

1999

## Worthen v. Walter : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JOHN E. WORTHEN,

Plaintiff/Appellant,

v.

ROBERT W. WALTER, SEABOARD  
SURETY COMPANY, AMERICAN  
SECURITIES TRANSFER & TRUST  
INC. & BERLINER ZISSER WALTER  
& GALLEGOS.

Defendants/Appellees.

Appellate Court No. 991061-CA

Trial Court No. 990901894CN

Priority No. 15

---

BRIEF OF APPELLEES ROBERT W. WALTER  
& BERLINER, ZISSER, WALTER & GALLEGOS

---

On Appeal from the Judgment of  
the Third Judicial District Court  
for Salt Lake County, State of Utah  
Honorable Homer R. Wilkinson, District Judge

---

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Utah Court of Appeals  
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## JURISDICTION

Pursuant to Utah Code Ann. § 78-2a-3(2)(j), the Utah Court of Appeals has appellate jurisdiction in this matter. The Order appealed from is a final judgment which disposed of this case.

Appellant John E. Worthen ("Mr. Worthen") appeals the decision of the Honorable Homer R. Wilkinson dismissing Mr. Worthen's claims against Appellees Robert W. Walter ("Mr. Walter") and Berliner, Zisser, Walter & Gallegos (the "Firm") with prejudice.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARDS OF REVIEW

Mr. Worthen included in his statement of the issues presented on appeal issues that were not addressed by the trial court and were raised for the first time on appeal. The longstanding rule is that appellate courts will not consider issues raised for the first time on appeal. *Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996) ("Issues not raised at trial cannot be argued for the first time on appeal. This rule applies to all claims, including constitutional questions, unless the petitioner demonstrates that 'plain error' occurred or 'exceptional circumstances' exist . . . .") (*quoting State v. Lopez*, 886 P.2d 1105, 1113 (Utah 1994))).

Mr. Worthen failed to comply with the requirements of Rule 24(5) of the Utah Rules of Appellate Procedure considering his statement of the issues presented for review failed to include a "citation to the record showing that the issue was

preserved in the trial court” or “a statement of grounds for seeking review of an issue not preserved in the trial court.” U.R.A.P. 24(5)(A) &(B) (1999). As a result, Mr. Worthen neither demonstrated that plain error occurred, nor that exceptional circumstances exist that warrant this Court to review issues raised for the first time on appeal.

Mr. Worthen’s opening brief raises the following issues for the first time on appeal:

- Did the trial court err by failing to recognize that Appellant’s claim did not arise until March 23, 1995?
- 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?
- Did the trial court err by failing to recognize that the statute of limitations was tolled by the discovery rule?
- 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?
- 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?

- Did the trial court err by not recognizing that upon proving the allegations made in Appellant's amended complaint, Appellant would be entitled to nominal damages?
- Was Appellant denied adequate notice that the Appellee's motion to dismiss was going to be decided without oral argument 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?

Consequently, Appellees Robert W. Walter ("Mr. Walter") and Berliner, Zisser, Walter & Gallegos (the "Firm") restate the issues presented for review in conformance with the issues addressed by the trial court.

### **Issue #1**

Was the trial court correct in ruling that Mr. Worthen's contract claims against Mr. Walter and the Firm were barred by the four-year statute of limitation governing oral contract claims considering that the last event necessary to complete Mr. Worthen's breach of contract claim against Mr. Walter and the Firm occurred on September 9, 1992, when AST issued Mr. Walter the Replacement Certificate?

**Issue Preserved for Appeal:** On December 9, 1999, Mr. Worthen filed a Notice of Appeal (R. 443-44) specifically preserving this issue for review on appeal.

**Standard of Review:** The application of a statute of limitation presents a question of law, which is reviewed for correctness. *Dow v. Gilroy*, 910 P.2d 1249,

1250 (Utah Ct. App. 1996); see also *United Park City Mines Co. v. Greater Park City Company*, 870 P.2d 880, 885 (Utah 1993); *Gramlich v. Munsey*, 838 P.2d 1131, 1132 (Utah 1992).

### **Issue #2**

Was the trial court correct in ruling that Mr. Worthen's breach of contract claim against Mr. Walter and the Firm failed to state a claim upon which relief could be granted given that Mr. Worthen's First Amended Complaint failed to sufficiently allege and demonstrate that Mr. Walter or the Firm caused him any damage?

**Issue Preserved for Appeal:** On December 9, 1999, Mr. Worthen filed a Notice of Appeal (R. 443-44) specifically preserving this issue for review on appeal.

**Standard of Review:** A 12(b)(6) dismissal presents a question of law, which is reviewed for correctness, granting no deference to the trial court. *Larson v. Park City Mun. Corp.*, 955 P.2d 343, 345 (Utah 1998); see also *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991). The appellate court accepts the factual allegations in the complaint as true and considers the facts and all reasonable inferences to be drawn from them in a light most favorable to the losing party below. *Id.*; see also *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218, 1219 (Utah 1996).

### **DETERMINATIVE STATUTES AND RULES**

Section 78-12-25 of the Utah Code provides:

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;

Utah Code Ann. § 78-12-25 (1996)(emphasis added).

Section 78-12-23 of the Utah Code provides:

An action may be brought within six years:

- (2) **upon any contract**, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

Utah Code Ann. § 78-12-23 (1996)(Emphasis added).

Rule 12(b) of the Utah Rules of Civil Procedure provides:

Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) ***failure to state a claim upon which relief can be granted***, . . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

U.R.C.P. 12(b)(1999)(emphasis added).

