

1990

Lon S. Nield, Patricia L. Nield, November Investors,
V. Mark Peterson and Nancy L. Peterson v. BJ Rone,
Ronald A. Bieber, Rab Ranch, James A. Gregg, and
David R. Batmeman : Reply Brief

Utah Court of Appeals

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LON S. NIELD; PATRICIA L.
NIELD; NOVEMBER INVESTORS, a
Utah limited partnership; and
V. MARK PETERSON and NANCY L.
PETERSON, as general partners
of and on behalf of November
Investors,

Plaintiffs and
Appellees,

vs.

B. J. RONE; RONALD A. BIEBER;
RAB RANCH, a business entity;
JAMES A. GREGG; and David R.
Bateman in his capacity as
Sheriff of Utah County, Utah,

Defendants and
Appellants.

B. J. RONE, JAMES A. GREGG,
and RONALD A. BIEBER,

Third Party
Plaintiffs,
and Appellants,

vs.

ASSOCIATED TITLE COMPANY, a
Utah corporation; BRIANT
STAFFORD, an individual; et al,

Third Party
Defendants.

No. 900187-CA

[Category 16]

REPLY BRIEF

Appeal from a final judgment of the Fourth Judicial District
Court, Utah County, the Honorable Boyd L. Park presiding.

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ASSOCIATED TITLE COMPANY, a Utah corporation BRIANT STAFFORD, an individual STORMY PETERSON, an individual WENDY WILSON, an individual DIANE C. GREEN, an individual D. & M. COAL COMPANY, a South Carolina corporation And other JOHN DOES and JANE DOES, whose true names are unknown at present, Third Party Defendants.	

SUMMARY OF ARGUMENT

RESPONDENTS ISSUES PRESENTED FOR REVEIW..... 2

Respondents try and blind the court by misstating the real issues and misstating the standard of review in summary judgment proceedings. The true standard of review gives no deference to the law, reviews facts in the light most favorable to the losing party, and reappraises the trial court's legal conclusions.

STATEMENT OF AUTHORITY TO BE INTERPRETED..... 3

Respondents attempt to divert the court's attention from pertinent statutory law which must be looked at and interpreted to reach a just decision in this case.

RESPONDENTS STATEMENT OF THE CASE..... 4

Respondents also attempt to throw in many conclusions with the true "facts".

RESPONDENTS SUMMARY OF ARGUMENT..... 6

Although respondents have completely avoided and gone to great lengths to avoide the question of TRUE IDENTITY in this case, the law of State v Tinnin still is the law in the State of Utah and in every area of the USA. Said law makes the individual responsible for his acts no matter what he labels himself.

RESPONDENTS ARGUMENT, POINT 1..... 7

Material facts of true identity still remain open for decision contrary to respondents attempt to make the court forget this main bedrock point. Also, newly discovered evidence bears upon "full" or "complete" adjudication as it pertains to the

necessary element of a fair and full adjudication of a question before collateral estoppel will be applied. Kris (Chris) Vreeken, a completely different person than was served in the Rone case, was served in the Gregg and Bieber cases in addition to Keith Vreeken. A presumption of validity unless overcome by clear and convincing evidence exists. The common law and rules of civil procedure in our state allow people to be sued in JOHN DOE AND JANE DOE designations as well as PARTNERSHIP or ASSOCIATION names. The affidavit of Neal E. Colledgte sets up counter facts in dispute requiring a full hearing regarding the validity of service on Kris (Chris) Vreeken.

RESPONDENTS ARGUMENT, POINT 2..... 10

Rule 54b pertains to appeals in the State of Utah and nothing else. The Federal law does not apply and should not. The new issue of when execution lies was not argued by appellants in their motion for summary judgment and is precluded from consideration on appeal. Even if it was arguable, Rule 62a and case law in Utah interpreting it show execution lies immediately upon recording of judgments of any kind in the register of actions.

RESPONDENTS ARGUMENT, POINT 3..... 15

Respondents cited cases about use of evidence merely substantiate appellants argument that the evidence was not properly presented in best evidence form. This is a collateral issue to the main questions raised in this appeal and should not be dwelt upon too heavily.

