

1989

Grantsville City v. William Kay Bankhead : Petition & Re-hearing Brief

Utah Court of Appeals

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Ronald L. Elton; Attorney for Respondent.

Steven Lee Payton; Attorney for Appellant.

Recommended Citation

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UTAH COURT
BRIEF

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IN THE UTAH COURT OF APPEALS

GRANTSVILLE CITY,

Plaintiff/Respondent,

vs.

WILLIAM KAY BANKHEAD,

Defendant/Appellant.

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DEFENDANT/APPELLANT'S
PETITION FOR "RE-HEARING"
ON MEMORANDUM DECISION
1/4/90

Case No. 890638-CA

PETITION

&

APPELLANT RE-HEARING BRIEF

Defendant/Appellants Petition For Re-Hearing On
Memorandum Decision Court Dismissal [Untimely Appeal] 1/4/90
Utah Court of Appeals
Judge, Gregory K. Orme
Judge, Richard C. Davidson
Judge, Regnall W. Garff

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* DEFENDANT/APPELLANT'S
* PETITION FOR "RE-HEARING"
* ON MEMORANDUM DECISION
* 1/4/90
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* Case No. 890638-CA
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Case No. 890638-CA

Defendant/Appellants Petition For Re-Hearing On
Memorandum Decision Court Dismissal [Untimely Appeal] 1/4/90
Utah Court of Appeals
Judge, Gregory K. Orme
Judge, Richard C. Davidson
Judge, Regnall W. Garff

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JURISDICTIONAL STATEMENT [UTAH COURT OF APPEALS]

Utah Court of Appeals has jurisdiction pursuant to its own rules and case authority as follows:

M.S., In re 012 Utah Adv. Rep. 63 (10/13/89)
[781 P.2d 1287]

Varian-Eimac, Inc. v Lamoreaux 767 P.2d 569 (UT App. 1989)

Rule 3 "Appeals as of Right; How Taken"

Rule 4 "Appeals as of Right; When Taken"

Rule 22 "Computation and Enlargement of Time"

*Rule 35 "Petition for Re-Hearing"

"...(a) Time For Filing; Answer; Oral Argument Not Permitted...A rehearing will not be granted in the absence of a petition for rehearing. A matter may not be reheard by the Court en banc. A petition for rehearing may be filed with the Clerk within 14 days after the entry of the decision of the Court of Appeals, unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which the petitioner claims the Court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner so desires. Counsel for the petitioner must certify that the petition is presented in good faith and not for delay. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the Court...."

Rule 36 "Remittitur"

U.R.C.P. Rule 6(a) [Time-Computation]

This Petition For Re-Hearing is based upon the fact that the Court of Appeals has overlooked its own case law Varian-Eimac, supra. wherein it has set out that all courts are required to date stamp all documents.

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STATEMENT OF NATURE OF PROCEEDINGS

Petition for Re-Hearing on Memorandum Decision of the court January 4, 1990 [Honorable, Gregory K. Orme; Honorable, Richard C. Davidson; Honorable, Regnall W. Garff] based upon Rules of the Utah Court of Appeals 4(a). Sua sponte consideration by the court allows no opportunity for oral argument or hearing at anytime herein; however, the court has ignored its own case which is relevant to the facts herein as follows:

M.S., In re 102 Utah Adv. Rep. 63 (10/13/89)
[781 P.2d 1287]

Varian-Eimac, Inc. v Lamoreaux 767 P.2d 569 (UT App. 1989)

STATEMENT OF ISSUE

When an order of the court has never been filed with the clerk and date stamped what is procedure for determining time of appeal.

RELIEF SOUGHT

Defendant/Appellant seeks a "re-hearing" on Memorandum Decision based upon the decision of the court of appeals wherein it has held that all courts are required to date stamp all documents.

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[STATEMENT OF THE CASE]
PETITION FOR RE-HEARING
(Rule 35 [Petition For Re-Hearing])
(Rule 27(a) [Form of Petition])

COMES NOW, the above-named Defendant/Appellant by and through his Attorney of Record, Steven Lee Payton, and hereby petitions the court for hearing on dismissal order [untimely appeal] 1/4/90 the court having not the full facts before it on points of law and its own cases specifying that courts must date stamp all documents, same being as follows:

Varian-Eimac, Inc. v Lamoreaux 767 P.2d 569 (UT App. 1989)

Timeliness of Petition

Petition for re-hearing is filed pursuant to R. Ut. Ct. App. Rule 35 "Petition For Re-Hearing" within fourteen (14) days after entry of decision of the court January 4, 1990 Memorandum Decision.

Defendant/Appellant filed "Motion For Extension of Time & Order" and therein pointed out that there is a variance between the certificate of mailing and actual postmark which is by meter therefore question of transmittal time arose.

Petition In Good Faith

Counsel for defendant/appellant certifies that this petition is presented in good faith, not for delay, and is based upon case law set out herein.

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Request For Oral Argument

Oral argument is requested herein however allowable only in the discretion of the court pursuant to R. Ut. Ct. App. Rule 2 "Suspension of Rules" it being in the interest of justice herein and it appearing that the court has not applied the law as previously held by it to be applicable.

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STATEMENT OF FACTS

<u>Date</u>	<u>Description</u>
09/15/89 (Fri.)	Edward A. Watson, Circuit Judge, Tooele signed "Order of Dismissal". Order of Dismissal record on appeal page 125 does not show that same has never been date stamped in by the clerk or filed therewith thus constituting "entry of judgment".
10/18/89 (Wed.)	Defendant filed appeal from the Order of Dismissal to the Utah Court of Appeals.
12/01/89 (Fri.)	*Utah Court of Appeals filed Notice of Sua Sponte Consideration By the Court For Summary Disposition.
*11/30/89 (Thurs.)	*Certificate of Mailing <u>12/4/89 (Mon.)</u> postmark.
12/11/89 (Mon.)	Plaintiff/Respondent <u>postmarked</u> Memorandum In Support of Summary Dismissal.
12/15/89 (Fri.)	Defendant/Appellant filed Motion For Extension of Time & Order to file Memorandum based upon delay in transmittal.
12/22/89 (Fri.)	Defendant/Appellant filed Memorandum In Opposition To Summary Dismissal.
01/04/90 (Thurs.)	Memorandum Decision of the court Certificate of Mailing 1/4/90 <u>postmarked 1/5/90 (Fri.)</u> .
01/22/90 (Mon.)	Motion For Extension of Time & Order for filing Petition For Re-Hearing to 1/29/90 (Mon.).
01/29/90 (Mon.)	Petition For Re-Hearing filed.

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LIST OF EXHIBITS

ADDENDUM

<u>Description</u>	<u>##</u>
Memorandum Decision 1/4/90 with envelope <u>postmarked 1/5/90</u>	1
Record on appeal - Trial courts Order of Dismissal as contained in <u>record on appeal page 125.</u>	2
Notice of Appeal date stamped by trial court 10/18/89 (Wed.)	3
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MEMORANDUM OF AUTHORITY
(Rule 23(3) "Motions" [Rules Utah Court of Appeals]
[All motions shall be accompanied by a brief
statement of points and authorities]

SUMMARY OF ARGUMENT

TRIAL COURT ORDER HAS NEVER BEEN DATE STAMPED BY
CLERK AND THUS THERE IS NO WAY FOR DETERMINATION
AS TO TIMELINESS OF APPEAL SINCE TIME RUNS FROM
ENTRY [FILING].

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POINT

TRIAL COURT ORDER HAS NEVER BEEN DATE STAMPED BY
CLERK AND THUS THERE IS NO WAY FOR DETERMINATION
AS TO TIMELINESS OF APPEAL SINCE TIME RUNS FROM
ENTRY [FILING].

TIME FOR APPEAL

Utah Court of Appeals Rules

Rule 3(a) "Appeals as of Right; How Taken"

"...(a) Filing appeal from final orders and judgments. As defined and provided by law, an appeal may be taken from the final orders and judgments of a district court, juvenile court, or circuit court to the Court of Appeals by filing a notice of appeal with the clerk of the particular court from which the appeal is taken within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is a ground only for such action as the Court of Appeals deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorneys fees...."

Rule 4 "Appeals as of Right: When Taken"

"...(a) Appeal From Final Judgment and Order. In a case in which an appeal is permitted as a matter of right from the district court, juvenile court, or circuit court to the Court of Appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the court from which the appeal is taken within 30 days after the date of entry of the judgment or order appealed from...."

(Emphasis Added)

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COMPUTATION OF TIME

R. Utah Ct. App. Rule 22 "Computation and Enlargement of Time"

"...In computing any period of time prescribed by these rules, by an order of the court, or by any applicable statute the day of the act, event, or default from which the designated period of time begins to run shall not be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes days designated as holidays by the state and federal governments...." (Emphasis Added)

U.R.C.P. Rule 6 [Time]

"...(a) Computation In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation...." (Emphasis Added)

U.C.A. 68-3-7 "Time How Computed"

"...The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it also is excluded...." (Emphasis Added)

U.C.A. 78-27-19 "Law" defined

"...Where the term "law" is used in this code, it means the Utah Constitution, the Utah Code, court rules, Judicial Council rules, and decisions of the Supreme Court and the Court of Appeals...." (Emphasis Added)

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*CASE INTERPRETATIONS

M.S., In Re 102 Utah Adv. Rep. 63 (10/13/89)
[781 P.2d 1287]

"...@pg 64[UAR]...R. Utah Ct. App. 4(a) provides that a notice of appeal "shall be filed with the clerk of the court from which the appeal is taken within 30 days after the date of entry of the judgment or order appealed from". The judgment in the present case was filed on November 15, 1988, and the last date on which to initiate an appeal was December 15, 1988. In determining whether a notice of appeal is timely filed and establishes jurisdiction in an appellate court, this court must be bound by the filing date indicated on the notice of appeal transmitted to it by the trial court...." (Emphasis Added)

Varian-Eimac, Inc. v Lamoreaux 767 P.2d 569 (UT App. 1989)

"...@pg 571...Lamoreaux urges us to find an exception where the filing is only one or two days late. She claims that it is the practice of the Commission to allow some leeway upon substantial compliance with the time limits because the Commission's internal procedures do not insure that documents are stamped with the date actually received". We reject this argument. It would be improper to find that sloppy office procedures in some way expanded jurisdiction beyond that conferred by the legislature...."

