

2008

James D. Clark v. Mark B. Archer, Bonneville Superior Title Company, Inc. : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

<p>JAMES D. CLARK, an individual, in his capacity as Personal Representative for the Estate of Dale D. Clark;</p> <p>Plaintiff and Appellee,</p> <p>v.</p> <p>MARK B. ARCHER, an individual; and BONNEVILLE SUPERIOR TITLE COMPANY, INC., a Utah Corporation;</p> <p>Defendants and Appellants.</p>	<p>BRIEF OF APPELLEE</p> <p>Supreme Court No. 20090309 Court of Appeals No. 20081007 Trial Court No. 060601640</p>
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Appeal from the Second Judicial District Court

Honorable Thomas L. Kay

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I. Jurisdiction

The Utah Supreme Court lacks jurisdiction to consider the issues outlined in Archer's opening brief because Archer failed to appeal the Court of Appeals' denial of his Interlocutory Petition within the thirty-day period established under Utah law.

II. Statement of Issue

Did the Court of Appeals properly determine that it lacked jurisdiction to consider Appellant's November 24, 2008 appeal?

III. Statement of the Case

This case requires the Court to determine whether the Utah Rules of Appellate Procedure permit an unsuccessful party to challenge the denial of a petition for interlocutory appeal of a judgment certified as final under Rule 54(b) until more than eighteen months later. The nature of the underlying case, for purposes of review on *certiorari*, is not contested. The only issue before this Court is whether jurisdiction remains in spite of Petitioner's failure to challenge the Rule 54(b) certification within the applicable appeals periods provided under the Utah Rules of Appellate Procedure. Because the entire question before the Court revolves around the procedural history of this case, the following statement of the procedural history is presented in an effort to provide context to that issue.

1. Plaintiffs Dale D. Clark and Ruth E. Clark (collectively referred to as "Clark") filed their original Complaint on May 15, 2006. (R. at 1.)¹ The original Complaint was never served. On June 7, 2006, Clark filed a First Amended Complaint, which was then served on Defendant and Appellant Mark B. Archer ("Archer"). (R. at 15.)

2. The underlying case concerns approximately eight acres of real property located in Syracuse City known and referred to as the "Syracuse Meadows Property." On November 19, 1997, a warranty deed was recorded in Archer's favor, whereby Clark

1. As noted *infra*, both original plaintiffs passed away during the pendency of the litigation, leaving James D. Clark, in his capacity as Personal Representative for the Estate of Dale D. Clark, as the plaintiff and respondent, and the term "Clark" should hereinafter be construed accordingly.

purportedly conveyed the Syracuse Meadows Property to Archer. (R. at 68.) Clark initiated the action against Archer in an effort to invalidate that deed and quiet title to the Syracuse Meadows Property in his favor.

3. On October 9, 2006, Archer responded by filing an Answer that, in a single sentence, denied all allegations and asserted all affirmative defenses pursuant to Rule 8 of the Utah Rules of Civil Procedure. (R. at 81.)

4. On December 8, 2006, Clark commenced discovery by propounding written discovery requests on Archer and co-defendants Bonneville Superior Title Company, Inc. and Bonneville Exchange, LLC. (R. at 103, 105.) On April 19, 2007, due to the advanced age of Plaintiff Dale Clark, Clark filed a Motion for Leave to Take Trial Deposition and Preserve Testimony of Dale D. Clark. (R. at 127.)

5. On May 8, 2007, the district court entered a Stipulated Order Granting Motion to Preserve Trial Testimony of Plaintiff Dale D. Clark for All Purposes. (R. at 252.) Pursuant to this Order, Mr. Clark's testimony was preserved by all counsel during a deposition that began on May 14, 2007, and lasted two days.

6. On April 26, 2007, Clark filed a motion for summary judgment on the second and ninth causes of action of the amended complaint, which sought, alternatively, quiet title relief based on the failure of delivery of the warranty deed recorded and possessed by Archer, or pursuant to the doctrine of adverse possession. (R. at 161.)

7. On May 14, 2007, Archer filed a cross-motion for summary judgment. (R. at 264.)

8. On September 24, 2007, the district court heard arguments on the cross-motions for summary judgment. (R. at 354.)

9. On October 15, 2007, the district court initially and as an interim ruling denied both parties' motions for summary judgment, but in doing so ordered supplemental briefing on the issue of whether Clark's failure of delivery claim, the second cause of action of the amended complaint, remained timely or had expired under the applicable statute of limitations. (R. at 356.)

10. After supplemental briefing was submitted to the district court, the district court heard oral argument once again on January 28, 2008, regarding the cross-motions for summary judgment. At the conclusion of this hearing, the district court awarded summary judgment to Clark on his second cause of action, ruling that the statute of limitations had been tolled under Utah law and that there had been no legal and effective delivery of the deed under Utah law. (R. at 457.)

11. Clark's counsel prepared a proposed form of judgment reflecting that ruling and, in accordance with Rule 7 of the Utah Rules of Civil Procedure, circulated a draft of that judgment to all counsel for review. Archer opposed the proposed form of judgment and submitted an alternative form of judgment. (R. at 451.)

12. On March 10, 2008, the district court convened a hearing for the sole purpose of clarifying the terms of the judgment. During this hearing, the trial court considered specifically whether the judgment would be certified as final and made the appropriate findings under Rule 54(b) regarding the lack of factual overlap in claims and the absence of just cause for delay in entering a final judgment. (R. at 456.)

13. The district court determined that Clark's proposed form of judgment accurately reflected its ruling and, accordingly, entered its Final Judgment on Plaintiffs' Second Cause of Action (the "Final Judgment") on March 10, 2008, and expressly certified it as final pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. (R. at 462–63.)

14. On March 14, 2008, Clark's counsel, pursuant to Rule 58A(d) of the Utah Rules of Civil Procedure, mailed to Archer's counsel a Notice of Entry of Final Judgment on Plaintiffs' Second Cause of Action. (R. at 465.)

15. Although the Final Judgment was expressly certified as final, was captioned as a final judgment, and Archer had received notice of its entry as a final judgment, Archer nevertheless requested permission, pursuant to Rule 5(a) of the Utah Rules of Appellate Procedure, to appeal the Final Judgment as though it were *interlocutory* by filing a Petition for Permission to Appeal Interlocutory Order (the "Interlocutory Petition") in the Utah Supreme Court on March 31, 2008, twenty-one days after the date on which the Final Judgment was entered. (R. at 610.)

16. Archer framed the "Question of Law" in his Interlocutory Petition as follows:

Under Utah Code Ann. § 78-12-44, does a statement (affidavit) by a party to an action referencing the tolling of an agreement, renew an alleged obligation or toll the statute of limitations when that statement is made in an affidavit after the statute of limitations has run without any evidence of intent to extend the obligation?

(R. at 619.)

17. On April 4, 2008, the Utah Supreme Court transferred Archer's Interlocutory Petition to the Utah Court of Appeals for consideration. (R. at 482.)

18. On April 15, 2008, Clark filed an Answer in Opposition to Petition for Permission to Appeal Interlocutory Order, arguing that Archer's Interlocutory Petition was improper in that it sought to appeal a judgment that had been specifically certified as final, and that any appeal of that judgment had to be filed pursuant to Rule 4 of the Utah Rules of Appellate Procedure, which Archer had failed to do. (R. at 626.)

