

2002

Loren Crank Jr. v. The Utah Judicial Council, Eric P. Swenson and Judge Lyle R. Anderson : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

LOREN CRANK, JR.,

Plaintiff,

vs.

THE UTAH JUDICIAL COUNCIL,

Defendant,

Case No 20020227-SC

with

ERIC P. SWENSON,

as Appellant,

and

JUDGE LYLE R. ANDERSON,

as Appellee.

BRIEF OF APPELLEE LYLE R. ANDERSON

Appeal from the Seventh Judicial District Court in and for
San Juan County, Utah, the Honorable Douglas L. Cornaby
Presiding

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JURISDICTION

This court has jurisdiction in this matter pursuant to § 78-2-2(3)(j), Utah Code Annotated (1996).

STATEMENT OF THE ISSUES AND STANDARD OF APPELLATE REVIEW

Did the trial court correctly decide that attorney Eric P. Swenson (“Swenson”) violated Rule 11(b), Utah Rules of Civil Procedure (“Rule 11”) and correctly impose sanctions against Swenson? The standards of review are 1) with respect to factual findings underlying the violations, whether they are clearly erroneous, (2) with respect to whether Rule 11 was violated, correction of error, and 3) with respect to type and amount of sanctions, abuse of discretion. Barnard v. Sutliff, 846 P.2d 1229 (Utah 1992).

DETERMINATIVE AUTHORITY

The determinative authority in this case is Rule 11 of the Utah Rules of Civil Procedure, and Rule 33 of the Utah Rules of Appellate Procedure (“Rule 33”) which set the standards for counsel as follows:

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

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

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

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

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

**Rule 33. Damages for delay or frivolous appeal;
recovery of attorney's fees.**

(a) If the court determines that an appeal taken is either frivolous or for delay it shall award just damages which may include single or double costs and/or reasonable attorneys fees, to the prevailing party.

(b) A frivolous appeal is one that is not grounded in fact, not warranted by existing law or not based on a good faith argument to extend, modify or reverse existing law. An appeal interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal.

STATEMENT OF THE CASE

Nature of the Case

Originally this was a civil rights case filed in state court against the Utah Judicial Council ("Council") and the district judges of the Seventh District Court. Sanctions were eventually ordered against Swenson and attorneys fees were awarded to Judge Lyle R. Anderson ("Judge Anderson") against Swenson for violations of Rule 11.

Judge Anderson notes at this juncture that he does not agree with the caption selected by Swenson. There has never been a case filed between Swenson and Judge Anderson. It is true the live dispute at present involves whether counsel for one of the parties (Swenson) should be sanctioned for attempting to hold a non-party (Judge Anderson) in contempt for not unilaterally enforcing the Agreement (hereinafter defined). Judge Anderson's caption for this case accordingly names the parties to the case as Loren Crank and the Utah Judicial Council, but names Swenson and Judge Anderson as appellant and appellee.

Course of Proceedings

On February 6, 2001, the Utah Supreme Court issued its decision in Crank v. the

Utah Judicial Council, et al., 2001 UT 8, 20 P.3d 307 (“Crank I”), in which it remanded to the trial court the question of attorneys fees sought by Swenson against the Council and the question of sanctions against Swenson sought by Judge Anderson.

Disposition by the Trial Court

On remand to the trial court, the trial court, on February 6, 2002, issued its written ruling on attorneys fees in which it denied Swenson’s request for fees against the Council and granted Judge Anderson’s motion for sanctions against Swenson and awarded Judge Anderson attorneys fees in the amount of \$5,701.45. The judgment was dated March 8, 2002, and filed on March 13, 2002. Swenson appealed the granting of sanctions against him but did not appeal the trial court’s denial of his fee request against the Council.

Statement of Facts

1. There was little participation by American Indians on San Juan County juries before 1993. Of those juries evaluated by Crank, only three of 80 jurors who served from 1960 through 1992 were American Indians, or 3.75%. R. 148-160A, R. 325-26.

2. Judge Anderson took office in February, 1993. R. 1067. By June 17, 1993, he had presided over only one jury trial, in which three of eight jurors, or 37.5%, were American Indians. R. 325, 1067.

3. Crank filed a complaint in Seventh District Court on June 17, 1993, against the Council and all three judges of the Seventh District Court, including Judge Anderson. The complaint accused the Council of failing to provide adequate jury lists for San Juan County and accused the judges of the Seventh District Court of serious misconduct, including discriminating against American Indians in San Juan County by failing to

compel them to serve as jurors, failing to properly determine qualifications to serve, failing to order the Council to alter its jury lists, excusing American Indians on insufficient grounds, and concocting rulings rationalizing the deliberate exclusion of American Indians from jury service. R. 8-10, ¶ 16. Because they were named as defendants, all judges of the Seventh District Court recused themselves. R. 31-34, 39-40.

4. Crank then proposed a settlement which included a dismissal of all claims against the judges with prejudice. The proposed settlement required certain actions of the Council. The most significant change was that the Council would adopt a third source list for its master jury list, which would probably be obtained from the Navajo Nation. The Council had already adopted a rule permitting such a change and had started to secure the list. See Rule 4-404(2)(c), Utah Code of Judicial Administration. R. 1644, pp. 154-59.

5. Crank's proposal led to the Agreement of the Parties (the "Agreement")¹ which Crank and the Council signed on March 25, 1996. R. 648-57. Pursuant to the Agreement, all claims against all the judges were dismissed with prejudice by an Order and Decree dated October 27, 1996 (the "Order"). R. 662-663; Crank I, 2001 UT 8, paragraph 3, 20 P.3d 307.

6. The Agreement required the Council to adopt a plan that would, by January 31, 1997, provide jury questionnaire lists ("Questionnaire Lists") that reasonably approximated the proportion of American Indians in San Juan County at the time of the 1990 census. R. 652, 657.

¹The Agreement is Exhibit 1 of the Addendum.

7. The Council did not meet the January 31, 1997, deadline. Their failure to do so was explained later to the trial court and found acceptable, though the court chided the Council for its failure to seek an extension from the court. R. 1561-62.

8. In the meantime, cases continued to be filed in San Juan County that required decisions by a jury. R. 690-91. No party in those cases challenged the composition of the venire, nor the process that led to the summoning of the venire, until July 18, 1997, when Crank's counsel, acting for a criminal defendant not a party to this proceeding, challenged the composition of the Questionnaire List for the second half of 1997. R. 776-84. At a hearing on July 18, 1997, counsel claimed that the Questionnaire List was made up of 40% American Indians. Judge Anderson supplemented the record with actual responses of potential jurors² and found that 44.6% of the potential jurors were American Indians.³ Comparing this proportion with the 1990 census percentage of 51.68%, Judge Anderson found that the disparity of 7.08% was not of constitutional dimension and denied the motion. Although Crank's counsel appealed the eventual conviction of his client, he expressly did not appeal this ruling. R. 786-87.

9. On September 3, 1997, Crank filed Plaintiff's Verified Motion for Appointment of a Receiver to Enforce Consent Decree and for Order to Show Cause (the "Verified Motion"). R. 684-699. The Verified Motion included several allegations against Judge Anderson, including "The Court should also consider whether Judge Anderson should be jailed for what can only be described as flagrantly racist conduct."

²At Crank's request, the Council added a line to the juror questionnaire asking potential jurors to identify their racial or ethnic groups.

³Thereafter, in this case, Crank admitted that 43.8% of the people on that list were American Indians. R. 1446.

R. 739. In essence the Verified Motion claimed Judge Anderson had violated the Agreement by continuing to hold jury trials in San Juan County. Crank never asked the court for permission to add Judge Anderson as a party, nor for permission to amend his complaint to state a new claim against Judge Anderson, and the order to show cause was never signed by Judge Roth. See Crank I, 2001 UT 8, paragraph 14, 20 P.3d 307.

10. Notwithstanding the lack of trial court approval of his effort to bring Judge Anderson back into the case, Crank served the unsigned order to show cause and the Verified Motion on Judge Anderson, R. 743, added Judge Anderson to the case caption, designating him as "contemnor", R. 758, and mailed discovery requests to Judge Anderson purporting to require him to respond. R. 761-62; Crank I, 2001 UT 8, paragraph 14, 20 P.3d 307.

11. Judge Anderson filed a motion to strike ("Motion to Strike") all of the allegations relating to him in the Verified Motion⁴ on June 19, 1998. On August 14, 1998, at a scheduling conference requested by Crank, Judge Roth considered the Motion to Strike and rendered the following decision:

Dealing first with Judge Anderson's Motion to Strike, I find that the October 1996 Agreement and Order is really central to all the motions that are before me today. That Agreement acknowledges that there is a real and actual controversy. The Council as a defendant, the Judicial Council, admits no wrongdoing but recognizes the problem and agrees to take steps to solve that problem. The Agreement acknowledges that it may take some time and that there are numerous problems to overcome.

In that Agreement the judges in the Seventh District are dismissed from the action with prejudice. There is no mention in the Agreement of any moratorium on jury trials until a jury list that reflects a correct proportion of Native Americans is constructed. There is no affirmative

⁴Judge Anderson gave Crank a chance to withdraw the Verified Motion, as Rule 11 requires, by serving a motion for sanctions on May 28, 1998, R. 1001-29.

duty in that Agreement on the judges to construct an appropriate master list.

