

1988

Mountain States Broadcasting Company, a corporation, and Dan Lacy, an individual v. Sterrett Neale and Neale Broadcasting Alliance : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

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

Stephen L. Henriod; Nielsen & Senior; attorneys for respondents.

Don R. Petersen, Leslie W. Slaugh; Howard, Lewis & Petersen; attorneys for appellants.

Recommended Citation

Brief of Respondent, *Mountain States v. Neale*, No. 880192.00 (Utah Supreme Court, 1988).
https://digitalcommons.law.byu.edu/byu_sc1/2135

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

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO.

880192-CA

IN THE SUPREME COURT
FOR THE STATE OF UTAH

MOUNTAIN STATES BROADCASTING
COMPANY, a corporation, and
DAN LACY, an individual,

Plaintiffs/Appellants,

vs.

STERRETT NEALE and NEALE
BROADCAST ALLIANCE,

Defendants/Respondents.

88-0192-CA

Case Nos. 870144 and
870207

CATEGORY 14b

BRIEF OF RESPONDENT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH, THE HONORABLE BOYD PARK PRESIDING.

FILED
MAR - 1 1988

Clerk, Supreme Court, Utah

DON R. PETERSON
LESLIE W. SLAUGH
HOWARD, LEWIS & PETERSON
120 East 300 North
Provo, Utah 84601
ATTORNEYS FOR APPELLANTS

STEPHEN L. HENRIOD
MARILYNN P. FINESHRIBER
NIELSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
ATTORNEYS FOR RESPONDENTS

MOUNTAIN STATES BROADCASTING
COMPANY, a corporation, and
DAN LACY, an individual,

VS.

Case Nos. 870144 and
870207

STERRETT NEALE and NEALE
BROADCAST ALLIANCE,

Defendants/Respondents.

CATEGORY 14b

BRIEF OF RESPONDENT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH, THE HONORABLE BOYD PARK PRESIDING.

DON R. PETERSON
LESLIE W. SLAUGH
HOWARD, LEWIS & PETERSON
120 East 300 North
Provo, Utah 84601
ATTORNEYS FOR APPELLANTS

STEPHEN L. HENRIOD
MARILYNN P. FINESHRIBER
NIELSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
JURISDICTION AND NATURE OF PROCEEDINGS	1
ISSUES PRESENTED FOR REVIEW.	1
STATEMENT OF THE CASE.	2
NATURE OF THE CASE	2
COURSE OF PROCEEDINGS AND DISPOSITION BELOW.	2
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENTS	9
POINT I	
THE TRIAL COURT'S FINDING WITH RESPECT TO MISSING EQUIPMENT IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE.	11
POINT II	
THE COURT'S FINDINGS WITH RESPECT TO DEFECTIVE CONTROL DESIGN BRAIN AND CAROUSELS ARE NOT SUPPORTED BY THE EVIDENCE.	14
POINT III	
THE TRIAL COURT ERRONEOUSLY AWARDED PLAINTIFFS AN OFFSET FOR THE REPAIR OF DEFECTIVE EQUIPMENT.	20
POINT IV	
THE TRIAL COURT'S DENIAL OF ANY OFFSET FOR PAYROLL EXPENSE OR LOSS ON RESALE WAS WITHIN ITS DISCRETION.	22

POINT V

THE TRIAL COURT PROPERLY AWARDED TO DEFENDANT INTEREST COMPOUNDED MONTHLY ON THE UNPAID PRINCIPAL BALANCE OF THE PROMISSORY NOTE.	25
----------------------------------------------------------------------------------------------------------------------------------------------------	----

POINT VI

THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES TO THE DEFENDANT WAS PROPER AND THE AWARD OF ATTORNEYS'S FEES TO THE PLAINTIFFS WAS IMPROPER.	28
-----------------------------------------------------------------------------------------------------------------------------------------------------------	----

A. Defendant is entitled to an award of attorney fees under applicable case law regarding fees to be recovered in accor- dance with contract terms.	29
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

B. Neale Broadcast is entitled to an award of fees as the prevailing party.	32
-------------------------------------------------------------------------------------------	----

POINT VII

THE TRIAL COURT ACTED PROPERLY AND WITHIN ITS DISCRETION IN AMENDING THE JUDGMENT TO ADD A SOCIAL SECURITY NUMBER IN ORDER TO CONFORM TO THE ADMINISTRATIVE ORDER NO. 25 OF THE FOURTH JUDICIAL DISTRICT COURT.	36
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

CONCLUSION	40
----------------------	----

TABLE OF AUTHORITIES

<u>Cases Cited</u>	<u>Page</u>
<u>Alaska Placer Co. v. Lee</u> , 553 P.2d 54 (Ala. 1976).	32
<u>Ault v. Dubois</u> , 739 P.2d 1117 (Utah App. 1987)	21
<u>Cabrera v. Cottrell</u> , 694 P.2d 622 (Utah 1985).	30
<u>Chadderdon v. King</u> , 659 P.2d 160 (Idaho App. 1983)	32
<u>Farnworth v. Jensen</u> , 117 Utah 494, 217 P.2d 571 (Utah 1950).	27
<u>Hal Taylor Associates v. Unionamerica, Inc.</u> , 657 P.2d 743, (Utah 1982).	12
<u>Highland Const. Co. v. Union Pacific Railway Co.</u> , 683 P.2d 1042 (Utah 1984).	12
<u>Highland Const. Co. v. Stevenson</u> , 636 P.2d 1034 (Utah 1981).	33
<u>Jensen v. Lichtenstein</u> , 45 Utah 320, 145 P. 1036 (Utah 1915).	26
<u>Newmeyer v. Newmeyer</u> , 69 Utah Adv. Rep. 32	40
<u>Ocean West Contractors v. Halec Const. Co.</u> , 600 P.2d 1102 (Ariz. 1979)	32
<u>Pelett v. Welch</u> , 694 P.2d 574 (Or. App. 1985).	32
<u>Stanger v. Sentinel Security Life Ins. Co.</u> , 669 P.2d 1201 (Utah 1983).	39
<u>Tolboe Construction Co. v. Staker Paving and Construction Co.</u> , 682 P.2d 843 (Utah 1984)	38
<u>Traynor v. Cushing</u> , 688 P.2d 856 (Utah 1984)	30

<u>Turtle Management, Inc. v. Haggis Management, Inc.,</u> 645 P.2d 662 (Utah 1982)	29
<u>Wolinasky v. Miller,</u> 704 P.2d 811 (Ariz. App. 1985). . . .	32

Rules Cited

Rule 60(a), Utah Rules of Civil Procedure.	39
Rule 62(a), Utah Rules of Civil Procedure.	37
Rule 32, Rules of the Utah Supreme Court	35
Rule 2.8 of the Local Rules.	36
Administrative Order No. 25 of the Fourth Judicial District.	36

JURISDICTION AND NATURE OF PROCEEDINGS

The Supreme Court of Utah has jurisdiction of this appeal pursuant to Utah Code Annotated §78-2-2(3)(i)(1987). Plaintiff appealed from the findings of fact and judgment of the trial court. Defendant cross-appealed.

