

2000

Gary and Kathleen McFadden v. Russell and Paula Diefenderfer : Reply Brief

Utah Court of Appeals

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Gary McFadden, Kathleen McFadden; pro se.

Russell J. Diefenderfer; appellant pro se .

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IN THE COURT OF APPEALS, THE STATE OF UTAH

Gary and Kathleen McFadden,

Plaintiff and Appellee,

Vs

Russell and Paula Diefenderfer

Defendant and Appellant.

Case Number: 2000611-CA

Trial Court Number: 990902659

Priority No 15

REPLY BRIEF OF APPELLANT

Appeal from the Order Overruling Defendant's Objections
To garnishment of his personal bank account, of the Third Judicial
District Court, Salt Lake County, the Honorable Glenn K. Iawaski,
Judge Presiding

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FILED
Utah Court of Appeals

JAN 04 2001

Paulette Stagg
Clerk of the Court

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COMMENT ON APPELLEE'S STATEMENT OF ISSUE

Counsel for the Appellee's would like to cloud the issues before this court by claiming that the matter in question was an eviction and unlawful detainer action. It is not. The appeal was correctly taken from the Objections hearing to Garnishment of the Appellant's personal bank account. Counsel would also have this court believe that the Appellee's presented evidence at the hearing that produced this appeal. They did not. Furthermore, Counsel for the Appellee's would have this court believe that it is a matter of UTAH State Law that regardless of where funds are derived from they lose their original characteristics and become something other than they are; i.e. wages. They do not.

In addition, Counsel for the Appellee's ignores or neglects to include specific facts that are a matter of the record. For example, Counsel refers only to the issuance of a Writ of Garnishment to the Appellant's bank. He ignores the undisputed fact that the Appellee's also issued, prior to this particular writ, several other Writs to the Appellant's employer. By ignoring this fact, counsel can also ignore the fact that the Writ of Garnishment issued to the Bank was "Not for Wages from Personal Services". From this he can then justify the claim that the monies in the bank were not derived from wages but from some other mythical source. Therefore the issues raised by the Appellant's in their Brief are proper and are properly before this court.

STATEMENT OF THE CASE

Counsel for the Appellee's was correct in that the case was initially filed in the trial court as an unlawful detainer action. However, to say that this is still that type of action would be to deny that the Appellee's were attempting to collect on the Judgment issued, in their favor, on or about November 2, 1999 as indicated in Counsel's Statement of the Case. The collection of a

money judgement is not an unlawful detainer action but a collection action. Where it derived from is not material to what action is being taken. The issuance of a Writ of Garnishment in May of 2000 fundamentally changed the nature of the action. It is from that aspect of the action that this appeal was taken. Therefore, without reiterating the facts set-forth in the Appellant's Brief the Appellant respectfully states that the issues are the same.

There are however, two issues that counsel raised that need to be addressed. The first issue deals with the fact that at the hearing, on June 28, 2000, both of the parties, the Appellant and the Appellee's appeared *pro se*. This is significant with regard to the issues of violating Appellant's rights. It is also important with regard to the assertion made by Counsel as to "Why" the Court denied the Appellant's Objections to Garnishment. Keeping in mind that the order used to obtain the funds was not the order referred to by Counsel. That order was issued subsequent to their obtaining the funds held by the bank.

The last issue to be addressed deals with minor discrepancies in the Appellant's brief. This bares little comment. Not because it is of little importance but because of the fact that it is expected that *pro se* counsel will make some errors in the briefing of a case. However, there are no major discrepancies in the brief and the court has the authority to overlook or excuse minor imperfections in the briefing by *pro se* counsel. To that end I defer to the judgement of this court.

SUMMARY OF ARGUMENTS

1. Contrary to the claims and assertions by Counsel for the Appellee's, the Court did err by ignoring the evidence presented by Appellant and awarding them the totality of his personal bank account. Appellant believes that he did meet the burden of showing that

the money in his bank account was derived from wages and in proving so, the burdened shifted to Appellee's to show that their assertion was more probable. To this end, they failed to meet that burden.

