

2000

John Hawkins v. Tom Callahan : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

JOHN HAWKINS,
Plaintiff/Appellee,

vs.

TOM CALLAHAN,
Defendant/Appellant.

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BRIEF OF APPELLEE

Case No. 2000550CA
Appeal from the Third Judicial District Court
Salt Lake County, State of Utah
Judge Robert K. Hilder

Priority No. 1 5

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FILED
Utah Court of Appeals

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Paulette Stagg
Clerk of the Court

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LIST OF PARTIES

THE CAPTION OF THE CASE CONTAINS THE NAMES OF ALL PARTIES

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STATUTES and OTHER AUTHORITIES

None

STATEMENT OF JURISDICTION

Appellee believes that this Court lacks jurisdiction over the appeal as it is untimely. *Burgers v. Maiben*, 652 P.2d 1320 (Utah 1982).; *U-M Investments. v. Ray*, 658 P.2d 1186 (Utah 1982).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any determinative constitutional provisions, statutes or rules are reproduced herein in addendum "B".

STATEMENT OF THE CASE

This action commenced with the filing of a Complaint on June 19, 1998. R.1. The Complaint was filed by the Plaintiff Pro Se. R.1. It is not clear from the file when the Complaint was served on the Defendant, as there is no copy of the served summons in the court's file.

An Answer and Counterclaim were filed by the Defendant on July 1, 1998. R.13.

Even though a possession bond was placed with the court, the Defendant through requesting various hearings managed to hold over in the property until August 16, 1998. R.10, T.99. The Defendant filed an Answer, a Counterclaim and Request for Hearing on the possession bond request. R.13, R.38. The hearing was scheduled for August 3, 1998. R.38.

At that hearing, Plaintiff was first represented by counsel Shawn D. Turner, and the law firm of Larson, Turner, Fairbanks. & Dalby.¹ A second hearing was scheduled on August 5, 1998. R.46.

¹ The firm was at that time called Larson, Kirkham and Turner.

At that hearing, counsel for the Defendant made claims contrary to the previous order of Judge Hilder, and consequently the matter was returned to Judge Hilder for a final determination. R.48.

After Plaintiff's counsel had made his appearance, Defendant's counsel purportedly mailed the Defendant's First Set of Interrogatories, Request for Production of Documents, and Request for Admissions to the Plaintiff. R.50. Plaintiff claims he never received any such pleadings, which, if sent, were sent to him in violation of both Utah Code of Professional Responsibility, and the Utah Rules of Civil Procedure.

The very first item actually received, from the Defendant, by Plaintiff's counsel was a Notice to Submit for Decision, dated the 16th day of September, 1998. R.76. On October 5, 1998, a Motion for Order Establishing Admissions was sent to Plaintiff's counsel. R.95. Plaintiff objected to the motion on the basis that he had never received the Request for Admissions, and further hadn't been able to see the certificate of mailing as the court's file was unavailable when Plaintiff's counsel went to the court. R.136-138.

On November 10, 1998, Judge Hilder scheduled a hearing to address the issue of the Request for Admissions. At the hearing, the court found that Plaintiff's counsel had never received copies of the discovery requests, but stated that it felt that under the *Langeland v. Monarch Motors, Inc.* case, the court was nevertheless required to deem the requests for admissions to be admitted. *Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058 (Utah 1998).

Defendant has failed to obtain a transcript of that hearing to be included as part of this record, failing in his duty to marshal the evidence. Following the initial hearing, the court asked for additional briefing on the issue, particularly on the *Langeland* case. In the Plaintiff's response, the Plaintiff clearly presented the alternative to the court of an amendment or withdrawal of his request for admissions under Rule 36(b) of the Utah Rules of Civil Procedure. R.209. Notwithstanding the Plaintiff's objections, the court felt that *Langeland* required the request for admissions to be deemed admitted.

Trial was held in this matter on March 22, 1999, before the Honorable Robert K. Hilder. Prior to the commencement of the trial, Judge Hilder informed counsel of the respective parties, that he was not going to allow the Defendant to perpetrate a fraud on the court. He informed the parties that he would allow evidence as to certain documentary evidence that would be submitted at trial to determine whether the documents included alterations or forgeries. T.3-4.

After hearing the witnesses and determining their credibility, the court entered a ruling from the bench, finding in favor of the Plaintiff on his Complaint and in favor of the Defendant on his Counterclaim in some aspects. Counsel for the Plaintiff was ordered by the court to prepare a draft order, findings of fact and conclusions of law. The documents were instead submitted by the Defendants and said findings were objected to by the Plaintiff. R.312, R.330. The court examined the respective filings of the parties and their various objections and entered a minute entry setting forth the court's findings of fact and conclusions of law on September 14, 1999. R.422.

Without waiting for the judgment to be signed, the Defendant filed a Rule 59 Motion. R.428. The initial judgment was signed on October 21, 1999. R.466.

The Defendant then filed a second Rule 59 Motion on November 3, 1999. The Rule 59 Motion of the Defendant was granted in part and was denied in part by a minute entry and order, which is undated but was completed at some point in May 2000. R.494. The minute entry informed the parties that the judgment would be amended to take into account a \$150.00 credit for the Defendant.

On June 7, 2000, the Notice of Appeal was filed in this case. R.497.

On June 19, 2000, the Amended Judgment was actually signed by the court and entered. R.499.

STATEMENT OF RELEVANT FACTS

1. At the inception of this proceeding Mr. Hawkins was the owner of certain real property located at 61 West Russett, Salt Lake City, Utah. T.20.

2. During the period of Mr. Hawkins ownership he leased rooms of the home located on the property to various tenants. T.21.

3. Mr. Hawkins had a standard form lease agreement which he used with a majority of the tenants in the property. T.32.

4. Initially Mr. Hawkins himself lived in the home and occupied one of the rooms. T.21.

5. On or about June 21, 1997 Mr. Hawkins entered into a lease agreement with the Defendant, Tom Callahan. T.23.

6. The lease provided that it was to be operational from July 15, 1997 until March 15, 1998. T.25.

7. Mr. Callahan took the original lease and refused to give Mr. Hawkins a copy thereof. T.24.

8. Under the terms of the lease Mr. Callahan was to provide a deposit of \$200.00 and was to pay a monthly rent of \$290.00. Plaintiff's Exhibit #1.

9. Mr. Callahan paid \$50.00 but never provided the other \$150.00. T.24.

10. At the time Mr. Callahan and Mr. Hawkins entered into the lease, Mr. Callahan had asked for a longer term lease. T.29-30.

11. Mr. Hawkins had declined to give Mr. Callahan a longer term lease and informed him that it was his belief he would be selling the property so that he could go to nursing school. T.30.

12. Shortly after Mr. Callahan occupied the premises Mr. Callahan would present Mr. Hawkins with 3 x 5 cards to act as receipts for the payment of Mr. Callahan's rent. T.34-35.

13. Mr. Hawkins would sign those receipts. T.35.

14. Pursuant to the terms of the lease, at the expiration of the lease period the arrangement between the parties was one of a month to month tenancy. Plaintiff's Exhibit #1.

15. Towards the end of April of 1998 Mr. Hawkins gave Mr. Callahan a 30 Day Notice to Quit in order to terminate the month to month tenancy. Plaintiff's Exhibit #5

16. The notice was given on the basis that the lease between the parties had expired and it was Mr. Hawkins desire to prepare the home for sale consistent with his intentions that he expressed to Mr. Callahan the previous June. Plaintiff's Exhibit #5

17. Mr. Callahan indicated that he would leave the property but that he needed time to find a new place. T.39

18. Mr. Callahan made no mention of having an additional period of time to stay in the property pursuant to any extension of the lease agreement. T.39.

19. On two or three separate occasions the Defendant assaulted and threatened Mr. Hawkins and/or his girlfriend who was on the premises on behalf of Mr. Hawkins. T.40-42.

20. On or about June 15, 1998 Mr. Hawkins served two notices to quit on Mr. Callahan. Plaintiff's Exhibit #6 & #7; T.42-46.

21. One of the notices was for failure to pay the full amount due and in particular the balance of the deposit, being \$150.00. The second Notice to Quit was for violating the rules of the lease including smoking in the house, failing to keep the living areas clean, and threatening the landlord. Plaintiff's Exhibit #6 & #7.

22. Callahan did not remedy any of the defaults in either of the notices and further did not vacate the premises.

23. Thereafter this action was filed. R.1.

24. After this action was filed a document purporting to be an extension of the lease between the parties was produced as part of the Defendant's pleadings. Plaintiff's Exhibit #4.

25. The document was a copy of a 3x5 card that Mr. Hawkins had signed acknowledging receipt of a rental payment. T.36-37.

26. The document was subsequently altered by the Defendant to add in the language purporting to give the defendant an extension of time to stay in the property for another full year. R.423.

27. The Defendant remained in the property up through and including August 15, 1998 although he had not paid rent for the months of July or August. T.99.

