

2011

# GDE Construction Inc v. Dianne W. Leavitt : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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GDE CONSTRUCTION, INC,  
  
Plaintiff/Appellant,  
  
vs.

DIANNE W. LEAVITT, individuals, BANK  
OF AMERICAN FORK; INTERIORS  
UNLIMITED, LC dba STEVE PETERSON  
INTERIORS; MOUNTAIN LAND DESIGN,  
INC; NOORDA ARCHITECTURAL  
METALS, INC.; THE DRYWALL  
SURGEONS OF UTAH, INC.; and JOHN  
DOES 1 through 10,

Defendants/Appellees.

**BRIEF OF APPELLEES  
LORIN LEAVITT AND  
DIANNE LEAVITT**

Appellate No. 20110128-CA

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APPEAL FROM JUDGMENT  
OF THE FOURTH DISTRICT COURT, UTAH COUNTY  
THE HONORABLE STEVEN L. HANSEN

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## STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal by virtue of the provisions of Utah Code Ann. § 78A-4-103(j).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah R. App. P. 11  
See Addendum.

Utah R. App. P. 24  
See Addendum.

Utah R. Civ. P. 7  
See Addendum.

Utah R. Civ. P. 15  
See Addendum.

## **STATEMENT OF THE CASE**

### **Nature of the Case**

Lorin Leavitt and Dianne Leavitt (“*Leavitts*”) hired GDE Construction, Inc. (“*GDE*”) to remodel their home. The Bank of American Fork (“*BAF*”) provided construction financing to the Leavitts, and GDE provided certain construction and lien guarantees to BAF.

There arose certain disputes, mostly relating to cost, as the remodel progressed. As a result, GDE filed a mechanics’ lien. The Leavitts and GDE negotiated an accord to complete the remodel, and GDE released the lien. The Leavitts satisfied the accord, yet GDE re-recorded a mechanics’ lien, and sued to foreclose the mechanics’ lien and claim additional amounts owed beyond that which had originally been agreed to with the Leavitts in the accord.

After discovery was completed, BAF and the Leavitts filed motions for summary judgment. The trial court found (a) that GDE had released its lien claim and had no right to record a new mechanics’ lien, (b) that there was an accord and satisfaction and GDE had no claim to additional amounts, (c) and that GDE’s guarantees to BAF were enforceable. Accordingly, the trial court dismissed GDE’s Complaint and removed its mechanics’ lien.

### **Course of Proceedings and Disposition**

1. On August 18, 2008, GDE filed a Complaint, naming Dianne Leavitt, Bank of American Fork, and others as defendants. (R.12). The Summons was not served on Dianne Leavitt until November 6, 2008. (R.51).



2. The Leavitts, unaware that GDE had filed a Complaint, filed their own Complaint on October 16, 2008, naming GDE as defendant. The Summons was served on GDE on October 21, 2008. This Complaint filed by the Leavitts was later consolidated with the Complaint filed by GDE. (R.24-37).

3. After the expiration of the discovery period, but prior to the deadline to file dispositive motions, the Leavitts filed their Motion for Partial Summary Judgment Against GDE Construction (“*Leavitt MSJ*”). (R.816, 1084).

4. BAF also filed a Motion for Summary Judgment (“*BAF MSJ*”). (R.1108).

5. GDE filed a Memorandum in Opposition to the Leavitt MSJ (“*Opposition*”), and to the BAF MSJ. (R.1929, 2025). In support of the Opposition, GDE also filed the Declaration of Amy Eldredge in Opposition to the Leavitts’ Motion for Partial Summary Judgment Against GDE (“*Declaration*”). (R.2029).

6. On July 9, 2010, the Leavitts filed a Motion to Strike (“*Leavitt Motion to Strike*”) relating to the Declaration. (R.2059). On July 22, 2010, BAF filed its Motion to Strike Portions of the Declaration of Amy Eldredge in Opposition to the Leavitts’ Motion for Partial Summary Judgment Against GDE (“*BAF Motion to Strike*”). (R.2126).

7. A hearing for oral argument related to the motions for summary judgment and motions to strike was held on September 13, 2010 (“*Hearing*”). (R.2213). On October 26, 2010, the trial court entered its Ruling RE: Motions for Partial Summary Judgment and Motions to Strike. (“*Ruling*”). (R.2221, 2230).

8. On November 8, 2010, the Leavitts filed a Motion for Attorneys’ Fees for Prevailing on Lien (“*Motion for Fees*”). (R.2242).

9. On November 29, 2011, the trial court entered the “Order Striking GDE Construction’s Defense of Mutual Mistake and Portions of the Declaration of Amy Eldredge” (“*Order to Strike*”). (R.2321).

10. On December 9, 2010, the trial court entered an “Order Dismissing GDE Construction’s Claims, Releasing Its Lien and Lis Pendens, Ordering It to Remove Mountain Land Design’s Lien, and Awarding Attorney’s Fees to the Bank of American Fork” (“*Summary Judgment Order*”). (R.2391).

11. GDE never filed an opposition or response to the Motion for Fees, and on January 4, 2011, the trial court entered the “Order Granting Leavitts’ Motion for Attorneys’ Fees for Prevailing on Lien” (“*Order on Fees*”).

12. The Leavitts’ Judgment was entered on January 10, 2011 (“*Leavitt Judgment*”). (R.2476). BAF’s Judgment was also entered on January 10, 2011 (“*BAF Judgment*”).

13. On November 26, 2010, GDE filed its Reqeust for Reconsideration or Clarification, regarding the trial court’s Ruling. The denied that request on January 4, 2011. (R.2313, 2471).

14. On January 28, 2011, GDE filed its Motion to Set Aside Judgments Entered on January 10, 2011 and Request for 54(b) Certification and Extension of Time to File Appeal. Prior to the deadline for memoranda in opposition from opposing parties, the trial court entered the Order Certifying Certain Orders as Final Under Rule 54(B) and Extending the Time to File a Notice of Appeal. (R.2534, 2624).

15. On February 1, 2011, GDE filed its Notice of Appeal. (R.2577).

16. On February 11, 2011, BAF filed its Objection to Leavitts' Writ of Execution and Motion to: (1) Declare the Attorney Fee Order issued in Favor of the leavitts on January 4, 2001 is Not a Final Order and Judgment; (2) Vacate Judgment Entered 02-11-11 Filed: Defendant Bank of American Fork's Memorandum. (R.2652).

17. On February 17, 2011, BAF filed its Motion to Set Aside "Order Certifying Certain Orders as Final Under Rule 54(b) and Extending the Time to File a Notice of Appeal". (R.2835).

18. On March 15, 2011, the trial court entered a stay, and reaffirmed that stay on April 6, 2011. (R.3341, 3447).

19. On October 19, 2011, GDE filed the Brief of Appellant ("**GDE Brf**").

### **Statement of the Facts**

#### **A. The Parties, the Project, and the Agreement**

1. In approximately October of 2006, the Leavitts entered into an agreement with GDE, whereby GDE would provide contractor services for the remodeling of the Leavitts' home located at 1774 North High Country Drive, Orem, Utah ("**Project**"). (R.404, 558).

2. Don Eldredge is the President of GDE, and Amy Eldredge is the Secretary for GDE, and she is also authorized to act on GDE's behalf. (R.1433, Deposition of Amy Eldredge ("**Amy Depo**") 22:16-17; R.1408, Deposition of Don Eldredge ("**Don Depo**"), 100: 22-23, 296: 2-10).

3. The agreement entered into between the Leavitts and GDE in October of 2006 provided that in return for their work on the Project, GDE would be paid on a cost

plus 15% basis (“*Agreement*”). (R.404, 558, 1433, Amy Depo 74:1-12; 1546).

4. As part of the Agreement, both parties originally agreed that the cost of the Project would be approximately \$900,000. (R.404, 558, 1408, Don Depo, 226:16-23).

**B. Disputes as to the Cost of the Project Have Existed Since the Beginning**

5. Although the Leavitts believed 15% was a high percentage for a “cost plus” contract in the industry, it was agreed to by the Leavitts because they understood that they would not be charged for labor performed by GDE or GDE employees, including but not limited to, framing and other labor performed. The Leavitts would be charged for any material that GDE was required to provide. These terms were included in the Agreement. (R.1354, Deposition of Dianne Leavitt (“*Dianne Depo*”), 11:9-21; R.1338, Deposition of Lorin Leavitt (“*Lorin Depo*”), 11:20—12:15).

6. GDE denies that the Leavitts were not to be charged for framing labor. (R.1379; *see also* Fact ¶36 below).

7. The Final Invoice includes amounts for framing labor. (*See* Fact ¶36 below).

8. The dollar amount GDE was charging the Leavitts for the Project changed several times during the construction period. The original estimate was for \$900,000, which later changed to \$1,200,000, then changed again to \$1,600,000, and has subsequently increased several times. (R.1433, Amy Depo., 60:8-21; R.1408, Don Depo. 231: 1-16; *see also* Fact ¶¶11 and 19 below).

9. When the Leavitts were informed of the increase to \$1,600,000 by Amy Eldredge, a principal of GDE, the Leavitts were shocked. They had not been given any warning or indication that there would be another price increase, and certainly not such a

large increase. (R.1354, Dianne Depo, 55:2-7, 57:7-12; R.1338, Lorin Depo., 45:8—46:12).

10. In or about October of 2007, despite the price changes from \$900,000 to \$1,200,000 to \$1,600,000, Amy Eldredge told the Leavitts that they would need another \$400,000 to complete the Project, and as a result, Lorin requested a meeting. (R.1338, Lorin Depo., 52:2—53:14; R.1354, Dianne Depo., 62:9—63:6).

11. In October of 2007, Lorin Leavitt met with the principals of GDE, Don Eldredge and Amy Eldredge (“*GDE Principals*”) to discuss the balance of the cost of the Project (“*October 2007 Meeting*”). (R.1408, Don Depo., 137: 24—138:12).

12. At the October 2007 Meeting, Don Eldredge presented to Lorin Leavitt a handwritten list of items still needing to be paid for on the Project, including items that were completed and items that still needed to be completed, and it also showed a grand total of how much was still owing at that time. The grand total of what was still owed as shown on the List was \$1,005,788.15 (the “*List*”). (R.1408, Don Depo., 142:14—144:3, 148:6-25; R.1325).

13. Prior to the October 2007 Meeting, the Leavitts were already in the process of obtaining a second construction loan from Bank of American Fork for \$600,000, which GDE knew about, which loan was finalized on December 4, 2007; so practically, the amount that would still be owed was approximately \$400,000. (R.1408, Don Depo. 145:23—146:14).

14. At the October 2007 Meeting, the parties agreed that the Leavitts would pay \$400,000. The Leavitts would provide \$150,000 up front, and \$250,000 would come

from a second mortgage after completion. (R.401, 1338, Lorin Depo., 59:13-20).

15. GDE denies that the parties reached any agreement related to \$400,000 at the October 2007 Meeting. (R.1377-1379).

16. Soon after the October 2007 Meeting, the Leavitts paid \$150,000 to the bank which was ultimately disbursed for Project costs. (R.1338, Lorin Depo., 66:7-16).

17. Since the October 2007 Meeting, the Leavitts have also paid an additional approximately \$127,000 directly to subcontractors for Project costs. (R.1338, Lorin Depo., 113:11—114:3).

18. According to GDE, the total amount of the Project is now approximately \$2.4 million. (R.1408, Don Depo., 9:14-17; 226:24—227:1).