RESPONDENTS ARGUMENT, POINT 4..... 15

There is reasonableness, law and facts making this appeal meritorious.

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UTAH COURT OF APPEALS

STATE OF UTAH

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LON S. NIELD; PATRICIA L.
NIELD; NOVEMBER INVESTORS, a
Utah limited partnership; and
V. MARK PETERSON and NANCY L.
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Third Party
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ASSOCIATED TITLE COMPANY, a
Utah corporation; BRIANT
STAFFORD, an individual; et al,

Third Party
Defendants.

ARGUMENT

For reply to the brief of respondents, appellants

ARGUMENT

respectfully submit the following rebuttal:

RESPONDENTS' ISSUES PRESENTED FOR REVIEW

Respondents try and get this honorable court to put on blinders regarding the true issues in this appeal and also misstate the time honored standard of review in this type of case.

Respondents try and treat this case as a review of a trial on the merits. They attempt to misguide the court. In reality, this case is not a review of a case where a jury trial and/or taking of evidence in open court has transpired.

This is a case reviewing the correctness of an order granting summary judgment. Consequently, the correct standard of review of summary judgment stated in one of the most recent cases decided by this honorable court is:

A grant of summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. And in deciding whether the trial court properly granted judgment as a matter of law to the prevailing party, we give no deference to the trial court's view of the law; we review it for correctness. We review the facts in the light most favorable to the losing party. Moreover, because a summary judgment is granted as a matter of law rather than fact, we are free to reappraise the trial court's legal conclusions. [Numerous case citations omitted] **Whatcott v Whatcott, 790 P2d 578 (Utah Court of Appeals April 4, 1990)**

As for issues, respondents try and tear out all of the important ones and replace them with ones which cannot be reached without addressing the real issues. The real issues as

addressed in appellants primary brief are:

1) Is the question of **true identity a genuine material fact** precluding summary judgment?

2) How does **true identity bear upon** principles of **service of process jurisdiction, judgment against all defendants, attachment of real property judicial liens, execution and sale, bona fide purchaser, and res judicata?**

3) What is **fair and complete adjudication** of an issue requiring issue preclusion under the principle of res judicata?

4) What effect does **new evidence** have pertaining to the principle of res judicata?

Secondary and subsidiary to the important issues is the question of validity of evidence relied upon by the trial judge in granting summary judgment.

RESPONDENTS' STATEMENT OF AUTHORITY TO BE INTERPRETED

Respondents' next try to divert the courts attention from all of the pertinent statutory law passed by our legislature, rules and regulations, which require interpretation by this honorable court in this case by inappropriately citing an interpretive case not called for or allowed by the rules on preparation of briefs. This can only have been done to cloud the issues and try and get this honorable court to unduly focus on one small spot of the entire vista. Respondents' try and take out of context one minute morsel of the rules and misinterpret while disregarding the whole context of the law as it works in society.

The rule on preparation of briefs does not say to list case citations at this part of the brief. It requires the listing of constitutional provisions, statutes, ordinances, and rules and regulations whose interpretation are determinative in the case.

Please don't be misguided by this attempt to block out many pertinent statutes and rules which must be considered as a whole in deciding this case.

Through respondents' brief, two additional rules have been brought into pertinency whose interpretation are additionally required in determining the issues presented. They are:

Rule 62, URCP
Rule 69, URCP

Said statutes and rules are set forth verbatim in the appendix hereto.

RESPONDENTS' STATEMENT OF THE CASE

Respondents try to completely disregard the integral issue in this case - that of TRUE IDENTITY. Who one is is fundamental to the determination of legal rights and responsibilities. The identity of persons is of first importance. Labels are labels. The underlying person or persons, no matter what they are called, is important. We are who we are. The question of what a label really represents must first be determined.

Respondents try and blur this fundamental principle by saying appellants claim that "some entity controlled by the Vreekens" owned the Owners homes in Alpine. Appellants do not claim Vreekens "controlled" entities. Appellants claim Vreekens

and all labels they used to hold property and conduct business are one and the same and that none of said labels have separate legal identity and that even if they did, corporate veils should be pierced, fraud precludes their use, and no one knew they were dealing with corporations so the personal individuals are liable.

