

2002

Linda Haymond and Melanie A. Lloyd, for  
themselves and for all others similarly situated v.  
Bonneville Billing and Collections, Inc., a Utah  
Corporation; Ted K. Godfrey; David Toller; and  
John Does 1-10 : Reply Brief of Appellants

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

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

**Plaintiffs/Appellants,**

**vs.**

**BONNEVILLE BILLING &  
COLLECTIONS, INC., A Utah  
Corporation; TED K. GODFREY;  
DAVID TOLLER; AND JOHN DOES  
1 through 10;**

**Defendants/Appellees.**

**Appeal No. 20020531**

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**REPLY BRIEF OF APPELLANTS**

---

**APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK**

---

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## Argument

### **I. Ms. Lloyd and Ms. Haymond have standing to pursue this suit.**

#### **A. The defendants' collection practices were designed to collect money to which the collection agency, Bonneville, had no legal right.**

The first practice is the collection of fictitious attorney's fees that are not attorney's fees from both open account debtors and check writers whose checks were dishonored. Bonneville is a large Utah collection agency who receives 1,500 dishonored checks and many open accounts each day to collect from Utah residents. Fact para. 18.<sup>1</sup> Prior to 1994, Bonneville took possession of all attorney's fees collected by its attorneys from collection lawsuits and kept one half of the fees and paid the other half to its attorneys. Fact para. 19 & 20. The attorney's fees totaled about \$1.0 million per year, with Bonneville keeping \$500,000. Fact para. 21. The Utah State Bar complained about this practice and Bonneville cut a new agreement with its attorneys by which the attorneys would collect all of the attorney's fees and pay Bonneville an amount equal to the \$500,000 per year that Bonneville previously received. Fact para. 19. Bonneville and its attorneys called the vast majority of these \$500,000 per year in payments "the contractual reimbursement for the right to be hooked into Bonneville's computer system that kept track of its collection accounts." Fact para. 19. This computer system, however, cost Bonneville only \$10,000 per year and only contained information that clients typically provided to their attorneys free of charge to aid

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<sup>1</sup> Fact paragraphs are in the original brief of Ms. Lloyd and Ms. Haymond.



the attorney in their litigation. Fact para. 22 - 24. The information on the computer system consisted of the name and address of the defendant, how much was owed, the basis of the debt such as a bad check or open account, and the contacts made by Bonneville's collectors with the debtor. Id. This was information provided to the attorneys for free during the pre 1994 period when Bonneville was simply retaining \$500,000 in attorney's fees each year for itself. Id.

The second practice is the collection of triple damages from check writers under the 1999 version of Utah's bad check statute, Utah Code Ann. § 7-15-1. Fact para. 26. When this statute was rewritten in 1999, the Utah State Legislature added the right of a holder of a dishonored check to: 1) offer a covenant not to sue the writer of the check and collect damages equal to the greater of \$50.00 or triple the amount of the check; and 2) after suit, collect damages equal to the greater of \$100 or triple the amount of the check. Id. The statute, however, prohibits a third party check collector, such as Bonneville or its attorneys, from collecting these damages for itself. Id. These damages can only be collected for the merchant to whom the check was originally written. Id. The statute also provides that any contract between the merchant and a third party check collector that allows the third party collector to retain the damages is void. Id. Bonneville never told the merchants whom it represented that they had the right to collect triple damages. Fact para. 27. Bonneville attempted to collect money for the triple damages and kept any such money for itself. Id. Since the merchants never knew that Bonneville was collecting the triple damages, they never authorized Bonneville and its attorneys to

collect the treble damages. Id.

Bonneville sued Ms. Lloyd and Ms. Haymond claiming the right to collect \$150.00 in attorney's fees. Fact para. 16 & 25. Ms. Lloyd paid the \$150.00 in attorney's fees. Id. Only one half of the \$150.00 was for attorney's fees. Id. The other half was funneled through the attorney to Bonneville's president pursuant to the above scheme. Id. Ms. Haymond was sued for the triple damages and the imaginary attorney's fees and she tried to defend herself in the suit. Fact para. 7 - 9. Bonneville pushed the lawsuit. After several months, Ms. Haymond hired an attorney to represent her. Fact para. 10. The attorney sent a letter to Mr. Godfrey, Bonneville's counsel in the collection suit, requesting information concerning the attorney fee and triple damage schemes. Fact para. 10 & 11. The letter was ignored so interrogatories and requests for production were sent to Mr. Godfrey. Id. They were ignored. Ms. Haymond moved for leave to amend her pro se complaint to allege the attorney fee splitting practice and the triple damage scheme. Id. Bonneville immediately dismissed its collection suit, over Ms. Haymond's objection. Fact para. 12.

