haven't had an opportunity to do is get
25 certified records that would further support my position. In

1 other words, to make my position completely controlling it
2 seems to me, a certified transcript of the Court's proceeding
3 in the Bankruptcy Court would pretty much decide it.

4 THE COURT: Well, the proceedings are irrelevant
5 with - I mean, the order, the signed order by the court is
6 what controls, not what may have been said in the
7 proceedings. It's the order that the court adopts as its
8 final expression of judgment and order.

9 MR. BILLINGS: That's why this is clearly a case of
10 either - I mean, I think defense counsel misunderstands the
11 issues here. If that's the Court's position, if that
12 defendant's position, then it clearly is a case of either it
13 has to be either a case of res judicata or collateral
14 estoppel. You don't just have an agreement that appears out
15 of nowhere and it is offered to the court as a judgment. A
16 Settlement Agreement, in order for that Settlement Agreement
17 to - well, let's put it this way then, if the Court is taking
18 the position that the -

19 THE COURT: Why isn't an order adopted pursuant to
20 a Settlement Agreement, negotiated by the parties and adopted
21 as an order of the Court, not - which it clearly has been
22 here by Judge Boulden, why is that not an adjudication on the
23 merits that is conclusive?

24 MR. BILLINGS: Now, there's a lot of confusion
25 here. You've got two things going here that are confused.

1 If you're going to proceed as if the order in the Bankruptcy
2 Court is irrelevant -

3 THE COURT: Not, they're not saying it's
4 irrelevant.

5 MR. BILLINGS: You did.

6 THE COURT: They're submitting to it.

7 MR. BILLINGS: You did. If you said the Bankruptcy
8 Court -

9 THE COURT: No, no, what I said is the discussion
10 of what may have been said as part of a transcript is not the
11 ultimate determinant of what this Court gives weight to.
12 What this Court gives weight to is what the judgment of the
13 other court is as reflected in a judgment and order signed by
14 the judge.

15 MR. BILLINGS: In that case -

16 THE COURT: That's what is binding on this Court,
17 not what may have been said that would require a transcript
18 to be submitted to this Court. That was what I was intending
19 to - not that the proceedings were irrelevant, that whatever
20 discussions may have occurred in the course of whatever
21 hearing, if any, was held before Judge Boulden, is not
22 controlling. It's the order that's controlling.

23 MR. BILLINGS: All right. Well, it does look to me
24 that you're looking at this then as a matter of res judicata.
25 In order for that judgment, settlement to have a res judicata

1 affect in this Court, it's extremely important what the Court
2 did there. In other words, for it to have res judicata
3 affect, it has to be a judgment on the same cause of action
4 against the same parties as in this case. Clearly -

5 THE COURT: Not all. It must include the parties
6 to this proceeding. It does not have to mean that it also
7 applies to the other parties in the other proceeding.

8 MR. BILLINGS: I'm not sure I understand that
9 point. What matters is -

10 THE COURT: The issue here is I have you and I have
11 Mr. Toscano and Mr. Toscano's professional corporation.

12 MR. BILLINGS: Right.

13 THE COURT: Okay. All three individuals or
14 entities, okay, the two individuals and the entity were all
15 present and parties to the Settlement Agreement and to the
16 litigation in the federal court, in the Bankruptcy Court.

17 MR. BILLINGS: I'm really not - nothing of this at
18 this point really turns on the parties. What really matters
19 because the Courts actually have relaxed a little bit, it
20 seems to me, the requirement that it be the same parties. I
21 mean it is true that the defendant, Toscano, was not a party
22 to those proceedings.