28. Contrary to the Rules of Civil Procedure, the Defendant after receiving notice of the appearance of Plaintiff's counsel, allegedly mailed discovery requests directly to the Plaintiff and not to Plaintiff's counsel. R.50.

29. Although the discovery was never sent to Plaintiff's counsel and Plaintiff's counsel had never seen the same, the court upheld the Defendant's Motion Establishing Admissions. R.194.

30. The Defendant's filed two Rule 59 Motions, one prior to the entry of judgment and one thirteen days thereafter. R.428, R.469. The Rule 59 Motion was denied in part and granted in part by minute entry. R.494-496.

31. The Notice of Appeal in this case was filed on June 7, 2000. R.497.

32. The final judgment in this case, comprising the amended judgment was filed on June 19, 2000. R.49.

SUMMARY OF THE ARGUMENT

This action began as a simple attempt by the Plaintiff to regain control of his property and ended up being a three ring circus of the Defendant attempting to defraud the court, with the case itself being churned for attorney's fees. It is no coincidence that the single greatest element of "damages" claimed by the Defendant in this case are his attorney's fees. It is likewise not a coincidence that the Defendant proclaimed himself "impecunious" and judgment proof.

Before getting to the "merits" of the Defendant's appeal, the Defendant would have to clear two hurdles which are fatal to the current action.

The first problem is that this Court has no jurisdiction to even address the appeal. Rule 4(a) of the Utah Rules of Appellate Procedure provides:

In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within ten days of the date of entry of the judgment or order appealed from.

U.R.A.P. Rule 4(a).

This is an unlawful detainer action and therefore, according to the Rule, the Notice of Appeal needed to be filed within ten days of the date of judgment. The initial judgment in this action was filed on October 21, 1999. R.466. The Notice of Appeal was filed on June 7, 2000. R.497.

The time for filing the Notice of Appeal is stayed when a timely motion under Rule 59 of the Utah Rules of Civil Procedure is made. In that event, the Notice of Appeal is to be filed at the conclusion of the post-judgment ruling.

The Defendant's first problem is that his Rule 59 Motions were not filed timely. The Defendant filed two Rule 59 Motions. The first, contrary to the express language of the rule, was filed before the entry of the judgment. R.428; R.466. The second, contrary to the rule, was filed thirteen days after the judgment. R.419. Even if the motion had been timely, the Notice of Appeal is still not.

The Defendant's motion, under Rule 59, was made and granted in part and denied in part. The result was the court entered an amended judgment on June 19, 2000. R.499. Appellant's Notice of Appeal was filed twelve days prior to the entry of the Judgment which he is attempting to appeal from. Where the Notice of Appeal is filed prior to the final disposition of the post-judgment motion, it is of no affect. *U-M Investments v. Ray*, 658 P.2d 1186 (Utah 1982); *Anderson v. Schwendiman*, 764 P.2d 999 (Utah App. 1988). The failure of the Defendant to refile his Notice of Appeal after the entry of the Amended Judgment, leaves this Court without jurisdiction and is fatal to Defendant's claims.

The next procedural hurdle that the Defendant would need to overcome in this appeal, is his failure to marshall the evidence. This matter comes before the Court on appeal from a bench trial wherein the court entered specific findings of fact and conclusions of law. To successfully challenge the trial court's finding, the Defendant must demonstrate that the findings are clearly erroneous. To make such a showing, the Defendant must marshall all of the evidence supporting the finding, and then demonstrate how this evidence, when viewed in the light most favorable to the finding, is insufficient to support it. *Fisher v. Fisher*, 907 P.2d 1172, 1177 (Utah App. 1995). Not only has the Defendant failed to marshall all of the evidence and analyze why it does not meet this minimal standard required, but the Defendant has failed to even order the necessary transcripts to marshall the evidence. In addition to the trial, there were three separate hearings held in this case. Not one of these transcripts has been ordered by the Defendant. One of those hearings specifically dealt with the issues relating to the Request for Admissions, which issue is the predominant issue included in the Defendant's Brief. Due to the Defendant's failure to marshall the evidence, this Court should not disturb the factual findings of the trial court. *Beesley v Harris*, 883 P.2d 1343, 1349 (Utah 1994).

If this Court determines to go on and address the merits of the Defendant's appeal, it will find that those merits are sorely lacking. Defendant's initial arguments are that the trial court made a mistake by not allowing the Defendant to defraud the court. In both its original judgment and in the minute entry rejecting in large part the Rule 59 Motion of the Defendant, the court made specific findings as to the total lack of credibility of the Defendant. The court specifically stated that it was

not going to allow the Defendant to subserve the presentation of the merits of the case through some sort of procedural chicanery.

The court's ruling on the documentary evidence and allowing that evidence at trial is more than supported both in case law and by statute. Indeed, the only error the court made was in originally granting the motion to have the admissions deemed admitted. R.494.

Because service of the Request was not done appropriately, the Defendant's Motion shouldn't have been granted at all and all of the benefits he derived from that in the trial would have been more appropriately stricken. Rather than providing the Defendant a basis for appeal, the court's ruling actually would have provided the grounds for appeal by the Plaintiff. Once you get past the issue of the Request for Admissions, the determination to the remaining issues is simply a matter of credibility. "The trial court is in the best position to weigh conflicting testimony, to assess credibility, and from this, to make findings of fact." *Fisher v. Fisher*, 907 P.2d 1172, 1178 (Utah App. 1995). Although not referred to in Appellant's Brief, there was direct testimony from both Plaintiff and Defendant with respect to whether the documents at issue had been altered. The trial court found that the Defendant totally lacked credibility. The court's ruling was based in large part on that determination. In addition to the testimony of the parties, the Plaintiff was able to show other lease documents that didn't contain the provisions that had been hand-written into the lease at question in this case. The additional hand-written additions were all in the hand-writing of the Defendant. The testimony from third party witnesses went to specific elements such as the provision

of cable television which was included in the lease proffered up by the Defendant. The direct testimony from the Plaintiff Mr. Hawkins and from Mr. Royal Kay, a former resident of the home, was that there had never been any cable television at the home in Mr. Hawkins' name.

Both the weight of the evidence and the credibility of the witnesses were clearly in favor of the Plaintiff in this action. The Defendant's appeal must therefore be denied and Plaintiff should be awarded his costs and attorney's fees in responding to this appeal pursuant to the attorney's fees clause in the lease between the parties.

ARGUMENT

I. THIS Court LACKS JURISDICTION TO HEAR DEFENDANT'S APPEAL.

The time for filing an appeal is jurisdictional. *State v. Montoya*, 825 P.2d 676 (Utah App. 1991). The rules regarding the timing of such filings are clearly set forth in Rule 4 of the Utah Rules of Appellate Procedure. This is an action brought under the Utah Unlawful Detainer Statutes. Pursuant to Rule 4(a), the Notice of Appeal in such an action is required to be filed with the clerk of the trial court within ten days after the date of entry of the Judgment. That Rule is somewhat modified by subpart (b) of Rule 4. This subsection provides in pertinent part:

If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party ... (3) under Rule 59 to alter or amend the judgment ... the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly ... a notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the

entry of the order of the trial court disposing of the motion as provided above.

U.R.A.P. Rule 4(b).

In the present case, the initial Judgment was filed on October 21, 1999. R.466. The Defendant had filed a premature Rule 59 Motion to amend on September 24, 1999, prior to the entry of the Judgment. R.428. A second Rule 59 Motion to Amend was filed on November 3, 1999. The plain language of Rule 59 requires that the motion be served “not later than ten days after the entry of the Judgment.” Under the plain language of the Rule therefore, the initial Rule 59 Motion to Amend filed on September 24, 1999, was untimely and could not toll the time to file a Notice of Appeal. *Burgers v. Maiben*, 652 P.2d 1320 (Utah 1982).

After entry of the Judgment on October 21, 1999, a second Rule 59 Motion to Amend was filed. R.469.² Although this Rule 59 Motion is purportedly dated October 27, 1999, the document was not in actuality filed with the court until November 3, 1999. R.469. Since the Judgment was filed on October 21, 1999, the Rule 59 Motion needed to be filed by October 31, 1999. October 31st was a Sunday which would allow Defendant until November 1, 1999. The Motion was not filed until November 3, 1999, making it untimely. The result is again that the untimely Motion failed to toll the time period for filing a Notice of Appeal, which in a unlawful detainer action like the one at present means the time for filing the Notice of Appeal likewise expired on November 1, 1999.

² The Motion was apparently in response to Plaintiff's First Memorandum in opposition to the initial Rule 59 Motion, where it was pointed out that the Motion was untimely. R.448.

The Notice of Appeal in this case was actually filed on June 7, 2000. R.497. In light of the untimely filing of the Notice of Appeal, this Court has no jurisdiction over the appeal and it must be dismissed.