**B. The plaintiffs suffered injury to their protected property rights, the loss of money and damages, through the fraud and illegal collection practices of Bonneville and its attorneys and have standing to sue under the traditional test of standing set forth in Jenkins v. Swan.**

Bonneville claims that how its attorneys spent the \$1.0 million in attorney's fees collected each year is none of the plaintiffs' business. They also argue that it is none of the plaintiffs' business whether the original merchants knew that Bonneville was collecting triple damages, whether the original merchants had authorized Bonneville to

collect the triple damages, and whether Bonneville was keeping the triple damages rather than passing them on to the original merchants. Bonneville uses, in its argument, the example of an attorney who is awarded his/her attorney's fees in a civil rights case and argues that the defendants in the civil rights case would have no right to complain about how the attorney spent the money that he/she collected for fees. Bonneville brief at 20 - 22.

This example has nothing in common with Bonneville's two collection practices. The money that Bonneville attempted to collect from Ms. Haymond and tens of thousands of other Utah check writers, for the triple damages (and would have collected from Ms. Haymond except that she spent money on an attorney who forced Bonneville to run and dismiss its collection suit) was not authorized by the merchants to whom the checks were written. These merchants did not even know that Bonneville was trying to collect the triple damages and keeping any such damages for itself.

The money collected for attorney's fees was merely money passed through to Bonneville's president under a preconceived contract between Bonneville and its attorneys. The amount of this money was substantial, \$500,000 per year paid to Bonneville's president and sole shareholder.

The Hawaii Court of Appeals was faced with an identical situation in Fuller v. Pacific Medical Collections, Inc., 891 P.2d 300 (Hawaii App. 1995), wherein the trial court concluded that the debtor did not have standing to challenge the collection of attorney's fees that were split between a collection agency and its collection attorney

under a prearranged agreement. The Court of Appeals disagreed with the trial court, stating:

“[In the trial court’s view], if a collection agency collects attorney fees from a debtor and does not pay to its attorney the attorney fees it collects, the debtor has not been damaged. We disagree. In our view, money collected from a debtor as an “attorney’s fee” is not an “attorney’s fee” when the collection agency did not pay the “attorney’s fee” to the attorney.

...

“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.<sup>2</sup>

As Ms. Lloyd and Ms. Haymond allege in their Complaint, Bonneville and its attorney not only committed a fraud on the courts of Utah, but also committed a fraud on the debtors from whom they attempted to collect and collected the fictitious attorney’s fees and triple

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<sup>2</sup> Bonneville attempts to distinguish this case by arguing that the Hawaii Appellate Court only stated that the check writers had standing to sue under the Hawaii deceptive act and practices act. The Hawaii court actually found that representing that the monies were attorney’s fees in order to fall under an attorney’s fee statute when in fact they were not attorney’s fees but were monies collected under a preexisting scheme by which they were funneled through the attorneys to the collection agency was dishonest, a lie, and a fraud. (In fact the court stated that the attorneys involved should be disciplined under the Code of Professional Responsibility.) Id. at 316. The common law actions of Ms. Haymond and Ms. Lloyd for fraud, negligent misrepresentation, unjust enrichment, wrongful collection, and others, falls squarely within the Hawaii court’s characterization of this practice.

damages, and were unjustly enriched by the amount of these imaginary “attorney’s fees” and unauthorized and illegal triple damages. The money taken from Ms. Lloyd for the illusory attorney’s fees and Ms. Haymond’s damages of the expense, aggravation and hassle in Bonneville’s collection suit that sought the attorney’s fees and triple damages, were “distinct and palpable injuries” that gave them a personal stake in the outcome of the lawsuit under the traditional test of standing set forth in Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983). They clearly had a “sufficient interest in the subject matter of the dispute and a sufficient adverseness [to Bonneville and its attorney] so that the issues [could] be properly explored” to constitute standing. Nat’l Parks & Conservation Ass’n v. Bd. of State Lands, 869 P.2d 909, 913 (Utah 1993).

**C. The fact that the defendants are collecting a set amount of money pursuant to Rule 4-505.01 of the Utah Rules of Judicial Administration does not change the nature of their fraud and unjust enrichment.**

Bonneville and its attorney argue that since Bonneville’s attorney filed a lawsuit against Ms. Lloyd and Ms. Haymond, Bonneville had an automatic right to collect \$150 under Rule 4-505.01, regardless of whether the money was for attorney’s fees. The defendants conclude that since they had this automatic right to \$150, Ms. Lloyd and Ms. Haymond could not have suffered an injury if Bonneville’s attorney choose to pay Bonneville one half of the \$150 pursuant to a pre-designed contract between the defendants to channel \$500,000 per year in fictitious “attorney’s fees” into the pockets of Bonneville’s president.

The fact that Bonneville and its attorney use Rule 4-505.01 to obtain an award of a

set amount of attorney's fees does not change the fact that they are telling the courts and the debtors such as Ms. Lloyd and Ms. Haymond that they are collecting attorney's fees, when in reality they are collecting money that are not attorney's fees but are payments to a collection agency. Their practice is dishonest, a deceit, and a fraud on the debtors and the courts and an unjust enrichment at the expense of tens of thousands of Utah residents, including the named plaintiffs.

