

1990

# Michael L. Miller v. Gordon E. Johnson : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Gordon E. Johnson; Pro Se for Appellant.

Michael L. Miller; Attorney.

---

## Recommended Citation

Brief of Appellant, *Miller v. Johnson*, No. 900469 (Utah Court of Appeals, 1990).

[https://digitalcommons.law.byu.edu/byu\\_ca1/2875](https://digitalcommons.law.byu.edu/byu_ca1/2875)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT  
KFU  
50

IN THE UTAH COURT OF APPEALS

DOCKET NO.

900469-CA

MICHAEL L. MILLER,  
Plaintiff/Respondent,  
vs.  
GORDON E. JOHNSON,  
Defendant/Appellant

:  
:  
:  
:

Court of Appeals No. 900469-CA  
Circuit Court 87 CV 60  
(Category 14B)

APPELLANT'S OPENING BRIEF FOR DAMAGES  
ON CROSS-COMPLAINT

APPEAL FROM THE JUDGEMENT OF THE FIRST CIRCUIT  
COURT IN AND FOR BOX ELDER, STATE OF UTAH,  
BRIGHAM CITY DEPARTMENT, THE HONORABLE PARLEY  
R. BALDWIN, CIRCUIT COURT JUDGE, PRESIDING

Michael L. Miller, Attorney  
20 South Main St.  
Brigham City, Utah 84302

Gordon E. Johnson  
Prose for Appellant  
216 West 1st North  
Brigham City, Utah 84302  
Telephone: (801) 723-3677

FILED

OCT 17 1990

COURT OF APPEALS

MICHAEL L. MILLER,  
Plaintiff/Respondent,  
vs.  
GORDON E. JOHNSON,  
Defendant/Appellant

Court of Appeals No.  
 Circuit Court 87 CV 60  
 (Category 14B)

APPEAL FROM THE JUDGEMENT OF THE FIRST CIRCUIT  
COURT IN AND FOR BOX ELDER, STATE OF UTAH,  
BRIGHAM CITY DEPARTMENT, THE HONORABLE PARLEY  
R. BALDWIN, CIRCUIT COURT JUDGE, PRESIDING

Michael L. Miller, Attorney  
20 South Main St.  
Brigham City, Utah 84302

Gordon E. Johnson  
Prose for Appellant  
216 West 1st North  
Brigham City, Utah 84302  
Telephone: (801) 723-3677

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT.....	3
NATURE OF PROCEEDINGS.....	3
STATEMENT OF ISSUES.....	3
DETERMINATIVE STATUTES.....	3
STATEMENT OF THE CASE.....	4
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	5
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10
ADDENDUM.....	11

## TABLE OF AUTHORITIES

### CASES

<u>Kershaw vs Tracy Collins</u> (Utah 1977) 561 P. 22 683.....	7
<u>Mann vs American Western</u> (Utah 1978) 586 P. 22 462.....	6
<u>Moore vs Fellner</u> (California) 318 P. 22 526.....	7
<u>Phillips vs Smith</u> (1989) 100 Utah Adv. Rptr 3.....	8

### STATUTES

Utah General Rules of Ethic #11.....	5 & 9
Utah Code Annotated #78-27-56.....	8

### JURISDICTIONAL STATEMENT

The above court has jurisdiction to hear this appeal pursuant to U.C.A. 78-2a-3.

### NATURE OF PROCEEDING

This matter has been before the Utah State Bar Fee Arbitration Committee which awarded cross-complainant \$500.00 and before this court which vacated a default judgement in favor of plaintiff/attorney Miller. Now, the trial court has awarded attorney Miller said \$500.00 in quantum meruit and rejected cross-complainant Johnson's claims.

### STATEMENT OF ISSUES

#### I

When does the trial court have authority to reject or ignore a ruling of the Utah State Bar Fee Arbitration Committee?

#### II

Can attorney Miller sue for a contingency fee and then recover in quantum meruit?

#### III

Is cross-complainant entitled to refund of a \$500.00 unearned retainer, reasonable attorney fees, costs of a prior appeal, and punitive damages?