Rule 4-404 of the Utah Code of Judicial Administration clearly gives the Council, the Judicial Council, the responsibility and the power to create a master list of jurors. And the judges are bound to use that list. I'm not aware of any court in this state that has yet found that it's illegal or unconstitutional to use the list provided by the Council.

Plaintiff claims that Judge Anderson should be in contempt of this Court for violating the Agreement and continuing to conduct jury trials using an unconstitutionally constituted master list. I find that Judge Anderson has no affirmative duty that arises out of this Agreement. I also find that he could only be in contempt of this Court under the Agreement if he did something to frustrate the Council's efforts to comply with the Agreement. I find no evidence of that. Judge Anderson's Motion to Strike is granted. R. 1600, pp. 7-8; Crank I, 2001 UT 8, paragraph 15, 20 P.3d 307.

Judge Roth then added the following regarding the motion for sanctions:

There is a Motion for Sanctions under Rule 11 for bringing this action against Judge Anderson. Quite frankly, I don't think it's even a close call to grant the Motion to Strike. R. 1600, p. 8.

12. Following the granting of the Motion to Strike, which eliminated Crank's contempt allegations against Judge Anderson, Crank abandoned his claim that the Council should be found in contempt of court, and asserted instead a claim for breach of contract, which was tried on December 10-11, 1998. R. 1256-1307.

13. At the conclusion of trial on December 11, 1998, the trial court, a) accepted the Council's explanation of its failure to meet the deadline for providing Questionnaire Lists reasonably approximate to the proportion of American Indians in San Juan County at the time of the 1990 Census; and b) denied Crank's request for attorney's fees and costs against the Council. R. 1555-1566, 1593-1596; Crank I, 2001 UT 8, paragraphs 20-21, 20 P.3d 307.

14. Crank's counsel appealed the rulings of the trial court on only two issues: a) the granting of Judge Anderson's Motion to Strike and refusal to hold Judge Anderson

in contempt; and b) the denial of Crank's request for attorney's fees and costs against the Council. Crank did not appeal the trial court's ruling with respect to the claim that the Council had breached the Agreement. R. 1588-1589, 1631-1633.

15. Judge Anderson appealed the denial of his motion for sanctions against Crank's counsel. R. 1597-1598.

16. The Utah Supreme Court affirmed the trial court's granting of Judge Anderson's Motion to Strike and refusal to hold Judge Anderson in contempt, and remanded the issue of Judge Anderson's claim for attorney's fees and costs under Utah R. Civ. P. 11 (b). Crank I, 2001 UT 8, 20 P.3d 307.

17. On February 6, 2002, the trial court issued its Ruling on Attorney's Fees which denied Swenson's fee request against the Council, and granted Judge Anderson's motion for sanctions against Swenson.⁵ R. 2057-2069, 2075-2080.

SUMMARY OF ARGUMENT

On remand the trial court correctly determined that Swenson had violated Rule 11(b) and imposed sanctions. The findings of the trial court should stand because Swenson has failed to marshal all the supporting evidence for such findings and demonstrate its insufficiency.

The trial court correctly followed the instructions and directives of the Supreme Court on remand and determined that Swenson had violated Rule 11(b), subparagraphs (2) and (3). Swenson failed to provide any concrete evidence or sworn facts in support of his claims or to establish that his claims were warranted by existing law or a non-

⁵The Ruling on Attorney's Fees is Exhibit 2 of the Addendum. The Judgment on Motions for Attorney's Fees is Exhibit 3 of the Addendum.

frivolous argument for the extension, modification or reversal of existing law or the establishment of new law. Swenson also violated Rule 11(b)(1) with his actions after Judge Roth made his initial ruling on August 14, 1998. Each subparagraph of Rule 11(b) is a separate and distinct basis for the awarding of sanctions.

This court should also impose sanctions on appeal in the form of attorneys fees. The general rule is that a party who received attorneys fees in the trial court and prevails on appeal is entitled to fees reasonably incurred on appeal.

The trial court properly applied the standards of Rule 11 and the prior decision of this court in awarding sanctions under Rule 11 and thus, did not use Rule 11 for an improper purpose.

ARGUMENT

I. SWENSON FAILED TO MARSHAL ALL THE SUPPORTING EVIDENCE AND DEMONSTRATE ITS INSUFFICIENCY.

Utah appellate courts have repeatedly held that in order to challenge findings of fact, the challenging party must show that the evidence, viewed in a light most favorable to the trial court, is legally insufficient to support the contested finding and that the burden is on the challenging party to marshal all the supporting evidence and demonstrate the insufficiency. Brewer v. Denver & Rio Grande W.R.R., 2001 UT 77, paragraph 33, 31 P.3d 557; Utah Department of Social Service v. Adams, 806 P.2d 1193 (Utah App. 1991). Judge Cornaby's February 6, 2002, ruling is lengthy and detailed. He found numerous facts supported by evidence, including the following:

1. "One of the reasons Mr. Swenson referred to Judge Anderson's conduct as 'flagrantly racist' was because Judge Anderson had ruled against him in the July 18,

1997, case.” R. 2066.

2. “This court has also reviewed the files and records and finds no action on the part of Judge Anderson which would indicate wrongdoing of any kind.” R. 2067.

3. “Mr. Swenson . . . was motivated in part by the rulings Judge Anderson made against him in the case tried on July 17, 1997 This does not become apparent until August 14, 1998, when the trial court ruled against him, yet he continued to pursue contempt against Judge Anderson. The purpose to harass and embarrass then becomes apparent.” R. 2067.

4. “[Mr. Swenson] never argued that the court should extend, modify or reverse the law or establish new law.” R. 2067.

5. “All action against Judge Anderson should have been abandoned after the August 14, 1998 hearing At that time it was clear that judge Anderson was not ‘flagrantly racist,’ was not a party to the Agreement, and had not duty with respect to constructing the master list.” R. 2067-2068.

6. “It was clear that Judge Anderson was not a party to the Agreement. No sworn facts indicate that Judge Anderson had violated the Agreement or had made an effort to interfere with its implementation.” R. 2068.

7. “The Court is aware of the many ways . . . to sanction a lawyer, but in this case the most effective method is the pocketbook.” R. 2068.

✧ In this case, the initial brief filed by Swenson makes no effort to marshal all the supporting evidence for the trial court’s findings and to demonstrate that the evidence is insufficient to support the findings. At best, Swenson’s arguments attack the trial court’s decision that Swenson violated Rule 11 and attempt to explain why the trial court abused

its discretion in awarding the type and amount of sanctions it awarded. Swenson makes no effort to deal with the factual findings of the trial court. At the least, this court should uphold the findings of the trial court.

II. THE TRIAL COURT FOLLOWED THE SUPREME COURT'S INSTRUCTIONS ON REMAND AND PROPERLY AWARDED SANCTIONS.

In Crank I, this court affirmed the granting of the motion to strike and stated, “We affirm the Court’s ruling wherein it refused to hold Judge Anderson in contempt. We remand the issue of Judge Anderson’s claim for attorney fees under subparts (2) and (3) of Utah R. Civ. p. 11(b).” Crank I, 2001 UT 8, paragraph 44, 20 P.3d 307. This court also allowed that the trial court’s ruling was not clear with respect to whether Swenson, as opposed to his client, had an improper purpose in pursuing Judge Anderson, and invited the trial court to clarify that question on remand. Id. at paragraph 13, n. 13.

In Crank I, this court made it clear,

Judge Anderson was not a party to the case at the time Crank filed his verified motion in September of 1997, and Crank never took any steps to have Judge Anderson reinstated as a party. Nor did Crank obtain any order directing Judge Anderson to appear and defend the new allegations according to the dictates of Section 78-32-3. Instead, Crank simply mailed papers to Judge Anderson denoting him as a contemnor.

Id. at paragraph 24. The court further indicated that the allegations of Crank

were insufficient to warrant initiation of contempt proceedings because they did not provide any sworn facts that indicated a violation of the agreement or an attempt to interfere with its implementation. Crank asserted that Judge Anderson had the affirmative duty to unilaterally remedy the Council’s failure to meet the agreement’s deadline for compliance with a required percentage of Native Americans on the jury questionnaire list. Even a cursory reading of the agreement refutes this assertion. Judge Anderson was not a party to the agreement and it imposed no affirmative duties on the judges of the Seventh District.

Moreover, despite Crank’s conclusory contentions that Judge

Anderson conspired with the Council, there are no concrete factual allegations indicating that Judge Anderson undertook any actions that could be remotely construed as hampering the Council's efforts nor has Judge Anderson contributed to any of the Council's conceded failures to comply with its terms.

Id. at paragraphs 29-30 (emphasis added).

This court then held that each of the four subparagraphs of Rule 11(b)

. . . furnish a distinct basis for a finding of a violation of the rule [and] while bad faith may often be associated with violation of subparagraphs (2) or (3), such is not a necessary element. A lawyer may bring frivolous or inadequately supported claims merely by failing to exercise the minimal required level of professional care and judgment.

