

2002

Linda Haymond v. Bonneville Billing and Collections, Inc. : Brief of Appellee

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

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

Lester A. Perry; Hoole and King, L.C.; Rebecca L. Hill; Christensen and Jensen PC attorneys for appellants.

Andrew M. Morse, D. Jason Hawkins; Snow, Christensen and Martineau; attorneys for appellee.

Recommended Citation

Brief of Appellee, *Haymond v. Bonneville Billing*, No. 20020531.00 (Utah Supreme Court, 2002).
https://digitalcommons.law.byu.edu/byu_sc2/2203

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

Red 1

IN THE UTAH SUPREME COURT

LINDA HAYMOND, and MELANIE A.
LLOYD, for themselves and for all
others similarly situated,

Plaintiffs/Appellants,

**BRIEF OF APPELLEE TED K.
GODFREY**

vs.

Appeal No. 20020531

BONNEVILLE BILLING &
COLLECTIONS, INC., a Utah
corporation; TED K. GODFREY;
DAVID TOLLER; and JOHN DOES 1
THROUGH 10,

Defendants/Appellees.

APPEAL FROM AN ORDER OF DISMISSAL
ENTERED BY THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
Honorable J. Dennis Frederick
(Trial Court Case No. 010911607)

Lester A. Perry
Hoole & King, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124
Attorneys for Appellants

Andrew M. Morse
D. Jason Hawkins
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Appellee Ted K. Godfrey

Rebecca L. Hill
Christensen & Jensen P.C.
50 South Main Street, #1500
Salt Lake City, Utah 84144
Attorneys for Appellants Bonneville
Billings & Collections, Inc. and David
Toller

COMPLETE LIST OF ALL PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the case.

TABLE OF CONTENTS

	<u>Page</u>
<u>COMPLETE LIST OF ALL PARTIES TO THE PROCEEDING</u>	i
<u>STATEMENT OF JURISDICTION</u>	1
<u>STATEMENT OF ISSUES AND APPELLATE REVIEW</u>	1
A. STATEMENT OF ISSUES	1
B. STANDARD OF REVIEW	1
<u>DETERMINATIVE PROVISIONS</u>	1
<u>STATEMENT OF THE CASE</u>	2
<u>STATEMENT OF RELEVANT FACTS</u>	2
A. Plaintiff Melanie Lloyd	2
B. Plaintiff Linda Haymond	3
<u>LITIGATION BACKGROUND</u>	5
A. <i>Pickering, et al. v. Bonneville Billing and Collections, Inc.</i> , 95-CV-125-B	6
B. <i>Heard v. Bonneville Billing and Collections, Inc. et al.</i> , 2:97-CV-445C	7
C. The Utah State Legislature	8
D. The Utah State Bar	9
E. State Court	10

<u>SUMMARY OF THE ARGUMENT</u>	10
<u>ARGUMENT</u>	11
I. STANDING REQUIREMENTS LIMIT THE POWER OF A COURT TO HEAR A CASE	11
A. State Common Law	11
B. The Utah Constitution	13
II. PLAINTIFFS' CLAIMS FAIL FOR LACK OF STANDING	14
A. Bonneville and Mr. Godfrey Complied with the Dishonored Instruments Act	14
B. Plaintiffs Lack Standing to Assert Their Claims Alleging Attorney Fee Splitting on Behalf of Bonneville and Mr. Godfrey	16
1. Plaintiffs have suffered no distinct and palpable injury	16
2. Plaintiffs are not the most appropriate plaintiffs to bring these claims	20
3. These are not issues of great importance that should be decided by the Court	21
4. Additionally, Plaintiffs are seeking relief which the Court cannot grant	22
C. Plaintiffs Lack Standing to Assert Their Claims Alleging the Improper Collection and Retention Treble Damages on Behalf of Bonneville and Mr. Godfrey	23
1. Plaintiffs have suffered no distinct and palpable injury	23

2.	Plaintiffs are not the most appropriate plaintiffs to bring these claims	25
3.	These are not issues of great importance that should be decided in the furtherance of public interest	26
III.	JUDGE FREDERICK’S ORDER OF DISMISSAL DID NOT VIOLATE PLAINTIFFS’ CONSTITUTIONAL RIGHTS	26
A.	Plaintiffs’ Constitutional Argument is Being Raised for the First Time on Appeal	27
B.	Plaintiffs’ Constitutional Rights were not Violated Because Plaintiffs Lack Standing to Sue	28
<u>CONCLUSION</u>		29
<u>CERTIFICATE OF SERVICE</u>		30
<u>ADDENDUM</u>		31

TABLE OF AUTHORITIES

Page

Cases

<i>Aldrich, Nelson, Weight & Esplin v. Dep't of Employment Sec.</i> , 878 P.2d 1191 (Utah Ct. App.1994)	1, 11-13, 20, 25
<i>Applied Med. Tech. v. Eames</i> , 2002 UT 18, ¶ 16, 44 P.3d 699	28
<i>Archuleta v. Hughes</i> , 969 P.2d 409 (Utah 1998)	21
<i>Broadbent v. Bd. of Educ. of Cache County Sch. Dist.</i> , 910 P.2d 1274 (Utah Ct. App. 1996)	20
<i>Certified Sur. Group, Ltd. v. Utah, Inc.</i> , 960 P.2d 904 (Utah 1998)	27
<i>Checkrite Recovery Serv. v. King</i> , 2002 UT 76, ¶ 5, 52 P.3d 1265	15
<i>Ditty v. Check Rite</i> , 182 F.R.D. 639 (D. Utah 1998)	5
<i>Faustin v. City and County of Denver</i> , 268 F.3d 942 (10 th Cir. 2001)	23
<i>Fuller v. Medical Collections, Inc.</i> , 891 P.2d 300 (Haw. Ct. App 1995)	19, 20
<i>Heard v. Bonneville Billing and Collections</i> , 216 F.3d 1087 (table), 2000 WL 825721 (10 th Cir. 2000)	8, 18
<i>Jenkins v. Swan</i> , 675 P.2d 1145 (Utah 1983)	14, 22
<i>Miller v. USAA Cas. Ins. Co.</i> , 2002 UT 6, ¶ 38, 44 P.3d 663	13, 28
<i>Monson v. Carver</i> , 928 P.2d 1017 (Utah 1996)	27
<i>National Credit Union Admin. v. Bank & Trust Co.</i> , 522 U.S. 479 (1998)	11

<i>Nat'l Parks & Conservation Ass'n v. Bd. of State Lands</i> , 869 P.2d 909 (Utah 1993)	12, 13
<i>Order of Police Lodge v. Nordfelt</i> , 869 P.2d 948 (Utah Ct. App. 1993)	12-14, 16, 21, 23, 26
<i>Pendleton v. Utah State Bar</i> , 2000 UT 96, ¶ 9, 16 P.3d 1230	21
<i>Riddle v. Perry</i> , 2002 UT 10, ¶ 4, 40 P.3d 1128	5, 8
<i>State v. Carter</i> , 707 P.2d 656 (Utah 1985)	27
<i>State v. Mace</i> , 921 P.2d 1372 (Utah 1996)	12, 24
<i>Treff v. Hinckley</i> , 2001 UT 50, ¶ 9 n.4, 26 P.3d 212	27
<i>Utah Bankers Ass'n v. Utah Dep't Fin. Inst.</i> , 888 P.2d 714 (Utah Ct. App. 1994)	1, 11
<i>Walston v. Lockhart</i> , 62 S.W.3d 257 (Tex. Ct. App. 2002)	29
<i>York v. Unqualified Washington County Elected Officials</i> , 714 P.2d 679 (Utah 1986)	25

Statutes

Utah Code Ann. § 7-15-1	1, 4, 14-17, 20, 24
Utah Code Ann. § 78-2-2(3)	1

Rules and Regulations

Rule 4-505.01, Utah Rules of Judicial Administration	1, 6, 7, 9, 17, 18, 20-22
Rule 4-505, Utah Rules of Judicial Administration	1, 9, 20, 21
Rule 1.5, Utah Rules of Professional Conduct	9
Rule 5.4, Utah Rules of Professional Conduct	9

Rule 60(b), Utah Rules of Civil Procedure 23

Other Authorities

Utah Const. art. I, § 11 13, 26, 28, 29

Utah Const. art. I, § 7 26, 28

Utah Const. art. VIII, § 3 1

Utah State Bar, Ethics Advisory Opinion No. 100 9

Black’s Law Dictionary 737 (7th ed. 1999) 16

STATEMENT OF JURISDICTION

Jurisdiction in this Court is proper under Utah Code Ann. § 78-2-2(3) and Utah Const. art. VIII, § 3.

STATEMENT OF ISSUES AND APPELLATE REVIEW

A. STATEMENT OF ISSUES

1. Did the court correctly find that Plaintiffs had no standing to challenge Defendants' alleged attorney fee splitting practices?
2. Did the court correctly hold that Plaintiffs had no standing to challenge Defendants' alleged improper collection of treble damages, when Plaintiffs never paid treble damages to Defendants?