19. The Utah Court of Appeals denied Archer's Interlocutory Petition on April 25, 2008. (R. at 483.)

20. Archer did not appeal the denial of his Interlocutory Petition by seeking reconsideration or by filing a petition for *certiorari*.

21. On May 19, 2008, Archer filed a Lis Pendens in the district court and recorded the same against the subject property. (R. at 485.)

22. On July 2, 2008, Clark filed with the district court a Motion to Dismiss Remaining Claims and Release Lis Pendens. (R. at 488.)

23. On July 17, 2008, Archer filed a Counterclaim and Crossclaim without first seeking leave of the district court to do so. (R. at 524.) On July 28, 2008, Clark filed a Motion to Strike Defendant Archer's Counterclaim. (R. at 548.) On August 6, 2008, Archer filed a Motion for Leave to File Crossclaim and Counterclaim. (R. at 567.)

24. On September 23, 2008, the district court heard oral argument on all pending motions. At the conclusion of this hearing, the district court granted Clark's

motion to dismiss his remaining claims and to release the lis pendens, and denied Archer's motion for leave to file his Counterclaim and Crossclaim. (R. at 716.)

25. On November 10, 2008, the district court entered an Order reflecting the various rulings made at the hearing on September 23, 2008. Id.

26. On November 24, 2008, Archer filed a Notice of Filing Appeal with the Utah Supreme Court. (R. at 723.) The Notice of Filing Appeal expressly stated that "Mark B. Archer [a]ppeals to the Utah Supreme Court the Final Judgment and Order in this matter of the Honorable Thomas L. Kay of the Second Judicial District Court in an for Davis County *signed on October 31, 2008 and entered on November 10, 2008.*" Id. (emphasis added). The Notice of Filing Appeal made no mention of challenging any previous orders. On December 15, 2008, Archer filed a Docketing Statement, a copy of which is attached hereto as Addendum A.

27. Archer's Docketing Statement specifically claimed as follows: "This appeal is **NOT** an appeal from an order in a multiple party or a multiple claim case in which the judgment has been certified as a final judgment by the trial court pursuant to Rule 54(b), Utah R. Civ. P." (Docketing Statement ¶ 5, at 2.) It was thus clear, both to the parties as well as the Court, that Archer was appealing the ruling contained in the November 10 Order dismissing the remaining claims and ordering the removal of the lis pendens, and nothing else.

28. Archer identified the following three issues in his Docketing Statement:

Issue Number One: As a preliminary jurisdictional question, did the trial court err in finding that Appellee's claim under the Second Cause of Action, Failure of Delivery,

remained timely when Appellee failed to bring the cause of action for nine years after receiving notice that the claim was a valid cause of action?

Id. at 2.

Issue Number Two: In the alternative, did the trial court err in granting Appellee's motion for summary judgment holding that Appellee had overcome the presumption of validity of a delivered deed when the only evidence presented to overcome the presumption was testimony of the grantor that he could not remember delivering the deed?

Id. at 4.

Issue Number Three: Did the trial court err in certifying its ruling as to Plaintiff's Second Cause of Action (Quiet Title/Declaratory Relief Against Archer – Failure of Delivery) as a final judgment under Utah R. Civ. P. 54(b) when the trial court failed to delineate a lack of factual overlap between the Second Cause of Action and the remaining causes of action and where a ruling on the remaining causes of action, including the Ninth Cause of Action for Adverse Possession, in the trial court would moot the issue on appeal?

Id. at 6.

29. On December 10, 2008, the Utah Supreme Court transferred the matter to the Utah Court of Appeals Court for consideration. (R. at 727.)

30. On January 12, 2009, the Utah Court of Appeals filed a Sua Sponte Motion for Summary Disposition and invited each of the parties to file a memorandum explaining why summary disposition should or should not be granted by the court.

31. On January 28, 2009, Archer filed a Response to Sua Sponte Motion for Summary Disposition, a copy of which is attached hereto as Addendum B. Archer argued therein that the district court's certification under Rule 54(b) was reviewable and

the district court's Rule 54(b) certification was incorrect. (See Resp. to Sua Sponte Mot. for Summ. Disposition at 6–9.)

32. On the same day, Clark filed a Memorandum in Support of Sua Sponte Motion for Summary Disposition.

33. On February 20, 2009, the Utah Court of Appeals filed a Memorandum Decision, issued *per curiam*, dismissing Archer's appeal for lack of jurisdiction. (R. at 742.)

34. On or about March 18, 2009, Archer filed an Ex Parte Motion for Extension of Time to File Defendant and Appellant's Petition for Writ of Certiorari, pursuant to which he requested thirty additional days to file a petition for writ of *certiorari*. The motion was granted. Thereafter, Archer filed his petition on April 20, 2009, one day after the deadline had passed. (R. at 751.)

35. On July 28, 2009, this Court issued an Order granting Archer's petition for writ of *certiorari* as to the following issue:

Whether the Court of Appeals erred in holding that it lacked jurisdiction to consider Petitioner's appeal and that Petitioner had waived the opportunity to challenge the propriety of a rule 54(b) certification in connection with his appeal.

(R. at 751.)

IV. Summary of Argument

Archer's opening brief raises, for the first time during the entirety of this case, an argument that his Interlocutory Petition should have been considered sufficient under this Court's decision in Cedar Surgery Center, L.L.C. v. Bonelli, 2004 UT 58, 96 P.3d 911 (Utah 2004), which holds that the only jurisdictional requirement for appealing a final judgment is timeliness. When the Court of Appeals denied Archer's Interlocutory Petition on April 25, 2008, the only way for Archer to preserve his appeal of the district court's Final Judgment of March 10, 2008, was to file a petition for *certiorari* on or before May 25, 2008. Instead, Archer never challenged the denial of his Interlocutory Petition before citing Bonelli in his opening brief to this Court. Accordingly, the Court lacks jurisdiction to consider any challenge to the Final Judgment. Even if the Court had jurisdiction, however, Archer has abandoned and necessarily waived the Bonelli argument by failing to raise it until filing his opening brief.

Since Archer failed to preserve his appeal of the Final Judgment, his argument regarding the propriety of the district court's Rule 54(b) certification is irrelevant for purposes of this Court's review on *certiorari*. Even if Archer had properly preserved his appeal, however, his challenge regarding certification would fail, since the district court carefully and deliberately certified the Final Judgment under Rule 54(b) in accordance with Utah law and procedure.