Id. at paragraph 33. This court then directed the trial court to address whether Swenson violated Rule 11(b)(2) and (3) and indicated that an "appropriate award of attorneys fees on appeal should be assessed by the district court on remand." Id., at paragraph 44, n. 18.

II.A. Swenson Violated Rule 11(b)(2) of the Utah Rules of Civil Procedure.

On remand the trial court followed the instructions and directives of this court in Crank I and made findings regarding Swenson's conduct and determined that Swenson had violated Rule 11(b). The trial court specifically found that Swenson violated Rule 11(b)(2). Rule 11(b)(2) provides that Swenson, when he filed the Verified Motion, certified that after reasonable inquiry and investigation, his claims were "warranted by existing law, or a non frivolous argument for the extensiion, modification or reversal of existing law or the establishment of new law." U.R.C.P. 11(b)(2) (2002). The trial court determined Swenson did not seek to extend, modify or reverse the law or establish new law but rather contended existing law warranted the relief he sought. Swenson still takes this position in his brief. Swenson argues that "the right of a court to hold a non-party in

contempt for aiding and abetting a party who is violating a court order is well recognized throughout the United States.” Swenson Brief, p. 30. In Crank I, this court noted that a trial court clearly has the power to hold non-parties in contempt. Crank I, 2001 UT 8, paragraph 25, 20 P.3d 307. Judge Anderson has always agreed with this. Thus, with respect to this general legal principle, the parties have always agreed.

The dispute has been the application of the law to the facts and whether the law warrants the relief Swenson sought. The question before the trial court was not what the law is, but whether there was any legal basis for holding Judge Anderson in contempt. The trial court, on remand, took the cue from this court’s determination in Crank I, that the Council was obligated to construct the list and Judge Anderson was obligated to use the list. R. 2067. Also, the trial court found that Judge Anderson was not a party to the action after claims against him were dismissed with prejudice and found that Swenson took no action to make him a party as part of his enforcement proceeding, R. 2067; Crank I, 2001 UT 8, paragraph 24, 20 P.3d 307. This court and the trial court each determined that the applicable law in this case was well settled but that it provided no arguable basis for holding Judge Anderson in contempt. The trial court determined that Swenson’s continuing efforts to hold Judge Anderson to the performance of an agreement of which he was not a party, under which he had no obligation, and which he had no right to unilaterally enforce, was a violation of Rule 11(b)(2). R. 2067-2068.

Still
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II.B. Swenson Violated Rule 11(b)(3) of the Utah Rules of Civil Procedure.

In Hunt v. Hurst, 785 P.2d 414 (Utah 1990) this court held that sanctions against the plaintiff under Rule 11(b) were appropriate because he could not prove his claim, the

record was devoid of any relevant admissible evidence in support of plaintiff's claims, and plaintiff nevertheless persisted in the litigation. In this case, the trial court determined that Swenson violated Rule 11(b)(3), which requires Swenson to certify that his allegations and contentions are supported by evidence. Once again, the trial court took the cue from this court, and found that it was clear Judge Anderson was not a party to the settlement agreement (although Swenson continues to assert that he is, Swenson Brief, pp. 32-33), and that there were no sworn facts indicating that Judge Anderson had violated the settlement agreement or attempted to interfere with its implementation. R. 2068; Crank I, 2001 UT 8, paragraphs 29-30, 20 P.3d 307. If the failure of Swenson to make any concrete factual allegation or provide any concrete evidence supporting his claims is not a violation of Rule 11(b)(3), what is?

Swenson makes numerous arguments as to why he did not violate Rule 11(b)(3). Only a few deserve a response. Swenson claims that he was never provided notice of the factual deficiencies and if he would have been, he could have cured the factual insufficiencies. This court addressed that issue when in Crank I it remanded the case to the trial court to make a determination whether Swenson had violated Rule 11(b)(3). If Swenson thought this court erred in remanding that issue, he should have petitioned this court for rehearing. That remand order is now the law of this case. To now claim that he was not provided notice is disingenuous. Further, Swenson's claim that he was entitled to an opportunity to cure any factual deficiencies is an attempt to have a second bite at the apple. Swenson chose to file court documents without any facts to support his claims. Judge Anderson chose to challenge those unsupported claims head on.

II.C. Swenson Violated Rule 11(b)(1) of the Utah Rules of Civil Procedure.

On remand, the trial court also found that Swenson violated Rule 11(b)(1). It is true this court did not expressly remand the question of sanctions under Rule 11(b)(1). It did however, invite the court to clarify whether Swenson or his client had acted in good faith. Crank I, 2001 UT 8, 20 P.3d 307, at n. 13. It also expressly remanded the question of whether sanctions should be awarded for the appeal. The most that can be said about Crank I is that this court affirmed Judge Roth's decision that Swenson had not violated Rule 11(b)(1) as of August 14, 1998. Between August 14, 1998, and February 6, 2002 (date of Judge Cornaby's ruling on attorneys fees), additional facts were evident from the record that were not known to Judge Roth on August 14, 1998.

The Council had the primary, if not sole, obligation under the Agreement to provide improved jury lists for San Juan County, and yet Swenson never sought to bring any employee, agent or member of the Council before Judge Roth to show cause why the improvement had been delayed. In fact, he initially postponed, and later abandoned (after Judge Roth granted the Motion to Strike) his claim the Council should be held in contempt for violating the Agreement. Of all the people involved in this case, Swenson selected Judge Anderson, who had no obligation under the Agreement, as the only person to accuse of "flagrantly racist conduct" and for whom to request incarceration. Even though several issues were sufficiently disputed to require a trial, Swenson chose to appeal only the issue characterized by Judge Roth as "not even a close call" and which involved only Judge Anderson.

Once Swenson lost the possibility of holding Judge Anderson in contempt, he dropped his contempt claim against the Council. After his claims against the Council were rejected at trial, Swenson elected not to appeal but still pursued his contempt claim against Judge Anderson on appeal in Crank I. This decision led to the oddity that the party with primary responsibility (the Council) was exonerated of any claims of contempt and prevailed on the most substantial issues at trial, with no appeal, while Swenson continued on appeal to pursue for contempt a person who had no responsibility. This course of conduct after August 14, 1998, makes it clear that there is something personal about Swenson's pursuit of Judge Anderson at the appellate level and that his purpose is to harass and embarrass Judge Anderson.

Even without the determination of the trial court that Swenson violated Rule 11(b)(1), this court can affirm the decision of the trial court and impose sanctions because each subparagraph of Rule 11(b) furnishes a distinct basis for a finding of a violation of Rule 11(b). Crank I, 2001 UT 8, paragraph 33, 20 P.3d 307.

Amazingly, Swenson still asserts that his motivation was proper because Judge Anderson still uses jury lists that do not comply with the Agreement. Swenson's Brief, pp. 24-25. To continue to pursue this contention after this court's clear rejection of that theory in Crank I shows that Swenson still has not learned and that he is still caught up in his obsessive pursuit of Judge Anderson.

Swenson also argues that Judge Roth's expression at the end of trial that both sides of the case were properly motivated, R. 1600 at 395, is evidence of his good faith and proper purpose. Swenson Brief, pp. 26-27. Swenson misconstrues the comment attributable to Judge Roth. This was a comment that was made at the end of a trial

involving only the plaintiff and the Council. Judge Anderson had been dismissed from the lawsuit and the motion to strike had already been granted. The statement of Judge Roth may describe the conduct between Swenson and the Council but says nothing about the conduct of Swenson towards Judge Anderson.

III. SANCTIONS AND ATTORNEYS FEES SHOULD BE IMPOSED ON SWENSON ON APPEAL.

Rule 33 of the Utah Rules of Appellate Procedure states,

(a) If the court determines that an appeal taken is either frivolous or for delay it shall award just damages which may include single or double costs and/or reasonable attorneys fees, to the prevailing party.

(b) A frivolous appeal is one that is not grounded in fact, not warranted by existing law or not based on a good faith argument to extend, modify or reverse existing law. An appeal interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal.

Utah R. App., p. 33 (2002). This rule is analogous to Rule 11(b).

In Utah Department of Social Services v. Adams, 806 P.2d 1193, 1197-1198 (Utah App. 1991), the court stated, “The general rule is that when a party who received attorneys fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal. Moreover, an appeal brought from an action which is properly determined to be in bad faith is necessarily frivolous under Utah R. App., p. 33.”

Utah appellate courts have found a variety of actions to be frivolous and grounds to award sanctions under Rule 33 of the Utah Rules of Appellate Procedure. Gildea v. Guardian Title Company, 970 P.2d 1285 (Utah 1998) (sanctions on an appeal taken from claims dismissed by the trial court was granted after the trial court had stated the plaintiff’s claim bordered on being frivolous); Hunt v. Hurst, 785 P.2d 414 (Utah 1990)

(plaintiff subject to sanctions where he could not prove his claims, the record was devoid of any relevant admissible evidence and plaintiff persisted in filing an appeal); Schoney v. Memorial Estates, Inc., 863 P.2d 59 (Utah Ct. App. 1993) (attorney who chose to ignore the decision and attempted to re-litigate the case was subject to sanctions); Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989) (frivolous appeal is one without reasonable legal or factual basis); Eames v. Eames, 735 P.2d 395 (Utah Ct. App. 1987) (appeal from a judgment was frivolous where there was no basis for the argument presented and the evidence and law was mistaken and misstated).