B. STANDARD OF REVIEW

Standing is a legal question reviewed for correctness. *See Utah Bankers Ass'n v. Utah Dep't Fin. Inst.*, 888 P.2d 714, 716 (Utah Ct. App. 1994); *Aldrich, Nelson, Weight & Esplin v. Dep't of Employment Sec.*, 878 P.2d 1191, 1194 (Utah Ct. App. 1994).

DETERMINATIVE PROVISIONS

The following statutes and rules are important to this appeal:

1. Utah Code Ann. § 7-15-1 (pre and post 1999 versions) (Addendum).
2. Rules 4-505 and 4-505.01, Utah Rules of Judicial Administration (Addendum).

STATEMENT OF THE CASE

Plaintiffs wrote bad checks that were referred to Defendant Bonneville Billings & Collections, Inc. (“Bonneville”) for collection. Bonneville used its attorney, Defendant Ted K. Godfrey to collect on the checks. Defendants’ strictly complied with Utah statutes that thoroughly regulate collection efforts. Plaintiffs nonetheless allege twenty-two separate causes of action that lead to two basic allegations: (1) improper attorney fee splitting; and (2) improper collection and retention of treble damages.

Defendants moved to dismiss based on Plaintiffs’ lack standing. Plaintiffs have not suffered a distinct and palpable injury giving them a personal stake in the outcome of this dispute. On June 3, 2002, Judge Frederick granted Defendants’ motions. This timely appeal followed.

STATEMENT OF RELEVANT FACTS

A. Plaintiff Melanie Lloyd

1. On April 16, 1999, Plaintiff Melanie A. Lloyd bounced a check to Conoco. *See* Complaint at ¶ 27; R. at 6.
2. The check was referred to Bonneville, which on April 30, 1999 sent statutory notice of the dishonored check to Ms. Lloyd. *See* Complaint at ¶ 29 and Exhibit “K”; R. at 6, 55.
3. On May 18, 1999, a second notice was sent to Ms. Lloyd. *See* Complaint at ¶ 30 and Exhibit “L”; R. at 6, 56. Ms. Lloyd did nothing.

4. On June 13, 1999, Mr. Godfrey, on behalf of his client, Bonneville, served Ms. Lloyd with a summons and complaint. *See* Complaint at ¶ 31 and Exhibit “M”; R. at 6, 58-60.

5. At this point, Ms. Lloyd sent Defendants a check for \$40.20. *See* Complaint at ¶ 32 and Exhibit “N”; R. at 6, 61.

6. Because suit had already been filed, Mr. Godfrey sought another \$160.00 (\$150.00 in attorney’s fees and \$10.00 for court costs). *See* Complaint at ¶ 33; R. at 6.

7. On June 25, 1999, Ms. Lloyd paid the remaining \$160.00 and the suit was dismissed. *See* Complaint at ¶ 34 and Exhibit “O”; R. at 6, 62.

8. To date, Ms. Lloyd has paid a total of \$200.20, consisting of the face amount of the check, a \$20.00 service charge, \$10.00 in court costs, \$150.00 in attorney’s fees and approximately thirty cents in interest. *See* Complaint at ¶¶ 32-34 and Exhibits “N” and “O”; R. at 6, 61-62. Ms. Lloyd did not pay any treble damages, nor were such damages sought by Defendants.

B. Plaintiff Linda Haymond

9. On February 24, 2001, Plaintiff Linda Haymond bounced a check to the Flower Patch for \$7.42. *See* Complaint at ¶ 9 and Exhibit “A”; R. at 3, 33.

10. The check was referred to Bonneville, and Bonneville used Mr. Godfrey as its attorney to collect on the check. *See* Complaint at ¶¶ 11-12; R. at 3.

11. On April 13, 2001, Mr. Godfrey sent statutory notice of the dishonored check to Ms. Haymond pursuant to § 7-15-1(5). *See* Complaint at ¶ 13 and Exhibit “B”; R. at 3, 34.

12. After receiving no response from Ms. Haymond, on June 13, 2001, Mr. Godfrey served Ms. Haymond with a summons and complaint pursuant to § 7-15-1(7). *See* Complaint at ¶ 14 and Exhibit “C”; R. at 3, 35-37.

13. On June 27, 2001, Ms. Haymond sent a cashier’s check for \$28.00 to the Flower Patch, the merchant that initially received her bad check. *See* Complaint at ¶ 15 and Exhibit “D”; R. at 3, 38. By this time, however, \$28.00 was insufficient to cover the amounts owing because of Ms. Haymond’s failure to act in a timely manner.

14. Ms. Haymond retained attorney Lester A. Perry to defend her in the collection action. *See* Complaint at ¶ 17; R. at 3.

15. In August and September of 2001, Mr. Perry sent two letters to Mr. Godfrey requesting various documents. In those letters, Mr. Perry also alleged that Mr. Godfrey split fees with Bonneville, and collected statutory damages that were prohibited by Utah’s Dishonored Instruments Act. *See* Complaint at ¶¶ 20-21 and Exhibits “E” and “F”; R. at 4-5, 39-41.

16. On October 2, 2001, Mr. Perry filed formal discovery requests. *See* Complaint at ¶ 23 and Exhibit “H”; R. at 5, 44-48.

17. Bonneville moved to dismiss the case against Ms. Haymond, and the court did so over Ms. Haymond's objection. *See* Complaint at ¶¶ 25-26 and Exhibits "I" and "J"; R. at 5, 49-54.

18. Ms. Haymond only paid Bonneville \$28.00, representing the face amount of the check and a twenty dollar service charge. *See* Complaint at ¶ 15 and Exhibit "D"; R. at 3, 38. Ms. Haymond did not pay any attorney's fees or treble damages.

LITIGATION BACKGROUND

For years Plaintiff's attorney, Lester Perry, has been challenging the practices of collection agencies.¹ He has had some success. *Ditty v. Check Rite*, 182 F.R.D. 639 (D. Utah 1998) (class action claim that a collection letter violated the Fair Debt Collection Practices Act settled after Judge Tena Campbell certified the class). Mr. Perry has challenged alleged fee splitting between collection agencies and their lawyers in federal and state courts, before the state legislature, and before the Utah State Bar. Despite such close scrutiny, Bonneville and its attorney's actions have not been found to violate the law. This lawsuit is another example of counsel's crusade against collection agencies.

¹Plaintiffs acknowledge this is their brief by stating that "counsel for Ms. Haymond and Ms. Lloyd has fought the attorney fee splitting issue against Bonneville and its attorneys in prior cases." Plaintiffs' Br. at 15 n. 1. *See also Riddle v. Perry*, 2002 UT 10, ¶ 4, 40 P.3d 1128 ("Mr. Perry is an attorney who represents plaintiffs in class action suits against attorneys who practice in the field of debt collection.").

The fatal flaw in this effort is that his clients have no standing to challenge such practices because they have suffered no injury.²

A. *Pickering, et al. v. Bonneville Billing and Collections, Inc.*, 95-CV-125-B

In 1995, Mr. Perry represented a plaintiff who sued Bonneville and its lawyer in federal court, alleging that Bonneville improperly split fees with its lawyers. On the standing issue, Judge Benson wrote:

The consumer plaintiffs' obligation to pay the statutory attorney fees in Rule 4-505.01 arises from the participation of attorneys in the collection case, not from the proper allocation of fees after the judgment has been paid. Only if attorneys were not actually involved in some material manner in the collection cases do the consumer plaintiffs have a claim based on their payment of attorney fees. Accordingly, if during discovery the facts demonstrate that there was more than a token or de minimus attorney involvement in Bonneville's collection efforts then the Plaintiffs may not have a cognizable injury at law, and the court would entertain a summary judgment motion to dismiss on this ground.

Memorandum Opinion and Order, dated October 9, 1996, at 5 (*See* Memorandum in Support of Defendant Ted K. Godfrey's Motion to Dismiss at Exhibit "1"; R. at 245-252).³ Judge Benson also stated that even "[i]f the Plaintiffs do not have a viable cause of

² In the following sections, Mr. Godfrey refers the Court to two unpublished decisions and to a letter from the Utah State Bar. They demonstrate that Plaintiffs' counsel has taken this crusade against collection agencies to every available forum prior to coming to state court. Also, the *Pickering* and *Heard* decisions are factually identical to the case at hand, they were brought by the same attorney as the present case, they contain the same arguments involving alleged fee splitting, and they recognize the rule of law – that Plaintiffs lack standing to assert such claims.

³ Rather than appending a copy of the unpublished decisions cited by Mr. Godfrey in the Addendum to his Brief, Mr. Godfrey will refer the Court to his Memorandum in

action based on their lack of injury, an equitable outcome may still occur. In oral argument plaintiffs' counsel stated that the Utah State Bar and the Department of Consumer Protection have pursued this problem against Bonneville and the attorneys involved. *These agencies appear to be the proper means of enforcement in this case of misused or misallocated attorney fees.*" *Id.* at 5 n. 3 (emphasis added). The *Pickering* case settled before trial and no class was ever certified. Plaintiffs' counsel carried these issues over into the *Heard* case.