**C. Leavitts and GDE Reach an Accord, Which the Leavitts Satisfied**

19. In March of 2008, the Leavitts and GDE Principals met again, at which meeting GDE informed the Leavitts that GDE had recorded a lien on the property for \$140,000 on March 18, 2008 (“*First Lien*”). (R.400, 556, 1322).

20. The First Lien prevented the Leavitts from obtaining permanent financing. The Leavitts requested that GDE remove the First Lien, but GDE refused. (R.1338, Lorin Depo., 74:3—75:10; R.1354, Dianne Depo., 106:6-11, 158:8-17; R.1463).

21. At the meeting in March of 2008 discussed above, when GDE presented the First Lien which had been recorded, the Leavitts were willing to negotiate terms to be able to pay GDE what GDE thought they were owed (“Help us make terms with what you think you're owed”). (R.1354, Dianne Depo., 101:2—102:3, 110:15—111:13, 157:16—158:17).

22. Four days after the initial meeting regarding the First Lien, GDE produced a Promissory Note and Trust Deed, and represented to the Leavitts that if the Leavitts signed the documents, GDE would release the First Lien. The Promissory Note was for \$150,000. (R.400, 556, 1317).

23. The Trust Deed provided as collateral property owned by Dianne Leavitt in Washington County, State of Utah, more accurately described as follows: CLIFFS OF SNOW CANYON H (SG) LOT 214. (R.1315).

24. In order for GDE to agree to release First Lien, the Leavitts were required to sign the Promissory Note. Once the promissory note was signed, the First Lien was released. (R.1408, Don Depo., 175:17-24).

25. GDE prepared and recorded a Release of Mechanic's Lien on April 3, 2008 (hereinafter the "Release of Lien"). (R.1408, Don Depo. 176:1-8; R.1433, Amy Depo., 11:11—13:5; R.1313).

26. GDE's intent in recording the Release of Lien was to release the First Lien, and that was because GDE had received the Promissory Note & Trust Deed. (R.1433, Amy Depo., 11:11—13:5).

27. The Release of Lien states: "PLEASE TAKE NOTICE THAT the Mechanic's Lien claimed by GDE...is hereby released, the claim having been fully paid and satisfied and that the Mechanic's Lien...is hereby satisfied and discharged." (R.1313).

**D. GDE Records Additional Liens**

28. On or about July 10, 2008, the Leavitts discovered that GDE had re-recorded

a lien on June 25, 2008, this one for \$150,000, but alleging the same dates of service as the First Lien (“*Second Lien*”). (R.1354, Dianne Depo., 127:22—128:5, 145:7-8; R.1311).

29. Even though the First Lien showed an amount owed of \$140,000, and the Second Lien showed \$150,000, no additional work had been performed between the filing of the two liens. GDE had simply recalculated the fees owed to it. (R.1408, Don Depo., 179: 5-23).

30. According to GDE, the purpose of filing the Second Lien was because the terms of the Promissory Note had not been met. (R.1408, Don Depo. 178: 19-22, 212:22—213:1; R.1433, Amy Depo., 13:6—14:2).

31. According to GDE, if the Leavitts had paid the Promissory Note in full, then GDE would not be owed anything and GDE’s debt would have been satisfied in full. (R.1433, Amy Depo., 130:17—132:23).

32. On July 16, 2008, GDE recorded an amended lien for \$563,690.45 (“*Amended Lien*”). (R.1308).

33. The Amended Lien, and the amounts claimed in this lawsuit, include the \$150,000 GDE claims it is owed and for which the Leavitts provided the Promissory Note. (R.1433, Amy Depo., 130:17—132:23).

34. On August 13, 2008, GDE filed its Complaint against the Leavitts. (R.12).

35. On August 18, 2008, GDE caused to be recorded a Notice of Default and Election to Sell, with respect to the Trust Deed (“*Notice of Default*”). (R.1305).



**E. GDE's Current Lien Claims Amounts That GDE Admits It Was Never Owed**

36. On October 8, 2008, GDE sent a letter demanding payment from the Leavitts ("***Demand Letter***"), in which GDE referenced a final invoice for \$146,332.05 ("***Final Invoice***"). (R.1302, 1299).

37. As part of responses to discovery requests propounded after commencement of this lawsuit, GDE provided a spreadsheet showing the amounts still allegedly owed to subcontractors who performed work on the Project ("***Sub Spreadsheet***"). (R.1294).

38. GDE believes it has no contract with and owes no money to Carl C. Nelson Painting for the work it performed on the Project, however, the amount claimed in GDE's Amended Lien includes the amount owed to Carl C. Nelson Painting, and GDE also charged the Leavitts the 15% general fee for work performed by Carl C. Nelson Painting. (R. 1433, Amy Depo. 77:18-25, 78:13—79:14, 134:7-12; R.1299, 1294).

39. GDE believes that it does not owe any money to Cascade Pool for the work it performed on the Project, however, the amount claimed in GDE's Amended Lien includes the amount owed to Cascade Pool, and GDE also charged the Leavitts the 15% general fee for work performed by Cascade Pool. (R.1433, Amy Depo., 79:15-17, 80:5-16, 134: 7-14; R.1299, 1294).

40. GDE believes it has no contract with and owes no money to Home & Office Technologies for the work it performed on the Project, however, the amount claimed in GDE's Amended Lien includes the amount owed to Home & Office Technologies, and GDE also charged the Leavitts the 15% general fee for work performed by Home &

Office Technologies. (R.1433, Amy Depo., 80:17—81:7, 135:16-18; R.1299).

41. GDE believes it has no contract with and owes no money to Interiors Unlimited for the work it performed on the Project, however, the amount claimed in GDE's Amended Lien includes the amount owed to Interiors Unlimited, and GDE also charged the Leavitts the 15% general fee for work performed by Interiors Unlimited. (R.1408, Don Depo. 185:3-15; R.1433, Amy Depo., 135:16-20; R.1294).

42. GDE believes that it does not owe any money to Lighting Specialists for the work it performed on the Project, however, the amount claimed in GDE's Amended Lien includes the amount owed to Lighting Specialists, and GDE also charged the Leavitts the 15% general fee for work performed by Lighting Specialists. (R.1433, Amy Depo., 81:11-20, 137:3-7; R.1299, 1294).

43. GDE believes it has no contract with and owes no money to MBA Electric for the work it performed on the Project, however, the amount claimed in GDE's Amended Lien includes the amount owed to MBA Electric, and GDE also charged the Leavitts the 15% general fee for work performed by MBA Electric. (R.1408, Don Depo., 184:3-11; R.1433, Amy Depo. 137:14-16; R.1299, 1294).

44. GDE believes it has no contract with and owes no money to Mountainland Design for the work it performed on the Project, however, the amount claimed in GDE's Amended Lien includes the amount owed to Mountainland Design, and GDE also charged the Leavitts the 15% general fee for work performed by Mountainland Design. (R.1433, Amy Depo., 81:21—82:14, 137:17-18; R.1299, 1294).

45. GDE believes it has no contract with and owes no money to Orion Outdoor

Lighting for the work it performed on the Project, however, the amount claimed in GDE's Amended Lien includes the amount owed to Orion Outdoor Lighting, and GDE also charged the Leavitts the 15% general fee for work performed by Orion Outdoor Lighting. (R.1433, Amy Depo., 82:19—83:5, 137:17-22; R.1299, 1294).

46. GDE believes it has no contract with and owes no money to R&M Woods for the work it performed on the Project, however, the amount claimed in GDE's Amended Lien includes the amount owed to R&M Woods, and GDE also charged the Leavitts the 15% general fee for work performed by R&M Woods. (R.1408, Don Depo. 184:12—185:2; R.1433, Amy Depo., 138: 2-4; R. 1299, 1294).

47. GDE believes that it does not owe any money to Total Protection for the work it performed on the Project, however, the amount claimed in GDE's Amended Lien includes the amount owed to Total Protection, and GDE also charged the Leavitts the 15% general fee for work performed by Total Protection. (R.1433, Amy Depo., 83:20—84:4, 138:15-16; R.1299, 1294).

48. According to GDE, of the subcontractors listed above with whom GDE believes it had no contract, GDE did not direct the work of those subcontractors, but their work was directed by the Leavitts, and yet, GDE still charged the 15% general fee for those subcontractors listed above. (R.1433, Amy Depo., 139:4-7; *see also* Fact ¶¶37—46 above).

49. GDE was not owed any money from the ten subcontractors listed above, but GDE intentionally included those amounts in its Amended Lien. GDE's reason for claiming amounts in a lien although such amounts were not owed to it was because GDE

was afraid it might get sued. (R.1408, Don Depo., 247:14—248:10; R.1433, Amy Depo. 14:7—15:5; R.1294).

50. GDE was afraid it might get sued, but yet it cannot recall whether any subcontractors had suggested or threatened they would sue at the time GDE filed the Amended Lien. (R.1433, Amy Depo., 14:7—15:5).

51. The total amount claimed by the ten subcontractors listed above is \$301,377.39. (R.1294).

52. In addition to the ten subcontractors discussed above, GDE apparently does not know whether it has a contract with or owes money to Cornaby Railing for the work it performed on the Project, however, the amount claimed in GDE's Amended Lien includes the amount owed to Cornaby Railing, and GDE also charged the Leavitts the 15% general fee for work performed by Cornaby Railing. (R.1433, Amy Depo., 80:3-16, 135:14-15).

53. The total amount claimed by the ten subcontractors mentioned above, plus Cornaby Railing, is \$323,172.99. (R.1294).

## **SUMMARY OF ARGUMENTS**

The Brief of Appellant fails to meet the standard set forth in the Utah Rules of Appellate Procedure, and the deficiencies should be considered fatal to Appellant's appeal.

The Brief of Appellant argues that the trial court erred in striking the affirmative defense of mutual mistake, along with a paragraph of a declaration. However, the affirmative defense of mutual mistake was not specifically pled, and neither the defense nor the underlying facts were raised until the dispositive motion stage of proceedings—after discovery had concluded. Further, the paragraph of the declaration which was stricken relied on inadmissible hearsay, was not admissible or relevant, and only related to the disallowed affirmative defense, and therefore was properly stricken.

Appellant argues that the trial court erred in ruling that an accord and satisfaction existed. Both at the trial court and appellate level, Appellant has simply concluded in argument that there were disputed facts, but at the trial court level Appellant never actually disputed any material fact related to the accord and satisfaction, and the statement of facts in the Brief of Appellant does not point to any specific facts.

Appellants Docketing Statement listed more issues than Appellant actually argued in the Brief of Appellant. Where Appellant has failed to argue an issue in its Brief of Appellant, any appeal of such issue is waived and such issue should not be considered.

## ARGUMENT

### **I. APPELLANTS FAILED TO FOLLOW THE RULES OF APPELLATE PROCEDURE, AND THEREFORE THE APPEAL SHOULD BE DISMISSED.**

#### *A. Appellant Failed to Provide a Transcript of All Relevant Evidence and Proceedings.*

The Utah Rules of Appellate Procedure state that within 10 days of filing the notice of appeal the appellant “shall file with the clerk of the appellate court a written request for transcript, specifying the entire proceeding or parts of the proceeding to be transcribed that are not already on file.” Utah R. App. P. 11(e)(1). If no such transcript is to be requested, the appellant “shall a certificate to that effect.” *Id.* Furthermore, “unless the entire transcript is to be included, the appellant shall . . . file a statement of the issues that will be presented on appeal,” and if the appellee believes a transcript or other parts of the proceedings to be necessary, appellee shall file a designation of additional parts to be included. Utah R. App. P. 11 (e)(3). This necessary designation by appellant provides appellee(s) with the opportunity to obtain necessary transcripts if appellant does not intend to provide them.