ISSUES PRESENTED FOR REVIEW

1. Was the trial court's finding with respect to missing equipment supported by the clear weight of the evidence?
2. Was the trial court's finding with respect to defective equipment erroneous?
3. Were plaintiffs erroneously awarded an offset for the repair of defective equipment?
4. Was the denial of any offset for payroll expense or loss on resale within the discretion of the trial court?
5. Was the award to defendant of interest compounded monthly on the unpaid principal balance of the Promissory Note proper?
6. Was the trial court's award of attorneys' fees to the plaintiffs improper?
7. Did the trial court act properly and within its discretion in amending the judgment to include defendant's

social security number, as required by the Administrative Order No. 25 of the Fourth Judicial District?

STATEMENT OF THE CASE

Nature of the Case. Plaintiffs filed their Amended Complaint on January 25, 1984, claiming that defendants had breached a contract between the parties for purchase of a radio station, had failed to pay debts due and owing to third parties, and had interfered with the plaintiffs' sale of the assets to a third party. Plaintiffs requested that the Court award damages for breach, order the defendants to pay obligations due and enjoin the defendants from foreclosing on plaintiffs' mortgage securing the Promissory Note or otherwise interfering with the sale of the assets to a third party.

Defendants counterclaimed for the balance due from plaintiffs on the Promissory Note and guarantees executed in connection with the sale, for attorneys' fees and punitive damages for tortious breach of contract.

Course of Proceedings and Disposition in Court Below. This case was tried to the court without a jury on September 15 and 16, 1986. Sterrett Neale was dismissed at the beginning of the trial. (T. 2) Plaintiffs did not present evidence with regard to the cause of action for unpaid obligations or with

regard to the request for an injunction against defendant, limiting the issues before the court to those arising from the alleged breach of contract. The trial court entered its Memorandum Decision on February 24, 1987, (R. 301-10) and Findings of Fact and Conclusions of Law (R. 312-24) and a Judgment (R. 325-26) were entered on March 24, 1987. Plaintiffs filed a Motion for New Trial Or In The Alternative To Amend The Findings Of Fact And Conclusions Of Law And Judgment on March 30, 1987 (R. 328-29), which motion was denied by ruling entered on April 15, 1987. (R. 358-59) Plaintiffs filed their Notice of Appeal on April 16, 1987. (R. 363) Neale Broadcast Alliance filed a Notice of Cross Appeal on April 29, 1987. (R. 377-78)

On April 6, 1987, the defendant filed a motion seeking to add a social security number to the judgment to conform to the Fourth Judicial District's Administrative Order 25 and allow disbursal of the funds on deposit to the defendant. (R. 354-55) The Order inserting the social security number of Sterrett Neale, sole surviving shareholder of Neale Broadcast Alliance, was signed and entered on April 7, (R. 356-57) and the money was disbursed on April 15, 1987. (R. 361-62) Plaintiffs filed a motion to vacate the Order and compel a return of the funds on April 29. (R. 380-81). The motion was

denied by Order entered on May 8, 1987. (R. 392-93) Plaintiffs filed a Notice of Appeal from that Order on June 5, 1987.

Plaintiffs also filed a Petition for a Writ of Mandamus seeking the same relief on or about June 4, 1987. (Case No. 870206) The Petition was denied on July 13, 1987.

STATEMENT OF FACTS

Plaintiff Mountain States Broadcasting Company is a Colorado corporation which operates, buys and sells radio stations. (T. 26-28, 69) Plaintiff Dan Lacy is a resident of the State of Colorado and President of Mountain States. (T. 24) Defendant Neale Broadcast Alliance was a Utah corporation in good standing until October of 1982, at which time it was voluntarily dissolved. (T. 357)

The parties entered into an Asset Purchase Agreement dated the 21st day of November, 1981, wherein Neale Broadcast Alliance was designated as seller and Dan Lacy, individually and on behalf of Mountain States, was designated as buyer, for the purchase of KTMP-FM and KONI-AM. The purchase was to include the radio stations, their FCC licenses and assets described in the Asset Purchase Agreement (Plaintiff's Exh. 1), Article II, "Sale and Purchase Assets." The purchase price was \$325,000.00.

The Asset Purchase Agreement executed at closing warranted that personal property in active use in the station's operation would be in good repair unless otherwise noted. (Exh. 1, p. 9)

Plaintiff Dan Lacy, an FCC licensed engineer, visited the radio stations several times and also just before the closing at the end of June, 1982. (T. 34) During the two-day closing, Sterrett Neale had informed plaintiff Lacy that there were two tape machines in the front production room that were not working right, and that Mr. Neale would see that those were fixed within two weeks of the date of closing. (T. 538) Neale Broadcasting submitted a statement that the equipment was in good working order. (Exh. 6)

The sale closed on June 30, 1982. (T. 34) Plaintiff Mountain States made, executed and delivered to defendant a Promissory Note in the principal amount of \$90,929.99. Payments were to be made monthly, and interest was to accrue at the rate of 10% per annum. (Exh. 2) The note contains the following provision, "Should interest not be paid when due, it shall thereafter bear like interest as the principal." To further secure the payment of the obligations evidenced by that Promissory Note, Mountain States executed a Security Agreement in defendant's favor, (Exh. 3) and plaintiff Lacy executed his individual guaranty. (Exh. 4)

On July 1, 1982, defendant turned over to the plaintiff radio station KONI-AM and radio station KTMP-FM and all the assets which were "used or useful" in connection with the operation of both stations and certain assets which were not used or useful in the operation of said radio stations, but which were included as part of the premises transferred. (Exh. 1) Some such assets were kept for spare parts only. (T. 254-55, 558) Mr. Neale was scheduled to meet with plaintiff Lacy on the morning of July 1, 1982, to turn over the assets, but plaintiff Lacy was unable to meet at the studio. (T. 538) Some time following the closing, plaintiff Lacy composed a detailed inventory of items of personal property on the station premises which he claimed were missing or not working and submitted the same to the trial court. (Exhs. 19 and 20) The trial court concluded that plaintiff Lacy was an engineer, expert in the operation of radio stations and radio station equipment, and that he and thereby Mountain States had to have been aware at the time of the sale that the sale included aging equipment in use which was in good repair, and other equipment not in use, not necessarily operable. (R. 315)