V. Argument

A. **EVEN IF ARCHER HAD A VALID ARGUMENT UNDER BONELLI, ARCHER DEPRIVED THE COURT OF JURISDICTION BY FAILING TO CHALLENGE THE DENIAL OF HIS INTERLOCUTORY PETITION WITHIN THIRTY DAYS.**

Archer's primary argument centers on this Court's decision in Cedar Surgery Center, L.L.C. v. Bonelli, 2004 UT 58, 96 P.3d 911 (Utah 2004) (hereinafter "Bonelli"). (See Br. of Appellant at 7–10.) Essentially, Archer's position is that his Interlocutory Petition satisfied the requirements of Rule 3 of the Utah Rules of Appellate Procedure even if the Rule 54(b) certification was proper, since “the timely filing of a notice of appeal is the *only* jurisdictional step’ implicated under rule 3(a).” Bonelli, 2004 UT 58 ¶ 10, 96 P.3d at 913. Relying on Bonelli, Archer argues that his “Petition for Interlocutory Appeal was sufficient to preserve Archer’s appeal rights regardless of whether the 54(b) certification was proper.” (Br. of Appellant at 10.) In making this argument, Archer states that he “filed his Petition for Interlocutory Appeal within the time constraints of Rules 4 and 5 of the Utah Rules of Appellate Procedure.” Id. at 9. In fact, Archer’s Interlocutory Petition was filed one day beyond the twenty-day deadline established pursuant to Rule 5 for interlocutory appeals, but within the thirty-day deadline established under Rule 4. See Utah R. App. P. 4(a), 5(a).

If Archer believed that his Interlocutory Petition constituted sufficient notice of appeal under Bonelli, he should have petitioned this Court for a writ of *certiorari* in the manner established by the Utah Rules of Appellate Procedure. The merits of the Bonelli

argument are of no moment now, more than a year and a half later, since Archer failed to challenge the denial within the time period required under Utah law.

If Archer believed he had a valid argument under Bonelli, Archer should have petitioned this Court for a writ of *certiorari* no later than May 25, 2008, thirty days after the Court of Appeals denied the Interlocutory Petition. See Utah R. App. P. 48(a). By failing to challenge the Court of Appeals' denial of the Interlocutory Petition within thirty days, Archer deprived this Court of jurisdiction to consider it at all. See, e.g., Earle v. Warden, 811 P.2d 180, 180–81 (Utah 1991) (“This court does not have jurisdiction to hear a case in which the petition for certiorari is not timely filed.”).

The only way Archer could have preserved his ability to challenge the merits of the district court's Final Judgment of March 10, 2008, was through a proper and timely appeal of that judgment. As noted above, if Archer had desired to argue that his Interlocutory Petition was in fact sufficient under Bonelli, he was required to appeal the Court of Appeals' denial of his Interlocutory Petition within thirty days. By failing to challenge the denial by seeking a writ of *certiorari* within thirty days, Archer failed to preserve his right of appeal with respect to any portion of the district court's Final Judgment of March 10, 2008. Accordingly, the Utah Court of Appeals was correct in dismissing Archer's appeal for lack of jurisdiction.

B. EVEN IF THE COURT HAD JURISDICTION TO CONSIDER ARCHER'S ARGUMENT UNDER BONELLI, ARCHER WAIVED THE ARGUMENT BY FAILING TO RAISE IT AT ANY TIME BEFORE FILING HIS OPENING BRIEF.

Even if the Court still had jurisdiction over Archer's appeal, Archer waived the Bonelli argument by failing to raise it until now. Until filing his opening brief in this appeal, Archer had never once asserted his theory that under Bonelli his Interlocutory Petition constituted sufficient notice of appeal to satisfy the Rules of Appellate Procedure. He did not raise it in his November 24, 2008 appeal of the district court's order dismissing all remaining claims in the case. (Indeed, Archer's Docketing Statement in that appeal made it clear that he was only challenging the rulings contained in the district court's decision entered on October 31, 2008). He did not raise it in his opposition to the Court of Appeals' *sua sponte* motion for summary disposition of that appeal. He did not even make the argument in his petition for *certiorari*. Indeed, at no time prior to the filing of his opening brief before this Court did Archer ever so much as cite the Bonelli case in his pleadings, briefs or any case filings. Accordingly, the decision of the Court of Appeals dismissing Archer's November 24, 2008 appeal for lack of jurisdiction did not consider Bonelli and was rendered on entirely different grounds.

While it is appropriate for this Court to *affirm* the Court of Appeals' decision below on any grounds at all, *see* Bailey v. Bayles, 2002 UT 58 ¶ 10, 52 P.3d 1158, 1161 (Utah 2002), Clark respectfully asserts that Archer has waived the Bonelli argument by raising it for the first time in his opening brief. *See, e.g.,* Estate of Berkemeir ex rel. Nielsen v. Hartford Ins. Co. of Midwest, 2004 UT 104 ¶ 10, 106 P.3d 700, 702 n.2 (Utah

2004); Trail Mountain Coal Co. v. Utah Div. of State Lands & Forestry, 921 P.2d 1365, 1371 n.11 (Utah 1996); see also, e.g., 4 AmJur 2d, Appellate Review § 336 (“Questions not raised in the petition are deemed abandoned.”). Accordingly, even if this Court had jurisdiction to consider the merits of Archer’s Bonelli argument, it would not matter, because Archer waived his opportunity to make the central argument of his brief.

C. THE TRIAL COURT’S 54(b) CERTIFICATION WAS PROPER AND WAS MADE AFTER CAREFUL CONSIDERATION OF THE FORM OF THE FINAL JUDGMENT AND PETITIONER’S OBJECTIONS THERETO.

As described *supra*, Archer failed to preserve his right to appeal any aspect of the district court’s Final Judgment of March 10, 2008 when he chose not to seek *certiorari* with respect to the Court of Appeals’ denial of his Interlocutory Petition under Bonelli. Thus, this Court has no jurisdiction to consider the propriety of the district court’s certification of the Final Judgment pursuant to Rule 54(b). Even if Archer had preserved his right of appeal, however, his challenge of the certification would fail, since the district court properly found, after due consideration, that the Final Judgment met the three-prong test for certification under Utah law and that there was no just cause for delay.

After the district court granted summary judgment in favor of Clark on the second cause of action of the amended complaint, Clark’s counsel submitted a proposed form of judgment that included, consistent with the district court’s ruling from the bench, a certification pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, which was then circulated for review by all opposing counsel. Archer specifically objected to the Rule 54(b) certification and submitted a proposed alternative form of judgment to the district

court. The district court convened a hearing for the sole purpose of addressing the form of judgment.

In that hearing, the district court entertained argument from counsel for both sides before confirming that Clark's proposed judgment, including specifically the Rule 54(b) certification, accurately reflected the court's decision. Accordingly, the court signed Clark's proposed form of judgment, which became the Final Judgment entered on March 10, 2008. The language of the Final Judgment was eminently clear regarding the issue of finality:

Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, the Court expressly finds that no just reason exists to delay the entry of a final judgment in this case and with respect to Clark's motion for summary judgment on the second cause of action of the amended complaint. Thus, this judgment is a final judgment on the second cause of action of the amended complaint in favor of Clark. The second cause of action is the only claim of the amended complaint to address the legal invalidity of Archer's warranty deed *ab initio*. In this regard, this claim stands alone and factually separate from the remaining claims of the amended complaint. Moreover, for this reason too, no just reason exists to delay the entry of this final judgment in favor of Clark to quiet title to the subject property, particularly given the advanced age of the plaintiffs.

(R. at 462 ¶ 15 (emphasis added)).

Due to the jurisdictional failure of Archer's Interlocutory Petition, the propriety of the district court's certification is not before the Court and, accordingly, is not addressed at length in this brief. Even if Archer had made a timely challenge to the certification, however, such challenge would fail, as the certification was proper under Utah law.