On September 13, 2010, the trial court held the Hearing to hear oral argument on the Leavitts’ MSJ and Motion to Strike, and the BAF MSJ and Motion to Strike. A review of the appellate record shows that no transcript has been provided for the hearing. Appellant was provided written notice from the Court on March 4, 2011, and May 2, 2011, informing Appellant that no Request for Transcript had been provided. Appellant failed to correct this deficiency.

B. *The Brief of Appellant Failed to Provide a Statement of the Issues Presented and the Other Necessary Information*

The Utah Rules of Appellate Procedure require the brief of appellant to contain the following, among other things:

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

...

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative . . . shall be set out verbatim with the appropriate citation.

...

(a)(7) A statement of the case. The statement shall *first* indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall *follow*. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

...

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph.

Utah R. App. P. 24 (a)(5), (6), (7) (emphasis added). The Brief of Appellant has failed to provide this information or follow these rules. The Brief of Appellant fails to provide a statement of the issues presented for review, and also fails to provide the standard of appellate review for each issue, a citation to the record showing each issue was preserved, and/or a statement of grounds seeking review of an issue not preserved.<sup>1</sup> Verbatim

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<sup>1</sup> The Brief of Appellant does state that

“[o]n the merits, GDE appeals threes issues: 1) whether the trial court properly struck the defense of mutual mistake and portions of the Declaration of Amy Eldredge; 2) whether the trial court properly found that there was an accord and satisfaction between the Leavitts and GDE; and 3) whether the trial court properly ruled that the First and Second Guaranties are enforceable against

citation of determinative statutes and rules was not provided. Appellant failed to properly set forth a statement of the case. Although Appellant did provide statement of facts and appears to have provided the course proceedings and disposition below, Appellant did so incorrectly. The items are listed in reverse order, and more important, Appellant failed to properly cite to the record for each of the facts stated.<sup>2</sup> Finally, Appellant failed to provide any addendum items, even though there are items which are of central importance that should have been included (i.e. findings of fact and conclusions of law, ruling, etc.)<sup>3</sup> The appellees, and the Court, are thus left to guess as to which issues Appellant is seeking review. The statement of issues and related items are also of particular importance for this particular brief of appellant because Brief of Appellant has stated several facts and made several arguments for the first time, and without a statement

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GDE.”

(GDE Brf, 21). However, this statement is found in the Argument section of the Brief of Appellant, and it fails to provide any of the other requisite information related to a statement of the issues.

<sup>2</sup> Once the Court has the opportunity to carefully review the Statement of Facts in the Brief of Appellant, it will become apparent that Appellant’s citations to the record are essentially of no value. Rather than actually citing to the portion of the record where a particular fact is demonstrated to be part of the record, Appellant cites to the first page of various pleadings. Rather than pointing to exhibits and documents which were included with the parties’ various pleadings, Appellant cites to the first page of a pleading. Citing the first page is acceptable when providing the procedural history, but not facts. Of even more concern, the pleadings to which Appellant cites are irrelevant. For example, on Statement of Fact Nos. 3, 5, 9, 11, and 32 (which as argued more fully below, are facts which were never made a part of the trial record at all), Appellant’s citation to the record (1084) is the first page of the Leavitts’ Motion for Partial Summary Judgment Against GDE Construction, Inc.. The citation is not to the Memorandum in Support thereof which contains a statement of facts and includes various exhibits, but rather Appellant cites to the first page of a pleading which is one page long. In addition to those facts, Statement of Fact Nos. 19, 24, 25, 34, and 46 were never made a part of the record, or in the very least, are distortions of facts. A primary basis upon which the trial court granted the various motions for summary judgment is because failed to (or could not) dispute the material facts which were before the trial court. At the trial level, GDE claimed the facts were disputed, but did not actually dispute the facts. Once again, Appellant now argues that the facts were disputed, but fails to even properly identify which facts are part of the trial record.

<sup>3</sup> Leavitts assume that GDE did not provide any addendum items. GDE has yet to provide the Leavitts (or BAF) with a physical copy of the Brief of Appellant, only an unsigned PDF of the Brief which was emailed. The unsigned PDF does not include an addendum, and does not reference an addendum or state that no addendum was needed. The Leavitts (and BAF) have also not received a CD pursuant to Standing Order No. 8. On December 7, 2011, counsel for Leavitts sent a reply email to counsel for GDE asking for a copy of the Brief of Appellant, a CD, or at least confirmation that there is no addendum. Counsel for Leavitts sent another email on December 15, 2011. Counsel for GDE has not responded to either email or provided a copy or CD.



of the issues and proper citation to the record, it is unclear whether the facts are actually part of the record, and whether the arguments are central to issues under review, or merely collateral.

*C. Failure by Appellant to Follow the Rules Should Result in Dismissal of the Appeal*

In *C.M.C. Cassity, Inc. v. Aird*, 707 P.2d 1304 (Utah 1985), the Utah Supreme Court relied on long-standing precedent and dismissed an appeal based on appellant's failure to follow the applicable rules. In that case, the appellant

failed to file a docketing statement as required by Rule 73A of the Utah Rules of Civil Procedure (U.R.A.P. 9), a designation of the contents of the record on appeal, as required by Rule 75(a) (U.R.A.P. 11(d)), or a certificate that a transcript has been ordered as required by Rule 75(a)(1) (U.R.A.P. 11(e)). The brief filed by [appellant] did not comply with the requirements for briefs set forth in Rule 75(p)(2) (U.R.A.P. 24) in that, among other things, it contained no table of contents, no index of authorities cited, and no citations to the record in the statement of facts.

*C.M.C. Cassity*, 707 P.2d at 1305. In our particular case, Appellant failed to request a transcript as required by Utah R. App. P. 11(e)(1), failed to designate which portions of the proceedings would be necessary, as required by Utah R. App. P. 11(e)(3), failed to provide a statement of the issues presented for review, and accompanying requisite information, as required by Utah R. App. P. 24 (a)(5), failed to provide a verbatim cite of determinative statutes, rules, etc., as required by Utah R. App. P. 24 (a)(6), failed to correctly provide a statement of the case and facts, as required by Utah R. App. P. 24 (a)(7), and Appellant failed to properly address the addendum, as required by Utah R. App. P. 24 (a)(11). The court in *C.M.C. Cassity* dismissed that appeal for less. The present appeal should be dismissed.

In the event that this Court is not inclined to dismiss the appeal, the trial court's judgment should be presumed to be valid in light of Appellant's failure to follow the rules. An appellant is required to provide a transcript, and "[n]either the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript." Utah R. App. P. 11(e)(2). Appellants failed to provide a transcript of the Hearing, and this Court has held that in such situations the judgment being appealed is presumed to be valid. "Since counsel failed to provide this court with all relevant evidence bearing on the issues raised on appeal, as required by Utah R. App. P. 11(e)(2), we can only presume that the judgment was supported by sufficient evidence." *State v. Nine Thousand One Hundred Ninety-Nine Dollars*, 791 P.2d 213, 217 (Utah Ct. App. 1990) (citing *Intermountain Power Agency v. Bowers-Irons Recreation Land & Cattle Co.*, 786 P.2d 250, 252 (Utah Ct. App. 1990); *Bevan v. J.H. Constr. Co.*, 669 P.2d 442, 443 (Utah 1983)); see also *State v. Cramer*, 2002 UT 9, ¶¶26-28 (Utah 2002). The appeal should be dismissed, or in the least, the trial court's judgment should be presumed to be valid.

**II. THE TRIAL COURT CORRECTLY GRANTED THE MOTIONS TO STRIKE THE DEFENSE OF MUTUAL MISTAKE AND PORTIONS OF THE DECLARATION OF AMY ELDREDGE**

GDE cannot raise an affirmative defense for the first time at the dispositive motion stage because affirmative defenses must be raised at the initial pleading stage or they are waived. Furthermore, portions of the Declaration should be stricken and disregarded because they (a) rely upon hearsay, and (b) they pertain to an affirmative defense which was not properly pled.

A. *GDE Cannot Raise an Affirmative Defense for the First Time At The Dispositive Motion Stage.*

The Utah Supreme Court has held that “[m]utual mistake is an affirmative defense as it raises matters outside the plaintiffs' prima facie case, and the failure to assert it is a waiver of that defense.” *Mabey v. Kay Peterson Constr. Co.*, 682 P.2d 287, 289 (Utah 1984) (citing Utah R. Civ. P. 8(c), 12(h); *Phillips v. JCM Development Corp.*, Utah, 666 P.2d 876 (1983)). In *Mabey*, the court held that mutual mistake had “not been raised as a defense nor was it made a claim,” and that “Rule 9(b) [of the Utah Rules of Civil Procedure] requires that in all averments of mistake, the circumstances constituting mistake shall be stated with particularity.” *Id.* (citations omitted); *see also Resolution Trust. Corp. v. Midwest Fed. Sav. Bank*, 36 F.3d 785, 792 (9th Cir. Cal. 1994) (holding that mutual mistake consistently has been recognized as an affirmative defense, one which is waived if not included in a party's first response to an opponent's pleading.)

GDE acknowledges that the holding in *Mabey* is correct and that “mutual mistake must be affirmatively pled.” (GDE Brf, 24-25). GDE did not specifically raise the defense of mutual mistake in any of its pleadings. The Brief of Appellant acknowledges this fact. GDE argues that its list of affirmative defenses set forth in its initial pleadings included a catchall statement: “and any other matter constituting an avoidance or affirmative defense as may be disclosed through discovery.” (GDE Brf, 24). However, GDE cites not case law which would allow a party to simply make a broad statement such as this. Allowing such a catchall statement defeats the entire purpose of requiring

that affirmative defenses be specifically pled: notice.<sup>4</sup> Nearly two years after the initiation of this lawsuit, GDE raised for the first time the idea that there was a mutual mistake. As a matter of law, any such defense was waived long ago, and cannot be raised simply because GDE faced the prospect of summary judgment. The factual and expert discovery times have expired, and the Leavitts (and other parties) would be prejudiced if GDE were allowed at such a late stage to raise an affirmative defense, which as shown below, fundamentally alters positions they have taken previously. The argument section of GDE's Opposition relating to mutual mistake should be stricken and disregarded.<sup>5</sup>

GDE next argues that issues which are tried by express or implied consent shall be treated as if they had been properly raised, citing Utah Rules of Civil Procedure 15. (GDE Brf, 25-26). However, GDE's new defense of mutual mistake was not tried by express or implied consent. At the first moment that GDE raised that argument, in its Opposition, both the Leavitts and BAF immediately filed motions to strike. Mutual mistake has neither been expressly or implicitly allowed, whether at trial or in motions. GDE further claims that the "facts surrounding mutual mistake have already been developed and there is no need for further discovery." (GDE Brf, 26). This is incorrect. Mutual mistake, and the underlying facts that GDE now alleges, are entirely new. The underlying facts were not even part of the deposition, hence the reason GDE provided the Declaration, rather than simply cite to the deposition transcript(s).<sup>6</sup> The course and scope

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<sup>4</sup> From the Ruling: "A catchall statement does not comply with the purpose of the Rule. The purpose is to put the opposing party on notice of what the party claims as defenses." (R.2229).