In this case, if Swenson violated Rule 11(b), he has clearly violated Rule 33. A review of Swenson's brief on appeal shows that he continues to assert the same claims and rationale as he did before Judge Roth, as he did in Crank I, and as he did on remand to Judge Cornaby. For example, Swenson still asserts Judge Anderson was a party to the Settlement Agreement, Swenson Brief, pp. 32, 33, still asserts that numerous facts on the record support his claims, Swenson Brief, pp. 39-46,⁶ and that the use of lists with deficient numbers of Native Americans by Judge Anderson continues his cycle of discrimination. Swenson Brief, p. 25. Swenson's effort to continue to assert the same claims and re-litigate the same claims after having been turned down three times, is clearly a violation of Rule 33. In addition, Swenson makes the unique arguments that this court should abandon its precedent (including Crank I) in favor of another line of reasoning, Swenson Brief, p. 11, and that this court addressed claims he never raised and

⁶The list of documents cited to by Swenson are affidavits and other documents relating to population percentages; questionnaire lists percentages, supplemental sampling, and other issues not remotely relevant to the claims made against Judge Anderson.

ignored claims he did raise. Swenson Brief, pp. 29-34, 39. This court should send a clear message to Swenson that such conduct is not tolerated and those who persist in needless litigation must pay the consequences.

There is an additional reason why this court should award sanctions or fees on appeal. Rule 11 is designed to deter misuse of the privileged access that lawyers have to the courts of this state. It is also designed in part as a remedy for those who suffer when lawyers misuse the courts. If Rule 11, and its appellate companion, Rule 33, are to have these desired effects, there should be a strong presumption in favor of awarding fees on appeal whenever they were properly awarded in the trial court for a Rule 11 violation.

Rule 11 places the primary burden on opposing parties and counsel to call violations to the court's attention. In this case, Judge Cornaby determined that Judge Anderson's counsel had necessarily spent time because of Swenson's Rule 11 violation for which they could reasonably expect compensation of \$17,255.00, but nevertheless exercised his discretion to reduce the fee award to \$5,701.45. If this court refuses to award fees on appeal, Judge Anderson's counsel will either receive no compensation for their efforts to uphold this Rule 11 award on appeal, or Judge Anderson will have to pay thousands of dollars to uphold a fee award to his attorneys of \$5,701.45.

What lesson will future litigants and attorneys affected by lawyers' misuse of the courts draw from a decision that upholds a Rule 11 award of a few thousand dollars but refuses to award attorneys fees for the cost of upholding that award on appeal, a cost that could easily exceed the amount of the award? Just as civil rights lawyers receive fees for the effort expended in collecting their fees if they are to have the proper incentives,

lawyers who pursue Rule 11 violations must be able to recover the cost of upholding those awards on appeal, or the cost of enforcing the rule will just be too high.

This court should remand this matter to the trial court, for determination of the full amount of costs and attorneys fees, without reduction, reasonably incurred by Judge Anderson on this second appeal. This court should send the clear message to Swenson that his “emotional involvement in this case completely distorts the factual merits of his arguments . . . and . . . any further efforts on his part will only result in his increased expenditure of time, effort and money.” Porco v. Porco, 752 P.2d 365, 369 (Utah Ct. App. 1988).

IV. THE TRIAL COURT PROPERLY APPLIED THE STANDARDS OF RULE 11 AND THE PRIOR DECISION BY THE UTAH SUPREME COURT.

Besides arguing that he did not violate Rule 11(b), Swenson also argues that the trial court’s imposition of sanctions under Rule 11 was an improper use of Rule 11 because (1) sanctions for appeals should be reserved for appellate courts; (2) granting attorneys fees as sanctions under Rule 11 is a punishment and conflicts with Rule 11; (3) there were unresolved disputed issues of fact; and (4) the awarding of sanctions chills the right of appeal and imperils the right of Native Americans. Each of these arguments is a further example of Swenson’s violations of Rule 11 and Rule 33 and is without merit.

First, Swenson wants the court to follow the federal rule from Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990), that Rule 11 only applies to district courts.

Unfortunately for Swenson, this is not federal court. The Utah Supreme Court in Crank I expressly remanded to the district court the question of attorneys fees at the trial court level and in addition stated, “any appropriate award of attorneys fees on appeal is

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dependent upon that determination and should be assessed by the district court on remand.” Crank I, 2001 UT 8, paragraph 44, n. 18. Thus, the trial court’s ruling and order relating to fees for work done on the appeal of Crank I was undertaken at the direction of this court.

Second, Swenson claims the fees imposed by the trial court were as punishment and not as a deterrent. This is an exercise in semantics. The trial court found that Swenson had violated Rule 11(b), subparts (1), (2) and (3) and should be sanctioned therefor. Nowhere in the trial court’s ruling does he refer to the sanctions as punishment. Judge Cornaby stated, “The sanction imposed is not based upon some formula, but is the judgment of the court that it is reasonable. It is meant as a sanction and the fact that Judge Anderson is not reimbursed for all his attorneys fees is not a consideration.” R. 2068-2069. Rule 11 allows for sanctions in the form of attorneys fees and Utah appellate courts have “affirmed the appropriateness of this type of Rule 11 sanctions on many occasions.” Schoney, 863 P.2d at 62. The trial court exercised its discretion and awarded approximately one-third of the fees found to be reasonable and necessary.

True

Third, Swenson’s claim that there are unresolved disputed issues of facts which require an evidentiary hearing is without merit. When Swenson filed the Verified Motion, Judge Anderson raised the issue of Swenson’s violation of Rule 11. The motion for sanctions was served on Swenson on May 28, 1998, and eventually filed on June 29, 1998. At the August 14, 1998 scheduling conference, Judge Roth considered the motion for sanctions and denied it. Swenson did not ask for an evidentiary hearing. When the trial court considered the motion for sanctions after remand under the standard set forth in Crank I determined that Swenson had violated Rule 11(b), Swenson also did not request

an evidentiary hearing. At the telephone conference held between counsel and Judge Cornaby in which the briefing schedule for the questions on remand was decided, Swenson agreed the matter could be determined without a hearing. Swenson knew Judge Anderson was asking for attorneys fees as sanctions, and he knew it would require affidavits to establish the amount of the claimed fees. Swenson even submitted his own Declaration. R. 1957-1963. The trial court had an appropriate record before him and made his ruling rejecting Swenson's claims.

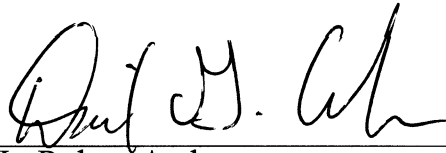
Fourth, Swenson's claim that awarding fees chills the right of appeal once again is contrary to this court's direction to the trial court in Crank I. Utah appellate courts have indicated that sanctions should be imposed when an appeal is obviously without any merit and was taken with no reasonable likelihood of prevailing. Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989); Porco v. Porco, 752 P.2d 365 (Utah Ct. App. 1988). In Hunt, this court stated, "We do not believe or intend that the litigation of new or uncertain issues will be chilled by imposing sanctions on attorneys who pursue what in reality are nuisance claims and do so in an unlawyer-like fashion by writing an unprofessional brief and relying on improper materials and arguments in the brief." Hunt, 785 P.2d at 417. A party does not have an unrestricted right to appeal any decision of a trial court. Rule 33 applies even on the first appeal. The fact that Swenson fails to recognize such basic principles is a further indication of the frivolous nature of his claims.

CONCLUSION

Swenson's claims on appeal are frivolous. The imposition of sanctions by the trial court against Swenson should be affirmed and the case remanded to the trial court to

determine the amount of attorneys fees and costs which Judge Anderson should be awarded for this second appeal.

DATED this 9th day of August, 2002.