## STATEMENT OF THE CASE

### **A. Nature of the Case**

This is an appeal from the Order granting Mr. Walter and the Firm's Rule 9(b) & 12(b)(6) Motion to Dismiss Mr. Worthen's First Amended Complaint with prejudice and denying Mr. Worthen's Motion to Disqualify.

The basis of this dispute stems from Mr. Worthen's purchase of 17,600,000 shares of Fintech, Inc. ("Fintech") stock from a group of controlling shareholders on March 12, 1986. Mr. Walter was among the group of controlling shareholders who sold Fintech stock to Mr. Worthen. Mr. Walter, individually, sold Mr. Worthen 3,100,000 shares (7,750 post-split shares) of Fintech's common stock.

Subsequent to the sale of stock to Mr. Worthen, Fintech changed its name to Summa Metals Company causing Mr. Walter to be confused about the stock transfer. As a result of this confusion, in July of 1992, more than six years after the sale of the stock to Mr. Worthen, Mr. Walter reported a lost certificate because he believed he owned the stock and because Mr. Worthen had failed to transfer the Fintech stock into his own name. Consequently, a stop transfer order was placed on the Certificate.

Mr. Worthen alleged three claims against Mr. Walter and the Firm in his First Amended Complaint: (1) breach of contract; (2) civil conspiracy; and (3) fraud. Mr. Worthen also unsuccessfully moved the trial court to disqualify Mark A. Larsen ("Mr. Larsen") as Mr. Walter and the Firm's counsel.

## **B. Course of Proceedings**

On February 16, 1999, Mr. Worthen pro se filed his Complaint against Mr. Walter, Seaboard Surety Company ("Seaboard"), and American Securities Transfer & Trust, Inc. ("AST"), alleging conspiracy, breach of contract and fraud. Mr. Worthen failed to personally serve the defendants, and consequently, Mr. Walter, Seaboard and AST each filed Rule 12(b)(5) Motions to Quash Service. On April 22, 1999, the Honorable Homer F. Wilkinson granted each of the Motions to Quash Service of the Summons and Complaint.

On June 10, 1999, Mr. Walter filed his partial answer and his Rule 9(b) Motion to Strike the Fraud Claim. On August 2, 1999, Mr. Worthen filed his First Amended Complaint, which included the Firm as a named defendant. In response, on August 31, 1999, Mr. Walter and the Firm filed a Rule 9(b) & 12(b)(6) Motion to Dismiss Mr. Worthen's First Amended Complaint. On September 28, 1999, Mr. Worthen filed his memorandum in opposition to Mr. Walter's and the Firm's Motion to Dismiss and his Motion to Disqualify Attorney of Record. Subsequently, on October 4, 1999, Mr. Walter and the Firm filed their Reply Memorandum in Further Support of Their Motion to Dismiss Mr. Worthen's First Amended Complaint, and on October 12, 1999, Mr. Walter and the Firm filed their Memorandum in Opposition to Mr. Worthen's Motion to Disqualify Attorney of Record, accompanied by supporting affidavits.

Mark A. Larsen ("Mr. Larsen"), counsel for Mr. Walter and the Firm, spoke with Judge Wilkinson's clerk regarding the feasibility of scheduling a hearing given Mr. Worthen's incarceration in Lompoc, California. Mr. Larsen agreed to waive his request for oral argument and agreed to submit Mr. Walter and the Firm's Rule 9(b) & 12(b)(6) Motion to Dismiss Mr. Worthen's First Amended Complaint to Judge Wilkinson to enable him to dispose of all pending motions at one time.

On October 26, 1999, Judge Wilkinson, in a 4-501 Ruling, granted Mr. Walter and the Firm's Rule 9(b) & 12(b)(6) Motion to Dismiss Mr. Worthen's First Amended Complaint and denied Mr. Worthen's Motion to Disqualify Attorney of Record.

On December 9, 1999, Mr. Worthen simultaneously filed a Notice of Appeal and a Motion to Reconsider. Mr. Walter and the Firm filed an objection to Mr. Worthen's Motion to Reconsider, and on February 11, 2000, Mr. Worthen withdrew his Motion to Reconsider.

### **C. Disposition of Trial Court**

On November 12, 1999, Judge Wilkinson signed the Order dismissing Mr. Worthen's First Amended Complaint against Mr. Walter and the Firm with prejudice and denying Mr. Worthen's Motion to Disqualify Attorney of Record. Judge Wilkinson's decision was based upon his determination that

- (1) Mr. Worthen failed to demonstrate how Mr. Walter and the Firm caused any loss to him;



- (2) Mr. Worthen's First Amended Complaint failed to allege any of the requisite elements of civil conspiracy against Mr. Walter or the Firm;
- (3) Mr. Worthen's claims against the firm failed under the intracorporate conspiracy doctrine;
- (4) the applicable four-year statute of limitations governing oral contract claims barred Mr. Worthen's claims against Mr. Walter and the Firm;
- (5) the applicable three-year statute of limitations governing fraud claims barred Mr. Worthen's claims against Mr. Walter and the Firm;
- (6) the applicable three-year statute of limitations governing claims against stockholders of a corporation bars Mr. Worthen's claims against Mr. Walter; and
- (7) Mr. Worthen's Motion to Disqualify Mr. Larsen was without merit. Mr. Worthen's appeal stems from this decision.