"...Footnote 3 @pg 571...Lamoreaux has included a letter from Commission's counsel which indicates that documents are not stamped with the date actually received. Instead the documents might be stamped a varying number of days afterward. We cannot consider this letter as part of the record because it was not reviewed as part of the proceedings before the Commission. However, such negligence, if true, is without excuse. It is easy to stamp each document as it is received. All courts are required to do so and as in the instant case, the rights of the parties may be determined by the time of filing...." (Emphasis Added)

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COMMENTARY

Decree of Judgment

Even the plaintiff/respondent has acknowledged and recognized that the time for appeal runs from the date of entry and as set out in the rules of the court as follows:

Rule 4 "Appeals as of Right: When Taken"

"...(a) Appeal From Final Judgment and Order. In a case in which an appeal is permitted as a matter of right from the district court, juvenile court, or circuit court to the Court of Appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the court from which the appeal is taken within 30 days after the date of entry of the judgment or order appealed from...."
(Emphasis Added)

It has previously been held in prior decisions that "date stamp" of documents as appears therefrom is the criteria for determining when documents are filed.

M.S., In re 102 Utah Adv. Rep. 63 (10/13/89)
[781 P.2d 1287]

Calfo v D.C. Stewart Co. 717 P.2d 697 (UT 1986)

State v Palmer 113 Utah Adv. Rep. 40 (7/18/89)

The Utah Court of Appeals has likewise recognized in Varian-Eimac, Inc., supra. the following:

"...Footnote 3 @pg 571...It is easy to stamp each document as it is received. All courts are required to do so and as in the instant case, the rights of the parties may be determined by the time of filing...."
(Emphasis Added)

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As in Varian, supra. the rights of the parties are determined by the filing date on the documents and this is a situation where Record on Appeal page 125 addendum shows clearly that the document appealed from has never been date stamped by the clerk of the court thereby showing date of entry. Clearly the court has not complied with what the Court of Appeals has indicated is the duty of every court to date stamp every document.

Question in this case involves what constitutes entry since the court may for a number of reasons have documents in its chambers or personally holding documents, therefore the time that it is date stamped by the clerk becomes significant in determining rights of parties. If that is not the case then there is no uniform basis for measurement thereby raising a question of due process of law and equal protection under both the Utah Constitution Article I Section 7, Article I Section 12, and the Federal Constitution Fifth and Fourteenth Amendment Due Process and Equal Protection.

The filing date of the clerk assures all parties, defendant and plaintiff, as to the date from which the appeal must run and it is a definite measureable date not subject to misinterpretation by anyone.

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It is basic to due process and other constitutional guarantees that government must follow its own rules and mandates.

West Gallery Corp. v Salt Lake City Bd. of Com'rs.
537 P.2d 1027 (UT 1975)

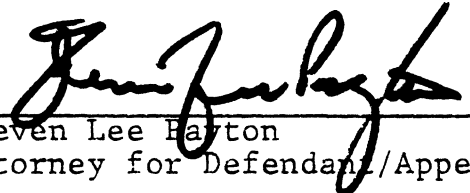
Freeman v Centerville City 600 P.2d 1003 (UT 1979)

Layton v Swapp 484 F. Supp. 958 (D. UT 1979)

Parker v Cook 642 F.2d 865 (5th Cir. 1981)

In this case where the Order of Dismissal has never been filed or date stamped in by the trial court the appeal should be allowed since even in In Re M.S., supra. that is recognized. The alternative remedy is that the defendant have a right to file a new appeal not later than 30 days from the date that the Order of Dismissal is date stamped and filed by the clerk in the lower court and therefore the case should be remanded for said purpose only.

DATED this 30th day of JANUARY, 19 90.


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ADDENDUM

FILED

JAN 1990
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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Grantsville City,)
Plaintiff and Respondent,) MEMORANDUM DECISION
(Not for Publication)
Case No. 890638-CA
William Kay Bankhead,)
Defendant and Appellant.)

Before Judges Orme, Davidson, and Garff (On Law and Motion).

PER CURIAM:

This case is before the court on its own motion for summary disposition pursuant to R. Utah Ct. App. 10(e). We dismiss the appeal as not timely filed. R. Utah Ct. App. 4.

William Kay Bankhead was convicted in the Grantsville City Justice of the Peace Court on April 13, 1988 of driving under the influence of alcohol and operating a vehicle without insurance. On June 1, 1988, Bankhead was present for sentencing. After Bankhead failed to comply with the sentence, the court advised him that a bench warrant had been issued. On February 22, 1989, Bankhead filed an appeal in circuit court. On September 15, 1989, the circuit court dismissed the appeal as not timely filed. Bankhead filed his notice of appeal to this court on October 18, 1989.

R. Utah Ct. App. 4(a) provides that a notice of appeal shall be filed with the clerk of the court within thirty days after the date of entry of the judgment or order appealed from. As this court stated in In re M.S., 102 Utah Adv. Rep. 63, 64 (Ct. App. 1989), R. Utah Ct. App. 4(e) sets forth the exclusive procedure for extending the time for filing a notice of appeal. Further, R. Utah Ct. App. 2 precludes this court from suspending the requirements of Rule 4(a) or Rule 4(e).

"except as specifically authorized by law."

In the present case, Bankhead's notice of appeal to this court was filed after the expiration of the thirty day period specified in Rule 4(a). Under the circumstances of this case, this court has no authority to deem timely the notice of appeal filed in this court. We therefore dismiss the appeal due to lack of jurisdiction.

ALL CONCUR:

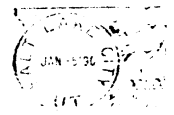
Gregory K. Orme, Judge

Richard C. Davidson, Judge

Reginal W. Garff, Judge

Utah Court of Appeals

400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102



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IN THE THIRD CIRCUIT COURT OF TOOELE COUNTY, STATE OF UTAH

GRANTSVILLE CITY
Plaintiff

ORDER OF DISMISSAL

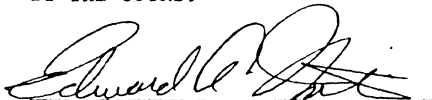
WILLIAM KAY BANKHEAD
Defendant

Case No. 895000066

The Court having reviewed the Appeal of the Defendant, the records of the Justice of The Peace Court, and the arguments of the parties, and being fully advised of the premises, hereby dismisses Defendant's appeal, since said appeal was not timely filed, and therefore this Court lacks jurisdiction over this matter. This case is hereby remanded to the Grantsville Justice Court.

DATED this ¹⁵~~19th~~ day of ~~May~~^{September}, 19 ~~89~~⁸⁹.

BY THE COURT:


CIRCUIT COURT JUDGE

Copies of the foregoing Order of Dismissal mailed to

_____, Attorney for Plaintiff, and
_____, Attorney for Defendant, on this
____ day of _____, 19 ____.

CIRCUIT COURT CLERK

BY _____
Deputy Clerk

CERTIFICATE OF AUTHENTICITY

State of Utah
County of Salt Lake } ss.

I, Mary T. Noonan, Clerk of the Utah Court of Appeals,
certify that the foregoing is a full, true, and correct copy of the

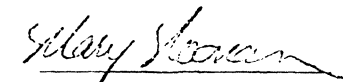
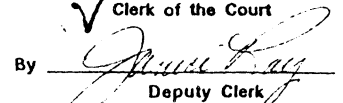
RECORD

in the action entitled

GRANTSVILLE CITY V. WILLIAM KAY BANKHEAD

now on file in my office.

In Testimony Whereof, I have set
my hand and affixed the seal of the
Utah Court of Appeals.


Clerk of the Court
By 
Deputy Clerk

Dated: JANUARY 8, 1990

IN THE THIRD CIRCUIT COURT OF TOOELE COUNTY, STATE OF UTAH

GRANTSVILLE CITY
Plaintiff
vs.
WILLIAM KAY BANKHEAD
Defendant
ORDER OF DISMISSAL
Case No. 895000066

The Court having reviewed the Appeal of the Defendant, the records of the Justice of The Peace Court, and the arguments of the parties, and being fully advised of the premises, hereby dismisses Defendant's appeal, since said appeal was not timely filed, and therefore this Court lacks jurisdiction over this matter. This case is hereby remanded to the Grantsville Justice Court.

DATED this 15th day of September, 1989.

BY THE COURT:

Edward A. [Signature]
CIRCUIT COURT JUDGE

Copies of the foregoing Order of Dismissal mailed to

_____, Attorney for Plaintiff, and

_____, Attorney for Defendant, on this

____ day of _____, 19____.

CIRCUIT COURT CLERK

BY
Deputy Clerk

STEVEN LEE PAYTON (#2554)
Attorney for Defendant
431 South 300 East, Suite 40
Salt Lake City, UT 84111
Telephone: (801) 363-7070

FILED
OCT 18 PM 6:30

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR TOOELE COUNTY
STATE OF UTAH

GRANTSVILLE CITY,
Plaintiff,
vs.
WILLIAM KAY BANKHEAD,
Defendant.
NOTICE OF APPEAL
Case No. 89-5000066

Defendant hereby files Notice of Appeal from all aspects of the case to the Utah Court of Appeals.

DATED this 10th day of October, 1989.

Steven Lee Payton
Steven Lee Payton
Attorney for Defendant

STATE OF UTAH
County of Tooele) ss
MARILYN RUSSELL, Clerk of the 3rd Circuit Court of the State of Utah,
in and for the County of Tooele, do hereby certify that the
foregoing is a true and correct copy of the original filed in my office.

