

1990

Lochhead v. Jordan : Brief of Appellant

Utah Supreme Court

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Frederick N. Green; Green & Berry; Attorney for Respondent.

Robert H. Wilde; Robert H. Wilde, Attorney at Law, P.C.; Attorney for Appellants.

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DOCKET NO. ROBERT H. WILDE, USB # 3466
ROBERT H. WILDE, ATTORNEY AT LAW, P.C.
Attorney for Appellants
6925 Union Park Center, Suite 490
Midvale, Utah 84047
Telephone: (801) 255-6000

IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL R. LOCHHEAD and
PENNY LOCHHEAD,

Plaintiffs/Appellants,

vs.

STEPHEN C. JORDAN,

Defendant/Respondent.

Case No. 890536

90-0140-

APPELLANTS' BRIEF

ON APPEAL FROM THE THIRD DISTRICT COURT

Honorable Pat B. Brian, District Court Judge, presiding

FREDERICK N. GREEN
GREEN & BERRY
30 Exchange Place, Suite 528
Salt Lake City, Utah 84111
Telephone (801) 363-5650
Attorney for Respondent

ROBERT H. WILDE
ROBERT H. WILDE
ATTORNEY AT LAW, P.C.
6925 Union Park Center
Suite 490
Midvale, Utah 84047
Telephone: (801) 255-6000
Attorney for Appellants

F

FEB 20 1990

Clerk, Supreme Court, Utah

ROBERT H. WILDE, USB # 3466
ROBERT H. WILDE, ATTORNEY AT LAW, P.C.
Attorney for Appellants
6925 Union Park Center, Suite 490
Midvale, Utah 84047
Telephone: (801) 255-6000

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FREDERICK N. GREEN
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30 Exchange Place, Suite 528
Salt Lake City, Utah 84111
Telephone (801) 363-5650
Attorney for Respondent

ROBERT H. WILDE
ROBERT H. WILDE
ATTORNEY AT LAW, P.C.
6925 Union Park Center
Suite 490
Midvale, Utah 84047
Telephone: (801) 255-6000
Attorney for Appellants

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ROBERT H. WILDE, USB # 3466
ROBERT H. WILDE, ATTORNEY AT LAW, P.C.
Attorney for Plaintiffs
6925 Union Park Center, Suite 490
Midvale, Utah 84047
Telephone: (801) 255-6000

IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL R. LOCHHEAD and)	
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Plaintiffs/Appellant,)	APPELLANTS' BRIEF
)	
vs.)	
)	Case No. 890536
STEPHEN C. JORDAN,)	
)	
Defendant/Respondent.)	

JURISDICTIONAL STATEMENT AND CASE HISTORY

Jurisdiction in this matter is vested in this court by Article VIII, Section 4 of the Utah Constitution and Utah Code Annotated 78-2-2(3). This is an appeal from an Order of the Honorable Pat B. Brian of the Third Judicial District Court of the State of Utah, denying the Plaintiff's Motion to Vacate an Order of Dismissal.

STATEMENT OF ISSUES ON APPEAL

The Trial Court erred in rewriting the parties' contract and refusing to vacate the dismissal.

STATEMENT OF THE CASE

The Plaintiffs/Appellants, Mr. and Mrs. Lochhead, sold property to the Defendant, Jordan. The obligation was secured by a Trust Deed. When the secured property

was sold, Jordan managed to have the property released without paying Lochheads, R 2, 21 file C87-3596¹. The balance owed was in excess of \$20,000.00. R 154, page 4, 7.

Following compliance with the provisions of the Utah Trust Deed Statute, a Trustees sale was held on March 31, 1987. The Trustee's Deed issued on May 27 of the same year. On May 28, Case No. C87-3596 was filed seeking a deficiency under the Trust Deed Statute. At some point thereafter personnel in both the Plaintiffs' and the Defendant's counsel's offices became confused on the civil numbers and pleadings relating to the 1987 case were filed with the 1985 number. The two cases were consolidated by an Order of the court dated November 21, 1989. R 36 file 87-3596.