Plaintiffs offered testimony that certain of the equipment included in the asset and purchase sale was either missing or not in good working order, and that as a result,

plaintiffs were required to hire extra personnel (T. 151-53 and Exh. 16) to operate the AM station and were required to allow an offset of \$5,500.00 upon the re-sale of the AM station due to the condition of the equipment. (T. 59-60) Defendant offered testimony that the equipment designated in the agreement was all present, and the equipment in use was in working order at the time of closing. (T. 551-52)

Defendant offered the testimony of Sterrett Neale and a copy of the schedule of assets which showed that certain items marked by an asterisk were specifically designated not in use and other items were lined out, designating that they were not part of the sale. (Exh. 9) Testimony regarding the "missing equipment" list (Exh. 19) revealed that the items on Exhibit 19 were either expressly excluded from the sale, or were actually still on the premises of the radio station months after the closing. (T. 244-280; Exh. 69)

The Ampex tape recorder and accessories were "not working" at the time of the sale. (Exh. 1, Schedule 2) These items, however, were designated not part of the equipment in active use in operation of the station.

Plaintiffs sold the AM station license and certain assets to a third party for the sum of \$225,000.00. (T. 59)

Plaintiffs claimed to have notified defendant by letters that there were certain items of equipment not in good repair

and working order and that there were certain items of equipment missing at the time of the transfer of the radio stations. However, the letters fail utterly to detail any specific items of equipment complained of. (T. 120-22) The Asset Purchase Agreement provided that the plaintiff, Mountain States, would be entitled to setoffs for defective or missing property if the plaintiff buyer gave notice to the seller, in writing, of the claimed defect or omission and defendant failed to cure within sixty days. (Exh. 1, ¶¶6.2.2 and 6.2.3) Plaintiff admitted in his testimony that he made no written complaint regarding any specific item of equipment at any time.

In May of 1983, the Court ordered the plaintiffs to pay to the defendant the sum of \$59,587.16, and defendants were to deposit \$10,000.00 in the form of a bond with the Clerk of the Court to secure payment of attorneys' fees and costs which might be awarded. (R. 33-35) Plaintiffs were directed to deposit a \$15,000.00 bond for attorneys' fees as required by the Utah Rules of Civil Procedure. The Court further ordered that the plaintiffs deposit with the Clerk of the Court the sum of \$30,000.00 to be held in an interest-bearing account to apply toward any judgment ordered obtained by the defendant.

Defendant posted a certificate of deposit in the sum of \$10,000.00. (R. 360-61) Plaintiffs finally deposited the sum

of \$30,000.00 with the Clerk of the Court on July 24, 1984, (R. 59-60) and never posted the \$15,000.00 bond. (R. 320)

Following the entry of the Judgment, defendant found that despite the requirement of the Judgment that the Fourth District Clerk release defendant's funds, the clerk refused to do so until the form of the Judgment conformed with the Fourth District's Administrative Order No. 25 by including, for income tax reporting purposes, the social security number of the party to whom funds were to be released. Defendant presented a Motion and Order in accordance with both local and state Rules of Civil Procedure and Practice for the purpose of satisfying the Administrative Order. (R. 354) The Court amended the Judgment and the funds were disbursed. (R. 361-62)

SUMMARY OF ARGUMENTS

The gravamen of this appeal is plaintiffs' contention that their evidence must be believed whenever there is a conflict. Plaintiffs assert that the findings of the trial court are unsupported by the evidence, even though that evidence must be viewed in a light most favorable to the conclusions of the trial court. Defendant responds that, with two exceptions, the findings of the trial court were supported by a clear preponderance of the evidence.

Plaintiffs received the benefits of their bargain in the purchase of the radio stations, and all the equipment which was part of the sale was present and in good working order. The finding that no material items of equipment were missing at the date of closing is supported by the weight of the evidence. The finding that certain equipment was defective (namely, the control design brain and two carousels) is erroneous, and the trial court improperly awarded plaintiffs an offset for the repair of defective equipment.

The trial court's denial of any offset for payroll expense or loss on resale of the station was within its discretion.

The award to defendant of interest compounded monthly on the unpaid principal balance of the Promissory Note was based upon a proper construction of the language of the contract and caselaw.

Defendant was entitled to the award of attorneys' fees pursuant to the language of the Promissory Note and individual guarantee as the prevailing party. The award of attorneys' fees to the plaintiffs was error.

The Court acted properly and within its discretion in entering the Order of April 7, 1987, in order to correct the clerical error and satisfy the Fourth District's Administrative Order No. 25.

ARGUMENT

POINT I

THE TRIAL COURT'S FINDING WITH RESPECT TO MISSING EQUIPMENT IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

Plaintiffs have challenged the trial court's finding that, regarding equipment listed on Schedule 2 to the Asset Purchase Agreement (Exh. 1), "there were no material items missing." (R. 316, ¶15) Defendant asserts that the finding is supported by the clear weight of the evidence. Plaintiffs have correctly acknowledged their obligation to marshal all the evidence concerning contested findings, including that favorable to defendant. (Brief of Appellants, p. 11) Plaintiffs have failed to do so.

The evidence regarding missing equipment included Lacy's testimony that twenty-three items were missing. The finding of the Court, after presentation of considerable evidence by both parties, was that no material items were missing. (R. 316, ¶15) Plaintiffs appeal that decision as to five items with a total value of \$2,897.49.

Mountain States argues that the court was required to accept its version of the facts. However,

[w]here the evidence is in conflict, the supreme court must defer to the trial court's first-hand assessment of the witness's

credibility and assume that the trial court believed those aspects of the evidence which support its findings.

Hal Taylor Associates v. Unionamerica, Inc., 657 P.2d 743, 749 (Utah 1982). Defendant presented considerable testimony regarding the equipment which plaintiffs claim to be missing. Sterrett Neale testified that he was to meet Dan Lacy at the station on the morning of the turnover of assets, July 1, 1982, and that he offered to do an inventory of equipment at that time. Mr. Lacy failed to appear and his representatives refused Mr. Neale's offer. (T. 538) He now asks this Court to overturn the trial court based solely on his unverified inventory, in spite of the evidence in the record to the contrary.