### DETERMINATIVE STATUTES

UTAH CODE ANNOTATED #78-27-56

GENERAL RULES OF ETHICS #11

### STATEMENT OF THE CASE

Plaintiff Michael L. Miller was retained by defendant Gordon Johnson in a personal injury action (GORDON E. JOHNSON & VERA K. JOHNSON VS. DAVID K. BUSH, Second District Court of Utah, Civil No. 1-37321). Plaintiff agreed to take the case on contingency and was paid \$500.00 as an advance in the action. Plaintiff obtained a settlement offer in the personal injury action for \$5,000 and submitted it to defendant. When defendant rejected the settlement offer, the plaintiff withdrew and immediately sued defendant for one-third of the offer, i.e. \$1,667 which would together with \$500.00 advance be 1/3 of the settlement offer which was rejected.

Third district presiding Judge Scott Daniels signed the fee arbitration ruling that plaintiff Miller owed the defendant \$500.00, and that he had not earned any fees because he quit.

Subsequently, defendant retained attorney Phillip W. Dyer who obtained a settlement offer of \$6,500 which was accepted and netted defendant \$5,000.

Please see the affidavit attached that attorney Miller submitted to the fee arbitration committee. There is no mention that an attorney employment agreement was mailed and not signed, or sufficient justification for him to quit. He had just made arrangements for defendant, in the case at bar, to pay for his deposition in Brigham City, Utah concerning the personal injury. His reasons for withdrawing continually change.

### SUMMARY OF ARGUMENT

Trial courts should not reject or ignore fee arbitration rulings; where there is a contingency agreement, recovery in quantum meruit is not available, and this action is meritless and malicious justifying punitive damages.

### ARGUMENT

#### I

In Utah it is virtually impossible to hire an attorney to sue or defend against another attorney. Therefore, fee arbitration is the only practical, economical remedy for a client sued by his attorney. Utah fee arbitration includes a non-attorney and is fair.

The first time around Judge Daines rejected the argument that the fee arbitration ruling was a sufficient answer.

Now, Judge Baldwin ignores the ruling of the fee arbitration committee which is in accordance with prevailing law. If a trial judge does not accept such rulings, he is letting an attorney pursue an action "not well grounded in fact and law" under Rule 11.

In California an attorney must attack an adverse fee ruling and not ignore it and proceed against his former client. See the excerpts from the California Business and Professions code on file herein, and appellant's first brief in this matter.

Now, the Utah State Bar won't arbitrate a fee dispute unless the attorney agrees to mandatory arbitration. Of course he won't. Arbitration must be preserved and strengthened!

## II

In the reporter's transcript State of Utah vs. Johnson, 880587-CA, attorney Miller testifies as follows:

"A - I took it to the point where they had made an offer of settlement, and withdrew at that point, and then<sup>e</sup> we accepted the offer of settlement after I withdrew." (Page 5, lines 23-25)

This agrees with the Affidavit of Gordon E. Johnson and not with the subsequent Affidavit of Michael L. Miller and trial court findings. There is no mention of an employment contract supposedly mailed and not signed or unreasonable conduct by defendant.

"Q - Did you have a contract with him to receive a contingency fee of some sort? (Emphasis Added)

A - Yes I did.

Q - And was that entire transaction and the contract we just mentioned, the basis of the lawsuit which you filed?

A - Yes." (Page 6, lines 5-10)

Actually his lawsuit was filed and default judgement taken before the settlement.

The case law is clear in Utah that when there is an express contract, the Plaintiff is not entitled to recover the reasonable value of his services.

"Recovery in Quasi Contract is not available where there is an express contract covering the subject matter of litigation." Mann v. American Western Life Insurance Company, 586 p.2d 462 (Utah, 1978).

Further, recovery in quantum meruit requires that it be clear from the facts that both parties intend that the suing party be paid. The Rule is stated in Kershaw v. Tracy Collins Bank and Trust Company, 561 p.2d 683 (Utah 1977) as follows:

"To find an implied promise warranting recovery of a theory of quantum meruit for services rendered or benefits conferred all of the facts must be examined to determine the intention of both parties, as to whether pay was expected by the renderer and to be paid by the recipient." (emphasis added)

Clearly, the Defendant did not expect to have to pay Mr. Miller after his withdrawal necessitated hiring new counsel. The California case of Moore v. Fellner, 318 p.2d 526, which dealt with a suit for attorney's fees by an attorney who did not complete his representation, reasoned as follows:

"The question is whether an attorney who undertakes to render an entire service may quit when an important part of the work remains undone and deserve to be paid for partial performance. As well as might a surgeon claim compensation when he quit in the middle of an operation, or a barber when he had shaved half of a customer's face. The answer is that there is no concept of law or fair dealing that permits one contracting party to repudiate his obligation to render personal service and hold another party to his reciprocal obligations under the contract (p. 531)."