2. The conclusion of law presented by Counsel for the Appellee's is not "a matter of law" as claimed. Monies deposited in a bank account do not, under Utah's Statute and or Rules, change characteristics as asserted by Counsel. His interpretation of the law is contrary to Rule 64D of the Utah Rules of Civil Procedure and Utah Code Ann. § 78-23-1 et seq., and 15 U.S.C. § 1673.
3. That the Appellee's did in fact violate the Appellant's Fifth Amendment rights by their actions, which were designed to deprive the Appellant of his rightful property without due process of law. In addition, Appellee's presented to a third party knowingly false documents in order to obtain control over his property, a violation of Utah Code Ann. § 76-6-405.

ARGUMENT

I

Did the defendants fail to meet their burden of proof that all of the monies in their bank account at the time of garnishment was derived from wages, and, therefore the trial court properly used its discretion in denying Defendant's Objections to Garnishment.

In Appellee's Brief, at pp. 4-6, Counsel spends a great deal of effort to convince this court that Appellant is ignorant of the Rules governing Garnishment. Counsel also attempts to convince the Court of another matter that needs to be addressed. In his claim counsel states that "The Defendants failed" to prove that "the money in their bank ACCOUNTS..." was from

wages. This statement implies a fact that is blatantly false. The Appellant asserted that the money going into his ACCOUNT was derived from wages. First and foremost is the undisputed fact that the Appellant has but ONE account. The assertion by Counsel of the existence of more than one account is blatantly false. Neither he nor his clients have ever produced any evidence to support the claim that the Appellant has more than one account. From the standpoint of this statement one might conclude that the Appellant is anything other than what he is — a hard working individual. This statement, albeit somewhat innocent in nature can lead to a false impression of the Appellant. Appellant believes that this statement is being made for that sole purpose, to impact the court in its impression of the Appellant.

Counsel correctly states that Rule 64D of the Rules of Civil Procedure direct how a Writ of Garnishment is to be handled. He cites in part 64D(h)(iii), and correctly states that the burden was the Appellant to prove his point. He correctly states that Appellant asserts that the evidence presented does in fact show that his claim was accurate. He then proceeds to request that the Court disregard that because of failure to cite it to the Record. What raises this logical question; If reference is made to the evidence and conversation between Appellant and the Court in the Transcripts of Proceedings does that not constitute a reference to the record? Appellant believes that such a reference does in fact meet the requirements of URAP Rule 24. The aspect of Rule 24 that is addressed by this is found at URAP 24(e), which states that:

“... References made to published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References made to exhibits shall be to the exhibit numbers.”

The Appellant did in fact make reference to the pages of the transcript and to the particular exhibit submitted to the court. The only error made was the Appellant's failure to cite the

indexed cover page number. This error is in fact harmless error and should not warrant disregarding the argument presented by the Appellant. Especially given the undisputed fact that the Appellee's failed to present any evidence to the contrary. In addition to this the Court must also consider the fact that the evidence presented to dispute this, and presented by Counsel for the Appellee's, is not a part of this record at all. Not only is it not a part of this record but it was not a part of the hearing. Therefore, he too can be consider in violation of URAP 24 and therefore his argument should be disregarded. However, in all fairness to both side it is the prayer of the Appellant that all information be considered.

Counsel claims that the fatal flaw in the Appellant's argument with regard to proving that all of the money in his account was from wages is that producing a two and a half month history is insignificant to proving that all funds in the account were from wages. There are two interesting statements made by counsel that raise question as to his thinking. First is this concept of "ALL MONIES". To address this counsel assumes that the question on the courts mind was "what about funds deposited in the account prior to that time period?" (Appellee's Brief at p.5). Well What about those funds? Garnishments are interesting documents. They give a plaintiff the ability to collect on monies owed to them by attaching monies owed to a debtor. Counsel would like this court to believe however that Writs of Garnishment look at the totality of a particular item, in this case a person's bank account. In reality a Writ is forward looking only. To understand this we need only to carefully read URCP 64D(a)(iii), which states that:

The property subject to garnishment that a writ may be used to levy upon or affect is all the accrued credits, chattels, goods, effects, debts, choses in action, money, and other personal property and rights to property of the defendant in possession of a third person, or under the control or constituting a performance obligation to the defendant of any third person, whether due or yet to become due at the time of the service of the writ of garnishment, which is not exempt from garnishment or exempt under any applicable provisions of state or federal law (hereinafter sometimes referred to as "Property subject to Garnishment").