<sup>5</sup> Even if GDE were allowed to raise such a defense, it would be futile, as argued in the Leavitts' Memorandum in Support of the Leavitt MSJ. (R.2111-2114).

<sup>6</sup> As argued by BAF in its Reply Memorandum in support of the BAF Motion to Strike, the concept of a mistake

of discovery would be fundamentally altered had GDE at any point raised even the suggestion it now argues regarding mutual mistake.

GDE also argues, perhaps as some justification for allowing it to maintain a defense of mutual mistake, that the Leavitts' argument of accord and satisfaction "had not been previously raised." (GDE Brf, 26). This is incorrect. The Amended Answer and Cross Claim of Dianne Leavitt to Plaintiff GDE Construction's First Amended Complaint specifically lists accord and satisfaction as an affirmative defense. (R.354). Furthermore, the underlying fact pattern was specifically pled in the First Amended Verified Complaint of Lorin & Dianne Leavitt, (R. 400-402), so GDE cannot claim it was either unaware of the defense, or of the underlying facts.

***B. Paragraph 5 of the Declaration Relies on Inadmissible Hearsay, and Pertains to an Affirmative Defense Which Was Not Properly Pled***

In paragraph 5 of the Declaration, Amy Eldredge states that "I was told by the Leavitts that the only condition precedent to the granting of a loan by Citywide Home Loans was the release of the First Lien." (R.2027). This statement is hearsay within hearsay, or as it is referred to, double hearsay, because there was the alleged statement from the Leavitts to Amy Eldredge, and there was also the alleged statement(s) from Citywide Home Loans to the Leavitts. "[D]ouble hearsay is admissible if both aspects qualify under an exception to the hearsay rule...." *State v. Schreuder*, 726 P.2d 1215, 1231 (Utah 1986). An affidavit must set forth facts that would be admissible in evidence. Ut. R. Civ. P. 56(e). "An affidavit that does not measure up to the standards of 56(e) is

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relating to the promissory note and trust deed was never raised during the Eldredge depositions. (R.2191-92).

subject to a motion to strike.” *Howick v. Bank of Salt Lake*, 28 Utah 2d 64, 66 (Utah 1972).

The alleged statement from the Leavitts to Amy Eldredge is likely excluded from the hearsay rule as an admission by a party opponent. However, there is no exception to the alleged statement from Citywide Home Loans to the Leavitts. It was therefore correct for the trial court to strike paragraph 5 as inadmissible hearsay.

GDE argues that the alleged statement from Citywide to the Leavitts is not being offered for the truth of the matter, “but rather the effect on the listener,” and is therefore not hearsay. (GDE Brf, 21). GDE is attempting to use this statement to support its newly-crafted defense of mutual mistake, and therefore it is in fact being offered for the truth of the matter. Even if this Court holds that the Citywide-to-Leavitt portion of the statement is not being offered for the truth of the matter asserted, then the affidavit should still be stricken, because an affidavit must set forth facts that would be admissible in evidence. Utah R. Civ. P. 56(e). The statement does not meet the basic requirement of relevance: “evidence having any tendency to make the existence of any fact...more probable or less probable that it would without the evidence.” Ut. R. Evid. 401. GDE knew or should have known that this alleged statement from Citywide to the Leavitts was untrue. GDE itself relied upon and attached to its Opposition as Exhibit F, the March 26, 2008 letter from Citywide Home Loans to Dianne Leavitt, (R.1930), prior to the Leavitt Motion to Strike being filed (R.2059). The letter states that the First Lien was preventing the loan from being finalized, but the letter makes no guarantees, promises, or representations that the loan would assuredly be completed once the First Lien was taken off. It is very different

to state that a lien is preventing financing than to say removal of a lien will automatically result in financing. The statement is therefore inadmissible hearsay and/or not relevant, and paragraph 5 was properly stricken.

The trial court also struck paragraph 6 of the Declaration. GDE does not appeal that decision; however the trial court's reason for striking paragraph 6 is also further justification for striking paragraph 5. The trial court indicated that it would "not consider the sixth paragraph of Mrs. Eldredge's affidavit as it pertains to the affirmative defense of mutual mistake." (R.2229). This reasoning is also applicable to paragraph 5, because GDE's purpose in offering paragraph 5 of the Declaration was to further their new argument of mutual mistake. The defense of mutual mistake was properly stricken, and therefore paragraph 5 would serve no purpose independent of an attempt to establish mutual mistake. The trial correctly struck paragraph 5 of the Declaration.

### **III. THE TRIAL COURT CORRECTLY RULED THAT AN ACCORD AND SATISFACTION EXISTED BETWEEN THE LEAVITTS AND GDE**

As argued above, the Brief of Appellant fails to include a statement of the issues presented for review as required by Rule 24(a)(5) of the Utah Rules of Appellate Procedure. However, as part of the Argument section, the Brief of Appellant does identify three issues that GDE appears to be appealing,<sup>7</sup> one of which includes "whether the trial court properly found that there was an accord and satisfaction between the Leavitts and GDE." (GDE Brf, 21).

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<sup>7</sup> See fn. 1, *supra*.

As part of its argument challenging the trial court's Ruling and Summary Judgment Order regarding accord and satisfaction, GDE first sets forth the elements of accord and satisfaction: "1) that the amount is unliquidated and disputed; 2) that payment is made in satisfaction of the debt; and 3) that the creditor accept the payment as full satisfaction." (GDE Brf, 27) (citing *Smith v. Grand Canyon Expeditions Co.*, 84 P.3d 1154, 1158 (Utah 2003)). GDE then states that "the undisputed facts of this case show that none of the three elements [of accord and satisfaction] were met." (GDE Brf, 27).

To the contrary, the Summary Judgment Order contained specific undisputed facts which set forth that an accord and satisfaction had been reached. (R. 2385-88, ¶¶14-38). Specifically, the Summary Judgment Order set forth (a) that there was a dispute as to the actual amount owed, (R.2385-88, ¶¶10-22), (b) that the Leavitts provided payment to GDE, (R.2386, ¶29), and (c) that GDE accepted the payment (R.2386, ¶33).<sup>8</sup>

The Brief of Appellant attempts to argue that there were disputed facts, even in some instances raising facts for the first time. There were no disputes as to any material facts at the trial court level. GDE's Opposition failed create an issue of material fact. Rule 7 of the Utah Rules of Civil Procedure requires that a memorandum in opposition to a motion for summary judgment which controverts the moving party's facts shall be "supported by citation to relevant materials, such as affidavits or discovery materials," Ut. R. Civ. P. 7(c)(3)(B), and each fact in the moving party's memorandum "is deemed admitted for the purpose of summary judgment unless controverted by the responding

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<sup>8</sup> The Ruling also addressed the lack of dispute on those factual issues, and stated that "the Leavitts have satisfied the requirements of accord and satisfaction; therefore the breach of contract claim is dismissed." (R. 2228).



party.” Ut. R. Civ. P. 7(c)(3)(A). Likewise, Rule 56(e) states that a party opposing a motion for summary judgment “may not rest upon the mere allegations or denials of the pleadings,” but must “set forth the specific facts showing that there is a genuine issue for trial.” Ut. R. Civ. P. 56(e).

In the Leavitts’ Memorandum in Support of the Leavitt MSJ, the Leavitts set forth 53 undisputed facts. (R.1453-1463). In a footnote on page 3 of its Opposition, GDE indicates that some of the Leavitts facts were denied in GDE’s Answer. (R.2023). Resting upon the allegations or denials of a pleading is specifically disallowed by Rule 56(e). Also, GDE’s Opposition pointed to several of the Leavitts’ facts which GDE found to be irrelevant, but GDE did not controvert the correctness thereof, nor did it cite any materials in an attempt to controvert. GDE failed to dispute the facts set forth by the Leavitts, failing to even address some of the facts, and certainly failing to cite to supporting evidence which might create a dispute. (R.2021-2023).

The second paragraph of the argument section of GDE’s Opposition states as follows: “As will be demonstrated, this matter is replete with disputed issues of fact precluding summary judgment.” (R.2018). GDE was mistaken as to its burden and the manner of procedure at the summary judgment stage. The argument section of a memorandum in opposition was not the time to dispute facts. A memorandum in opposition “shall contain a verbatim restatement of each of the moving party’s facts that is controverted...[and] [f]or each of the moving party’s fact that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials.” Ut. R. Civ. P.

7(c)(3)(B). GDE failed to controvert the Leavitts' facts, and thus they were admitted. "Once the moving party has challenged the nonmoving party's case on [summary judgment], the burden shifts to the nonmoving party to demonstrate the existence of a genuine issue of material fact." *Uintah Basin Medical Center v. Hardy*, 2008 UT 15, ¶16; see also Utah R. Civ. P. 56(e). Rather than fulfill its burden by providing admissible evidence, GDE relied on baseless assertions and overstates what little evidence that it attempted to present to the trial court. It was GDE's burden to bear, and neither the trial court nor this Court should rescue GDE from its failure to meet that burden. Where there is no dispute of material fact, the Court should view the arguments of the Leavitts from a legal standpoint only, the requisite facts having been admitted. A review of the summary judgment memoranda will show that the undisputed facts as set forth in the Summary Judgment Order were in fact undisputed.<sup>9</sup>

The Brief of Appellant argues that the promissory note "was never meant to be payment," and "was never meant to be enforceable." (GDE Brf, 27-28). These statements are unsupported, and are completely contradictory to the specific finding of the trial court that "GDE accepted the Promissory Note as payment. (R.2386, ¶33). GDE cites no supporting evidence for these statements, or any reason why this Court should rely on the GDE's current representations rather than the trial court's order.

The Brief of Appellant also argues that "the Leavitts have expressly disclaimed any obligation to pay under the Note, and indeed, sought a temporary restraining order

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<sup>9</sup> BAF also set forth a significant number of facts, (R.1837-1850), some similar to that of the Leavitts, and GDE likewise failed to dispute any material fact. (R.1922-1929)

preventing GDE's action to foreclose." (GDE Brf, 28). First, the inconsistency of GDE's arguments is glaring. In one paragraph, GDE asserts that the promissory note was never meant to be payment or be enforceable. In the very next paragraph, GDE unwittingly acknowledges that they attempted to foreclose on the collateral which had been provided to secure the promissory note. If the note was never intended as payment, or was never intended to be enforceable, why then would GDE attempt to foreclose the collateral in response to the Leavitts' alleged failure to pay the note? The answer is that the note was always intended to be payment, was always meant to be enforceable, and GDE never disputed that fact at the trial court level. Second, GDE voluntarily stipulated to a preliminary injunction as to the foreclosure until after this matter had been resolved. (R.2021). And third, GDE again fails to cite to the record as to where this issue of disclaimer was raised at the trial court level. Even if that issue had been raised, it is not persuasive. Rule 8 of the Utah Rules of Civil Procedure allows a party to plead in the alternative. 8(e). GDE sued the Leavitts claiming GDE was owed a significant amount of money. The Leavitts believed an accord and satisfaction had been reached, but if a court were to find that there was no accord, then for what purpose had the Leavitts given the promissory note and trust deed. The purpose of the note and deed was to finalize the accord between the Leavitts and GDE, that was the purpose as represented by GDE, but if the note and deed did not actually resolve the dispute, then the Leavitts had been fraudulently induced into signing that note and deed. The Leavitts pled in the alternative, but the trial court correctly found that there was in fact an accord and satisfaction.<sup>10</sup>

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<sup>10</sup> The Leavitts have not disclaimed any obligation to pay under the note. In support of that stance, this Court can see

GDE admitted the correctness of all facts which it failed to specifically controvert by citation to relevant materials. The trial court found that an accord and satisfaction had been reached based upon the undisputed facts that were before the trial court.