Mr. Miller did not have the right to condition his further performance of the contract on Defendant's acceptance of a settlement offer which he felt to be inadequate. Mr. Miller clearly breached his contract of representation and is therefore not entitled to recover any compensation.

Defendant Johnson had a right for his personal injury action to go to trial. Attorney Miller realized he had a difficult client but did not provide for exigencies of employment prior to resolution of the lawsuit in any written agreement. Phillips vs. Smith (1989) 100 Utah Adv. Rptr. 3.

In the case at bar, the facts are much more favorable to the Defendant: There was no written fee agreement, although the Rules of Ethics require it, counsel in the case at bar withdrew when the litigant failed to accept the offer he proposed, rather than being discharged; and subsequent counsel obtained a more favorable settlement for the litigant. All of these facts favor the Defendant in the case at bar.

The Phillips case suggests that Mr. Miller may have a cause of action against attorney Dyer, who directly benefitted from his work on the case, in quantum meruit, but not against the defendant.

### III

By not agreeing to binding arbitration attorney Miller acknowledged his action was meritless. His conduct was malicious in taking a default judgement when there was an "appropriate responsive pleading" on file. See the Order 880324-CA on file and Declarations of Costs on Appeal which he should pay. Also, attorney Mayorga should be paid for her time and defendant for his per U.C.A. 78-27-56.

In the file is a copy of a letter by Lynn Q. Beard, M.D. to attorney Miller outlining defendant's health problems. Punitive

damages are justified for the harassment and frustration of procedural technicalities while ill, including arrest and six days in jail.

There is no cover letter or follow-up letter for an employment agreement supposedly mailed and not signed.

This is an egregious example of an action not "well grounded in fact or law" per Rule 11, particularly after the fee arbitration ruling. Sanctions are appropriate. Apparently, Mr. Miller didn't want the risk of proceeding to trial and winning one-third of nothing.

#### CONCLUSION

When there is a contingency agreement; quitting and suing for one-third of an offer, is a meritless action.

Plaintiff is not entitled to recover in this suit under the law, and he should be required to return the \$500.00 cost retainer, pay defendant's reasonable attorney fees and punitive damages; and costs of the prior appeal, underlying lawsuit, and this appeal.

Dated September 5 , 1989 at Brigham City, Utah

Respectfully Submitted

Gordon E. Johnson

Gordon E. Johnson  
Appellant/Defendant/Cross-Complainant

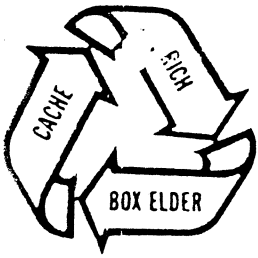
PROOF OF SERVICE BY MAIL

I hereby certify or declare under penalty of perjury that on the following date I mailed four (4) copies of the foregoing Appellant's Opening Brief to Michael L. Miller, Attorney At Law, 20 South Main Street, Brigham City, Utah 84302.

Dated September      , 1989

Gordon E. Johnson

Gordon E. Johnson



## BEAR RIVER COMMUNITY MENTAL HEALTH CENTER

November 27, 1985

To Whom It May Concern:

Gordon Johnson is under my care and suffers from emotional problems. He is not able to attend a summons in Davis County; however, he could attend one scheduled in Box Elder County.

Sincerely,

Meredith Alden, M.D.