Some key factors in here that Counsel for Appellee's failed to take into account are extremely obvious. The first and most critical of this is the statement that this property subject to garnishment must be in possession of a third party. In this case a bank would constitute a third party. It has to belong to the Defendant, and it must be due or to become due. A bank account is the property of the Depositor and it is due upon demand, so that the next two conditions can be said to have been met. But the most critical and important factor in considering what property can be garnished hinges on one factor being repeatedly overlooked and that is the conditional statement of this rule.

What conditional statement are we referring? The statement that says, "***at the time of service of the writ of garnishment, which are NOT exempt from garnishment or exempt under any applicable provisions of state OR federal law***". This language is clear. You can only look at that time slice when the writ is served. Not before. So, what about the funds in the account prior to May 2000? Doesn't matter where they came from or anything about them. They are immaterial to the issue. We can only look at the funds from, actually June 7, 2000. The writ issued in May of 2000 was incorrect because of deficiencies. What then was the source of the monies in the Bank account on June 7, 2000? Wages. Did the Appellant prove this with the evidence presented to the court on June 28, 2000? Yes. Did the Appellant meet the burden of proof required of him? Yes. Did the Court abuse its discretion by ignoring the evidence presented and overruling the objection? Yes. Has the Appellee presented any evidence that clearly rebutted the claims of the Appellant? No. Should the Appellee have received the totality of the Appellant's bank account? No.

II

IS IT A MATTER OF LAW THAT FUNDS ONCE DEPOSITED INTO A BANK ACCOUNT, EVEN IF COMING FROM WAGES, LOSE THEIR CHARACTERISTICS AND ARE NO LONGER SUBJECT TO THE WAGE EXEMPTION.

Counsel for the Appellee's presents a very interesting argument with regard to the changing characteristics of Monies deposited into a bank account. He relies on Court decisions from other states and even goes as far as equating Bank Accounts with Tax Refunds. He does make certain remarks with which I fully agree. For example, what I refer to as, the 25% rule only applies to those funds in the hands of the employer. I concur with his definitions of Disposable earnings and what constitutes disposable earnings. I do not agree with his analysis and conclusions as to the changing nature of funds deposited into bank accounts. I do not agree with his assertion that bank accounts have no periodic nature to them; and lastly, I disagree that bank accounts derived from any exempt source are subject to garnishment.

Counsel seems to rely heavily on the contention that bank accounts are like tax refunds. He states that "Just as tax returns are of a non-periodic nature, amounts in a bank account have absolutely no periodic nature." (Appellee's brief at 9). The thrust of his claim comes from the contention that funds can be deposited and withdrawn at any time. There is however a fundamental difference between Tax Returns and Bank Accounts that counsel simply ignores. Tax returns are rooted in monies withheld from an individual's paycheck. A bank account is nothing more than a repository for funds so that an individual has use of them through various means, i.e. debit cards, checks, money orders, etc. In order for an individual to get a tax return you must first pay the taxes, and second file a return to receive any over payment. Your refund

will depend on how much of an overpayment you made and when you file. The non-periodic nature of a tax return comes in that your refund will be dependant on when you file your return.

But what about the period nature of a bank account? Are deposits made randomly or is there a pattern to the deposits? To understand lets look at Exhibit A of Appellants Brief. If deposits are made at regular intervals than can we not conclude that a bank account has a periodic nature to. Withdrawals are irrelevant. We are only looking at deposits. For the sake of argument, let us assume that I am receiving a retirement check. I receive my Social Security check on the first of each month. If I deposit it in the bank would that not be a periodic deposit? Based on the contentions of Counsel for the Appellees, it would not. What if I get a paycheck every two weeks and deposit it into my bank account? Would that not constitute a periodic deposit? Any deposits I make into my bank account at regular intervals would constitute a periodic deposit. Given this “periodic nature” we can conclude that bank accounts are fundamentally different from Tax Refunds.

Now lets us turn our attention to the claim that because Courts of other jurisdictions have held that bank account deposits change characteristics that it is a matter of law in Utah. The court held in Genesee County Court v General Motors Corporation, No. 206049 Slip Op. at ¶ 6, that “judicial interpretation of statutes is to give effect to the intent of the Legislature”. This sentiment was echoed in by the Utah Supreme Court in Stephens v Bonneville Travel Inc., No. 950412 Slip Op. at ¶ 13, where the court stated that “When faced with a question of statutory construction, we look first to the plain language of the statute.” Since URC P 64D governs Garnishments, any questions with regard to the characteristics of bank accounts must first be reviewed there. If the language is clear than we need look no further in determining whether or

not bank accounts are exempt as declared by the Trial Court in the June 28, 2000 hearing.