Even had the Rule 59 Motions been timely filed, the Notice of Appeal is still untimely. The untimely Rule 59 Motion was granted in part and denied in part. The result of the partial grant of the Motion resulted in the court filing an Amended Judgment. R.499. An Amended Judgment would be the final judgment in this case. It would be the order disposing of the Rule 59 Motion. Rule 4(b) of the Utah Rules of Appellate Procedure provides in pertinent part, "a Notice of Appeal filed before the disposition of any of the above motions shall have no effect. A new Notice of Appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above." This very issue was addressed by the Utah Supreme Court in the case of *U-M Investments v Ray*, 658 P.2d 1186 (Utah 1982). The issue in that case was whether an appeal filed before the final disposition of a Rule 59 Motion provided jurisdiction for the Appellate Court to hear an appeal. The Utah Supreme Court clearly stated:

After the motions were made by the defendants, both groups filed a notice of appeal from the September judgment. Had no motions been filed under Rule 59 within ten days of the judgment, such notice of appeal clearly would have been timely. However, under Rule 73(a) the timely motions filed to upset the judgment render the notice of appeal ineffective. The time for appeal therefore automatically was rescheduled, and an appeal then had to be taken within one month of the date of the register of actions entry that denied defendant's motions or amended the judgment.

U-M Investments v. Ray, at 1187.

There are two possible results out of a Rule 59 Motion. Either it is denied, which triggers time for filing the appeal, or it is granted, and if it is granted, then the filing of the Amended Judgment is the event that triggers the time frame for filing an appeal. The sort of preliminary ruling by the court announcing an Amended Judgment would be filed is not a final Judgment triggering the time for appeal. See *Anderson v. Schwendiman*, 764 P.2d 999 (Utah App. 1988). Accordingly, even if the Defendant had in some fashion filed a timely Motion under Rule 59, the premature filing of the Notice of Appeal before the entry of the Amended Judgment in this case makes the notice ineffective. This Court therefore lacks jurisdiction over the appeal and it must be dismissed.

II. DEFENDANT'S APPEAL SHOULD BE DENIED DUE TO HIS FAILURE TO MARSHALL THE EVIDENCE.

The Defendant seeks to challenge findings of the trial court that the lease agreement between the parties and a purported extension of that lease were documents which had been fraudulently altered by the Defendant. In order meet this burden, the Defendant must show that the finding of the trial court is "clearly erroneous." *Fisher v. Fisher*, 907 P.2d 1172, 1178 (Utah App. 1995). In *Fisher*, this Court clearly set forth the duties and burdens of a party seeking to demonstrate that the trial court's findings were clearly erroneous. This Court stated:

To successfully challenge the trial court's finding, the trust must demonstrate that finding is clearly erroneous. To make such a showing the trust must marshall all of the evidence supporting the finding and then demonstrate how this evidence, when viewed in the light most favorable to the finding, is insufficient to support it.

Fisher, at 1177. The Defendant has clearly failed in that burden in this case. Rather than citing to the evidence supporting the court's ruling, the Defendant provides his own narration as to the facts that he presented at trial. It is not in any fashion an attempt to marshall the evidence and examine the items that the court would have ruled on. This is the exact situation this Court addressed in the *Fisher* case. This Court held:

Rather than marshall the evidence, the trust merely highlights a portion of the trial court's findings and then argues that there was other, contrary evidence before the trial court ...

The trial court is in the best position to weigh conflicting testimony, to assess credibility, and from this, to make findings of fact. This Court does not lightly disturb the factual findings of a trial court. Accordingly, absent a proper showing that the trial court erred, we will not revisit the facts on appeal.

Fisher, at 1178 (citations omitted).

Not only has the Defendant failed to marshall the evidence presented at trial, he has likewise failed to even obtain transcripts of the prior hearings held in this case. One of those hearings was specifically held on the issue of the Request for Admissions which form the central portion of the Defendant's appeal. In light of the Defendant's failure to marshall the evidence, the court must presume that the evidence presented to the court was sufficient to sustain the court's ruling and deny the Defendant's appeal.

III. THE COURT PROPERLY PREVENTED THE DEFENDANT FROM PERPETRATING A FRAUD ON THE COURT.

A. The Request for Admissions was not properly served.

Rule 5 of the Utah Rules of Civil Procedure provides in pertinent part, “whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney, unless the service upon the parties is ordered by the court.” U.R.C.P. Rule 5(b)(1). Counsel first appeared for the Plaintiff at the hearing in this matter on August 3, 1998. That appearance is reflected on the docket. R.48.

On August 14, 1998, in direct contravention of the Rules of Civil Procedure, the Defendant alleges that he mailed a copy of his discovery request directly to the Plaintiff and not to Plaintiff’s counsel. R.50. The Plaintiff claims that he never received such discovery. Plaintiff’s counsel certainly never received such discovery until a Motion for Order Compelling discovery and Motion for Order Establishing Admissions were sent on or about October 5, 1998. Plaintiff’s counsel went to the court to review the file on three separate occasions. after receiving Defendant’s motion, to examine the file in this case. Each time he was told the file was not available. Plaintiff’s counsel was left therefore unable to determine that the discovery had allegedly inappropriately been sent to his client, because he never saw the mailing certificate. R.137. That document was never directly provided to Plaintiff’s counsel by the Defendant or his counsel.

The reason is obvious. The document shows that service was not appropriately made. Because the alleged service of the discovery was inappropriate, the trial court’s initial order granting

the Motion to have the items deemed admitted was improper. The court's subsequent decision therefore to allow limited testimony to the effect relating to areas where the Defendant was attempting to perpetrate a fraud on the court, while not going far enough, clearly remedied at least some of its deficiency.

**B. The Court's Decision to Grant the Motion
Deeming the Admissions Admitted Without
Proper Service was Improper.**

In determining whether the Request for Admissions in this case should be admitted, the court examined three cases: *Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058 (Utah 1998); *Jensen v. Pioneer Dodge Center, Inc.*, 702 P.2d 98 (Utah 1985); and, *Whittaker v. Nikols*, 699 P.2d 685 (Utah 1985). All three of these cases provided examples where the court found that Request for Admissions should be deemed admitted. All of these cases share one thing in common, there was no dispute in any of the cases that the Request for Admissions were actually sent to the other party in accordance with the Rules of Civil Procedure, or that the other party had received them. The importance of this distinction is clear. If a party has not received discovery requests, he has no duty to respond to them. If they have not received them, deeming them admitted is a violation of the due process rights of a party against whom the Motion has been filed.

"Due process is not a technical concept that can be reduced to a formula with a fixed content, unrelated to time, place, and circumstances. Rather, the demands of due process rests on the concept of basic fairness of procedure and in a manner procedure appropriate to the case and parties

involved.” *In re: Worthen*, 926 P.2d 853, 877 (Utah 1996). “The test of procedural due process is fairness.” *Wells v. Children's Aid Society of Utah*, 681 P.2d 199, 204 (Utah 1984). The basic procedural due process requirements are notice and an opportunity to be heard. *Id.*

By deeming the admissions in this case to be admitted, the trial court subverted the fundamental and basic rights incorporated in procedural due process. In the hearing, the court stated that it accepted the fact that Plaintiff’s counsel had never received the Request for Admissions from the Defendant. The mailing certificate demonstrates that they were never sent to Plaintiff’s counsel and instead were at best improperly sent to the Plaintiff himself. In keeping within the constitutional requirements of due process, therefore, the court could not and should not have deemed the Request for Admissions to be admitted. The court’s determination to at least allow limited testimony on issues where fraud was to be attempted on the court, to some degree ameliorated this prior erroneous ruling.

**C. The Court’s Modification of its Prior Ruling
was at Least a Partial Response to
Plaintiff’s Rule 36(b) Motion.**

Under Rule 36(b) of the Utah Rules of Civil Procedure, it provides that the “court may permit withdrawal or amendment when the presentation of the merits of the action will be subverted thereby and the party who obtained the admission fails to satisfy the court, the withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.” While the Defendant proclaims that the court’s decision to allow evidence that could show the attempt by the Defendant

to perpetrate a fraud on the court in some fashion prejudiced him, there is not a single concrete example of such prejudice.

Defendant failed to identify a single exhibit or a single witness that could have been presented to the court, outside of those that were already presented. Indeed, it is impossible to foresee any such circumstances that could have arisen. The documents at issue were executed solely between the Plaintiff and Defendant. No other parties were present when the documents were executed. The documents themselves were presented to the court. There is no allegation other than the documents presented to the court that there were any extrinsic documents that could have been used to evaluate the authenticity of the various documents. The trial court took all of the evidence and listened to all of the evidence before determining what was relevant and what should be admitted for purposes of trial. The court found specifically that the Defendant had altered documents which he tried to present to the court as if they were originals. T.163.

In Defendant's Brief, they allege that no Rule 36 Motion was ever made. That is simply not true.