Respondents also try and throw in many conclusions in what they say are "facts". For example, they say "it is uncontested that the Nields and Petersons had no involvement", "which appellants now believe were once owned by an entity related to the Vreekens", no judgment has been entered as to the remaining defendants", judgment has been entered against individuals who are not parties to the action", "Utah County records do not reflect that the Vreekens have ever held an interest" in the Owners Alpine property, "the parties named in the Rone, Gregg and Bieber lawsuits have [never] held an interest" in the Owners Alpine property, Owners "had no knowledge of the Vreekens' business dealings". These statements are all conclusions left for a trier of fact to make. They are not undisputed material facts.

Respondents also in footnotes on page 6 of their Respondents Brief clasp onto an affidavit made in 1983 in note one which was made based upon a few days investigation as opposed to facts which have been uncovered for the past 7 years. The affidavit merely adds to the material facts left to be decided. Once again they also incorrectly caricature the "true identity" issue as "control". It is not "control" appellants

argue. That is only one part of it. Control has bearing on the much greater and real issue appellants argue of "true identity".

RESPONDENTS' SUMMARY OF ARGUMENT

Respondents dismiss, in fact go to great lengths to avoid the use of, true identity as having any bearing in this case. Instead, they attempt to get this court to focus on "procedure".

But substantive principles take priority over "procedure". One again, the prior determination of the substantive and basic issue of true identity must be made before rules of "procedure" and even other legal principles can be applied to the situation. This is so because all legal principles and rules flow from the initial fact of who we really are. Privileges and obligations flow from people. Please do not allow respondents to blur your vision regarding this very important doctrine.

State v Tinnin, 232 P 543 (Utah 1925) is still the law in the State of Utah and in every state, possession and territory in these United States of America.

Respondents also throw in some more caricatures at the bottom of page 9 of their brief stating "the undisputed evidence show". Well it does not. Two people were served in the Gregg and Bieber cases. And in the Rone case, the question of fair and complete adjudication of the issue regarding Keith Vreeken remains for decision. And we mention once again that the question of true identity has to be decided before anyone can say Keith Vreeken and/or Christ Vreeken were not sufficient

people to be served summons in the Judgment Creditors' 3 cases.

RESPONDENTS ARGUMENT, POINT 1.

Respondents would have us just forget the principle of ID all together. It's not that convenient. Once a full hearing is held before a jury or judge in open court, opportunity for witnesses, direct and cross examination, etc. and the issue of true identity is determined, then other legal principles and rules can be applied - not until.

In applying those other legal principles and rules, respondents are in error when they argue that material facts left for decision do not exist as it pertains to res adjudicata applying. Appellants concede that they mistakenly argued that the parties element of res adjudicata had not been met. A further study of that point shows that the same parties element is existing.

But the element of a fair and complete adjudication required to be determined before collateral estoppel can apply in this state **still remains open for decision!** This is as much an element required for collateral estoppel res adjudicata application as **any** of the other elements.

Mel Trimble Real Estate v Monte Vista Ranch, 758 P2d 451 (Utah Ct. App. 1988) It requires that determination. That issue has been raised in this case. Conflicting facts have been presented. The question of "fair and complete" still lumes. Some conflicting facts before the court have been indicated on pages 24 and 25 of Appellants initial brief. These conflicting

facts going to the question of "fair and complete" cannot be ignored.

Newly uncovered evidence certainly discredits to finding of "fully" or "completely". In this state, new evidence has always been allowed to reach justice. **Univ. Investment Co. v Carpets, Inc.**, 400 P2d 564, 567 (Utah 1965), **Gregerson v Jensen**, 617 P2d 369, 372 (Utah 1980), **Reed v Alvey**, 610 P2d 1374 (Utah 1980), **Ferris v Jennings**, 595 P2d 857, 859 (Utah 1979), **Walter v Peterson**, 278 P2d 291 (Utah 1954), **State v Whitely**, 110 P2d 337 (Utah 1941)

In other words, when all the court has before it is a partial picture, and because of that partial picture, mistaken conclusions are made, if the full picture can be made, it should be viewed and a correct conclusion reached.