In his opening brief, Mr. Worthen failed to address or raise any issues regarding the trial court's ruling on his civil conspiracy and fraud claims, or his attempt to disqualify Mr. Larsen as Mr. Walter and the Firm's counsel. Consequently, Mr. Worthen waived these issues on appeal and this appeal is solely limited to his breach of contract claim against Mr. Walter. *Pease v. Industrial Comm'n*, 694 P.2d 613, 616 (Utah Ct. App. 1992)(An appellant has "the obligation to raise all the issues that could have been presented at that time, and those issues not raised [are] waived.")

## STATEMENT OF FACTS

Mr. Worthen's Statement of Facts includes the following facts which are not supported by the record.

- In paragraph 1 of Mr. Worthen's Statement of Facts, the pages cited to in the record do not support Mr. Worthen's contention that his stock purchase was **pursuant to a written purchase agreement**.
- Similarly, paragraph 2 of Mr. Worthen's Statement of Facts again includes reference to the **same purchase agreement**, which is not supported by any of the pages cited to in the record.
- In paragraph 4 of Mr. Worthen's Statement of Facts, the pages cited to in the record do not support Mr. Worthen's contention that, at the time Mr. Walter sold the stock at issue to Mr. Worthen, Mr. Walter worked at the Firm. Quite the contrary is supported by the record. When Mr. Walter sold Mr. Worthen the stock at issue, Mr. Walter worked at his own firm known as Robert W. Walter, P.C. (R. 4, 9).
- In paragraph 8 of Mr. Worthen's Statement of Facts, the pages cited to in the record do not support Mr. Worthen's contention that the value of the stock represented by Certificate 115 equaled \$116,250.00. The citation to the record supports the fact that the stock of **Casmyn Corporation** declined from approximately \$15 per share in value to a

bid price of \$13.50 per share, and makes no reference to the value of stock represented by Certificate 115.

As a result, pursuant to Rule 24(a)(7) of the Utah Rules of Appellate Procedure, Mr. Walter and the Firm set forth the following material facts:

Mr. Walter resides in Colorado where he is a licensed attorney (R. 159, 225). Berliner Zisser Walter & Gallegos is the law firm where Mr. Walter is currently employed (R. 159-60, 225).

On March 12, 1986, John E. Worthen ("Mr. Worthen") acquired, from a group of controlling shareholders, 17,600,000 shares of Fintech stock , which included 3,100,000 shares from Mr. Walter (R. 161, 225). When Mr. Walter sold Mr. Worthen the stock at issue, Mr. Walter worked at his own firm known as Robert W. Walter, P.C. (R. 4, 9).

American Securities Transfer & Trust, Inc. ("AST") is the appointed transfer agent for Fintech (R. 161, 225). On December 11, 1985, AST issued stock certificate no. 115 (the "Certificate") evidencing 3,100,000 shares (7,750 post-split shares) of Fintech's common stock registered in the name of Mr. Walter (R. 110 ¶ 4). On January 23, 1992, the Certificate was presented to AST for transfer, but was rejected for Rule 144 paperwork paper work necessary to remove the restrictive legend on the Certificate (R. 110 ¶ 5).

Subsequent to the sale of stock to Mr. Worthen, Fintech has from time to time changed its corporate name. Between November 29, 1991, and September 26,

1994, Fintech's name was changed to Summa Metals Corporation. From September 26, 1994, to the present time, Fintech's name has been Casmyr Corporation (R. 110 ¶ 3).

Given the various changes in Fintech's corporate name, Mr. Walter was confused about the stock transfer (R. 226). As a result of this confusion, in July of 1992, more than six years after the sale of the stock to Mr. Worthen, Mr. Walter reported a lost certificate because he believed he owned the stock and because Mr. Worthen had failed to transfer the Fintech stock into his own name. As a result, a stop transfer order was placed on the Certificate (R. 226, 110 ¶ 6).

On August 12, 1992, Mr. Walter executed and submitted to AST an Affidavit of Loss in furtherance of obtaining a replacement certificate (R. 188-89). On September 9, 1992, AST issued Mr. Walter a replacement certificate no. 1038 (the "Replacement Certificate") (R. 111 ¶ 8).

In the late Fall of 1994, AST received an inquiry from Mr. Worthen's broker stating that he had possession of the Certificate and wanted to know the status of the Certificate. Trina Leigh advised Mr. Worthen's broker that the Certificate had been reported lost, that a stop order had been placed on the Certificate and that the Certificate was not valid since the Replacement Certificate had been issued on September 9, 1992. (R. 295 ¶¶ 3-4)

On March 23, 1995, Stephen C. Vickstrom instructed AST to place a stop payment notation on the Replacement Certificate because there was a dispute over its ownership. (R. 299)

Throughout September 1996, a series of communications ensued between David Billeter, Mr. Worthen's former counsel, and Mr. Walter regarding the ownership of the Certificate (R. 193, 195-96). On April 3, 1997, when the error due to the confusion from the name change was brought to Mr. Walter's attention, and after he had an opportunity to review the signature guaranty on the Certificate, he released all claims he had to the Certificate (R. 204, 206).

On or about December 16, 1997, Mr. Walter returned the Replacement Certificate (R. 297 ¶ 14, 312-13). As of June 9, 1999, the Certificate remains registered in Mr. Walter's name. (R. 298 ¶ 17, 316).

### **SUMMARY OF ARGUMENTS**

This Court should uphold the decision of the trial court by finding that it was correct in ruling that the four-year statute of limitations governing oral contracts barred Mr. Worthen's breach of contract claim against Mr. Walter. Contrary to Mr. Worthen's suggestion, the last event necessary to complete his breach of contract claim against Mr. Walter was Mr. Walter's alleged breach, which occurred on September 9, 1992, when AST issued Mr. Walter the Replacement Certificate. Despite numerous attempts to circumvent the statute of limitations, including raising new issues on appeal, each of Mr. Worthen's arguments lacks merit.