First, the underlying action as set forth in the amended complaint involved both multiple claims and multiple parties. See Weiser v. Union Pacific R.R., 932 P.2d 596, 597 (Utah 1997) (citing Pate v. Marathon Steel Co., 692 P.3d 765, 767 (Utah 1984)).

Second, the Final Judgment on the second cause of action involved a “separate” claim, with distinct and non-overlapping facts, and the same would have been appealable but for the existence of remaining claims and parties. The Final Judgment was based on Clark’s claim that there had been a failure of delivery. The district court, in ruling in Clark’s favor, found that Clark had overcome the legal presumption of valid delivery and that the deed in question “was not supported by legal and effective delivery as required by law.” (R. at 460.) As a result, the deed in question was void *ab initio* and was ordered stricken from the public record. (R. at 7.) Clark’s successful claim regarding failure of delivery was the only claim raised in the amended complaint that could have resulted in a ruling that the deed in question was void *ab initio*. As such, it was factually distinct from each and every other claim, and the district court properly found that there was no “factual overlap” between the claim certified as final under Rule 54(b) and the remaining claims in the case. See Kennecott Corp. v. Utah State Tax Comm’n, 814 P.2d 1099, 1104–05 (Utah 1991).

Third, the Final Judgment met the requirement of “finality” in that it ended the litigation on the merits and left nothing for the district court to do but execute the judgment. See id. at 1101 (citing Catlin v. United States, 324 U.S. 229, 233 (1945)). Finally, the district court expressly found, based on the advanced age of the plaintiffs, that no just reason existed for delay in entering the judgment as final, thereby facilitating

expeditious resolution of the matter. Accordingly, the certification was proper under Utah law.

Archer has consistently asserted that because he disagreed with the district court's certification of the Final Judgment pursuant to Rule 54(b), his only choice was to challenge the Final Judgment by means of a petition for interlocutory appeal:

By seeking an interlocutory appeal, Defendant Archer maintained his position that certification was improper, and pursued the only option available Otherwise, Defendant Archer would be forced to avail himself of a rule that he beleived [sic] to be inapplicable. Through pursuing the appeal of the trial court's order as an interlocutory appeal, Defendant Archer placed the burden of defending the trial court's certification on the prevailing party in the trial court.

(Br. of Appellant at 18–19.) Archer's argument, however, ignores the fact that the Utah Rules of Appellate Procedure expressly delineate the requisite procedure for appealing a judgment certified as final:

A timely appeal from an order certified under Rule 54(b), Utah Rules of Civil Procedure, that the appellate court determines is not final may, in the discretion of the appellate court, be considered by the appellate court as a petition for permission to appeal an interlocutory order.

Utah R. App. P. 5(a). Read in conjunction with Rules 3 and 4, the procedure mandated by Rule 5(a) becomes clear: If a party believes that a judgment certified as final under Rule 54(b) is not in fact final, that party should appeal the certification directly in an appeal as of right (pursuant to Rule 3) within thirty days (pursuant to Rule 4). If the appellate court agrees that the judgment is not in fact final, that court has the discretion to consider the appeal as a petition for interlocutory appeal. If the appellate court disagrees

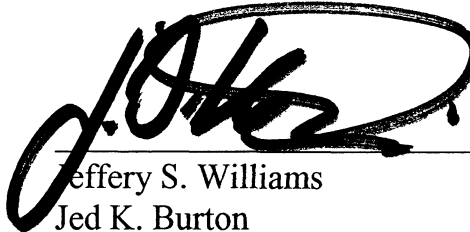
and finds that the certification was in fact correct (as presumably would have been the case here if Archer had appealed in accordance with the procedure outlined by the rules instead of devising his own procedure), then the appellate court proceeds to consider the petitioner's appeal of the merits of the final order. This is the procedure established by the Utah Rules of Appellate Procedure. The procedure described (and followed) by Archer fails to conform to the rules.

VI. Conclusion

For the reasons outlined above, Clark respectfully urges this Court to affirm the decision of the Utah Court of Appeals. Alternatively, Clark requests that the Court dismiss Archer's appeal for lack of jurisdiction.

DATED this 16th day of December, 2009.

NELSON CHRISTENSEN HELSTEN
HOLLINGWORTH & WILLIAMS

A large, stylized handwritten signature in black ink, appearing to read "J. Williams", is written over a horizontal line.

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Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served via U.S. first-class mail, postage prepaid, this 16th day of December, 2009, upon:

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A handwritten signature in black ink, appearing to read "S.F. Noel", is written over a horizontal line.

ADDENDUM “A”

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IN THE UTAH SUPREME COURT

JAMES D. CLARK, in his capacity as Personal Representative for the ESTATE OF DALE D. CLARK, Plaintiffs and Appellees, vs. MARK B. ARCHER, an individual, Defendant and Appellant.	DOCKETING STATEMENT Trial Court No. 060601640 Appellate Case No. 20081007
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Plaintiff/Appellant, through counsel, files this Docketing Statement pursuant to Rule 9 Utah R. App. P.

1. **Nature of the Proceeding.** This appeal is from a final judgment by the Honorable Thomas L. Kay of the Second Judicial District of the State of Utah.

2. **Jurisdiction.** This Court has jurisdiction pursuant to Utah Code Ann. §78A-3-102(3)(j).

3. **Relevant Dates.**

a. Date the final judgment appealed from was entered:

October 31, 2008.

b. Date the notice of appeal was filed: **November 24, 2008.**

c. Date any motions filed pursuant to Utah R. Civ. P. Rules 50(b), 52(b), or 59, of Utah R. Crim. P., Rule 24: **None Filed.**

4. **Inmate mailbox rule.** The appellant is **NOT** a confined inmate invoking Rule 4(f)

5. **Rule 54(b).** This appeal is **NOT** an appeal from an order in a multiple party or a multiple claim case in which the judgment has been certified as a final judgment by the trial court pursuant to Rule 54(b), Utah R. Civ. P.

6. **Criminal cases.** This is **NOT** a criminal case

7. **Issues on appeal.** Appellant intends to assert the following issues on appeal:

a. **Issue Number One:** As a preliminary jurisdictional question, did the trial court err in finding that Appellee's claim under the Second Cause of Action, Failure of Delivery, remained timely when Appellee failed to bring the cause of action for nine years after receiving notice that the claim was a valid cause of action?

Determinative law:

Utah Code Ann. §78B-2-309(2): An action may be brought within six years: (2) upon any contract, obligation, or liability

founded upon an instrument in writing, except those mentioned in Section 78B-2-311.

Utah Code Ann. § 78B-2-207: Actions or defenses founded upon title to real estate

An action, defense, or counterclaim to an action based upon title to the property or entitlement to the rents or profits from the property shall be brought:

(1) not later than seven years after the act on which it is based

Utah Code Ann. § 78B-2-113(1)(b): Effect of payment, acknowledgment, or promise to pay

(1) An action for recovery of a debt may be brought within the applicable statute of limitations from the date:

(b) a written acknowledgment of the debt or a promise to pay is made by the debtor;

***Wells Fargo v. Temple View Investments*, 82 P.3d 655 (Utah App. 2003):**

In order to extend a deadline in a contract, there must be proof of mutual assent; otherwise the courts will not give “legal force to a party’s attempt to unilaterally alter the terms of the note.” at 657.