23 THE COURT: But you -

24 MR. BILLINGS: But that's not the real issue.

25 THE COURT: Yeah, you agreed to include actions in

1 the settlement that -

2 MR. BILLINGS: We have to put that aside for a
3 moment.

4 THE COURT: Why?

5 MR. BILLINGS: Because first we have to decide
6 whether we have a judgment that's entitled to res judicata
7 (inaudible). That's the first issue. And that issue has to
8 be decided on the following basis, a judgment is not entitled
9 to res judicata effect unless it is a judgment on the merits
10 of the same cause of actions brought in that court as the
11 same cause of action brought in this court and that's clearly
12 not the case. We had absolutely no judgment on any question
13 of the merits of the abuse of process claims, named in Count
14 1 of the First Amended Complaint. So res judicata clearly
15 does not apply. It doesn't turn on the presence of the
16 parties. It turns on the fact that there was no judgment in
17 the Federal District Court on the merits of the abuse of
18 process claims brought in this court, (cough) excuse me, on
19 the first count of abuse of process. That's out, clearly.

20 Now, the only real question -

21 THE COURT: Okay. I'm not sure I'm -

22 MR. BILLINGS: The only real question here and it's
23 not a real question either, is whether collateral estoppel
24 applies. Now collateral estoppel is different than res
25 judicata, as you know.

1 THE COURT: Should have or could have been.

2 MR. BILLINGS: No, the issue there on collateral
3 estoppel would be is whether the court made any findings on
4 some other cause of action that somehow binded the parties on
5 an issue that some cause of action in this court depends
6 upon. That's how collateral estoppel works. That also
7 clearly did not happen. In fact, the Court was emphatic that
8 it did not have subject matter jurisdiction over the case.
9 It was emphatic that it was not going to enjoin this action
10 and simply approved the debtor's disposition of her estate.
11 But the court clearly made absolutely no findings about any
12 issue that pertains to the First Amended Complaint - sorry,
13 to the First Count, Count 1 of Abuse of Process of the First
14 Amended Complaint. So even collateral estoppel does not
15 apply. There as no hearing on that issue.

16 Now, as far as - so it seems to me there's
17 absolutely not res judicata effect to that judgment. I'm not
18 collaterally estopped from proceeding in this court and just
19 as a simply matter of summary judgment, I have clearly stated
20 in affidavits before the court under penalty of perjury that
21 the document that Defendant Toscano and his counsel are
22 presenting to this Court, is an absolute fraud and I can
23 prove it. I wouldn't have come here from Shanghai, China if
24 this was just some sort of personality conflict with
25 defendants. Defendant Toscano has abused process in an

1 extremely serious way. He got nervous about what he did in
2 the Federal Bankruptcy Court and so he became very reckless
3 in how he attempted to resolve it.

4 I drafted the Settlement Agreement that was
5 ultimately patched together and changed by Defendant Toscano
6 when he presented it to the Bankruptcy Court and to this
7 Court and I'm telling the Court again and I'll swear under
8 penalty of perjury again, that Settlement Agreement is a
9 fraud. I've never agreed - it's not true that I never agreed
10 but I certainly advised him in light of his breaches of
11 contract, in light of his unilateral changes that he made to
12 the agreement, that I was no longer willing to waive any
13 claims against him for anything.

14 So as a matter of summary judgment, the mere fact
15 that I've contradicted and controverted the only issue that
16 he's raising here, i.e. that he's entitled to some sort of
17 waiver of the claims, is clearly contradicted. So the Court
18 is precluded from granting any sort of summary judgment on
19 that issue. To make it very clear, (sneeze) excuse me, the
20 document which counsel just submitted to the Court is a
21 fraud.

22 THE COURT: It is a document that was signed,
23 presumably signed by you.

24 MR. BILLINGS: No, I didn't sign it. That's should
25 be a clear sign, a very clear sign of what's going on here.

1 You'll never find my signature on any of those documents. He
2 changed that document in very serious ways, very important
3 ways. It completely undermined the value of the settlement
4 and now he's submitted it to you and he also submitted it in
5 the same form to the Bankruptcy Court. It's a fraud and I
6 can prove it.