Additionally, this Court should uphold the decision of the trial court by finding that it was correct in dismissing Mr. Worthen's First Amended Complaint with prejudice because he failed to make a sufficient showing that Mr. Walter caused any loss to him, an essential element of his breach of contract claim, with respect to which he had the burden of proof.

Finally, after considering the facts and circumstances surrounding this appeal, this Court should not only affirm the trial court's decision dismissing Mr. Worthen's First Amended Complaint with prejudice, but should also grant Mr. Walter and the Firm damages against Mr. Worthen pursuant to Rule 33 of the Utah Rules of Appellate Procedure.

## **ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT CORRECTLY RULED THAT MR. WORTHEN'S BREACH OF CONTRACT CLAIM AGAINST MR. WALTER WAS BARRED BY THE APPLICABLE FOUR-YEAR STATUTE OF LIMITATIONS GOVERNING ORAL CONTRACT CLAIMS**

The arguments advanced by Mr. Worthen in his opening appellate brief, regarding the trial court's decision that his contract claims against Mr. Walter and the Firm were barred by the relevant statute of limitations, raised new issues that were not addressed by the trial court and were raised for the first time on appeal. Specifically, Mr. Worthen raised the following issues for the first time on appeal: (1) his breach of contract claim did not arise until March 23, 1995; (2) Mr. Walter's letter

regarding Mr. Worthen's ownership of the Fintech stock tolled the statute of limitations; (3) the discovery rule tolled the statute of limitations; and (4) Mr. Worthen purchased the Fintech stock from Mr. Walter pursuant to a written purchase agreement and, therefore the six-year statute of limitations governing written contracts applies instead of the four-year limitations period governing oral contracts. In addition to raising these issues for the first time on appeal, Mr. Worthen's arguments lack merit.

**A. The Last Event Necessary to Complete Mr. Worthen's Breach of Contract Claim Against Mr. Walter and the Firm Occurred on September 9, 1992, When AST Issued Mr. Walter the Replacement Certificate**

The trial court correctly ruled that the four-year statute of limitations governing oral contracts barred Mr. Worthen's breach of contract claim against Mr. Walter and the Firm. Under Utah Code Ann. § 78-12-25(1)(1996), an action based upon an oral contract may be brought within four years.

As a general rule, a cause of action accrues and the relevant limitations period begins to run "upon the happening of the last event necessary to complete the cause of action . . . [and] mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations." *Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981).

As applied to the subject dispute, the applicable four-year statute of limitations governing oral contracts began to run when the last event necessary to complete the

cause of action occurred. Although a breach of contract claim requires the plaintiff to allege the existence of a contract, a breach, causation, and damages as a result of the breach, the last **event** necessary to complete this cause of action is a breach.

Contrary to Mr. Worthen's suggestion, the last event necessary to complete his breach of contract claim against Mr. Walter is Mr. Walter's alleged breach, which occurred on September 9, 1992, when AST issued Mr. Walter the Replacement Certificate. At that time, Mr. Worthen would have been able to allege the requisite elements of a breach of contract claim. Mr. Worthen could have alleged that a contract existed, that Mr. Walter breached the contract by having the Replacement Certificate issued, that Mr. Walter's breach caused him damages, and that he suffered damages in an amount equal to the amount he paid Mr. Walter for the 3,100,000 shares of Fintech stock.

Simply stated, based upon the allegations in the Amended Complaint, Mr. Worthen entered into a contract with Mr. Walter for the purchase of 3,100,000 shares of Fintech stock. Mr. Walter agreed to sell Mr. Worthen the Fintech shares he owned, and in exchange, Mr. Worthen agreed to purchase the Fintech stock from Mr. Walter. Subsequently, on September 9, 1992, when AST issued Mr. Walter the Replacement Certificate, Mr. Walter breached the contract. Mr. Walter's breach immediately allegedly resulted in damages to Mr. Worthen given that Mr. Worthen satisfied his obligation to pay Mr. Walter for the stock and essentially received nothing of value in return.



Mr. Worthen waited until February 16, 1999, more than six years after Mr. Walter's breach, to file the Complaint. Considering that the last event necessary to complete Mr. Worthen's breach of contract claim occurred on September 9, 1992, Mr. Worthen had until September 9, 1996, to file the Complaint. As a result of failing to file the Complaint within the statutory period, Mr. Worthen's breach of contract claim against Mr. Walter was barred by the relevant statute of limitations. In short, the trial court correctly ruled that Mr. Worthen's breach of contract claim against Mr. Walter was barred by the four-year statute of limitations governing oral contracts because Mr. Worthen waited more than six years before he filed the Complaint.

**B. Mr. Worthen's Argument That His Breach of Contract Action Against Mr. Walter Did Not Arise until March 23, 1995 Is Contrary to the Facts and Undermines the Guiding Policy Considerations for Enacting Limitation Periods**

Mr. Worthen acknowledged that Mr. Walter breached the contract on September 9, 1992, when AST issued Mr. Walter the Replacement Certificate. However, Mr. Worthen contends that he was not damaged until March 23, 1995, when Stephen C. Vickstrom instructed AST to place a stop payment notation on the Replacement Certificate because there was a dispute over its ownership. Mr. Worthen suggests that he was not damaged by Mr. Walter's breach prior to this time, because the breach did not interfere with his attempts to sell the stock. Not only is this suggestion counterintuitive and contrary to the facts, it circumvents the underlying policy considerations for enacting limitation periods.