Lochheads asked for a deficiency of \$20,524.00 plus attorney's fees and interest at the contractual rate of 12.5 percent from June 15, 1984, R2 file C87-3596. The accrued interest on the principal as of November 1989, the month of the hearing, was \$13,896.46 for a total balance of principal and interest of \$34,420.46.

¹ All citations to the record are to file number C85-8354 unless otherwise specified.

While the litigation was pending Jordan filed a Chapter 13 in Phoenix, Arizona. R 134, 45. Lochheads were advised by Jordan's bankruptcy counsel that the allocation of assets based upon the debts listed would pay them less than \$7,400.00, R 154, pg. 4, R 120, 92, and \$7,000.00 was offered to resolve the matter.

After negotiations Lochheads agreed to take \$8,000.00, R 123. Jordan moved the bankruptcy court to authorize the settlement but the motion was denied, R 147, 133. Thereafter Jordan dismissed the bankruptcy and demanded that Lochheads settle on the previous terms, R 137. Lochheads responded that the \$8,000.00 settlement offer had been made with the understanding that they would receive the money in relatively short order which had not occurred, R 105. If they were to settle they would need interest at Utah's statutory rate on the settlement amount, R 138. Jordan declined and moved to reopen the bankruptcy in order to enforce the supposed settlement, R 113. That Motion was also denied. In that order Lochheads learned that Jordan had misrepresented his available assets to them, R 147. Further negotiations ensued and Lochheads advised Jordan that they would settle for \$8,000.00 if the sum could be received within ten

days, R 139, 118. Lochhead's counsel prepared a stipulation and order of dismissal which were given to and signed by Jordan's Salt Lake counsel on Jordan's behalf, R 120, 51, 50. The Third District Court matter had been dismissed based upon a Stipulation between the parties as part of the settlement, R 154 p. 4-6. More than a month later Lochheads advised Jordan that the money had not been paid and that they were proceeding to reopen the matter in the Third District Court, R 140.

Lochheads moved Third District Court to vacate the Order of Dismissal based upon Jordan's failure to comply with the terms of the settlement agreement, R 53. Judge Brian heard oral argument on the matter and ruled essentially that the only thing involved was the additional interest claimed by the Lochheads and that they should be paid that sum in addition to the \$8,000.00 forthwith. If they were so paid the matter would remain dismissed, R 127, R 154 pg. 14. The Lochheads appealed.

SUMMARY OF ARGUMENT

This matter should be reviewed de novo.

An executory accord does not produce a satisfaction of the underlying agreement unless the terms of the accords are met.

When parties enter into a contract with specific terms the Court may not rewrite that agreement on terms it deems to be just.

A party to a contract is entitled to rely upon factual statements made by the other party.

ARGUMENT

I.

THIS COURT SHOULD EXAMINE THE EVIDENCE
AND REVIEW DE NOVO.

Lochheads Motion to Vacate the Order of Dismissal was heard pursuant to Rule 4-501 of the Code of Judicial Administration. At the hearing the court reviewed affidavits describing the history of negotiations between the parties. No testimony was taken. In other words all the evidence relied upon by the trial court is in the record before this court.. All argument was on the record.

This case is in the same posture before the Appellate Court as was Bench v. Bechtel Civil & Minerals, Inc., 758 P.2d 460, 461 (Utah App. 1988). There the court said,

"Because the trial court made its determination based solely upon Bench's deposition, proffers and the pleadings, it had no opportunity to evaluate the credibility of witnesses. Thus, this Court on appellate review, has as good an

opportunity as the trial court to examine the evidence and may review the facts de novo."

This is an appropriate standard of review because there were no findings of fact made by the trial court and this court gives no deference to legal conclusions but only reviews them for correctness, Cove View Excavating & Const. v. Flynn, 758 P.2d 474, 477 (Utah App. 1988).

II.

THE SETTLEMENT AGREEMENT WAS A CONTRACT JORDAN BREACHED.

The history in the affidavits before the trial court shows a lengthy set of negotiations culminated by a letter from Lochheads counsel offering to settle the matter on specific terms, R. 118, 129. These negotiations and the offer to settle should be analyzed in accordance with the rules applied to general contract actions, Butcher v. Gilroy, 744 P.2d 311, 312 (Utah App. 1987).

