

1999

# John E. Worthen v. Robert W. Walter : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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JOHN E. WORTHEN,  
  
Plaintiff and Appellant,

:  
Appellate Case No. 991061-CA

:  
Trial Court No. 99090189CN

-v-

ROBERT W. WALTER,  
SEABOARD SURETY CO.,  
AMERICAN SURETIES TRANSFER &  
TRUST INC., and BERLINER, ZISSLER,  
WALTER & GALLEGOS,

:  
Priority No.15

Defendants and Appellees.

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**BRIEF OF APPELLANT**

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APPEAL FROM 12(b)(6) DISMISSAL OF THE THIRD JUDICIAL DISTRICT  
COURT OF SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE HOMER F. WILKINSON

---

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Appellant, John E. Worthen, pursuant to Rule 24 of the Utah Rule of Appellate Procedure, submits this Appeal Brief.

### **JURISDICTIONAL STATEMENT**

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Annotated, section 78-2a-3(2)(j). The orders appealed from are final orders disposing of all claims of all parties.

### **ISSUES PRESENTED ON APPEAL**

1. Did the trial court commit err by dismissing Appellant's breach of contract claim on the grounds that the claim was barred by the statute of limitations?
  - A. Was it err to find the statute of limitations governing oral contracts barred Appellant's claim where no finding of fact was made as to when the statute of limitation began to run?
  - B. Did the trial court err by failing to recognize that Appellant's claim did not arise until March 23, 1995?
  - C. Did the trial court err by failing to recognize that Appellee's letter acknowledging the validity of Appellant's claim renewed the statute of limitations?
  - D. Did the trial court err by failing to recognize that the statute of limitations was tolled by the discovery rule?
  - E. Did the trial court err by failing to recognize that the appropriate limitations period was the six year statute of limitations period governing written contracts?

1. Did the trial court err by dismissing Appellant's breach of contract claim for failure to show causation and damages?
  - A. Did the trial court err by not recognizing the complaint and amended complaint both alleged facts that if proven would entitle Appellant to an award of damages?
  - B. Did the trial court err by not recognizing disputed issues of material facts existed as to causation and damages?
  - C. Did the trial court err by not recognizing that upon proving the allegations made in Appellant's amended complaint, Appellant would be entitled to lost profits damages?
  - D. Did the trial court err by not recognizing that upon proving the allegations made in the Appellant's amended complaint, Appellant would be entitled to restitution damages?
  - E. Did the trial court err by not recognizing that upon proving the allegations made in the Appellant's amended complaint, Appellant would be entitled to nominal damages?
3. Was Appellant denied adequate notice that the Appellee's motion to dismiss was going to be decided without oral argument by since the motion was decided without a notice to submit for decision being filed as to that motion and the Appellee's earlier request for oral argument had not been withdrawn or otherwise waived by either party?

## **STANDARD OF APPELLATE REVIEW**

“When reviewing a motion to dismiss based on Rule 12(b)(6), an appellate court must accept the material allegations of the complaint as true, and the trial court ruling should be affirmed only if it clearly appears the complainant can prove no set of facts in support of his or her claims.” Mackey v. Cannon, 996 P.2d 1081, 1084 (Utah App. 2000). “A dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim.” Id (quoting Colman v. Utah State Land Brd., 795 P.2d 622, 624 (Utah 1990)). The appellate court “must consider all the reasonable inferences to be drawn from the facts in a light most favorable to the plaintiff.” Id (quoting Anderson v. Dean Witter Reynolds, 841 P.2d 742, 744 (Utah App. 1992)). “The propriety of a trial court’s decision to grant or deny a motion to dismiss under rule 12(b)(6) is a question of law that we review for correctness.” Id. “The courts are a forum for settling controversies, and if there is any doubt about whether a claim should be dismissed for the lack of a factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof.” Id (quoting Colman, 795 P.2d at 624).

## **DETERMINATIVE AUTHORITY**

The determinative authority for this appeal are Utah Code Annotated, section 78-2a-3(2)(j), section 78-12-23, section 78-12-25, section 78-12-44, Utah Code of Judicial Administration Rule 4-501, and Rule 12(b)(6) of the Utah Rules of Civil Procedure.

## **STATEMENT OF THE CASE**

### **1. Nature of the Case**

This is an appeal from a final order of the Third District Court, Honorable Homer F.

Wilkinson presiding, granting Walter's and Berlinger, Zissler, Walter and Gallagos' Rule 9(b) and 12(b) Motion To Dismiss Plaintiff Worthen's First Amended Complaint With Prejudice. Appellant does not contest that portion of the trial court's order dismissing his claims against American Securities Transfer and Trust Inc., and Seaboard Surety Company.

## **2. Course of Proceedings**

On February 16, 1999, Appellant John E. Worthen, ("Worthen"), filed his complaint against Robert E. Walter, ("Walter"), his law firm Berlinger, Zissler, Walter & Gallegos, (the "Law Firm"), Seaboard Surety Company, ("Seaboard"), and American Securities Transfer and Trust Inc., ("AST"), alleging conversion of securities, breach of contract and fraud. On June 10, 1999, Walter filed his answer accompanied by a Rule 9(b) motion to strike Worthen's fraud claim. On June 14, 1999, AST filed its Motion to Dismiss or Alternatively, Motion for Summary Judgement. In support of its motion AST filed affidavits from two of its employees. On June 6, 1999, Worthen sought leave to amend his complaint, and on August 2, 1999, he filed his First Amended Complaint. On August 31, 1999, Walter responded by filing his Rule 9(b) and 12(b) Motion To Dismiss Plaintiff Worthen's First Amended Complaint. On the following day, September 1, 1999, Walter filed his supporting memorandum and request for oral argument on his motion to dismiss. On September 28, 1999, Worthen filed his motion in opposition to Walter's motion to dismiss. On October 4, 1999, Walter subsequently filed his reply memorandum in further support of the motion to dismiss. No notice to submit for decision was ever filed relating to Walter's Rule 9(b) and Rule 12(b)(6) motion to dismiss. No waiver of oral argument was filed after Walter requested oral argument on his motion to dismiss. On October 26, 1999, the trial court entered its 4-501 Ruling granting Walter's motion to dismiss, and on

November 12, 1999, the trial court signed and entered its written Order Granting Walter's & Berlinger, Zissler, Walter & Gallegos' Rule 9(b) & 12(b)(6) Motion To Dismiss Plaintiff Worthen's First Amended Complaint With Prejudice and Denying Motion To Disqualify. Worthen filed his Notice of Appeal on December 9, 1999.

### **3. Disposition In The Trial Court**

Upon written motions of the parties and without oral argument, the trial court, Honorable Judge Homer F. Wilkinson, by its 4-501 Ruling granted Seaboard and AST's motion for summary judgment dismissing all claims against those two parties. No appeal is being brought from this portion of the trial court's ruling. The trial court's 4-501 Ruling also granted Walter's Rule 9(b) and Rule 12(b)(6) motion to dismiss with prejudice, from which this appeal is being brought.