"Statutes of limitations 'are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Sevy v. Security Title Co. of S. Utah*, 902 P.2d 629, 634 (Utah 1995)(citing *Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981)(quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944))).

By arguing that the four-year statute of limitations did not begin to run until March 23, 1995, Mr. Worthen is essentially trying to improperly select when the last event necessary to complete his breach of contract claim against Mr. Walter occurred. To allow Mr. Worthen to do this would permit him to circumvent the statute of limitations by allowing him, in his sole discretion, to dictate exactly when he suffered damages. If this Court were to agree with Mr. Worthen's argument that he did not suffer any damages from Mr. Walter's breach until March 23, 1995, then this Court would create an enormous loophole in the statute of limitations jurisprudence that would enable plaintiffs to effectively circumvent limitation periods. Additionally, allowing Mr. Worthen to improperly select when the last event necessary to complete his breach of contract claim against Mr. Walter occurred undermines the policy considerations that dictate the necessity for enacting statutes of limitations. More than 14 years have lapsed since Mr. Worthen purchased the Fintech stock from Mr. Walter, and it is likely that evidence has been lost, memories have faded, and witnesses have disappeared.

In summary, given the policy considerations, combined with the fact that Mr. Walter's breach occurred on September 9, 1992, not March 23, 1995, Mr. Worthen's argument that his Complaint was timely filed because his breach of contract action did not arise until March 23, 1995 lacks merit.

**C. Mr. Walter's Acknowledgment of Mr. Worthen's Ownership of the Shares Is Not the Type of Acknowledgment Contemplated by Section 78-12-44 of the Utah Code Relating to Acknowledgment of a Debt, Liability or Claim**

Section 78-12-44 of the Utah Code has no application to Mr. Worthen's breach of contract claim against Mr. Walter and, therefore, provides no basis for tolling the relevant statute of limitations. Section 78-12-44 provides:

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.

Utah Code Ann. § 78-12-44 (1953).

This statute clearly has no application to Mr. Worthen's breach of contract claim against Mr. Walter. Mr. Walter's letter, dated April 3, 1997, provides, in pertinent part: "[h]aving reviewed the signature guaranty on the reverse of the stock certificate which was forwarded by Mr. Billeter, it does appear that the signature on

such signature guaranty is in fact my own. On the basis of the apparent accuracy of that document, I hereby release any claim to the foregoing certificates.” (R. 204). Mr. Worthen argues that this letter constitutes an acknowledgment. By advancing this argument, Mr. Worthen is torturing the concept of an acknowledgment necessary to extend the statute of limitations. The acknowledgment contemplated by the statute is “an acknowledgment of an existing liability, debt or claim, or any promise to pay the same,” not a release of an ownership interest. Utah Code Ann. § 78-12-44 (1953).

In conclusion, considering that § 78-12-44 of the Utah Code has no relevant application to Mr. Worthen’s breach of contract claim against Mr. Walter, Mr. Walter’s letter releasing his ownership interest in the Certificate fails to provide a basis for extending the applicable statute of limitations.

**D. The Discovery Rule Does Not Provide a Basis for Tolling the Applicable Statute of Limitations for a Sufficient Period of Time to Circumvent the Preclusion of Mr. Worthen’s Claim Against Mr. Walter Because Mr. Worthen Knew, or Should Have Known, of the Alleged Breach in the Fall of 1994, When Mr. Worthen’s Stock Broker Contacted American Securities Transfer (“Ast”) and Was Advised That Certificate 115 Had Been Reported Lost, That a Stop Order Had Been Placed on the Certificate, and That a Replacement Certificate Had Been Issued on September 9, 1992**

The statute of limitations governing Mr. Worthen’s claim does not provide a basis for tolling the applicable limitation period for a sufficient period of time to circumvent the preclusion of his breach of contract claim against Mr. Walter. The

discovery rule is considered an exception to the general rule regarding statutes of limitations, and delays the running of the limitation period "until the discovery of facts forming the basis for the cause of action." *Warren v. Provo City Corp.*, 838 P.2d 1125, 1129 (Utah 1992)(quoting *Myers v. McDonald*, 635 P.2d at 86).

In addressing this issue, the Ninth Circuit Court of Appeals has held that:

an action is time-barred if the plaintiff discovered or should have discovered the alleged wrongdoing within the limitation period and that the question of when it was or should have been discovered is a question of fact. *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 877 (9<sup>th</sup> Cir.), *cert. denied*, 469 U.S. 932 (1984). The *Mosesian* court further added that the question may be decided as a matter of law only when "uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." *Id.* (quoting *Kramas v. Security Gas & Oil Inc.*, 672 F.2d 766, 770 (9<sup>th</sup> Cir.), *cert. denied*, 459 U.S. 1035 (1982)).

*United Park City Mines Co. v. Greater Park City Company*, 870 P.2d 880, 886 (Utah 1993).

The Utah Supreme Court "has recognized three circumstances where the discovery rule applies: (1) in situations where the discovery rule is mandated by statute; (2) in situations where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct; and (3) in situations where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action." *Id.*

Because this is an issue raised for the first time on appeal, Mr. Worthen failed to present to the trial court any argument regarding the application of the discovery rule to his case. Mr. Worthen suggested that trial court overlooked facts which he alleged were sufficient to invoke the discovery rule. In making this argument, Mr. Worthen failed to recognize that it was not the obligation of the trial court to invoke the discovery rule. Rather, it was his responsibility to raise the discovery rule as an exception to the general rule regarding statutes of limitations. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Additionally, none of the circumstances articulated by the Utah Supreme Court apply to allow Mr. Worthen to invoke the discovery rule. First, as applied to the facts before this Court, this discovery rule is not mandated by statute. Second, Mr. Worthen has never asserted that he was not aware of his cause of action because of the Mr. Walter's concealment or misleading conduct. Finally, this case neither presents exceptional circumstances, nor would the application of the general rule be irrational or unjust.