B. *Heard v. Bonneville Billing and Collections, Inc. et al.*, 2:97-CV-445C

The next spring, another plaintiff represented by Mr. Perry sued Bonneville again in federal court, again alleging unlawful fee splitting. Judge Tena Campbell granted Bonneville's motion to dismiss for lack of standing:

Even assuming that Bonneville's attorneys were improperly splitting fees with their client, *plaintiff does not have standing to challenge this practice.*

* * *

Here, plaintiff has suffered no injury from Bonneville's alleged fee splitting practice that could be redressed by a favorable decision. Plaintiff does not allege that the amount of attorney's fees collected from her by defendants was excessive. In fact, it is undisputed that Bonneville's attorney's collected the amount of attorney's fees authorized by rule 4-505.01 of the Code of Judicial Administration. Plaintiff's claim relates only to the later distribution of the fees collected by Bonneville's attorneys. *Because plaintiff has suffered no concrete, particularized injury from defendants'*

Support of Defendant Ted K. Godfrey's Motion to Dismiss. Each of the decisions was attached as an exhibit to that memorandum and, therefore, are included in the appellate record.

distribution of fees, she lacks standing to bring a claim based on Bonneville's alleged fee splitting practice.

Order of November 30, 1998, at 5-6 (emphasis added) (*see* Memorandum in Support of Defendant Ted K. Godfrey's Motion to Dismiss at Exhibit "2"; R. at 253-264). Judge Campbell added: "[i]f plaintiff suspects defendants are engaging in illegal fee splitting, the proper course of action would be to file a complaint with the Utah State Bar Association in hopes of initiating a disciplinary proceeding." *Id.* at 6 n. 3.

Ms. Heard appealed Judge Campbell's decision, and the Tenth Circuit Court of Appeals affirmed the dismissal: "What Bonneville's attorney did with the statutory fees may violate state ethical rules. How that injures plaintiff, however, eludes us. It is the fundamental deficiency of Ms. Heard's stake in the outcome of the fee splitting issue which defeats her standing." *Heard v. Bonneville Billing and Collections*, 216 F.3d 1087 (table), 2000 WL 825721 at *5 (10th Cir. 2000) (*see* Memorandum in Support of Defendant Ted K. Godfrey's Motion to Dismiss at Exhibit "3"; R. at 265-269).

C. The Utah State Legislature

Plaintiffs' counsel has also taken this issue to the Utah State Legislature. Mr. Perry testified before the Business, Labor and Economic Development Committee about amending Utah's "civil check law." *See Riddle v. Perry*, 2002 UT 10, ¶ 4, 40 P.3d 1128.

D. The Utah State Bar

On July 6, 2002, Mr. Perry filed a lengthy complaint with the Utah State Bar alleging that Mr. Godfrey improperly split fees with Bonneville. *See* Memorandum in Support of Defendant Ted K. Godfrey's Motion to Dismiss at Exhibit "5"; R. at 278-299. In the complaint, Mr. Perry alleged that Mr. Godfrey violated the Dishonored Instruments Act, Rules 4-505 and 4-505.01 of the Utah Rules of Judicial Administration, Rules 1.5 and 5.4 of the Utah Rules of Professional Conduct, and Ethics Advisory Opinion No. 100. Despite Mr. Perry's accusations, the Bar's Office of Professional Conduct dismissed the complaint:

You have alleged that Mr Godfrey and Bonneville have a fee splitting arrangement by Mr. Godfrey making excessive payments for the use of the CUBS system when the attorneys were not previously billed for the use of this system. Mr. Godfrey stated that he does not engage in any fee splitting with Bonneville and that Bonneville is paid for the lease, equipment, insurance, and use of the CUBS system. *The evidence is insufficient to establish by a preponderance of the evidence that Mr. Godfrey has violate the Rules of Professional Conduct. You have not established that Mr. Godfrey is fee splitting because of the large payments to Bonneville for use of the CUBS system. Bonneville is not prohibited from charging its attorneys more than its cost for the use of its system. Accordingly this matter is dismissed.*

(Letter from Renee Spooner to Lester M. Perry, May 18, 2001 (emphasis added) (*see* Memorandum in Support of Defendant Ted K. Godfrey's Motion to Dismiss at Exhibit "6"; R. at 300-302). Mr. Perry attempted to appeal the dismissal of his complaint but his appeal was untimely.

E. State Court

Plaintiffs now bring the same attack to state court. The forum and the plaintiffs may be different, but they press the same failed claims. They fare no better here. Judge Frederick ruled that Plaintiffs lack standing to assert these claims. Plaintiffs now appeal Judge Frederick's Order of Dismissal.

SUMMARY OF THE ARGUMENT

To prove standing under Utah law, a plaintiff must show he has suffered a distinct and palpable injury giving rise to a personal stake in the outcome of the dispute. In rare instances, courts find standing without injury if plaintiff is the most appropriate plaintiff to bring the claims. In still rarer settings, courts will find standing without injury if plaintiff raises issues of such public importance that they ought to be decided to further public interest.

Regarding the alleged fee splitting claims, Plaintiffs suffered no distinct and palpable injury because Mr. Godfrey was authorized by statute to collect reasonable attorney's fees, and the amounts sought were not unreasonable or excessive. Moreover, even if Mr. Godfrey split fees with Bonneville, Plaintiffs have no interest in the fees once they are paid. In sum, what happens to fees after they are lawfully collected is none of Plaintiffs' business.

Similarly, Plaintiffs lack standing to assert their treble damages claims. Neither of the Plaintiffs paid Bonneville treble damages. They were not sought from Ms. Lloyd, and

although sought, were never collected from Ms. Haymond. Furthermore, Mr. Godfrey was authorized by statute to seek treble damages from Ms. Haymond. Plaintiffs, therefore, suffered no distinct and palpable injury regarding treble damages.

Likewise, Plaintiffs cannot satisfy the alternate tests for standing under Utah law. Ms. Haymond and Ms. Lloyd clearly are not the most appropriate plaintiffs to bring these claims, and these are not issues of sufficient public importance in and of themselves to warrant standing. Therefore, this Court should affirm Judge Frederick's Order of Dismissal.

ARGUMENT

I. STANDING REQUIREMENTS LIMIT THE POWER OF A COURT TO HEAR A CASE.

A. State Common Law

The United States Supreme Court has held that “standing principles are founded in concern about the proper – and properly limited – role of the courts in a democratic society.” *National Credit Union Admin. v. Bank & Trust Co.*, 522 U.S. 479 (1998) (citations omitted). Standing “operates as a gatekeeper to the courthouse, allowing only those cases that are fit for judicial resolution.” *Aldrich, Nelson, Weight & Esplin v. D.E.S.*, 878 P.2d 1191, 1194 (Utah Ct. App. 1994); *Utah Bankers Ass’n v. Utah Dep’t of Fin. Inst.*, 888 P.2d 714, 717 (Utah Ct. App. 1994).

Standing . . . is designed to preserve the integrity of judicial adjudication by requiring that legal issues be adequately defined and crystalized so that

judicial procedures focus on specific well defined legal and factual issues. To that end the parties must have both a sufficient interest in the subject matter of the dispute and a sufficient adverseness so that the issues can be properly explored.

Nat'l Parks & Conservation Ass'n v. Bd. of State Lands, 869 P.2d 909, 913 (Utah 1993).

Standing preserves the integrity of our legal system by ensuring that only those cases fit for judicial resolution come before the courts. Grievances better addressed by other branches of the government do not satisfy the standing requirements.

Standing can be shown if a plaintiff “show[s] some distinct and palpable injury giving rise to a personal stake in the outcome of the dispute.” *Order of Police Lodge v. Nordfelt*, 869 P.2d 948, 950 (Utah Ct. App. 1993); *Nat. Parks*, 869 P.2d at 913. “One who is not adversely affected has no standing. A mere allegation of an adverse impact is not sufficient. There must also be some causal relationship alleged between the injury to the [complainant], the [defendants’] actions and the relief requested.” *State v. Mace*, 921 P.2d 1372, 1379 (Utah 1996). This is the traditional test for standing.

Utah law provides two alternate tests for standing.⁴ In rare instances, standing may be found if there is “no other party who has a greater interest in the outcome of the case than the aggrieved party and if the issue is unlikely to be raised at all if standing is denied.” *Aldrich*, 878 P.2d at 1194. *Accord Nordfelt*, 869 P.2d at 951; *Nat. Parks*, 869

⁴Plaintiffs fail to address the applicability of the two alternate tests for standing because they believe that “the ‘traditional’ test of a particularized, palpable injury has been met.” Plaintiffs’ Br. at 30-31 n. 11.

P.2d at 913. In rarer instances, standing may be found “if the issues presented are unique and of such importance that they ought to be decided in the furtherance of public interest.” *Nordfelt*, 869 P.2d at 951-52. *Accord Aldrich*, 878 P.2d at 1194; *Nat’l Parks*, 869 P.2d at 913. Plaintiffs satisfy none of these tests.

B. The Utah Constitution

Although Utah courts have recognized three tests for standing, only the traditional test finds any support in the Utah constitution. The second two enjoy no constitutional underpinnings. The open courts provision of the Utah Constitution defines who shall have access to courts:

All courts shall be open, and *every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law*, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const. art. I, § 11 (emphasis added). Parties who meet this requirement are guaranteed the “right and opportunity, in a judicial tribunal, to litigate a claim, seek relief, or defend one’s rights.” *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 38, 44 P.3d 663.