Notice of Appeal
I hereby certify that the foregoing is a true and correct copy of the original filed in my office.
I have hereunto set my hand and the seal of my office at Salt Lake City, Utah, this 10th day of October, 1989.
MARILYN RUSSELL
Deputy Clerk
Original Filed 10-18-89
FILE NO. 89-5000066
CERIFIED
ATTORNEY
File Copy

heater and an electrical extension cord found in the mental health offices had been the cause of the fire.

Within a couple of days, Stephens and Midgeley became concerned that a truly independent investigator was needed. The county contracted with Jim Ashby of Global Investigations for that service. Harman was told of the new investigator but the evidence is conflicting whether Tolman and Yearby were to continue. It is clear that they stopped working on the case shortly thereafter.

Meanwhile, the space heater and the extension cord were sent for analysis. The laboratory report indicated that electrical current had not been present in either the heater or the cord when those objects burned. Ashby relied on this report in determining that the heater and cord could not have started the fire. He concluded the fire started in the roof above the mental health offices. Larsen disregarded the laboratory report and held firm in his earlier conclusion that the heater and cord had caused the fire.

Although both Larsen and Harman had been pressuring Tolman for his report, it was not written and submitted for approval until August. Both the laboratory report and Ashby's full investigation report preceded Tolman's report. Tolman first submitted the report to his immediate supervisor, Sam Dawson, who rejected it. Tolman objected and demanded that it be sent to Harman, who received the report and also rejected it. In a heated discussion, Harman told Tolman to write a new report. Tolman did so but kept a copy of the first report in his investigation file and also gave a copy to the Murray City Fire Chief, Wendell Coombs. Also, Harman sent a copy of Tolman's first report to William Hyde, supervisor of the county attorney's civil division, and possibly several others.

In 1985, Larsen disclosed the existence of the first Tolman report during a deposition

conducted pursuant to a civil suit over Salt Lake County's liability for the fire. An inquiry by the grand jury and this case followed.

On appeal, Harman questions the sufficiency of the evidence, the admission of certain hearsay evidence, and the refusal of his request for a bill of particulars. We find the first issue dispositive so we do not reach the others.

[1,2] We may review the verdict of a jury in a criminal case and reverse as a matter of law if we find the evidence is insufficient. *See State v. Cantu*, 750 P.2d 591, 593 (Utah 1988). However, the standard for reversal is high. "We reverse only when the evidence . . . is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime. . . ." *State v. Petree*, 659 P.2d 443, 444 (Utah 1983). The weight and credibility to be given a witness is an exclusive function of the jury. *State v. Lamm*, 606 P.2d 229, 231 (Utah 1980). Furthermore, all evidence and reasonable inferences drawn therefrom must be reviewed in a light most favorable to the jury's verdict. *Petree*, 659 P.2d at 444.

Although this is a high standard, it is not insurmountable. We will not make "speculative leap[s] across . . . remaining gap[s]" in the evidence. *Id.* at 445. Every element of the crime charged must be proven beyond a reasonable doubt. If the evidence does not support those elements, the verdict must fail.

Utah Code Ann. § 76-8-510(1) (1978) defines the crime of tampering with evidence. To be guilty, an actor must have altered, destroyed, concealed, or removed an item with the purpose to impair its verity or availability to a pending, or potential, official proceeding or investigation.¹ A person must have the same culpability to attempt to tamper with evidence. Utah Code Ann. § 76-4-101(1) (1978).

(1) Alters, destroys, conceals, or removes anything with a purpose to impair its verity or availability in the proceeding or investigation . . .

1. The full text of § 76-8-510(1) reads:

A person commits a felony of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

We now consider the evidence presented in this case in a light most favorable to the jury's verdict. Harman was chief of the investigations division of the Salt Lake County Attorney's Office. Part of his duties were to review and approve or disapprove reports written by investigators. Reports could be rejected for content as well as form. Harman testified he thought Tolman's first report "parroted" Dean Larsen's opinion, contained unsupported factual assertions, and was a "bad report." Furthermore, at approximately the same time as Harman rejected the report, he told William Hyde and Lou Midgeley about Tolman's opinion and gave a copy of the report to Hyde. Hyde, in turn, told the county commissioners about Tolman's opinion. Hyde and Midgeley had requested the investigation in the first place and, at that time, were in charge of the county's defense of any liability claims arising from the fire. Copies of the report were kept in several files, including Hyde's case file and Tolman's investigative file. The documents in these files were available to the deputy county attorneys who responded to discovery and Hyde produced his copy of the Tolman report for the grand jury. There is no evidence that Harman made any attempt to alter, destroy or remove the report from these files or to influence others who knew of the report.

On the other hand, the prosecution introduced evidence that Harman had said that the report would make the county look bad, cost the county millions, and make the county liable.

In these circumstances, it became critical for the state to show that Harman's rejection of Tolman's report was improper. The state failed to do this. Culpability can be implied from the actions and statements of the defendant, but the evidence must be clear enough that the jury does not have to guess. We believe that the evidence of guilt was so slight, so conflicting, and so inherently improbable that reasonable minds could not have concluded that Harman rejected the report in an attempt to alter, destroy, conceal or remove it to impair its verity or availability, rather than rejecting it because it was a "bad report."

We, therefore, hold that the evidence was insufficient to establish the required mental state. Since the state failed to prove that critical element, Harman's conviction is reversed.

GARFF and GREENWOOD, JJ., concur.



VARIAN-EIMAC, INC. and/or
Employers Mutual Liability
Insurance, Plaintiffs,

v.

Helen D. LAMOREAUX, Industrial
Commission of Utah, and Second
Injury Fund, Defendants.

No. 870344-CA.

Court of Appeals of Utah.

Jan. 13, 1989.

Employer petitioned for review of a decision of the Industrial Commission reversing an administrative law judge's denial of a claim for workers' compensation benefits. The Court of Appeals, Davidson, J., held that the 15-day time limit for filing a motion for the Commission to review an ALJ's decision was mandatory and jurisdictional.

Reversed and remanded.

Administrative Law and Procedure §513
Workers' Compensation §798

The 15-day time limit for filing motion for Industrial Commission's review of administrative law judge's decision was mandatory and jurisdictional; Commission's jurisdiction terminated upon expiration of time limit. U.C.A.1953, 35-1-82.55 (Repealed).

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Report

Cite as 767 P.2d 569 (Utah App. 1989)

Michael E. Dyer (argued), Stephanie A. Illory, Richards, Brandt, Miller & Nelson, Salt Lake City, for plaintiffs.

D.R. Henriksen, Jr. (argued), Henriksen, Henriksen & Call, P.C., Salt Lake City, for defendant D. Lamoreaux.

Erie V. Boorman, Admin. (argued), Second Injury Fund, Salt Lake City.

Before DAVIDSON, GREENWOOD and ORME, JJ.

OPINION

DAVIDSON, Judge:

Administrative Law Judge Gilbert A. Martinez denied Helen Lamoreaux's claim for workers' compensation benefits. The Industrial Commission reversed the A.L.J. and granted the claim. Varian-Eimac, Inc., (Varian) Lamoreaux's former employer, appeals the Commission's ruling.

Although the parties have argued several issues before this court, one issue, that the timeliness of the appeal from the A.L.J. to the Commission, is dispositive. We will limit our discussion of the facts of the case accordingly.

The actual date of filing the motion for review of the A.L.J.'s denial of the claim is in dispute. The motion was dated February 19, 1987, the last day the motion could be filed.¹ However, the Commission's date stamped on the motion reads February 19, 1987, two days after the due date. Varian raised the timeliness issue before the Commission in its opposition to the motion for review. However, the Commission did not accept any evidence on the untimeliness of the motion nor did it address the issue in its ruling.

Varian argues that the fifteen day time limit imposed by section 35-1-82.55, in effect at all pertinent times,² was jurisdiction-

al and the Commission lacked authority to review the matter.

"Subject matter jurisdiction is the power and authority of the court to determine a controversy and without which it cannot proceed." *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah App.1987). If a court acts beyond its authority those acts are null and void. *Id.* Therefore, the initial inquiry of any court should always be to determine whether the requested action is within its jurisdiction. When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action. *Id.* The sources of jurisdictional limits may vary according to the type of court involved. However, it is basic that "the jurisdictional limits of a statutorily created court . . . are circumscribed by its empowering legislation." *Id.* It follows that the subject matter jurisdiction of a quasi-judicial administrative agency, such as the Industrial Commission, which is a statutory creation, would also be "fixed by statute." *Retherford v. Industrial Comm'n of Utah*, 739 P.2d 76, 80 (Utah App.1987). Just as any court, the Commission should first determine that it has jurisdiction and, if it does not, dismiss the matter. Any action beyond its jurisdiction is void.

Utah Code Ann. § 35-1-82.55 (1987) required a motion for review of an A.L.J.'s order to be filed with the Commission within fifteen days. If this requirement was not met "said order shall become the award of the commission and shall be final." *Id.* The statute uses the word "shall" and so is mandatory. Therefore, the Commission's jurisdiction is terminated once the filing time limit has been exceeded.

Such an interpretation is consistent with Utah appellate court decisions on similar time limits. In *Watson v. Anderson*, 2³

2. After the Commission proceedings and commencement of this appeal, this section was repealed. Currently, the statutes do not prescribe a specific time limit within which review by the Commission must be sought. Instead, responsibility for setting the appropriate procedures and time limits for the filing of motions for review is delegated to the Commission. See Utah Code Ann. § 35-1-82.53 (1988).

Utah 2d 36, 504 P.2d 1003 (1973) the Utah Supreme Court determined that failure to file an appeal within the required time limit deprived the court of subject matter jurisdiction. The court emphasized this principle in *Prowswood, Inc. v. Mountain Fuel Supply Co.*, 676 P.2d 952, 955 (Utah 1984): "It is axiomatic in this jurisdiction that failure to timely perfect an appeal is a jurisdictional failure requiring dismissal of the appeal." In an action closely related to the one before us, this court found that it was without jurisdiction to review a decision of the Industrial Commission when the applicable time limit had been exceeded. *Retherford*, 739 P.2d at 80. Finally, in *Thiessens v. Department of Emp. Sec.*, 663 P.2d 72, 73 (Utah 1983), the supreme court noted that another related time limit for appeals to the Commission was probably jurisdictional.