"Fully" has been defined by a neighboring court to mean, "entirely, completely, and to the utmost extent." **Keystone Tankship Corp. v Willamette Iron & Steel Co.**, 222 F Supp., 320, 322 (D. C. Oregon) This question remains a contested issue of material fact in this case.

Respondents try and argue on page 15 of their Respondents Brief that every individual must be placed down on paper in the English language for the law to have any legal effect on them. The law is an intangible thing. It exists whether written in a particular tool of communication or not. It is every existing and present in the universe. It is the essence by which civilized people coexist.

Symbols, markings on a piece of paper, are all modes of attempted communication. REALITY OF EXISTENCE is what's important. The law of Greece, Rome, England and now our country has always recognized this. That is why, as is quoted in Appellants primary brief on 10, 11, 21 and 27, that **Rules 10a and 17d, URCP**, allow pleading in JOHN AND JANE DOE names when real identity is unknown or in PARTNERSHIP OR ASSOCIATION labels. As long as the constitutional requirement of notice and a hearing are lived, these people are real and they are treated, and they are responsible for their acts. An examination of the cases cited in paragraph 1 of page 15 of Respondents Brief shows these cases do not hold, as respondents try to argue, that a person responsible cannot be subject to a judgment just because his personal legal name is not typed on the paper. If the JOHN DOE or other label he was listed under is really him as far as where the buck stops as to identity, he is bound. The above rules specifically state that as well as overwhelming case precedent in this nation.

Respondents argue on page 16 of their Respondents Brief that even though a second individual was also served with process in the Gregg and Bieber cases, Gregg and Bieber are not entitled to their day in court to substantiate the genuineness of proper service and notice on Kris (Chris) Vreeken. They quote from the Transcript of the Demetropolis trial [Transcript of Hearing, 2/23/84, at 20-44. R1201-25, esp. at 36, R1217]. Appellants Gregg and Bieber are still entitled to their

presumption that service was proper. **Carnes v Carnes, 668 P2d 555, 557 (Utah 1983)** In addition, the affidavit of Neal E. Colledge [R596-7] places in issue any contention that Respondents have made that Kris (Chris) Vreeken was not a proper person on whom service could be made in the Gregg and Bieber cases. The all pervasive issued of TRUE IDENTITY of the individuals and their labels also renders summary judgment inappropriate on this contention. The same arguments apply to any service of summons question on Keith Vreeken.

RESPONDENTS ARGUMENT, POINT 2.

Appellants feel they have fairly and adequately indicated in pages 31 through 37 of their primary Appellate Brief that judgment liens in Utah attach on all judgments of whatever type at the moment the judgment is docketed. Appellants also feel they have fairly and adequately indicated that the bedrock question of TRUE IDENTITY renders moot the argument of respondents regarding attachment of judicial liens in our state.

In pages 18-30 of Respondents Brief, respondents now for the first time in this case, raise the issue of when execution lies on judgments in our state. This issue and thought was never brought before the trial court nor argued in respondents motion or memorandum in support of its motion for summary judgment. It is a new issue, fresh, and not passed upon by the trial judge. It is therefore precluded from consideration here.

This honorable court has just most recently stated this doctrine again in **Call v City of West Jordan, 788 P2d 1049 (Utah**

Ct. App March 1990) when you said:

It is well established that this court will not consider an issue on appeal when there is no indication in the record on appeal that the trial court reached or ruled on an issue.

The issue cannot be considered here, but even if it could, respondents' recitation of Federal Court decisions and out of state decisions are not the established law in this state. The Federal decisions also interpret federal code. The decisions cited by respondents also narrow visioned, bad precedent, and not worthy of any weight by this honorable Utah court.

The use of **Rule 54, URCP**, to apply to anything else than appeals is untenable. Justice Zimmerman, writing for our own Utah State Supreme Court, has on two occasions defined the purpose of our state's **Rule 54**. In the first case in 1984, he said:

Rule 54b is "designed to avoid the potential injustice caused by rigid application of the traditional single appeal principle." **Pate v Marathon Steel Co., 692 P2d 765, 767 (Utah 1984)**

He did not say **Rule 54b** had or has anything to do with when a judgment lien attaches nor when execution on a judgment can begin!