Rule 4-505 and Rule 4-505.01 of the Utah Rules of Judicial Administration presuppose that money awarded under their requirements is money for real "attorney's fees." These rules require that the attorney's fees that they designate must be allowed by statute or by contract. These rules expressly contemplate that the monies that are being sought are for attorney's fees. Indeed, the words "attorney fees" are used 15-20 times within the body of each rule.

These rules do not allow the award of collection agency fees pursuant to a prearranged contract between the collection agency and its collection attorney to collect monies from tens of thousands of Utah residents under the disguise of "attorney's fees," with the collection agency receiving half of the fees. This collection scheme violates the very purpose of Rules 4-505 and 4-505.01 which is to prevent the abuse of attorney fee awards, especially by high volume sophisticated litigants such as collection agencies who have a significant advantage over the average unsophisticated consumer. N.A.R., Inc. v. Walker, 37 P.3d 1068, 1069 (Utah 2001) and N.A.R., Inc. v. Farr, 997 P.2d 343, 345 (Ut. Ct. of App. 2000).

Prior to 1995, the Utah Judicial Council knew that collection agencies were using the large volume of business that they generated for attorneys as leverage to require that attorneys demand monies from consumers, call the monies “attorney’s fees,” and then split the monies with the collection agencies through prearranged contracts. In 1995, the Judicial Council amended Rules 4-505 and 4-505.01 to make it clear that the attorney’s fees awarded under these rules were to be real attorney’s fees and could not be split with the attorney’s clients, such as collection agencies. Rule 4-505(3) and Rule 4-505.01(9).

**D. Utah Code Ann. § 7-15-1 prohibits Bonneville from collecting money from check writers under the guise of attorney’s fees that were not actual attorney’s fees.**

Many of the debts collected by Bonneville and its attorney were bad checks. Utah’s bad check statute contains additional prohibitions against Bonneville’s collection of imaginary attorney’s fees. The 1998 version of Utah’s bad check statute, Utah Code Ann. § 7-15-1(3), that was in effect at the time Ms. Lloyd wrote her check, expressly prohibited third party collectors such as Bonneville and its attorney from collecting anything except the face amount of the check, interest, a \$20.00 service charge, and attorney’s fees. Utah Code Ann. § 7-15-1(4). The 1999 version of the statute, Utah Code Ann. § 7-15-1(7), that was in effect at the time Ms. Haymond wrote her check, expressly limited the amount that could be collected to a \$20.00 service charge under Section 7-15-1(2)(b), \$20.00 “costs of collection” pursuant to Section 7-15-1(4), interest, court costs, reasonable attorney’s fees, and damages in the amount of the greater of \$100.00 or triple the amount of the check.

Each bad check statute contained a specific notice to be sent to the check writer.

This notice expressly stated that only the **actual** costs could be collected. Neither statute allowed Bonneville's practice of collecting money for fictitious attorney's fees that were syphoned to Bonneville's president pursuant to a prearranged agreement with its attorneys.

The defendants argue that collecting money costs money and the person that wrote a bad check should pay these costs. Godfrey Brief at 14. The Utah Legislature recognized this concept and established a hierarchy of payments for costs, fees and damages under Section 7-15-1. Bonneville, however, wants more money than allowed by this statute. It attempts to collect this additional money through misrepresentations about the nature of the illusory attorney's fees and the right to the triple damages.<sup>3</sup>

**E. The non-traditional tests of standing of Jenkins v. Swan are also met.**

In Jenkins, this Court outlined two alternative considerations, or tests, upon which standing may be based, if the traditional test is not met. These alternative considerations are: 1) whether there is anyone with a greater interest in the outcome of the case than the plaintiff; and 2) where the case involves a great public interest or societal impact, whether there is

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<sup>3</sup> The defendants cite the case of CheckRite Recovery Services v. King, 52 P.3d 1265 (Utah 2002) for the proposition that Utah Code Ann. § 7-15-1 allows a collection agency to collect costs of collection greater than \$20.00. This conclusion is clearly incorrect with respect to Ms. Lloyd because collection of her check was governed by the earlier version of Section 7-15-1 which expressly prohibited a third party collector from collecting costs of any kind or amount, whether before or after suit. With respect to Ms. Haymond, the CheckRite case does not legitimize the collection of monies for fictitious attorney's fees under a prearranged contract with Bonneville's attorneys or the collection of money for triple damages that were not authorized by the merchants or even collected with their knowledge.



anyone who will assert the claims. Jenkins v. Swan, 675 P.2d at 1150.