### **STATEMENT OF FACTS**

1. Worthen purchased 17,600,000 common voting shares of Fintech Inc. ("Fintech"), stock from a group of controlling shareholders on March 12, 1986 pursuant to a written purchase agreement. (Record at 2, 4, 87 ¶ 3, 161 ¶ 1, 225 ¶ 5)
2. Robert Walter was among the controlling shareholders and personally sold Worthen 3,100,000 common shares under the same purchase agreement. (Record at 4-6, 9-11, 14-18, 71, 87 ¶ 3, 161 ¶ 2, 160 ¶ 29, 179, 193, 195, 200, 204, 334)
3. Stock Certificate 115 ("Certificate 115") was signed by Robert Walter and delivered to Worthen evidencing the 3,100,000 shares he purchased. (Record at 166 ¶ 29, 204)
4. At the time of the stock sale, Robert Walter, working at the law firm of Berlinger, Zissler, Walter and Gallegos, was legal counsel for Fintech and prepared the documents necessary to

facilitate the sale to Worthen. (Record at 4-5, 11, 161 ¶ 4)

5. On March 12, 1986, Form 8-K was filed with the Securities and Exchange Commission as required by Section 13 or 15(d) of the Securities and Exchange Act of 1934 notifying the SEC of the change in control of the registrant. (Record 4-5, 14-16, 161 ¶ 4)

6. The Form 8-K identified Walter as one of the individuals from whom Worthen purchased the Fintech stock with notice that Worthen paid \$50,000 cash for the 17,600,000 shares purchased under the agreement. (Record at 14-16)

7. Following Worthen's purchase of the stock, a number of name changes and reverse stock splits were completed by the company which resulted by the fall of 1992 in the total number of shares represented by Certificate 115, post name changes and splits, being 7,750 of Summa Metals Corporation. (Record at 71, 161 ¶¶ 5-9, 184, 193)

8. During the summer or fall of 1996 the price of the stock peaked at \$15.00 per share and the value of the stock represented by Certificate 115 equaled \$116,250.00 in value. (Record at 195)

9. In September of 1992, Robert Walter contacted the transfer agent of the stock AST and reported Certificate 115 as "lost or stolen" and requested that a new certificate be issued in his name. (Record at 162-65 ¶¶ 12-22)

10. On September 9, 1992, AST issued a replacement certificate to Robert Walter in his name ("Certificate 1038") evidencing ownership of 7,750 shares of Summa Metals Corporation stock. (Record at 165 ¶ 22)

11. In the late fall of 1994, Worthen's stock broker contacted AST and inquired into the status of Certificate 115 and was advised by AST that it had been reported lost and that a

replacement certificate had been issued. (Record at 295 ¶ 3)

12. On or about March 23, 1995, Worthen contacted Stephen C. Vickstrom of St. Paul Surety and filed an adverse claim on Certificate 1038, claiming ownership of the stock and Mr. Vickstrom contacted AST requesting that a stop payment notice be placed on Certificate 1038. (Record at 191)

13. On September 4, 1996, Robert Walter issued a letter to Worthen's attorney repudiating the contract and claiming he had "no recollection of the purported sale to Mr. Worthen." Robert Walter further stated that if the sale had occurred "that Mr. Worthen has, at a minimum, a signature guaranteed stock power from me and a stock purchase agreement." (Record at 165 ¶ 24, 193)

14. On September 24, 1996, Robert Walter sent a second letter threatening legal action against Worthen if he did not produce substantive evidence of his ownership of the Fintech stock as it had declined in value and Robert Walter was suffering "economic loss." (Record at 164-65 ¶¶ 25-27)

15. On March 18, 1997, Seaboard Surety Company delivered to Robert Walter the signature guaranteed stock power bearing his signature as evidence that he did in fact sell the stock to Worthen. (Record at 166 ¶ 28-29, 204)

16. Robert Walter acknowledged the signature as his own and on April 3, 1997, he released all claims to the stock. (Record at 166 ¶ 29, 204, 206)

17. On April 9, 1997, Seaboard faxed a letter to AST notifying the company that Robert Walter had released all claims to the stock. (Record at 166 ¶¶ 30-31, 206)

18. AST then sent a letter to Robert Walter, dated April 11, 1997 requesting that he

immediately return Certificate 1038 so that it could be canceled and the original Certificate 115 could be reinstated and the stock could be returned to Worthen. (Record at 166 ¶ 32, 208)

19. Robert Walter failed to return Certificate 1038 for cancellation and AST was forced to make additional request on June 9, 1997, July 22, 1997, August 21, 1997, September 9, 1997, and again on November 11, 1997. (Record at 167 ¶¶ 33-36)

20. Finally on December 12, 1997, Robert Walter's law firm returned Certificate 1038 for cancellation. (Record at 167-68 ¶ 39)

21. Mr. Worthen was notified on December 16, 1997 that Walter had released his claim to the stock. (Record at 315)

22. From September 3, 1996 until December 12, 1997 the stock continued to lose value and was almost worthless by the time Walter returned Certificate 1038 for cancellation. (Record at 5)

### **SUMMARY OF THE ARGUMENT**

The trial court erred in granting Walter's motion to dismiss. When considering a Rule 12(b)(6) motion to dismiss the court must accept the factual allegations of the complaint as true and may only grant the motion if it clearly appears the plaintiff can prove no set of facts in support of his claim. Because the factual allegations must be accepted as true the burden remains on the moving party to prove by uncontroverted evidence that the plaintiff is not entitled to the requested relief.

In both his original and amended complaints Worthen alleged facts sufficient to support his breach of contract claim. Worthen alleged the existence of a written contract between himself and Walter and that Walter breached the contract by failing to relinquish ownership of

the stock. He further alleged that Walter's failure to surrender the stock caused him economic loss by preventing him from selling the stock. And finally, he alleged that he was entitled to damages as he had already sold his other shares of Fintech stock and attempted to sell the disputed shares but could not due to Walter's breach.

With respect to the statute of limitations, Worthen alleged that he did not learn of the breach until at least March 23, 1995, and that prior to that time he did not know of the breach and had no reason to know of the breach. In addition, Worthen alleged that he exercised the voting privileges and other privileges inherent to the stock which also gave him no reason to suspect that Walter had claimed ownership. These allegations were also supported by letters and other documents filed with his complaints. In addition, Walter acknowledged the validity of Worthen's claim in a letter signed and dated April 7, 1997, which renewed the statute of limitations. Thus, Worthen had until April 7, 2001 to file on the basis of an oral contract and until April 7, 2003 to file on the basis of a written contract. Also, the discovery rule tolling the statute of limitations is applicable in these circumstances. Worthen's allegations are sufficient to make a prima facie showing that he was not in a position to reasonably discover the breach of contract until March 23, 1995, and thus, in accordance with the discovery rule, had until March 23, 1999 to file on the basis of an oral contract and until March 23, 2001 to file on the basis of a written contract.