(Record at 248, p.6). Let us look at the language governing this issue.

URCP Rule 64D(h) states in part that:

...The request for a hearing, which shall be provided by the garnishee to the defendant and or other persons shall be in a form to enable the defendant or other person to specify the grounds upon which the defendant challenges the issuance of the writ or the accuracy of the answers to interrogatories, or claims the amount garnished to be exempt, in whole or in part, including, but not limited to exemptions claimed for Social Security benefits, Supplemental Security Income benefits, Veterans' benefits, unemployment benefits, Workers' Compensation benefits, public assistance (welfare) benefits, alimony and child support, pensions, **wages or other earnings for personal services**, and non-ownership of the garnisheed property....

It is clear from this that, in whole or in part, wages or other earnings for personal services would be exempt. Since there is a limitation on garnishment of wages we can conclude that wages deposited into a bank account would be exempt completely. If we follow the philosophy proposed by Counsel for the Appellees and believe that funds deposited into a bank account change characteristics than any of the above sources would effectively change characteristics once deposited. This would mean that Social Security Benefits, Supplemental Security Income Benefits; both of which are exempt under Federal Statute; Veterans' Benefits, Unemployment Benefits, etc would no longer be exempt. It is difficult to believe that our Legislature would not exempt those sources which are necessary for our survival simply because those fund are deposited into an account.

Counsel for the Appellees cited Kokoszka v Belford, 417 U.S. 642 (1974) and indicated that the conclusion of the High Court was that tax refunds did not enjoy the same immunity as wages. I must agree, however, in addition to this the High Court also stated in Kokoszka that, "In Lines, we described wages as 'a specialized type of property presenting distinct problems in our economic system' since they (wages) provide the basic means for the economic survival of the

debtor”. In the Lines case the High Court was comparing vacation pay with tax refunds. While vacation pay, tax refunds, and bank accounts are all different they also have some of the same characteristics. They all have wages as the source.

Like vacation pay, we can refer to a bank account as a “wage substitute”. Instead of taking my wages directly to pay for my immediate family needs, I use my checking account. There are also periodic deposits made to the account. Again this is similar to wages. Unlike a tax refund which, although wage based has no periodic nature. In reaching its conclusion it would appear that the High Court did not look at where the funds were but rather where they came from and how they would be used under normal circumstances to determine if those funds enjoyed exempt status. In reaching its decision, the High Court declared that vacation pay was a wage substitute. In reaching this conclusion the Court recognized the periodic nature of wages and other monies paid to an individual. It can also be stated that this decision clearly established that source was more important than where the funds are when a Writ is served. In light of this decision we have no alternative but to reach a similar conclusion that bank accounts are wage substitutes and not similar in nature to tax refunds as indicated by Counsel for the Appellees.

Clearly, Counsel for the Appellees, also failed to take into consideration the legislative intent of the Rules governing the issuance of a writ of Garnishment in Utah, when he asserted that it was a “matter of law” that bank accounts changed their characteristics. I believe that the statutes and rules are clear and we need look no further to find that the decision of the Trial Court, with regard to the fact that bank accounts derived from wages are exempt, was the correct decision.

One final comment on this issue. I would agree that everything we obtain comes from our wages. While researching this I could not help but see the wisdom in the Decision from the

Supreme Court. The aspect I am speaking about is the concept that “Wages” are unique and pose a fundamental dilemma for the Courts. While Counsel looks at those things that we can acquire with our wages he ignores the obvious fact that we use those same wages for our survival as well. In the terms of the Supreme Court, we use our wages for our basic needs. How I choose to handle the payment of my necessities is for me to decide. To say that monies paid to an individual for personal services render can not be used by that individual for his/her basic needs is simply ridiculous. To contend that all funds received by an individual, because he/she chooses to deposit them into an account, are subject to garnishment is and would be outrageous. The Utah Exemptions Act clearly establishes that this Legislative body did not intend that any individuals be left destitute. If a person has four cars and three homes than a creditor has the right to reduce that, but not to zero. Even in Bankruptcy one does not lose everything. The debtor must be left with the ability to support him and his family or we would have chaos. Especially since all Americans are debtors.