Courts should be very reluctant to grant standing when the plaintiffs have suffered no direct injury giving them a personal stake in the outcome of the dispute.

[D]espite our recognition of this Court’s power to grant standing where matters of great public interest and societal impact are concerned, this Court will not readily relieve a plaintiff of the statutory requirement of showing a real and personal interest in the dispute.

Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1983). Thus, Plaintiffs must show they have suffered a “distinct and palpable injury giving rise to a personal stake in the outcome of the dispute.” *Nordfelt*, 869 P.2d at 950. They cannot meet this burden.

II. PLAINTIFFS’ CLAIMS FAIL FOR LACK OF STANDING.

A. Bonneville and Mr. Godfrey Complied with the Dishonored Instruments Act.

Our economic system relies upon the mutual understanding that when a person issues a check, there are sufficient funds to cover the check, and the merchant who receives the check will be paid in full. If there was a guessing game between the issuer and the merchant every time a check was presented, then merchants would not accept checks. A check is a promise and covenant that the issuer’s account contains sufficient funds to honor the check. When a person bounces a check, this covenant still needs to be enforced. However, collecting money costs money. It is only fair that the person who breaches the covenant pay for the costs. That is the purpose of the Dishonored Instruments Act. It reflects the importance of this covenant to the economy, and it thoroughly regulates how those checks are to be collected.

The Dishonored Instruments Act, Utah Code Ann. § 7-15-1, authorizes the holder of a dishonored check to take specific actions to collect what is owed. The Act “provides for an escalation of recoverable amounts as time elapses without payment of the dishonored check and as additional steps are taken to recover the check amount.”

Checkrite Recovery Serv. v. King, 2002 UT 76, ¶ 5, 52 P.3d 1265. Initially, the issuer of a dishonored check is liable for the check amount and a “service charge” of \$20.00. Utah Code Ann. § 7-15-1(2)(b). Before a holder may charge “collection costs” or file suit, it must mail statutory “written notice” to the issuer, under § 7-15-1(5)(b). If the issuer does not pay the check amount and the service charge of \$20.00 within fifteen days from when the notice was mailed, the holder is authorized to collect the check amount, the service charge of \$20.00 and “collection costs” not to exceed \$20.00. *Id.* § 7-15-1(4).

If the issuer does not pay these amounts within thirty days from when the notice was mailed, the holder has two options. First, the holder may offer not to file a lawsuit if the issuer pays the holder the check amount, a service charge of \$20.00, collection costs not to exceed \$20.00, treble damages, and reasonable attorney’s fees not to exceed \$50.00 (if the holder retains an attorney). *See id.* § 7-15-1(6)(a). Second, if a lawsuit is filed then the issuer is liable to the holder for the check amount, interest, costs of collection, including all court costs and reasonable attorneys fees, and treble damages. *See id.* § 7-15-1(7)(b). The statute specifically states the amount of treble damages which the holder is authorized to collect. *See id.* § 7-15-1(6)(a)(iii) and (7)(b)(iv). Although the holder is authorized to collect treble damages, the statute requires that all such damages “be paid to and be the property of the original payee of the check.” *Id.* § 7-15-1(6)(b) and (7)(d). Bonneville is the holder of the checks it is assigned to collect. Both Bonneville and its attorney, Mr. Godfrey, complied with the Dishonored Instruments Act.

B. Plaintiffs Lack Standing to Assert Their Claims Alleging Attorney Fee Splitting on Behalf of Bonneville and Mr. Godfrey.

1. Plaintiffs have suffered no distinct and palpable injury.

Plaintiffs claim to have suffered a “distinct and palpable injury giving rise to a personal stake in the outcome of the dispute.” *Order of Police Lodge v. Nordfelt*, 869 P.2d 948, 950 (Utah Ct. App. 1993). Plaintiffs allege that:

Ms. Lloyd paid \$150.00 to \$160.00 in attorney’s fees that were split with Bonneville . . . [and] Ms. Haymond had to hire an attorney to defend her in Bonneville’s collection action and keep Bonneville and its attorney from collecting the bogus attorney’s fees.

Plaintiffs’ Br. at 30. Plaintiffs have suffered no injury.

Bonneville complied with applicable law and sought only statutory attorney’s fees from Plaintiffs. Both versions of Utah Code Ann. § 7-15-1 that were in effect when Ms. Lloyd and Ms. Haymond wrote their respective checks allowed the “holder” to collect “court costs and reasonable attorney’s fees.” *See* Utah Code Ann. § 7-15-1.⁵ A “holder” is “[a] person who has legal possession of a negotiable instrument and is entitled to receive payment on it.” *Black’s Law Dictionary* 737 (7th ed. 1999). Bonneville had legal possession of both checks and was entitled to receive payment on them. Thus, Bonneville

⁵Subsection (4) of § 7-15-1 of the 1997 amendments in effect on April 16, 1999 when Ms. Lloyd wrote her check, allowed the holder to collect “reasonable attorney’s fees” (Addendum). Subsection (7) of § 7-15-1 of the 1999 amendments, in effect on February 24, 2001 when Ms. Haymond wrote her check, also allowed the holder to collect “reasonable attorney’s fees” (Addendum).

was a “holder” entitled to collect reasonable attorney’s fees under Utah Code Ann.

§ 7-15-1.

The fees sought by Bonneville were reasonable. On Bonneville's behalf, Mr. Godfrey sought \$150.00 in attorney’s fees from both Plaintiffs once he filed suit.⁶ This is the amount that Rule 4-505.01 of the Rules of Judicial Administration allows in a default judgment of less than \$700.00. Plaintiffs can suffer no injury when Bonneville sought only statutory fees authorized by law.

As Judge Benson put it in *Pickering*:

The consumer plaintiffs’ obligation to pay the statutory attorney fees in Rule 4-505.01 arises from the participation of attorneys in the collection case, not from the proper allocation of fees after the judgment has been paid. Only if attorneys were not actually involved in some material manner in the collection cases do the consumer plaintiffs have a claim based on their payment of attorney fees. Accordingly, if . . . the facts demonstrate that there was more than a token or de minimus attorney involvement in Bonneville’s collection efforts then the Plaintiffs may not have a cognizable injury at law . . .

Memorandum Opinion and Order, October 9, 1996, at 5 (*see* Memorandum in Support of Defendant Ted K. Godfrey’s Motion to Dismiss at Exhibit “1”; R. at 245-252). Here, Mr. Godfrey followed the statutory collection steps to the letter, and requested only the

⁶Plaintiffs allege in their Complaint that Bonneville “collected up to \$160.00” in attorney’s fees from Ms. Lloyd. *See* Complaint at ¶ 71; R. at 15. However, that amount actually represents \$150.00 in attorney’s fees and \$10.00 in court costs for the cost of serving Ms. Lloyd.

statutory sum. If Plaintiffs suffered some injury, it is not legally cognizable, for the law requires the very steps that Mr. Godfrey followed.

Judge Campbell's order in the *Heard* case similarly noted that requesting statutorily authorized attorney's fees does not result in an injury:

Even assuming that Bonneville's attorney's were improperly splitting fees with their client, plaintiff does not have standing to challenge this practice.

* * *

Here, plaintiff has suffered no injury from Bonneville's alleged fee splitting practice that could be redressed by a favorable decision. Plaintiff does not allege that the amount of attorney's fees collected from her by defendants was excessive. In fact, it is undisputed that Bonneville's attorney's collected the amount of attorney's fees authorized by rule 4-505.01 of the Code of Judicial Administration. Plaintiff's claim relates only to the later distribution of the fees collected by Bonneville's attorneys. Because plaintiff has suffered no concrete, particularized injury from defendants' distribution of fees, she lacks standing to bring a claim based on Bonneville's alleged fee splitting practice.

Campbell Order of November 30, 1998, at 5-6 (*see* Memorandum in Support of Defendant Ted K. Godfrey's Motion to Dismiss at Exhibit "2"; R. at 253-264). Finally, the Tenth Circuit rejected identical claims in the *Heard* decision. "What Bonneville's attorney did with the statutory fees may violate state ethical rules. How that injures plaintiff, however, eludes us. It is the fundamental deficiency of Ms. Heard's stake in the outcome of the fee splitting issue which defeats her standing." *Heard v. Bonneville Billing and Collections*, 216 F.3d 1087 (table), 2000 WL 825721 at *5 (10th Cir. 2000)

(see Memorandum in Support of Defendant Ted K. Godfrey's Motion to Dismiss at Exhibit "3"; R. at 265-269).