In *Brunetti v. Mascaro*, 854 P.2d 555 (Utah App. 1993), this Court found that documents served in opposition to a Motion for Summary Judgment which addressed the attempt to have the Request for Admissions deemed admitted constituted a Motion for Withdrawal, even though the pleadings were not captioned or titled the same. *Brunetti*, at 558. In this case, the Plaintiff had filed an objection to the Defendant's Motion for Order Compelling Discovery. That Motion could have

been treated by the court as a Motion to Withdraw the Request for Admissions. In the Supplemental Memorandum in Response to Request for Admissions be Deemed Admitted filed by the Plaintiff, the court's option to treat the prior objection as a Motion to Withdraw was pointed out together with a more formal presentation of the same request. R.210. Attached to the Plaintiff's Memorandum were copies of the sworn Answer to the Request for Admissions and an Affidavit of the Plaintiff, setting forth the objections made in the Request for Admissions. The court's specific findings with respect to the forged documents clearly shows that presentation of the evidence in this case would have been subverted had the court not stepped in and modified its ruling.³

Rule 60(b) of the Utah Rules of Civil Procedure provides that "a trial court may in the furtherance of justice relieve a party or his legal representative from the final judgment, order, or proceeding where there has been fraud, misrepresentation, or other misconduct of an adverse party." U.R.C.P. Rule 60(b). The Rule also specifically states that "this Rule does not limit the power of the court to entertain independent action to relieve a party from a judgment order or proceeding, or to set aside a judgment for fraud upon the court." *Id.* The court specifically found that the Defendant in this action was trying to perpetrate a fraud upon the court. It was clearly within the court's power to prevent such an event from taking place.

³ This meets the requirements set forth in *Langeland*, that the parties seeking withdrawal or amendment of the Request for Admissions must show that the presentation of the merits of the action would be served, show that the matters deemed admitted against it are relevant to the merits of the underlying cause of action and must introduce some evidence by affidavit or otherwise that the specific facts indicating the matters deemed admitted against it are in fact untrue.

The court's ruling, while Plaintiff believes the court did not go far enough, at least ameliorated to some extent the trial court's original erroneous ruling deeming the Request for Admissions be admitted.

IV. THE EVIDENCE WAS SUFFICIENT TO SHOW AN ATTEMPT OF FRAUD UPON THE COURT.

The court specifically found that two documents presented at trial had been altered by the Defendant from the original state that they had been in at the time Plaintiff signed those documents.

The documents were the original lease agreement between the parties and a document purporting to be an extension of that lease. As set forth in section II. above, it was the duty of the Defendant in this case to marshal all of the evidence supporting the court's ruling, and to show why that evidence could not support the court's finding. He has failed to do that. It was this Court that stated in *Fisher v. Fisher* that "the trial court is in the best position to weigh conflicting testimony, to assess credibility, and from this, make findings of fact." *Fisher*, at 1178. In this case, the court made the following specific finding with respect to the lease agreement and the credibility of the witnesses:

I am first going to address the issue of the admissions, most of which I am continuing to deem admitted, with the exception of those admissions that go to the issue of a so-called extension of the lease or the lease terms.

I find Mr. Callahan to be a not credible witness overall. I find it difficult to believe his testimony for a number of reasons. I find it to be inconsistent and self-serving, and I find that he did in fact alter the lease after it was signed by the parties.

I therefore, find -- I also find that the card that allegedly extended the lease was not prepared and signed in its form, as presented to the court, by Mr. Hawkins. Therefore, there was no extension of lease past March 15, 1998.

T.163.

The court reiterated its position at the time that it addressed the Defendant's Rule 59 Motion. In its minute entry, the court stated:

The court has carefully considered the Motion and Response. With respect to the Request for Admissions, that issue is squarely before the court on the date of trial, and the court denies Defendant's Motion to Amend. The court recalls, and review of the video tape confirms, that at the outset of trial, the court indicated that admittedly on its own motion (and alerted to the possibility by Plaintiff's Trial Brief), that it would revisit the Request for Admissions, particularly the one regarding in the purported lease extension. if it appeared that the extension was a result of fraud or forgery. That is exactly what the court found.

Langeland v. Monarch Motors, Inc., 952 P.2d 1058 (Utah 1998), notwithstanding, this court does not that Rule 36, U.R.C.P.. robs this court of its inherent power to prevent injustice, and particularly the power to prevent the use of a court rule, or litigation device, to perpetrate a fraud on the court or on a party. The court explicitly found that the Defendant was not credible on the issue of the lease extension. The court is aware that the Defendant believes that the evidence does not support this finding, but as fact the court was unequivocally persuaded that the finder "extension" was bogus and any dispute with that finding is a matter for appeal.

R.494.

A. Evidence Relating to the Lease.

The following evidence was presented by the Plaintiff in support of his contention that the lease agreement between the parties had been altered. Beginning with page 23 of the transcript, Mr. Hawkins testified that Plaintiff's Exhibit #1 was a copy of the lease agreement that he had entered into with Mr. Callahan. Mr. Hawkins went on to testify that he did not have the original of the document and in fact, did not have a copy of the document until litigation had begun because the Defendant had kept the original and had refused to return it to him. T.24. Mr. Hawkins then went on to specifically identify the items on the lease agreement that were in his hand-writing versus that of the Defendant. T.25-26.

Mr. Hawkins then went on to testify that a large number of the items that were set forth on Exhibit #1, were not on there at time he signed the agreement. T.26-31.

Plaintiff then introduced Exhibits #2 & #3. These documents were other leases that were signed in a contemporaneous period with other individuals who were leasing from Mr. Hawkins. T.31. Mr. Hawkins testimony was that aside from the fixed terms of the lease, offered to Mr. Callahan, the terms and conditions that he offered were exactly the same as those to his other tenants. T.43.

In the brief testimony allowed from Mr. Royal Kay, he testified that contrary to the terms purportedly set out in the lease with Mr. Callahan, there was no cable television provided. T.75. Mr. Hawkins also testified that he had never had cable television in his name at the home.

The court had therefore the direct testimony of the Plaintiff, supporting testimony as to at least one feature by an independent third party witness, and additional documentary evidence supporting the Plaintiff's view as to the legitimacy of the lease document.

That direct evidence coupled with the demeanor of the witness, including his other attempts to obtain fictional damages on his Counterclaim, was sufficient for the court to determine the veracity of the witnesses which was a key factor in determining the Defendant's credibility at this point.

B. Evidence Relating to the So-called Lease Extension.

Just as the Plaintiff had testified that the lease had been altered, so did he testify that the so-called lease extension was a fraud. T.36-37.

Mr. Hawkins had testified that the 3x5 cards consisting of Plaintiff's Exhibit #4 were handed to him by Mr. Callahan. Mr. Callahan would have the document prepared and have Mr. Hawkins sign it. Mr. Hawkins testified that there had been no conversations with Mr. Callahan regarding an extension of the lease until March. This was two months later than the date of the purported lease extension.

Again, the court had before it the parties and the document. The court had other examples of the same document prepared by Mr. Callahan. Based on the testimony of the parties and the documents before it, the court determined Mr. Callahan's testimony was not credible and that the document was a fraud.

In light of the court's finding and the evidence presented, there is clearly a reasonable basis upon which the court could have made its findings of fact and conclusions of law. This Court accordingly should not overturn the trial court's ruling with respect to those items and the Judgment should be sustained.

V. DEFENDANT IS NOT ENTITLED TO ANY ATTORNEY'S FEES.

At the conclusion of trial, the court found in favor of Mr. Hawkins on his Complaint, and in favor of the Defendant on his Counterclaim. It is ironic that the Counterclaim was actually filed before the events purportedly comprising the Counterclaim had even taken place.

The court next went on in a detailed analysis evaluating the fees and costs submitted by each party and the objections of the same filed by each side. Based upon those determinations, the court awarded attorney's fees to both parties and ordered those fees offset against one another.

Plaintiff does not believe that Defendant should have been entitled to anything on their Counterclaim and therefore should have been denied all attorney's fees. It has been obvious from the inception of this action, however, that the Defendant is impecunious and judgment proof. And consequently, while a great deal of time and resources could have been spent on filing a cross appeal in this action, it would be a waste of resources for the Defendant and the court.

Defendant's counsel cannot receive payment from Defendant and is seeking to get those fees paid by the Plaintiff. This Court should not award such mercenary behavior. The Defendant's request for additional attorney's fees should be denied. Plaintiff should be awarded his fees in

responding to this appeal. Although in reality, Plaintiff will never see a dime of those funds as the Defendant is judgment proof.

The Appellant's Brief does not address any of the legal argument set forth in the court's detailed entry regarding attorney's fees, and the same together with their factual findings should be therefore upheld by this Court.

CONCLUSION

This appeal is simply a waste of the Court's time and the parties' resources. Total legitimate claimed damages between the parties are less than \$1,000.00 on either side. All the rest of the damages involve attorney's fees. The time involved in dealing with this appeal alone goes far beyond the value of this case.

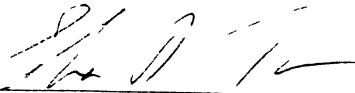
This is a case where the Defendant having been found a blatant liar, now comes to this Court seeking to take advantage of his breach of the Rules of Civil Procedure in order to gain some sort of a tactical litigation advantage. That type of behavior cannot and should not be rewarded.