In supporting his motion to dismiss Walter simply denied Worthen's factual allegations. Walter merely argued that a written contract did not exist because Worthen had failed to produce one. With respect to both causation and damages Walter argued that Worthen failed to allege these elements because he failed to offer proof that he had sold his other Fintech stock. Because

Worthen's factual allegations must be accepted as true he was under no obligation to provide conclusive proof of his allegations. To the contrary, the burden remained on Walter to disprove by uncontroverted facts that Worthen was not entitled to his requested relief. Walter's mere denials fall far short of that task.

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED IN RULING WORTHEN'S BREACH OF CONTRACT CLAIM WAS BARRED BY THE STATUTE OF LIMITATION**

Reviewing a motion to dismiss the appellate court accepts the allegations contained in the complaint as true and draws all reasonable inference in the light most favorable to the plaintiff. Mackey v. Cannon, 996 P.2d 1081, 1082 (Utah Ct. App. 2000). "[T]he trial court's ruling should only be affirmed if it clearly appears the complainant can prove no set of facts to support his or her claim." Id. at 1084. Moreover, Utah courts recognize that dismissal "is a severe measure and should only be granted by the trial court if it is clear that a party is not entitled to relief." Id. Whether to uphold a trial court's ruling to dismiss under Rule 12(b)(6) is a question of law and the Appellate Court reviews for correctness giving no particular deference to the trial court's ruling. Id.

#### **A. The trial court erred in failing to make a specific finding of fact with respect to when the statute of limitations period began to run on Worthen's breach of contract claim.**

In granting Walter's motion to dismiss the trial court failed to make a specific finding of fact as to when the statute of limitation period began to run on Worthen's claim. Instead, the trial court reached only the general conclusion that Worthen's claim was barred by the four year

statute of limitations period governing oral contracts as codified in Utah Code Annotated, section 78-12-25. (Record at 421 ¶ 3) Because the trial court must receive the factual allegations in the complaint as the only credible evidence before it, the trial court was required to point to a set of facts alleged by Worthen that supported its determination that the statute of limitations barred his claim. See, Arrow Industries, Inc., v. Zions National Bank, 767 P.2d 935, 936 (Utah 1988). The trial court failed to do so.

**B. Worthen's breach of contract claim was timely filed as his cause of action on the breach did not arise until March 23, 1995.**

Even if the Court concludes the contract between the parties was oral rather than written, Worthen's claim was not barred by the statute of limitations until March 23, 1999.<sup>1</sup> Worthen filed his complaint on February 16, 1999. As a general rule the statute of limitations does not begin to run until the last event necessary to complete the cause of action occurs. Sevy v. Security Title Company Of Southern Utah, 902 P.2d 629, 634 (Utah 1995). Accepting the allegations in Worthen's complaint as true, he did not suffer damages until March 23, 1995 when Walter's breach prevented him from claiming ownership of the stock. (Record at 191)

A cause of action for breach of contract does not arise until a plaintiff can show a contract, a breach, causation and damages from that breach. Mackey, 996 P.2d at 1085. Worthen's purchase of the stock from Walter was sufficient to form a contract. (Record at 4-6, 9-11, 14-18, 71) By claiming the certificate 115 as lost or stolen on September 4, 1992, Walter breached that contract. (Record at 162-65 ¶¶ 12-22) Walter's breach, however, did not cause damages to Worthen until approximately March 23, 1995, when Worthen filed his adverse claim

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<sup>1</sup>UTAH CODE ANN. § 78-12-25 (1996).

with Seaboard following his unsuccessful attempt to have the stock registered in his name. (Record at 3 ¶¶ 1-2, 5 ¶ 1, 165 ¶ 23, 191, 323 ¶ 4) Prior to March 23, 1995, none of Worthen's attempts to sell the stock were interfered with by Walter's breach. (Record at 3 ¶ 1, 220 ¶¶ 8-10, 331 ¶12) Therefore, Worthen suffered no economic loss from Walter's breach until March 23, 1995 when he gave the stock to his broker to sell and the broker learned of the certificate's cancellation. Since purchasing the stock in 1986, Worthen continued to exercise the other privileges of owning the stock, but in 1995, his right to sell the stock was interfered with by Walter's breach. Until March 23, 1995, Worthen could not claim an erosion of his rights as stockholder and therefore no claim arose which would have started the statute of limitations to run. This point is further illuminated by recognizing that had Walter reversed his action and released all claims to the stock before March 1995, he would have caused Worthen absolutely no harm. Instead, Worthen would have submitted certificate 115 through his stock broker, the stock would have been issued in his name and Worthen could have sold the stock on the market as he desired to. Consequently, having suffered no damages until March 23, 1995, Worthen's breach of contract claim did not arise until then and therefore his claim was not barred until March 23, 1999.

Arguing for dismissal on this point, Walter asserted only that he breached the contract on September 4, 1992 and that Worthen's claim was therefore barred either on September 4, 1996 as an oral contract or on September 4, 1998 as a written contract. (Record at 232-33) Walter made no effort to show that all the elements necessary to form a breach of contract claim had been met in 1992 or on any other date. (Record at 228-238) Such skeletal contradictory claims at a minimum demonstrated that issues of material facts still existed between the parties that

prohibited the trial court from dismissing Worthen's claim. Moreover, because the trial court was required to accept the allegations of Worthen's claim as true, the mere fact that Walter alleged facts different from Worthen's is insufficient to support its ruling to dismiss the breach of contract claim as barred by the statute of limitations.

**C. Worthen's breach of contract claim was timely filed as Walter's letter acknowledging Worthen's ownership of the Fintech stock renewed the statute of limitations.**

In dismissing Worthen's breach of contract claim as untimely the trial court's ruling should only be upheld if it is clear that his claim was barred by the statute of limitations. Mackey, 996 P.2d at 1084. Attached and incorporated in his original and amended complaints was a letter from Walter, dated April 7, 1997, that effectively renewed the statute of limitations period by acknowledgment. Utah Code Annotated, section 78-12-44 states:

In any case founded on contract, when any part of the principle or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period proscribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.

Under the statute, Worthen was required to show that Walter acknowledged in a signed writing Worthen's claim under the contract and that such acknowledgment was made before the statute of limitations period ended. State Bank of Southern Utah v. Troy Hygro Systems, Inc., 894 P.2d 1270, 1276 (Ut. App. 1995). Moreover, in expanding on section 78-12-44, the Utah Supreme Court has held that a letter is sufficient to form an acknowledgment if the defendant admits he is still liable on the claim and bound for its satisfaction. Beck v. Dutchman Coalition Mines Co., 269 P.2d 867, 869-870 (Utah 1954).