Regarding the specific items of equipment identified in plaintiffs' appeal, there was testimony as follows:

a. Ampex Play-Back Electronics: Steven Hope, general manager of KONI after the sale in September, 1982, testified that the Ampex equipment was present in the station and in working condition. (T. 193-95) George Culbertson, former owner and station engineer, testified that the Ampex equipment and the pre-amplifiers were in the station when he performed an inventory in December, 1983. (T. 277, Exh. 69) Michael Pearce, a

disc jockey at the station after July 1, 1982, used the Ampex play-back equipment. (T. 302)

b. Tape pre-amps: Mr. Culbertson testified that these were in the station and in working order, but not in use in December, 1983. (T. 276-77) Malcolm Crawford, an engineer familiar with the equipment at KONI in June, 1982, testified that the pre-amps were in the basement of the station. (T. 492)

c. Stereo Heads: Mr. Culbertson testified that the stereo heads had been installed in the Ampex equipment. (T. 279) Mr. Crawford testified that the four Ampex PR10 play-back machines were in the basement of the station long after the sale. (T. 482)

d. Oscilloscope: Mr. Culbertson testified that the oscilloscope was at the transmitter site. (T. 277) Mr. Crawford recalled oscilloscopes in two locations, the transmitter room and the transmitter site on the mountain. (T. 478)

e. Noise and Distortion Meter: Plaintiffs claim that Mr. Culbertson's testimony substantiates a missing noise and distortion meter. (T. 280) Culbertson's inventory was not performed, however, until eighteen months following the sale of the station to Mountain

States. Mr. Neale testified that in June, 1982, the noise and distortion meter was in the station. (T. 562)

The trial court compared the testimony summarized above with Lacy's testimony and, in its discretion, determined that no material items of equipment were missing. Viewed in the light most favorable to the Court below, the evidence presented above is sufficient to support the findings of fact and Neale Broadcast urges this Court to leave these findings undisturbed.

POINT II

THE COURT'S FINDINGS WITH RESPECT TO DEFECTIVE CONTROL DESIGN BRAIN AND CAROUSELS ARE NOT SUPPORTED BY THE EVIDENCE.

The appropriate standard of review for findings of fact has been set forth previously. Plaintiffs have appealed claiming they are entitled to a greater offset for the control design brain and two carousels than the \$6,000.00 awarded by the Court. Defendant cross-appeals on the same issue, and contends that the evidence requires a finding that the brain and carousels were in good operating condition.

Plaintiffs' appeal of this issue is based on an argument not raised in the proceedings before the trial court. Specifically, on page 10 of Appellant's Amended Brief, plaintiffs argue that the warranty of equipment in the Asset

Purchase Agreement actually constituted two separate warranties: (1) that all of the transmitting and studio equipment would be in good repair and working order; and (2) that the personal property listed in Schedule 2 which was in active use in operation of the station would be in good repair and working order at the time of closing.

By this warranty, therefore, Neale Broadcast warranted that all of the transmitting and studio equipment (the first three categories on Schedule 2) were in good repair and working order. This warranty was not limited to only those items of transmitting and studio equipment in active use. With respect to all other assets listed on Schedule 2, however, the warranty was limited to only those items presently in active use in the operation of the stations.

(App. Amended Br., p.10)

This Court has often repeated the rule that matters not presented to the trial court for decision are not reviewable on appeal. Trayner v. Cushing, 688 P. 2d 856 (Utah 1984). Plaintiffs argue that all of defendant's transmitting and studio equipment was subject to an unconditional warranty that it was in good repair and working order. In fact, however, the notations to Schedule 2 to the Asset Purchase Agreement which were admitted into evidence as Exhibit 1, specifically identify certain pieces of equipment as either "not in use" (by asterisk) or "not part of the sale" (lined out). (T. 561,

Schedule 2 to Exh. 1) Plaintiffs were fully aware of the status of the equipment and negotiated the purchase price accordingly. Much of the equipment sold was for "back-up" or spare parts only, and much was included simply because it was present in the basement. (T. 253-56) Plaintiff Lacy had observed the equipment and its operation on several occasions. (T. 34) Plaintiffs cannot now be allowed to argue that the equipment was subject to an unconditional warranty.

The trial court concluded that the equipment warranted to be in working order was, in fact, in working order with the exception of the control brain and two carousels. Plaintiffs claim that the finding was erroneous. First, plaintiffs claim that they should have received an offset for the cartel. Mr. Neale, Mr. Smith and Mr. Carter all testified that the automation equipment, including the cartel, was in regular daily use up until the last day that they operated the station. (T. 537, 416, 393-397)

Second, plaintiffs ask damages of \$1,500.00 for an additional carousel. Mr. Crawford testified that only three of the carousels were in regular use at the time of the sale, and the other three were not. (T. 471) Mr. Lacy testified that he removed three carousels, shipped them to his own station in Durango, and was using them at present. Plaintiffs concede

that there is testimony from a defense witness who worked at the station as an announcer that all of the carousels were in use and functioning at the time of the transfer of the station assets in June, 1982. (T. 420)

Third, plaintiffs demand an offset alleging the Magnecord recorder was not functioning. The Magnecord recorder was specifically identified on the Schedule 2 list of assets as "not in use" in the daily operation of the station, and is therefore exempt from warranty.

Defendant submits that the testimony set forth above is sufficient to support the Court's finding that Mountain States was entitled to no offset for the cartel and Magnecord recorder. With regard to the finding that the control brain and two carousels were inoperable, however, defendant submits that such a conclusion is not supported by the evidence.

Testimony established that the control brain was present in the station and in use in the daily operation of the automation equipment at the time of the transfer of assets on June 30, 1982. (T. 493, 516) The testimony of Mr. Crawford, who was performing engineering duties at the radio station both before and after the sale and was extremely knowledgeable about the condition of the equipment, was that the automation system developed problems and the control brain ceased to function properly after the sale. (T. 513-17) Mr. Crawford testified

that one evening in approximately August or September of 1982, he was called by Mr. Harold, a disc jockey at Mountain States Broadcasting, regarding a failure in the automation system brain. Mr. Crawford could not get the brain to operate thereafter. Mr. Crawford's notes were admitted as Exhibit 15.

The brain of the automation system never functioned after that date, and Mr. Culbertson was unable to get it working again when he was hired to attempt to do so in September of 1982. (T. 263) Clearly, this failure occurred after the closing, after risk of loss had passed to the plaintiffs.