This appeal is untimely and it is improperly prepared in that it fails to marshal the evidence. It fails to state a legitimate basis for appeal and should be summarily dismissed. If either party had a legitimate gripe for appeal, it is the Plaintiff. Plaintiff however realizes the futility of obtaining more of a Judgment against an impecunious party and does not wish to waste the Court's time or his own resources in pursuing that action.

Plaintiff therefore respectfully requests that this matter be summarily stricken and the appeal of the Defendant denied.

Dated this 29th day of November, 2000.

LARSON, TURNER, FAIRBANKS & DALBY

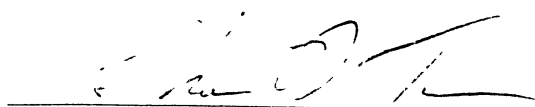
A handwritten signature in dark ink, appearing to read 'Shawn D. Turner', is written over a horizontal line.

Shawn D. Turner
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2000 a true and correct copy of Brief of Appellee was mailed, postage prepaid, to the following:

Thor B. Roundy
Attorney for Appellant
275 East South Temple, Ste. 150
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Thor B. Roundy", is written over a horizontal line.

ADDENDUM “A”

Thor B. Roundy (Bar No. 6435)
Attorney for Defendant
275 East South Temple, Suite 150
Salt Lake City, Utah 84111
Telephone (801) 364-3229
Facsimile (801) 364-4721

FILED DISTRICT COURT
Third Judicial District
JUN 13 2000
By SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

John B. Hawkins
Plaintiff,
v.
Tom Callahan
Defendant.

:
: AMENDED JUDGEMENT
:
:
: Civil No. 980906136
:
: Judge Hilder
:
:

IMAGED

980906136
JD1363243
CALLAHAN, TOM
JD
Amended Judgment @ J

Based on the Court's Minute Entry and Order dated May 26, 2000, Judgment in the above-captioned matter is hereby amended as follows:

Plaintiff is awarded judgment against the Defendant in the amount of \$430.00, consisting of two month's rent less the deposit in the amount of \$150.00. Plaintiff is awarded pre-judgment interest on the amount of \$140.00 at the rate of 10% from June 15, 1998 and the remaining \$290.00 at the rate of 10% interest from July 15, 1998, until the date of initial judgment in this matter. Plaintiff is further awarded attorneys fees and costs in this matter in the amount of \$1,330.75.

The Defendant in this matter is awarded damages in the amount

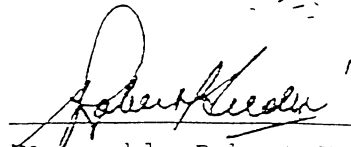
of \$195.00 on his counterclaim. Defendant is awarded interest at the prejudgment rate of 10% from August 16, 1998 until the date of the initial judgment. Defendant is also awarded attorneys fees and costs in the amount of \$941.00.

The amounts owing to the Defendant are to be offset against those amounts owing to the Plaintiff.

The net amount due to the Plaintiff shall bear interest at the statutory rate for judgments from the date of the initial judgment in this matter.

DATED this 16th day of June, 2000.

BY THE COURT:

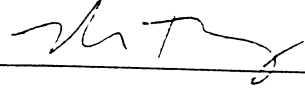


Honorable Robert K. Hilder
Third District Judge

Certificate of Service

I hereby certify that I caused to be mailed a true and correct copy of the foregoing Amended Judgment, by United States mail, postage prepaid, this 1st day of June, 2000, to the following counsel of record for plaintiff John B. Hawkins:

Shawn D. Turner
4516 South 700 East, Suite 100
Salt Lake City, Utah 84107



ADDENDUM “B”

WEST'S UTAH RULES OF COURT
UTAH RULES OF APPELLATE PROCEDURE
TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS

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RULE 4. APPEAL AS OF RIGHT: WHEN TAKEN

(a) Appeal From Final Judgment and Order. In a case in which an appeal is permitted as a matter of right from the trial court to the **appellate** court, the notice of appeal required by **Rule 3** shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by **Rule 3** shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Motions Post Judgment or Order. If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under **Rule 50(b)**; (2) under **Rule 52(b)** to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under **Rule 59** to alter or amend the judgment; or (4) under **Rule 59** for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court under **Rule 24** for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) Filing Prior to Entry of Judgment or Order. Except as provided in paragraph (b) of this **rule**, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) Additional or Cross-Appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this **rule**, whichever period last expires.

(e) Extension of Time to Appeal. The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this **rule**. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the **rules** of practice of the trial court. No extension shall exceed 30 days past

the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) Appeal by an Inmate Confined in an Institution. If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. If a notice of appeal is filed in the manner provided in this paragraph (f), the 14-day period provided in paragraph (d) runs from the date when the trial court receives the first notice of appeal.

[Amended effective November 1, 1998; April 1, 1999.]

Rules App. Proc., Rule 4

UT R RAP Rule 4

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WEST'S UTAH RULES OF COURT
UTAH RULES OF **CIVIL** PROCEDURE
PART II. COMMENCEMENT OF ACTION; **SERVICE** OF PROCESS, PLEADINGS, MOTIONS AND
ORDERS

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RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) **Service:** When Required.

(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(2) No **service** need be made on parties in default for failure to appear except as provided in Rule 55(a)(2) (default proceedings). Pleadings asserting new or additional claims for relief against a party in default shall be served in the manner provided for **service** of summons in Rule 4.

(3) In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any **service** required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Service:** How Made and by Whom.

(1) Whenever under these rules **service** is required or permitted to be made upon a party represented by an attorney, the **service** shall be made upon the attorney unless **service** upon the party is ordered by the court. **Service** upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.

(A) Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

(B) **Service** by mail is complete upon mailing. If the paper served is notice of a hearing and if the hearing is scheduled 5 days or less from the date of **service**, **service** shall be by delivery or other method of actual notice.

(2) Unless otherwise directed by the court:

(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(C) an order or judgment prepared by the court shall be served by the court.

(c) **Service:** Numerous Defendants. In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that **service** of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and **service** thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. Except where rules of judicial administration prohibit the filing of discovery requests and responses, all papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after **service**. The papers shall be accompanied by a certificate of **service** showing the date and manner of **service** completed by the person effecting **service**.

(e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk.

[Amended effective November 1, 1997; April 1, 1999.]

Advisory Committee Notes

The 1999 amendment to subdivision (b)(1)(B) does not authorize the court to conduct a hearing with less than 5 days notice, but rather specifies the manner of **service** of the notice when the court otherwise has that authority.

1997 note: **Rule 5(d)** is amended to give the trial court the option, either on an ad hoc basis or by local rule, of ordering that discovery papers, depositions, written interrogatories, document requests, requests for admission, and answers and responses need not be filed unless required for specific use in the case. The committee is of the view that a local rule of the district courts on the subject should be encouraged.

Rules Civ. Proc., Rule 5

UT R RCP Rule 5

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WEST'S UTAH RULES OF COURT
UTAH RULES OF CIVIL PROCEDURE
PART V. DEPOSITIONS AND DISCOVERY

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RULE 36. REQUEST FOR ADMISSION

(a) Request for Admission.

(1) A party may serve upon any other party a written request for the admission, for purpose of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. The request for admission shall contain a notice advising the party to whom the request is made that, pursuant to Rule 36, the matters shall be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as the court may allow. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

(2) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

(3) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated

time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subverted thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

[Amended effective November 1, 1999.]

Advisory Committee Note

For a complete explanation of the 1999 amendments to this rule and the interrelationship of these amendments with the other discovery changes, see the advisory committee note appended to Rule 26. The Supreme Court order approving the amendments directed that the new procedures be applicable only to cases filed on or after November 1, 1999.

Rules Civ. Proc., Rule 36

UT R RCP Rule 36

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WEST'S UTAH RULES OF COURT
UTAH RULES OF CIVIL PROCEDURE
PART VII. JUDGMENT

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RULE 59. NEW TRIALS; AMENDMENTS OF JUDGMENT

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Affidavits; Time for Filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such **service** within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rules Civ. Proc., Rule 59

UT R RCP Rule 59

END OF DOCUMENT

WEST'S UTAH RULES OF COURT
UTAH RULES OF CIVIL PROCEDURE
PART VII. JUDGMENT

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Current with amendments received through 10-1-2000.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[Amended effective April 1, 1998.]

Advisory Committee Note

The 1998 amendment eliminates as grounds for a motion the following: "(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action." This basis for a motion is not found in the federal rule. The committee concluded the clause was ambiguous and possibly in conflict with rules permitting service by means other than personal service.

ADDENDUM “C”

1 JOHN B. HAWKINS,
2 plaintiff herein, called to testify on
3 his own behalf, being first duly sworn,
4 was examined and testified on his oath as
5 follows:

6 MR. TURNER: Your Honor, as a preliminary matter,
7 I have a number of exhibits that I'm going to introduce
8 through this witness. May I have the Court's permission to
9 approach the witness?