At the earliest Walter breached his contract with Worthen on August 12, 1992, when Walter filed his affidavit of loss with AST. (Record at 188-89) For the sake of argument only, if we assume this is the date Worthen's claim arose, Worthen would be required to file his complaint by August 12, 1998 or it would be barred by the statute of limitations governing written contracts. UTAH CODE ANN §78-12-23. On April 3, 1997, however, Walter signed and delivered a letter to Seaboard acknowledging Worthen's claim of ownership of the disputed stock. (Record at 166 ¶ 29, 204, 206) This acknowledgment was made a full fifteen (15) months before the statute of limitations period would have ended. Having fulfilled the requirements of the statute, Worthen's breach of contract claim was renewed by Walter's acknowledgment letter. Under section 78-12-44, the statute of limitations period was renewed and Worthen had until April 3, 2003 to file his claim.

**D. The statute of limitations governing Worthen's claim was tolled by the discovery rule.**

The trial court's decision to dismiss Worthen's claim can only be affirmed if there existed no set of facts that he could prove that entitled him to relief as a matter of law. Mackey, 996 P.2d at 1084. In granting Walter's motion to dismiss the trial court overlooked facts alleged by Worthen sufficient to invoke the discovery rule. The discovery rule is an exception to the general rule and tolls the statute of limitations under certain circumstances. Sevey, 902 P.2d 629, 634 (Ut. App. 1995).

In order to fall within the discovery rule, Worthen, as a threshold matter must show that he did not know, nor reasonably should have known of Walter's breach. Id. (See Record at 3 ¶ 3, 334 ¶ 2, 220 ¶ 10) The Utah Supreme Court has held "that the issue of when a claimant

discovered or should have discovered the facts forming the basis of a cause of action is a question of fact” and only becomes an issue of law when no issues of material fact exist. Id (See 3 ¶ 3, 220 ¶ 10, 334 ¶ 2) As noted above, Worthen and Walter made contradictory claims before the trial court as to when the facts forming the breach of contract claim actually occurred. Because there existed issues of material facts as to when the cause of action arose there also existed issues of material fact as to when Worthen discovered or should have discovered the cause of action. In the face of these disputed material facts the trial court erred in dismissing Worthen’s claim. Mackey, 996 P.2d at 1085 (holding factual questions not appropriately resolved in motion to dismiss.).

Next Worthen must show the circumstances surrounding his breach of contract claim falls within one of the categories triggering the rule. Sevy, 902 P.2d at 636. One such category governs “exceptional circumstances where the application of the general rule would be irrational or unjust.” Id. In making this determination the court utilizes a balancing test and considers whether the hardship imposed on the claimant by the statute of limitations against the prejudice to the defendant resulting from the passage of time. Id. Factors considered include whether the problems caused to the defendant by the passage of time are greater than the plaintiff’s, whether the defendant preformed a technical service for the plaintiff, and whether the claim has aged to the point that witnesses can not be located, evidence cannot be found, and witnesses cannot remember basic events. Id.

In this instance while it is clear that Walter did not provide a technical service for Worthen, whether the problems caused to Worthen by the passage of time are greater to him than to Walter is an issue of fact. Because this issue of fact remains unresolved the trial court erred in

failing to recognize the discovery rule and in dismissing Worthen's claim. Mackey, 996 P.2d at 1085. The same is true with respect to the third factor. Certainly there are facts that weigh in Worthen's favor. Much of the evidence in this matter is already preserved by the exchange of letters between the parties as well as other documents filed with the court. Additional evidence may be obtained from the S.E.C.'s files and market reports. With respect to the contract and whether it is oral or written, permitting the parties to enter into formal discovery would likely resolve that issue. Because issues of fact remain in dispute as to whether the discovery rule should have been applied, the trial court erred in dismissing Worthen's claim as barred by the statute of limitations. Id.

**E. The sale of stock was facilitated through a written purchase agreement between Worthen and Walter.**

Considering a Rule 12(b)(6) motion to dismiss the trial court must accept the factual allegations of the complaint as true and draw all reasonable inferences from those facts in favor of the plaintiff. Id. at 1084. In both his original and amended complaints, Worthen alleged facts and provided incorporated documentation showing he and Walter entered into a written purchase agreement at the time Worthen purchased the 3,100,000 shares of stock from Walter. (Record at 2, 4, 87 ¶ 3, 161 ¶ 1, 225 ¶ 5, 334 ¶ 2) Accepting this allegation as true the trial court erred in concluding the contract between the parties was oral and further erred in dismissing Worthen's claim as barred by the four year statute of limitations governing oral contracts. (Record at 421)

Additionally, when considering a motion to dismiss the trial court is required to draw all reasonable inference in favor of the plaintiff. Id. Worthen in both his original and amended complaints alleged additional facts that infer the existence of a written agreement. First, there is

Walter's letter dated September 4, 1996. (Record at 193) Second, Fintech filed an amended Form 8-K with the SEC detailing the sale of stock to Worthen. (Record at 15) Repudiating the contract, Walter unbelievably argued that he could not recall selling Worthen 3,100,000 shares of Fintech stock. (Record at 193) When confronted with the Form 8-K, Walter responded in his letter of September 4, 1996, that "[i]f, in fact, the filing with the Securities and Exchange Commission was true and accurate, I would expect that Mr. Worthen has, at a minimum, a signature guaranteed stock power from me and a stock purchase agreement." (Record at 193) This letter is important for two reasons: First, it serves as an admission that had Walter sold Worthen the stock, he would have done so by a written purchase agreement. Second, Worthen did in fact provide Walter with a "signature guaranteed stock power" bearing Walter's signature. (Record at 204) Only after receiving a copy of the signature guarantee did Walter admit to selling Worthen the stock. (Record at 204, 227 ¶ 13) Together, Walter's letter of September 4, 1996, and Worthen's ability to produce the requested signature guarantee, support a reasonable inference that the written agreement did in fact exist.

The amended Form 8-K filed with the SEC further supports the existence of the written purchase agreement. Again, when confronted with the Form 8-K, Walter asserted that if the form was "true and correct" Worthen would be able to produce the signature guarantee. (Record at 193) Worthen did so and Walter acknowledged the same. This correct Form 8-K filed with the SEC contained the particulars of the parties transaction and identified Worthen as the purchaser of 17,600,000 shares of Fintech stock, the purchase price of \$50,000.00 and Walter as one of the shareholders selling stock to Worthen. (Record at 15) In addition, by filing the Form 8-K, the SEC was notified that Worthen's purchase of the stock made him the controlling shareholder of

the company. (Record at 15) Given the details expressed in the Form 8-K, that the sale made Worthen the majority shareholder in Fintech, and the total number of shares sold, it seems unlikely that the parties would not reduce their intentions, rights and obligations under that transaction into a written contract.