In a later case in 1986, Justice Zimmerman again addressed **Rule 54b** as one governing appeal rights - not one regarding attachment of judgments liens or execution.

The rule on execution of judgments in our state has been completely disregarded by respondents. **Rule 62a, URCP** in our

state indicates clearly:

Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

Our Utah Supreme Court solidified this principle in their 1982 decision of **Taylor National Inc. v Jensen Bros. Construction Co.**, 641 P2d 150, 154 (Utah 1982) when they said:

A party receiving a judgment is entitled to have that judgment enforced by the granting court. That court, in its discretion, may temporarily stay execution in order to prevent injustice, but it may not negate its own judgment by indefinitely staying execution thereon. . . . [Case Citations and recitation of Rule 62a omitted]

An immediate execution is proper, therefore, unless the court authorizes a temporary stay of execution. Nothing in this rule contemplates an indefinite stay of execution on the judgment. An indefinite stay of execution is as if no judgment had been granted. This court, in **Ketchum Coal Co. v Christensen**, 48 Utah 214, 159 P 541 (Utah 1916), stated:

. . . If, however, in any matter in litigation or dispute of which the inferior court has jurisdiction, it has regularly proceeded to judgment, and has judicially determined and declared the rights of the parties to the proceeding, then the court may not exercise its discretion with regard to whether it will or will not enforce a judgment thus regularly entered. When the judgment is once entered, and under the law is an enforceable judgment, the party in whose favor it is rendered has a clear right to have the same enforced, and if any one attempts to interfere with that right, it is also the clear legal duty of the court, in case a proper application is made, to enforce the judgment

[The] court may not arbitrarily or capariciously,

or for any reason except a sufficient legal reason, refuse to act when the fact is conceded that the enforcement or the enjoyment of the fruits of the judgment, as the case may be, is denied. To permit such a course would be tantamount to permitting a court to enter a judgment but thereafter deny its enforcement [The] law gives plaintiff the right to have the judgment enforced and imposes the duty upon the court to enforce it, and no discretion is vested in the court whether it will enforce it or not.

On page 26 of Respondents Brief, respondents try and get the court to buy the theory that the time when benefits accrue or responsibilities are received is the time when a court of law signs and enters a decree that that is so. They would allow manipulation of responsibility and benefits by the mere unilateral adoption of labels. That argument is not just as is argued in Appellants primary Brief at p. 33-36.

The **Gauthier v Crosby Marine Service Inc., 590 F. Supp. 171 (1984 E. D. La.)** case cited on page 21 of Respondents Brief is really a case applying federal law - not state - in a case under maritime law. No state law is involved - just specifically the Jones Act.

The **Bank of Lincolnwood v Federal Leasing, Inc., 622 F2d 944 (1980 7th Cir. N. D. Ill.)** is actually a case on a promissory note. The appellant objected to the courts grant of Rule 54b certification. The case talks of Rule 54b regarding final judgments for appeal purposes. The court indicates said rule is designed to facilitate appeal. Anything said regarding execution of federal judgments is dictum. There is not direct holding

regarding execution on judgments.

The respondents misuse **Redding & Co. v Russwine Const. Corp, 417 F 2d 721 (D. C. 1969)** cited on page 27 of their brief. The D. C. court looked at an order and (contrary to the representationf of respondents at page 27 that the "judgment" was not certified as final under Rule 54b) construed a statement from the court that an immediate appeal might expedite resolution of the litigation (page 723 of opinion). The Federal Courts "collateral order docdtrine" construing 28 USC 1291 (1964) was used to allow an appeal - not deny one and under that doctrine found appealable an order refusing a stay of execution and an order requiring a supersedeas bond. The question of right to execution was not reached here.

Furthermore, the argument of no right to appeal is in error, because there are always rights to interlocutory appeal and stay of execution in Utah.

Respondents are trying to import not only their old cases regarding lien attachment but additional cases from federal court judicially legislating and using dictum.