7 THE COURT: Why are you here instead of before
8 Judge Boulden?

9 MR. BILLINGS: Well, I was in front of Judge
10 Boulden as well but Judge Boulden - it's hard to figure out
11 exactly - if we want to get into the mind of the tribunal
12 it's a little bit difficult to say but -

13 THE COURT: Wait. It seems to me that as a first
14 matter, that's an issue - if you are asserting under penalty
15 of perjury that there's been a fraud upon the court -

16 MR. BILLINGS: Yes.

17 THE COURT: - then we start with a fraud upon Judge
18 Boulden's Court.

19 MR. BILLINGS: We sure do and I can prove that and
20 that's part of one of my causes of action in the - I believe
21 it's my third cause of action - second cause of action of the
22 First Amended Complaint. The fact of the matter is, as far
23 as I can tell, Judge Boulden wanted to simply wash her hands
24 of these abuse of process claims and what she really wanted
25 to do was just get the debtor's estate settled. But we did

1 not - she did not take evidence on the issue of fraud. She
2 did not take evidence on the issue and she refused any sort
3 of evidence on this issue, on the question of whether or not
4 the terms of conditions that Defendant Toscano included in
5 that Settlement Agreement were accurate. So that matter
6 cannot be res judicata. In other words, I've never had -
7 that's the key here, I have never had a day in court -

8 THE COURT: Well, the document that I have in front
9 of me, a certified copy of the court's order and judgment
10 includes as an attachment that it incorporates by reference,
11 an agreement that while it doesn't carry your physical
12 signature, it carries a notation that indicates a signature.

13 MR. BILLINGS: I refuted - I'm not sure what you're
14 referring to there. I haven't seen this document. The key
15 issue is that issue was never decided in the - that's why
16 it's not collateral estoppel.

17 THE COURT: You and I may have some disagreements
18 on how you and I read that matter but -

19 MR. BILLINGS: May I approach?

20 THE COURT: You may. Now, I don't know what the
21 original document carries. All I know is that that is a
22 notation that signifies that an original signature has been
23 secured at some point.

24 MR. BILLINGS: It never was. Here's what was
25 secured at one point is that on January 28 I wrote an email

1 authorization to approval of a January 28th Settlement
2 Agreement. The agreement that you have before you is
3 Defendant Toscano's cut and pasted, fraudulently created
4 version of the agreement that I sent to him on January 28th
5 and agreed to be bound by according to those terms and
6 conditions. That's why you don't see my signature on there.
7 He changed in very material ways, that Settlement Agreement
8 and then presented it to the court without my signature.
9 None of that was litigated in Federal Bankruptcy Court.

10 And in any case, even it had been litigated there,
11 here's really a key, even if it had been litigated there for
12 purposes of summary judgment motion, any settlement that was
13 obtained pursuant to fraud, in other words, if you want to
14 disagree with me about the fact that this does not qualify as
15 collateral estoppel, you would still have to agree with me,
16 it seems to me, that the case law is very clear that any
17 settlement obtained through fraud is ineffective and that is
18 the allegation that I'm making here which would also defeat
19 summary judgment.

20 So not only does this case not satisfy res
21 judicata, not satisfy any of the requirements of collateral
22 estoppel, it also is based entirely upon a fraudulently
23 obtained Settlement Agreement that I never signed. I've
24 never had a day in court on this. Mr. Toscano has committed
25 very serious offenses -

1 THE COURT: Have you filed an appeal of Judge
2 Boulden -

3 MR. BILLINGS: I'm trying to - if necessary I'm
4 going to. We just had the hearing the other day, the 20th.

5 THE COURT: Ten days ago.

6 MR. BILLINGS: Yes, so there's still time to
7 appeal. I frankly don't even think it's necessary to appeal
8 and I'm trying to work this thing out, nobody is quite
9 reasonable over here on defense table. If I can work this
10 out without the appeal, that would be great. Frankly, I
11 don't think I even have to appeal it but just to be safe and
12 to be sure, perhaps I will. I am inclined to do it just to
13 be safe but as I say, even if I don't appeal, it wouldn't
14 matter because res judicata and collateral estoppel don't
15 apply even if it was a valid judgment. The issue here isn't
16 whether it was a valid judgment in the court, the issue in
17 the Federal Bankruptcy Court, the issue here is whether it's
18 entitled to res judicata or collateral estoppel effect in
19 this court. That's the issue.