**IV. ANY ISSUES IDENTIFIED IN GDE’S DOCKETING STATEMENT, BUT NOT ARGUED IN THE BRIEF OF APPELLANT, ARE WAIVED AND SHOULD BE DISREGARDED**

In GDE’s Docketing Statement, GDE listed seven issues on appeal. However, in the Brief of Appellant, GDE only cites three issues, and even those three issues were not correctly listed, as argued above. (GDE Brf, 21). In *Rasmussen v. Sharapata*, 895 P.2d 391 (Utah Ct. App. 1995), this Court held that were the appellant had failed to analyze the individual rulings, and instead simply attached portions of a transcript and “invite[d] [the court] to ferret out the errors and make her arguments for her.” *Rasmussen v. Sharapata*, 895 P.2d at 392. This Court concluded that “[t]his will not do.” *Id.*

Similarly, although GDE may have listed certain issues in the Docketing Statement, it has not presented those issue in the Brief of Appellant, and neither Appellees nor this Court should be required to guess as to what basis GDE might have to argue the alleged errors committed by the trial court. Accordingly, any issues not addressed in the Brief of Appellant should not be considered by this Court, and should be disregarded.

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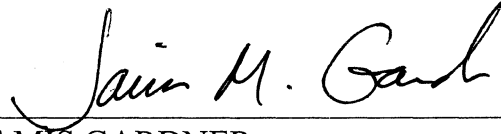
from the record that the Leavitts served a writ of execution upon GDE in an attempt to recover the original promissory note. BAF and another party have also served similar writs, and that issue is awaiting resolution in the trial court.

## CONCLUSION

This Court should affirm the trial court's decision, and deny Appellant's appeal.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of December, 2011.

ROBINSON, SEILER & ANDERSON, LC

A handwritten signature in cursive script, reading "Jamis M. Gardner". The signature is written in dark ink and is positioned above a horizontal line.

JAMIS GARDNER

Attorney for the Leavitts/Appellees

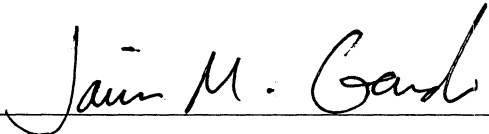
### CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>st</sup> day of December, 2011, I caused a copy of the foregoing BRIEF OF APPELLEE to be sent via U.S. Mail to the following:

Randy B. Birch  
114 South 200 West  
PO Box 763  
Heber City, UT 84032

Daniel R. Widdison  
Tesch Law Offices  
314 Main Street, Suite 201  
PO Box 3390  
Park City, Utah 84060-3390  
*Attorneys for GDE Construction, Inc.*

Felicia B. Canfield  
FABIAN & CLENDENIN  
215 South State Street, Suite 1200  
Salt Lake City, UT 84111-2323  
*Attorneys for Bank of American Fork*

  
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## **ADDENDUM**

1. Ruling.
2. Summary Judgment Order.
3. Order to Strike.
4. Utah R. App. P. 11
5. Utah R. App. P. 24
6. Utah R. Civ. P. 7
7. Utah R. Civ. P. 15

## **ADDENDUM NO. 1**

### **Ruling**



FILED

OCT 26 2010

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH

<p>GDE CONSTRUCTION, INC., a Utah Corporation,</p> <p>Plaintiff,</p> <p>v.</p> <p>DIANNE W. LEAVITT, an individual; BANK OF AMERICAN FORK; INTERIORS UNLIMITED, LC dba STEVE PETERSON INTERIORS; MOUNTAIN LAND DESIGN, INC.; MBA ELECTRIC LC; NOORDA ARCHITECTURAL METALS, INC.; THE DRYWALL SURGEONS OF UTAH, INC.; LIGHTING SPECIALISTS, INC.; and JOHN DOES 1 through 10,</p> <p>Defendants.</p>	<p><b>RULING RE: Motions for Partial Summary Judgment and Motions to Strike</b></p> <p>Date: October 21, 2010 Case No. 080402840</p> <p>Judge Steven L. Hansen Division 2</p>
---	---

There are four pending motions before the Court, including two Motions to Strike Portions of Amy Eldredge's Affidavit and two Motions for Summary Judgment. On September 13, 2010, the parties participated in oral arguments before the Court pursuant to the four motions.

Having reviewed the parties' briefs, being fully advised in the premises, and good cause appearing, the Court now makes the following Ruling:

**RULING**

**Motions to Strike**

The Court notes the arguments and finds them consistent with the pleadings submitted. The Court finds that Rule 8(c) requires that parties "shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense." A catchall statement does not comply with the

purpose of the Rule. The purpose is to put the opposing party on notice of what the party claims as defenses. This Court finds that the affirmative defense of mutual mistake has been waived by GDE and will strike all portions of the affidavit and memorandum which were filed in support of GDE's affirmative defense.

Secondly, as to the fifth paragraph of Amy Eldredge's affidavit, the Court finds that it is based on inadmissible double hearsay; therefore, the Court will not consider it for purposes of the summary judgment motion. This paragraph is stricken from the affidavit for lack of foundation. As to the sixth paragraph of Mrs. Eldredge's affidavit, the Court notes that this paragraph is inconsistent with prior statements made by Mrs. Eldredge, as well as statements made by Don Eldredge, a principle of GDE. Generally, an inconsistent statement alone not a sufficient reason to strike a paragraph—the consistency of Mrs. Eldredge's statements is a question of fact and goes to credibility, not admissibility. Nevertheless, the Court will not consider the sixth paragraph of Mrs. Eldredge's affidavit as it pertains to the affirmative defense of mutual mistake.

#### **Motions for Partial Summary Judgment**

The Court finds that the parties do not dispute that the initial lien on the subject property was released when Plaintiff filed a notice of satisfaction on April 3, 2008. Then on June 25, 2008, Plaintiff recorded a second lien alleging monies owed for services performed on the same dates as the first lien (October 10, 2006 - April 30, 2008). After filing the second lien, Plaintiff filed an Amended Lien claiming, again, services performed on the same dates as the first lien. The Court finds that the lien

release, which "released the claim" for labor, materials and/or equipment furnished on and between October 10, 2006 and April 30, 2008, extinguishes Plaintiff's right to file a second lien (and subsequent Amended Lien) for labor, materials, and/or equipment furnished on and between the above stated dates. Therefore, the second lien and Amended Lien are void as a matter of law. The fourth cause of action—Lien foreclosure—is dismissed.

As to the breach of contract claim, the Court finds that the parties agreed that a deed of trust and promissory note would satisfy the first lien. The parties do not dispute the validity of the deed of trust or promissory note. Additionally, the parties do not dispute that the work was completed prior to April 3, 2008, when the release of lien was filed. The Court finds that the Leavitts have satisfied the requirements of accord and satisfaction; therefore, the breach of contract claim is dismissed.


The Court will not address the factual question of whether or not GDE violated the Utah's abuse of lien statute (Utah Code 38-1-25) because issues of disputed material facts remain. Therefore, the Court will not consider, at this time, whether GDE's lien was abusive. Such a question is one for trial, not summary judgment, when issues of material fact—such as intent—are not resolved.

The claim for quantum meruit, implied in fact, is likewise denied. This Court found an enforceable contract which was not breached. Therefore, this claim cannot survive against either the Leavitts or the Bank. Therefore, cause of action of quantum meruit, implied in fact, is dismissed.

The Court finds that the guarantee signed by GDE is a valid and enforceable contract for the reasons argued by the Bank of American Fork in its pleadings and at the hearing. Therefore, the Court will grant attorney fees as provided for by contract.

The Court adopts and incorporates the arguments of both the Leavitts and the Bank of American Fork in support of its findings and conclusions. Ms. Canfield and either Mr. Gardner or Mr. Seiler are directed to prepare Findings of Fact and Conclusions of Law consistent with their pleadings and this ruling.

DATED this 22 day of Oct, 2000

  
Steven L. Hansen  
District Court Judge



## **ADDENDUM NO. 2**

### **Summary Judgment Order**

Thomas W. Seiler, #2910  
Jamis M. Gardner, #11888  
ROBINSON, SEILER & ANDERSON, LC  
2500 North University Ave.  
PO Box 1266  
Provo, Utah 84604  
Telephone: (801) 375-1920  
Email: jmg@rsalawyers.com

FILED  
DEC 9 2010  
4TH JUDICIAL DISTRICT  
STATE OF UTAH  
UTAH COUNTY

*Attorneys for Lorin & Dianne Leavitt*

IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

GDE CONSTRUCTION, INC.,

Plaintiff,

vs.

DIANNE W. LEAVITT, et al.,

Defendants.

AND RELATED CONSOLIDATED  
ACTIONS, CROSS-CLAIMS AND  
COUNTERCLAIMS.

ORDER DISMISSING  
GDE CONSTRUCTION'S CLAIMS,  
RELEASING ITS LIEN  
AND LIS PENDENS, ORDERING IT TO  
REMOVE MOUNTAIN LAND  
DESIGN'S LIEN, AND AWARDED  
ATTORNEYS' FEES TO BANK OF  
AMERICAN FORK

Civil No. 080402840  
Judge Steven L. Hansen

The Court has reviewed the Leavitts' Motion for Partial Summary Judgment Against GDE Construction ("Leavitt Motion"), the Bank of American Fork's Motion for Summary Judgment Against GDE Construction, Inc. ("BAF Motion") (collectively the "Motions"), and all memoranda in support, oppositions and replies thereto, heard oral argument on September 13, 2010, where counsel for GDE Construction, the Leavitts, and Bank of American Fork were present and argued, issued the "RULING RE: Motions for Partial Summary Judgment and Motions to Strike" ("Ruling") on October 26, 2010, has been fully advised in the premises, and

for good cause appearing, does hereby enter the following:

### FINDINGS OF FACT

#### A. The Parties, the Project, and the Agreements

1. Dianne W. Leavitt is the owner of a home located at 1774 North High Country Drive, Orem, Utah, more particularly described as: Lot 7, Hat "F", Cherapple Farms Subdivision, Orem, Utah, according to the Official Plat thereof on file and of record in the Utah County Recorder's Office ("*Property*").

2. In approximately October of 2006, Lorin and Dianne Leavitt ("*Leavitts*") entered into an agreement with GDE Construction, Inc. ("*GDE*"), whereby GDE, as general contractor, would provide contractor services for the remodeling of the Leavitts' home located on the Property ("*Project*").

3. Don Eldredge is the President of GDE, and Amy Eldredge is the Secretary for GDE, and both are authorized to act on GDE's behalf.

4. The agreement entered into between the Leavitts and GDE in October of 2006 provided that in return for their work on the Project, GDE would be paid on a cost plus 15% basis ("*Agreement*").

5. As part of the Agreement, both parties originally agreed that the cost of the Project would be approximately \$900,000.

6. In 2007, Bank of American Fork ("*BAF*") made two construction loans in the principal amounts of \$1,137,000 and \$600,000 (collectively the "*BAF Loans*") to Dianne W. Leavitt in connection with the Project.