In order for a signed writing to be used against the debtor, the writing must be “clear, distinct, direct, unqualified, and intentional.” At 658.

***State Bank v. Troy Hydro Sys.*, 894 P.2d 1270, 1276 (Utah App. 1995):**

...the statutory exception for a promise, part payment, or acknowledgment does not extend the limitations period if the promise, payment, or acknowledgment occurs *after* the applicable statute of limitations has run. Instead, the statute would have its extending effect only if the appropriate act occurs before the otherwise applicable limitations period initially expires.

Standard of Review:

The district court's application of a statute of limitations is a question of law, which we review for correctness. *Davis v. Provo City Corp.*, 193 P.3d 86 (Utah 2008).

- b. **Issue Number Two:** In the alternative, did the trial court err in granting Appellee's motion for summary judgment holding that Appellee had overcome the presumption of validity of a delivered deed when the only evidence presented to overcome the presumption was testimony of the grantor that he could not remember delivering the deed?

Determinative Law:

***Baker v. Pattee*, 684 P.2d 632 (Utah 1984):**

A presumption of valid delivery arises where the deed has been executed and recorded, *Kresser v. Peterson*, Utah, 675 P.2d 1193

(1984); *Controlled Receivables, Inc. v. Harman*, supra, but such a presumption may be overcome by clear and convincing evidence to the contrary. *Gold Oil Land Development Corp. v. Davis*, Utah, 611 P.2d 711 (1980).

The recording of a deed and placing the names of others on the property is somewhat in the nature of a public declaration that [the grantor] intended the instrument to become effective immediately. People as a rule do not deliberately put a flaw in the title to their property, thereby handicapping its later disposal, unless they really intend to transfer some interest to the person whose name is thus placed in the record.

Allen v. Allen, 115 Utah 303, 204 P.2d 458 (1949).

Standard of Review:

A party attacking the validity of a written instrument must do so by clear and convincing evidence. *Pagano v. Walker*, Utah, 539 P.2d 452 (1975)

In reviewing a grant or denial of summary judgment, the court of appeals was obligated to "view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party" and to review the district court's legal conclusions, as well as the grant of summary judgment as a whole,

for correctness. *Fericks v. Lucy Ann Soffe Trust*, 2004 UT 85, PP2, 10, 100 P.3d 1200 (citation omitted). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.* P10; Utah R. Civ. P. 56(c). *View Condo. Owners Ass'n v. MSICO, L.L.C.*, 127 P.3d 697 (Utah 2005)

c. **Issue Number Three:** Did the trial court err in certifying its ruling as to Plaintiff's Second Cause of Action (Quiet Title/Declaratory Relief Against Archer – Failure of Delivery) as a final judgment under Utah R. Civ. P. 54(b) when the trial court failed to delineate a lack of factual overlap between the Second Cause of Action and the remaining causes of action and where a ruling on the remaining causes of action, including the Ninth Cause of Action for Adverse Possession, in the trial court would moot the issue on appeal?

Determinative Law:

Utah R. Civ. P. 54(b): Judgment upon multiple claims and/or involving multiple parties.

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of

the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

***Kuhre v. Goodfellow*, 69 P.3d 286 (Utah Ct. App. 2003):**

"The initial question of whether an order is eligible for certification under rule 54(b) . . . is a question of law." *Kennecott Corp. v. Utah State Tax Comm'n*, 814 P.2d 1099, 1100 (Utah 1991). "Rule 54(b) of the civil rules permits the trial court to certify certain interlocutory orders and, by so doing, force the appellate court to entertain the appeal." *Id.*; see also Utah R. Civ. P. 54(b). In determining whether a trial court's rule 54(b) certification is proper, we "'focus[] on the degree of factual overlap between the issues certified for appeal and the issues remaining in the district court.'" *Kennecott*, 814 P.2d at 1103 (quoting *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 860 F.2d 1441, 1445 (7th Cir. 1988)).

"When this factual overlap is such that separate claims appear to be based on the same operative facts or on the same operative facts with minor variations, they are held not to constitute separate claims for rule 54(b) purposes." *Id.*; see also *FMA Leasing Co. v. Citizens Bank*, 823 P.2d 1065, 1066 (Utah 1992)."

***Bennion v. Pennzoil Co.*, 826 P.2d 137 (Utah 1992):**

"Today we hold that a claim is not separate if a decision on claims remaining below would moot the issues on appeal." at 138

"In order to facilitate this court's review of judgments certified as final under rule 54(b), trial courts should henceforth enter findings supporting the conclusion that such orders are final. The findings should explain the lack of factual overlap between the certified and remaining claims and thus satisfy the *Kennecott* criterion for certification to be proper." at 139

***Weiser v. Union Pac. R.R.*, 932 P.2d 596 (Utah 1997):**

A trial court ruled that a railroad company's claim of title to a certain tract of land failed due to lack of condition. The trial court certified the ruling under Rule 54(b). The Utah Supreme Court stated:

"Here we have one claim--ownership of the disputed land--supported by different legal theories.

"The trial court stated that the issue of the validity of the land grant

was a core dispositive issue, because a decision in Union Pacific's favor would moot the other claims and render further proceedings unnecessary. Therefore, there was "no just reason to delay directing entry of final judgment." While it may be true that if we were to find that Union Pacific prevails under the grant, Weiser's other arguments would be irrelevant, the trial court failed to consider the opposite case.¹ If Union Pacific were to lose on appeal on the land-grant issue, it could pursue its claim under one of the reserved theories of law and/or equity, resulting in a piecemeal appeal. We held in *Bennion v. Pennzoil Co.*, 826 P.2d 137, 138 (Utah 1992), that "a claim is not separate if a decision on claims remaining below would moot the issues on appeal." Here, a ruling that Union Pacific owns the disputed land under, for example, adverse possession would moot the appeal now before us. Thus, to hear this case in its present form would be to risk a waste of judicial resources."

Standard of Review:

We review questions of law for correctness, giving no deference to the ruling of the court below. *R.A. McKell Excavating, Inc. v. Wells Fargo Bank, N.A.*, 100 P.3d 1159 (Utah 2004)

8. Factual summary:

This case involves an experienced developer, Dale Clark ("Clark"), who

brought suit against Mark Archer ("Archer") nine years after he conveyed title to 8 acres of land to Archer seeking a return of the land. On or about September 26, 1997, Clark and Archer entered into an Earnest Money and Real Estate Sales Agreement. Clark agreed to sell to Archer the Syracuse Meadows Property for the purchase price of Three-Hundred Sixty-Two Thousand Seven Hundred and No/100 Dollars (\$362,700.00).

The Earnest Money Contract stated that Clark was to finance the purchase of the Syracuse Meadows Property and that Archer would secure that financing with a Note and a Trust Deed. Archer was to develop the land into thirteen (13) lots and to make thirteen (13) installment payments of \$27,900.00 as each lot sold.