20 THE COURT: Okay. I'll hear from Mr. Guyon.

21 MR. GUYON: Judge, all of these arguments that Mr.
22 Billings has brought before you today, were argued before the
23 Bankruptcy Court on August 20th. All these allegations of
24 fraud, all these allegations of "I didn't sign the
25 agreement," all of these allegations of every kind were

1 brought up on August 20 and disposed of as the Court can see
2 in the form of this order that the judge signed and the judge
3 prepared, I might add.

4 Now, as we sit here today, I mean, this is really a
5 novel approach to things and Mr. Billings really is arguing
6 even if, even if the judge over in the Bankruptcy Court says,
7 rejected all my arguments of fraud on the court and fraud by
8 Mr. Toscano and fraud by everybody else and she didn't buy
9 those and she's going to enforce this agreement on me which I
10 entered into verbally in April of this year - and let me add
11 that. There was a hearing before the Bankruptcy Court in
12 April at which Mr. Billings and his brother attended and all
13 the parties to that agreement and they verbally agreed to
14 this, even though they hadn't signed it and even though they
15 had filed all kinds of objections or whatever it was they
16 filed and all that was taken into account by Judge Boulden on
17 August 20. So that's kind of a fate'acompli. I don't think
18 Mr. Billings gets to enter into an enforceable agreement in
19 the Bankruptcy Court and then come to this Court and say
20 well, that didn't mean anything because of some wild
21 allegations of fraud which he's already brought up there.

22 So anyway, so here we are today and -

23 THE COURT: So your representation to me is that
24 the arguments that Mr. Billings is making here today were
25 presented to Judge Boulden.

1 MR. GUYON: Absolutely -

2 MR. BILLINGS: I would appreciate it if you would
3 take him under oath.

4 MR. GUYON: - they were.

5 MR. BILLINGS: Would the Court please swear -

6 THE COURT: I'm not going to swear an attorney who
7 is appearing here as an advocate. I'm sorry, Mr. Billings,
8 that is not an appropriate position to put an attorney in as
9 a fact witness in the proceedings.

10 MR. BILLINGS: He's offering evidence. That's all
11 I'm saying -

12 THE COURT: He is making a representation as an
13 officer of the court and I am accepting a representation of
14 an officer of the court.

15 MR. GUYON: Well, the bottom line is I think for
16 our purposes, Judge, is that we've stated and showed the
17 Court that all these claims were agreed by Mr. Billings, that
18 they disappeared. There are no such claims and because there
19 are no such claims, the claim that he's trying to bring in
20 this Court has disappeared also, as a matter of law. So
21 regardless of whether the Court uses the issue of res
22 judicata or collateral estoppel, or summary judgment, Rule 56
23 requires Mr. Billings to, by sworn affidavit, create a
24 question of material fact, not just a question of fact but it
25 has to be a material fact and I'd simply point out to the

1 Court that all of the material facts are uncontroverted and
2 that is that Mr. Billings was bound by the agreement and that
3 it was - became part of the order in the Bankruptcy Court and
4 the Bankruptcy Court confirmed that and it's binding against
5 him as a matter of law.

6 Does the Court have any other questions of me?

7 THE COURT: No, I do not.

8 MR. GUYON: Thank you.

9 THE COURT: Okay. All right -

10 MR. BILLINGS: Your Honor, may I please respond to
11 that?

12 THE COURT: Ahhh -

13 MR. BILLINGS: He made some very serious claims
14 there that are not true.

15 THE COURT: Normally - I mean, this is their
16 motion, so normally they get the reply but I will give you,
17 given that you have come a long ways, I will give you the
18 opportunity to make a final rebuttal but keep it brief.

19 MR. BILLINGS: Okay. Thank you, Your Honor. It
20 does seem to me that defendants don't understand the issue of
21 res judicata or collateral estoppel.