Defendant also contends that the evidence does not support the conclusion that plaintiffs were entitled to an offset for two carousels not functioning properly. Mr. Lacy testified there were seven carousel-type pieces of equipment, that six were called carousels and one called a "cartel." (T. 95) The cartel has been discussed above, was not in use and not, therefore, subject to the warranty. As set forth above, Mr. Crawford testified that three carousels were not in regular use at the time of the sale. They are therefore exempt from any warranty of personal property. Mr. Lacy removed three carousels to his station in Durango and the remaining carousels were sold by plaintiffs to a third party, as part of the sale of the radio station KONI. Inasmuch as all six of the

carousels which were in use at the time of sale were either used or sold thereafter, plaintiffs cannot claim offset.

Furthermore, the value of three carousels has been overstated by the plaintiffs; Mr. Culbertson testified that the total cost of three carousels, purchased used in 1974, was \$1,773.91. Mountain States' contention that it should receive an offset in the amount of \$1,500.00 for each inoperable carousel is obviously excessive.

Defendant offered further testimony that the equipment was not properly maintained and cared for after the date of sale (T. 372,376, 383, 402, 517-18) and that Mountain States' personnel were inexperienced in equipment maintenance and were specifically instructed by plaintiffs to concentrate their attention on the other two stations they were operating at the time and to operate KONI on full-time automation for the sole purpose of staying on the air to maintain the FCC license until sale of that station to a third party had been consummated. (T. 346, 501-504)

Defendant contends that evidence as to the condition of equipment following the date of sale is irrelevant to the issues before this Court, and that plaintiffs failed to carry their burden to establish that any equipment was inoperable at the time of sale, even when the evidence is viewed in the light most favorable to the finding of the trial court.

Consequently, defendant was not in breach of the contract of sale, and plaintiffs are entitled to no offset.

POINT III

THE TRIAL COURT ERRONEOUSLY AWARDED PLAINTIFFS AN OFFSET FOR THE REPAIR OF DEFECTIVE EQUIPMENT.

Defendant respectfully directs the Court's attention to the numerous instances of recorded testimony that the control design brain was functioning at the time ownership was transferred to plaintiffs. Mr. Crawford testified that the brain was in daily use as part of the automation equipment until June 30, 1982, (T. 493) and only failed late in the summer of 1982. (T. 513-517) Mr. Watkins, also an engineer for the station, testified that the brain worked properly and dependably. (T. 372) Mr. Smith testified that the automation equipment was used until the transfer to plaintiffs. (T. 416) Mr. Hall testified that the automation equipment needed attention after the sale but was never unusable (T. 343) and was used after the sale to keep KONI on the air. (T. 344) Mr. Carter used it after the sale; (T. 393-397) Mr. Pearce operated it every day after the sale. (T. 308) Mr. Culbertson found it inoperable in October, 1982. (T. 262) Defendant is not aware of any evidence that the brain was inoperable at the time of transfer and suggests that the evidence above does not

support a finding that the equipment was not working properly or that plaintiffs were entitled to an offset.

In the event that this Court determines that plaintiffs are entitled to an offset, defendant submits that the trial court's calculation of the measure of damages is the only proper calculation for said repair. Plaintiffs cite Ault v. Dubois, 739 P.2d 1117 (Utah App. 1987) for the proposition that the proper measure of damages would be replacement cost, or \$25,000.00, as asserted by plaintiffs. The following language from Ault contradicts plaintiffs' proposition:

It is in the context of the damaged or destroyed items of personal property where evidence of replacement cost seems least appropriate, especially since many of the items were old, worn, or otherwise marginal to begin with, and the date of damage or destruction was unknown. . . .

Ault, p. 1122, Note 7.

Plaintiffs concede that cost of repair is typically an appropriate measure of damages. (Appellants' Amended Brief p. 16) However, plaintiffs seek to claim the entire original cost of the automation equipment as damages, rather than the cost of repair. Defendant is unaware of any evidence that the control brain was irreparable, only that Mr. Culbertson had been unable to repair it. Consequently, the court reasonably relied on Mr. Culbertson's evaluation of the cost of repair of

the brain, as set forth in Exhibit 68: "Estimated repair cost \$2,000.00 to \$3,000.00, plus \$200.00 to \$400.00 in parts on carousels." At most, Mountain States would be entitled only to an offset equal to the "market value" at the time of taking of the property. Ault, p. 1121.

POINT IV

THE TRIAL COURT'S DENIAL OF ANY OFFSET FOR PAYROLL EXPENSE OR LOSS ON RESALE WAS WITHIN ITS DISCRETION.

Once the trial court had determined whether the control design brain and carousels were operable at the time the station was transferred to plaintiffs, the issues of whether payroll expense or loss on resale could be attributed to any breach by defendant was an issue of fact. Utah Rule of Civil Procedure 52(a) provides: "Findings of fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Testimony before the trial court indicated that the decision to operate the radio station manually rather than by automation was determined by choice, rather than by necessity. For example, Mr. Hope testified that the control brain and attendant equipment was present in the station after the sale,

but was not needed or used. (T. 199) Several employees of the station testified that the automation equipment was available and used to keep KONI on the air. (T. 344, 308, 393-97) Mr. Harold, who testified that the equipment was difficult to work with, also testified that he preferred to work live. (T. 324) Although Mr. Lacy testified that extra payroll expense was incurred because "the automation and things didn't work," (T. 151) the trial court would be justified in making its own assessment of the witnesses' credibility and its determination that no payroll expense was attributable to the condition of the automation equipment was not an abuse of discretion.

Similarly, Mr. Lacy testified that he had been required to give an offset in the sum of \$5,500.00 on the resale of KONI, due to non-functional and missing equipment. (T. 59-60) According to Exhibit 63, Mountain States was able to sell the AM station, KONI, to a third party on July 26, 1982, for the sum of \$225,000.00. Defendant submits that plaintiffs' claim that they were required to reduce the purchase price in the sum of \$5,500.00 due to the condition of the equipment does not make sense. In that sale, Mountain States warranted only that the physical assets of the station would be maintained in their present condition between the date of sale and the date of

closing. If such a setoff occurred between Mountain States and the purchaser, it could be attributable only to damages occurring to the physical assets of the station between July 1, 1982, and September 30, 1982, when the assets and operation of KONI were transferred to the purchaser. The trial court's finding was supported by the evidence.

Defendant further contends that plaintiffs have failed to prove any damages at all resulting from the conduct of the defendant. In Utah, damages must be proven as follows:

It is also a general rule long standing that a plaintiff must show damages by evidence of facts and not by mere conclusions and that the items of damage must be established by substantial evidence and not by conjecture. Bunnell v. Bills, 13 Utah 2d 83, 90, 368 P.2d 597 (1962); Bingham C & L Co. v. Board of Education, 61 Utah 149, 159; 211 P. 981 (1922). And, whether general or special, damages must be traceable to the wrongs complained of. Ranch Homes Inc. v. Greater Park City Corp., 592 P.2d 620 (1979).