Plaintiffs rely on *Fuller v. Medical Collections, Inc.*, 891 P.2d 300 (Haw. Ct. App 1995), for the proposition that money collected by an agency from a debtor as an attorney's fee is not an attorney's fee if it is not paid to the attorney. *See id.*, at 316. *Fuller* is not binding on this Court. Nor is it persuasive, because it is materially different from this case. In *Fuller*, the appellate court vacated an order granting defendant's motion to dismiss. The Hawaii statute which governed collection agencies in *Fuller* provided a private cause of action to any consumer injured by a collection agency's unlawful acts:

While HRS § 443B-2 (Supp. 1992) does delegate enforcement of the chapter to the director, enforcement may also be had through HRS chapter 480 (1985 and Supp.1992). HRS § 443B-20 (Supp. 1992) states that, "A violation of this chapter by a collection agency shall constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce for the purpose of Section 480-2." HRS § 480-2(d) (Supp. 1992), in turn, permits suit on any unfair and deceptive trade practice to be brought by a "consumer." HRS § 480-13(b) allows "[a]ny consumer who is injured by any unfair or deceptive act or practice forbidden or declared unlawful by Section 480-2" to sue for damages. The complaints, thus, pray for relief under HRS § 480-13(b) (Supp. 1992) based on violations of HRS chapter 443B.

Id. at 305 (emphasis added). The Hawaii court went on to hold that if:

the collection agencies collected attorney fees knowing that, pursuant to contract with their attorney, they would pay their attorney less attorney fees than they collected, the collection agencies have in fact collected under the "attorney's fee" label something other than "an attorney's fee or

commission[.]” Obtaining a judgment for and collecting that “attorney’s fee” under those circumstances is a serious fraud upon the court and a violation of HRS Chapter 443B, and affords Plaintiffs a cause of action against the collection agencies for the Plaintiffs’ resulting damages

Id. at 316 (emphasis added). In stark contrast, Ms. Haymond and Ms. Lloyd rely on the Utah Dishonored Instruments Act and Rules 4-505 and 4-505.01 to bring their claims, none of which provide a private cause of action. *See generally* Utah Code Ann. § 7-15-1; Rules 4-505 and 4-505.01 of the Utah Rules of Judicial Administration. Furthermore, Utah courts will not recognize a “private cause of action based upon state law, absent some specific direction from the Legislature.” *Broadbent v. Bd. of Educ. of Cache County Sch. Dist.*, 910 P.2d 1274, 1278 (Utah Ct. App. 1996). Therefore, *Fuller* is inapplicable. Plaintiffs have not suffered a legally cognizable injury and, therefore, have no standing. Plaintiffs also fail to satisfy the alternate tests for standing.

2. Plaintiffs are not the most appropriate plaintiffs to bring these claims.

Plaintiffs have failed to show that there is “no other party who has a greater interest in the outcome of the case than the aggrieved party and the issue is unlikely to be raised at all if standing is denied.” *Aldrich, Nelson, Weight & Esplin v. D.E.S.*, 878 P.2d 1191, 1194 (Utah Ct. App. 1994). First and foremost, there is no “issue” to raise in this case. As shown above, Plaintiffs have suffered no injury as a result of Mr. Godfrey seeking the attorney’s fees authorized by statute. Because Mr. Godfrey’s actions were consistent with Utah law, there can be no “appropriate plaintiff” to bring this action.

Moreover, Ms. Haymond did not pay any attorney's fees to Mr. Godfrey. Therefore, she clearly fails this test because any party who actually paid attorney's fees would be a more appropriate plaintiff than Ms. Haymond. Ms. Lloyd, finally, who paid only the statutory fee, cannot complain they were excessive or unreasonable.

Although Plaintiffs attempt to characterize their fee splitting claims as violations of the Utah Dishonored Instruments Act, and Rules 4-505 and 4-505.01, in reality their claims are based upon the alleged violation of Rule 5.4 of the Utah Rules of Professional Conduct which prohibits attorney fee splitting. Plaintiffs' Br. at 25 n.10; Complaint at ¶ 75; R. at 16-17. Violations of the Utah Rules of Professional Conduct do not give rise to a private cause of action. *See Archuleta v. Hughes*, 969 P.2d 409, 413-414 (Utah 1998). Furthermore, "[v]iolations of the Rules of Professional Conduct are prosecuted by the Utah State Bar through the Office of Professional Conduct." *Pendleton v. Utah State Bar*, 2000 UT 96, ¶ 9, 16 P.3d 1230. Therefore, the Office of Professional Conduct is also a more appropriate plaintiff to bring these claims, and Plaintiffs, therefore, fail the first alternate test for standing.

3. These are not issues of great importance that should be decided by the Court.

Plaintiffs have failed to show that "the issues presented are unique and of such importance that they ought to be decided in the furtherance of public interest." *Nordfelt*, 869 P.2d at 951-52. Once again, Plaintiffs have suffered no injury as a result of Mr.

Godfrey seeking the attorney's fees authorized by Rule 4-505.01, and Ms. Haymond and Ms. Lloyd are not the most appropriate plaintiffs to bring these claims. Furthermore, Plaintiffs' fee splitting claims are not issues that should be decided by any court.

Judge Benson and Judge Campbell have both declined to adjudicate identical grievances, finding that fee splitting is an attorney disciplinary matter for the Utah State Bar. Sure enough, Plaintiffs' counsel filed a lengthy complaint against Mr. Godfrey with the state bar raising these very allegations. Yet, it was dismissed in May of 2001. Still unsatisfied, Plaintiffs' counsel is trying again in court. Changing courts does change the disciplinary nature of the grievance. Utah courts "will not entertain generalized grievances that are more appropriately directed to [other] branches of the state government." *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983). The same rule and result apply here. Plaintiffs have no standing.

4. Additionally, Plaintiffs are seeking relief which the Court cannot grant.

Still another reason why this is not a justiciable controversy is that Plaintiffs seek relief which the Court cannot grant. Plaintiffs' complaint alleges twenty-two causes of action and requests class certification. Plaintiffs allege that Defendants obtained judgments against many class members for "imaginary attorney's fees." *See* Complaint at ¶ 77; R. at 17. Plaintiffs have requested that the trial court "enter an order vacating all such judgments and require Bonneville to record the order in all cases that have such

judgments entered.” *See* Complaint at ¶¶ 77, 82, 88, 90, 94; R. 17-20. Plaintiffs, however, have not complied with Rule 60(b) of the Utah Rules of Civil Procedure, the only available avenue by which to challenge unappealed final judgments. Thus, Plaintiffs cannot show “a likelihood that the injury will be redressed by a favorable decision.”

Faustin v. City and County of Denver, 268 F.3d 942, 947 (10th Cir. 2001).

In summary, Plaintiffs lack standing to assert their claims alleging attorney fee splitting by Mr. Godfrey and Bonneville.

C. Plaintiffs Lack Standing to Assert Their Claims Alleging the Improper Collection and Retention Treble Damages on Behalf of Bonneville and Mr. Godfrey.

1. Plaintiffs have suffered no distinct and palpable injury.

Plaintiffs fail the traditional test for standing because they have not suffered a “distinct and palpable injury giving rise to a personal stake in the outcome of the dispute.” *Order of Police Lodge v. Nordfelt*, 869 P.2d 948, 950 (Utah Ct. App. 1993). Neither Ms. Lloyd nor Ms. Haymond paid treble damages to Bonneville. Treble damages were never requested of Ms. Lloyd and, in fact, were not available when Ms. Lloyd bounced her check. Therefore, Ms. Lloyd suffered no distinct and palpable injury.

The 1999 amendments to the Dishonored Instruments Act (Addendum), in effect when Ms. Haymond bounced her check, authorized the check holder to collect triple the

face amount of the check as treble damages.⁷ Such damages, however, must be “paid to and be the property of the original payee of the check.” Utah Code Ann. § 7-15-1(6)(b)(i) and (7)(e)(i). Bonneville, as holder, is authorized to collect treble damages, but may not “retain amounts charged or collected.” They belong to the payee of the check.

In the pre-suit notice and the complaint served upon Ms. Haymond, Bonneville requested treble damages as authorized by statute. However, Ms. Haymond did not pay any treble damages to Mr. Godfrey or Bonneville. Plaintiffs allege that “Bonneville and Mr. Godfrey attempted to collect such damages with the intent of keeping the damages for themselves.” *See* Complaint at ¶ 47; R. at 9. Even if true, Ms. Haymond has suffered no injury. If any party could allege an injury it would be the original merchant who received the check, not Ms. Haymond. “One who is not adversely affected has no standing. A mere allegation of an adverse impact is not sufficient. There must also be some causal relationship between the injury to the [complainant], the [defendants’] actions and the relief requested.” *State v. Mace*, 921 P.2d 1372, 1379 (Utah 1996).

Ms. Haymond claims that she suffered a distinct and palpable injury because she had to hire a lawyer to avoid paying treble damages. *See* Plaintiffs’ Br. at 32. However, to the extent that hiring a lawyer is an injury, it was the direct result of Ms. Haymond’s

⁷ The Act also sets minimum and maximum limits for treble damages. The minimum amount is \$50.00 if no suit is filed, and \$100.00 if a lawsuit is filed. The maximum amount is \$250.00 if no suit is filed, and \$500.00 if a lawsuit is filed. *See* Utah Code Ann. § 7-15-1(6) and (7).

own actions. First, Ms. Haymond bounced a check. Second, she failed to pay the check amount and a minor service charge in a timely manner. Had she done so, treble damages would not have been an issue. It was only after Ms. Haymond bounced a check, and then was derelict in correcting the problem, that Bonneville filed suit. Ms. Haymond did not hire an attorney solely to avoid paying treble damages. She hired Mr. Perry to defend her in the collection lawsuit. If Ms. Haymond suffered any injury at all, it was self inflicted and does not confer standing to bring these claims. Therefore, under the traditional test, Plaintiffs lack standing on the fee splitting claims.