L. Robert Anderson
Daniel G. Anderson
ANDERSON & ANDERSON, P.C.
Attorneys for Lyle R. Anderson
P. O. Box 275
Monticello, Utah 84535

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2002, I deposited in the United States Mail, postage prepaid, two copies of the foregoing Brief addressed to the Appellant as follows:

Eric P. Swenson
P. O. Box 58798
Salt Lake City, UT 84158



Daniel G. Anderson

ADDENDUM

- Exhibit 1, Agreement of the Parties
- Exhibit 2, Ruling on Attorney's Fees
- Exhibit 3, Judgment on Motions for Attorney's Fees
- Exhibit 4, Rule 11, Utah Rules of Civil Procedure
- Exhibit 5, Rule 33, Utah Rules of Appellate Procedure

Exhibit 1

Agreement of the Parties

Eric P. Swenson, # 3171
P.O. Box 940
Monticello, Utah 84535
Telephone: (801) 587-2843

Jensie L. Anderson, # 6467
American Civil Liberties Union
of Utah Foundation, Inc.
9 Exchange Place, Suite 715
Salt Lake City, Utah 84111
Telephone: (801) 521-9862

SEVENTH DISTRICT COURT
San Juan County

FILED MAY 13 1996

JENNY L. ANDERSON
CLERK OF THE COURT
BY
DEPUTY

Attorneys for Plaintiff

IN THE SEVENTH JUDICIAL DISTRICT COURT, SAN JUAN COUNTY

STATE OF UTAH

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                                )
LOREN CRANK, JR.,              )
                                )
    Plaintiff,                  )  AGREEMENT OF THE PARTIES
                                )
v.                               )
                                )
UTAH JUDICIAL COUNCIL,          )  Civil No. 9307-26
                                )
    Defendant.                  )  Judge Roth
                                )
=====
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The parties desire to settle this litigation by entering into this agreement. It is therefore agreed and stipulated as follows:

1. This is an action brought pursuant to 42 U.S.C. § 1983 alleging that the Defendant and others acting in concert with the Defendant have committed acts and omissions which have resulted in the improper exclusion of Native American jurors in the District Court for San Juan County, Utah. Plaintiff maintains that these acts and omissions violate the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, comparable provisions

of the Utah Constitution, and applicable laws and regulations of the State of Utah. Defendant denies these allegations. There is a real and actual controversy between the parties in connection with such matters. This Court has jurisdiction over this action and the parties hereto.

2. The following constitute agreed facts:

a. Mr. Crank is an adult Native American resident of Montezuma Creek, San Juan County, Utah, and an enrolled member of the Navajo Tribe of Indians.

b. Navajo, Paiute, and Ute Native Americans in San Juan County constitute a cognizable group.

c. Native Americans have been represented on jury lists used in and for the Seventh Judicial District Court in the numbers and in the disparities listed in the documents attached to this Order, Judgment, and Decree as Exhibit A.

d. The following definitions are incorporated into this Agreement:

The Master List is the merged juror-source list used by the Utah Judicial Council.

The District Court Questionnaire List is the juror-list for the San Juan County District Court which is sent by the Judicial Council VIA the Court Administrator's Office to the Clerk of Court. The Clerk then sends qualification questionnaires to the persons on that list.

The Qualified List contains those San Juan jurors who are on the Master List and the District Court Questionnaire List and have

been through the qualification process and found to be qualified to serve as trial jurors in the San Juan County District Court.

Trial Juror Venire is the list of San Juan County District Court jurors who are summoned to appear and participate in the jury selection process in individual trials.

Trial Venire is the final list of San Juan County jurors who are selected to serve as trial jurors in a specific case.

The foregoing facts and definitions are admissible only for the purpose of enforcing or modifying this agreement or for the purpose of enforcing or modifying the orders of this Court in this case.

3. This case is maintained as a class action pursuant to Rule 23 (a) & (b)(2) of the Utah Rules of Civil Procedure. The class is so numerous that all of its members cannot be joined herein, there are common questions of law and fact applicable to the class, and the claims of Plaintiff are typical of the claims of the class. Plaintiff has alleged that the Defendant has acted upon grounds generally applicable to the class, which alleged facts, if true, would make appropriate final injunctive relief with respect to the class as a whole. Separate actions by individual members of the class would create a risk of inconsistent adjudications with respect to the individual members of the class and would, in turn, establish incompatible standards of conduct for the Defendant. Plaintiff shall represent a class of present and prospective San Juan County Native American jurors. Notice of this agreement shall be provided to the class as follows:

a. The proposed decree, this agreement, and a statement that any member of the plaintiff class may file a written statement of objections with the Clerk of Court on or before a date set by the Court, which counsel recommend be approximately 45 days after this agreement is filed with the Court, shall be posted within three days after the Court so orders as follows:

(i) Plaintiff shall post the documents at the Navajo Chapter Houses for those units of Navajo local government serving the Utah Portion of the Navajo Reservation. Plaintiff shall also post said documents at a suitable community meeting place located within the Ute Mountain Ute Reservation at White Mesa, San Juan County, Utah.

(ii) Plaintiff shall also provide notice by causing the terms of this Agreement and the proposed Order of the Court to be presented at meetings of the aforementioned Chapters.

(iii) The Defendant shall provide notice by posting a copy of this Agreement, the proposed decree, and the Notice to Class at the office of the Clerk of the Seventh District Court for San Juan County, and at the other offices of the Clerk of Court in the Seventh District, and the San Juan County Attorney's Office. Defendant shall also post notice of this settlement by advertising this Agreement, Notice to Class and the proposed decree in a newspaper of general circulation in San Juan County for a period of one month. Notice shall also be accomplished by advertising in the Navajo tribal newspaper, The Navajo Times.

(iv) Plaintiff and Defendant shall file proof with the Court that they have done the foregoing in affidavit form within 10 days

after said acts have been completed. Any objections should be heard by the Court on a date to be set by the Court, which counsel recommend by 60 days after this Agreement is filed with the Court.

4. Defendant shall formulate and implement a plan to assure that Seventh District Court jurors are chosen from sources reflective of a cross section of the community of San Juan County. Defendant and those acting for and in its behalf will have reasonable discretion to undertake actions and implement policies which will comply with the goals of this paragraph and any plan filed pursuant to this paragraph. The plan, inter alia, shall include the following:

a. The names on the District Questionnaire Lists provided to the Seventh District Court pursuant to the plan shall be within on average, plus or minus, 5 per cent of the estimated percentage of adult Native Americans in San Juan County in any given year. This requirement shall be implemented as soon as is reasonably practicable, and no later than January 31, 1997. The parties recognize that there may be administrative difficulties in implementing the provisions of this sub-paragraph and that the Defendant may for good cause petition the Court for an extension of time in which to bring the jury lists into compliance. Prior to resorting to further litigation, the parties shall engage in reasonable discussions to resolve their differences informally.

b. The plan shall provide for the use of a juror-qualification questionnaire which shall be adequate to determine the qualifications of the jurors.

c. The plan shall provide for the collection and proper use of demographic data sufficient to comply with applicable statutes and regulations.

d. The plan shall provide for the identification of jurors on the Qualified Lists by name, address, and race.

e. The plan shall also provide for the routine use of compulsory process and sanctions which are available under Utah state law or as may be available pursuant to any agreement with the Navajo or Ute tribes to encourage compliance by jurors with jury selection procedures. The parties recognize, however, that compulsory process is not currently available.

f. Nothing in the plan or this agreement shall be construed to prevent litigants and jurors from raising in a criminal case or in a separate action the question of improper peremptory-juror challenges.

g. The plan shall be filed with the Court within six months of this Court's entry of the permanent injunction and decree. Plaintiff may within 60 days following submission of the plan file with the Court their position regarding any such proposed plan. Prior to doing so, the parties shall take reasonable measures to informally resolve any differences. The Court may then schedule a hearing on the proposed plan. At such hearing, the Court may approve the plan, modify the plan, or direct that Defendant submit a new plan. If no comments are received, the plan shall go into immediate effect.

(h) Defendant may submit new or supplemental plans in the

manner set forth in this paragraph as may be needed to implement the purpose and goals of this agreement.

5. The Defendant shall maintain at its office and in the office of the Clerk of the Seventh District Court for San Juan County, the following records:

a. The District Court Questionnaire Lists used for the Seventh District Court for San Juan County for the time period in which this Court retains jurisdiction over this action.

b. The Trial Juror Venire lists and Trial Venire list, for each case in which such lists are generated for the period of time in which this Court retains jurisdiction over this action.

c. A record of all compulsory process used to summons jurors to jury duty or to complete juror qualification questionnaires.

d. A record adequately explaining the basis for all excused and disqualified jurors during the period in which this Court retains jurisdiction.

e. Each court-approved plan formulated pursuant to this Agreement.

f. Plaintiff, members of the class, and class counsel shall be provided with reasonable access to information pertaining to Defendant's compliance with this agreement and the court's decree.

g. For the first three years that this Agreement and the Court's Decree is in effect, Defendant shall file an annual report with this Court stating, with specificity, the acts and procedures undertaken to ensure compliance with this Agreement and the plan or plans submitted pursuant thereto.

6. If Defendant cannot comply with this agreement, the Court's decree, or any plan it submits pursuant to this agreement, then Defendant shall notify Plaintiff and class counsel, and the Court within 60 days of such occurrence.

7. Upon the expiration of a reasonable period of time following the provision of notice to the class, and after resolving all objections of the class to this Agreement and the proposed decree, the Court shall enter a decree incorporating this Agreement therein and restraining and enjoining the parties to abide by the terms and provisions of this Agreement. The Court's order will specify that the defendant-judges are dismissed from this action.

8. Defendant, and all those acting in concert with it, shall, in regards to jury selection procedures and activities in the Seventh Judicial District Court for San Juan County, abide by all applicable laws, regulations, and constitutional provisions.

9. The requirements of this decree may be modified upon a showing of a significant change in law or fact. If at the time modification is sought the foregoing criteria does not reflect the current rule, then the parties shall comply with contemporary standards for the modification of consent decrees under the rules of civil procedure.