Clark agreed to convey the Syracuse Meadows Property by Warranty Deed at closing of the sale. On November 14, 1997, Clark executed a Warranty Deed whereby he conveyed the land to Archer. On November 19, 1997, Bonneville Title Company, Inc., the escrow agent, recorded the Warranty Deed with the Davis County Recorder's Office.

To secure the purchase of the property, Archer executed a Trust Deed and a Trust Deed Note. The Trust Deed Note required Archer to render payment in the amount of \$362,700.00 plus applicable interest, "on or before April 27, 1998." Archer executed both instruments on November 14, 1997, and Bonneville Title Company recorded the Trust Deed on November 19, 1997 with the Davis County Recorder's Office. The Trust Deed was executed

with Archer as Trustor, Bonneville Title Company, Inc as Trustee and Bonneville Exchange, LLC as intermediary for Dale D. Clark and Ruth E. Clark as beneficiary.

As Archer began to develop the land, he learned that there were runoff and drainage problems on the surrounding land that prevented him from gaining final approval for the subdivision. Archer learned that Clark owned the surrounding land. Archer attempted to work with Clark in order to repair the deficiencies of the surrounding land in order to develop the subdivision. Clark proved unwilling to assist and, after Archer expended great time, money, and energy in his attempts, Archer was unable to pursue the development further. Archer was unable to sell any lots and did not the amount due under the Trust Deed Note by April 27, 1998.

On May 21, 1998, 180 days after the Warranty Deed and the Trust Deed had been recorded, Bonneville Title Company, Inc. executed an Assignment of Trust Deed. The Assignment of Trust Deed was then recorded on May 22, 1998 and the instrument was mailed to Dale D. Clark and Ruth E. Clark at their address in Bountiful, Utah.

On May 15, 2006, Clark filed a complaint in the Second Judicial District in the State of Utah. The Complaint was then amended on September 8, 2006. Clark asserted fifteen (15) causes of action against Archer, Bonneville Title Company, Inc, and Bonneville Exchange, LLC.

On April 26, 2007, Clark filed, through counsel, a Motion for Summary

Judgment on his Second and Ninth Causes of Action. Archer opposed the motion and filed a counter motion for summary judgment on the same causes of action. The parties briefed the two motions and Judge Thomas L. Kay heard oral argument on September 24, 2007.

On October 15, 2007, Judge Kay entered his initial ruling on the cross motions for summary judgment denying all motions. Judge Kay ruled that the statute of limitations might have run subject to a potential application of the discovery rule. Judge Kay stated:

The record on this issue [the application of the discovery rule to the underlying facts] is lacking, however, and the Court will require additional briefing on it before a decision can be reached which grants either party's motion. Accordingly, both Motions for Summary Judgment on Clark's Second Cause of Action are denied. If the parties wish to submit an additional motion addressing the statute of limitations and the application of the discovery rule they may.

See Ruling on Cross Motions for Summary Judgment, Case No. 060601640 attached hereto as Attachment A.

The parties each submitted supplemental briefing on the discovery rule. Clark exceeded the scope of the supplemental briefing and briefed the issue of whether Archer's Affidavit, attached to Archer's Cross Motion for Summary Judgment on the Second and Ninth Causes of Action, acted as an acknowledgment of an existing debt under Utah Code Ann. §78-12-44 (now Utah Code Ann. §78B-2-113(1)(b)). Judge Kay heard oral arguments on the issue of the discovery rule and, heard Clark's argument regarding the

application of Utah Code Ann. §78B-2-113(1)(b).

After oral argument, Judge Kay ruled from the bench granting Clark's motion for summary judgment stating that the parties had agreed to toll the statute of limitations. Judge Kay relied on a statement made by affidavit filed by Archer in support of his motion for summary judgment. In his affidavit, Archer stated "I reached an oral agreement with Clark wherein it was agreed that their written agreement would be tolled until other phase problems were in compliance with drainage through Phase 6 (which still is not complete) and interest would be tolled as well with lots sold and payment released at \$27,900.00 per lot plus my efforts to assist would be deducted against the note amount of \$362,700.00."

In his written ruling dated March 10, 2008, Judge Kay granted Clark's motion for summary judgment stating that Clark had overcome the presumption of validity of a recorded deed by clear and convincing evidence. Judge Kay further stated that the "discovery rule" was inapplicable given Archer's statement in his affidavit regarding the tolling of the agreement. Judge Kay ruled that Archer's testimony renders the second cause of action timely under the terms of Utah Code Ann. §78-12-44. Judge Kay found that "Having agreed and represented to the Court to the existence of a "tolling" understanding between the parties, Archer is precluded under Utah statutory law and otherwise from claiming that Clark's second cause of action for failure of delivery has now expired." Judge Kay continued, "Archer cannot, in

a sworn Affidavit submitted in opposition to a summary judgment motion, claim that a “tolling” agreement exists between the parties, but then assert, contrary to that representation, that Clark’s rights have nevertheless expired.”

Judge Kay then certified this ruling as a final judgment under Utah R. Civ. P. 54(b).

Archer filed a Petition for Interlocutory Appeal on March 31, 2008. Clark opposed the Petition on March 15, 2004, arguing that, as per the Rule 54(b) certification, the matter was not appealable as an interlocutory appeal. The Court of Appeals denied the Petition on April 24, 2008.

Clark then moved the trial court to dismiss all remaining causes of action without prejudice. Archer moved the trial court for permission to file a counterclaim and cross-claim. On September 23, 2008, the trial court heard oral argument on the two motions. On November 10, 2008, the trial court issued a written order granting Clark’s motion to dismiss the remaining causes of action without prejudice and denying Archer’s motion to file a counterclaim and cross claim.

Archer now appeals the trial court’s ruling on the Second Cause of Action.

9. Assignment. This appeal is subject to assignment by the Supreme Court to the Court of Appeals pursuant to Utah Code Ann. §78A-3-102(4) and Utah Code Ann. §78A-4-103(2)(j). However, the Utah Supreme

Court should **not** assign this matter to the Court of Appeals as it involves an important issue that has yet to be ruled on by this Court.

As demonstrated above, the Utah Court of Appeals has heard and ruled on cases involving the application of Utah Code Ann. § 78B-2-113(1)(b) as a “saving clause” for an action barred by the statute of limitations. The Court of Appeals has determined that in order for the statute to apply, the statement “resurrecting” a debt must be clear, distinct, unqualified, and intentional. *Wells Fargo v. Temple View Investments*, 82 P.3d 655 (Utah App. 2003). The Court of Appeals has also determined that “the statutory exception for a promise, part payment, or acknowledgment does not extend the limitations period if the promise, payment, or acknowledgment occurs *after* the applicable statute of limitations has run. Instead, the statute would have its extending effect only if the appropriate act occurs before the otherwise applicable limitations period initially expires.” *State Bank v. Troy Hydro Sys.*, 894 P.2d 1270, 1276 (Utah App. 1995).

In spite of these clear rulings, the trial court failed to apply these appropriate standards. The Supreme Court should retain this matter so as to clearly identify the terms under which a party may “resurrect” a debt.

10. Related Appeals. Appellant filed a Petition for Interlocutory Appeal with this Court on March 31, 2008. Appellee opposed the Petition on April 15, 2008. The Court of Appeals denied the Petition on April 24, 2008.