Highland Const. Co. v. Union Pacific Railway Co., 683 P.2d 1042, 1045 (Utah 1984).

In the Highland case, the court found that the plaintiff, Highland, failed to prove its cost for each alleged problem or breach caused by the defendants, failed to compare its estimates with actual costs for each such problem or breach, and failed to prove that defendants were solely responsible for any alleged additional expense. In addition, Highland failed

to prove a causation between its cost and the breach of any particular defendant.

With respect to the action at hand, defendant submits that plaintiffs, like the Highland plaintiff above, failed to establish damages traceable to any action of the defendant. Plaintiffs purchased KONI and KTMP from Neale Broadcast for the sum of \$325,000.00, and within a month of closing, resold KONI for \$225,000.00. Within nine months from the date of closing, Mountain States had sold KTMP (together with radio station KFTN which was already owned by the plaintiffs) for the sum of \$1,200,000.00 to another third party. (T. 108, Exh. 64)

With such testimony and evidence before the court, it could reasonably, and without abuse of its discretion, conclude that plaintiffs had suffered no damage attributable to the condition of the equipment at the time the radio station assets were transferred. As set forth in Hal Taylor Associates, supra, this Court must assume that the trial court believed those aspects of the evidence which support its findings.

POINT V

THE TRIAL COURT PROPERLY AWARDED TO DEFENDANT
INTEREST COMPOUNDED MONTHLY ON THE UNPAID
PRINCIPAL BALANCE OF THE PROMISSORY NOTE.

Mountain States has appealed from the trial court's award of interest compounded monthly, citing cases from California

and Washington which have refused to award compound interest. There is Utah case law which supports the decision of the trial court.

The Promissory Note states in the second paragraph:

This note shall bear interest upon the unpaid principal balance hereof from the date hereof until paid at a rate of 10% per annum. Should interest not be paid when due, it shall thereafter bear like interest as the principal.

The second sentence of the contract paragraph would be meaningless unless unpaid interest was to be compounded for each payment period, that is, monthly. The specific addition of a sentence stating "should interest not be paid when due it shall thereafter bear like interest as the principal" can only be understood to add to the terms of the note the special provision that past-due unpaid interest which is payable monthly shall earn interest on a monthly basis, that is, the interest shall be compounded monthly. The policy behind such a provision as a penalty for late payments is also eminently reasonable.

Defendant relies on the case of Jensen v. Lichtenstein, 45 Utah 320, 145 P. 1036 (Utah 1915). In Jensen, the Utah Supreme Court was called upon to construe the following language:

If any interest remains due and unpaid for the period of thirty days then the principal sum and all accrued and unpaid interest shall at

once be due and payable at the option of the holder of this note and the principal sum and all unpaid interest shall then draw interest at the rate of 12% per annum until paid.

The Jensen defendants had promised to pay the interest quarterly. The court reasoned that if defendants had paid plaintiff the interest when due, he could have reloaned it to them, or could have loaned it to anyone else, and could have contracted for any rate of interest not exceeding 12% per annum. The plaintiff, therefore, was as much entitled to interest upon the unpaid interest as though it had been paid to him when due and he had reloaned it, and was entitled to interest upon each quarterly installment of interest from the time it became due until the principal and interest were merged into judgment. Jensen at 1041.

The Jensen case is quoted with approval in Farnworth v. Jensen, 117 Utah 494, 217 P.2d 571 (Utah 1950). The contract in Farnworth provided for the payment of interest at the rate of 6% per annum and each yearly payment was to include the amount of this interest. Once again, the court concluded that the plaintiff was entitled to interest upon the unpaid interest as though it had been paid to him when due and he had reloaned it. Farnworth at 577.

The parties agreed that plaintiffs' payments on the principal amount were to be made on a monthly basis. (Exh. 2) Neale Broadcast submits that the language of the Note can only

be construed to require that interest was also payable monthly, and should earn interest on a monthly basis. The trial court so concluded, and that conclusion is a proper application of the principles of law to the language of the Note.

POINT VI

THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES TO
THE DEFENDANT WAS PROPER AND THE AWARD OF
ATTORNEYS' FEES TO THE PLAINTIFFS WAS IMPROPER.

There are three provisions for payment of attorney fees which are a part of the contractual agreement between the parties. In Exhibit 1, the Asset Purchase Agreement, paragraph 10.6 on page 23 provides:

In the event of commencement of suit by either party to enforce the provisions of this Agreement, the prevailing party shall be entitled to receive attorneys' fees and costs as a court may adjudge reasonable in addition to any other relief granted. (Emphasis added.)

The Promissory Note, Exhibit 2, provides in paragraph 4:

The undersigned promises to pay costs of collection and attorneys' fees in reasonable amount if default is made in the payment of this Note. (Emphasis added.)

The individual Guaranty, Exhibit 4, page 2 in the second full paragraph states:

The undersigned further agrees without demand immediately to reimburse Neale for all costs and expenses including attorneys' fees incurred in the enforcement of this Guaranty or the collection of such indebtedness. (Emphasis added.)

The language in the Asset Purchase Agreement contains the phrase "prevailing party." Under the Promissory Note, if the Court finds that the plaintiff Mountain States Broadcasting Corporation is in default in payment of the Note, defendant is entitled to its costs of collection and attorneys' fees in reasonable amount. The provision in the Individual Guaranty is not so limited. Mr. Lacy agreed to reimburse Neale for all costs and expenses, including attorneys' fees, incurred in the enforcement of the Guaranty or the collection of the indebtedness. Defendant submits simply based upon the Individual Guaranty that Mr. Lacy is obligated to pay all attorneys' fees incurred in connection with the collection of the indebtedness due and owing under the Promissory Note, and that there is no limitation on the amount and that therefore the defendant should be awarded all attorneys' fees incurred, including fees incurred in connection with post trial motions, the Writ of Mandamus and the appeal.

A. Defendant is entitled to an award of attorney fees under applicable case law regarding fees to be recovered in accordance with contract terms.

The general parameters for an award of attorney fees are set forth in the case of Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 662 (Utah 1982). In that case, the Supreme Court stated:

Utah adheres to the well established rule that attorney's fees generally cannot be recovered unless provided for by statute or by contract. B&R Supply Company v. Bringhurst, 28 Utah 2d 442, 503 P.2d 1216 (1972). If by contract, the award of attorney's fees is allowed only in accordance with the terms of the contract. 25 CJS Damages, §50 (1966). The amount to be awarded as attorney's fees is generally within the sound discretion of the trial court. Yreka United, Inc. v. Harrison, Idaho, 510 P.2d 775, 780 (1973).