10. The parties have made a separate settlement as to the payment of the costs and attorneys fees incurred by Plaintiff in bringing this action for the period up to and including the date of the Court's entry of the permanent injunction and decree. If the parties cannot agree as to Plaintiff's costs and fees, the matter

shall be submitted to the Court for resolution.

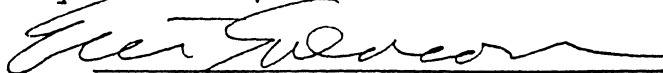
11. The parties, or any member of the plaintiff-class, may petition the Court for enforcement of this agreement, the Decree, or any order or subsequent orders issued by the Court. Prior to petitioning the Court, the parties shall undertake reasonable efforts to resolve such agreements informally.

12. This Agreement of Parties, and any Order of the Court, shall be binding on the heirs, successors, and assigns of the parties hereto, including any courts of general jurisdiction that may succeed the present Seventh District Court for San Juan County. The parties recognize that there are discussions underway concerning the division of San Juan County into two counties. Should San Juan County be divided, the Defendant shall be afforded a reasonable opportunity to formulate a new plan, if necessary.

13. This Court shall retain jurisdiction over this action to enforce the parties' compliance with the terms of this Agreement and all orders of the Court. Should the Court's retention of jurisdiction terminate, Defendant's obligation to abide by the permanent injunction of the Court shall continue.

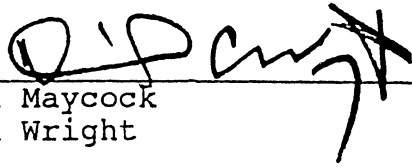
14. Nothing in this Agreement constitutes, or shall be construed as, an admission by Defendants of any of Plaintiff's allegations.

Dated this 26th day of March, 1996.



Eric P. Swenson
Jensie L. Anderson

Attorneys for Plaintiff

A handwritten signature in black ink, appearing to read "D. Wright", is written over a horizontal line.

Ellen Maycock
David Wright

Attorneys for Defendants

Exhibit 2

Ruling on Attorney's Fees

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR
SAN JUAN COUNTY, STATE OF UTAH

LOREN CRANK, JR.,

Plaintiff,

vs.

RULING ON ATTORNEY'S FEES

Civil No. 9307-26

UTAH JUDICIAL COUNCIL,

Defendant.

The Supreme Court of Utah remanded this case on the issue of Crank's claim for attorneys fees under 42 U.S.C., section 1988, and Judge Anderson's claim for attorney fees under subparts (2) and (3) of Utah R. Civ. P. 11(b).

The Court will first deal with the issue of Crank's claim for attorneys fees. It must be kept in mind that Crank lost on appeal on his attempt to have Judge Lyle R. Anderson found in contempt of court. This was a major thrust of his supplemental proceedings. The Court will, however, only deal with the issue of Crank's attorneys fees asserted against the Utah Judicial Council.

The Utah Supreme Court stated:

"Crank asserts that he is entitled to attorney fees under 42 U.S.C., Section 1988(b), which provides, in pertinent part, that 'in any action or proceeding to enforce a provision of section [] ... 1983 ... of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs....' Crank argues the district court erred in holding he was not a prevailing party under this standard and in refusing to award him attorney fees. ..."

The Court then reviewed *Arvinger v. Mayor of Baltimore*, 31 F.3d 196, 200-02 (4th Cir. 1994) and quoted the test as follows:

"...When plaintiffs are forced to litigate to preserve the relief originally obtained,' and where the issues pertaining to both actions are 'inextricably intermingled,' the plaintiff may be treated as a prevailing party. *Id.* at 202. Crank's motion facially meets this test."

"Whether the motion to enforce the Agreement qualifies Crank for prevailing party status under section 1988 presents a separate question, however, to which we now turn. In *Farrar v. Hobby*, 506 U.S. 103 (1992), the United States Supreme Court addressed the question of the standards applicable to an award of attorney fees under section 1988. The *Farrar* Court prescribed as follows the standard for determining prevailing party status:

'To qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgement against the defendant from whom fees are sought ... or comparable relief through a consent decree or settlement.... Whatever relief the plaintiff secures must directly benefit him at the time of the judgement or settlement.... In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'

Farrar, 506 U.S. at 111-12 (citation omitted.)

In this case, it is not clear whether the district court considered this standard."
CRANK v. UTAH JUDICIAL COUNCIL, 20 P.3d 316-318 (Utah 2001)

The trial court found that a basic question was whether or not supplemental proceedings were necessary. The Agreement was filed on May 13, 1996 and the order to show cause was filed September 3, 1997 (16 months). Judge David E. Roth tried the issues on supplemental proceedings, and, among other rulings, made the following findings and rulings on December 11, 1998:

"The first thing I would like to say is that in my opinion from what I have seen of this case and during these last two days, I believe that on both sides of this case the parties are properly motivated and well intentioned. Both

trying to solve a similar problem but doing it in different ways from different perspectives. And while I agree and disagree with both of you to some extent, I don't see any villains in this courtroom....

It is an agreed fact in this case that the Judicial Council did not meet the plan timely. The question is, were they justified in not meeting the plan timely. They have given reasons for their failure to comply....

I think it's commendable that they have tried to work with the Navajo Nation in solving this problem... I think it's a good thing for the Council to work with them in solving this problem and I find that that has led to some of the delays in coming into compliance with the agreement.

Had the Council asked for an extension with that explanation, I very likely would have granted it.

I understand that Counsel thought that by communicating with Mr. Swenson they were free to continue to work and try to solve this problem without reporting to the Court. Without submitting a plan....

I appreciate efforts to avoid litigation, but that doesn't mean that you can't get together and submit a stipulated request for an extension. I see no effort, there is no evidence that that was attempted."

Judge Roth found both parties to be "properly motivated" and "well intentioned." He did not see "any villains" in the courtroom. He then said, "The question is, were they [the Council] justified in not meeting the plan timely." He seemed to find that the Council was justified because he found it commendable that the Council was working with the Navajo Nation to solve the problem. He found that such work "has led to some of the delays in coming into compliance with the agreement." He also stated he would probably have extended the time if the parties had asked for it. He was bothered that the parties hadn't got together and stipulated to a request for an extension. He said, "I see no effort, there is no evidence that that was attempted." The Agreement itself anticipated that an "extension of time in which to bring the jury lists into compliance" might be needed. See paragraph 4.a. The same paragraph of the Agreement provided that "Prior to resorting to further litigation, the parties shall engage in reasonable discussions to resolve their differences informally." The parties exchanged letters but did not

"engage in reasonable discussions to resolve their differences." Both parties were in default in this provision of the Agreement.

What did Crank accomplish by his motion for supplemental proceedings? Was he a "prevailing party" under section 1988? Did he "obtain some relief on the merits of his claim?" This Court's task on remand is to determine whether, based on the facts and the Farrar standard, Crank qualifies as a prevailing party." This Court does not believe he qualifies as a prevailing party.

The Council filed a "Response Brief on Remand" dated December 17, 2001. This Court is persuaded by the facts, arguments and conclusions contained therein and adopts them as part of the ruling herein. Many quotes from that brief follow without credit being given to the writer of the brief for them.

The Council determined to obtain the best possible source list of Native Americans--a tribal enrollment list from the Navajo Nation itself, which would then be merged with drivers license and voter lists to form the master jury list. A usable list was finally obtained in time for the second half of 1998. The Council had, admittedly, not filed required status reports with the trial court. But it was undisputed that plaintiff was updated regularly and often.

The Supreme Court held that the Council's stipulation that it had not filed its reports with the trial court did not confer prevailing party status. The Court held that "because the stipulations did not create any legally-enforceable alteration in the Council's behavior toward Crank, the [trial] could not employ them as a predicate for a finding that Crank was a prevailing party." The Council was waiting for the Navajo Nation to sign the Agreement before filing it.

The trial court's ruling that the Council take action to increase the percentage of Native Americans on future inadequate questionnaire lists does not confer prevailing party status. The

ruling did not benefit Crank and it did not alter the relationship already specified under the Agreement. The Council already had "reasonable discretion to undertake actions and implement policies which will comply with the goals [of the Agreement] and any plan filed pursuant to [paragraph 4 of the Agreement]." The Council could also "submit new or supplemental plans . . . as may be needed to implement the purpose and goals of this agreement." Agreement, paragraphs 6-7 The Council was already obligated to "abide by all applicable laws, regulations, and constitutional provisions" in connection with its jury selection procedures. Agreement, paragraph 8. Under the Agreement, the Council either had to implement measures to hit the target or seek relief from the trial court. Nothing in the trial court's order changes that. The court's ruling, therefore, did not materially alter the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."

The evidence shows that the Council always intended to meet its obligations. The Council had already hired someone to obtain the Navajo list and to survey the residents along the Arizona border. Each time a new questionnaire list was to be drawn the Council believed it was about to get the list it needed to merge with the other source lists. So, there was no need for interim measures. The Council was already working diligently to satisfy the Agreement, so that Crank's motion did not alter the Council's behavior. The Council began working with the Navajo Nation in January of 1996, three months before the case settled. The relationship with the Navajo Nation is unprecedented. Judge Roth found the Council's effort commendable. He also found that "it was reasonable for [the Council] to focus its efforts on supplementing the mast list for San Juan County."