11. Attachments. The following are attached:

- a. **Attachment A:** The final judgment from which the appeal is taken entered by the trial court on November 10, 2008.
- b. **Attachment B:** The trial court's ruling titled Final Judgment on Plaintiff's Second Cause of Action entered March 10, 2008.
- c. **Attachment C:** The trial court's ruling titled Ruling on Cross Motions for Summary Judgment entered October 15, 2007.
- d. **Attachment D:** The Notice of Appeal filed on November 24, 2008.
- e. **Attachment E:** The Notice of Filing Petition for Appeal, filed on March 31, 2008.
- f. **Attachment F:** Order from the Utah Court of Appeals denying Appellant's Petition for Interlocutory Appeal, dated April 25, 2008.

DATED and signed this 15 day of December 2008.

B. Ray Zoll, PC

B. Ray Zoll,
Attorney for Appellant/Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing
DOCKETING STATEMENT postage prepaid, to:

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Stephen F. Noel
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on this 15th day of December 2008.

Melanie Thatcher

ADDENDUM “B”

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Attorneys for Defendant and Appellant

IN THE UTAH COURT OF APPEALS

JAMES D. CLARK, in his capacity as Personal Representative for the ESTATE OF DALE D. CLARK, Plaintiffs and Appellees, vs. MARK B. ARCHER, an individual, Defendant and Appellant.	RESPONSE TO THE SUA SPONTE MOTION FOR SUMMARY DISPOSITION Trial Court No. 060601640 Appellate Case No. 20081007
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Defendant/Appellant Mark B. Archer ("Archer"), through counsel, files this Response to the Court's Sua Sponte Motion for Summary Disposition. The Court raises this motion for the purpose of determining whether this Court has jurisdiction after the trial court attempted to certify a ruling on the Second Cause of Action as final under Rule 54(b) on March 10, 2008.

INTRODUCTION

This case comes before the Court on appeal from the trial court's final adjudication dismissing Plaintiff/Appellee (Clark)'s remaining causes of action

after the court granted Clark's motion for summary judgment on one of his causes of action. The underlying dispute revolves around ownership of a particular tract of land located in Syracuse, Utah. A more complete recitation of the underlying facts has been submitted to the Court in Archer's Docketing Statement. To conserve the limited space for this brief, Archer directs the Court's attention to that recitation. For the purposes of this motion, however, it is imperative to point out that Clark's claim revolves solely around the ownership of that particular tract of land.

In brief, Clark and Archer entered into an agreement whereby Clark agreed to sell Phase 6 of the Syracuse Meadows Development to Archer. Clark deeded the property to Archer and Archer set to work to develop the land into thirteen (13) lots for a subdivision to be built. Due to problems existing on the surrounding phases of the Development that were still owned by Clark, Archer was unable to develop the land as contemplated. Clark made no effort whatsoever to seek a return of the land after Archer allegedly defaulted under the terms of the sales agreement.

On May 15, 2006, Clark filed a complaint in the Second Judicial District in the State of Utah seeking a return of the land and a nullification of the Warranty Deed whereby he granted the land to Archer. The Complaint was then amended on September 8, 2006. Clark asserted fifteen (15) causes of action against Archer, Bonneville Title Company, Inc, and Bonneville Exchange, LLC. Of the fifteen (15) causes of action, only eleven (11) applied

to Archer. These legal theories were 1) Declaratory Relief – Equitable Tolling Against Archer & Bonneville, 2) Quiet Title/Declaratory Relief Against Archer – Failure of Delivery, 3) Equitable Estoppel Against Archer, 4) Breach of Contract Against Archer – Earnest Money Contract, 5) Breach of Contract Against Archer – Note, 6) Declaratory/Damage Relief Against Archer – Constructive Trust, 7) Declaratory Relief Against Archer – Trust Deed Valid, 8) Breach of Fiduciary and Joint Venture Obligations Against Archer, 9) Quiet Title/Declaratory Relief Against Archer – Adverse Possession, 10) Foreclosure of Equitable Lien Against Archer, and 11) Unjust Enrichment Against Archer.

The parties are before this Court on the trial court's ruling on Clark's Second Cause of Action (Failure of Delivery). The parties originally each moved for summary judgment on Clark's Second Cause of Action and Ninth Cause of Action in April 2007. The trial court heard very little in the way of argument concerning the Ninth Cause of Action (Adverse Possession) and the issues surrounding that cause of action were never ruled on.

The argument centered generally on Archer's assertion that Clark's claims were time barred by the statute of limitations. The trial court determined that the statute of limitations might have run but denied both motions for summary judgment on the basis that the Discovery Rule may have tolled the statute of limitations. The parties submitted additional briefing to the court on whether the Discovery Rule applied to this situation and the parties again argued whether the Discovery Rule had tolled the

statute of limitations. Clark argued a new position that Archer's affidavit had, in some way, tolled the statute of limitations. The court, instead of ruling on the application of the Discovery Rule as anticipated, instead found that Archer's affidavit had tolled the statute of limitations and granted Clark's motion for summary judgment on the Failure of Delivery claim. Such ruling is clearly legally erroneous.

Clark subsequently moved to dismiss all remaining causes of action and the trial court entered a final judgment on the entirety of the case.

RULE 54(b) CERTIFICATION

Upon granting Clark's motion for summary judgment, Judge Kay signed an order that had been proffered by Clark over Archer's objections. The signed order purported to enter a "Final Judgment" and the trial court included language necessary to certify the judgment as a final adjudication on the Second Cause of Action. Archer petitioned this Court to hear the appeal as an interlocutory appeal. The petition was denied.

The trial court's certification of its ruling on the Second Cause of action was improper given the remaining causes of action in Clark's Complaint.

Rule 54(b)

Utah R. Civ. P. 54(b) allows a trial court to force an appellate court to hear an interlocutory order. *Kennecott Corp. v. Utah State Tax Comm'n*, 814 P.2d 1099, 1100 (Utah 1991). The Rule states:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment.

Utah R. Civ. P. 54(b). The Utah Supreme Court has delineated three criteria necessary for a judgment to be certified under the Rule.

First, there must be multiple claims for relief or multiple parties to the action. Second, the judgment appealed from must have been entered on an order that would be appealable but for the fact that other claims or parties remain in the action. Third, the trial court, in its discretion, must make a determination that 'there is no just reason for delay' of the appeal.

Pate v. Marathon Steel Co., 692 P.2d 765, 767 (Utah 1984).

However, the Rule continues:

In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Therefore, if the trial court does not make a certification on an interlocutory order, or if that certification is improper, then the ruling is only subject to review by the appellate courts on a petition for interlocutory appeal until the entire case is resolved. Once the entire case is resolved, then the party seeking appeal may seek an appeal as of right.