In the case of Traynor v. Cushing, 688 P.2d 856 (Utah 1984), 1988, the Utah Supreme Court ruled that the granting of attorney fees to the party entitled thereto by contract is not discretionary with the court, but mandatory. The amount of attorney fees which must be awarded is discretionary. In Cabrera v. Cottrell, 694 P.2d 622 (Utah 1985), the court also held that attorney fees are not to be determined on the basis of an equitable standard, but that when awarded as allowed by law, are awarded as a matter of legal right.

In Traynor, the contractual provision was not one awarding fees to the prevailing party, but one in which the parties agreed to payment of attorney fees for any action brought to enforce the agreement or any right arising out of breach. The provision in the Individual Guaranty (Exhibit 4) uses this same language. In Traynor, the court on appeal found that each party was successful in one or more points and unsuccessful on others and that therefore each had successfully

sued to enforce the agreement and was entitled to an award of attorney fees.

In the Turtle Management, Inc. case, supra, the provision interpreted by the Supreme Court was one which stated:

The cost of enforcing this Agreement including reasonable attorney's fees should be borne by the party in default.

In that case, the court awarded attorney fees against the party in default, but only those attorney fees incurred in connection with that specific party's default. In the Turtle Management case, the defendant in default was in default because he had violated a covenant not to compete.

In Cabrera, supra, the court sets a standard for determining the amount of reasonable attorney fees. (Both the Asset Purchase Agreement (Exhibit 1) and the Promissory Note (Exhibit 2) provide for payment of reasonable attorney fees.) The Court in Cabrera stated:

Reasonable attorney's fees are not measured by what an attorney actually bills nor is the number of hours spent on the case determinative in computing fees. . . . The Court may consider, among other factors, the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours charged on the case, the fee customarily charged in the locality for similar services, the amount involved in the case, and the result attained, and the expertise of the attorneys involved.

Cabrera, at 624-25. In that case, the court found that awarding attorney fees in excess of the damage awarded was reasonable and proper.

B. Neale Broadcast is entitled to an award of fees as the prevailing party.

In Idaho, the prevailing party is the party which prevails on the main issue in the case. Chadderdon v. King, 659 P.2d 160 (Idaho App. 1983). In Arizona, the party with the greater net result is the prevailing party. Wolinasky v. Miller, 704 P.2d 811 (Ariz. App. 1985), Ocean West Contractors v. Halec Const. Co., 600 P.2d 1102 (Ariz. 1979). In Alaska, a party is the prevailing party even if it does not recover the full measure of relief prayed for, and a litigant which defeats a claim of great potential liability may be the prevailing party. Alaska Placer Co. v. Lee, 553 P.2d 54 (Ala. 1976). The Oregon Supreme Court has held that there can only be one prevailing party in an action even in litigation involving counterclaims, and that prevailing party is the one receiving the net award. Pelett v. Welch, 694 P.2d 574 (Or. App. 1985).

Plaintiffs argue in their Brief that, because plaintiffs tendered into Court the sum of \$89,587.16 in conjunction with filing their Complaint, such tender constituted an acknowledgment of their obligation to pay to defendant the full

amount due and owing under the contract, less such offsets as the Court would allow. (R. 1-4; 47-51) Plaintiffs then argue that, although the Court awarded judgment to defendant on its counterclaim for the balance due on the Promissory Note together with interest and costs, defendant recovered only the sum that plaintiffs had acknowledged from the beginning was due. Therefore, because plaintiffs were found to be entitled to an offset and had already tendered the balance due on the Note, plaintiffs assert that they were entitled to recover attorneys' fees as the prevailing party, and the award of attorneys' fees to the defendant is argued to be erroneous.

Plaintiffs' alleged tender actually meant nothing. No funds ever changed hands until the Court's order of May 1983 when plaintiffs were ordered to pay defendant some \$57,000.00 and to deposit \$30,000.00 of disputed funds, which was not paid into Court until July, 1984. The issue of which party is prevailing is governed by Highland Construction Co. v. Stevenson, 636 P.2d 1034 (Utah 1981). In Highland, a subcontractor brought an action against a general contractor for damages allegedly caused by defective construction plans and unreasonable delay and the general contractor counterclaimed for declaratory judgment on certain issues. The general contractor admitted it owed and voluntarily paid the

excavating subcontractor the amount the excavating subcontractor had claimed that it was owed. This Court held that where the general contractor admitted owing and voluntarily paid the amount the subcontractor claimed it was owed in its action for damages after the action had been commenced, the subcontractor was prevailing party on that particular cause of action and entitled to an award of attorneys' fees under the statute awarding attorneys' fees to the prevailing party.

Regarding the issue of whether or not the subcontractor was the "prevailing party," the Court further added:

It should make no difference whether the plaintiff recovers money from the defendant during the course of the action by voluntary payment or whether the plaintiff recovers that amount by a judgment. In both instances, the plaintiff has recovered money by virtue of its action.

Highland, at 1038.

In summary, defendant submits that it is the prevailing party under any of the standards set forth in the cases articulated above. Pursuant to the more narrow provision of the Promissory Note, the defendant is entitled to all attorney fees and costs incurred in connection with any recovery on the Promissory Note, and as set forth in the provision in the Guaranty, all costs of enforcement and collection of

indebtedness are to be borne by the Guarantor, plaintiff Lacy. Accordingly, the trial court's award of attorney's fees to plaintiffs was clearly erroneous.

Further, with regard to the issue of fees, Neale Broadcast requests that the Court award it an additional sum equal to all of the additional attorneys' fees incurred in defense of this action since the fees were calculated by the Court. The fees incurred in connection with those matters after conclusion of the evidentiary portion of the trial include preparation of proposed findings of fact and conclusions of law, written closing argument, preparation of the final findings, conclusions and judgment, post-trial motions, defense of petition for Writ of Mandamus and this appeal. As argued above, such an award is authorized by the terms of the Promissory Note and Guaranty executed by plaintiffs in favor of defendants. Fees to be included would be those relating to the preparation of the Closing Argument and responses to plaintiffs' post trial motions and those pursuant to this appeal. Defendant also asks that the unpaid portion of the Judgment bear interest throughout the pendency of this appeal, as authorized by Rule 32, Rules of the Utah Supreme Court.

POINT VII

THE TRIAL COURT ACTED PROPERLY AND WITHIN
ITS DISCRETION IN AMENDING THE JUDGMENT TO ADD
A SOCIAL SECURITY NUMBER IN ORDER TO CONFORM TO
THE ADMINISTRATIVE ORDER NO. 25
OF THE FOURTH JUDICIAL DISTRICT COURT.