The traditional standing test set forth in Jenkins is the test that would normally be applied to private litigants such as the parties in the present case. The alternative standing tests usually come into play when a plaintiff seeks to remedy a perceived wrong being committed by the administrative or legislative branches of government. The content of the alternative standing tests demonstrates the fact that almost all standing cases from Utah's appellate courts involve lawsuits against government agencies.<sup>4</sup> This is one reason why the constitutional underpinning of Utah's standing test is the separation of powers doctrine, rather than the Article III case in controversy doctrine followed by the Federal courts.<sup>5</sup> It is

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<sup>4</sup> Jenkins v. Swan, 675 P.2d 1145 (Utah 1983), a taxpayer action challenging Utah's educational system and seeking a declaration that members of the system could not be members of the state's legislature; Terracor v. Utah Board of State Lands & Forestry, 716 P.2d 796 (Utah 1986), a petition for a writ of mandamus by a real estate developer directing the Board of State Lands and Forestry to rescind a special use lease; Utah Bankers Association v. Utah Department of Financial Institutions, 888 P. 2d 714 (Utah Ct. App. 1994), an action by the banks against the Utah Department of Financial Institutions to prevent credit union branches; Aldrich, Nelson, Weight and Esplin v. Department of Employment Security, 878 P.2d. 1191 (Utah Ct. App. 1994), an action against the Utah Department of Employment Security by law firms specializing in workers compensation cases to force them to change their rule allowing attorney's fees of only 25% of the benefits; National Parks and Conservation Association v. Board of State Lands, 869 P. 2d. 909 (Utah 1993), environmental challenge to the Utah Division of State Lands and Forestry on exchange of school trust lands in Garfield County; and West Valley City Fraternal Order of Police Lodge #4 v. Nordfelt, 869 P. 2d. 948 (Utah Ct. App. 1993), a challenge by police officer association against West Valley police chief and his practices regarding advancement to the office of Sargent.

<sup>5</sup> The Court stated that "[u]nlike federal law where the standing doctrine is related to the case in controversy language of the United States Constitution, our standing law arises from the general precepts of the doctrine of separation of powers found in Article V of the Utah Constitution." Terracor v. Utah Board of State Lands & Forestry, 716 P.2d

difficult to apply these cases and their alternative standing tests to a case where the litigants are private individuals.<sup>6</sup>

The defendants argue that these alternative standing tests are not met. Ms. Lloyd and Ms. Haymond maintain that the Court does not need to reach these alternative considerations because the traditional test of standing is met. However, the defendants' arguments concerning these alternative tests are addressed below.

**1. The Utah State Bar does not have a greater interest than the plaintiffs in challenging the illegal collection practices of Bonneville and its attorneys and cannot gain a remedy for the plaintiffs' injuries.**

The defendants claim that the Utah State Bar has a greater interest in the outcome of the case than Ms. Lloyd and Ms. Haymond. Bonneville brief at 23. The defendants argue that since they collected the attorney's fees from Ms. Lloyd and attempted to collect the attorney's fees from Ms. Haymond pursuant to Rule 4-505.01 of the Utah Rules of Judicial Administration, and since this Rule states that "[n]o attorney fees awarded pursuant to this

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at 798.

<sup>6</sup> For example, this Court stated in Terracor v. Utah Board of State Lands & Forestry, 716 P.2d at 798 "the doctrine of standing limits judicial power so that there will not 'be a significant inroad on the representative form of government, cast[ing] the courts in the role of supervising the coordinate branches of government . . . [and converting] the judiciary into an open forum for the resolution of political and ideological disputes about the performance of government.'"

Similar discussions are contained in every one of Utah's standing cases. These considerations are not helpful in cases involving private litigants, as in the present case.

rule, nor portion thereof, may be shared in violation of Rule of Professional Conduct 5.4,” the Utah State Bar has a greater interest in the outcome of this case than the plaintiffs and the Utah State Bar should be the entity to assert the claims made herein.

The defendants are correct in their assertion that the Utah State Bar has the power to discipline attorneys for violating the Rules of Professional Responsibility. However, the disciplining of Bonneville’s attorneys for engaging in a state wide attempt to collect millions of dollars from tens of thousands of Utah citizens under the misleading title of “attorney’s fees” is not at issue in this case. Likewise, the disciplining of Bonneville’s attorneys for engaging in an attempt to collect triple damages from thousands of Utah’s citizens, which damages are not allowed by law, is not at issue in this case. This case is about two Utah citizens who were exposed to these illegal practices, one of whom, Ms. Lloyd, who fell for the demands and paid the illegal attorney’s fees, and the other, Ms. Haymond, who hired an attorney to defend her and, thereby, did not pay the illegal attorney’s fees or triple damages, but who incurred the cost of her attorney and the aggravation and hassle of being exposed to Bonneville’s collection suit seeking such fees and triple damages.

Ms. Lloyd and Ms. Haymond cannot gain a remedy for their injuries through the disciplinary power of the Utah State Bar.<sup>7</sup> Their remedy lies in a lawsuit against Bonneville and its attorney for fraud, unjust enrichment and the other common law causes of action

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<sup>7</sup> The Preamble to the Rules of Professional Conduct states that “[v]iolation of a Rule should not give rise to a cause of action, nor should it create any presumption that a legal duty has been breached. . . [t]hey are not designed to be a basis for civil liability.”

asserted in their complaint.