Lamoreaux urges us to find an exception where the filing is only one or two days late. She claims that it is the practice of the Commission to allow some leeway upon substantial compliance with the time limits because the Commission's internal procedures do not insure that documents are stamped with the date actually received.³

We reject this argument. It would be improper to find that sloppy office procedures in some way expanded jurisdiction beyond that conferred by the legislature. Subject matter jurisdiction cannot be ex-

3. Lamoreaux has included a letter from Commission's counsel which indicates that documents are not stamped with the date actually received. Instead the documents might be stamped a varying number of days afterward. We cannot consider this letter as part of the record because it was not reviewed as part of

panded by waiver or consent. *Thompson*, 743 P.2d at 1232. "The issue is not one of the actual practice of the Industrial Commission, but one of jurisdiction as prescribed by the workers' compensation statutes." *Ring v. Industrial Comm'n*, 744 P.2d 602, 603 (Utah App.1987).

Accordingly, we hold that the statutory time limit formerly imposed on filing appeals from the orders of A.L.J.s to the Commission was jurisdictional. Since no evidence was taken or considered by the Commission on the timeliness of the filing, we remand for a factual determination of whether Lamoreaux's motion was filed within the statutory time limit. Depending upon that determination, the Commission must either dismiss or return the case to this court. In either case, findings should be made.

We reverse and remand for proceedings consistent with this opinion. We retain jurisdiction pending the Commission's proceedings.

GREENWOOD and ORME, JJ., concur.



the proceedings before the Commission. However, such negligence, if true, is without excuse. It is easy to stamp each document as it is received. All courts are required to do so and, as in the instant case, the rights of the parties may be determined by the time of filing.

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Digest

Cite as
102 Utah Adv. Rep. 63

IN THE UTAH COURT OF APPEALS

State of Utah in the interest of: M.S.,
A Person Under Eighteen Years.

No. 880702-CA
FILED: February 23, 1989

Fourth District Juvenile Court, Utah County
Honorable Merrill L. Hermansen

ATTORNEYS:

Jay D. Gurmankin, Salt Lake City, for
Appellant

R. Paul Van Dam, Sandra L. Sjogren, Salt
Lake City, for Respondent

Before Judges Bench, Davidson, and Jackson
(On Law and Motion).

MEMORANDUM DECISION

PER CURIAM:

This matter is before the court pursuant to R. Utah Ct. App. 10(e) on its own motion to dismiss for lack of jurisdiction based on an untimely notice of appeal. The appeal is from a judgment of the Fourth District Juvenile Court for Utah County filed on November 15, 1988. This court received a certified copy of the notice of appeal on December 27, 1988, which was accompanied by a letter from appellant's counsel addressed to the Clerk of the Fourth District Juvenile Court and dated December 19, 1988. The notice of appeal was stamped "Filed December 20, 1988, Juvenile Court, Fourth District." The letter was stamped as "Received" on December 20, 1988, by the Fourth District Juvenile Court.

REPORTS

This court served a Notice of Sua Sponte Consideration by the Court for Summary Disposition on the parties. Appellant filed a Memorandum in Opposition to Summary Dismissal of Appeal. The state filed a responsive memorandum in which it suggests that the case be remanded to the Fourth District Juvenile Court for determination whether an order should be entered pursuant to R. Utah Ct. App. 4(e) extending the time for filing the appeal. We remand the case to the trial court for the purposes of making such a determination.

Appellant advises this court that the notice of appeal was, through mistake or inadvertence, incorrectly filed with the Fourth Judicial District Court rather than the Fourth District Juvenile Court. Appellant states the notice was mailed on December 13, 1988, to the Utah County Clerk marked "Attention: Juvenile Section." On December 14, 1988, the Utah County Clerk returned the original notice of appeal to appellant's counsel accompanied by two notes. One note indicated the correct address for the Fourth Judicial District Court and the other stated:

December 14, 1988
Incorrectly sent to Utah County
Clerk's Office. Should be sent to:
Fourth Juvenile Court
2021 South State
Provo, UT 84601

This information is available on
page 134 of the 1987-88 Utah State
Bar directory. You will be able to find
most, if not all, addresses in this
directory.

Utah County Clerk's Office

Appellant notes that the "Utah County Clerk's Office, rather than transmit the notice of appeal to the Juvenile Court, mailed the original notice of appeal back" to appellant's counsel. Appellant's counsel states that he received the original notice of appeal on December 16, 1988. He also indicates that on December 16, a clerk of the Fourth District Juvenile Court advised him by telephone that the juvenile court had received a copy of the notice of appeal and if a letter of explanation was sent, "it would be called to the Court's attention for a determination as to whether the Notice of Appeal would be considered timely filed." This explanation is apparently contained in the December 19, 1988, letter, a copy of which was transmitted to this court. The notice of appeal certified to this court, however, is stamped as filed on December 20, 1988, five days after the expiration of the appeals period.

R. Utah Ct. App. 4(a) provides that a notice of appeal "shall be filed with the clerk of the court from which the appeal is taken within 30 days after the date of entry of the judgment or order appealed from." The judgment in the present case was filed on November 15, 1988, and the last date on which to initiate an appeal was December 15, 1988. In determining whether a notice of appeal is timely filed and establishes jurisdiction in an appellate court, this court must be bound by the filing date indicated on the notice of appeal transmitted to it by the trial court. This requirement

is implicit in provisions of our rules governing timeliness of an appeal. R. Utah Ct. App. 4(a) requires a notice of appeal to be filed within thirty days with "the clerk of the court from which the appeal is taken." In addition, R. Utah Ct. App. 4(e) states the exclusive procedure for extending the time for filing a notice of appeal:

The court from which the appeal is taken, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by Paragraph (a) of this rule. A motion to extend time that is filed before expiration of the prescribed time may be heard ex parte unless the court from which the appeal is taken requires otherwise. Notice of any such motion that is filed after the expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the court from which the appeal is taken. No extension shall exceed 30 days past the prescribed time or 10 days from the date of the entry of the order granting the motion, whichever occurs later.

R. Utah Ct. App. 4(e) (Emphasis added). R. Utah Ct. App. 2 specifically precludes this court from suspending the requirements or provisions of either Rule 4(a) or Rule 4(e), and R. Utah Ct. App. 22(b) precludes this court from extending the time for filing a notice of appeal "except as specifically authorized by law." Under the circumstances of the present case, this court has no authority to deem timely a notice of appeal that is not indicated by the trial court to be timely, nor can this court consider a motion to extend the time for appeal.

Appellant makes several arguments in support of its contention that the notice of appeal was either timely filed or deemed timely filed by the juvenile court. First, appellant argues that the filing with the Utah County Clerk was timely and "the Utah County Clerk transmitted a copy of it directly to the Juvenile Court." Second, appellant claims that the notice of appeal was deemed timely filed because if it had not been, the clerk would have so advised counsel. Finally, appellant argues that if the juvenile court had not found the appeal was timely filed, the notice of appeal would not have been filed with this court. For the reasons stated below, none of the foregoing arguments has merit.

As to the first contention, we conclude that the filing with the Utah County Clerk does not constitute a timely filing with the juvenile court. There is no indication when the Utah County Clerk transmitted a copy of the notice of appeal to the juvenile court, and the original was returned to appellant's counsel. The record in this appeal reflects that the notice of appeal was "filed" in the juvenile court on December 20, 1988, five days after the expiration of the time for appeal.

Appellant also argues that the appeal was deemed timely based on the fact that the juvenile court did not notify counsel otherwise, and alternatively, based on the fact that the juvenile court transmitted the notice of appeal to the Utah court of appeals. If the procedures for initiating an appeal set forth in our rules are to have any practical significance, a determination of timeliness cannot be presumed or inferred from actions of the trial court. The juvenile court's purpose in transmitting a copy of counsel's letter of December 19 to the court of appeals is not clear. If the letter was considered to be a motion to extend the time for initiating an appeal, it must be ruled on by the juvenile court under R. Utah Ct. App. 4(e). Similarly, if transmittal of the letter was intended as an indication to this court that the trial court determined the appeal to have been timely received, that determination should be specifically indicated by an order of the trial court or by the date of filing stamped on the notice of appeal.

Under the particular circumstances of this case, including a specific request of the state to remand the case for determination of timeliness, we do not dismiss the appeal at this time. The case is temporarily remanded to the Fourth District Juvenile Court in order to allow that court to make a determination whether an order extending the time for appeal should be entered by the juvenile court under R. Utah Ct. App. 4(e). If the juvenile court declines to extend the time for appeal, the appeal will be dismissed for lack of jurisdiction upon notice to this court of the entry of such an order.

ALL CONCUR:

Russell W. Bench, Judge
Richard C. Davidson, Judge
Norman H. Jackson, Judge

777 P.2d 521 (UTAH APP 1989)

State v. Palmer
113 Utah Adv. Rep. 40

CODE • CO
Provo, Utah

Cite as
113 Utah Adv. Rep. 40

IN THE
UTAH COURT OF APPEALS

People of Utah,
Plaintiff and Respondent,
v.
R. PALMER,
Defendant and Appellant.

890312-CA

890358-CA
FD: July 18, 1989

Fourth District, Salt Lake County
Honorable John A. Rokich

COUNSEL:

For Appellant:
James A. Valdez, Salt Lake City, for
Appellant
Paul Van Dam, Sandra L. Sjogren, Salt
Lake City, for Respondent
Before Judges Jackson, Orme, and Garff (On
Remand and Motion).