The legal enforceability of the trial court's order does not alter the Council's relationship with, or confer a benefit on Crank. The Agreement was always legally enforceable. So a second

order with the same instructions changed nothing. The mere filing of the plan as ordered by the trial court did not confer a benefit on Crank. It was the plan's implementation that conferred the benefit, not the filing of it with the court. The Council's plan showed results during the second half of 1998, before the written plan was actually filed. The reforms were already underway and positive results were obvious at the time of trial and the plan had not been filed. The plan was the heart of the Agreement, however, the plan was being implemented before it was filed and Crank knew what the plan was and what was being done to implement it.

The order to file the yearly reports already required under the Agreement did not confer a benefit on Crank. Crank was well aware of the delay in getting the additional source list from the Navajo Nation and he knew the reason it was delayed. Crank was not better informed after the filing of the annual reports than before. Again, he knew the plan and he knew what was being done to implement it.

Crank objects to the arguments put forth by the Council in that brief. Some of the Court's comments on them follow.

Trial in this case was concluded on December 11, 1998. The trial court required the Council to file the order, follow it up with annual compliance reports and take reasonable measures to correct future jury lists that may have deficient numbers of Native American jurors. The last provision is the only one that suggests anything new. Even this, however, is not really new. The Agreement provided in paragraph four (4) that, "Defendant shall formulate and implement a plan to assure that Seventh District Court jurors are chosen from sources reflective of a cross section of the community of Jan Juan County." Necessarily implied within this term of the Agreement is the requirement that defendant take reasonable measures to correct jury lists that may have deficient numbers of Native American jurors. The Court does not find this to be

"relief" that was obtained through supplemental proceedings. Crank knew the Council's plan before filing supplemental proceedings and disagreed with it. He had an ongoing dispute with Judge Lyle R. Anderson. He wanted the trial court and Council to use supplemental sampling to create a jury list. Crank also knew the percentages of Native Americans on the jury lists being used prior to the time he filed supplemental proceedings.. Exhibit A of Agreement of the Parties contains a chart. Column III shows the percentage of Native Americans on the San Juan District Court Questionnaire Lists from 1990 thru the middle of 1996.

| | | |
|---------------|-------|---------------------------------|
| 1990 | 34.89 | |
| 1991 | 45.15 | |
| 1992 | 37.27 | |
| 1993 | 45.25 | |
| 1994 | 48.99 | |
| 1995 | 42.84 | |
| 1996 (1/2 yr) | 34.00 | (Up to filing of the Agreement) |

Corresponding figures since the filing of the Agreement follow:

| | | |
|------|------|---|
| 1996 | 45.8 | (Last 1/2 of year) |
| 1997 | 43.2 | Up to filing of supplemental proceedings) |

The 1990 census showed that 51.68 percent of San Juan County residents were Native Americans. The Agreement called for the Council to be within five points of the target or 46.68 percent. The percentages support the fact that the Council was conscientiously attempting to comply with the Agreement at all times. It is also interesting to note that "for the years 1932 to 1970, there were no Native Americans on any jury lists."

The percentages since may be of interest but are not related to the decision.

| | |
|------|-------|
| 1998 | 45.45 |
| 1999 | 49.70 |
| 2000 | 48.30 |

Crank did not obtain anything of substance more after filing supplemental proceedings than he already had. The fact that the plan and annual compliance reports were filed did not give him anything new. The only thing the Council was waiting for before filing was the approval of the Navajo Nation. Had Crank requested the filing without approval of the Navajo Nation, it would have been forthcoming.

Crank also argues that "The Supreme Court has held that a plaintiff prevails when actual relief on the merits materially alters the legal relationship of the parties by modifying the defendant's behavior in a way that directly benefits plaintiff." [Farrar case] This Court does not differ with the legal principle involved but does differ with the application that Crank urges. Crank states that, "The Council needed the prod of a legal proceeding before taking action." This argument is a restatement of the prior argument concerning the filing of the plan, etc., but based on a different legal theory. This Court is not persuaded by it.

Crank also urges an award of attorney fees based on "the public interest test." There is a public interest in having Native American jurors chosen in a fair and open jury selection process. Crank urges "this is a factor only in cases where it is alleged that plaintiff's success was limited in nature." There are two problems with the application of this test in this case. First, this Court has found that Crank has not prevailed even in a limited nature. It also appears to be a point which plaintiff did not preserve on appeal because he "did not adequately brief it in his motion for fees before the trial court." Crank, 20 P.3d 319, n.17. Crank, however, insists that his claim is based solely on "the attorneys fee provisions of 42 U.S.C., section 1988. In either case, the Court rejects his arguments.

Crank's request for costs and attorneys fees is denied.

The Court will now deal with the issue of Judge Anderson's claim for attorney fees under subparts (2) and (3) of Utah R. Civ. P. 11(b).

The Utah Supreme Court held that the subparagraphs of Utah R.Civ.P., Rule 11(b)

" . . . furnish a distinct basis for a finding of a violation of the rule [and] while bad faith may often be associated with violation of subparagraph (2) and (3), such is not a necessary element. A lawyer may bring frivolous or inadequately supported claims merely by failing to exercise the minimal required level of professional care and judgment." Crank v. Utah Judicial Council, 20 P. 3d 316

Rule 11(b) provides as follows:

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

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

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

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

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

Rule 11(c) provides as follows:

Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation."

At the beginning of his brief of December 14, 2001, Eric P. Swenson states, "This Court should view the lengthy recitation of this case made in Judge Anderson's brief with caution because the judge's role in this case is multi-faceted. He is involved as a litigant. He appeared as a defense witness for the Judicial Council. 1645, Page 225. He assists the Judicial Council in

implementing the Agreement and Consent Decree, e.g., R. 685-696. He also monitors the Council's compliance. R. 1621 (Addendum to Judicial Council Plan)."

The Court is asked to use caution in reviewing Judge Anderson's brief because he is a "litigant." Judge Anderson is a litigant in much the same way that Mr. Swenson is a litigant. Neither are really parties to the action. There was an attempt by Mr. Swenson to have Judge Anderson found in contempt and there is an attempt by Judge Anderson to have Mr. Swenson sanctioned.

This Court finds the following to be facts. Judge Anderson was dismissed with prejudice as a party to the lawsuit on October 27, 1996. He was not a party to the Agreement between Crank and the Council which had been signed about March of 1996. The Agreement required the Council to adopt a plan that would, by January 31, 1997, provide jury questionnaire lists. On July 18, 1997, Mr. Swenson, acting for a criminal defendant not a party to this proceeding, challenged the composition of the questionnaire lists for the second half of 1997. Judge Anderson found that the 44.6% of the potential jurors were American Indians. He further found that the disparity of 7.08% was not of constitutional dimension and denied the motion. On September 3, 1997, Crank filed a motion to enforce the consent decree. Judge Anderson was included in the motion. Mr. Swenson suggested that, "The Court should consider whether Judge Anderson should be jailed for what can only be described as flagrantly racist conduct." Judge Anderson was never made a party to these supplemental proceedings. The motion added Judge Anderson to the case caption designating him as a "contemnor." One of the reasons Mr. Swenson referred to Judge Anderson's conduct as "flagrantly racist" was because Judge Anderson had ruled against him in the July 18, 1997 case. Judge Anderson filed a motion to strike which was heard on August 14, 1998. The trial judge granted the motion to strike Judge Anderson. In doing so he said, "I find that Judge

Anderson has no affirmative duty that arises out of this Agreement. I also find that he could only be in contempt of this Court under the Agreement if he did something to frustrate the Council's efforts to comply with the Agreement. I find no evidence of that.... Quite frankly, I don't think it's even a close call to grant the Motion to Strike." This Court also has reviewed the files and records and finds no action on the part of Judge Anderson which would indicate wrongdoing of any kind. After the trial court granted Judge Anderson's motion to strike, Crank abandoned his claim to find the Council in contempt of court. A trial was held on the other issues on December 10-11, 1998. Crank appealed the rulings of the trial court denying his request for attorney fees against the Council and the motion to strike Judge Anderson and the refusal to find him in contempt of court. The Utah Supreme Court affirmed the motion to strike Judge Anderson and the refusal to hold him in contempt of court.

Mr. Swenson violated Rule 11(b)(1). He was motivated in part by the rulings Judge Anderson made against him in the case tried on July 17, 1997. This is when he describes Judge Anderson's conduct as "flagrantly racist." This does not become apparent until August 14, 1998, when the trial court ruled against him, yet he continued to pursue contempt against Judge Anderson. The purpose to harrass and embarrass then becomes apparent.

Mr. Swenson violated Rule 11(b)(2). He never argued that the court should extend, modify or reverse the law or establish new law. He contended that the existing law warranted the relief he sought. The Agreement imposed no affirmative duty on Judge Anderson to construct an appropriate master jury list. The Council was obligated to construct the list. Judge Anderson was bound to use the list. Judge Anderson was not a party to this action and Mr. Swenson took no action to make him a party. All action against Judge Anderson should have been abandoned after the August 14, 1998, hearing wherein the trial court granted Judge Anderson's motion to strike.