**2. The merchant who received Ms. Haymond's check did not have a greater interest in challenging the illegal collection practices of Bonneville and its attorneys.**

The defendants argue that the merchant who received Ms. Haymond's dishonored check has a greater interest in seeing that Bonneville and its attorney's do not collect triple damages that are not authorized by the merchant and are retained by Bonneville and its attorneys in violation of Utah Code Ann. § 7-15-1. Bonneville brief at 26. The problem with this argument is that the merchant, like most if not all of the other merchants for whom Bonneville is attempting to collect the triple damages, did not know that Bonneville was attempting to collect the triple damages and had not authorized their collection from Ms. Haymond. The merchant who initially received the Haymond check also had no interest in making sure that Bonneville and its attorneys were not engaged in a fraud on Utah check writers like Ms. Haymond by collecting triple damages to which Bonneville and its attorneys were not entitled and had not been authorized to collect.

**3. The Utah Department of Commerce, Division of Corporations, does not have a greater interest than the plaintiffs in challenging the illegal collection practices of the defendants and does not have the authority to do so.**

Bonneville argues that the Utah Department of Commerce, Division of Corporations, has a greater interest than the plaintiffs in challenging the collection practices of Bonneville and its attorneys. Bonneville brief at 26. The defendants reason that Utah Code Ann. § 12-1-1 grants power to the Division to seek injunctive relief against Bonneville and its attorney

to prevent these illegal collection practices.

Title 12, Chapter 1, of the Utah code only addresses the posting of a \$10,000.00 bond with the State of Utah for the protection of merchants who refer their collection accounts to collection agencies. If a collection agency collects an account and absconds with the money, the merchant can make a claim on the bond for the money stolen by the collection agency. This statute does not grant any right to the State to regulate the illegal collection practices of collection agencies against debtors or sue on behalf of debtors for money fraudulently obtained by the collection agencies. Protection of debtors from dishonest collection agencies is left up to the common law in state courts and the Fair Debt Collection Practice's Act in the Federal system.

**4. Ms. Haymond is not basing her claims against Bonneville on the claims of other Utah check writers.**

The defendants argue that, with respect to the claim of Ms. Haymond concerning the attempted collection of the triple damages, she is asserting the claims of the many other Utah check writers who fell for Bonneville's scheme and paid the triple damages. The defendants conclude that these other check writers have a greater interest than Ms. Haymond in seeing that Bonneville's practice is stopped. Bonneville brief at 26.

Ms. Haymond does not base her claim on the claims of the thousands of other Utah check writers who were exposed to the same practice. Rather, she basis her claim on the injury caused to her by having to defend against the collection suit of Bonneville which sought treble damages that were not allowed by Utah's bad check statute. Her injury included

her attorney's fees, costs, aggravation and hassle caused by the suit. The issue of the unauthorized triple damages collected from thousands of other Utah check writers is an issue that should be addressed at the time of class certification.

**5. There is a great public importance that would justify the imposition of an alternative test for standing.**

The defendants argue that there is no great public importance in this action. Thus, the alternative tests of standing should not be followed. Bonneville brief at 27.

Bonneville receives 1,500 dishonored checks per day. It is also referred thousands of open accounts for collection. Bonneville is only one of many collection agencies in Utah. The trial court's decision in this case has given the green light to Bonneville and the other collection agencies to collect and keep triple damages in violation of the clear prohibition of Section 7-15-1 and to attempt to collect the triple damages without the knowledge and authorization of the original merchant. The trial court's decision also legitimizes the collection of millions of dollars from tens of thousands of Utah residents based upon the misrepresentation that the money is "attorney's fees." This misrepresentation is in direct violation of Rules 4-505 and 4-505.01.

There are tens of thousands, probably hundreds of thousands, of Utah residents who have been exposed to these practices. Protecting these residents from the fraud that has been sanctioned by the trial court is a great public importance.

**II. The injuries suffered by Ms. Haymond and Ms. Lloyd were to property rights that are protected under Utah law and gives them standing to bring this action.**

The defendants argue that Ms. Lloyd and Ms. Haymond raise the constitutional defenses of due process, Art. I, § 7, Utah Const., and open courts, Art. I, § 11, Utah Const., as new arguments which should not be considered because they are raised for the first time on appeal.

The traditional test of standing is that the plaintiff must show that he/she suffered a distinct and palpable injury that gives him/her a personal stake in the outcome of the suit. Jenkins v. Swan, 675 P.2d at 1148. Thus, the court must determine if the plaintiff has been injured. The due process and open courts provisions help define what interests of the plaintiff need to be injured in order to meet the traditional test of standing in Jenkins. This traditional test in Jenkins is the key issue raised by the defendants. This issue has always been before the court in this case. It is not argued for the first time on appeal.<sup>8</sup>

Art. I, § 7 of the Utah Const., provides that “[n]o person shall be deprived of life, liberty or property, without due process of law” and Art. I, § 11, provides that “[a]ll 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, . . .” Thus, life, liberty, property, the person and reputation are protected interests. If they are injured, the plaintiff has standing to seek relief from the courts.