10 THE COURT: Yes. That's no problem.

11 MR. TURNER: I've also made courtesy copies of
12 those for the Court and Counsel. I've given him his. May I
13 approach?

14 THE COURT: You may. Thank you.

15 DIRECT EXAMINATION

16 BY MR. TURNER:

17 Q. Mr. Hawkins, will you please state your full name
18 and current address for the record.

19 A. John Browning Hawkins. And my address is 1427
20 East Sherman Avenue in Salt Lake City, 84105.

21 Q. And, Mr. Hawkins, are you formerly the owner of
22 the property located at 61 West Russett Avenue in Salt Lake
23 City?

24 A. Yes, I am.

25 Q. And about when did you buy that property?

1 A. It was about three, maybe three and a half years
2 ago.

3 Q. And what was the purpose of buying the property?

4 A. The purpose was to move out of my parents' house
5 and have a place to live.

6 Q. And about how many bedrooms were there in that
7 house?

8 A. There were two.

9 Q. And at the time you moved into the home, was
10 anybody else living there with you?

11 A. Initially, when I moved in, I moved in for a month
12 and I did some work on the hardwood floors. And then after
13 that, my sister moved in with me.

14 Q. And did you subsequently take in renters into the
15 property?

16 A. I didn't until about six months later. When I
17 finished one of the rooms downstairs, I did. I took in a
18 renter after that.

19 Q. Okay. And so was that to act as another bedroom?

20 A. Yes, it was.

21 Q. And how many bedrooms, by the time you sold the
22 property, had you finished in the house?

23 A. I had finished two of them.

24 Q. So how many bedrooms were there total?

25 A. Four bedrooms.

1 person. He wasn't there at the time that I delivered them.

2 Q. Did you ever discuss this with Tom Callahan?

3 A. No. I didn't discuss this, but he said that he
4 was planning to move out and that he had some prospects,
5 that he was looking for a place.

6 Q. And when was that?

7 A. That would have been -- I think that would have
8 been the beginning of March.

9 Q. Okay. Was that around the time that you had
10 discussed the extension?

11 A. No. That should have been before.

12 Q. Which would have --

13 A. The extension should have -- he talked about that
14 before -- before we talked about him moving out.

15 Q. Okay. So after you told him he couldn't extend,
16 he told you that he was planning on moving out, correct?

17 A. That's correct.

18 Q. Now, from the time that he told you that he
19 planned on moving out until the time that he moved out, did
20 you ever see any signs that Mr. Callahan was trying to move
21 out?

22 A. No. Not other than his verbal comments that he
23 was trying to find a place.

24 Q. During that time, did you ever have any verbal
25 altercations or any other altercations with Mr. Callahan?

1 A. Any verbal altercations? What do you mean by
2 that?

3 Q. Did Mr. Callahan ever threaten you?

4 A. Yes. There was actually two times. One time was
5 when I was working on my home. I was painting Henry
6 Bowman's room that's upstairs just above Tom's room. And I
7 was pulling out his telephone line because he had a separate
8 telephone line. And I pulled that out and I was proceeding
9 to tape along the floor, and I heard some yelling and
10 screaming, and Tom came upstairs and was waiving his arms
11 around and yelling and screaming. I couldn't even
12 understand what he was saying. And I stood up and walked
13 over and I tried to ask him, you know, what was wrong.

14 And after a minute or two later, you know, he said
15 his phone didn't work and he said it was all my fault. and
16 I went into the kitchen and picked up the phone and the
17 phone worked, and it -- you know, it didn't -- at that time,
18 you know, I didn't think of, you know, his phone wasn't
19 working downstairs.

20 And after, you know, we talked about that, I went
21 downstairs and I guess the phone didn't work downstairs.
22 Then I went out to the phone box and I couldn't see anything
23 going on there, and then when I went back in the house, my
24 girlfriend was in the closet in that same room and my
25 adrenalin was going, and she said she felt scared, and I

1 was, like, well, yeah, that -- I felt scared too. So I
2 called the police and I had them come over at that time and,
3 you know, talk with Tom about his behavior.

4 Q. And you said there were two occasions. What was
5 the other?

6 A. The other occasion was when we came in the back
7 door because the front door was locked. I don't have a key
8 to the deadbolt, so we came around the back. And as we came
9 in, I heard something in the basement that seemed like
10 running water. So I went downstairs. And the washer was
11 flooding over because the door was open. And I put down
12 the -- the door and it stopped, and after that, I talked to
13 my girlfriend. I told her I was going to go home to get my
14 camera to take some pictures. And after I did that, I came
15 back and then I proceeded to work on my house after I could
16 clean up some of the water, because -- in the bathroom and
17 then, you know, the door was locked to Tom's room, so I
18 couldn't really clean up anything else. So I proceeded to
19 work on my home upstairs. I was doing some taping and
20 working on my bathroom up there.

21 And Dan came home and I asked him about it, asked,
22 you know, if he had anything to do with the washer, and he
23 told me no, that he, you know, woke up at 6:00 a.m. and went
24 to work and that he hadn't been there.

25 MR. ROUNDY: Objection. Hearsay.

1 THE COURT: Sustained.

2 THE WITNESS: And then when Tom came home, I told
3 him that the washer had been flooded and that I was going to
4 take them out because that was the second time that that
5 happened. And as I proceeded to go back into the room where
6 I was working before, he came up -- Tom came upstairs and he
7 was yelling and screaming again. And my girlfriend Nancy
8 was in the kitchen washing off some rollers, and he
9 proceeded to yell and scream at her, telling her that that
10 wasn't his -- his fault.

11 And at that point, I think we just left. I don't
12 think I called the police at that point.

13 Q. (By Mr. Turner) Okay. I'd like to show you
14 what's been marked as Plaintiff's Exhibit No. 6.

15 MR. TURNER: Actually, before we do that, I'd move
16 for the admission of Plaintiff's Exhibit No. 5.

17 THE COURT: Any objection?

18 MR. ROUNDY: No objection, Your Honor.

19 THE COURT: Received.

20 Q. (By Mr. Turner) Looking at Plaintiff's Exhibit
21 No. 6, Mr. Hawkins, can you tell me what that is?

22 A. This is a three-day notice to pay rent or vacate
23 that I served to Tom on June the 15th of '98.

24 Q. Okay. And why was it that you were delivering
25 this three-day notice on June 15th?

1 A. Well, I served him --

2 MR. ROUNDY: Objection, Your Honor. This runs
3 contrary to the request for admission again.

4 MR. TURNER: And, Your Honor --

5 MR. ROUNDY: There's a couple of them. The one
6 that talks about the fact that he has in fact paid the rent
7 and then another which indicates the purpose of his eviction
8 was the purpose of -- that he wanted to move out, not to try
9 to collect this deposit.

10 THE COURT: Okay. I'm going to allow it subject
11 to your objection. It will depend on my other rulings
12 whether it is indeed relevant. Okay?

13 MR. ROUNDY: Thank you, Your Honor.

14 MR. TURNER: Your Honor, I'd like to make one
15 brief statement with respect to the issue of what the
16 purpose of the eviction was. That may have been a purpose,
17 but that doesn't mean that that can be the sole purpose or
18 the sole reason that those --

19 THE COURT: That's fine. Keep that for argument as to
20 the relevance.

21 MR. TURNER: Thank you, Your Honor.

22 Q. Okay. Mr. Hawkins, this particular document was
23 being delivered on June 15th why? I'm sorry, I don't
24 remember your answer.

25 A. I delivered it to him because the second time the

1 washer flooded over, the first time I did get an insurance
2 settlement, but the second time I felt like he, you know,
3 didn't really care about the property or where he lived and
4 that he didn't want to pay the deposit and he felt like, you
5 know, he could cause any damage that he wanted to at that
6 point.

7 Q. So at the time you delivered this, it was your
8 understanding and belief that he had not paid the remaining
9 \$150 of his deposit; is that correct?

10 A. That's correct.

11 Q. And would June 15th have also been the day that
12 the rent for the next month was due?

13 A. That's correct.

14 Q. And did Mr. Callahan ever offer to pay you that
15 next month's rent?

16 A. On June 15th, no, I don't think he did.

17 Q. Okay. But, subsequently, he tendered you a
18 cashier's check for the month of June to July, right?

19 A. Yes.' That's correct. That would have been after
20 the fact. That would have been, probably, five -- five days
21 later.

22 Q. Okay. When he tendered that check, did he offer
23 to pay the rest of the deposit?

24 A. No, he did not.

25 Q. Did you accept that check?

1 A. That check, I did not accept.

2 Q. Let me show you what's been marked as Plaintiff's
3 Exhibit No. 7. Can you tell us what that is?

4 A. This is an eviction notice that was served the
5 same day, June 15th, '98.

6 Q. Okay. And what is the basis for serving this
7 particular eviction notice?

8 A. The basis was that he threatened me and I felt
9 unsafe being there at the home.

10 Q. Okay. Looking at the three criteria in the middle
11 there, are those in your handwriting?

12 A. Yes, they are.

13 Q. Okay. At the time you filled this out, did you
14 feel that Mr. Callahan broke all three of those rules?

15 A. Yes, I did.

16 Q. Turning back for a minute, can you go back to
17 Exhibit No. 1? Now, comparing that with your Exhibit No. 7,
18 the first item you've listed as breaking rule No. 7, no
19 smoking in the house or your bathroom, how does that fit
20 into rule No. 7?