Does this mean that funds in a bank account are all exempt? No. The Appellant is simply saying that as the only source of monies coming to his household are derived from wages, the taking of 100% of his bank account would leave him without the ability to survive. The Appellees on the other hand are claiming that the monies are not derived from wages but from some other source. In their application they indicate that the money is subject to garnishment because it is NOT wages for personal service. This they contradicted by filing a Writ of garnishment with an employer. If an individual has an employer and a bank account can be reasonably conclude that the money in their bank account was not derived from wages? NO. Unless your sole purpose was to seize monies that were specifically exempt. And to do so with total disregard for the consequences of your actions. They have repeatedly maintained this

position from the very beginning and are asking this Court to re-write the law to suit them. The basis for their action was clearly and succinctly stated during the Objections hearing when they stated that they “believed” they could do this. (Record at 248 p. 5). Believing something does not form a legal basis for an action.

III

DID THE APPELLEES VIOLATE THE APPELLANT’S FIFTH AMENDMENT RIGHTS?

When considering whether or not the Appellees violated the Fifth Amendment rights of the Appellant we must revisit the assertion of Counsel for the Appellees. He initially stated that this action was commenced as an Unlawful detainer action. He also stated that a Judgment was issued on or about November 2, 1999. (Appellee’s Brief at p.1). If this is the case than pursuant to URCP Rule 58A(d) a copy of that judgement should have been served on the Appellant in a manner provided by URCP Rule 5. What is interesting to note about URCP Rule 58A(d) is the fact that this requires that “a copy of the *SIGNED* judgement shall be promptly served by the party preparing it”. By not adhering to this rule the Appellees, by and through their counsel, they successfully circumvented the Appellants right to challenge that Judgement. In addition, it left the Appellant in a position where he was unaware of the existence of the Judgement. From the record it is clear that the Judgement issued by the Court on or about November 2, 1999 was not a default Judgement. While the rules do not require notice after entry of a default Judgement (URCP 55(a)(1)), notice is required after the defendant has appeared and lost. In addition the court directed Counsel for the Appellees to provide the Appellant with certain specific information, i.e. costing details, for him to dispute. His failure to provide that information and

the failure to provide a signed copy of the Judgement must raise question to the validity of the Judgement itself. If the Judgment is not valid than the Writ of Garnishment would not be valid. Pursuant to U.C.A. 70C-7-102, no Writ may be issued without entry of a Judgement. Therefore the seizure of the Appellants bank account would violate his right to Due Process.

We can apply this same rule to the issuance of the order used to obtain the release of the Appellants funds on June 28, 2000 (Appellant's Brief Exhibit "G"). This order was not signed by the Court, as per the Court's instructions (Record at 248, pp. 9-10), and was not served on the Appellant pursuant to URCP Rule 58A(d) and in accordance with URJA 4-504(1)(2). These sections refer to the orders issued in ALL Rulings by the court. Furthermore the issuance of the order referred to by Counsel for the Appellants and dated August 8, 2000 (Record at 233-234) is not consistent with URJA 4-504(1) which requires that "counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in CONFORMITY with this ruling." Current Counsel, who did not become involved in this case until July submitted a proposed order on July 18, 2000, well outside the fifteen day period for submitting and only after the order issued by the Appellees was used obtain release of the funds to them immediately. URJA 4-504 not only provides that orders are submitted to the court in an expedient manner, but it also allows for the losing party to object to the order. Failure to provide a signed copy of the order in no way affects the appeal process, but it does raise concern about the motives of the Appellees.

Furthermore the order used by the Appellees was not only improper but conveyed information to a third party that was deceptive in nature. U.C.A. 76-6-401(5)(a)(b) states that Deception occurs when:

"...a person intentionally:

- (a) Creates or confirms by words or conduct an impression of law *or* fact this is false and that the actor does not believe to be true and that is likely to affect the judgement of another in the transaction: or
- (b) Fails to correct a false impression of law *or* fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not *NOW* believe to be true; or..."