Taking into account Worthen's allegation that a written contract existed, the filing of the Form 8-K and Walter's letter of September 4, 1996, an inference is created that a written contract did exist. In challenging Worthen's claim, Walter asserted only that the statute of limitations governing oral contracts barred the claim. (Record at 232-33) Walter did not claim that no written contract existed. Any assertion by Walter that a written agreement did not exist would be disingenuous for several reasons: First, under a Rule 12(b)(6) motion to dismiss Worthen was not required to produce the written contract because the trial court was required to accept his allegation as true. Mackey, 996 P.2d at 1084; Hill v. Grand Cent., Inc., 477 P.2d 150 (Utah 1970) (holding on motion to dismiss trial court acted improperly by demanding plaintiff produce evidence to support malice claim). Second, Walter knew that during the entire proceedings before the trial court, Worthen was incarcerated and did not have full access to his personal records. (Record at 152-54) Third, the parties had not yet entered into formal discovery and Worthen had not had the opportunity to prove the existence of the purchase agreement by deposition, interrogatories or requests for production of documents. (Record at 322)

In short, Walter's denial of a written contract only creates a disputed issue of material fact and does not in and of itself show that Worthen was not entitled to relief as a matter of law. Because Worthen alleged a written contract in his original and amended complaint, as well as other facts, the trial court was required to draw the inference that a written agreement existed

because the trial court was required to accept the allegation in the complaint as true. Mackey, 996 P.2d at 1084. Consequently, the trial court erred in ruling the contract between the parties was oral and Worthen's breach of contract claim was barred by the four year statute of limitations. Id.

## **II WORTHEN WAS ENTITLED TO DAMAGES ON HIS BREACH OF CONTRACT CLAIM**

The trial court erred in concluding that Worthen failed to show he was entitled to damages on his breach of contract claim. (Record at 228-29, 420 ¶ 2) This decision rested solely on the inference that even if Walter honored the contract Worthen was just going to lose his money anyway. The trial court improperly drew this inference from Walter's allegations that Worthen owned other shares of Fintech stock and that Worthen failed to sell those additional shares. (Record at 228-29, 420 ¶ 2) This was err for several reasons: First, the trial court was required to accept the factual allegations of Worthen's complaint as true. Mackey, 996 P.2d at 1084. Second only in the face of undisputed facts would it have been proper for the trial court to conclude that Worthen was not entitled to compensatory damages. Arrow Industries, Inc. v. Zions National Bank, 767 P.2d 935, 937 (Utah 1988). Third, even if Worthen was not entitled to compensatory damages, he would still be entitled to nominal damages.

### **A. Worthen alleged facts in both his original and amended complaints that entitled him to compensatory damages.**

The trial court erred in dismissing Worthen's claim by concluding he was not entitled to compensatory damages. (Record at 420 ¶ 2) Considering Walter's motion to dismiss, the trial court was required to accept Worthen's factual allegations concerning his right to recover compensatory damages as true. Mackey, 996 P.2d at 1084. Moreover, in considering Walter's

Rule 12 (b)(6) motion it was improper for the trial court to require him to produce evidence in support of his claim for damages. Hill, 477 P.2d 150 (Utah 1970).

In his original complaint, incorporated in his amended complaint, Worthen asserted that he deposited his shares of Fintech stock with a licensed broker in order to sell them on the market. (Record at 2 ¶ 3) He further asserted that Certificate 115 was rejected as a result of Walter reporting it lost and having Certificate 1038 issued in his name. (Record at 2 ¶ 3, 3 ¶ 1, 6 ¶ 4, 172 ¶ 67, 68, 220 ¶ 8) And finally, he asserted that the Fintech stock illegally possessed by Walter reached a high value in excess of \$75,000 after Walter's breach but that it was all but worthless by the time Walter returned Certificate 1038 for cancellation. (Record at 5 ¶ 3, 170 ¶ 2, 195, 327 ¶ 5) Accepting these allegations as true it is clear that Worthen is entitled to compensatory damages in the amount of the stock's high value minus its current value. Bjork v. April Industries, Inc., 560 P.2d 315, 317 (Utah 1977) (discussing proper formula for calculating damages respecting corporate stock). Having alleged facts sufficient to show his right to compensatory damages the court erred in dismissing Worthen's claim on this issue.

**B. It was error for the trial court to dismiss Worthen's claim in the face of disputed facts concerning his right to damages.**

The trial court's decision to dismiss Worthen's claim can only be affirmed if there were no issues of material fact in dispute. Mackey, 996 P.2d at 1085. In challenging Worthen's claim for compensatory damages, Walter only asserted that Worthen had failed to sell his other shares of Fintech stock and so could not show that his breach caused Worthen any economic loss. (Record at 228-29) Worthen on the other hand, asserted in his original complaint, which was incorporated in his amended complaint, that he was attempting to sell the Fintech stock

embodied in Certificate 115 when he discovered Walter's breach. (Record at 2 ¶ 3) And further asserted in his memorandum in opposition of Walter's motion to dismiss that he had in fact sold all of his shares of Fintech stock except for those shares illegally retained by Walter. (Record at 323 ¶ 4) Worthen was not required, in opposing the motion to dismiss, to produce evidence that he had in fact sold all his other shares of Fintech stock. Hill, 477 P.2d 150 (Utah 1952). To the contrary, the trial court was required to accept the allegations as true. Makey, 996 P.2d 1084. Thus, the assertion that Worthen failed to sell his other shares demonstrates only that issues of material fact existed that prohibited the trial court from granting the motion to dismiss. Id at 1085.

**C. Worthen is entitled to any lost profit caused by Walter's breach.**

Worthen is entitled to be placed in the same position that he would have been had the Walter performed as obligated under the contract. Clayton v. Crossroads Equipment Company, 655 P.2d 1125, 1130 (Utah 1982). The value of the Fintech stock appreciated considerably after Worthen purchased it, reaching \$15 per share at one point. (Record at 195) By interfering with Worthen's ownership of the stock and having it reissued in his name, Walter prevented Worthen from selling the stock at the higher price and enjoying the profit from his investment. Worthen is therefore entitled to recover that lost profit from Walter. Id; Bjork, 560 P.2d at 317.

In granting the motion to dismiss, the trial court concluded that Worthen failed to show his right to that lost profit because he failed to submit evidence that he sold other shares of Fintech stock that he owned. (Record at 420 ¶ 2) On a motion to dismiss the trial court was required to accept the allegations of the complaint as true and the burden is on the party moving for dismissal to show that on its face the complaint fails to state a claim upon which relief can be

granted. Mackey, 996 P.2d at 1084. In this instance the Walter simply alleged in his motion to dismiss, without any supporting documentation, that Worthen did not sell any of his other shares of Fintech stock. (Record at 350 ¶ 2) In his first amended complaint and in his memorandum in opposition, Worthen specifically alleged that he had in fact sold his other shares of Fintech stock and the only stock remaining to be sold were the shares represented by certificate 115 that Walter illegally retained. (Record at 2 ¶ 3, 323 ¶ 4) Accepting his factual allegations as true, a reasonable inference must be drawn that Worthen would have sold the shares of stock illegally retained by Walter if they had been in his possession just as he had sold his other shares. Furthermore, it was not even necessary for Worthen to allege in his complaint that he sold all the other shares he purchased under the agreement.