MA/jm

RECEIVED

APR 07 1986

Dale M. Dorius Atty at Law

William F. Bannon, 3698  
STRONG & HANNI  
Attorneys for Defendant  
Sixth Floor Boston Building  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080

---

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY  
STATE OF UTAH

---

GORDON E. JOHNSON and	)	
VERNA K. JOHNSON,	)	
	)	<u>ORDER</u>
Plaintiffs,	)	
	)	
vs.	)	
	)	
DAVID R. BUSH,	)	Civil No: 1-37320
	)	
Defendant.	)	Judge Douglas L. Cornaby
	)	

---

Defendant's motion to dismiss plaintiffs' complaint, having been called up regularly for hearing on the 1st day of April, 1986, and plaintiffs appearing by and through their attorney of record, Michael L. Miller, and defendant appearing by and through his attorney of record, William F. Bannon, and the parties having represented to the court that they had reached an agreement and entered a stipulation on record that defendant's motion to dismiss may be dismissed, and that defendant shall have an award of attorney's fees in the amount of \$100.00 and costs in the amount of \$12.00 for traveling to Brigham City to take the plaintiffs' depositions with said award contingent upon defendant's counsel actually traveling to Brigham City for said depositions, and other good cause appearing, therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's motion to dismiss be and hereby is dismissed and

defendant is awarded \$100.00 in attorney's fees and \$12.00 in costs against the plaintiffs, contingent upon the defendant's counsel traveling to Brigham City to take the plaintiffs' depositions.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1986.


BY THE COURT:

\_\_\_\_\_  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

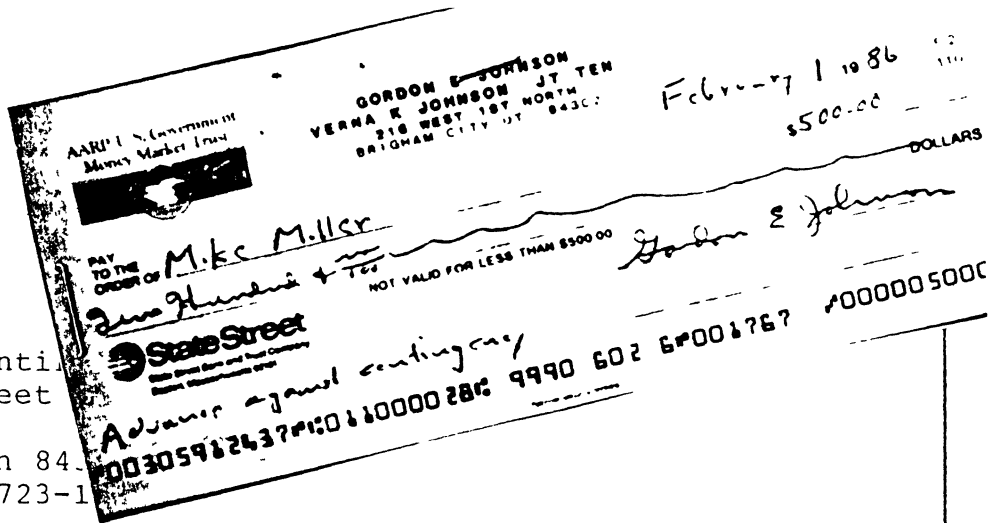
I hereby certify that on this 4th day of April, 1986  
I mailed a true and correct copy of the foregoing ORDER, postage  
prepaid to the following:

Michael L. Miller, Esq.  
29 South Main Street  
P.O. Box U  
Brigham City, UT 84302

  
Mary Mylonakis

Michael L. Miller  
Attorney at Law  
20 So. Main  
P.O. Box 399  
Brigham City, Ut  
84302  
(801) 723-1784

MICHAEL L. MILLER  
Attorney for Plaintiff  
20 South Main Street  
P.O. Box 399  
Brigham City, Utah 84302  
Telephone: (801) 723-1784



IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY  
STATE OF UTAH

GORDON E. JOHNSON and  
VERNA K. JOHNSON,

) WITHDRAWAL OF COUNSEL  
Plaintiffs,

vs.

DAVID R. BUSH,

) Civil No. 1-37320  
Defendant. ) Judge Douglas L. Cornaby

COMES NOW MICHAEL L. MILLER, attorney of record for the  
Plaintiffs abovenamed and does hereby withdraw as attorney for the  
Plaintiffs upon the grounds and for the reasons that Plaintiffs  
have \* failed to cooperate with counsel.