OPINION

PER CURIAM:

This matter is before the court on its own motion pursuant to R. Utah Ct. App. 10 for summary dismissal because the notice of appeal was not timely filed in the trial court. The court served its Notice of Sua Sponte Consideration By The Court For Summary Disposition, and the defendant filed a Memorandum In Opposition to Sua Sponte Summary Dismissal of Appeal. We dismiss the appeal for lack of jurisdiction. The trial court entered its judgment on December 19, 1988. Defendant prepared a notice of appeal, which he apparently mailed or about January 16, 1989. The notice of appeal was filed in the district court on February 3, 1989, more than thirty days after entry of the judgment being appealed.¹ Defendant does not dispute the foregoing, but urges this court to "accept jurisdiction" and hear the appeal. Defendant makes two arguments against dismissal. First, he contends that this court should interpret its rules "so as to consider a Notice of Appeal to be timely which is placed in the prison mail by an incarcerated criminal defendant within the thirty-day period set forth in R. Utah Ct. App. 4." Second, defendant urges that, if untimely, the appeal should be remanded to the district court for entry of an order extending the time for appeal.

We conclude that the notice of appeal was not timely filed under any plausible interpretation of our rules. R. Utah Ct. App. 4(a)

provides that a notice of appeal "shall be filed with the clerk of the court from which the appeal is taken within 30 days after the date of entry of the judgment or order appealed from." R. Utah Ct. App. 2 specifically precludes this court from extending the time for filing a notice of appeal provided in Rule 4(a), and R. Utah Ct. App. 22(b) precludes this court from extending the time for filing a notice of appeal "except as specifically authorized by law." In *State v. Johnson*, 635 P.2d 36, 37 (Utah 1981), the Utah Supreme Court held that the 30-day period for filing a notice of appeal in a criminal case is jurisdictional and cannot be enlarged by an appellate court. R. Utah Ct. App. 4(e) clarifies that the procedure for extending the time for appeal is by a motion to the trial court. Similarly, *State v. Johnson*, held that a convicted defendant's claim he has been denied his constitutional right to an appeal should be presented to the sentencing court pursuant to a motion for post-conviction relief under Utah R. Civ. P. 65B(i). 635 P.2d at 38. Thus, the determination whether an untimely criminal appeal may proceed is reserved to the trial court by appellate rule and case law.

Defendant urges this court to interpret its rules to consider a notice of appeal to be timely filed where it is placed in the prison mail by an incarcerated criminal defendant within the thirty-day period set forth in R. Utah Ct. App. 4. Rule 4(e) provides that a notice of appeal must be "filed" with the trial court. The Utah Supreme Court rejected the assertion that filing was complete upon mailing to the trial court. *Isaacson v. Dorius*, 669 P.2d 849 (Utah 1983). Similarly, in *State in re: M.S.*, 102 Utah Adv. Rep. 63 (Utah App. 1989), this court concluded that an appellate court is bound by the filing date stamped on the notice of appeal by the trial court. To hold that filing in the trial court is complete upon mailing is inconsistent with R. Utah Ct. App. 4(a). Application of a three-day mailing rule is inappropriate on the same grounds and also on the basis that the notice must be filed within thirty days of the judgment's entry, and not of its service "by mail" on the defendant within the meaning of R. Utah Ct. App. 22(d).

Defendant also urges this court to remand the case to the trial court for entry of an order extending the time for appeal, relying upon *State in re: M.S.*, 102 Utah Adv. Rep. at 64. In that case, an appellant filed the notice of appeal in the trial court along with letter explaining the late filing. The letter and the notice of appeal were transmitted to this court, without any disposition by the trial court of the issues raised in the letter. The trial court stamped the notice of appeal as filed on a date that made the appeal untimely. The appeal was temporarily remanded to the trial court pursuant to R. Utah Ct. App. 4(c)

CODE • CO
Provo, Utah

Mountain States Broadcasting Co. v. Neale (RO)

113 Utah Adv. Rep. 41

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for a determination (1) whether the letter would be deemed a motion to extend the time to file and (2) if so, whether an extension would be granted. There was no filing in the trial court in this case that may be considered a timely motion for extension.

The notice of appeal in No. 890312-CA was not timely filed and did not confer jurisdiction on this court. The notice of appeal in No. 890358-CA was also untimely. The appeals are dismissed.

ALL CONCUR:

Norman H. Jackson, Judge
Gregory K. Orme, Judge
Regnal W. Garff, Judge

1. After appointment of counsel on appeal, counsel filed an additional notice of appeal from the same judgment which has been docketed as a separate appeal in the Utah Supreme Court and poured over to the Court of Appeals as our No. 890358-CA. Our disposition of this appeal is also dispositive of No. 890358-CA which was not filed until March 16, 1989.

Cite as
113 Utah Adv. Rep. 41

IN THE
UTAH COURT OF APPEALS

MOUNTAIN STATES BROADCASTING
COMPANY, a corporation, and Dan Lacy, an
individual,

Plaintiffs, Appellants and Cross-
Respondents,
v.

Sterrett NEALE and Neale Broadcast
Alliance,

Defendants, Respondents and Cross-
Appellants.

No. 880192-CA
FILED: July 20, 1989

Fourth District, Utah County
Honorable Boyd L. Park

ATTORNEYS:

Don R. Petersen, Leslie W. Slauch, Provo,
for Appellants
Stephen L. Henriod, Marilyn P. Fineshriber,
Salt Lake City, for Respondents
Before Judges Davidson, Greenwood, and
Orme.

MEMORANDUM DECISION ON
PETITION FOR REHEARING

ORME, Judge:

Our opinion in this matter issued on June

20, 1989. See *Mountain States Broadcasting Co. v. Neale*, 111 Utah Adv. Rep. 50 (Ct. App. 1989). Mountain States seeks our reconsideration of the attorney fees issue, particularly our conclusion that it was not the "prevailing party" in proceedings before the district court. Although the petition for rehearing is otherwise without merit and is denied, Mountain States identifies an oversimplification in our opinion which merits comment and clarification.

The thrust of Mountain States' petition is that it must be held the prevailing party since it only claimed all along that it was entitled to some offset, in an amount to be proven, and ultimately proved it was entitled to an offset. Conversely, Mountain States argues, NBA was the loser because it contended no offset was in order and it was proven wrong. Mountain States suggests that the absurdity of our reliance on the "net judgment" rule in a case like this is shown by the fact that if it had proven offsets totalling even \$1.00 less than the amount otherwise due under the note, despite a near-total victory for Mountain States the net judgment would still be in favor of NBA and strict application of the net judgment rule would leave NBA the prevailing party.

Mountain States' point is well-taken. On the other hand, carrying its own position to an equivalent extreme works an equally untenable result: If Mountain States had shown its entitlement to an offset of only \$1.00, under its view it would be the prevailing party since it claimed an offset in an amount to be proven and proved one.

We recognized in footnote 7 of our opinion and here emphasize "the need for a flexible and reasoned approach to deciding in particular cases who actually is the prevailing party." Consistent with that view, we point out that nothing in our opinion should be taken to suggest that the net judgment rule can be mechanically applied in all cases, although it will usually be at least a good starting point.

In this case, we remain convinced that application of the net judgment rule does not distort the relative success of the parties at trial, as seen from two additional perspectives implicit in Mountain States' petition.¹

Taking a narrower focus, the real dispute centered on the \$30,000 held in court after the initial disbursement to NBA. Mountain States fought long and hard to show that it was entitled to at least that amount in offsets. NBA claimed it was entitled to the entire fund, pursuant to its note, since Mountain States was not entitled to any offset. Total victory for Mountain States would have been its proving entitlement to all \$30,000. Total victory for NBA would have been its proving Mountain States was entitled to nothing. A "draw" would have been a decision dividing the \$30,000 equally. As it happened, \$6,000

2. Criminal Law \Rightarrow 394.4(12), 1169.1(8)

Admission of drugs seized from vehicle violated Fourth Amendment and was reversible error in trial for possession of controlled substances and possession with intent to distribute, where officers had no reasonable, legitimate basis, statutory or circumstantial, for impounding defendant's vehicle prior to search. U.S.C.A. Const. Amend. 4; U.C.A.1953, 41-1-115, 41-6-116.10, 58-37-3.

G. Fred Metos, Ronald J. Yengich, Salt Lake City, for defendant and appellant.

David L. Wilkinson, Sandra Sjogren, Salt Lake City, for plaintiff and respondent.

PER CURIAM:

Defendant appeals his conviction of possession of controlled substances and possession with the intent to distribute. He was also convicted of driving with a suspended driver's license, but he does not appeal that conviction. He urges that the drug convictions should be reversed because the drugs admitted into evidence were unlawfully seized in a warrantless search of his truck, impounded at the time of his arrest.

County sheriff's officers had previously suspected defendant of drug dealing, but had insufficient cause for either an arrest or a search warrant. Aware that defendant's driver's license was suspended, the officers staked out the home of defendant's parents for the purpose of stopping defendant as he drove to their home.

When stopped by the officers, defendant pulled over and parked his truck off of the street in an office parking lot. He was then arrested for driving with a suspended license. The officers refused to permit him to leave his locked truck in the parking lot or to allow it to be retrieved by his parents, who lived only four blocks away. Instead, an officer drove the truck to the police station and there privately conducted an inventory search, during which time the drugs were found and seized.

U.C.A., 1953, as amended.

[1] We have previously held that an inventory search is improper when conducted "only as a pretext concealing an investigatory police motive," *e.g.*, to obtain evidence in place of a full-blown investigative search. *State v. Hygh*, Utah, 711 P.2d 264, 268 (1985) (quoting *South Dakota v. Opperman*, 428 U.S. 364, 376, 96 S.Ct. 3092, 3100, 49 L.Ed.2d 1000 (1976)). "In order to support a finding that a valid inventory search has taken place, the court must first determine whether there was reasonable and proper justification for the impoundment of the vehicle." 711 P.2d at 268. There was no statutory authorization for detention of the vehicle under sections 58-37-3, 41-6-116.10, or 41-1-115,¹ as in *State v. Earl*, 716 P.2d 803 (1986). Absent a statutory basis justifying impoundment, we look to the totality of the surrounding circumstances to determine the reasonableness of the seizure of the vehicle.

[2] Cache County has no written standards or procedures for police impoundment of motor vehicles. It is undisputed that defendant's truck was safely locked and parked in a parking lot behind a law office. There is no evidence that there the vehicle posed any danger to the officers or the public. Defendant was not permitted to have someone pick up his locked truck from the parking lot or to arrange other disposition. Defendant was neither advised of the search in advance nor allowed an opportunity to be present. 711 P.2d at 268-69.