**D. Plaintiff is entitled to restitution damages.**

Worthen is entitled to restitution damages so as to avoid unjust enrichment to Walter. Unjust enrichment of a person occurs when he has retained money or benefits which in justice and equity belong to another. Baugh v. Darley, 184 P.2d 335, 337 (Utah 1947). Restitution damages require the breaching party to pay for any benefits received under the contract by the non-breaching party's performance. In this instance, Worthen performed his obligations under the contract and paid \$50,000 for the Fintech shares he purchased from Walter. (Record at 5 ¶ 1, 6 ¶ 3) Walter on the other hand repudiated the contract, had those same shares reissued in his name and refused to return them to Worthen until they had become almost worthless. (Record at 4-6, 162-68, 180-81, 193, 196-97, 208) The practical effect is that Worthen received nothing for the money he spent to purchase the stock. Worthen is therefore entitled to at least the return of the money he paid Walter for the 3.1 million shares of stock.

**E. Worthen was entitled to nominal damages.**

Historically, the law has presumed damages in favor of a party who's legal rights have been violated. Bigler v. Fryer, 25 P.2d 598, 601 (Utah 1933); Foote v. Clark, 962 P.2d 52, 58 (Utah 1998). So much so, that even where an injured party can not prove his right to compensatory damages the court will nonetheless award nominal damages. Foote, 962 P.2d 52, 58 (Utah 1998). For the purposes of a Rule 12(b)(6) motion, by showing that Walter breached the contract Worthen established his right to recover for that breach even if the recovery was only for nominal damages. The issue of whether Worthen sold his other Fintech stock does not effect the validity of the Worthen's breach of contract claim but rather goes to the calculation of actual damages. See Bjork, 560 P.2d at 317. In short, Walter violated Worthen's legal rights under the contract and consistent with the doctrine of nominal damages, Worthen has the right to seek redress in our courts. Foote, 962 P.2d at 58. Granting Walter's motion to dismiss on the basis that Worthen could not recover actual damages was clearly erroneous.

Moreover, had Worthen enjoyed the benefits of formal discovery he may have proven conduct by Walter sufficiently malicious to recover punitive damages. It is well established that punitive damages may be awarded in contract law if the breaching party's conduct was willful or malicious. Nash v. Craigco, Inc., 585 P.2d 775, 776 (Utah 1978). Furthermore, the award of punitive damages is unrelated to the amount of actual damages a party might recover. Id at 778. Accordingly, the Plaintiff may have recovered punitive damages from Walter even if he was only entitled to nominal damages for the breach.

Certainly, Worthen alleged facts that supported malicious conduct by Walter. First it seems wholly incredulous that Walter sold all 3.1 million shares of his Fintech stock to Worthen

and then simply forgot that he had done so. (Record at 193) Second, Walter demanded the return of the 3.1 million shares despite having no reasonable basis to claim ownership. (Record at 164-65 ¶¶ 24-27, 195-96) He even went so far as to threaten to file suit against Worthen to recover the “economic loss which I have experienced and am continuing to incur.” (Record at 164 ¶ 26-27, 195-96) Third, presented with proper proof of ownership, Walter failed to return the replacement certificate. (Record at 166 ¶ 29) On April 11, 1997, immediately after Worthen presented the signature stock guarantee, AST requested that Walter return the replacement certificate so that the 7,750 shares could be reissued in Worthen’s name. (Record at 166 ¶ 32) Despite repeated request to do so, Walter remained in possession of the replacement certificate until December 12, 1997. (Record at 167 ¶ 33-39) A full seven months after he was requested to return the certificate and during which time the Fintech stock continued to lose value until the point it became almost worthless. (Record at 5 ¶ 3)

With the assistance of formal discovery Worthen might have expanded on these troublesome facts and established that Walter acted with sufficient maliciousness to warrant punitive damages. In simply concluding that Worthen failed to show entitlement to compensatory damages, the trial court ignored his right to recover nominal damages as well as the potential that he might recover punitive damages.

**III. WORTHEN WAS DENIED NOTICE THAT WALTER’S MOTION TO DISMISS WAS GOING TO BE DECIDED WITHOUT ORAL ARGUMENT AS THE RULING WAS MADE WITHOUT A NOTICE TO SUBMIT FOR DECISION AND WALTER HAD NOT WITHDRAWN HIS REQUEST FOR ORAL ARGUMENT ON THE MOTION**

Walter’s motion to dismiss was decided in violation of the Rules of Judicial

Administration Rule 4-501(1)(D). That rule states:

Notice to submit for decision. Upon the expiration of the five-day period to file a reply memorandum, either party may notify the clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

Walter's motion to dismiss was filed on August 31, 1999. (Record at 217-21) A request for oral argument was filed on September 1, 1999. (Record at 222-23) Worthen filed his opposition to the motion to dismiss on September 28, 1999. (Record at 322-44) On October 4, 1999, Walter filed a reply memorandum in further support of the motion to dismiss. (Record at 348-57) Defendants Seaboard and American each filed a motion to dismiss and in the alternative for summary judgment, and each filed notices to submit for decision on those motions. (Record at 82-108, 242-64, 358-60, 383-85) However, as to Walter's motion to dismiss, no notice to submit for decision was filed and Walter did not withdraw the request for oral argument. As such, Worthen was not put on notice that the motion would be considered by the trial court before it was decided. Up until the trial court issued its 4-501 ruling on October 26, 1999, Worthen was in a position where he could have provided further support for his position at oral argument. See U.J.A. RULE 4-501(3) (hearings).

A perusal of the docket shows notices to submit for decision being filed on October 6 and 7, 1999, both of which were filed by Seaboard and American in relation to their motions to dismiss and in the alternative for summary judgment. Walter's motion to dismiss was not, however, ever noticed up for decision and Worthen was led to believe by Walter's request for oral argument that the motion would be set on the trial court's calender for oral argument.

## CONCLUSION

For the reasons stated above Worthen respectfully requests this Court to reverse the trial court's decision granting Walter's motion to dismiss Worthen's breach of contract claims under Rule 12(b)(6) of the Utah Rules of Civil Procedure and remand the case back to the trial court.

Worthen further seeks all other relief the Court deems just and appropriate.

Respectfully submitted this 30 day of June, 2000.