21 A. When we negotiated the contract, in the ad that I
22 placed it said "no smoking," and Tom said he smoked, so we
23 agreed that there would be no smoking in the house. And he
24 said he would smoke outside. So we came to agreement that
25 the no smoking was a rule.

1 Q. Okay.

2 MR. ROUNDY: Objection, Your Honor. This is
3 contrary to the written terms of the lease that were merged
4 into the lease and his oral testimony about other things
5 that he agreed to verbally. It's not admissible as
6 evidence.

7 THE COURT: Why would I allow that, Mr. Turner?

8 MR. TURNER: I've got a follow-up question, Your
9 Honor, where I think that becomes clear.

10 THE COURT: Okay. I'll allow that question
11 subject to the objection. Go ahead.

12 Q. (By Mr. Turner) Looking at rule 7 of the house
13 rules which is on the -- on the lease agreement, correct?

14 A. Uh-huh. Yes.

15 Q. Was it your understanding that the language in the
16 third line down of that which -- relating to odors dealt
17 with cigarette smoking?

18 A. Yes, that is correct.

19 Q. So it was your understanding that, under the
20 express terms of the lease, that no smoking was allowed in
21 the home?

22 A. That is correct.

23 MR. ROUNDY: Objection, Your Honor. I don't see
24 where this interpretation can come from. It says that there
25 might be some rules that relate to odors, but it doesn't say

1 A. Okay.

2 Q. Have you seen that document before?

3 A. I have.

4 Q. And what is it?

5 A. It's a copy of the lease agreement.

6 Q. And who is that lease agreement between?

7 A. John Hawkins and I.

8 Q. Okay. And where have you seen that document
9 before?

10 A. I had it at one time.

11 Q. And did you give a copy of that to Mr. Hawkins?

12 A. I gave it -- I gave the copy to him, the copy that
13 I had to him.

14 Q. Okay. And was that the sole lease agreement
15 between you and Mr. Hawkins for this property?

16 A. Uh-huh. (Affirmative.)

17 Q. Okay. Now, as you recall the terms of your lease
18 agreement, was Mr. Hawkins to provide you with cable
19 television?

20 A. No.

21 Q. Did Mr. Hawkins ever provide you with cable
22 television?

23 A. Huh-uh. (Negative.)

24 Q. Who was supposed to provide the normal utilities,
25 like electricity and gas and water?

1 Q. Did you see these come sliding under the door when
2 you were in the room?

3 A. No, sir.

4 Q. Okay. Thanks.

5 Tom, when was the last day that you actually
6 stayed in the premises at 61 West Russett Avenue?

7 A. I think it was August 16th. It was on a Sunday.
8 I didn't actually stay there that night. I was out for
9 the...

10 THE COURT: I didn't hear that date, I'm sorry.
11 August what?

12 THE WITNESS: I -- I think I -- it should be down
13 there some place. It's -- I think it's August 16th.

14 THE COURT: August 16th. Thank you.

15 Q. (By Mr. Roundy) Of 1998; is that right?

16 A. Yes, sir.

17 Q. Okay. I'd like to show you a document which we'll
18 mark as Defendant's Exhibit No. 1, if we may.

19 MR. ROUNDY: If I could approach the bench.

20 THE COURT: Okay. Go ahead.

21 Q. (By Mr. Roundy) All right. Tom, this is a
22 document. I want to ask you if you recognize it.

23 A. It looks like the document of the constable's
24 office.

25 Q. Okay. And did you ever receive this document?

ADDENDUM “D”

C

[illegible]

5 ATTORNEY'S FEES. If litigation is taken by either party to enforce this agreement or to enforce any rights arising out of the breach of this agreement, the prevailing party shall be entitled to all costs incurred in connection with such action including a reasonable attorney's fee.

16 WAIVER. No failure of Owner to enforce any part of this agreement shall be deemed as a waiver nor shall any acceptance of a partial payment of rent be deemed a waiver of Owner's right to full amount.

17 NOTICES. All notices shall be given in accordance with state laws. Where requirements are not spelled out by law, notice may be given by mailing the same postage prepaid to Resident at the premises or to Owner at the address shown below or at such other places as may be designated.

18 HOLD OVER. Any holding over after expiration of lease term with the consent of the Owner shall be construed as a month to month tenancy in accordance with the terms of this agreement.

19 REIMBURSEMENT BY RESIDENT. Resident agrees to reimburse Owner promptly for the replacement cost of any loss, property damage or cost of repairs or service (including plumbing trouble), caused by negligence or improper use by Resident, his agents, family or guests. Resident shall be responsible for damage from windows or doors, egress. Such reimbursement is due when Owner makes demand. Owner's failure to demand damage reimbursement, late payment charges, returned check charges or other sums due by Resident, shall not be deemed a waiver and Owner may demand same at any time including after move-out.

20 OWNER SHALL NOT BE LIABLE. Owner shall not be liable for any damages or losses to person or property caused by other residents or other persons. Owner shall not be liable for personal injury or damage or loss of Resident's personal property (furniture, jewelry, clothing, etc.) from theft, vandalism, fire, water, rain, hail, smoke, explosions, sonic booms or other causes whatsoever, unless the same is due to the negligence of Owner. Owner's agent or recommends that Resident secure insurance to protect himself against the above occurrences. If any of Owner's employees are requested to render any services such as moving automobiles, including of furniture, cleaning, delivering packages or any other service not contemplated in this contract, such as employees shall be deemed the agent of Resident regardless of whether payment is arranged for such services and Resident agrees to hold Owner harmless from all liability in connection with such services.

21 REPAIRS AND MALFUNCTIONS. RESIDENT AGREES TO REQUEST ALL REPAIRS AND SERVICES IN WRITING TO MANAGER except in extreme emergency when telephone calls will be accepted. In case of malfunction of equipment or utilities or damage by fire, water or other cause, Resident shall notify Manager immediately and Owner shall act with due diligence in making repairs and RENT SHALL NOT ABATE DURING SUCH PERIOD. If the damaged premises are unfit for occupancy and Owner decides not to repair the building, Owner may terminate his contract by giving written notice to Resident. If terminated, rent will be prorated and the balance refunded along with the deposit(s) less lawful deductions.

22 DEFAULT BY OWNER. Owner agrees to (a) keep all areas of the apartment complex in a reasonably clean condition, (b) properly maintain hot water, heating and air conditioning equipment if provided, (c) abide by applicable state and local laws regarding repairs, (d) make reasonable repairs, subject to Resident's obligation to pay for damages caused by Resident, his family or guests.

23 DEFAULT BY RESIDENT. If Resident fails to pay rent or other lawful charges when due or to reimburse Owner or damages, or if Resident fails to comply with the terms of this contract or Owner's rules and regulations, or if Resident abandons the apartment or if Resident's family, guests or other occupants create a nuisance or are violent or use offensive language against any agent or employee or representative of Owner, the Owner may terminate this contract by giving Resident notice.

24 ESCALATION CLAUSE. Owner may raise the monthly rent, taxes, insurance and other operating expenses. Owner may raise the monthly rent in a lease non 20 days written notice. Resident may hereafter be increased more than 5% during the initial term of the lease.

25 ABANDONMENT. Abandonment shall have occurred if (1) without notifying the Owner, Resident is absent from the premises for a period exceeding 30 days and Resident possesses or retains in the apartment or (2) without notifying the Owner, Resident is absent for a period exceeding 30 days and Resident possesses or retains in the apartment. If Resident abandons the apartment, Owner may take possession and all items left in the apartment shall be deemed abandoned. Resident shall be liable for the entire rent due for the remainder of the lease term or the cost of re-renting the apartment, including rent, cost of restoring the apartment to the condition at the time it was rented and reasonable fees for re-renting the apartment. (Resident has left personal property in the apartment. Owner may remove same and give Resident notice of this action. Resident may collect same by paying moving and storage costs. If Resident fails to do so within 20 days of notice, Owner may make reasonable use of the property and all items left in the apartment shall be deemed abandoned. Resident may sue for money remaining after such action shall be disposed of in accordance with C.A. 3-44-11).