What is key here is the fact that one intentionally creates an impression of either a law or fact this or becomes known to be false. Counsel is, by his words, trying to create an impression of law that he knows to be false in an effort to effect this courts judgment. We refer to this action as looking as something from his perspective. But when an individual uses it to obtain control over another property then we call it "Theft by Deception". In this case the Appellees attempted to convince the Garnishee that the monies in the Appellants bank account was "NOT" from wages for personal services. Once supplemental proceedings clearly established that the only source of income was from the Wages of the Defendant and that all of those funds were deposited directly into his bank account their beliefs and conveyances should have changed. They did not. In two subsequent hearings, one of which is on appeal, the Appellees made the same claims, that the monies going into the Appellant's bank account were "NOT" from wages for personal services. Their goal was to obtain control over the property of the Appellant either permanently or temporarily deprive the Appellant of those funds. This type of action qualifies as Theft by Deception under U.C.A. 76-6-405.

CONCLUSION

The argument present by counsel might be a valid argument provided Counsel had not agreed with the Court regarding the Exempt Status of bank accounts that are derived from wages. Counsel for the Appellees, failed to present the fact that while he is claiming that Bank Accounts are exempt, he is also conveying to the Courts that if the Appellant can prove that ALL monies


going into the account are wages than they are exempt (see Exhibit "A", Append). Since the issue of whether or not the monies going into the account at the time the Writ is served are from wages than it is clear that the evidence presented by the Appellant prevails. There is also the issue of whether or not Counsel is even permitted to brief this case given there is no indication that a properly executed Notice of Substitution of Counsel has been filed with this court. While it is not clear in the rules that one must submit a Notice before intervening in an appeal on behalf of a Pro Se party, it is also not clear that a Notice filed in the Trial Court automatically transfers up to the Appellate Court. I believe that this issue, while insignificant compare to the other issues presented, be addressed before the court considers its conclusions.

Given the fact that Counsel for the Appellees has incorrectly interpreted the conclusions of the court; and ignored that the Record and the Rules clearly and succinctly state that Bank Accounts derived from wages are exempt; and given the fact that the Appellees presented no evidence to contradict the evidence presented by Appellant, it is proper for this court to reverse the order of the lower court and return the sum of \$1,008.22 to the Appellant.

WHEREFORE, the Appellant respectfully requests the court grant the relief requested as set forth in the Appellant's Brief.

Dated this 4th day of January, 2001

Respectfully Submitted by:



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APPENDUM

1 MR. MOHLMAN: He does have a copy.

2 This is a document that was obtained pursuant to
3 a subpoena duces tecum from his bank, which is the same
4 account that he has just provided you the information.

5 THE COURT: Okay.

6 MR. MOHLMAN: This particular one that I've given
7 you is sub--is prior to the documentation that Mr.
8 Diefenderfer just provided to you with regard to his bank
9 account. If I looked at his records accurately, he gave
10 you documents starting in May or June.

11 THE COURT: I've got balance on May 17th of 2000,
12 on--the heading on one, and it looks like a statement,
13 period ending 4-30-2000, which would be reflected in a
14 similar type of deposit. Those are the two I have.

15 MR. MOHLMAN: So, I think most of the documents
16 he pro--or the documents he provided to you are just
17 subsequent to this--this document, but this indicates the
18 information for his checking account through April 19th,
19 2000, probably, I assume from March 20th, 2000, through
20 April 19.

21 If you look at Page 2 of this document I've just
22 give you, your Honor, and again, this is the same checking,
23 same account we're talking about here, if you look at Page
24 2, it lists five deposits into the account.

25 THE COURT: Uh huh.

1 MR. MOHLMAN: One of which is a direct deposit
2 from his employer. There was a (sic) ATM, looks like an
3 ATM deposit is reflected in this document, which is, you
4 know an ATM machine on March the 20th, of \$967.02; another
5 counter deposit which I assume means he went right--he or
6 his wife or someone on his behalf, went directly to the
7 counter at the bank and deposited funds in 13--in the
8 amount of \$1,300 on March 20th--

9 THE COURT: Right.

10 MR. MOHLMAN: --of this year. And then two other
11 customer deposits in April 6th and April 11th of \$1,300 and
12 \$1,700, clearly evidencing that, contrary to his claim, not
13 every deposit he ever makes into his account is direct
14 deposit from his employer. Obviously, he is making
15 deposits from other accounts.

16 THE COURT: So, your position is, at least on the
17 document that you've shown me, that the Court should at
18 least take into consideration a \$967.02 deposit from an ATM
19 deposit--

20 MR. MOHLMAN: Correct.

21 THE COURT: --a \$1,300 deposit on 3-20 in
22 addition to the ATM; a \$1,300 deposit on 4-6 and a \$1,700
23 deposit on 4-11.