Rule 54(b) Certification is Reviewable

Although the trial court issued a certified “final” judgment, and used the *Pate* language that there is “no just reason for delay” in its attempt to effectuate a “final” judgment, this alone does not prevent this Court from reviewing the propriety of the certification. In general, the cases wherein the trial court’s certification under Rule 54(b) is reviewed focus on the second of the *Pate* criteria – whether the issue certified is “appealable but for the fact that other claims or parties remain in the action.” The issue rests in the underlying premise that “interlocutory appeals should be avoided because they present appellate courts with multiple appeals involving narrow issues taken out of the context of the whole case which slow down the final determination of the matter.” *Kennecott*, 814 P.2d at 1101. Rule 54(b) certification, then is reserved for those cases wherein the “degree of factual overlap between the issues certified for appeal and the issues remaining in the district court” is such that the issues certified for appeal can be found to be “separate claims.” *Id.* at 1100 (quoting *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 860 F.2d 1441, 1445 (7th Cir. 1988)). “The initial question of whether an order is eligible for certification under rule 54(b)...is a question of law.” *Kennecott Corp.*, 814 P.2d 1100. When reviewing questions of law, the Utah appellate courts review the trial court’s ruling “for correctness, giving no deference to the ruling of the court below.” *R.A.*

McKell Excavating, Inc. v. Wells Fargo Bank, N.A., 100 P.3d 1159 (Utah 2004).

Judge Kay's Certification was Incorrect

In this case, the degree of factual overlap between the issue certified for appeal, Clark's Second Cause of Action (Failure of Delivery), and the remaining causes of action was too great for certification to be proper. "When this factual overlap is such that separate claims appear to be based on the same operative facts or on the same operative facts with minor variations, they are held not to constitute separate claims for rule 54(b) purposes." *Kuhre v. Goodfellow*, 69 P.3d 286, 289 (Utah Ct. App. 2003); see also *FMA Leasing Co. v. Citizens Bank*, 823 P.2d 1065, 1066 (Utah 1992). "[I]t is inappropriate to place an emphasis on a variation of specific facts needed to prove a claim, ... while ignoring the factual overlap of the overriding operative facts." *Id.* citing *Weiser v. Union Pac. R.R.*, 932 P.2d 596 (Utah 1997).

Further, "a claim is not separate if a decision on claims remaining below would moot the issues on appeal. *Bennion v. Pennzoil Co.*, 826 P.2d 137, 138 (Utah 1992). The Court, in *Bennion*, went on to explain that a trial court's findings "should explain the lack of factual overlap between the certified and remaining claims and thus satisfy the *Kennecott* criterion for certification to be proper." *Id.* at 139.

In this case, Judge Kay failed to outline how the underlying facts of the Second Cause of Action were unrelated to the underlying facts on the remaining causes of action. At the heart of this matter is the disputed ownership of a certain tract of land. The land was deeded to Archer and, nearly ten years after the land was deeded, Clark filed an action to recuperate the land. Each of the underlying causes of action rest on the same claim – ownership of the disputed land. Clark has sought to prove ownership through fifteen (15) different legal theories, but all theories are aimed at solving the single claim – ownership.

This case is nearly identical to the Utah Supreme Court case of *Weiser v. Union Pac. R.R.*, 932 P.2d 596 (1997). In *Weiser*, the parties disputed ownership of a particular tract of land. Weiser claimed ownership based on a land grant to a remote predecessor in the land from President Ulysses S. Grant. Union Pacific Railroad's claim rested on a right of way granted to its predecessor in interest, Utah Central Railroad. The trial court determined that the grant under which Union Pacific claimed its interest was conditioned on Utah Central Railroad filing with the Secretary of Interior "a map approved by him 'exhibiting the line of said company, as the same has been located and constructed' within three months of the grant." *Id.* at 597. The trial court found that Utah Central Railroad had failed to meet this condition and ruled that Union Pacific's claim of title to the land failed due to lack of condition. The trial court then certified this ruling under Rule 54(b).

Upon review, the Utah Supreme Court determined that the Rule 54(b) certification was improper. The Court reasoned

Here we have one claim--ownership of the disputed land--supported by different legal theories. The trial court stated that the issue of the validity of the land grant was a core dispositive issue, because a decision in Union Pacific's favor would moot the other claims and render further proceedings unnecessary. Therefore, there was "no just reason to delay directing entry of final judgment." While it may be true that if we were to find that Union Pacific prevails under the grant, Weiser's other arguments would be irrelevant, the trial court failed to consider the opposite case. If Union Pacific were to lose on appeal on the land-grant issue, it could pursue its claim under one of the reserved theories of law and/or equity, resulting in a piecemeal appeal. We held in *Bennion v. Pennzoil Co.*, 826 P.2d 137, 138 (Utah 1992), that "a claim is not separate if a decision on claims remaining below would moot the issues on appeal." Here, a ruling that Union Pacific owns the disputed land under, for example, adverse possession would moot the appeal now before us. Thus, to hear this case in its present form would be to risk a waste of judicial resources.

Similarly, in this matter, there is but one claim, that of ownership of the disputed land. While the failure of delivery claim is one theory under which Clark claims ownership, there remain subsequent theories under which he could pursue his ownership claim should he lose on appeal.

For instance, if Archer had pursued the Second Cause of Action on appeal as certified, and had Clark lost on appeal (as the Docketing Statement demonstrates will almost assuredly happen), Clark could have then pursued his claim for ownership of the property under the theory of adverse possession. To pursue an appeal under a Rule 54(b) certification, then, would have resulted in a piecemeal appeal and a waste of judicial resources.

Therefore, the Rule 54(b) certification was improper and, after the petition for interlocutory appeal was denied, the only proper manner to appeal the ruling was to ensure the case was entirely resolved before seeking appeal.

CONCLUSION

The trial court failed to discuss whether the underlying facts to the Second Cause of Action overlapped with the underlying facts to the remaining fourteen (14) causes of action. Even if the trial court had entered into such a discussion, the facts of the case are simply too interrelated to allow for only one cause of action to be certified under Utah R. Civ. P. 54(b).

There is but one claim at issue in this case, the ownership of the Syracuse Meadows property in spite of Clark's fifteen (15) legal theories. To certify a judgment on only one of these issues as final for purposes of appeal is improper as it leaves the possibility that, if the judgment is overturned, another theory may then be championed as the winning theory.

Therefore, the trial court's attempt to certify its ruling on the Second Cause of Action (Failure of Delivery) under Utah R. Civ. P. 54(b) was improper and this matter is now properly before this Court.

DATED and signed this 28th day of January 2009.

B. Ray Zoll, PC

B. Ray Zoll,
Attorney for Appellant/Defendant

Certificate of Mailing

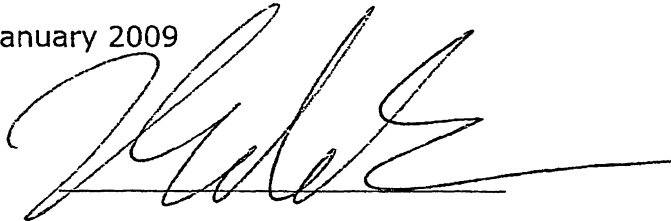
I hereby certify that I mailed a true and correct copy of the foregoing
RESPONSE TO THE SUA SPONTE MOTION FOR SUMMARY DISPOSITION via
U.S. Mail, first class, postage prepaid to the following:

Stephen F. Noel
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Second District, Layton Dept.
ATTN: Alyson/ Lee/ Pam
425 N. Wasatch Dr.
Layton, UT 84041

Dated and signed this 27th day of January 2009

A large, stylized handwritten signature in black ink, likely belonging to the sender, is written over a horizontal line.