2. Plaintiffs are not the most appropriate plaintiffs to bring these claims.

Plaintiffs have failed to show that there is “no other party who has a greater interest in the outcome of the case than the aggrieved party and the issue is unlikely to be raised at all if standing is denied.” *Aldrich, Nelson, Weight & Esplin v. D.E.S.*, 878 P.2d 1191, 1194 (Utah Ct. App. 1994). Plaintiffs cannot satisfy this test, for they have no “interest in the outcome.” Neither Plaintiff paid treble damages. Therefore, anyone who actually paid treble damages would be a more appropriate plaintiff. Additionally, even if Bonneville and Mr. Godfrey improperly retained treble damages, the payees of the checks would be the injured parties and would be the appropriate plaintiffs. “Plaintiff[s] may not allege jeopardy or injury to others in order to confer standing upon [their] own claims.” *York v. Unqualified Washington County Elected Officials*, 714 P.2d 679, 680 (Utah

1986). Ms. Haymond and Ms. Lloyd clearly are not the most appropriate plaintiffs to bring these claims.

3. These are not issues of great importance that should be decided in the furtherance of public interest.

Plaintiffs have failed to show that “the issues presented are unique and of such importance that they ought to be decided in the furtherance of public interest.” *Order of Police Lodge v. Nordfelt*, 869 P.2d 948, 950 (Utah Ct. App. 1993). The treble damages claims are not of sufficient public importance in and of themselves to warrant standing. There is nothing in the Complaint to support the argument that these issues need to be decided and that they need to be decided right now. To the contrary, it was appropriate for the Judge Frederick to dismiss Plaintiffs’ claims and wait to address these issues if and when they are brought by an appropriate plaintiff who has suffered a distinct and palpable injury.

In summary, Plaintiffs lack standing to assert their claims alleging the improper collection and retention of treble damages by Mr. Godfrey and Bonneville.

III. JUDGE FREDERICK’S ORDER OF DISMISSAL DID NOT VIOLATE PLAINTIFFS’ CONSTITUTIONAL RIGHTS.

Plaintiffs argue that the trial court violated Article I, Sections 7 and 11 of the Utah Constitution by dismissing their claims and denying them their right to a day in court. *See* Plaintiffs’ Br. at 32-34. This argument, however, is being raised for the first time on appeal and, therefore, should not be considered by the Court. Furthermore, even if the

Court were to consider Plaintiffs' untimely constitutional argument, this argument fails on the merits because Plaintiffs lack standing.

A. Plaintiffs' Constitutional Argument is Being Raised for the First Time on Appeal.

Plaintiffs' constitutional argument, claiming violation of the due process and open courts provisions, is being raised for the first time on appeal. Plaintiffs failed to raise this argument in their memoranda filed in opposition to Defendants' Motions to Dismiss. *See* R. at 322-431. Plaintiffs also failed to raise this argument during the hearing on Defendants' Motions to Dismiss. *See* Transcript of June 3, 2002 Hearing; R. at 479 (pp. 1-14).

This Court has repeatedly held that "[i]ssues not raised at trial cannot be argued for the first time on appeal." *Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996) (citation omitted); *accord Treff v. Hinckley*, 2001 UT 50, ¶ 9 n.4, 26 P.3d 212 ("We will not address any arguments raised for the first time on appeal."); *Certified Sur. Group, Ltd. v. Utah, Inc.*, 960 P.2d 904, 906 n.3 (Utah 1998) ("Issues raised for the first time on appeal will generally not be considered."). "This rule applies to all claims, including constitutional questions." *Monson*, 928 P.2d at 1022. Because Plaintiffs failed to raise their constitutional argument in the trial court, it should not be considered on appeal. *See State v. Carter*, 707 P.2d 656, 661 (Utah 1985) ("Failure to raise the point [below] precludes its consideration here.").

B. Plaintiffs' Constitutional Rights were not Violated Because Plaintiffs Lack Standing to Sue.

Even if the Court considers Plaintiffs' untimely constitutional argument, that argument fails on the merits because Plaintiffs lack standing to sue. The due process provision of the Utah Constitution provides that "[n]o person shall be deprived of life, liberty or property, without due process of law." Utah Const. art. I, § 7. The open courts provision of the Utah Constitution provides:

All courts shall be open, and every person, *for an injury done to him* in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const. art. I, § 11 (emphasis added).

The protections provided under due process and open courts provisions are not triggered unless a plaintiff has standing to sue. This Court recently held that:

[T]he open courts provision guarantees litigants access to the courts, i.e., a day in court, affording them the opportunity to litigate any justiciable controversy. However, that right is limited to those individuals who actually have a viable claim, because the right is inextricably connected with that claim..

Applied Med. Tech. v. Eames, 2002 UT 18, ¶ 16, 44 P.3d 699; *accord Miller v. USAA*

Cas. Ins. Co., 2002 UT 6, ¶ 38 ("Parties to a suit . . . are constitutionally entitled to litigate any justiciable controversy . . ."). The requirement that a plaintiff have a viable claim and a justiciable controversy presupposes that the plaintiff has suffered some

legally cognizable injury. *See* Utah Const. art. I, § 11 (“All courts shall be open, and every person, *for an injury done to him*. . .); *Walston v. Lockhart*, 62 S.W.3d 257, 258-59 (Tex. Ct. App. 2002) (“The requirement of standing is implicit in the . . . open courts provision, which contemplates access to the courts only for those litigants suffering an injury.”). In summary, implicit in the due process and open courts provisions of the Utah Constitution is the requirement that the plaintiff have standing to sue.

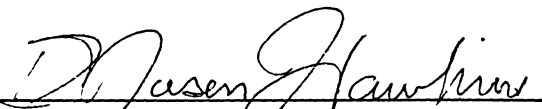
In the present case, Plaintiffs lack standing to assert their claims. Even assuming Plaintiffs’ allegations are true, they have not suffered a distinct and palpable injury giving rise to a personal stake in the outcome of the dispute. Because Plaintiffs lack standing, they cannot claim a violation of the due process and open courts provisions of the Utah Constitution.

CONCLUSION

For these reasons, the trial court’s Order of Dismissal should be affirmed.

DATED this 5 day of December, 2002.

SNOW, CHRISTENSEN & MARTINEAU

By 

Andrew M. Morse

D. Jason Hawkins

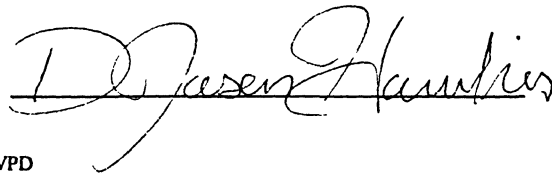
Attorneys for Defendant Ted K. Godfrey

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of December, 2002, I caused two true and correct copies of the Brief of Appellee Ted K. Godfrey to be served by U.S. First Class Mail, postage prepaid, upon the following:

Lester A. Perry
Hoole & King, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124
Attorneys for Appellants

Rebecca L. Hill
Christensen & Jensen, P.C.
50 South Main Street, #1500
Salt lake City, Utah 84144
Attorneys for Appellants Bonneville Billings
& Collections, Inc. and David Toller

A handwritten signature in cursive script, appearing to read "D. Jensen-Hankins", written over a horizontal line.

N:\21313\1\djh\Appeal\BRIEF.WPD

ADDENDUM

Citation
UT ST S 7-15-1
U.C.A. 1953 s 7-15-1

Search Result

Rank(R) 1 of 5

Database
UT-STANN9'

UTAH CODE, 1953
TITLE 7. FINANCIAL INSTITUTIONS
CHAPTER 15. DISHONORED INSTRUMENTS

Copyright (C) 1953-1997 by Michie, a division of Reed Elsevier Inc. and Reed Elsevier Properties Inc. All rights reserved.

-15-1 Civil liability of issuer -- Notice of action -- Collection costs.

(1) Any person who makes, draws, signs, or issues any check, draft, order, or other instrument upon any depository institution, whether as corporate agent or otherwise, for the purpose of obtaining from any person, firm, partnership, or corporation any money, merchandise, property, or other thing of value or paying for any service, wages, salary, or rent is liable to the holder of the check, draft, order, or other instrument if:

(a) the check, draft, order, or other instrument:

(i) is not honored upon presentment; and

(ii) is marked "refer to maker"; or

(b) the account upon which the check, draft, order, or other instrument has been made or drawn:

(i) does not exist;

(ii) has been closed; or

(iii) does not have sufficient funds or sufficient credit for payment in full of the check, draft, or other instrument.

(2) (a) The holder of the check, draft, order, or other instrument that has been dishonored may:

(i) give written or verbal notice of dishonor to the person making, drawing, signing, or issuing the check, draft, order, or other instrument; and

(ii) impose a service charge that may not exceed \$20.