In its responding brief, the State concedes the invalidity of the search in this case because the officers had no reasonable, legitimate basis, statutory or circumstantial, for impounding defendant's vehicle prior to its search. The purpose of the impound was to further the investigation of defendant's suspected drug activities by creating a pretext for a custodial search. Consequently, the drugs were illegally seized, and the resulting convictions should be reversed.

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Cite as 717 P.2d 697 (Utah 1986)

Utah 697

Because the impoundment and search were admittedly a pretext concealing an investigatory police motive, the evidence seized was improperly admitted at trial under the fourth amendment of the United States Constitution. 711 P.2d at 270. We again note that neither party has discussed or applied article I, section 14 of the Utah State Constitution to the facts of the instant case, and therefore, we do not here consider any separate state standards. See *State v. Earl*, *supra*.

Defendant's convictions of possession and possession with the intent to distribute controlled substances are reversed and remanded.



Angelo CALFO, Plaintiff and Respondent.

v.

D.C. STEWART CO., Clara J. DeGraff, dba C.J. Realty and Roland Vance, Defendants and Appellants.

No. 19309.

Supreme Court of Utah.

March 28, 1986.

Holder brought action against promisor, realtor and realtor's agent, as guarantor, upon promissory note issued by promisor to realtor and sold to holder by realtor's agent. The Third District Court, Salt Lake County, David B. Dee, J., entered summary judgment for holder and granted promisor indemnity against realtor and realtor's agent, and upon promisor's motion to strike, entered order eliminating interest and stating that summary judgment was properly signed and entered and in full force and effect, and promisor appealed from such order. The Supreme Court, Zimmerman, J., held that: (1) time for taking

appeal did not begin to run until entry of order stating that summary judgment was properly signed and entered, and (2) promissory note stating that note was due in full upon final closing between promisor and buyers, which would be on or before certain date, when buyers would exercise their option to purchase motel, was not negotiable instrument.

Reversed and remanded with directions.

1. Appeal and Error \Rightarrow 347(2)

Time for taking appeal from judgment did not begin to run until entry of order stating that previous summary judgment was properly signed and entered and in full force and effect, where form of prior summary judgment had not been served upon defendant prior to submission to trial court, as required by local rule. Rules Civ.Proc., Rule 58A(c); Rule 73(a) (Repealed).

2. Bills and Notes \Rightarrow 144

To be negotiable under Uniform Commercial Code, instrument must evidence signature by maker or drawer, contain unconditional promise or order to pay sum certain in money, be payable on demand or at definite time and be payable to order or to bearer. U.C.C. § 3-104(1); U.C.A.1953, 70A-3-104.

3. Bills and Notes \Rightarrow 144

To qualify as negotiable instrument under Uniform Commercial Code, promise to pay and certainty of payment must be unequivocal. U.C.C. § 3-104(1); U.C.A. 1953, 70A-3-104.

4. Bills and Notes \Rightarrow 144

Instrument's negotiability must be determinable from what appears on face of instrument, without reference to extrinsic facts. U.C.C. §§ 3-104(1), 3-105 comment; U.C.A.1953, 70A-3-104.

5. Bills and Notes \Rightarrow 144

Purpose of requirement that instrument's negotiability be determinable from what appears on face of instrument is to

protect transferees from latent defenses to payment. U.C.C. § 3-104(1).

Bills and Notes ⇨342

Transferee is not entitled to insulation from apparent defenses where negotiable instrument evinces terms which should alert transferee of possible defenses. U.C.C. §§ 3-104(1), 3-105 comment; U.C.A. 1953, 70A-3-104.

Bills and Notes ⇨164

Promissory note issued by seller to buyer, stating that note was due in full upon final closing between seller and buyers, which would be on or before certain date, when buyers would exercise option to purchase motel, was conditional and indefinite on its face, and thus, was not negotiable instrument. U.C.C. § 3-104(1); U.C.A. 1953, 70A-3-104.

Bills and Notes ⇨452(1), 452(3)

Promisor's defenses of lack of consideration, nonmaturity of note, and failure of condition precedent were absolute in holding action upon promissory note, issued by promisor to realtor and sold to holder by agent of realtor, stating that note was due in full upon final closing between promisor and buyers, which would be on or before certain date, when buyers would exercise their option to purchase motel, where title of motel did not occur. U.C.C. § 3-104(1), 3-302(1); U.C.A. 1953, 70A-3-14.

Michael R. Carlston, Salt Lake City, for defendants and appellants.

Joseph H. Gallegos, Michael R. Sciumba, Salt Lake City, for plaintiff and respondent.

ZIMMERMAN, Justice:

This case involves a suit by plaintiff Angelo Calfo upon a promissory note issued by defendant D.C. Stewart Co. ("Stewart"). The note was payable to the order of C.J. Realty and was sold to Calfo by an agent of C.J. Realty. The trial court granted against a summary judgment enforcing the note. Stewart appealed. We hold that the

note was not a negotiable instrument and reverse the trial court on that ground.

Stewart owned the Astro Motel in Cedar City, Utah. Defendant Roland Vance, a real estate agent for defendant C.J. Realty, approached Stewart about listing the motel for sale with C.J. Realty. The listing agreement was entered into, and Vance subsequently obtained a potential buyer for the motel.

On September 24, 1979, Stewart and the potential buyer entered into a lease agreement and option to purchase. The agreement provided that the lessees could exercise an option to purchase the motel on or before May 1, 1980. Also on September 24, 1979, Stewart executed a promissory note for \$15,900 payable to C.J. Realty to secure the real estate commission to which C.J. Realty would be entitled if the lessees exercised their option to purchase. The promissory note provided that it would be payable as follows:

Total due in full upon final closing between D.C. Stewart Co., Seller, and Wendell James Downward and Connie Downward, husband and wife, Buyers, which shall be on or before May 1, 1980, when Buyers exercise their option to purchase the Astro Motel in Cedar City, Utah.

On September 27, 1979, the promissory note was sold by Vance, acting on behalf of C.J. Realty, to the plaintiff Calfo for \$12,720.

The lessees never exercised their option to purchase the Astro Motel. However, after May 1, 1980, Calfo made demand upon all of the defendants for payment of the note. When payment was not forthcoming, suit was brought on the note against Stewart, and against Vance as guarantor of the note. Stewart then cross-claimed against his co-defendants for indemnity.

On January 5, 1982, the trial court heard Calfo's motion for summary judgment. Calfo argued that the promissory note was a negotiable instrument on its face, that it was past due, and that he was a holder in due course. On that same date, the court

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also heard Stewart's motion for a summary judgment. Stewart asserted that the note was not a negotiable instrument and that Calfo was not a holder in due course. In addition, Stewart's counsel represented that if a judgment was granted against Stewart, counsel for Stewart's co-defendants had consented to entry of judgment on Stewart's cross-claim for any amounts it was required to pay Calfo. The trial court orally granted Calfo's motion. In so doing, it found the note to be "a good note." The court denied Stewart's motion against Calfo, but allowed Stewart indemnity against its co-defendants.

[1] On January 14, 1982, the trial court executed a document entitled "Summary Judgment" which awarded Calfo the principal amount of the note \$15,900, plus interest at six percent per annum from the due date, and attorney fees of \$2,700. Stewart first became aware of this document in May of 1982, when Calfo attempted to collect upon it by instituting supplemental proceedings. Stewart's counsel complained to Calfo's counsel that the form of judgment had not been served upon him prior to its submission to the trial court, as required by Rule 2.9(b) of the District and Circuit Court Rules of Practice for the State of Utah. Efforts to have Calfo's counsel voluntarily withdraw the summary judgment failed. Stewart then moved the trial court to strike the judgment, arguing that the judgment improperly allowed interest and that it had not been submitted to opposing counsel for approval prior to submission to the court.

After a series of hearings on Stewart's motion to strike, the trial court executed an order on June 7, 1983, stating that "the summary judgment entered by the court on January 14, 1982 . . . was properly signed and entered by the court on said date and is in full force and effect. . . ." However, the court's June 7th order did modify the

earlier order by deleting the award of interest.

Stewart appeals from the order of June 7, 1983. Calfo objects to the timeliness of the appeal, arguing that the June 7th order merely confirmed the judgment entered on January 14, 1982, albeit as redrawn to eliminate interest; therefore, the time to appeal expired one month after January 14, 1982, not one month after June 7, 1983. Rule 73(a), Utah R.Civ.P.¹

The appeal was timely taken. We have previously held that unless Rule 2.9(b) of the District and Circuit Court Rules of Practice has been complied with, the judgment in question is not deemed "filed" within the meaning of Rule 58A(c) of the Utah Rules of Civil Procedure and the time for taking an appeal from that judgment under Rule 73(a) [now Rule 4(a) of the Rules of Appellate Procedure] does not begin to run because the judgment has not been properly "entered." *Bigelow v. Ingersoll*, Utah, 618 P.2d 50, 52 (1980); *Larsen v. Larsen*, Utah, 674 P.2d 116, 117 (1983); *Wayne Garff Construction Co., Inc. v. Richards*, Utah, 706 P.2d 1065, 1066 (1985). Because Rule 2.9(b) was not complied with here, there was no judgment from which an appeal could be taken until June 7, 1983. Stewart's appeal from the order entered on that date is timely.

[2] Reaching the merits, Stewart argues that trial court erred in finding the promissory note to be a negotiable instrument. To be negotiable under section 3-104(1) of the Uniform Commercial Code, U.C.A., 1953, § 70A-3-104 (Repl.Vol. 7B, 1980), an instrument must meet four criteria. Specifically, it must (i) evidence a signature by the maker or drawer, (ii) contain an unconditional promise or order to pay a sum certain in money, (iii) be payable on demand or at a definite time, and (iv) be payable to order or to bearer. Stewart and Calfo agree that the promissory note in question satisfies the first and fourth of

1. Rule 73(a) was superseded on January 1, 1985, by Rule 4(a) of the Rules of Appellate Procedure. All relevant developments in this case occurred under Rule 73(a), although the holding

of this case with respect to when a judgment is "filed" is equally applicable under the new Rule 4(a).

ese requirements. They disagree as to whether second and third are met.