26 TIME. All times of day shall be in accordance with the time zone of the State of New York.

27 ENTIRE CONTRACT. The following hereby agree and consent that this agreement is the entire contract.

28 ACCEPT OF TERMS OF CO-CONDITIONS

29 SIGNATURES. The following hereby agree and consent that this agreement is the entire contract.

30 CO-CONDITIONS. The following hereby agree and consent that this agreement is the entire contract.

31 SIGNATURES. The following hereby agree and consent that this agreement is the entire contract.

32 SIGNATURES. The following hereby agree and consent that this agreement is the entire contract.

33 SIGNATURES. The following hereby agree and consent that this agreement is the entire contract.

ADDENDUM “E”

11/11

related to the premises at _____ COLLEGE ST. _____
to Cash or Order or Other at a deposit which upon acceptance of this rental agreement shall belong to the Lessor of the premises hereinafter referred to as Owner and shall be applied as follows:

Monthly Rental Amount: \$	RECEIVED	PAYABLE PRIOR TO OCCUPANCY
Rent for the period from <u>Sept 1/1980</u> to <u>Sept 30/1980</u> (Period of one month)	\$	\$
Last _____ months rent	\$	\$
Security Deposit <u>\$150</u> <input type="checkbox"/> Refundable <input type="checkbox"/> Not Refundable	\$	\$
Other <u>\$50</u> <input type="checkbox"/> Refundable <input checked="" type="checkbox"/> Not Refundable	\$	\$
TOTAL <u>\$150</u> (Refundable)	\$	\$

If this agreement is not accepted by the Owner or his agent within _____ days the total deposit received shall be refunded. Resident agrees to rent from the Owner the premises situated in the City of Chicago County of _____ State of _____ located at 6111 Cass St. Apt. No. _____ consisting of _____ upon the following TERMS and CONDITIONS:

1. TERM: The term shall begin on _____ '80 and continue (Circle one of the two following alternatives):
☐ on lease basis until _____ 19____ OR
☒ on a month to month basis
until tenancy shall terminate by giving owner 30 days notice prior to the end of rental period or owner shall terminate by giving tenant 15 days notice prior to end of rental period.

2. RENT: Rent shall be \$ 200.00 per month payable in advance upon the 1st day of each calendar month to Owner or his authorized agent at the following address: 6111 Cass St. Chicago IL 60641. If rent is not paid within five (5) days after due date Resident agrees to pay a late charge of \$15.00. Resident agrees to pay her part \$8.00 for a non-refundable check. If check is dishonored Tenant agrees to make all future payments with Cash or Cashier's Check. Tenant agrees to pay 2% per month on delinquent amount.

3. MULTIPLE OCCUPANCY: It is expressly understood that this agreement is only with the Owner and all rights and jointly and severally in the event of default by any person other than the Owner and/or remaining Tenant shall be responsible for payment of rent and all other provisions of this agreement.

4. UTILITIES: Resident shall be responsible for the following utilities: Water, Gas, Electric, Heat, Sewer, Trash. ☐ Water ☒ Gas ☐ Electric ☐ Other _____

5. USE: The premises shall be used for residential purposes only and shall not be used for any other purpose without the written consent of the Owner. The premises shall not be used for any purpose which is illegal, immoral, or in violation of any law, ordinance, or regulation of the City of Chicago or the State of Illinois.

6. PETS: No pets shall be brought on the premises except temporarily without the prior written consent of the Owner. The unauthorized presence of a pet will subject the resident to penalties, damages, conditions and termination.

7. HOUSE RULES: If the premises are a portion of a building containing more than one unit, Resident agrees to be bound by the house rules which are attached and are hereby made a part of this agreement. While the rules are being enforced after the installation thereof including but not limited to rules with respect to noise, hours of disposal of refuse, pets, parking and use of common areas Resident shall abide by a waterbed on the premises without prior written consent of the Owner.

8. ORDINANCES AND STATUTES: Resident shall comply with all laws, ordinances, codes and regulations of all public bodies and municipal authorities.

9. ASSIGNMENT AND SUBLETTING: Resident shall not assign this agreement or sublet any portion of the premises without prior written consent of the Owner.

10. MAINTENANCE, REPAIRS OR ALTERATIONS: Resident accepts the premises as being in good order and repair unless otherwise indicated. Resident shall at his own expense maintain the premises in a clean and sanitary manner, including a full equipment, appliances, furniture and furnishings, herein and shall surrender the same at termination in as good condition as received, normal wear and tear excepted. Resident shall be responsible for all repairs required for damages caused by his negligence and that of his family or invitees or guests. Resident shall not paint or otherwise redecorate or make alterations to the premises without the prior written consent of the Owner. Resident shall engage and maintain any surrounding grounds, including lawns and shrubbery, and keep the same clear of brush, weeds or other obstructions if such are a part of the premises and are not used for the use of the resident. Resident will not remove Owner's fixtures, furniture and appliances from the premises for any purpose. When Resident moves in, Owner shall furnish light bulbs of prescribed wattage for apartments, sockets and outlets and shall be responsible for the same. Resident agrees to notify Owner of any malfunction or of worn out appliances.

11. ENTRY AND INSPECTION: Resident shall permit Owner or Owner's agent to enter the premises at any time for the purpose of inspecting the premises or checking the same or for the purpose of making any repairs or improvements.

12. POSSESSION: If Owner is unable to deliver possession of the premises as agreed, Owner shall not be liable for damages. Resident shall not be liable for damages if Resident terminates this agreement if possession is not delivered as agreed above.

13. SECURITY DEPOSIT: The security deposit shall secure the performance of the obligations of the Resident to the Owner and shall be applied as follows:
(a) And as Rent: Example: For the first month's rent. If Resident moves out before the term expires, the security deposit shall be applied to the first month's rent and the balance shall be refunded to the Resident.
(b) As a refund for the security deposit.
(c) As a refund for the security deposit.

PLAINTIFF'S
EXHIBIT
3

The above information is for the use of the
 Social Security Administration only.
 It is not to be used for any other purpose.
 It is not to be made available to the public.
 It is not to be used for any other purpose.
 It is not to be made available to the public.

ADDENDUM “F”

This is notification that this house will be put up for sell and all renters need to be moved out by June 14. For reimbursement of your deposit the house and yard need to be clean and your belongings cleared. If you have any questions call me at 532 7895

JOHN HAWKINS
DATE 5-1-98
FOR 61 WEST RUSSETT AVE.
SLC, UT 84115

PLAINTIFFS
EXHIBIT

5

ADDENDUM “G”

THREE-DAY NOTICE TO PAY RENT OR VACATE

PLAINTIFF'S
EXHIBIT

6

TO:

TOM Callahan
Tenant in Possession

61 W Russett Ave SLc UT 84117
Address

WITHIN THREE DAYS after service of this notice upon you, you are hereby required to pay the rent now due and owing on the premises at the above address, which premises you now occupy as tenant of the undersigned, said rent amounting to the sum of \$ 150.00, being rent for the period commencing Deposit, and ending , payable monthly in advance computed at the rate of per month amounting to the total sum of \$ 150.00, less \$, paid on account of the rent thus accrued and unpaid:

OR, in the alternative, you are required, within such period of THREE DAYS, TO VACATE SAID PREMISES and deliver possession to the undersigned landlord, or his duly authorized agent.

IN THE EVENT of your failure to pay the said rent or vacate the said premises within such period of THREE DAYS, you will be unlawfully detaining possession of said premises, and in accordance with the provisions of Section 78-36-10, Utah Code Annotated, 1953, you will be liable for treble damages for such unlawful detainer, and action will be commenced against you to evict you from said premises and to take judgment against you for the rent accrued and for three times the damages assessed by the court for unlawful detainer, together with the costs of legal action.

This notice is given and served in accordance with the provisions of Section 78-36-3 and Section 78-36-6, Utah Code Annotated, 1953.

Dated this 15 day of June A.D. 1998

John Hawkins

Section 156 of the Ordinances of Salt Lake City, Utah provides:

"It shall be unlawful for any person, upon vacating or removing from dwellings, store rooms, or any other building situated within the corporate limits of Salt Lake City, Utah, to fail to remove all garbage, rubbish and ashes from such building and premises and also the ground appertaining thereto, or to fail to place same in a thoroughly sanitary condition 24 hours after said premises shall be vacated".

I John Hawkins served TOM Callahan
By sliding under his door. June 15 1998

ADDENDUM “H”

Eviction Notice

THREE-DAY NOTICE TO VACATE
(NUISANCE)

To:

Tom Callahan
Tenant in Possession

61W Rurseth Av
Address
SLC UT 84115

WITHIN THREE DAYS after service of this notice upon you, you are required to vacate the premises at the above address, which premises you now occupy as a tenant of the undersigned for the reason that you have suffered, permitted or maintained a nuisance on or about the said premises, to-wit: Breaking Rule # 7 No Smoking in The House
or your Bathroom.
and Rule # 23 Default By RESIDENT
NOT Keeping Living Areas Clean
23 THE EXTERNAL Landlord

In the event of your failure to vacate the said premises within such period of THREE DAYS you will be deemed guilty of an unlawful detainer and legal action will be initiated against you for restitution of the premises and for three times the damages assessed against you in accordance with the provision of Section 78-36-10, Utah Code Annotated, 1953.

This Notice is given and served in accordance with the provisions of Section 78-36-3(4) and Section 78-36-6, Utah Code Annotated, 1953.

Dated this 15 day of June, 1998. John Hawkins
I John Hawkins served Tom Callahan
By shrike under h.s. ROBERT JUNE 15 1998