Furthermore, even if Mr. Worthen was allowed to invoke the discovery rule, the uncontroverted evidence irrefutably demonstrates that Mr. Worthen discovered or should have discovered Mr. Walter's breach in the Fall of 1994, when Mr. Worthen's stock broker contacted American Securities Transfer ("AST") and was advised that Certificate 115 had been reported lost, that a stop order had been placed on the Certificate, and that the Replacement Certificate had been issued on

September 9, 1992. See *United Park City Mines Co. v. Greater Park City Company*, 870 P.2d 880 (Utah 1993).

Considering that Mr. Worthen discovered the facts forming the basis for his breach of contract claim against Mr. Walter in the Fall of 1994, he had until the Fall of 1998 to file the Complaint. Mr. Worthen filed the Complaint on February 16, 1999, which was after the limitation period expired. Consequently, even if the discovery rule were applied to toll Mr. Worthen's breach of contract claim against Mr. Walter until he discovered the facts forming the basis of his claim, he still failed to file the Complaint within the applicable time period.

In summary, because the discovery rule presents an issue for the first time on appeal, the trial court was never given the opportunity to address its application to Mr. Worthen's breach of contract claim against Mr. Walter. Additionally, none of the circumstances articulated by the Utah Supreme Court apply to allow Mr. Worthen to invoke the discovery rule. Furthermore, even if the discovery rule were applied to toll Mr. Worthen's breach of contract claim against Mr. Walter until he discovered the facts forming the basis of his claim, he still failed to file the Complaint within the applicable time period.

**E. Mr. Worthen's Argument That He Purchased the Fintech Shares Through a Written Purchase Agreement Is Not Supported by the Record, and Even If the Purchase Was Pursuant to a Written Agreement, the Six-year Statute of Limitations Governing Written Contracts Would Bar Mr. Worthen's Breach of Contract Claims Against Mr. Walter**

Mr. Worthen's argument that he purchased the Fintech stock from Mr. Walter pursuant to a written purchase agreement is not supported by the record and Mr. Worthen neither alleged nor provided incorporated documentation evidencing a written purchase agreement in either the Complaint or the First Amended Complaint. The pages Mr. Worthen cited to in the record do not support his contention that this stock purchase was pursuant to a written purchase agreement.

Mr. Worthen mentioned a written agreement once, when he stated: "Mr. Walter entered into a written agreement signed by all of those of his group who sold shares to Worthen and disclosure of that agreement was made public pursuant to Securities and Exchange Commission regulations, and such disclosure did not refer to conditional sale." (R. 334). This is the only time Mr. Worthen mentioned a written agreement in any of the pleadings or motions filed with the trial court, and this statement regarding the written agreement is ambiguous. One plausible interpretation is that the written agreement referred to was between Mr. Walter and the other controlling shareholders who sold Mr. Worthen stock.

Moreover, even if the contract was in writing, it would be barred by the six-year statute of limitations contained in Utah Code Ann. § 78-12-23(2). Under Utah



Code Ann. § 78-12-23(2)(1996), an action based upon a written contract may be brought within six years.

As previously discussed, Mr. Walter's breach of contract occurred on September 9, 1992, when AST issued Mr. Walter the Replacement Certificate. Pursuant to the six-year statute of limitations governing written contracts, Mr. Worthen had until September 9, 1998, to file the Complaint. Mr. Worthen filed the Complaint on February 16, 1999, which was after the limitation period expired.

In short, Mr. Worthen's assertion that he purchased the Fintech shares from Mr. Walter pursuant to a written purchase agreement is not factually supported by the record. Even if the contract was in writing, it would be barred by the six-year statute of limitations governing written contracts given that Mr. Walter breached the contract on September 9, 1992, when AST issued Mr. Walter the Replacement Certificate.

## **POINT II**

**THE TRIAL COURT CORRECTLY RULED THAT MR. WORTHEN'S BREACH OF CONTRACT CLAIM AGAINST MR. WALTER FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED BECAUSE MR. WORTHEN FAILED TO DEMONSTRATE THAT MR. WALTER CAUSED HIM ANY LOSS**

Mr. Worthen's First Amended Complaint failed to assert a claim against Mr. Walter upon which relief could be granted. Mr. Worthen's appeal is limited to his breach of contract claim against Mr. Walter. A breach of contract claim requires a showing of causation and damages. The trial court properly dismissed Mr.

Worthen's First Amended Complaint with prejudice because he failed to demonstrate how Mr. Walter caused any loss to him.

- ▶ Mr. Worthen failed to allege in his First Amended Complaint that if he had possession of the stock in question he would have sold it; and
- ▶ Mr. Worthen owned 14,500,000 additional shares in Fintech stock available to him for sale. He failed to allege in his First Amended Complaint that he sold any of this Fintech stock during this time and also failed to allege that after selling all of the other Fintech stock available to him, he was unable to sell the Fintech stock Mr. Walter sold to him.

In other words, before Mr. Walter's conduct could cause Mr. Worthen any damage, he would have to sell all of his available stock. If he did not do so, not only is there no loss causation, but he also obviously failed to mitigate his damages.