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<sup>8</sup> Even the defendant, Mr. Godfrey, recognizes that one of the constitutional underpinnings to standing is the open court’s provision. He argues, at page 13 of his brief, that in order for a plaintiff to have standing, he must have “an injury done to him in his person, property or reputation” as those terms are used within the open courts provision of the Utah Constitution.

This Court defines “life, liberty, and property” as constitutional terms that are to be taken in their broadest sense. “They indicate the three great subdivisions of all civil right. The term ‘property,’ in this clause, embraces all valuable interest which a man may possess outside of himself; that is to say, outside of his life and liberty. It is not confined to mere tangible property but extends to every species of vested right.” McGrew v. Industrial Commission, 84 P.2d 608, 610 (Utah 1938); as quoted in Miller v. USAA Casualty Insurance Co., 44 P. 3d 663, 674 (Utah 2002).

In Miller, the plaintiffs’ rights that were at issue were extra-contractual claims for loss of use of a home, mental and emotional distress, physical illness and distress, frustration and embarrassment, infliction of emotional distress, bad faith settlement claims against an insurer, punitive damages and other general and consequential damages. Miller v. USAA Casualty Insurance Co., 44 P. 3d at 668. This Court determined that these claims were vested property rights just as tangible things were property and could not be taken from the plaintiffs without due process of law. Id at 674. Thus, the plaintiffs in Miller were guaranteed the “right and opportunity, in a judicial tribunal, to litigate a claim, seek relief, or defend one’s rights.” Id. at 674.

The claim of Ms. Lloyd for the \$150.00 in fictitious attorney’s fees that she paid to the defendants is a protected property right. It is the right to a judgment for the wrongful taking of money based upon misrepresentations and unjust enrichment. The claim of Ms. Haymond for her defense costs, frustration, aggravation, embarrassment, and emotional distress caused by the wrongful attempts to collect the illegal treble



damages and the illusory attorney's fees in Bonneville's collection suit against her is also a property right.<sup>9</sup> Both Ms. Lloyd and Ms. Haymond suffered distinct and palpable injuries to property rights that gives them a personal stake in the outcome of their suit against the defendants. Thus, they have standing.

**III. The plaintiffs have a right of action under the common law claims pled in their complaint, including fraud, unjust enrichment, constructive fraud, and negligent misrepresentation.**

The defendants argue that there is no private right of action under Rule 4-505.01 or Utah Code Ann. § 7-15-1.<sup>10</sup> Whether there is a private right of action under Rule 4-505.01

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<sup>9</sup> Bonneville argues that Ms. Haymond is a particularly undeserving plaintiff because she did not fall for Bonneville's attempt to collect either the fictitious attorney's fees or the illegal treble damages. Bonneville sued Ms. Haymond for these fees. Ms. Haymond initially represented herself in the suit. While she was acting as a pro se defendant, Bonneville made every effort to obtain a judgment for these illegal fees and damages. Ms. Haymond, thereafter, hired an attorney to represent her. The attorney sent a letter to Bonneville's attorney explaining that he was aware that Bonneville had engaged in the attorney's fee and triple damage practices and requested information about these practices. The letter was ignored and Ms. Haymond's attorney sent interrogatories and requests for production of documents designed to establish the facts necessary to plead a counterclaim in good faith. At the same time, Ms. Haymond's attorney moved the trial court for leave to amend Ms. Haymond's pro se answer to allege these illegal practices. Bonneville and its attorney immediately dismissed the collection case, over Ms. Haymond's objection.

Ms. Haymond has the right to seek a remedy for her injuries inherent in this collection case. This case was an abuse of process and a wrongful use of civil proceedings. Bonneville's actions also fell within the other common law claims identified below.

<sup>10</sup> This defense was not raised by the defendants in their motions to dismiss or the memorandums in support. Record at 116 & 225. It was briefly mentioned in oral argument without citation to any authority. This defense should not be considered on appeal.

or Utah Code Ann. § 7-15-1 is an issue that is irrelevant to the present case. The claims of Ms. Haymond and Ms. Lloyd are founded on common law causes of action, including fraud<sup>11</sup>, fraudulent concealment<sup>12</sup>, negligent misrepresentation<sup>13</sup> and unjust enrichment.<sup>14</sup> The actions of the defendants fall within each of these causes of action and the plaintiffs should be given the chance to prove their case under one or all of them.

In Utah, attorney's fees are awarded only when allowed by statute or by contract. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). The fact that the defendants choose to collect money for what they misrepresented as attorney's fees under Rule 4-505.01, rather than misrepresenting the attorney's fees under some other

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<sup>11</sup> The elements of fraud are: 1) a representation; 2) concerning a presently existing material fact; 3) which is false; 4) which the representor knew to be false or was made recklessly on insufficient knowledge; 5) for the purpose of inducing the other party to act thereon; 6) and the other party so acts, reasonably and in ignorance of its falsity; 7) to his injury and damage. Dugan v. Jones, 615 P.2d 1239, 1246 (Utah 1980).