A handwritten signature in black ink, appearing to read 'Darwin Overson', written over a horizontal line.

Darwin Overson  
Attorney for Appellant, John E. Worthen

**ADDENDUM**

ORDER GRANTING WALTER'S & BERLINGER, ZISSLER, WALTER &  
GALLEGOS' RULE 9(b) & 12(b)(6) MOTION TO DISMISS PLAINTIFF  
WORTHEN'S FIRST AMENDED COMPLAINT WITH PREJUDICE AND  
DENYING MOTION TO DISQUALIFY

UTAH CODE ANN. § 78-12-23

UTAH CODE ANN. § 78-12-25

UTAH CODE ANN. § 78-12-44

UTAH JUDICIAL ADMINISTRATION RULE 4-501

THIRD DISTRICT COURT - SLC COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

JOHN E WORTHEN,	:	
Plaintiff,	:	4-501 RULING
	:	
vs.	:	
	:	Case No: 990901894
	:	
ROBERT W WALTER,	:	Judge: WILKINSON, HOMER
Defendant.	:	Date: 10/26/99

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Clerk: deborahw

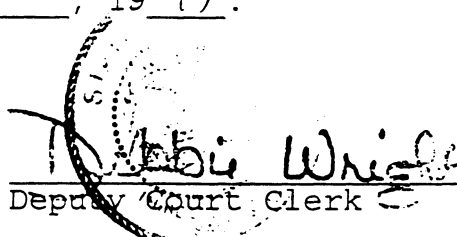
(1) Defendant Seaboard Surety Company's motion to quash or in the alternative to dismiss is granted as to the quashing of the summons. Service of process must comply with Rule 4 of the Utah Rules of Civil Procedure. (2) Defendant American Sureties Transfer and Trust Inc.'s motion to dismiss or alternativley, motion for summary judgment is granted. (3) Defendant Robert W. Walter and Berliner Zissler Walter & Gallegos rule 9(b) and 12(b)(c) motion to dismiss plaintiff Worthen's first amended complaint is granted. (4) Plaintiff John E. Worthen's motion to disqualify attorney of record (Mark A. Larsen of Larsen & Mooney law firm) is denied.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 990901894 by the method and on the date specified.

METHOD	NAME
Mail	JOHN E WORTHEN PLAINTIFF 3600 GUARD ROAD LOMPAC, CA 93436
Mail	LAURIE S HART ATTORNEY DEF GATEWAY TOWER EAST, SUITE 900 10 EAST SOUTH TEMPLE SALT LAKE CITY, UT 841330000
Mail	MARK A. LARSEN ATTORNEY DEF 50 West Broadway Suite # 100 SALT LAKE CITY UT 84101

Dated this 26<sup>th</sup> day of October, 19 99.

  
Deputy Court Clerk

**FILED DISTRICT COURT**  
Third Judicial District

NOV 12 1999

SALT LAKE COUNTY

By

Deputy Clerk

MARK A. LARSEN (3727)  
LARSEN & MOONEY LAW  
50 West Broadway, Suite 100  
Salt Lake City, Utah 84101  
Telephone: (801) 364-6500

Attorney for Defendants Robert W. Walter  
and Berliner Zissler Walter & Gallegos

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JOHN E. WORTHEN,

Plaintiff,

v.

ROBERT W. WALTER, SEABOARD  
SURETY COMPANY, AMERICAN  
SURETIES TRANSFER & TRUST INC. &  
BERLINER ZISSLER WALTER &  
GALLEGOS.

Defendants.

**ORDER GRANTING WALTER's &  
BERLINER ZISSLER WALTER &  
GALLEGOS' RULE 9(b) & 12(b)(6)  
MOTION TO DISMISS PLAINTIFF  
WORTHEN's FIRST AMENDED  
COMPLAINT WITH PREJUDICE and  
DENYING MOTION TO DISQUALIFY**

Civil No. 990901894CN

Judge Homer F. Wilkinson

Pursuant to Rule 4-501 of the Utah Code of Judicial Administration, Defendant Robert W. Walter's and Berliner Zissler Walter & Gallegos' Rule 9(b) & 12(b)(6) Motion to Dismiss Plaintiff Worthen's First Amended Complaint and Worthen's Motion to Disqualify Attorney of Record were submitted to Judge Homer F. Wilkinson for decision. Robert W. Walter ("Mr. Walter") and Berliner Zissler Walter & Gallegos (the "Firm") waived their

request for oral argument. Based upon the Motions, Memoranda and Affidavits in the file, and good cause appearing, it is ORDERED as follows:

1. Robert W. Walter's and Berliner Zissler Walter & Gallegos' Rule 9(b) & 12(b)(6) Motion to Dismiss Plaintiff Worthen's First Amended Complaint is granted. Worthen's First Amended Complaint is dismissed with prejudice.

2. In the Amended Complaint, Plaintiff John E. Worthen ("Mr. Worthen") asserts the following claims against Defendants Mr. Walter and the Firm each of which fails to state a claim upon which relief can be granted for the reasons indicated:

- (a) Mr. Worthen asserts two causes of action against Defendants Mr. Walter and the Firm: (1) breach of contract; and (2) fraud. Each of these causes of action require a showing of causation and damages, and Mr. Worthen has failed to demonstrate how Mr. Walter and the Firm caused any loss to him. Mr. Worthen failed to allege that if he had possession of the stock in question he would have sold it. Mr. Worthen also failed to allege that he sold any Fintech stock during this time, considering that he owned additional Fintech stock which was available. Rather, Mr. Worthen has suffered no damage, and therefore, his claims against Mr. Walter and the Firm fails to state a claim upon which relief can be granted.
- (b) Mr. Worthen's First Amended Complaint also alleges civil conspiracy against

both Mr. Walter and the Firm. To prove civil conspiracy, five elements must be shown: "(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof." *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 790 (Utah Ct. App. 1987). Mr. Worthen's First Amended Complaint fails to allege any of the requisite elements of civil conspiracy against Mr. Walter or the Firm, and therefore, the Amended Complaint fails to state a claim upon which relief can be granted.

- (c) Further, Mr. Worthen's claims against the Firm fail under the intracorporate conspiracy doctrine. Under the intracorporate conspiracy doctrine, "a corporation cannot conspire with itself through its agents when the acts of the agents are within the scope of their employment." *Larson by Larson v. Miller*, 76 F.3d 1446, 1456 n.6 (8th Cir. 1996).

3. The applicable four-year statute of limitations contained in Utah Code Ann. § 78-12-25 governing oral contract claims bars Mr. Worthen's claims against Mr. Walter and the Firm.

4. The applicable three-year statute of limitations contained in Utah Code Ann. § 78-12-26 governing claims based upon either fraud or mistake bars Mr. Worthen's claims

against Mr. Walter and the Firm. At the outset, Mr. Worthen discovered the facts he alleges constituted the fraud or mistake on March 23, 1995.