Loss causation has been addressed in other cases. In *Virginia Bank Shares Inc. v. Sanberg*, 501 U.S. 1083 (1991), Virginia Bank had 2,000 minority shareholders holding a total of 15% of the common stock. The Board obtained an opinion from an investment banking firm that \$42.00 per share represented a fair price. The Executive Committee and the entire Board of Directors approved the "freeze-out" merger based upon the investment banking firm's opinion on price. The violation was based upon alleged false statements in a proxy solicitation. The alleged misrepresentation attempting to garner the minority shareholder's vote was

unnecessary and meaningless, *i.e.*, the merger would have taken place even if all of the minority shareholders voted against it.

The thrust behind the holding in *Virginia Bank Shares* is that a shareholder cannot plead loss causation in the situation where his vote as a shareholder is essentially meaningless. It is based upon a claimed false representation contained in a proxy statement requesting minority shareholders' votes in favor of a squeeze-out merger. This false statement is based upon the Board of Directors' action. In other words, the focus of the case is upon whether a false statement soliciting a shareholder vote which was unnecessary to effectuate the merger pleads loss causation. In the *Virginia Bank Shares* case, the conclusion reached was that any false statements to minority shareholders were meaningless because their vote was unnecessary to effect the squeeze-out merger. The minority shareholders could not alter the outcome of the merger regardless of how they voted, so lying to them to persuade them to vote in favor of the merger when their vote did not matter could not damage them.

Similarly, in this case, any delay associated with providing Mr. Worthen access to the shares Mr. Walter sold him in Fintech could not cause any loss to Mr. Worthen when Mr. Worthen owned 14,500,000 additional shares in Fintech stock available to him for sale if he wanted sell them. To plead and establish loss causation in this case, Mr. Worthen must plead that he first sold the additional 14,500,000 shares in Fintech stock he owned. Mr. Walter's actions in clouding the

title to the Fintech stock he sold Mr. Worthen, as in the *Virginia Bank* case, simply do not matter when Mr. Worthen owned an additional 14,500,000 shares of Fintech stock he decided not to sell. There is no loss causation.

Considering that Mr. Worthen has not demonstrated that Mr. Walter caused him any damage, the trial court correctly dismissed his breach of contract claim against Mr. Walter.

Given the arguments Mr. Worthen advanced in his opening brief, it is readily apparent that he failed to understand the basis of the trial court's ruling on the 12(b)(6) issue. The trial court determined that Mr. Worthen's breach of contract claim against Mr. Walter failed to state a claim upon which relief could be granted because Mr. Worthen failed to allege or demonstrate how Mr. Walter **caused** any loss to him. The trial court's decision did not hinge on whether Mr. Worthen alleged damages, rather, the trial court ruled that Mr. Worthen failed to allege a claim upon which relief could be granted because he failed to plead causation which is a critical element to his breach of contract claim.

Mr. Worthen's arguments that he stated a claim upon which relief could be granted focuses solely on the damage element. Mr. Worthen argues that he is entitled to lost profit, compensatory, restitution, and nominal damages, and he even goes so far as to allege that he might be able to recover punitive damages even though restitution, nominal and punitive damages were never requested in his First Amended Complaint.

### POINT III

#### **MR. WORTHEN NEVER FILED A WRITTEN REQUEST FOR A HEARING PURSUANT TO RULE 4-501(3)(B) AND, CONSEQUENTLY, WAIVED HIS RIGHT TO A HEARING**

Mr. Worthen failed to request a hearing and consequently waived his right to a hearing. Rule 4-501(3)(F) provides: "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." Utah Code of Jud. Admin. 4-501(3)(F). As a result of failing to request a hearing, Mr. Worthen was not prejudiced by the trial court's decision in the absence of a hearing.

If Mr. Worthen wanted a hearing, Mr. Worthen easily could have requested one. Rule 4-501(3)(B) of the Utah Code of Judicial Administration provides:

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.

Utah Code Jud. Admin. 4-501(3)(B).

Although Mr. Walter requested a hearing, Mr. Walter waived his request given the logistical problems due to Mr. Worthen's incarceration in Lompoc, California at the time. Nothing in the Utah Code of Judicial Administration precludes a party from subsequently waiving their request for an oral argument. Further, Mr. Worthen fails to suggest how he would have attended oral argument in Utah, given his incarceration at Lompoc.

In addition, Mr. Worthen argues that the court never should have decided Mr. Walter and the Firm's Rule 9(b) & 12(b)(6) Motion to Dismiss Mr. Worthen's First Amended Complaint because a notice to submit for decision was not filed. Admittedly, a written notice to submit for decision was not filed with the court. Mr. Larsen, however, orally requested Judge Wilkinson's clerk to submit Mr. Walter and the Firm's Motion to Dismiss to Judge Wilkinson for decision. Judge Wilkinson's clerk contacted Mr. Larsen to discuss waiving the request for an oral argument given the logistical problems of conducting a hearing as a result of Mr. Worthen's incarceration in Lompoc, California. Mr. Larsen waived Mr. Walter and the Firm's request for a hearing and requested the Clerk to submit their Rule 9(b) & 12(b)(6) Motion to Dismiss Mr. Worthen's First Amended Complaint to Judge Wilkinson for decision to enable him to decide all pending motions at one time.

Even if it was error for the trial court to render a decision absent a written notice to submit for decision and without a hearing, the result would not have been different in the absence of the error. In *Joseph v. W.H. Groves Latter Day Saints Hosp.*, 318 P.2d 330 (Utah 1957) the Utah Supreme Court stated that "[w]e are aware of an in accord with the mandate not to reverse a case merely because of error, and we will do so only when it appears to be prejudicial to the rights of a party." *Joseph v. W.H. Groves Latter Day Saints Hosp.*, 318 P.2d at 333 (citations omitted). In other words, if the error appears to be of such nature that it was of no

material consequence in its effect because the trial court would have arrived at the same result, regardless of such error, the error is harmless.