What is this state going to do? Follow its own law. Stand up to mislogic? Give in to the path of least effort? Or uphold public will epitomized by unambiguous straight language needing no interpretatin stated suack dab in our state's codes of legislatively enacted law?

Why have we fallen into the complacent mode that whatever big Sam dreams up, it must be best? Why have we let

ourselves be captured by the big brother syndrome? It is beside me that we are gullable enough as a judiciary to dopt "procedural" rules from the Federal Court and then take federal decisions from that rule and allow the rule to transform itself into a substantive law - a foreign virus - which can attack and pray on the will of the people of the State of Utah and dilute, weaken, and significantly alter the strong will of the people clearly declared in a law passed by the representatives of the people and signed by their governor.

Respondents argument should in the first place not even be considered regarding executions, and even then is amiss. The rule and case law from Utah, not someplace else, cited above clearly says so.

RESPONDENTS ARGUMENT, POINT 3

Appellants feel their argument in their original brief at pages 37-38 are sufficient to counter respondents attempt to cloud this issue. This is a collateral issue to the main points raised by appellants.

The two cases cited by respondents, however, on the bottom of page 32 of their Respondents Brief really supports appellants' argument regarding adequacy of the affidavits and evidence. One holds the court should take notice sua sponte when it is placed in evidence in a matter before the court and the other says that "notice" may be taken of the record in another case but it should be offered in evidence.

RESPONDENTS ARGUMENT, POINT 4

As for respondents accusations on pages 33-35 of their Respondents Brief, little need be stated in reply. We are sure this court will see this effort as merely another attempt to divert the court's attention from the really important issues in this case - that of TRUE IDENTITY.

If execution on the Owners property in Alpine was so bad, then why did the Fraudulent Conveyances Act in effect in this state at the time of levy of the pertinent executions, passed so long ago in Utah, based upon the common law, specifically state that a creditor when a claim has matured, "may, as against any person, except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase or one who has derived title immediately or mediately from such a purchaser, (2) disregard the conveyqance, and attach, levy execution upon, the property conveyed? 25-115(2) UCA 1953 (old act) That certainly is sufficient basis in law for the appellants to execute. The respondents certainly are not "innocent parties". They are investors. Let's have a jury decide the "facts".

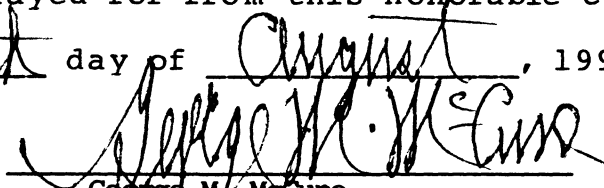
An appeal is not inappropriate so long as there are reasonable, legal and/or factual bases for it. **Call, supra.** There is case law in this state on identity which has been quoted, there is case law in this state on collateral estoppel which has been quoted, there is statutory law in this state on judgments and liens, there are rules in this state on execution which have all been quoted. There is a just and reasonable and

plausible argument in this case for TRUE IDENTITY. There are facts which have been presented which set up issues of fact entitling the appellants to their day in court to decide and that certainly included the issue of fair and full litigation in the Rone case. This case is not one of reckless disregard for procedure and rights and interests of 3rd parties but rather let's call it a case regarding justice and, above all, truth!

CONCLUSION

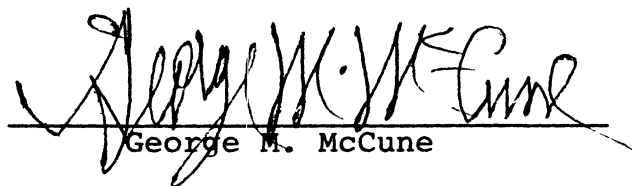
This is a case regarding summary judgment. Appellants have given sufficient facts to set up material genuine issues of fact on **true identity** and the other issues in this case. They have not been given the opportunity to prove their facts before a jury. They have this basic right. Such a right is very fervantly requested and prayed for from this honorable court.