(b) Notwithstanding Subsection (2) (a), a holder of a check, draft, order, or other instrument that has been dishonored may not charge the service charge permitted under Subsection (2) (a) if:

(i) the holder redeposits the check, draft, order, or other instrument; and

(ii) that check, draft, order, or other instrument is honored.

(3) Prior to filing an action based upon this section, the holder of a dishonored check, draft, order, or other instrument shall give the person making, drawing, signing, or issuing the dishonored check, draft, order, or other instrument written notice of intent to file civil action, allowing the person seven days from the date on which the notice was mailed to tender payment in full, plus the service charge imposed for the dishonored check, draft, order, or other instrument.

(4) In a civil action, the person making, drawing, signing, or issuing the check, draft, order, or other instrument is liable to the holder for:

(a) the amount of the check, draft, order, or other instrument;

(b) interest; and

(c) all costs of collection, including all court costs and reasonable attorneys' fees.

5) As used in this section, "costs of collection" includes reasonable compensation, as approved by the court, for time expended if the collection is sued personally by the holder and not through an agent.

ST S 7-15-1

tory: C. 1953, 7-15-1, enacted by L. 1981, ch. 16, s 13; 1986, ch. 29, s 1; 8, ch. 52, s 1; 1988, ch. 128, s 1; 1997, ch. 245, s 1.

NOTES, REFERENCES, AND ANNOTATIONS

Repeals and Reenactments. -- Laws 1981, ch. 16, s 1 repeals former ss 7-15-1, 5-3 (L. 1969, ch. 240, ss 1, 3; 1977, ch. 15, ss 1, 3; 1979, ch. 92, ss 1, relating to fraudulent checks. Laws 1981, ch. 16, s 13 enacts present ss 7-1 and 7-15-2. Former s 7-15-2 was repealed by Laws 1979, ch. 92, s 3.

Amendment Notes. -- The 1997 amendment, effective May 5, 1997, subdivided sections (1) and (2) adding the Subsection (3) designation, redesignated former Subsections (3) and (4) as (4) and (5), and added Subsection (2)(b).

Cross-References. -- Criminal penalties for issuing bad check, s 76-6-505.

NOTES TO DECISIONS

ANALYSIS

sufficient funds.

Knowledge of holder.
ed.

sufficient funds.

Knowledge of holder.

There was no fraudulent issuance of a check, and plaintiff was not entitled to attorney fees in an action on the check, where the check was issued to pay on a past due account, plaintiff accepted it with knowledge that there were sufficient funds to cover it and agreed to hold it for two weeks before presenting it to the bank. *Howells, Inc. v. Nelson*, 565 P.2d 1147 (Utah 1977). This section requires that the signator of a bad check personally receive benefits, services, or money transfer or, in the alternative, have actual knowledge that the check is drawn on insufficient funds in order to be held liable. *Mountain States Tel. & Tel. Co. v. Payne*, 782 P.2d 464 (Utah 1989). The trial court committed reversible error in construing this section as imposing strict liability on a corporate employee for signing corporate checks on behalf of her employer in payment for corporate obligations, where employee had no interest, beneficial or otherwise, in the checking account, the funds in the account, or in the corporation, had no knowledge or reason to believe that the checks in question were drawn on insufficient funds, and functioned merely as a scribe in executing checks for her employer. *Mountain States Tel. & Tel. Co. v. Payne*, 782 P.2d 464 (Utah 1989).

Cited in *Peterson Plumbing Supply v. Bernson*, 797 P.2d 473 (Utah Ct. App. 1990).

COLLATERAL REFERENCES

Utah Law Review. -- Criminal and Civil Liability for Bad Checks in Utah, 1970

Copr. (C) West 2002 No Claim to Orig. U.S. Govt. Works

Westlaw

Citation
T ST S 7-15-1
U.C.A. 1953 s 7-15-1

Search Result

Rank(R) 1 of 5

Database
UT-STANN00

UTAH CODE, 1953
TITLE 7. FINANCIAL INSTITUTIONS
CHAPTER 15. DISHONORED INSTRUMENTS

Copyright (C) 1953-2000 by Matthew Bender & Company, Inc. one of the LEXIS Publishing companies. All rights reserved.

-15-1 Definitions --Civil liability of issuer --Notice of action -- Collection
costs --Exemptions.

(1) As used in this chapter:

(a) "Check" means a payment instrument on a depository institution including

- (i) check;
- (ii) draft;
- (iii) order; or
- (iv) other instrument.

(b) "Issuer" means a person who makes, draws, signs, or issues a check, whether as corporate agent or otherwise, for the purpose of:

- (i) obtaining from any person any money, merchandise, property, or other thing of value; or
- (ii) paying for any service, wages, salary, or rent.

(c) "Mailed" means the day that a notice is properly deposited in the United States mail.

(2) (a) An issuer of a check is liable to the holder of the check if:

(i) the check:

- (A) is not honored upon presentment; and
- (B) is marked "refer to maker";

(ii) the account upon which the check is made or drawn:

- (A) does not exist;
- (B) has been closed; or
- (C) does not have sufficient funds or sufficient credit for payment in full of the check; or

(iii) (A) the check is issued in partial or complete fulfillment of a valid and legally binding obligation; and

(B) the issuer stops payment on the check with the intent to:

- (I) fraudulently defeat a possessory lien; or
- (II) otherwise defraud the holder of the check.

(b) If an issuer of a check is liable under Subsection (2)(a), the issuer is liable for:

- (i) the check amount; and
- (ii) a service charge of \$20.

(3) (a) The holder of a check that has been dishonored may:

- (i) give written or oral notice of dishonor to the issuer of the check; and
- (ii) waive all or part of the service charge imposed under Subsection (b).

(b) Notwithstanding Subsection (2)(b), a holder of a check that has been dishonored may not collect and the issuer is not liable for the service charge imposed under Subsection (2)(b) if:

- (i) the holder redeposits the check; and

ST S 7-15-1

(ii) that check is honored.

4) If the issuer does not pay the amount owed under Subsection (2)(b) within calendar days from the day on which the notice required under Subsection (5) mailed, the issuer is liable for:

(a) the amount owed under Subsection (2)(b); and

(b) collection costs not to exceed \$20.

5) (a) A holder shall provide written notice to an issuer before:

(i) charging collection costs under Subsection (4) in addition to the amount owed under Subsection (2)(b); or

(ii) filing an action based upon this section.

(b) The written notice required under Subsection (5)(a) shall notify the issuer of the dishonored check that:

(i) if the amount owed under Subsection (2)(b) is not paid within 15 calendar days from the day on which the notice is mailed, the issuer is liable for:

(A) the amount owed under Subsection (2)(b); and

(B) collection costs under Subsection (4); and

(ii) the holder may file civil action if the issuer does not pay to the holder the amount owed under Subsection (4) within 30 calendar days from the day which the notice is mailed.

(6) (a) If the issuer has not paid the holder the amounts owed under Subsection (4) within 30 calendar days from the day on which the notice required Subsection (5) is mailed, the holder may offer to not file civil action under this section if the issuer pays the holder:

(i) the amount owed under Subsection (2)(b);

(ii) the collection costs under Subsection (4);

(iii) an amount that:

(A) is equal to the greater of:

(I) \$50; or

(II) triple the check amount; and

(B) does not exceed the check amount plus \$250; and

(iv) if the holder retains an attorney to recover on the dishonored check, reasonable attorney's fees not to exceed \$50.

(b) (i) Notwithstanding Subsection (6)(a), all amounts charged or collected under Subsection (6)(a)(iii) shall be paid to and be the property of the original payee of the check.

(ii) A person who is not the original payee may not retain any amounts charged or collected under Subsection (6)(a)(iii).

(iii) The original payee of a check may not contract for a person to retain any amounts charged or collected under Subsection (6)(a)(iii).

(7) (a) A civil action may not be filed under this section unless the issuer fails to pay the amounts owed under Subsection (4) within 30 calendar days from the day on which the notice required by Subsection (5) is mailed.

(b) In a civil action, the issuer of the check is liable to the holder for:

(i) the check amount;

(ii) interest;

(iii) all costs of collection, including all court costs and reasonable attorneys' fees; and

(iv) damages:

(A) equal to the greater of:

(I) \$100; or

T ST S 7-15-1

(II) triple the check amount; and

(B) not to exceed the check amount plus \$500.

(c) If an issuer is held liable under Subsection (7) (b), notwithstanding subsection (7) (b), a court may waive all or part of the amounts owed under subsections (7) (b) (ii) through (iv) upon a finding of good cause.

(d) (i) Notwithstanding Subsection (7) (b), all amounts charged or collected under Subsection (7) (b) (iv) shall be paid to and be the property of the original payee of the check.

(ii) A person who is not the original payee may not retain any amounts charged or collected under Subsection (7) (b) (iv).

(iii) The original payee of a check may not contract for a person to retain any amounts charged or collected under Subsection (7) (b) (iv).

(8) This section may not be construed to prohibit the holder of the check from seeking relief under any other applicable statute or cause of action.

(9) (a) Notwithstanding the other provisions of this section, a holder of a check is exempt from this section if:

(i) the holder:

(A) is a depository institution; or

(B) a person that receives a payment on behalf of a depository institution;

(ii) the check is a payment on a loan that originated at the depository institution that:

(A) is the holder; or

(B) on behalf of which the holder received the payment; and

(iii) the loan contract states a specific service charge for dishonor.