Plaintiffs have presented three arguments in support of their appeal of this issue. The first argument is that Rule 2.8 of the Local Rules governed the procedure to amend the Judgment previously entered. The second argument is that the April 7th Order actually changed the payee of the Judgment, and was not simply a correction of a clerical error, namely, omission of a social security number. Plaintiffs' third argument is that this Court should make its judgment effective against Sterrett Neale, to the extent of the funds it claims were wrongfully disbursed.

In reply, Neale Broadcast asserts that Sterrett Neale is not a party before the Court, and no judgment can be made effective against him. Plaintiffs have not appealed the dismissal of Sterrett Neale from the action before the trial court. Furthermore, defendant submits that plaintiffs' argument that the April 7th Order actually changed the payee of the Judgment is merely an attempt to place before the Court another issue not argued below. As a consequence, defendant believes that plaintiffs' only argument regarding this issue is

whether it is Rule 2.8 or Rule 2.9 of the Local Rules which should be applied in this situation.

The motion in question was not a Rule 2.8 motion. Rule 2.8 of the Local Rules covers "all motions except uncontested or ex parte matters." The motion was an ex parte, uncontested matter because the right to the funds had already been adjudicated. There is no merit whatsoever to plaintiffs' objection to the addition of a social security number to conform with Administrative Order No. 25. In fact, defendant finds it difficult to imagine what testimony or evidence could have been offered as relevant to the issue if a hearing had been held prior to disbursement.

According to Rule 62(a) of the Utah Rules of Civil Procedure, execution may "issue immediately upon entry of judgment" and a stay of execution may be obtained only upon "approval of supersedeas bond by the court." Accordingly, the lack of a social security number was all that prevented distribution of the funds on any date after March 24, 1987, and before May 15, 1987, the date upon which plaintiffs posted their supersedeas bond.

If any local rule was applicable in the situation, it is Rule 2.9. Rule 2.9 provides:

Copies of judgments and/or orders shall be served upon opposing counsel before being presented to the court for signature . . .

notice of objections thereto shall be submitted to the court and counsel within five days after service.

The motion and order were mailed April 4, 1987, and signed April 7, 1987. Any objections should have been filed by April 13, 1987, (five days plus three days for mailing). Plaintiffs filed nothing until April 16, 1987, failing to respond within the required time periods for objection under Rule 2.9.

Plaintiffs may argue that the April 7 Order was signed by the court before April 13, the expiration of the time period for objection. In Tolboe Construction Co. v. Staker Paving and Construction Co., 682 P.2d 843 (Utah 1984), a judgment was signed by the court the day after it was presented by counsel. Opposing counsel filed an objection within five days after service as required by Rule 2.9, and appealed from the judgment. The Utah Supreme Court held that the rule requirements were met whether the judge signed the judgment when presented or after waiting five days so long as the parties in question had five days in which to object. This Court reasoned:

The requirement as well as the rule itself are binding only upon counsel, not upon the trial court. The rule does not therefore preclude the court from signing the documents, as it did, within five days of their service upon counsel. Furthermore, we are unable to detect any prejudice to the plaintiff by reason of the court's early signing of the documents, inasmuch as plaintiff's timely filing of

objections preserved any claim it had with respect to the documents and plaintiff received a hearing upon those objections just as it would have had the court waited the full five days before signing the documents. For all these reasons, we hold that Rule 2.9 was fully satisfied in this case.

Tolboe, at 849.

Plaintiff allowed their five days to expire in this case. Just as in Tolboe, however, they received a hearing upon their objections. (R. 391-93) Defendant submits that Rule 2.9 has been satisfied.

Neale Broadcast also submits that this Amendment was merely a correction of a clerical error. As set forth in the case of Stanger v. Sentinel Security Life Ins. Co., 669 P.2d 1201, 1206 (Utah 1983), a clerical mistake is defined as "a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney." Under Rule 60(a) of the Utah Rules of Civil Procedure, the trial court may correct clerical mistakes in judgments at any time, with or without a motion by any party. Defendant's motion was clearly a request to amend to correct a clerical error, that of failing to conform to the Fourth District procedure of requiring a social security number prior to the distribution of monies. Such a correction is not subject to plaintiffs' objection.

CONCLUSION

Plaintiffs are simply asking this Court to substitute its judgment for that of the trial court on contested factual issues. According to Newmeyer v. Newmeyer, 69 Utah Adv. Rep. 32, that the Court cannot do. Newmeyer's

challenge to the trial court's factual findings as to the relative contributions of the parties amounts to nothing more than an attempt to re-try the matter on appeal. There was evidence supporting the positions of both parties. It was for the trial court to resolve the conflicts. . . .

Newmeyer, at 33.

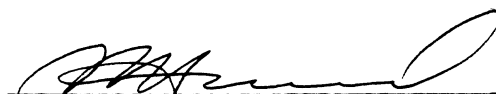
With one exception, defendant submits the findings of the trial court are supported by the evidence. Defendant submits that the finding that plaintiffs were entitled to an offset for items of defective equipment was erroneous.

Defendant asserts that it was the prevailing party and entitled to an award of attorneys' fees, but that the award of fees to plaintiffs was a misapplication of principles of law. Defendant requests that it be awarded an additional sum equal to the amount of fees incurred since the conclusion of the evidentiary portion of the trial, including preparation of findings, conclusions, judgment, post-trial motions, petition for Writ of Mandamus and appeal.

That portion of the Judgment awarding fees and offset to the plaintiffs should be overturned. In all other findings, the decision of the trial court should be upheld.

Respectfully submitted this 1 day of March, 1988.

NIELSEN & SENIOR

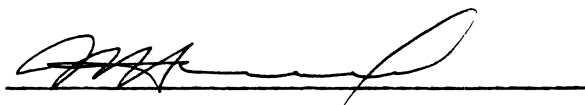
A handwritten signature in dark ink, appearing to read 'S. Henriod', is written over a horizontal line.

Stephen L. Henriod
Marilynn P. Fineshriber
Attorneys for Respondents

MAILING CERTIFICATE

I hereby certify that on this / day of March, 1988, I have caused to be mailed, postage prepaid, four true and correct copies of the foregoing Brief to counsel of record as follows:

Don R. Peterson, Esq.
Howard, Lewis & Petersen
120 East 300 North
P.O. Box 778
Provo, Utah 84603

A handwritten signature in dark ink, appearing to read "Don R. Peterson", is written over a horizontal line.