24 MR. MOHLMAN: That's correct, your Honor. And I
25 think, as far as I understand the law, and I would like to

1 argue that for a minute, Mr. Diefenderfer only has the
2 claim of exemption if he can prove to this Court if every
3 deposit ever made into this account was from--from wages.
4 And once he fails in that proof or there is contrary proof
5 otherwise,--

6 THE COURT: Uh huh.

7 MR. MOHLMAN: --then he loses that argument. And
8 if you'll look at Rule 64(d), that applies to garnishments,
9 I think the language implies without specifically saying,
10 but if you look at especially Subsection (d) that deals
11 with the exemption that Mr. Diefenderfer is claiming here
12 that implies that that is only talking about garnishing
13 wages from your employer. Uses the language, you know, the
14 25 percent earning exemption is computed, you can only take
15 25 percent of what is computed for the pay period, I'm
16 quoting from--

17 THE COURT: Right.

18 MR. MOHLMAN: --Rule 64(d), compute it for the
19 pay period for which the earnings accrued, which clearly
20 from that language, implies that that exemption is only
21 applicable if you are garnishing those wages directly from
22 the employer.

23 I've done a fairly exhaustive search, your Honor,
24 and was not--have not been able to find any Utah appellate
25 court decisions in which this exact issue was addressed by

1 deposits are indicated are the direct deposits that you
2 have said, which makes your balance, after withdrawals and
3 everything else like that and fees, a net amount. And
4 that's your argument.

5 MR. DIEFENDERFER: That is correct.

6 THE COURT: All right. Thank you.

7 Care to respond to that?

8 MR. MOHLMAN: Again, your Honor, I think the law,
9 at least that I understand from all jurisdictions is that
10 once that money hits the checking account, it loses its
11 unique identity as wages and therefore, it's not subject to
12 the exemption anymore.

13 THE COURT: All right. Thank you.

14 And while I agree in principle and generally with
15 your statement, Mr. Mohlman, I think I also have to look at
16 your concession, that if he can prove that the amounts were
17 a result of direct deposits, then--then they could be
18 exempt in that--in that vein.

19 It appears that that first June 28th, 2000,
20 objection that I overruled cleared out the account. The
21 account from the doc--from the records that you have
22 indicated to me, Mr. Mohlman, pre-date that time.

23 The records that Mr. Diefenderfer has supplied to
24 me post-date that time, which would indicate to me that he
25 has borne the burden, at least as to this hearing, that the

1 funds that are deposited were as a result of direct deposit
2 from his two employers as indicated--two employers; right?
3 Or at least two sources from your employers?

4 MR. DIEFENDERFER: Two sources.

5 THE COURT: Okay. Same employer but two sources?
6 Or two different employers?

7 MR. DIEFENDERFER: At one point in time, it was
8 two different employers.

9 THE COURT: All right. And--and if your argument
10 and I think your argument prevailed on the last objection
11 to the garnishment, Mr. Mohlman, but I think on this one
12 here, I'm going to have to sustain the objection. So, the
13 Court will so rule and no costs or fees involved.

14 Anything else this morning?

15 And where is the thing on appeal? It's still
16 over at the Court of Appeals, you said; right?

17 MR. MOHLMAN: It is, your Honor.

18 THE COURT: Okay.

19 MR. MOHLMAN: I think we have a briefing
20 schedule--

21 THE COURT: Hear your brief--

22 MR. MOHLMAN: Yeah, we have our briefing
23 schedule, so--

24 THE COURT: Very well. All right.

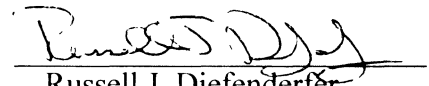
25 MR. MOHLMAN: I assume--do you want an order

CERTIFICATE OF SERVICE

I Russell J. Diefenderfer certify, that on January 4th, 2001, I served a true and correct copy of the REPLY BRIEF OF APPELLANT, by First Class mail, and with sufficient postage prepaid to the Following addresses:

Gary and Kathleen McFadden
1664 East Sunnyside Avenue
Salt Lake City, UT. 84105

Dated this 4th January, 2001

A handwritten signature in black ink, appearing to read "Russell J. Diefenderfer", is written over a horizontal line.

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