The address of the Plaintiffs is 216 West 100 North, Brigham  
City, Utah 84302.

DATED this 13<sup>th</sup> day of March, 1987.

Michael L. Miller  
Attorney for Plaintiffs

\* Refused ludicrous \$5,000 settlement offer,  
we wanted jury to determine damages!

# MICHAEL L. MILLER

ATTORNEY AT LAW

20 South Main Street  
P.O. Box 399  
Brigham City, Utah 84302  
Tel. (801) 723-1784



March 31, 1987

Fee Arbitration Committee  
Utah State Bar Association  
425 East First South  
Salt Lake City, Utah 84111

Re: Fee Arbitration Claim, Gordon E. Johnson

Dear Committee Members,

I am in receipt of the petition of Gordon E. Johnson for arbitration of a fee dispute. Please be advised that I have already filed civil suit against Mr. Johnson in the First Circuit Court. I prefer at this time to have the matter resolved in this fashion rather than through arbitration. I am herewith returning the agreement to arbitrate, unsigned. My understanding is that the committee will hear the case regardless of whether I agree to have it binding. For the purpose of your hearing I am enclosing a statement of the nature, amount and basis of my claim. If there is anything further that I can provide, please let me know.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael L. Miller".

Michael L. Miller  
Attorney at Law

MLM/vt

Enclosure: Agreement to Arbitrate  
Statement of claim

STATE OF UTAH                    )  
                                      :SS  
COUNTY OF BOX ELDER)

The undersigned being first duly sworn does depose and state upon his oath that:

In approximately December of 1985, I received a phone call from Mr. Gordon E. Johnson in regard to representation in a civil matter pending in The Second District Court of Davis County. He indicated that he had been representing himself up to that point; but felt that he needed counsel to intercede in as much as he was facing dismissal of the matter for refusing to attend a deposition. I asked Mr. Johnson to send the documentation on the matter, including court pleadings and I would review the same. On December 4th I wrote Mr. Johnson a letter, a copy of which is attached. After receipt of the letter, Mr. Johnson called me and we spoke about the matter further. Mr. Johnson indicated that he would let me know if and when my representation was needed. On December 31st I received a letter from Mr. Johnson, a copy of which is attached. I responded to the letter with a letter dated January 10, 1986, a copy of which is attached. On February 4th I received a letter and a check from Mr. Johnson. A copy of the letter is attached. I did not ask for a \$500.00 retainer, nor did Mr. Johnson ever sign the attorney retainer agreement. My reason for claiming attorney's fees is not based on whether or not there was an agreement between Mr. Johnson and myself for a contingency fee. My reason is that Mr. Johnson by his actions, caused me to withdraw as his attorney, thereby depriving me of my opportunity to collect a contingent fee. My claim is that because of Mr. Johnson's bad faith in pursuing the action for which I was retained, he breeched any agreement that existed between us. I also feel that Mr. Johnson has no intention of ever actively pursuing a resolution of the case. He has stalled the matter at every turn and has gained the benefit of my services in the process. My claim is that he has been unjustly enriched by the value of my services on his behalf; and that I deserve compensation for these services. The basis of my claim that he acted in bad faith is set forth in detail below.

The basis of the case in the Second District Court was an auto accident in July of 1983. There is not an issue as to fault as the car in which Mr. Johnson was riding was rear ended. After taking the case I learned that Mr. Johnson had attempted to settle the matter through arbitration with his insurance company. When he was dissatisfied with the result, he filed suit against the driver. I also learned after the fact that Mr. Johnson was