DATED this 27th day of August, 1990


George M. McCune
Attorney for Appellants
Rone, Bieber, RAB Ranch
and Gregg

CERTIFICATE OF SERVICE

I hereby certify that four (4) copies each of the foregoing Reply Brief were served upon each Appellee and other Interested Parties herein by placing four (4) copies each of said brief in a securely sealed envelope, and depositing the same in the United States mail, with first-class postage affixed, each addressed to Michael M. Later/Bruce A. Maak, KIMBALL PARR CROCKETT & WADDOUPS, Suite 1300, 185 South State, Box 11019, Salt Lake City, UT 84147; A. Dennis Norton, SNOW CHRISTENSEN & MARTINEAU, 10 Exchange Place, 11th Floor, Salt Lake City, UT 84111; and Guy R. Burningham, UTAH COUNTY ATTORNEY'S OFFICE, Utah County Courthouse, Provo, UT 84601 on this 8th day of August, 1990.


George M. McCune

is substantial and prejudicial. *Kesler v. Rogers*, 542 P.2d 354 (Utah 1975).

Trial error corrected in judgment.

A buyer under a conditional sales contract was not prejudiced by a conclusion of law in which inadvertently no credit had been given to him for an amount that was due to him, and according to which the seller was thus entitled to a judgment in a certain larger sum, where the court, in arriving at its judgment, correctly credited to the buyer the amount that was due to him, and entered judgment only for the difference. *Knudsen Music Co. v. Masterson*, 121 Utah 252, 240 P.2d 973 (1952).

Cited in *State v. Geurts*, 11 Utah 2d 345, 359 P.2d 12 (1961); *Brunson v. Strong*, 17 Utah 2d 364, 412 P.2d 451 (1966); *Estate of*

McFarland v. Holt, 18 Utah 2d 127, 417 P.2d 244 (1966); *Bank of Pleasant Grove v. Johnson*, 552 P.2d 1276 (Utah 1976); *Rigtrup v. Strawberry Water Users Ass'n*, 563 P.2d 1247 (Utah 1977); *Anderton v. Montgomery*, 607 P.2d 828 (Utah 1980); *State ex rel. K.K.H.*, 610 P.2d 849 (Utah 1980); *Chournos v. D'Agnillo*, 642 P.2d 710 (Utah 1982); *Madsen v. Brown*, 701 P.2d 1086 (Utah 1985); *Chandler v. Mathews*, 734 P.2d 907 (Utah 1987); *Mountain States Tel. & Tel. v. Sohm*, 755 P.2d 155 (Utah 1988); *Painter v. Painter*, 752 P.2d 907 (Utah Ct. App. 1988); *Belden v. Dalbo, Inc.*, 752 P.2d 1317 (Utah Ct. App. 1988); *King v. Barron*, 770 P.2d 975 (Utah 1988); *Mann v. Wadsworth*, 776 P.2d 926 (Utah Ct. App. 1989); *Ostler v. Albina Transf. Co.*, 781 P.2d 445 (Utah Ct. App. 1989).

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Appeal and Error §§ 702, 776 to 819; 58 Am. Jur. 2d New Trial § 31.

C.J.S. — 5A C.J.S. Appeal and Error §§ 1676 to 1777; 5B C.J.S. Appeal and Error §§ 1778 to 1800, 1894 to 1907; 66 C.J.S. New Trial § 13.

A.L.R. — Counsel's argument or comment stating or implying that defendant is not insured and will have to pay verdict himself as prejudicial error, 68 A.L.R.4th 954.

Key Numbers. — Appeal and Error ⇌ 1025 to 1074, 1170; New Trial ⇌ 27.

Rule 62. Stay of proceedings to enforce a judgment.

(a) **Stay upon entry of judgment.** Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

(b) **Stay on motion for new trial or for judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) **Injunction pending appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.

(d) **Stay upon appeal.** When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e) **Stay in favor of the state, or agency thereof.** When an appeal is taken by the United States, the state of Utah, or an officer or agency of either,

or by direction of any department of either, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) **Stay in quo warranto proceedings.** Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed on an appeal.