[3] Although the second and third requirements of negotiability are separately stated, in fact they are closely related. Both focus on whether the instrument is a clear and unconditional promise to pay. These concerns are central to the whole concept of negotiable instruments and that could be kept in mind in determining whether a document is entitled to be treated as a negotiable instrument under the Uniform Commercial Code. Two important functions of negotiable instruments are "to supplement the supply of currency" and to provide a present representation of "future payment of money." 1 W. Hawkland, *A Practical Guide to the Uniform Commercial Code* § 2.0304, at 459 (1964). These currency and credit functions could be defeated by conditional promises, because the costly and time consuming investigations that would be required by such promises would impede circulation. Conditional paper would increase the risks of the holder, and discount rates would be increased commensurately. Substitutes for money must be capable of rapid circulation at minimum risks, and credit documents are feasible only when low discounting prevails. Obviously, then, negotiable instruments must be unconditional to serve the purposes for which they are created.

Because a negotiable instrument is a substitute for money or currency, both the promise to pay and the certainty of payment must be unequivocal.

[4-6] For similar reasons, an instrument's negotiability must be determinable from what appears on its face and without reference to extrinsic facts. See *Participating Parts Associates, Inc. v. Pylant*, 460 So.2d 1299, 1301 (1984); *Isonback v. First State Bank*, Ala.Civ. p., 394 So.2d 381, 383 (1980), cert. den., Ala., 394 So.2d 384 (1981). See also *Special Comments to U.C.C. § 3-105*, which requirement protects transferees from defenses to payment, i.e., those defenses which are not readily apparent from

the document. 5 Anderson, *Uniform Commercial Code* § 3-104:4 (3d ed. 1984) (relying upon *First State Bank v. Clark*, 91 N.M. 117, 570 P.2d 1144, 22 U.C.C. Rep. § 1186 (1977)). On the other hand, if the document evinces terms which should alert the transferee of possible defenses, then the transferee is not entitled to insulation from those apparent defenses.

The whole purpose of the concept of a negotiable instrument under Article 3 is to declare that transferees in the ordinary course of business are only to be held liable for information appearing in the instrument itself and will not be expected to know of any limitations on negotiability, or changes of terms, etc., contained in any separate documents. The whole idea of the facilitation of easy transfer of notes and instruments requires that a transferee be able to trust what the instrument says, and be able to determine the validity of the note and its negotiability from the language in the note itself.

First State Bank v. Clark, 91 N.M. 117, 570 P.2d 1144, 1147 (1977).

[7] The present case involves a promissory note which is "due in full upon final closing between . . . seller and . . . buyers, which shall be on or before May 1, 1980, when buyers exercise their option to purchase the Astro Motel. . . ." In determining whether this promise to pay is conditional or indefinite, we are not aided by the trial court's summary finding that this is a "good note." The document specifically states that it is due only upon final closing "when buyers exercise their option to purchase." This language clearly places the holder on notice that the note will become due only upon a contingency which the holder cannot control, i.e., the exercise by buyers of their option to purchase. As for definiteness, the date set forth, May 1, 1980, merely defines when the option to purchase expires and does not establish a time as to when the note will certainly become due. On these facts, we find the note to be both conditional and indefinite on its face.

Cite as 717 P.2d 701 (Utah 1986)

Calfo relies upon the case of *Northwestern National Bank of Minneapolis v. Shuster*, Minn., 307 N.W.2d 767 (1981), in support of his argument that language in the promissory note does not make the obligation to pay conditional. We find this unpersuasive. In *Shuster*, the promissory note contained language that "[t]his is promised payment for ownership in Casper project [when] option is exercised for 2nd half." *Id.* at 770. The *Shuster* court found that this reference to an option did not create a conditional promise to pay. However, it ultimately held that the quoted language prevented the holder from being a "holder in due course" under section 3-302(1) of the Uniform Commercial Code because it placed the holder on notice as to a defense against payment based upon failure of a condition precedent if the option there was not exercised. *Id.* at 771. The holdings in *Shuster*—that the note is unconditional but that it gave the holder notice of defenses—appear to be inconsistent. The better reasoning would be that the note was conditional and therefore non-negotiable. See, e.g., *Participating Parts Associates, Inc. v. Pylant*, Ala., 460 So.2d 1299, 1301-02 (1984).

[8] For the reasons stated, we hold that the promissory note sued upon is not a negotiable instrument and that judgment was improperly entered against Stewart. There appears to be no dispute in the record that the sale of the Astro Motel did not occur. Stewart's defenses of lack of consideration, non-maturity of the note, and failure of condition precedent seem to be absolute. We therefore remand the case for entry of a judgment in favor of Stewart on its motion for summary judgment, and for such further proceedings against the other defendants as are appropriate under the pleadings, and as are consistent with this opinion. Consistent with Rule 33(a), Utah R.App.P., costs are awarded to appellant.

HALL, C.J., and STEWART, HOWE, and DURHAM, JJ., concur.

In re DISCIPLINARY ACTION OF George McCUNE.

No. 20140.

Supreme Court of Utah.

March 31, 1986.

Disciplinary proceeding was instituted. The Supreme Court, Stewart, J., held that counsel, who retained out-of-state attorney to represent client and engaged court reporter to transcribe depositions in a case, was subject to disciplinary sanctions, including reimbursement as condition to reinstatement, for failure to pay for the reporter's and other counsel's services, where those amounts were billed to the clients, who paid counsel.

Suspension ordered.

Howe, J., filed concurring statement, in which Zimmerman, J., joined.

1. Attorney and Client ⇨52

Counsel's failure to answer formal complaint issued by ethics and discipline committee panel constituted an admission of charges that he had failed to pay out-of-state attorney whom he had engaged to represent client and certified court reporter which had been engaged to transcribe depositions in one of counsel's cases.

2. Attorney and Client ⇨36(1)

Supreme Court's power to regulate practice of law necessarily includes the power to discipline a lawyer. Const. Art. 8, §§ 1 et seq., 4.

3. Attorney and Client ⇨36(1)

Legislature's power to regulate and control attorneys in certain aspects is subject to Supreme Court's inherent power to discipline its officers. Const. Art. 8, §§ 1

control or possession of Bank and the proceeds of such property.

Defendant filed its financing statement with the Secretary of State on December 6, 1972. On July 30, 1973, the plaintiff entered into a security agreement with Nuclear Controls and Electronics Corporation (hereinafter called Nuclear) which covered all of Nuclear's inventory, work in process, raw materials, and stock in trade, and all after acquired inventory and any proceeds rising therefrom.¹ On July 30, 1973, the plaintiff and Nuclear entered into a security agreement which covered the revolving accounts receivable of Nuclear. Financing statements were duly filed by the plaintiff with the Secretary of State.

The Trans-Atlas Corporation was the parent corporation of both Nuclear and Summit. Nuclear was engaged in manufacturing calculators and other electronic equipment. Summit was engaged in the marketing of the products. In September, 1973, the Board of Directors of Trans-Atlas Corporation authorized Nuclear and Summit to effect an intercompany sale of all assets of Nuclear to Summit. The intercompany transfer of inventory and assets was made on the books of both corporations as of January 1, 1974. The transfer of assets was a bookkeeping entry and without consideration. As of the date of the transfer of assets Summit had accounts receivable in the amount of more than \$2,000,000. During January, 1974, the plaintiff and the defendant learned of the transfer of assets from Nuclear to Summit.

As of the time of the transfer of assets Nuclear was indebted to the plaintiff in the sum of \$831,770, and thereafter Summit and the plaintiff had several discussions concerning that indebtedness. On February 12, 1974, Summit gave to the plaintiff a promissory note in the amount of the indebtedness secured by a financing agreement which granted to the plaintiff a security interest in raw materials and other

assets including finished products, the pertinent language is as follows:

Raw materials, parts and work in process involved in assembly of electronic calculators; as well as the finished goods inventory of calculators held for sale to customers.

All collateral covered hereunder, especially cash and noncash proceeds (including chattel papers and accounts receivable) is subordinate to and the terms and conditions set forth in paragraphs 2-9 are limited in application by a prior and superior security interest in accounts receivable held by Zions First National Bank, Salt Lake City, Utah.

As further security, Summit granted to the plaintiff a security interest in its accounts receivable which instrument contained the following provision:

All collateral assigned to secured party hereunder and all terms and conditions hereof are subordinate to and limited by the security interest in accounts receivable presently held by Zions First National Bank, Salt Lake City, Utah.

[1,2] In determining the priorities as between the parties, it is quite clear that the defendant's security interests in Summit's accounts receivable take precedence over any interest of the plaintiff, and that fact is recognized by the plaintiff by the language contained in its security agreements² with Summit above referred to. As to the transfer of the inventory from Nuclear to Summit, plaintiff retained its security interest in the transferred assets.³ The security interest of plaintiff in the transferred assets was not extinguished by the plaintiff taking a new promissory note procured by the security agreements entered on February 12, 1974. The transferred assets not being subject to the defendant's security interest, the new security agreement entered into on February 12, 1974, does not have the effect of

subordinating the plaintiff's interest in the transferred assets.

[3,4] The record before this court does not support the claim of the defendant that the plaintiff is estopped to claim a priority over the defendant. Also in view of the fact that Nuclear was engaged in manufacturing rather than the sale of merchandise, the transfer of assets from Nuclear to Summit was not a bulk transfer as contemplated by Section 70A-6-102.

[5] We are of the opinion that a summary judgment should not have been entered and that evidence should have been taken, and the plaintiff should have been accorded the opportunity to trace, if it can, the assets and proceeds which went to defendant subject to the plaintiff's security interests. It appears also that a question of fact exists as to the accounts receivable in which the defendant had a security interest prior in time to that of the plaintiff.