<sup>12</sup> Fraudulent concealment is the nondisclosure of material information, known to the party, who has a duty to disclose, upon which nondisclosure the other party reasonably relies and suffers a loss. Mitchell v. Christensen, 31 P.3d 572, 574 (Utah 2001).

<sup>13</sup> Negligent misrepresentation is a tort with the elements of: 1) one having a pecuniary interest in a transaction; 2) is in a superior position to know material facts; 3) carelessly or negligently makes a false representation concerning them; 4) expecting the other party to rely and act thereon; and 5) the other party reasonably does so and suffers a loss. Christenson v. Commonwealth Land Title Insurance Co., 666 P.2d 302, 305 (Utah 1983).

<sup>14</sup> The elements of unjust enrichment are: 1) a benefit conferred on a person; 2) the conferee must appreciate or have knowledge of the benefit; and 3) the circumstances make it inequitable for the conferee to retain the benefit. Desert Miriah, Inc. v. B & L Auto, Inc., 12 P.3d 580, 582 & 83 (Utah 2000).

statute or rule of common law, does not mean that Ms. Haymond and Ms. Lloyd are limited to using Rule 4-505.01 in seeking recovery of the bogus attorney's fees and the damages caused by Bonneville's attempt to collect them. The collection of attorney's fees that are not attorney's fees because of a prior contract between the collection agency and its attorneys to funnel the money to the collection agency as an illegal collection fee is simply a fraud and an unjust enrichment regardless of whether the imaginary fees are sought pursuant to statute or contract.

Likewise, Bonneville and its attorneys attempted to collect, and are presently attempting to collect, something that they call "triple damages." However, the statute upon which they rely expressly prohibits the defendants from collecting the triple damages unless the merchant who originally received the check receives the triple damages. Bonneville and its attorneys are prohibited from receiving the triple damages. Yet, Bonneville and its attorneys tell the check writers that they have the right to collect the triple damages pursuant to the statute. This is a misrepresentation and a fraud, and Bonneville's collection and retention of the triple damages for itself is an unjust enrichment. Further, the defendants do not tell the check writers that the merchants who received the dishonored checks do not even know that Bonneville is attempting to collect the triple damages and that the merchants have not authorized the collection of such damages. Ms. Haymond and Ms. Lloyd have a right of action under the common law claims in their complaint. They do not assert any private right of action under a statute.

**IV. The argument that Rule 60(b) of the Utah Rules of Civil Procedure prevents the plaintiffs from seeking relief for the fraud committed upon them is without merit.**

Mr. Godfrey claims that there is “no justiciable controversy” because the plaintiffs have asked in the prayer of their complaint for an order vacating all judgments in collection lawsuits that awarded the fictitious attorney’s fees and triple damages that could not be awarded under Utah’s bad check statute. Godfrey brief at 22.

This argument is a red herring. Bonneville and its attorneys often collected money for the illusory attorney’s fees and money for the illegal triple damages after a summons and complaint were served on the debtors but before a judgment was entered. This is exactly what happened to Ms. Lloyd and Ms. Haymond. No judgment was entered against them.

Ms. Lloyd and Ms. Haymond are the only plaintiffs presently before the court. Thus, this issue does not apply to them and Mr. Godfrey’s argument should be disregarded as a red herring. This issue will become relevant in a motion to certify a class of Utah debtors who were exposed to these collection practices. Some debtors would have paid the illegal fees after judgments were entered against them. The trial court will need to address the issue of whether these debtors could be in the class at that time.

**V. The court should strike the citations to unpublished decisions in both of the appellees’ briefs, and, to prevent prejudice, require the appellees to redact the citations from their briefs.**

Ms. Lloyd and Ms. Haymond have moved the Court for an order striking the citation of unpublished opinions in the briefs of both Bonneville and Mr. Godfrey and have asked the Court for an order requiring the redacting of the opinions to prevent prejudice. Both

appellants cited a number of unpublished decisions by the United States District court for the District of Utah to the trial court as precedent. They even cited as precedent an informal decision of the Utah State Bar Office of Attorney Discipline concerning Mr. Godfrey. None of these cases or the State Bar complaint involved Ms. Lloyd or Ms. Haymond. Rule 4-508 of the Rules of Judicial Administration states:

Unpublished opinions, orders and judgments have no precedential value and shall not be cited or used in the courts of this state, except for purposes of applying the doctrine of the law of the case, res judicata, or collateral estoppel.