7. As security for the BAF Loans, Ms. Leavitt gave BAF two construction deeds of

trust which were recorded on the Property on February 15, 2007 as Entry 23665:2007 and on December 6, 2007 as Entry 169460:2007, respectively, (collectively the "*BAF Trust Deeds*") in the official records of the Utah County Recorder, pledging the Property and improvements thereon as collateral for the BAF Loans in favor of BAF as beneficiary.

8. In connection with Ms. Leavitt obtaining the BAF Loans to finance the Project, for each loan GDE, as Guarantor, executed a "Guaranty of Completion and Performance" dated, respectively, February 9, 2007, for the loan in the principal amount of \$1,137,000, and December 4, 2007, for the loan in the principal amount of \$600,000 (collectively the "*Guaranties*"), each for the benefit of BAF.

9. The only claim BAF has asserted against GDE in this action in its "Amended Answer and Counterclaim of Defendant Bank of American Fork to Plaintiff's First Amended Complaint" ("*BAF's Counterclaim*") is for breach of the Guaranties of Completion and Performance.

**B. Disputes as to the Cost of the Project Existed Since the Beginning**

10. Although the Leavitts believed 15% was a high percentage for a "cost plus" contract in the industry, it was agreed to by the Leavitts because they understood that they would not be charged for labor performed by GDE or GDE employees, including but not limited to, framing and other labor performed. The Leavitts would be charged for any material that GDE was required to provide. These terms were included in the Agreement.

11. GDE denies that the Leavitts were not to be charged for framing labor, and its invoices include amounts for framing labor.

12. The dollar amount GDE was charging the Leavitts for the Project changed several times during the construction period. The original estimate was for \$900,000, which later



changed to \$1,200,000, then changed again to \$1,600,000, and has subsequently increased several times.

13. When the Leavitts were informed of the increase to \$1,600,000 by Amy Eldredge, a principal of GDE, the Leavitts were shocked. They had not been given any warning or indication that there would be another price increase, and certainly not such a large increase.

14. In or about October of 2007, despite the price changes from \$900,000 to \$1,200,000 to \$1,600,000, Amy Eldredge told the Leavitts that they would need another \$400,000 to complete the Project, and as a result, Lorin Leavitt requested a meeting.

15. In October of 2007, Lorin Leavitt met with the principals of GDE, Don Eldredge and Amy Eldredge ("*GDE Principals*") to discuss the balance of the cost of the Project ("*October 2007 Meeting*").

16. At the October 2007 Meeting, Don Eldredge presented to Lorin Leavitt a handwritten list of items still needing to be paid for on the Project, including items that were completed and items that still needed to be completed, and it also showed a grand total of how much was still owing at that time. The grand total of what was still owed as shown on the List was \$1,005,788.15 (the "*List*").

17. Prior to the October 2007 Meeting, the Leavitts were already in the process of obtaining a second construction loan from Bank of American Fork for \$600,000, which GDE knew about, which loan was finalized on December 4, 2007; so practically, the amount that would still be owed was approximately \$400,000.

18. At the October 2007 Meeting, the parties agreed that the Leavitts would pay \$400,000. The Leavitts would provide \$150,000 up front, and \$250,000 would come from a

second mortgage after completion.

19. GDE denies that the parties reached any agreement related to \$400,000 at the October 2007 Meeting.

20. Soon after the October 2007 Meeting, the Leavitts paid \$150,000 to the bank which was ultimately disbursed for Project costs.

21. Since the October 2007 Meeting, the Leavitts have also paid an additional approximately \$127,000 directly to subcontractors for Project costs.

22. According to GDE, the total amount of the Project is now approximately \$2.4 million.

**C. Leavitts and GDE Reach an Accord, Which the Leavitts Satisfied**

23. In March of 2008, the Leavitts and GDE Principals met again, at which meeting GDE informed the Leavitts that GDE had recorded a lien on the property for \$140,000 on March 18, 2008 ("*First Lien*").

24. The First Lien was recorded as Entry 31368:2008 in the official records of the Utah County Recorder.

25. In its First Lien GDE claims it "furnished the first labor, materials and/or equipment on October 10, 2006 and furnished the last labor; materials and/or equipment on April 30, 2008."

26. The First Lien prevented the Leavitts from obtaining permanent financing.

27. At the meeting in March of 2008 discussed above, when GDE presented the First Lien which had been recorded, the Leavitts were willing to negotiate terms to be able to pay GDE what GDE thought they were owed.

28. Four days after the initial meeting regarding the First Lien, GDE produced a promissory note and trust deed, and represented to the Leavitts that if the Leavitts signed the documents, GDE would release the First Lien.

29. On April 2, 2008, GDE obtained from Mrs. Leavitt an executed a promissory note in the principal amount of \$150,000 ("*Promissory Note*"), as payment of the unpaid principal balance owed to GDE for its work on the Project, which Note included the \$140,000 previously claimed in the First Lien ("*GDE Debt*").

30. As security for the Promissory Note, GDE obtained the trust deed from Mrs. Leavitt dated April 4, 2008, and recorded May 5, 2008 as Entry 20080018279 in the official records of the Washington County Recorder (the "*GDE Trust Deed*"), pledging as collateral other property owned by Dianne Leavitt in Washington County, State of Utah, more accurately described as follows: CLIFFS OF SNOW CANYON H (SG) LOT 214.

31. In order for GDE to agree to release First Lien, the Leavitts were required to sign the Promissory Note. Once the Promissory Note was signed, the First Lien was to be released.

32. GDE and the Leavitts agreed that Promissory Note and Trust Deed would satisfy the First Lien. GDE and the Leavitts do not dispute the validity of the Promissory Note and Trust Deed.

33. GDE accepted the Promissory Note as payment, as evidenced by its recordation of the Trust Deed, and its attempt to enforce it through the Notice of Default.

34. GDE prepared and recorded a Release of Mechanic's Lien on April 3, 2008 ("*Release of Lien*").

35. GDE and the Leavitts do not dispute that its work was completed prior to April 3,

2008, when the Release of Lien was filed.

36. GDE's intent in recording the Release of Lien was to release the First Lien, and that was because GDE received the Promissory Note as payment of the GDE Debt in the principal amount of \$150,000, which amount included the \$140,000 principal amount previously claimed in its First Lien.

37. The Release of Lien states: "PLEASE TAKE NOTICE THAT the Mechanic's Lien claimed by GDE...is hereby released, the claim having been fully paid and satisfied and that the Mechanic's Lien...is hereby satisfied and discharged."

38. GDE and the Leavitts reached an accord and satisfaction.

**D. GDE Recorded Additional Liens For the Same Dates and Services**

39. On or about July 10, 2008, the Leavitts discovered that on June 25, 2008, GDE had recorded another lien on the Property, this one for \$150,000, but alleging the same dates of service as the First Lien ("*Second Lien*").

40. The Second Lien was recorded as Entry 73098:2008 in the official records of the Utah County Recorder.

41. Even though the First Lien showed an amount owed of \$140,000, and the Second Lien showed \$150,000, no additional work had been performed on the Project from the time of the recording of the First Lien to the time of recording the Second Lien. GDE had simply recalculated the fees owed to it.

42. According to GDE, the purpose of filing the Second Lien was because the terms of the Promissory Note had not been met.

43. According to GDE, if the Leavitts had paid the Promissory Note in full, then GDE

would not be owed anything and GDE's debt would have been satisfied in full.

44. On July 16, 2008, GDE recorded an amended lien for \$563,690.45, as Entry 80751:2008 in the official records of the Utah County Recorder ("*Amended Lien*").

45. The Amended Lien claims the same dates of service GDE previously claimed in the First Lien and Second Lien.

46. The Amended Lien, and the amounts claimed in this lawsuit, include the \$150,000 GDE claims it is owed and for which the Leavitts provided the Promissory Note.

47. The Amended Lien also included additional unpaid amounts for sums purportedly owed both to GDE subcontractors, and to other contractors or suppliers for the Project with whom GDE claims it did not have any contract and to whom it owes nothing.

48. GDE did not perform any new work on the Project from the time of recording of the Second Lien to the time of recording the Amended Lien.

49. GDE claims that if the Promissory Note had been paid, GDE would not be owed anything now, including not the GDE Debt in the principal amount of \$150,000, which is claimed in the Amended Lien.

50. On August 18, 2008, GDE caused to be recorded a Notice of Default and Election to Sell, for the GDE Trust Deed, as Entry 20080032544 in the official records of the Washington County Recorder ("*Notice of Default*").

51. On August 18, 2008, GDE filed this action against the Leavitts, BAF and others.

52. In its First Amended Complaint filed November 6, 2008 ("*Amended Complaint*"), GDE brought claims for, as against Mrs. Leavitt, (1) breach of contract, (2) quantum meruit/contract implied in fact, (3) quantum meruit/contract implied in law, each in the total

principal amount of \$563,690.23, and, as against all parties, (4) to foreclose its Amended Lien, with a deficiency judgment as against Mrs. Leavitt for any resulting deficiency following foreclosure of its Amended Lien.

53. The total principal amount GDE claims in this Action that the Leavitts owe to GDE is the same \$150,000 GDE Debt covered by the Promissory Note and Trust Deed, the Second Lien and Amended Lien.

54. The only claim GDE asserted in its Amended Complaint as against BAF is its lien foreclosure claim.

**E. GDE's Current Lien Claims Amounts That GDE Admits It Was Never Owed**

55. The Amended Lien includes amounts owed for work and/or materials provided to the Project by the following contractors with whom GDE claims it did not have any contract, has no obligation to pay and has paid, in the following principal amounts:

- a. Carl C. Nelson Painting: \$35,724.00
- b. Cascade Pool: \$5,324.00
- c. Cornaby Railing: \$21,795.60
- d. H&O Technologies: \$96,434.65
- e. Interiors Unlimited: \$20,000.00
- f. Lighting Specialists: \$21,687.51
- g. MBA Electric: \$34,886.96
- h. Mountain Land Design: \$24,132.41
- i. Orion Outdoor Lighting: \$3,808.86
- j. R&M Woods: \$54,950.00
- k. Total Protection: \$4,429.00

56. According to GDE, it has no contract with any of the eleven contractors listed above, it did not direct the work of any of those contractors, and yet, GDE still charged the 15% general fee for each of the eleven contractors.

57. GDE claims it did not owe any money to any of the eleven contractors listed above,

but GDE intentionally included amounts claimed by them in its Amended Lien. GDE's reason for claiming these amounts in its lien although such amounts were not owed to it, was because GDE was afraid it might get sued.

58. GDE was afraid it might get sued, but yet it cannot recall whether any of the contractors included in its Amended Lien had suggested or threatened they would sue at the time GDE filed the Amended Lien.

59. The total amount claimed by the eleven subcontractors mentioned above is \$323,172.99.

#### CONCLUSIONS OF LAW

1. The First Lien was unambiguously released when GDE recorded the Release of Lien on April 3, 2008.

2. Once a lien claimant has unambiguously released a lien for payment or consideration, that claimant waives any rights to later lien for the same amounts, or property, covered by the lien it released. *See e.g., Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 742, 752 (Utah 1990); *First Denver Mortgage Investors v. C.N. Zundel and Associates*, 600 P.2d 521 (Utah 1979); *Zions First Nat. Bank v. Saxton*, 493 P.2d 602, 603 (Utah 1972).