This matter is remanded to the district court for further proceedings in conformity with this opinion. Appellant is entitled to costs.

HENRIOD, C. J., and CROCKETT, ELLETT and MAUGHAN, JJ., concur.



WEST GALLERY CORPORATION, a Utah Corporation, dba Gallery I Theatre, et al., Plaintiffs and Respondents,
v.

SALT LAKE CITY BOARD OF COMMISSIONERS, Defendant and Appellant.

No. 13963.

Supreme Court of Utah.

July 10, 1975.

Action was brought by corporation operating a cinema against board of city commissioners. The Third District Court, Salt Lake County, Stewart M. Hanson, Jr.,

J., enjoined city commission from proceeding further in the matter of revocation of corporation's license to do business until related criminal action pending against corporation had been concluded, and board of commissioners appealed. The Supreme Court, Henriod, C. J., held that city, having passed ordinances which set up a fact-finding citizens' committee to determine existence of obscenity before a license could be revoked, could not deviate from the ordinance by instituting proceeding, before conclusion of criminal action, to show cause why license to do business should not be revoked.

Affirmed.

Maughan, J., concurred in result.

Crockett, J., dissented and filed opinion in which Ellett, J., joined.

1. Theaters and Shows — 3

City which passed ordinances establishing a fact-finding citizens' committee to determine existence of obscenity before revoking a license could not deviate from procedures established in the ordinances, after filing criminal complaint against corporation operating a cinema, by instituting proceeding, before conclusion of the criminal action, to show cause why corporation's license should not be revoked.

2. Injunction — 83

District court, which enjoined city commission from further proceedings against corporation in relation to revocation of corporation's license to do business before criminal action, pending against corporation had been concluded, did not improperly interrupt a legislative power and an administrative hearing, where city failed to follow procedures, set forth in city ordinance establishing a fact-finding commission to determine existence of obscenity before a license may be revoked, in that it filed criminal complaint against corporation ordering corporation to show cause why its license to do business should not be revoked before criminal action against corporation was concluded.

1. 70A-9-203(1)(b), U.C.A.1953.

2. 70A-9-316, U.C.A.1953.

3. 70A-9-201, U.C.A.1953; 70A-9-315, U.C.A. 1953; Intermountain Association of Credit Men v. The Villager, Inc., Utah, 527 P.2d 604.

Roger F. Cutler, Salt Lake City Atty., Ray L. Montgomery, Asst. City Atty., Salt Lake City, for defendant and appellant.

Gerald H. Kinghorn and Bruce C. Luheck, of Kinghorn, Oberhansly & O'Connell, Salt Lake City, for plaintiffs and respondents.

HENRIOD, Chief Justice:

Appeal from an order granted by the lower court enjoining the City Commission from "further proceedings until the related criminal action pending against plaintiffs have been concluded in City Court." Affirmed.

Plaintiffs operated a cinema house in which they showed, for a price, a flicker that allegedly appealed to one's prurient, japeless sensitivity, according to the U.S. Supreme Court's conception. There were neighborhood complaints about the films, which, substantiated by City peace officers' statements and others who saw them, hardly could have represented any watchword documentary dedicated to decency or any Hallmark card deifying virtue.

With this scenario, the City (after filing a criminal complaint against them) ordered the purveyors of these visual aids, on a lay certain, to show cause, if any there be, why their license to do business should not be buried.

The City based its interdiction on an ordinance which the Commission had passed followed by a rather precipitous repealer) naming the deviations from decency, which, if accomplished, well might result in rime, chaos, charge, possible penalty, and conceivable institutional penal servitude. Really, it had to do with the hoped-for demise of the turnstiles employed by the ticket-buying biological curios.

[1] The order which the City says is offensive (constitutionally, because of separation of powers concepts), to proper legislative and administrative decor, succinctly aid:

1) That the City, having passed Salt Lake Ordinances, Secs. 20-20-18.1, es-

tablishing a fact finding citizens' committee to determine before a license revocation that obscenity "cannot 'deviate' therefrom in making or attempting to make such a determination."

That should be dispositive here. The City hardly can claim it could proceed and convict someone without following its own procedural requirements. It is conceded that the City did not follow its own legislative pronouncement,—and the District Court having pointed this out in its order, together with the admission of the City of its accuracy,—adds up to one inescapable conclusion,—that the City as a consequence, could not proceed in violation thereof, and that the writ issued here was apropos,—and that the City's looking askance at that part of the Court's order because it became moot by virtue of the ordinance's subsequent revocation, doesn't justify its espousal of an attack on the writ for some other reason, i. e.,

[2] 2) That the District Court was in error because it interrupted a legislative power and an administrative hearing.

The suggestion of mootness on the part of the City is mute evidence that it has attempted to shift its own abortive procedures onto the shoulders of the District Court, justification enough for the issuance of the writ. The City is not hydra-headed enough as to say it must determine obscenity by a prescribed procedure which admittedly it failed to pursue in order to delicense one, but simultaneously can punish one for obscenity under some other procedure.

The City's argument seems to be a study in inconsistency. It seems to say that someone didn't do the thing right because we didn't do it right, and now we wish to right our wrong by saying that our wrong was a circumstance that does not justify the District Court in saying it was wrong, but, on the contrary, that we have some sort of Constitutional right to prevent a Court of Law from saying our wrong was not a protectable constitutional right.

Somehow an excusable neglect ogre somehow, somewhere, looms large in the wings, to be identified by the City in a devious attempt to detour a couple of fundamentals.

If it be any comfort to the City, wherein its second point on appeal is asserted, to which we subscribe, that:

The District Court has no power to review the action of the "commissioners until after their final action has been taken," we simply say that if the Commission has not exceeded, circumvented or ignored its conceded legislative prerogative, and has followed its constitutional tri-partite privileges under its constitutional authority,—gospelly, it is right,—but here,—the City wants us to say that the Judiciary has no right to interfere with another branch of government,—even though the latter is afield in its presumed, but unrespected undue process contention of governmental individualism, impregnability and isolation,—and we agree with the City, but not its action of inconsistency.

We think that except under the circumstances of this case, no one justifiably could say that the City could not pursue a course of conduct designed to examine facts justifying the granting of, the continuation of or the revocation of a business license for cause,—and at the same time pursue an action against someone for an alleged infraction of the law.

TUCKETT, J., concurs.

MAUGHAN, J., concurs in the result.

CROCKETT, Justice (dissenting).

I am unable to concur with the affirmation of the judgment. It is my opinion that the appellant Salt Lake City is entitled to have an adjudication of this case on the basis of the order entered by the district court at the time it was entered; and it is further my opinion that the order made and appealed from was both ill advised and beyond the proper prerogatives of that court.

The proceeding before the City Commission involved the question as to why the

plaintiffs' license should not be revoked. Such a determination is properly within both the duty and the prerogative of the City Commission, which it should have been not only permitted, but encouraged to discharge with dispatch. This, for the benefit of all concerned, including the public. I know of no justification whatsoever for the district court to enter an order staying the action of the City Commission until the criminal proceedings had been completed.

Three points are noted: First, whether the licenses should or should not be revoked was not necessarily dependent on the outcome of the criminal proceedings; Second, the burden of proof in the criminal proceedings is different from the unrelated proceeding before the City Commission; and Third, the criminal proceedings, for various reasons, and perhaps by appeal or otherwise, may well be delayed and protracted and thus unjustifiably delay the Commission from performing its duty.

ELLETT, J., concurs in the dissenting opinion of CROCKETT, J.



M. L. SEARS et al., Plaintiffs and Appellants,

v.

OGDEN CITY, a body politic, et al., Defendants and Respondents.

No. 13647.

Supreme Court of Utah.

July 11, 1975.

Appeal from Third District Court, Weber County; John F. Wahlquist, Judge.

Pete N. Vlahos of Vlahos & Gale, Ogden, for plaintiffs and appellants.

L. Kent Backman, Ogden City Atty., Ogden, for defendants and respondents.

AFFIDAVIT OF MAILING

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

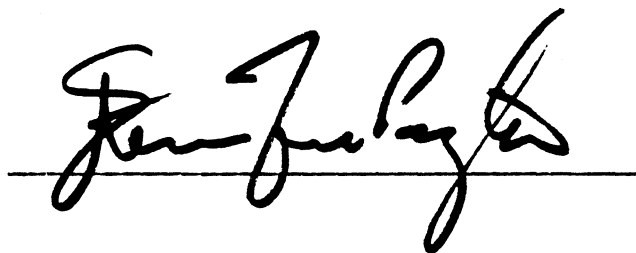
I hereby certify that a true and correct copy of the foregoing Petition For Re-Hearing was mailed via United States Mail, first class, postage prepaid on the 30th day of January, 19 90, to the following:

Grantsville City Attorney
7 Park Street
Grantsville, UT 84029
Attn: Ronald L. Elton, Esq.
Certified Mail #P652-408-548

William Kay Bankhead
(U.S. Certificate of Mailing)

*[4 copies per R. Utah Ct. App. Rule 26 "Filing & Service"]

Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, UT 84102
HAND DELIVERED



Authority

Judicial Council Rules of Judicial Administration
CJA Rule 4-504 "Written Orders, Judgments & Decrees"

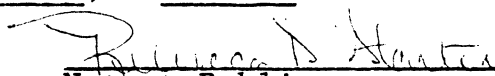
U.C.A. 77-35-3 Rule 3 "Service & Filing of Papers";

U.R.C.P. Rule 5 "Service and Filing of Pleadings and Other Papers"

R. Utah Ct. App. Rule 21 "Filing and Service"

SUBSCRIBED and SWORN to before me this 30 day

of January, 19 90.


Notary Public



OFFICIAL SEAL
REBECCA D. STANTON
NOTARY PUBLIC - STATE OF UTAH
COUNTY OF SALT LAKE
My Comm. Expires July 7, 1995

"Becky"
LEGAL ASSISTANT

LAWYER
431 SOUTH 300 EAST, SUITE 40
SALT LAKE CITY, UTAH 84111-3298
TELEPHONE (801) 363-7070