Clearly if any error occurred, it was harmless. Given that Mr. Worthen failed to request a hearing, Mr. Worthen was not prejudiced by the trial court's decision in the absence of a hearing. Additionally, Mr. Worthen was not prejudiced by the absence of a written notice to submit for decision. The trial court's ruling dismissing Mr. Worthen's First Amended Complaint with prejudice would have been exactly the same regardless of whether or not Mr. Walter and the Firm filed a written notice to submit for decision.

Mr. Worthen also argues that up until October 26, 1999, when the trial court issued its 4-501 ruling, that he could have provided further support for his position at oral argument. Neither the Utah Rules of Civil Procedure, nor the Utah Code of Judicial Administration would allow Mr. Worthen to submit new evidence in further support of his position at oral argument.

As a result of failing to request a hearing, Mr. Worthen waived his right to a hearing. Consequently, Mr. Worthen was not prejudiced by the fact that Mr. Walter and the Firm's Motion to Dismiss was decided without a hearing.

#### POINT IV

**MR. WORTHEN'S APPEAL IS FRIVOLOUS AND, THEREFORE, PURSUANT TO RULE 33 OF THE UTAH RULES OF APPELLATE PROCEDURE MR. WALTER AND THE FIRM SHOULD BE AWARDED THEIR ATTORNEYS' FEES AND COSTS ON APPEAL**

Pursuant to Rule 33 of the Utah Rules of Appellate Procedure, if this Court determines that Mr. Worthen's appeal is either frivolous or for delay, it may award just damages that may include single or double costs and/or reasonable attorney fees to the prevailing party. U.R.A.P. 33(a) (1999).

A frivolous appeal is defined as "one that is not grounded in fact, not warranted by the existing law, or not based on a good faith argument to extend, modify, or reverse existing law." U.R.A.P. 33(b)(1999). "An appeal, motion, brief or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief or other paper." U.R.A.P. 33(b)(1999).

The standard for frivolous appeal does not require a finding of bad faith. *O'Brien v. Rush*, 744 P.2d 306 (Utah Ct. App. 1987). A frivolous appeal is one that has no reasonable legal or factual basis. *Backstrom Family Ltd. Partnership v. Hall*, 751 P.2d 1157 (Utah Ct. App. 1988); *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989). A frivolous appeal has also been defined as "[o]ne in which no justiciable question has been presented and . . . is readily recognizable as devoid



of merit in that there is little prospect that it can ever succeed.” *Hunt v. Hurst*, 785 P.2d 414, 416 (Utah 1990); *see also Farrell v. Porter*, 830 P.2d 299, 302 (Utah Ct. App. 1992).

Mr. Worthen’s appeal is frivolous. It is frivolous in that the arguments raised by Mr. Worthen are not grounded in fact nor warranted by existing law, as evidenced by the numerous issues raised for the first time on appeal combined with the several facts that are not supported by the record. Additionally, Mr. Worthen’s appeal lacks merit. Regardless of the various avenues Mr. Worthen attempted to use to approach his greatest hurdle, the statute of limitations, each attempt failed to present a meritorious argument. Furthermore, Mr. Worthen failed to even address the basis of the trial court’s Rule 12(b)(6) ruling, perhaps out of a lack of understanding of the essential element of causation to a breach of contract claim.

As a result, this Court should find that Mr. Worthen’s appeal is frivolous and not warranted by existing law, and should award Mr. Walter and the Firm double its costs and reasonable compensation for the time and labor expended by their attorneys in defending this appeal.

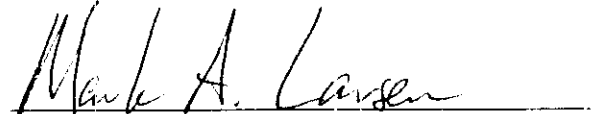
### **CONCLUSION**

Mr. Walter and the Firm request this Court to affirm the trial court’s decision and find that the trial court correctly dismissed Mr. Worthen’s First Amended Complaint with prejudice. Mr. Walter and the Firm also request that they be

awarded their costs and attorneys' fees pursuant to Rule 33 of the Utah Rules of Appellate Procedure.

Dated: August 30, 2000.

LARSEN & MOONEY LAW

A handwritten signature in cursive script, reading "Mark A. Larsen", is written over a horizontal line.

Mark A. Larsen

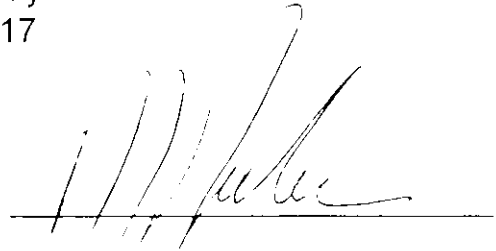
Attorneys for Appellees

Robert W. Walter & Berliner, Zisser,  
Walter & Gallegos

**CERTIFICATE OF SERVICE**

I certify that on August 30, 2000, two true and correct copies of the foregoing  
**BRIEF OF APPELLEES ROBERT W. WALTER & BERLINER, ZISSER, WALTER  
& GALLEGOS** were mailed, postage prepaid, to the following:

Darwin Overson  
Law Office of Darwin Overson, LLC  
1366 East Murray Holladay Road  
Salt Lake City, Utah 84117

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