At that time it was clear that Judge Anderson was not "flagrantly racist," was not a party to the Agreement and had no duty with respect to constructing the master jury list. If anyone should have been found in contempt of court it should have been someone working for the Council. Even this was not warranted because the Council had been acting in good faith throughout the proceedings. Mr. Swenson continued, however, to assert that Judge Anderson had an obligation to enforce the Agreement.

Mr. Swenson violated Rule 11(b)(3). This paragraph requires counsel to certify that his allegations and contentions are supported by evidence. It was clear that Judge Anderson was not a party to the Agreement. No sworn facts indicated that Judge Anderson had violated the Agreement or had made an attempt to interfere with its implementation. The Supreme Court noted that, "there are no concrete factual allegations indicating that Judge Anderson undertook any actions that could be remotely construed as hampering the Council's efforts."

The Court finds that the attorneys fees outlined by counsel for Judge Anderson to be reasonable in the amount of \$5,931.24 for pre-appeal work and \$11,402.90 for appeal and post-appeal work, or, a total attorneys fees of \$17,255.00 as of November 16, 2001. The Court also finds them to be necessary.

The Court finds that counsel for the Plaintiff has violated Rule 11(b), subparts (1), (2) and (3) and should be sanctioned therefor. The Court is aware of the many ways there are to sanction a lawyer, but in this case the most effective method is the pocketbook. As a sanction, Eric P. Swenson is ordered to pay to Anderson & Anderson, P.C. one-half of Judge Lyle R. Anderson's attorneys fees for appeal and post-appeal work in the amount of \$5,701.45. The sanction imposed is not based upon some formula but is the judgement of the Court that it is reasonable. It is meant as a sanction and the fact that Judge Anderson is not reimbursed for all of his attorneys

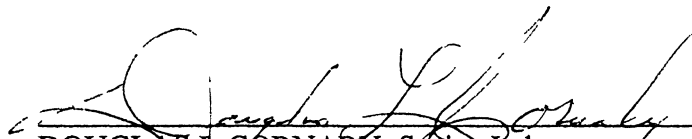
fees is not a consideration. It was limited to the appeal and thereafter because the trial court found both parties to be "well-motivated" and "well intentioned" at the trial on December 11, 1998.

This Court finds that the ACLU played a relatively small part in the supplemental proceedings. Their counsel should not be sanctioned.

In summary, Crank is denied attorney fees from the Utah Judicial Council. Judge Lyle R. Anderson is granted attorneys fees against Eric P. Swenson in the amount of \$5,701.45.

Counsel for the Utah Judicial Council is directed to draw a formal less wordy judgment.

Dated this 6th day of February, 2002.



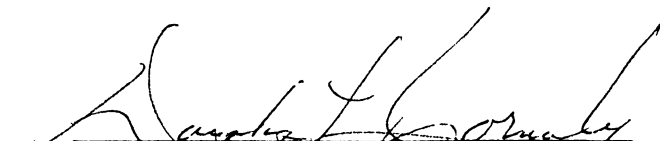
DOUGLAS L. CORNABY, Senior Judge

I certify that on the 6th day of February, 2002, I caused to be served via the U.S. Mail a copy of the foregoing to:

Eric P. Swenson
Attorney at Law
P O Box 58798
Salt Lake City, Utah 84158

David C. Wright
White & Mabey, L.L.C.
265 East 100 South, #300
Salt Lake City, Utah 84111

Daniel G. Anderson
Anderson & Anderson, P.C.
81 East 100 South
Monticello, Utah 84535



DOUGLAS L. CORNABY

Exhibit 3

Judgment on Motions for Attorney's Fees

ORDERED, ADJUDGED AND DECREED:

1. Plaintiff's motion for attorney fees against the Utah Judicial Council under 42 U.S.C. § 1988 is denied. Plaintiff was not a prevailing party at the trial in December of 1998 within the meaning of 42 U.S.C. § 1988, as applied in *Crank v. Utah Judicial Council* and in *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). The rulings at trial do not qualify plaintiff as a prevailing party as they did not materially alter the relationship between the parties or defendant's obligations to plaintiff.

2. Judge Lyle Anderson's motion for sanctions pursuant to UTAH R. CIV. P. 11 against plaintiff's counsel, Eric P. Swenson, is granted. Mr. Swenson violated rules 11(b)(1), (2) and (3). An appropriate sanction based on all of the circumstances is an award of attorney fees to compensate for Judge Anderson's having to appear and defend the meritless claims against him. The hourly rates charged and hours expended by Anderson & Anderson are reasonable and were necessarily incurred on Judge Anderson's behalf. A reasonable amount for the sanction is \$5,701.45, which is half the amount of fees incurred for appeal and post-appeal work performed by Anderson & Anderson on Judge Anderson's behalf.

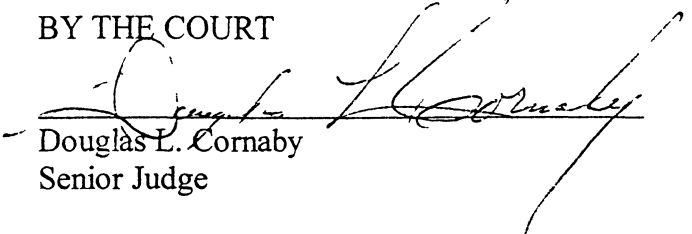
3. Judge Anderson's motion for sanctions against the American Civil Liberties Union is denied.

4. The American Civil Liberties Union's request for attorney fees is denied.

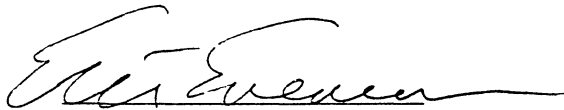
March
~~February~~ 8th, 2002.



BY THE COURT


Douglas L. Cornaby
Senior Judge

Approved as to form:


Eric P. Swenson
Attorney for plaintiff

Daniel G. Anderson
Attorney for Judge Lyle
Anderson

CERTIFICATE OF SERVICE

I certify that on ~~February~~ ^{March} 4, 2002, a true and correct copy of the foregoing Judgment

on Motions for Attorney Fees was mailed to the following:

Eric P. Swenson
P.O. Box 58798
Salt Lake City UT 84158

Daniel G. Anderson
Anderson & Anderson
81 East 100 South
P.O. Box 275
Monticello UT 84535

Douglas L. Cornaby
3612 North 2900 East
Layton UT 84040

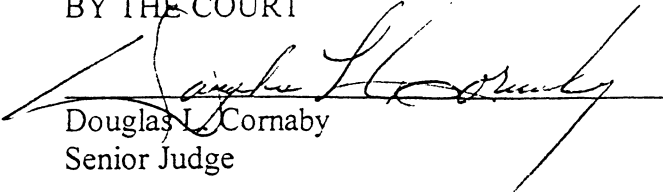
~~Clerk of the Court~~

Approved as to Form.

A handwritten signature in black ink, appearing to read "Stephen C. Clark", written over a horizontal line.

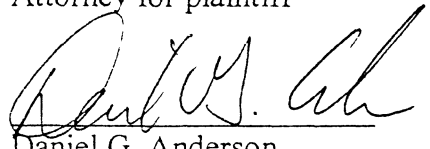
Stephen C. Clark
American Civil Liberties
Union

BY THE COURT


Douglas L. Cornaby
Senior Judge

Approved as to form:

Eric P. Swenson
Attorney for plaintiff


Daniel G. Anderson
Attorney for Judge Lyle
Anderson

CERTIFICATE OF SERVICE

I certify that on February ____, 2002, a true and correct copy of the foregoing Judgment
on Motions for Attorney Fees was mailed to the following:

Eric P. Swenson
P.O. Box 58798
Salt Lake City UT 84158

Daniel G. Anderson
Anderson & Anderson
81 East 100 South
P.O. Box 275
Monticello UT 84535

Douglas L. Cornaby
3612 North 2900 East
Layton UT 84040

Clerk of the Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 930700026 by the method and on the date specified.

METHOD NAME

| | |
|------|--|
| Mail | DAVID WRIGHT ATTORNEY 265 E. 100 S, #300 SALT LAKE CITY, UT 84111 |
| Mail | ERIC P. SWENSON ATTORNEY PO BOX 58798 SALT LAKE CITY UT 84158 |
| Mail | DANIEL ANDERSON ATTY PO BOX 275 MONTICELLO UT 84535 |

Dated this 13th day of March, 2002.

Shelly Keton
Deputy Court Clerk

Exhibit 4

Rule 11, Utah Rules of Civil Procedure

RULE 11. Signing of pleadings, motions, and other papers; representations to court; sanctions.

(a) *Signature.* Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

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

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

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

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

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

(c) *Sanctions.* If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How initiated.*

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

(B) *On court's initiative.* On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of sanction; limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

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

(d) *Inapplicability to discovery.* Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and

Exhibit 5

Rule 33, Utah Rules of Appellate Procedure

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) *Damages for delay or frivolous appeal.* Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) *Definitions.* For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) *Procedures.*

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.