The trial court did not rule on the motion to strike filed by Ms. Lloyd and Ms. Haymond. However, both defendants were faced with the motion to strike at the trial level and know that their practice violated the Rules of Judicial Administration. The plaintiffs, however, are placed in a position to address these cases in this brief, but do so without waiving any right to assert in their motion to strike filed before this court that the defendants should be required to redact such references and argument.<sup>15</sup>

The unpublished decisions are:

a. Pickering v. Bonneville Billing and Collections, Inc., 95-CV-125B, a decision of Judge Benson denying Bonneville's motion to dismiss based on the argument that the Federal Court could not review state court judgments that contained the illusory attorney's fees. R. 245. This case is cited throughout the defendants' briefs, in the Godfrey brief

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<sup>15</sup> The doctrines of law of the case, res judicata, and collateral estoppel do not apply to these unpublished decisions because the check writers who were parties to these actions were individuals other than Ms. Lloyd and Ms. Haymond.

primarily at 6, 7, 17 and 22, and in the Bonneville brief at 14 & 15. Judge Benson denied Bonneville's motion, but volunteered a statement concerning standing in dicta that made no difference in the decision. R. 249. In fact, the issue of standing was not briefed for Judge Benson.

b. Heard v. Bonneville Billing and Collections, Inc., 2:97-CV-445C, a decision by Judge Campbell, in which judgment was granted for the illegal collection practices of Bonneville and its attorney. R. 253. This case is also cited throughout the defendants' briefs, in the Godfrey brief primarily at 7, 8, 18 and 22, and in the Bonneville brief at 14, 15 & 20. Judge Campbell addressed the standing issue on claims other than the ones on which the judgment and injunction were entered and her decision was expressly based on the Federal standard of standing, Article III of the United States constitution, "case in controversy." Id., R. 258. The Utah state court standard is significantly different, being based on the separation of powers and open court doctrines of the Utah constitution.

c. Bonneville appealed Judge Campbell's decision to the Tenth Circuit, which affirmed the judgment against Bonneville. The Tenth Circuit issued an unpublished decision, that commented on the standing issue, again based on the Federal standard of standing. Heard v. Bonneville Billing and Collections, 2000 WL 825721 (10th Cir. (Utah). R. at 265. The Tenth Circuit's opinion contains the warning for courts in the Federal system that "[t]his order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel." Id. This case is cited throughout the defendants' briefs,

primarily in the Godfrey brief, at 8, 18 and 19, and in the Bonneville brief at 14, 15 & 20.

d. Judge Campbell suggested in her decision in Heard and the Tenth Circuit likewise stated in its decision in Heard that the fictitious attorney's fee scheme may violate the Rules of Professional Responsibility. Campbell decision, R. 258, and Tenth Circuit decision, R. 268 & 269. In addition, the Hawaii Court of Appeals in Fuller v. Pacific Medical Collections, Inc., 891 P.2d 300 (Hawaii App.1995), indicated that an identical scheme being used in Hawaii by collection attorneys and collection agencies was a fraud and the attorneys should be disciplined. See above. After these decisions, the plaintiffs' counsel filed a complaint with the Utah State Bar against Mr. Godfrey for engaging in this fraud against tens of thousands of Utah residents. The state bar summarily dismissed the complaint in a one page letter. R. 300. This letter is cited throughout the defendants' briefs, in the Godfrey brief primarily at 6 & 9, and in the Bonneville brief at 12, 13,14, 24 & 25.

There is no reason to have rules, such as Rule 4-508 of the Rules of Judicial Administration, if attorneys are allowed to knowingly ignore the rules. The citation of these unpublished decisions should be stricken and redacted from the appellees' briefs.

**VI. The court should strike the references to other cases that plaintiffs' counsel has handled against collection agencies other than Bonneville in light of the fact that such cases are irrelevant to the present case and the references are designed only to paint the counsel in a bad light.**

Just in case the unpublished opinions were not enough, counsel for Bonneville and Mr. Godfrey decided that they would engage in an attack on the plaintiffs' counsel personally. The nature of this attack is set forth in the memorandum of Ms. Lloyd and Ms.

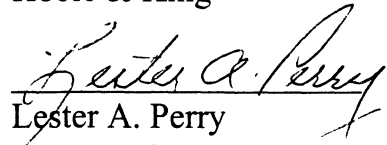
Haymond in support of their motion to strike this argument that was filed with their reply brief. The Court is referred to this memorandum for the particulars of this attack.

### **Conclusion**

Ms. Lloyd and Ms. Haymond request that the Court reverse the decision of the trial court, reinstate their claims against the appellees, and give them their day in court.

Dated this 2<sup>nd</sup> day of January, 2003.

Hoole & King

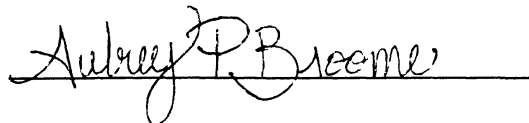
  
Lester A. Perry  
Attorney for the Appellants

### **Certificate of Mailing**

I certify that on the 3<sup>rd</sup> day of January, 2003, two true and correct copies of the foregoing brief was mailed, postage prepaid, to each of the following:

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