22 THE COURT: And you do?

23 MR. BILLINGS: Yes.

24 THE COURT: Please inform me how you are so much
25 more -

1 MR. BILLINGS: I'm just stating -

2 THE COURT: - better versed -

3 MR. BILLINGS: - well because I'm simply stating
4 the correct rule. The rule speaks for itself. You can check
5 it in the books.

6 THE COURT: I am well aware of what the rules
7 imply.

8 MR. BILLINGS: It has to be an issue that was
9 actually litigated in the Federal Bankruptcy Court. Now,
10 counsel's representation that this issue was actually
11 litigated in Federal Bankruptcy Court is absolutely false.

12 THE COURT: That's not what I heard Mr. Guyon
13 saying.

14 MR. BILLINGS: He said all these arguments were
15 brought before the Federal Bankruptcy Court.

16 THE COURT: Were presented to the court and
17 considered by the court, whether they went through a whole
18 adjudicative process or not is not I don't think what was
19 represented by Mr. Guyon, but that it was presented to Judge
20 Boulden and she had the opportunity to consider that.

21 MR. BILLINGS: This is exactly why I preface my
22 comments with it seems that counsel doesn't understand the
23 requirements of res judicata, because it wouldn't matter that
24 we just had a plethora of evidence, for example, it wouldn't
25 matter for purpose of res judicata. What matters is whether

1 the court agreed to conduct a hearing on the issue and the
2 court did not do that. We didn't have a discussion on
3 whether or not this was a fraudulent document and so on.
4 That wasn't even discussed. I asked the court if - I marked
5 exhibits that demonstrated very clearly that - we premarked
6 exhibits that demonstrated very clearly that this document is
7 a fraud. I lodged those documents with the clerk. The judge
8 says she's not going to allow me to introduce, to lay a
9 foundation to introduce that evidence. So there was
10 absolutely no hearing on that issue. And then the court
11 said, move on to the other issues of jurisdiction and
12 removal. In order for collateral estoppel to apply, the
13 court would have had to have accepted those documents into
14 evidence and to rule upon them. The court would have had to
15 have made findings of fact and conclusions of law as to
16 whether or not this document is a fraud or not. So the real
17 issue here is that I've never had a day in court to
18 demonstrate that this document is a fraud.

19 I should also mention, of course, that I have filed
20 a First Amended Complaint and even if the Court granted
21 summary judgment on the first count which it absolutely
22 should not, the rest of the complaint is still valid because
23 it has absolutely nothing to do with that agreement.

24 THE COURT: Well, no, because according to the
25 Settlement Agreement that is before me that was again adopted

1 by Judge Boulden, the parties release all claims whether
2 known or unknown, you know, in any forum -

3 MR. BILLINGS: Not future claims, Your Honor, not
4 future claims.

5 THE COURT: Counsel, that's -

6 MR. BILLINGS: No, it doesn't.

7 THE COURT: That's what this language says.

8 MR. BILLINGS: No, it doesn't. It doesn't say a
9 word about future claims. (Inaudible) all future claims?

10 THE COURT: I'll tell you, it happens all the time.

11 MR. BILLINGS: Well, I don't, and I didn't.

12 THE COURT: Well -

13 MR. BILLINGS: And it's not even in the fraudulent
14 document.

15 THE COURT: Well, I think I've heard what you need
16 to say unless there's something new that you wanted to -

17 MR. BILLINGS: Just the final point is all of this
18 is obviously a controverted genuine issue as to material
19 facts. The Court is precluded from granting summary judgment
20 on these issues, no res judicata, no collateral estoppel and
21 clearly these facts have been controverted by my affidavit.

22 THE COURT: Where is your written affidavit?

23 MR. BILLINGS: I filed it with the Court.

24 THE COURT: I haven't seen it.

25 MR. BILLINGS: Well, I filed it with the Court and

1 I also provided - I also provided -

2 THE COURT: I received your memorandum, I have
3 received something that you've labeled a Separate Statement
4 of Disputed Facts, I'm not sure why I would consider a
5 Separate Statement of Disputed Facts that is not part of your
6 memorandum. This is not an authorized filing under Rule 7,
7 but even there, there is no affidavit.