3. The Release of Lien, which "released the claim" for labor, materials and/or equipment furnished on and between October 10, 2006 and April 30, 2008, extinguished Plaintiff's right to file the Second Lien and subsequent Amended Lien for labor, materials, and/or equipment furnished on and between the above stated dates.

4. The Second Lien and Amended Lien are void as a matter of law and its lien

foreclosure claim in its Amended Complaint therefore must be dismissed.

5. Pursuant to the Release of Lien, GDE has waived any and all rights to maintaining any lien upon the Property in connection with the Project.

6. Its liens being void and unenforceable as a matter of law, GDE does not have any right to lien the Property, nor any right to receive or otherwise collect any amounts due from or relating or pertaining in any way to work, services, equipment and/or materials that it allegedly provided to the Property, or that any subcontractor, contractor or independent contractor provided to the Property, or any part, parcel, and portion of the Property in connection with the Project.

7. There is a three-part test for accord and satisfaction: "There must be (1) a bona fide dispute over an unliquidated amount, (2) a payment made in full settlement of the entire dispute, and (3) an acceptance of the payment." *Smith v. Grand Canyon Expeditions Co.*, 84 P.3d 1154, 1158 (Utah 2003).

8. There was a bona fide dispute between GDE and the Leavitts over the total amount owed on the Project, which was an unliquidated amount.

9. The Leavitts made a payment in full settlement of the entire dispute when it provided to GDE the Promissory Note.

10. A promissory note serves as full payment of the original debt if the parties so agree. *See Interstate Trust Co. v. Headlund*, 51 Utah 543 (Utah 1918).

11. The Release of Lien unequivocally reflects the parties' intent for the Promissory Note to act as full payment of the First Lien: "PLEASE TAKE NOTICE THAT the Mechanic's Lien claimed by GDE...is hereby released, the claim having been fully paid and satisfied and



that the Mechanic's Lien...is hereby satisfied and discharged."

12. GDE and the Leavitts having reached an accord and satisfaction, GDE's remaining three claims in its Amended Complaint for breach of contract, quantum meruit/contract implied in fact, and quantum meruit/contract implied in law must be dismissed.

13. There are issues of disputed material facts which preclude a finding of summary judgment on the question of whether or not GDE violated Utah's abuse of lien statute, Utah Code § 38-1-25.

14. Having concluded that the Second Lien and Amended Lien are void as a matter of law, the issue of whether or not GDE violated Utah's one-action rule, Utah Code § 78B-6-901, is moot and need not be decided.

15. Having concluded that the Second Lien and Amended Lien are void as a matter of law, the issue of whether or not the Amended Lien should be found invalid or reduced because GDE lienied for amounts which GDE had not paid and which GDE claims it has no contract and no obligation to pay, as argued in BAF's Motion and Memorandum in Support thereof, is moot and need not be decided.

16. GDE signed the Guaranties, and thereby absolutely guaranteed it would complete the Project, among other things, free from any and all liens and encumbrances including mechanics' liens and materialmens' liens.

17. The Guaranties require GDE to pay for and obtain the release and discharge of any and all mechanics' liens and materialmens' liens that were filed on the Property in connection with the Project.

18. The Guaranties require GDE to pay BAF's attorneys' fees and costs incurred in

enforcing the Guaranties, including the attorneys' fees and costs incurred in bringing the BAF Motion, as well as attorneys' fees and costs incurred in the above-captioned lawsuit.

#### ORDER

#### IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Motions are granted.
2. The Amended Complaint filed by GDE is hereby dismissed with prejudice.
3. GDE does not have any enforceable lien on the Property.
4. The "Notice of Claim of Lien" recorded by GDE against the Property on June 25, 2008, as Entry No. 73098:2008, in the Office of the Utah County Recorder, is void and unenforceable and is hereby released.
5. The "Amended Lien" recorded by GDE against the Property on July 16, 2008, as Entry No. 80751:2008, in the Office of the Utah County Recorder, is void and unenforceable and is hereby released.
6. The "Notice of Lis Pendens" recorded by GDE against the Property on December 12, 2008, as Entry No. 130179:2008, in the Office of the Utah County Recorder, is null and void and is hereby released.
7. GDE does not have any right to lien the Property, nor any right to receive or otherwise collect any amounts due from or relating or pertaining in any way to work, services, equipment and/or materials that it allegedly provided to the Property, or that any subcontractor, contractor or independent contractor provided to the Property, or any part, parcel, and portion of the Property in connection with the Project.
8. GDE shall pay for and obtain the release of all liens recorded on the Property that

in any way relate to the Project, including, but not limited to, the "Amended Notice of Mechanics Lien" recorded by Mountain Land Design, Inc. against the Property on June 18, 2008, as Entry No. 70829:2008, in the Office of the Utah County Recorder.

9. BAF is entitled to an award of reasonable attorneys' fees and costs as against GDE in the above-captioned action, and for bringing the BAF Motion, to be established by attorneys fee affidavit.

10. Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, the Court expressly determines that there is no just reason for delay for entry of final judgment as to the claims of GDE and BAF.

11. Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, the foregoing ruling is certified as, and is, a final order(s), judgment(s), and decree(s) with respect to all matters stated therein as between GDE and BAF, and as to all matters stated therein as claimed by GDE against the Leavitts.

12. A copy of this order may be recorded in the office of the Utah County Recorder.

DATED this 9 day of Dec., 2010

BY THE COURT

HON. STEVEN C. HANSEN  
DISTRICT COURT JUDGE  
FOURTH JUDICIAL DISTRICT COURT

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11 day of November, 2010, I caused a copy of the foregoing [proposed] ORDER DISMISSING GDE CONSTRUCTION'S CLAIMS, RELEASING ITS LIEN AND LIS PENDENS, ORDERING IT TO REMOVE MOUNTAIN LAND DESIGN'S LIEN, AND AWARDING ATTORNEYS' FEES TO BANK OF AMERICAN FORK to be sent via U.S. Mail to the following:

Randy B. Birch  
114 South 200 West  
PO Box 763  
Heber City, UT 84032

Daniel R. Widdison  
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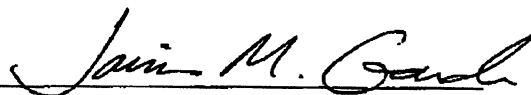
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NOTICE OF INTENT TO SUBMIT FOR SIGNATURE

TO:

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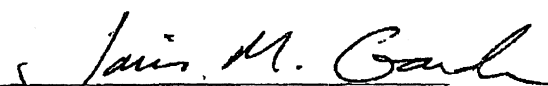
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Please take notice that the undersigned attorney for the Leavitts will submit the above and foregoing [proposed] Order Dismissing GDE Construction's Claims, Releasing Its Lien and Lis Pendens, Ordering it Remove Mountain Land Design's Lien, and Awarding Attorneys' Fees to Bank of American Fork to the Honorable Steven L. Hansen for his signature upon the expiration of five (5) days from the date of this notice, plus three days for mailing, unless written objection is filed prior to that time pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure.

DATED this 11 day of November, 2010.

ROBINSON, SEILER & ANDERSON

  
THOMAS W. SEILER  
JAMIS M. GARDNER  
Attorneys for Lorin & Dianne Leavitt

## **ADDENDUM NO. 3**

### **Order to Strike**

NOV 15 2010

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*Attorneys for Lorin & Dianne Leavitt*

IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

GDE CONSTRUCTION, INC.,

Plaintiff,

vs.

DIANNE W. LEAVITT, et al.,

Defendants.

AND RELATED CONSOLIDATED  
ACTIONS, CROSS-CLAIMS AND  
COUNTERCLAIMS.

ORDER STRIKING GDE  
CONSTRUCTION'S DEFENSE OF  
MUTUAL MISTAKE AND PORTIONS  
OF THE DECLARATION OF  
AMY ELDREDGE

Civil No. 080402840  
Judge Steven L. Hansen

The Court has reviewed the Leavitts' Motion to Strike ("*Leavitt Motion*"), the Bank of American Fork's Motion to Strike Portions of the Declaration of Amy Eldredge ("*BAF Motion*") (collectively the "*Motions to Strike*"), and all memoranda in support, oppositions and replies thereto, heard oral argument on September 13, 2010, where counsel for GDE Construction, the Leavitts, and Bank of American Fork were present and argued, issued the "RULING RE: Motions for Partial Summary Judgment and Motions to Strike" ("*Ruling*") on October 26, 2010, has been fully advised in the premises, and for good cause appearing, does hereby enter the

Exhibit B

following:

### FINDINGS OF FACT

1. On October 16, 2008, the Leavitts filed a Verified Complaint against GDE, civil no. 080403334, ("*Verified Complaint*") which was later consolidated with the above-captioned matter.
2. On December 4, 2008, GDE filed its Verified Answer for GDE Construction to Verified Complaint of Lorin and Dianne Leavitt ("*Verified Answer*").
3. The sworn verification in the Verified Answer was provided by Amy Eldredge, a principal of GDE.
4. On May 28, 2010, the Leavitts filed their Motion for Partial Summary Judgment Against GDE Construction and their accompanying Memorandum in Support.
5. On June 1, 2010, BAF filed its Motion for Summary Judgment Against GDE Construction, Inc and its accompanying Memorandum in Support.
6. On June 28, 2010, GDE filed its Memorandum in Opposition to the Leavitts' Motion for Partial Summary Judgment ("*Opposition*"), as well as its Memorandum in Opposition to Bank of American Fork's Motion for Summary Judgment, in which it also incorporated its Opposition to the Leavitts' Motion.
7. On June 30, 2010, GDE filed the Declaration of Amy Eldredge in Opposition to the Leavitts' Motion for Partial Summary Judgment Against GDE ("*Declaration*").
8. Leavitts and BAF filed their respective Motions to Strike, set forth above, in response to the Declaration.
9. In GDE's Opposition, GDE raised the affirmative defense of mutual mistake for the



first time in this case. GDE had never raised the defense or made any allegation or averment related to mistake or mutual mistake in any of its prior pleadings or filings in this action.

10. In paragraph 5 of the Declaration, Amy Eldredge made the following statement: "I was told by the Leavitts that the only condition precedent to the granting of a loan by Citywide Home Loans was the release of the First Lien."

11. In paragraph 6 of the Declaration, Amy Eldredge also states: "GDE did not expect the Leavitts to make payments pursuant to the Promissory Note but expected to be paid from the proceeds of the refinancing of the Leavitts' property."

12. The Verified Complaint filed by the Leavitts alleged, in paragraph 28:

Plaintiffs informed Defendant that it would be impossible for Plaintiffs to meet the terms of the Promissory Note. Defendant assured Plaintiffs that they could work out other terms, *that Defendant would not actually expect Plaintiffs to make the \$15,000 initial payment, nor the \$10,000 monthly payments as provided for in the Promissory Note*, but that Defendant needed something signed in order to release the First Lien.

(emphasis added).

13. The Verified Answer filed by GDE, in paragraph 28 (in response to paragraph 28 of the Verified Complaint), states: "Denied."

14. On November 5, 2009, Amy Eldredge was placed under oath in a scheduled 30(b)(6) deposition of GDE. During the deposition, Amy Eldredge testified:

Q. And why did you record this notice of mechanic's lien?

A. Because nothing had happened on the promissory note.

Q. So because you had not been paid on the promissory note you recorded another mechanic's lien.

A. Yes.

15. On November 3, 2009, Don Eldredge was placed under oath in a scheduled 30(b)(6) deposition of GDE. During the deposition, Don Eldredge testified:

Q. And what was the purpose of this promissory note?

A. To set up payments for the general contractor fee.

...