5. The applicable three-year statute of limitations contained in Utah Code Ann. § 78-12-27 governing claims against stockholders of a corporation bars Mr. Worthen's claims against Mr. Walter. At the outset, Mr. Worthen discovered the facts he alleges against Mr. Walter as a stockholder on March 23, 1995.

6. Mr. Worthen's First Amended Complaint contains general, conclusory allegations and does not satisfy the pleading with particularity requirements of U.R.C.P. 9(b).

7. Mr. Worthen's Motion to Disqualify Mark A. Larsen and Larsen & Mooney Law is denied. Mr. Worthen's Motion is without merit for numerous reasons:

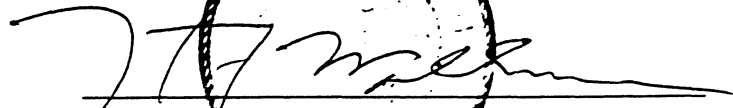
- (a) The prior cases and the present litigation are not "substantially factually related";
- (b) The mere fact that Mr. Barber rents office space at Larsen & Mooney Law does not serve as a basis for disqualifying Mr. Larsen from representing Mr. Walter and the Firm in the present litigation;
- (c) Mr. Worthen never sought representation from, nor paid a retainer fee to, Larsen & Mooney Law or Mooney Law Firm, P.C. in the present litigation;
- (d) Larsen & Mooney Law does not currently possess, nor has it ever

possessed, privileged information and confidential documents pertaining in any way to the present case; and

- (e) Mr. Worthen's motion is untimely considering he has been aware of this alleged conflict of interest for over six months.

Dated: November 12 1999.

BY THE COURT:



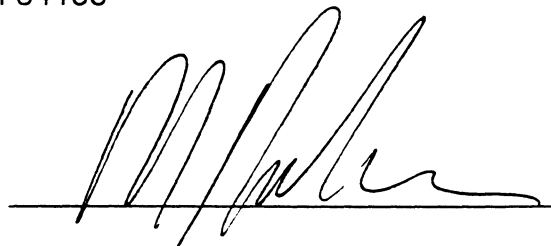
Homer F. Wilkinson  
Third Judicial District Court Judge

**CERTIFICATE OF SERVICE**

I hereby certify that I am a member of and/or employed by the law firm of Larsen & Mooney Law, and that in said capacity caused a true and correct copy of the preceding **ORDER GRANTING WALTER's & BERLINER ZISSLER WALTER & GALLEGOS' RULE 9(b) & 12(b)(6) MOTION TO DISMISS PLAINTIFF WORTHEN's FIRST AMENDED COMPLAINT WITH PREJUDICE and DENYING MOTION TO DISQUALIFY** to be served by U.S. Mail, postage prepaid, to the following on October 28, 1999:

John E. Worthen  
Fed. Reg No. 02454-081  
FCI Lompoc  
3600 Guard Road  
Lompac, California 93436

Laurie S. Hart  
Callister, Nebeker & McCullough  
10 East South Temple, #900  
Salt Lake City, Utah 84133

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

UTAH CODE, 1953  
TITLE 78. JUDICIAL CODE  
PART II. Actions, Venue, Limitation of Actions  
CHAPTER 12. LIMITATION OF ACTIONS  
ARTICLE 2. OTHER THAN REAL PROPERTY  
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reserved. Current through End of 1999 General Session

78-12-23 Within six years --Mesne profits of real property --Instrument in writing.

An action may be brought within six years:

- (1) for the mesne profits of real property;
- (2) upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

History: L. 1951, ch. 58, s 1; C. 1943, Supp., 104-12-23; L. 1984, ch. 16, s 2; 1996, ch. 79, s 109; 1996, ch. 210, s 5.

UTAH CODE, 1953  
TITLE 78. JUDICIAL CODE  
PART II. Actions, Venue, Limitation of Actions  
CHAPTER 12. LIMITATION OF ACTIONS  
ARTICLE 2. OTHER THAN REAL PROPERTY  
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78-12-25 Within four years.

An action may be brought within four years:

(1) upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received;

(2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1);

(3) for relief not otherwise provided for by law.

History: L. 1951, ch. 58, s 1; C. 1943, Supp., 104-12-25; L. 1988, ch. 59, s 14; 1996, ch. 79, s 110.

UTAH CODE, 1953  
TITLE 78. JUDICIAL CODE  
PART II. Actions, Venue, Limitation of Actions  
CHAPTER 12. LIMITATION OF ACTIONS  
ARTICLE 3. MISCELLANEOUS PROVISIONS  
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**78-12-44** Effect of payment, acknowledgment, or promise to pay.

In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.

History: L. 1951, ch. 58, s 1; C. 1943, Supp., 104-12-44.

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

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Rule 4-501. Motions.

Intent:

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all trial courts of record except proceedings before the court commissioners and small claims cases. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) Filing and service of motions and memoranda.

(A) Motion and supporting memoranda. All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(B) Memorandum in opposition to motion. The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(D) of this rule.

(C) Reply memorandum. The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(D) Notice to submit for decision. Upon the expiration of the five-day period to file a reply memorandum, either party may notify the clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) Motions for summary judgment.

(A) Memorandum in support of a motion. The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(B) Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) Hearings.

(A) A decision on a motion shall be rendered without a hearing unless ordered by the court, or requested by the parties as provided in paragraphs (3)(B) or (4) below.

(B) In cases where the granting of a motion would dispose of the action or any claim in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(C) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(D) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(E) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two

working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(F) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(G) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the court.

(H) If a hearing has been requested and the non-moving party fails to file a memorandum in opposition, the moving party may withdraw the request or the court on its own motion may strike the request and decide the motion without oral argument.

(4) Expedited dispositions. Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) Telephone conference. The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

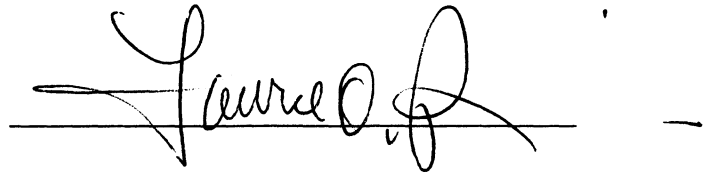
(Amended effective January 15, 1990; April 15, 1991; November 1, 1996; November 1, 1998; April 1, 1999.)

CERTIFICATE OF SERVICE OF BRIEF

I do hereby certify that I hand delivered two copies of the foregoing Brief of Appellant to the following:

Mark A. Larson  
Larson & Mooney Law  
50 West Broadway, Suite 100  
Salt Lake City, Utah 84101

Dated this 30<sup>th</sup> day of June, 2000.

A handwritten signature in black ink, appearing to read "Laurence D. [unclear]", is written over a single horizontal line. The signature is stylized with large, flowing loops.