(b) A holder exempt under Subsection (6) (a) may contract with an issuer for a collection of fees or charges for the dishonor of a check.

History: C. 1953, 7-15-1, enacted by L. 1981, ch. 16, s 13; 1986, ch. 29, s 1; 1988, ch. 52, s 1; 1988, ch. 128, s 1; 1997, ch. 245, s 1; 1999, ch. 100, s 1; 1999, ch. 171, s 1.

NOTES, REFERENCES, AND ANNOTATIONS

Repeals and Reenactments. --Laws 1981, ch. 16, s 1 repeals former ss 7-15-1, 7-15-3 (L. 1969, ch. 240, ss 1, 3; 1977, ch. 15, ss 1, 3; 1979, ch. 92, ss 1, 3) relating to fraudulent checks. Laws 1981, ch. 16, s 13 enacts present ss 7-15-1 and 7-15-2. Former s 7-15-2 was repealed by Laws 1979, ch. 92, s 3.

Amendment Notes. --The 1997 amendment, effective May 5, 1997, subdivided sections (1) and (2), adding the Subsection (3) designation; redesignated former Subsections (3) and (4) as (4) and (5); substituted "\$20" for "\$15" in section (2) (a) (ii); added Subsection (2) (b); and made stylistic changes. The 1999 amendment by ch. 100, effective May 3, 1999, rewrote the section. The 1999 amendment by ch. 171, effective May 3, 1999, added the last section, establishing exemptions. This section is set out as reconciled by the Office of Legislative Research General Counsel.

Cross-References. --Criminal penalties for issuing bad check, s 76-6-505.

**WEST'S UTAH RULES OF COURT
UTAH CODE OF JUDICIAL ADMINISTRATION
PART I. JUDICIAL COUNCIL RULES OF JUDICIAL ADMINISTRATION
CHAPTER 4. OPERATION OF THE COURTS
ARTICLE 5. CIVIL PRACTICE**

Copr. © West Group 2002. All rights reserved.

Current with amendments received through 9-15-2002.

RULE 4-505. ATTORNEY FEES AFFIDAVITS

Intent. To establish uniform criteria and a uniform format for affidavits in support of attorney fees

Applicability. This rule shall govern the award of attorney fees in the trial courts.

Statement of the Rule.

(1) Affidavits in support of an award of attorney fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorney fees are claimed, and affirm the reasonableness of the fees for comparable legal services.

(2) The affidavit must also separately state hours by persons other than attorneys, for time spent, work completed and hourly rate billed.

(3) If the affidavit is in support of attorney fees for services rendered to a person or entity who has been assigned an interest in a claim for the purpose of collection or hired by the obligee to collect a debt, the affidavit shall also state that the attorney is not sharing the fee or any portion thereof in violation of Rule of Professional Conduct 5.4.

(4) If judgment is being taken by default for a principal sum which it is expected will require considerable additional work to collect, the following phrase may be included in the judgment after an award consistent with the time spent to the point of default judgment, to cover additional fees incurred in pursuit of collection:

"AND IT IS FURTHER ORDERED THAT THIS JUDGMENT SHALL BE AUGMENTED IN THE AMOUNT OF REASONABLE COSTS AND ATTORNEY'S FEES EXPENDED IN COLLECTING SAID JUDGMENT BY EXECUTION OR OTHERWISE AS SHALL BE ESTABLISHED BY AFFIDAVIT."

(5) Attorney fees may be awarded pursuant to this rule or pursuant to Rule 4- 505.1.

[Amended effective November 15, 1995.]

Judicial Administration Rule 4-505

UT R J ADMIN Rule 4-505

END OF DOCUMENT

**WEST'S UTAH RULES OF COURT
UTAH CODE OF JUDICIAL ADMINISTRATION
PART I. JUDICIAL COUNCIL RULES OF JUDICIAL ADMINISTRATION
CHAPTER 4. OPERATION OF THE COURTS
ARTICLE 5. CIVIL PRACTICE**

Copr. © West Group 2002. All rights reserved.

Current with amendments received through 9-15-2002.

RULE 4-505.01. AWARDS OF ATTORNEY FEES IN CIVIL DEFAULT JUDGMENTS WITH A PRINCIPAL AMOUNT OF \$5,000 OR LESS.

Intent:

To provide for uniformity in awards of attorney fees in civil default judgments with a principal damages amount of \$5,000 or less.

To provide for notice of the amount of attorney fees that may be awarded in the event of default.

Applicability:

This rule shall govern awards of attorney fees in civil default judgments with a principal damages amount of \$5,000 or less in which the claimant elects to seek an award of attorney fees pursuant to this rule.

Statement of the Rule:

(1) When reasonable attorney fees are provided for by contract or statute and the claimant elects to seek an award of attorney fees pursuant to this rule, such fees shall be computed as follows:

Principal Amount of Damages, Exclusive of Costs and Interest, Attorney Between and: Fees Allowed		
\$0.00	\$700.00	\$150.00
700.01	900.00	175.00
900.01	1,000.00	200.00
1,000.01	1,500.00	250.00
1,500.01	2,000.00	325.00
2,000.01	2,500.00	400.00
2,500.01	3,000.00	475.00
3,000.01	3,500.00	550.00
3,500.01	4,000.00	625.00
4,000.01	4,500.00	700.00
4,500.01	5,000.00	775.00

(2) Reference to this rule and the amount of attorney fees allowed pursuant to paragraph (1) shall be stated with particularity in the body or prayer of the complaint.

(3) When a statute provides the basis for the award of attorney fees, reference to the statutory authority shall be included in the complaint.

(4) Clerks may enter civil default judgments which include attorney fees awarded pursuant to this rule.

(5) Attorney fees awarded pursuant to this rule may be augmented after judgment pursuant to Rule 4-505. When the court considers a motion for augmentation of attorney fees awarded pursuant to this rule, it shall consider the attorney time spent prior to the entry of judgment, the amount of attorney fees included in the judgment, and the statements contained in the affidavit supporting the motion for augmentation.

(6) Prior to entry of a judgment which grants attorney fees pursuant to this rule, any party may move the court to depart from the fees allowed by paragraph (1) of this rule. Such application shall be made pursuant to Rule 4-505.

(7) If a contract or other document provides for an award of attorney fees, an original or copy of the document shall be made a part of the file before attorney fees may be awarded pursuant to this rule.

(8) No affidavit for attorney fees need be filed in order to receive an award of attorney fees pursuant to this rule.

(9) No attorney fees awarded pursuant to this rule, nor portion thereof, may be shared in violation of Rule of Professional Conduct 5.4.

[Amended effective November 15, 1995; November 1, 2002.]

Judicial Administration RULE 4-505.01

UT R J ADMIN RULE 4-505.01

END OF DOCUMENT

FILED DISTRICT COURT
Third Judicial District

JUN 18 2002

SALT LAKE COUNTY

By _____
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LINDA HAYMOND and MELANIE A.)	
LLOYD, for themselves and for all others)	ORDER OF DISMISSAL
Similarly situated;)	
)	
Plaintiffs)	
)	
vs.)	
)	
BONNEVILLE BILLING &)	
COLLECTIONS, INC., a Utah corporation;)	
TED K. GODFREY, DAVID TOLLER;)	Civil No.: 010911607
And JOHN DOES 1 THROUGH 10;)	Judge J. Dennis Frederick
)	
Defendants.)	
)	

Defendant Ted K. Godfrey's Motion to Dismiss and Defendants Bonneville Billing & Collections, Inc.'s and David Toller's Motion to Dismiss or in the Alternative Motion For Summary Judgment came regularly for hearing on June 3, 2002 at 9:00 a.m. before the Honorable J. Dennis Frederick. Plaintiffs were represented by Lester A. Perry, Defendant Ted K. Godfrey was represented by Andrew M. Morse and Defendants Bonneville Billing &

Collections, Inc. and David Toller were represented by Rebecca L. Hill. The Court heard the arguments of counsel and considered the parties' memoranda and material on file, and good cause appearing therefor,

IT IS ORDERED ADJUDGED AND DECREED that Defendants' Motions to Dismiss are granted. The Court rules that Defendants' arguments as set forth in their Memoranda are well-taken as Plaintiffs have no standing or basis under Utah law for a right of action against Defendants as they allege in their Complaint. Plaintiffs' Complaint is dismissed with prejudice and on the merits. Parties to bear their own costs. This Order of Dismissal concerns Plaintiffs' entire action against Defendants and is final for purposes of appeal.

DATED this 18th day of June, 2002.

BY THE COURT:

/s/
J. Dennis Frederick
Third District Court Judge

Approved as to form:

Lester A. Perry
Lester A. Perry
HOOLE & KING, L.C.
Attorneys for Plaintiffs

Approved as to form:



Andrew M. Morse
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant Ted K. Godfrey

Approved as to form:



Rebecca L. Hill
CHRISTENSEN & JENSEN, P.C.
Attorneys for Defendants Bonneville
Billing & Collections, Inc. and David Toller