(g) **Power of appellate court not limited.** The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction, writ of mandate or writ of prohibition during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) **Stay of judgment upon multiple claims.** When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(i) **Excepting to sureties; justification; multiple sureties; deposit in lieu of bond.** The adverse party may except to the sufficiency of the sureties to the undertaking filed pursuant to the provisions of this rule at any time within 10 days after written notice of the filing of such undertakings; and, unless they or other sureties, within 10 days after service of the notice of such exception, justify before a judge of the court in which the judgment was entered, or the clerk thereof, upon not less than five days' notice to the party excepting to such sureties of the time and place of justification, execution of the judgment is no longer stayed. In all cases where the bond required exceeds \$2,000 and there are more than two sureties thereon, they may state in their affidavits that they are severally worth the amounts for which they agree to be found if less than that expressed in the undertaking, provided the whole amount is equivalent to that of two sufficient sureties. In all cases where an undertaking is required by these rules a deposit in court in the amount of such undertaking, or such lesser amount as the court may order, is equivalent to the filing of the undertaking.

(j) **Waiver of undertaking.** In all cases the parties may by written stipulation waive the requirements of this rule with respect to the filing of a bond or undertaking.

Compiler's Notes. — This rule is similar to Rule 62, F.R.C.P.

Cross-References. — Bond for costs on appeal, Rule 6, Utah R App P

NOTES TO DECISIONS

ANALYSIS

Injunctive relief pending appeal.
Stay to prevent injustice
Temporary nature of stay
Cited

Injunctive relief pending appeal.

Motion for injunction to restrain dissipation of marital assets during the pendency of the

appeal of the divorce action should be filed with the district court, any jurisdiction that the Supreme Court may have in such matters should be invoked only after a party has sought relief in the district court, in all but the most exceptional circumstances Warren v Warren, 642 P 2d 385 (Utah 1982)

Stay to prevent injustice.

Equitable relief from the enforcement of a

attention the fact that money was not produced in court, he did waive his right in that regard, more especially was that true where tender was by check and money to meet same was at

all times in bank on which drawn. *Hirsh v. Ogden Furn & Carpet Co*, 48 Utah 434, 160 P. 283 (1916).

COLLATERAL REFERENCES

Am. Jur. 2d. — 20 Am Jur 2d Costs §§ 23, 24

C.J.S. — 20 C J S Costs § 76 et seq.
Key Numbers. — Costs ☞ 42.

Rule 69. Execution and proceedings supplemental thereto.

(a) **Issuance of writ of execution.** Process to enforce a judgment shall be by a writ of execution unless the court otherwise directs, which may issue at any time within eight years after the entry of judgment, (except an execution may be stayed pursuant to Rule 62) either in the county in which such judgment was rendered, or in any county in which a transcript thereof has been filed and docketed in the office of the clerk of the district court. Notwithstanding the death of a party after judgment execution thereon may be issued, or such judgment may be enforced, as follows:

(1) In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest.

(2) In case of the death of the judgment debtor, if the judgment is for the recovery of real or personal property or the enforcement of a lien thereon.

(b) **Contents of writ and to whom it may be directed.** The writ of execution must be issued in the name of the state of Utah, sealed with the seal of the court and subscribed by the clerk. It may be issued to the sheriff of any county in the state (and may be issued at the same time to different counties) but where it requires the delivery of possession or sale of real property, it must be issued to the sheriff of the county where the property or some part thereof is situated. If it requires delivery of possession or sale of personal property, it may be issued to a constable. It must intelligibly refer to the judgment, stating the court, the county where the same is entered or docketed, the names of the parties, the judgment, and, if it is for money, the amount thereof, and the amount actually due thereon. It shall be directed to the sheriff of the county in which it is to be executed in cases involving real property, and shall require the officer to proceed in accordance with the terms of the writ; provided that if such writ is against the property of the judgment debtor generally it may direct the constable to satisfy the judgment, with interest, out of the personal property of the debtor, and if sufficient personal property cannot be found, then the sheriff shall satisfy the judgment, with interest, out of his real property.

If the judgment requires the sale of property, the writ of execution shall recite such judgment, or the material parts thereof, and direct the officer to execute the judgment by making the sale and applying the proceeds in conformity therewith. The judgment creditor may require a certified copy of the judgment to be served with the execution upon the party against whom the judgment was rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.