8 MR. BILLINGS: Yes. On August 27th, if I could
9 approach? I filed what's titled Opposition to Defendant's
10 Motion for Summary Judgment. I did it very quickly because I
11 was given nothing but email notices, but it is an affidavit
12 signed by me -

13 THE COURT: I do not - hold on a second. I need to
14 check my docket because I do not see any such filing.

15 MR. BILLINGS: I filed it with the court and I also
16 left a courtesy copy in your chambers of each of these
17 documents. The title of the document is Opposition to
18 Defendant's Motion for Summary Judgment and then it shows
19 Declaration of Joseph Billings -

20 THE COURT: I don't see an affidavit. I see -

21 COURT CLERK: (Inaudible).

22 MR. BILLINGS: It is an affidavit, the Opposition
23 is an affidavit and it was filed August 27th and even the
24 Separate Statement because of lack of time, is styled and
25 presented as an affidavit under penalty of perjury and signed

1 under penalty of perjury. There's actually four documents
2 that we should make sure the Court has.

3 THE COURT: Okay. I do not know what you are
4 referring to.

5 MR. BILLINGS: May I approach? I can show you,
6 Your Honor.

7 THE COURT: The document entitled Memorandum of
8 Points and Authority in Support of Opposition to Defendant's
9 Motions for Summary judgment. Is that the document you're
10 referring to?

11 MR. BILLINGS: No, Your Honor, that's filed August
12 31st.

13 THE COURT: Yes.

14 MR. BILLINGS: And a courtesy copy too.

15 THE COURT: That's all I have seen.

16 MR. BILLINGS: No, there's three other important
17 documents. It sounds like you have one of them.

18 THE COURT: I have a Separate Statement of Disputed
19 Facts which as I say there's a procedural problem with how
20 this has been filed -

21 MR. BILLINGS: Well, (inaudible) to that, I was
22 just putting these things together as quickly as possible in
23 light of the fact that we were given basically ex parte
24 notice of a summary judgment motion but I would also point
25 out that the Separate Statement is presented also as a

1 declaration and as an affidavit under penalty of perjury and
2 it's exhaustive in controverting the issues.

3 THE COURT: Except that there is no recognized -

4 MR. BILLINGS: Affidavit.

5 THE COURT: I don't see -

6 MR. BILLINGS: Yes.

7 THE COURT: Where?

8 MR. BILLINGS: You'll see in the first -

9 THE COURT: I see an -

10 MR. BILLINGS: You'll see a footnote which refers
11 to - that I'm also treating it as an declaration and then
12 you'll also see at the back page -

13 THE COURT: I do not see a signature here.

14 MR. BILLINGS: Sure, there's a signature on the
15 last page -

16 THE COURT: There is no signature. There is an 'S'.

17 MR. BILLINGS: That's the courtesy copy.

18 THE COURT: It's not marked courtesy copy.

19 COURT CLERK: Judge, we're talking about six
20 different things, (inaudible) because they don't want
21 courtesy copies (inaudible) so in case somebody ends up - I
22 docketed some, she's docketed some. They're not marked
23 courtesy copies so we're marking them all as originals and
24 it's getting confusing.

25 MR. BILLINGS: The originals are all filed with the

1 clerk's office and signed.

2 THE COURT: Well, I don't have those in front of
3 me.

4 MR. BILLINGS: All of the originals have been
5 signed and apparently you don't even have any sort of copy of
6 the document that I first filed immediately, my affidavit
7 opposing this motion which is itself sufficient to preclude
8 summary judgment which was filed on August 27, 2009. Can I
9 approach to show you that?

10 THE COURT: Do you have that and does that show on
11 the docket?

12 CLERK: (Inaudible). We got a bunch of stuff
13 yesterday afternoon -

14 MR. BILLINGS: This was August 27th -

15 CLERK: - (inaudible). And I do have a bunch of
16 stuff that we got yesterday and it looks like we docketed
17 this morning.