Q. So were you involved in the decision making process that resulted in this notice of mechanic's lien being filed?

A. Yes.

Q. And what was the purpose of filing this -- I'll call it a second lien.

A. Because this one was -- the terms of the promissory note had not been met.

#### CONCLUSIONS OF LAW

1. Rule 8(c) of the Utah Rules of Civil Procedure requires that parties "shall set forth affirmatively...any other matter constituting an avoidance or affirmative defense." Ut. R. Civ. P. 8(c).

2. A catchall statement does not comply with the purpose of Rule 8(c), whose purpose is put the opposing party on notice of what the party claims as defenses.

3. "Mutual mistake is an affirmative defense as it raises matters outside the plaintiffs' prima facie case, and the failure to assert it is a waiver of that defense." *Mabey v. Kay Peterson Constr. Co.*, 682 P.2d 287, 289 (Utah 1984) (citing Utah R. Civ. P. 8(c), 12(h); *Phillips v. JCM Development Corp.*, Utah, 666 P.2d 876 (1983)).

4. "Rule 9(b) [of the Utah Rules of Civil Procedure] requires that in all averments of

mistake, the circumstances constituting mistake shall be stated with particularity." *Id.*

5. In GDE's Opposition, GDE raised the affirmative defense of mutual mistake for the first time in this case. GDE had never raised the defense or made any allegation or averment related to mistake or mutual mistake in any of its prior pleadings or filings in this action.

6. The affirmative defense of mutual mistake has been waived by GDE.

7. An affidavit must set forth facts that would be admissible in evidence, and which are based on personal knowledge. Ut. R. Civ. P. 56(e).

8. "An affidavit that does not measure up to the standards of [Rule] 56(e) [of the Utah Rules of Civil Procedure] is subject to a motion to strike." *Howick v. Bank of Salt Lake*, 28 Utah 2d 64, 66 (Utah 1972).

9. Paragraph 5 of the Declaration is based on inadmissible double hearsay.

10. Paragraph 6 of the Declaration is inconsistent with prior statements made by the principals of GDE, Amy Eldredge and Don Eldredge, and pertains to the affirmative defense of mutual mistake.

11. The inconsistency of the statements in the Declaration is a question of fact and goes to credibility, not admissibility.

#### **ORDER**

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

1. The Motions to Strike are granted in part, and denied in part.
2. GDE waived the affirmative defense of mutual mistake in this action.
3. Paragraph 5 of the Declaration is stricken.
4. All portions of the Declaration and Opposition which were filed in support of

GDE's attempt to claim an affirmative defense of mutual mistake will not be considered.

5. Paragraph 6 of the Declaration will not be considered as it pertains to GDE's attempt to claim an affirmative defense of mutual mistake.

DATED this 29 day of November, 2010.

BY THE COURT:

(S)

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HON. STEVEN L. HANSEN  
DISTRICT COURT JUDGE  
FOURTH JUDICIAL DISTRICT COURT

## **ADDENDUM NO. 4**

Utah R. App. P. 11

## **Rule 11. The record on appeal.**

(a) Composition of the record on appeal. The original papers and exhibits filed in the trial court, including the presentence report in criminal matters, the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and the docket sheet, shall constitute the record on appeal in all cases. A copy of the record certified by the clerk of the trial court to conform to the original may be substituted for the original as the record on appeal. Only those papers prescribed under paragraph (d) of this rule shall be transmitted to the appellate court.

(b) Pagination and indexing of record.

(b)(1) Immediately upon filing of the notice of appeal, the clerk of the trial court shall securely fasten the record in a trial court case file, with collation in the following order:

(b)(1)(A) the index prepared by the clerk;

(b)(1)(B) the docket sheet;

(b)(1)(C) all original papers in chronological order;

(b)(1)(D) all published depositions in chronological order;

(b)(1)(E) all transcripts prepared for appeal in chronological order;

(b)(1)(F) a list of all exhibits offered in the proceeding; and

(b)(1)(G) in criminal cases, the presentence investigation report.

(b)(2)(A) The clerk shall mark the bottom right corner of every page of the collated index, docket sheet, and all original papers as well as the cover page only of all published depositions and the cover page only of each volume of transcripts constituting the record with a sequential number using one series of numerals for the entire record.

(b)(2)(B) If a supplemental record is forwarded to the appellate court, the clerk shall collate the papers, depositions, and transcripts of the supplemental record in the same order as the original record and mark the bottom right corner of each page of the collated original papers as well as the cover page only of all published depositions and the cover page only of each volume of transcripts constituting the supplemental record with a sequential number beginning with the number next following the number of the last page of the original record.

(b)(3) The clerk shall prepare a chronological index of the record. The index shall contain a reference to the date on which the paper, deposition or transcript was filed in the trial court and the starting page of the record on which the paper, deposition or transcript will be found.

(b)(4) Clerks of the trial and appellate courts shall establish rules and procedures for checking out the record after pagination for use by the parties in preparing briefs for an appeal or in preparing or briefing a petition for writ of certiorari.

(c) Duty of appellant. After filing the notice of appeal, the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of paragraphs (d) and (e) of this rule and shall take any other action necessary to enable the clerk of the trial court to assemble and transmit the record. A single record shall be

transmitted.

(d) Papers on appeal.

(d)(1) Criminal cases. All of the papers in a criminal case shall be included by the clerk of the trial court as part of the record on appeal.

(d)(2) Civil cases. Unless otherwise directed by the appellate court upon sua sponte motion or motion of a party, the clerk of the trial court shall include all of the papers in a civil case as part of the record on appeal.

(d)(3) Agency cases. Unless otherwise directed by the appellate court upon sua sponte motion or motion of a party, the agency shall include all papers in the agency file as part of the record.

(e) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.

(e)(1) Request for transcript; time for filing. Within 10 days after filing the notice of appeal, the appellant shall, order the transcript(s) online at [www.utcourts.gov](http://www.utcourts.gov), specifying the entire proceeding or parts of the proceeding to be transcribed that are not already on file. If the appellant desires a transcript in a compressed format, appellant shall include the request for a compressed format within the request for transcript. If no such parts of the proceedings are to be requested, within the same period the appellant shall file a certificate to that effect with the clerk of the appellate court.

(e)(2) Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

(e)(3) Statement of issues; cross-designation by appellee. Unless the entire transcript is to be included, the appellant shall, within 10 days after filing the notice of appeal, file a statement of the issues that will be presented on appeal and shall serve on the appellee a copy of the request or certificate and a copy of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the request or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has requested such parts and has so notified the appellee, the appellee may within the following 10 days either request the parts or move in the trial court for an order requiring the appellant to do so.

(f) Agreed statement as the record on appeal. In lieu of the record on appeal as defined in paragraph (a) of this rule, the parties may prepare and sign a statement of the case, showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the trial court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court. The clerk of the trial court

shall transmit the statement to the clerk of the appellate court within the time prescribed by Rule 12(b)(2). The clerk of the trial court shall transmit the index of the record to the clerk of the appellate court upon approval of the statement by the trial court.

(g) Statement of evidence or proceedings when no report was made or when transcript is unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, or if the appellant is impecunious and unable to afford a transcript in a civil case, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement shall be served on the appellee, who may serve objections or propose amendments within 10 days after service. The statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included by the clerk of the trial court in the record on appeal.

(h) Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, the trial court, or the appellate court, either before or after the record is transmitted, may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted. The moving party, or the court if it is acting on its own initiative, shall serve on the parties a statement of the proposed changes. Within 10 days after service, any party may serve objections to the proposed changes. All other questions as to the form and content of the record shall be presented to the appellate court.

#### Advisory Committee Notes

The rule is amended to make applicable in the Supreme Court a procedure of the Court of Appeals for preparing a transcript where the record is maintained by an electronic recording device. The rule is modified slightly from the former Court of Appeals rule to make it the appellant's responsibility, not the clerk's responsibility to arrange for the preparation of the transcript.



## ADDENDUM NO. 5

Utah R. App. P. 24

## **Rule 24. Briefs.**

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of 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 to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs.

(f)(1) Type-volume limitation.

(f)(1)(A) A principal brief is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text; and a reply brief is acceptable if it contains no more than 7,000 words or it uses a monospaced face and contains no more than 650 lines of text.

(f)(1)(B) Headings, footnotes and quotations count toward the word and line limitations, but the table of contents, table of citations, and any addendum containing statutes, rules,

regulations or portions of the record as required by paragraph (a) of this rule do not count toward the word and line limitations.

(f)(1)(C) Certificate of compliance. A brief submitted under Rule 24(f)(1) must include a certificate by the attorney or an unrepresented party that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word processing system used to prepare the brief. The certificate must state either the number of words in the brief or the number of lines of monospaced type in the brief.

(f)(2) Page limitation. Unless a brief complies with Rule 24(f)(1), a principal briefs shall not exceed 30 pages, and a reply briefs shall not exceed 15 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule.

In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(g)(5) Type-Volume Limitation.

(g)(5)(A) The appellant's Brief of Appellant is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text.

(g)(5)(B) The appellee's Brief of Appellee and Cross-Appellant is acceptable if it contains no more than 16,500 words or it uses a monospaced face and contains no more than 1,500 lines of text.

(g)(5)(C) The appellant's Reply Brief of Appellant and Brief of Cross-Appellee is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text.

(g)(5)(D) The appellee's Reply Brief of Cross-Appellant is acceptable if it contains no more than half of the type volume specified in Rule 24(g)(5)(A).

(g)(6) Certificate of Compliance.

A brief submitted under Rule 24(g)(5) must comply with Rule 24(f)(1)(C).

(g)(7) Page Limitation.

Unless it complies with Rule 24(g)(5) and (6), the appellant's Brief of Appellant must not

exceed 30 pages; the appellee's Brief of Appellee and Cross-Appellant, 35 pages; the appellant's Reply Brief of Appellant and Brief of Cross-Appellee, 30 pages; and the appellee's Reply Brief of Cross-Appellant, 15 pages.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the page, word, or line limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages, words, or lines requested, and the good cause for granting the motion. A motion filed at least seven days prior to the date the brief is due or seeking three or fewer additional pages, 1,400 or fewer additional words, or 130 or fewer lines of text need not be accompanied by a copy of the brief. A motion filed within seven days of the date the brief is due and seeking more than three additional pages, 1,400 additional words, or 130 lines of text shall be accompanied by a copy of the finished brief. If the motion is granted, the responding party is entitled to an equal number of additional pages, words, or lines without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within seven days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

### **Advisory Committee Notes**

Rule 24(a)(9) now reflects what Utah appellate courts have long held. See *In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original)(quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)). See also *State ex rel. M.S. v. Salata*, 806 P.2d 1216, 1218 (Utah App. 1991); *Bell v. Elder*, 782 P.2d 545, 547 (Utah App. 1989); *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

**ADDENDUM NO. 6**

Utah R. Civ. P. 7

## **Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.**

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b)(1) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b)(2) Limit on order to show cause. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order.

### **(c) Memoranda.**

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) Length. Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

### **(c)(3) Content.**

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.



(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

#### Advisory Committee Notes

**ADDENDUM NO. 7**

Utah R. Civ. P. 15

**Rule 15. Amended and supplemental pleadings.**

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to conform to the evidence. When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subverted thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.