originally represented by counsel. This attorney apparently withdrew after filing the initial pleadings and some discovery. I began investigating the matter to determine injuries, damages etc. Mr. Johnson was still trying to resist attending a deposition and I was attempting to establish a medical basis for his claim that he could not attend. I have included a number of documents which establish the events at this time in the proceeding and my efforts on his behalf. I was eventually able to avoid dismissal of the action. I also reviewed all of the medical evidence provided. I could find no basis for the injuries that Mr. Johnson was claiming. The only injury which could be documented was a broken rib, with a resultant arthrosis at the point of the break. All of the doctors statements indicate that this is the only injury and that it did not, nor does pose a significant problem to Mr. Johnson. The medical bills I could attribute to this injury were negligible, between \$100.00 and \$200.00. I have included copies of the doctors' reports. I informed Mr. Johnson of what the evidence showed as to injuries and damages and he repeatedly insisted that he would get me the evidence that he had injuries which were much more serious than the broken rib and the tied these injuries to his medical bills. My request to him was made several times, and each time he said he would get me the information. Each time a report came, it confirmed only the broken rib and nothing further. I have attached copies of the correspondence in this time period. In addition, I spoke with Mr. Johnson on the phone several times. On each occasion I attempted to explain to him my position that he could not justify his claims based on the evidence that I had seen. I attempted to get him to focus on the injury to his rib and to forget about the other phantom injuries he kept insisting he could prove. I also attempted to get him to tell me what he wanted in the way of a settlement. He stated that no amount would be enough to compensate him.

Mr. Johnson placed me in the position where I had to withdraw as his attorney. I could not in good conscious, nor as a practical concern for my credibility, continue to represent him in attempts to gain damages for injuries that he did not suffer as a result of the accident. I could not represent him in a bad faith or spurious claim. I also could not dissuade Mr. Johnson to accept the fact that only injury was the broken rib. I finally set a deadline, after which I would withdraw if one of three things did not happen, first I gave him one last chance to document his claims, second he could accept an offer of \$5,000.00 as settlement, or third he could make a counteroffer based on the injury to his rib. I called Mr. Johnson to get his decision and he said he would get back to me. When he did not get back to me, I called again, he informed me that he was arranging for another attorney to take over the case and asked me to wait for the substitution of counsel. I told him I would not and that I would

have to withdraw. I then spoke to the office of the bar counsel concerning whether or not I could bill him for my time. I was informed that I could if I spent the time and felt as I did that he had forced me to withdraw. I then sent him a bill for the time I could document spending on the case. Attached is a copy of this list.

In closing let me say that I sincerely wanted to help Mr. Johnson recover for what I believed were legitimate injuries. I became aware of his emotional problems and despite of this I attempted to represent his interests to the best of my ability. When it became clear that he was not going to abandon his claim to unjustifiable injuries I felt compelled by my professional responsibilities to withdraw. I believe that I was correct in this decision. Despite of Mr. Johnson's emotional problems, I believe that he has knowingly decided to continue a meritless claim and that his failure to pursue this matter in good faith has been with a clear understanding of what he was doing. He should not be allowed to continue this practice, and for this reason I have chosen to file suit to collect what I believe is my due. To not do so would be in my mind an injustice to me and to the system.

DATED this 15<sup>th</sup> day of April, 1987.

  
Michael L. Miller

Subscribed before me this 1<sup>st</sup> day of April, 1987.

  
Notary Public

residing Brigham City  
my commission expires July 3, 1990

BEFORE THE  
FEE ARBITRATION COMMITTEE  
UTAH STATE BAR

---

GORDON E. JOHNSON,	:	
	:	NOTICE OF DECISION
vs.	:	
	:	
MICHAEL L. MILLER, ESQ.	:	

---

The Petition of Gordon E. Johnson in the matter of his legal fee dispute with Michael L. Miller, came on regularly for hearing on Monday, July 21, 1987 at 5:30 p.m., at the offices of Prince, Yeates & Geldzahler, City Centre I, 9th Floor, 175 East 400 South, Salt Lake City, Utah, before the undersigned, comprising one of the Board of Arbitrators of the Fee Arbitration Committee of the Utah State Bar.

The parties having received Notice by certified mail not less than seven (7) days before the hearing submitting written response and electing not to appear at the hearing.

The Committee having carefully considered the petitions, having reviewed and considered the documents and responses of the parties, finds as follows:

1. Gordon E. Johnson retained Michael Miller under a contingent fee arrangement to represent him in a personal injury matter.

2. In February 1986, Mr. Johnson sent to Mr. Miller a check for \$500.00 as an advance against any contingent fee earned.

3. Mr. Miller accepted the check and continued to represent Mr. Johnson under the contingent fee arrangement.

4. It appears through a review of the documentation that the retainer agreement between the parties did not change during Mr. Miller's representation of Mr. Johnson and that the matter involving Mr. Johnson's injury was not settled or resolved through trial.