18 THE COURT: Yeah. The only thing I'm seeing is -

19 MR. BILLINGS: I'll be happy to sign this one.

20 THE COURT: What?

21 COURT CLERK: What is that titled?

22 THE COURT: This is titled Opposition to
23 Defendant's Motion for Summary Judgment.

24 COURT CLERK: We have two copies of that.

25 THE COURT: We do? Okay. You may take that back.

1 MR. BILLINGS: Thank you. Did you get a copy of
2 the First Amended Complaint?

3 COURT CLERK: We have two copies of that as well.

4 THE COURT: Okay. I don't need duplicate copies of
5 anything. I just need one copy unless it's specifically
6 marked courtesy copy, I do not want to see it.

7 MR. BILLINGS: I gave it to the clerk and I asked
8 her, should I mark it courtesy copy and -

9 THE COURT: Okay -

10 MR. BILLINGS: - and she said it doesn't matter,
11 it's stamped.

12 THE COURT: No, it matters. I don't - I don't
13 accept - courtesy copies, I will accept only in advance if
14 they come in substantially in advance of oral argument
15 because they're worthless to me when they're filed on the
16 morning of the argument.

17 MR. BILLINGS: I understand, but -

18 THE COURT: There's just no opportunity for me to
19 review them.

20 MR. BILLINGS: This is one of the strategies in
21 setting this thing with less than five days notice.

22 THE COURT: But, all right. Well, the matter is
23 submitted. I will, because it's clear that I don't have all
24 the documentation in front of me, I will take it under
25 advisement, review the paperwork and I will inform the

1 parties of my decision.

2 MR. BILLINGS: I have one question, would you
3 entertain - the memorandum of points of authority I had to do
4 very quickly and there seems to be some question here of
5 exactly how does res judicata and collateral estoppel come
6 down, would the Court permit some additional -

7 THE COURT: No. The motion has been - I don't want
8 to create further supplementation because if I let you
9 supplement then I need to give Mr. Guyon the opportunity to
10 supplement. I am perfectly capable of distinguishing res
11 adjudicata and collateral estoppel and applying it to the
12 facts. I understand your argument, I will consider it.

13 MR. BILLINGS: Thank you, Your Honor.

14 MR. GUYON: Thank you, Judge.

15 (Whereupon the hearing was concluded)
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APPLICABLE RULES OF COURT ON APPEAL

1. Utah Rule of Civil Procedure 7 (c)(3)(A):

A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party. Utah Rule of Civil Procedure Section 7 (c)(3)(A).

2. Utah Rule of Civil Procedure 56:

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPLICABLE CONSTITUTIONAL PROVISIONS ON APPEAL

1. U.S. Constitution: Fourteenth Amendment

Fourteenth Amendment - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Section. 1. 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.

2. Utah State Constitution Article I, Declaration of Rights

Sec. 7. [**Due process of law.**] No person shall be deprived of life, liberty or property, without due process of law.

Certificate of Service

I am not a party to this action. On May 8, 2010 (May 7, 2010 USA) I served the following described document:

Appellant's Opening Brief

upon the interested parties by placing a true and correct copy addressed and delivered as follows:

Defendants Paul Toscano and Paul Toscano, P.C.


Law offices of Paul Toscano and Paul Guyon
Newhouse Building, Suite 614
10 Exchange Place
Salt Lake City, UT 84111
(Two Copies)

Original Filed with the court at
Clerk of the Court of Appeals
450 South State Street, 5th Floor
Salt Lake, City, Utah 84114
(Federal Express Mail – Original and Eight Copies)

X (By Mail) I deposited the sealed envelope with the China Postal Service with postage fully prepaid.

I certify under penalty of perjury under the laws of the State of Utah that the foregoing is true and correct.

Executed on May 8, 2010 in Shanghai, China. (May 7, 2010 in USA).


Jili Jiang