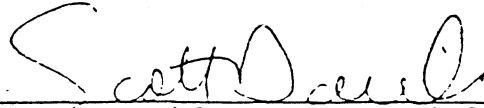
5. Pursuant to the contingent fee arrangement, except for reimbursement of costs and expenses, Mr. Miller would only receive payment upon a favorable ruling or settlement of this matter.

6. Based upon the foregoing it is the decision of the undersigned that the contingent fee arrangement in which Mr. Johnson and Mr. Miller based their attorney-client relationship restrained Mr. Miller from applying the \$500.00 to any charges except out of pocket costs and expenses.

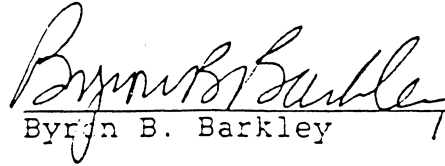
7. The Committee therefore awards Mr. Johnson the sum of \$500.00 less any sums which represent out of pocket costs or expenses expended by Mr. Miller in this matter.

DATED this 29<sup>th</sup> <sup>September</sup> day of July, 1987.

  
\_\_\_\_\_  
J. Randall Call



The Honorable Scott Daniels



Byron B. Barkley

0311n

FILED

OCT 16 1999

COURT OF APPEALS

1 Gordon E. Johnson  
216 West 1st North  
2 Brigham City, Utah 84302  
Tel. 801 723-3877

3 In Propria Persona

4 IN THE UTAH COURT OF APPEALS

5 MICHAEL L. MILLER,

6 Plaintiff/Cross-Defendant/Respondent, )

7 vs. )

No. 900409-GA

8 GORDON E. JOHNSON, )

Supplemental Brief

9 Defendant/Cross-Complainant/Appellant.)

10  
11 Credibility can be equated with consistency, and Attorney Miller testified  
12 of three amounts of the settlement offer he received for plaintiff in the under-  
13 lying case, \$7,500 in an affidavit to the trial court, \$8,500 in State Of Utah  
14 vs. Johnson "I took it to the point where they had made an offer of settlement,  
15 and withdrew at that point, and then he accepted the offer of set-  
16 tlement after I withdrew.

17 Q. Okay, in the same amount?

18 A. Yes."

19 And \$5,000 in his affidavit to the Utah State Bar Fee Arbitration Committee.

20 It is interesting to note that Mr. Miller did not mention Attorney Phillip  
21 M. Dyer who obtained the settlement offer after Mr. Miller had withdrawn. Thus,  
22 it appeared to Judge Parley R. Baldwin that Mr. Miller was cheated out of a fee.

23 There was no Fee Agreement tendered that appellant refused to sign, and the  
24 only reason Mr. Miller withdrew is because appellant, plaintiff in the underlying  
25 action, refused a \$5,000 settlement proposed by Mr. Miller. Please see his  
26 March 3, 1987 letter in the file in which he threatens to quit unless the offer  
27 is accepted.

28 Appellant made a motion to have his cross-complaint transferred to District

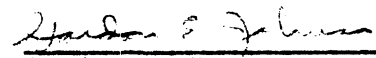
Court after he was legally harassed, did six days in jail, had about \$2,000 of expenses as a result of Mr. Miller surreptitiously taking a default judgment.

The trial court could have ruled on this motion as it did not allege malicious prosecution but an abuse of process, i.e. Mr. Miller taking a default judgment while there was an "appropriate responsive" pleading on file. See the opinion in 8800324-CA.

Restatement, Torts #682 (1938) reads: "One who uses legal process whether civil or criminal, against another to accomplish a purpose for which it is not intended is liable to the other for the pecuniary loss caused thereby." Also, see Comment 2 thereunder and Declaration of Costs on Appeal which is attributable to said Abuse of Process. It wasn't necessary to wait for the conclusion of the trial.

Dated October 13, 1990 at Brigham City, Utah

Respectfully Submitted

  
Gordon E. Johnson

Proof Of Service By Mail

I hereby certify or declare under penalty of perjury that on October 13, 1990 I mailed a copy of the foregoing to Michael L. Miller, Attorney At Law, 20 South Main Street, Brigham City, Utah 84302