The language of this offer was specific,

"The Lochheads had [sic] reconsidered and are willing to except [sic] the amount of \$8,000.00 for settlement of the above matter if that amount it [sic] received within the next ten (10) days."

The letter, typographical errors notwithstanding, expressed an offer to settle for a specified amount within a specified time. The offer was accepted, as admitted by

Mr. Jordan's Arizona counsel, R 120, by requesting a dismissal of the action pending in Salt Lake. No request was made for an extension of time beyond the 10 days in the Lochheads' August 1 letter. The signed stipulation and the order of dismissal were delivered to Jordan's Utah counsel was signed by him on August 7. Jordan's Utah counsel's name and telephone number appear on Arizona counsel's copy of the August 1 letter.

The terms of the settlement contract were:

1. Payment of \$8,000.00;
2. Within ten days; and
3. Dismissal of the action.

Terms one and three were met. Term two was not.

The court below felt it appropriate to engraft his own standard of reason onto this contract some three months after it had been reached and breached. The transcript of the hearing displays his thinking and attitude, R 154, Pgs. 8, 11-23.

This court has previously held that judicial modification of a stated performance time in a contract is plain error. In Watson v. Hatch, 728 P.2d 989, 990 (Utah 1986) Justice Durham said, writing for the court:

"When a contract specifically states the time for its performance, it is plain error to allow it to be performed within a

reasonable time. A court may allow a contract to be performed within a reasonable time only when the contract is silent as to the time for its performance. In Bradford v. Alvey & Sons, 621, P.2d 1240, 1242 (Utah 1980), we stated: "[W]hen a provision in a contract requires an act to be performed without specifying the time, the law implies that it is to be done within a reasonable time under the circumstances.' The contract at issue here is explicit in its time for performance and leaves no room for other interpretations."

The language here is as clear as it was in Watson, ". . . if that amount [is] received within the next ten (10) days." Despite having been cited to rule of law in Watson, R 154 page 13, the trial court chose to reform the contract.

III.

THE SETTLEMENT AGREEMENT WAS AN EXECUTORY ACCORD.

Lochheads underlying claims against Jordan exceed \$30,000.00. The negotiations between the parties were intended to compromise all claims in exchange for payment as an accord and satisfaction. The mere creation of an executory accord does not result in satisfaction or discharge of the underlying claim.

The situation here is strikingly similar to that in L & A Drywall, Inc. v Whitmore Const. Co., Inc., 608 P.2d 626, 629 (Utah 1980) where Justice Hall held,

"It is true that, where an alleged breach of an agreement or compromise and settlement occurs, the aggrieved party need not file a separate action to seek judicial relief, but may proceed by a simple motion made as a part of the original action on the underlying dispute. It is likewise true that an agreement of compromise and settlement in a legal dispute constitutes an executory accord. As such, a party to the agreement aggrieved by an alleged breach thereof by the other party has the option of seeking to enforce the settlement agreement, or regarding the agreement as rescinded and moving against the other party on the underlying claim."

Lochheads clearly opted to rescind the breached executory accord and proceed on their original claims for breach of the Real Estate Contract.

Despite having this argument presented to him, R154 page 17, the trial court maintained that all that was at issue was the interest on the amount subject to the executory accord.

IV.

JORDAN'S MISREPRESENTATION IS SUFFICIENT,
BY ITSELF, TO VACATE THE SETTLEMENT
AGREEMENT.

Very early in the negotiations Jordan's Arizona counsel represented that Jordan's assets would only support a recovery, in the Chapter 13 Bankruptcy of \$7,400.00, R 92-93. A year and a half later the Arizona Bankruptcy Court denied Jordan's motion to reinstate his Bankruptcy

because of the existence of "substantial additional assets"
R 146-147.

When the issue of misrepresentation was raised with the trial court, R 154 pg. 18, he responded that Lochheads had a duty to investigate Jordan's counsel's representation, R 154 pg. 18.

The trial court's position on this point is directly in conflict with Utah Law. In Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980) this court held that one party had no duty to investigate the facts surrounding a representation by another party as to the extent of his assets, see also Christenson v. Com. Land Title Ins. Co., 666 P.2d 302, 307 (Utah 1983). In this case the representations were the sworn statements of the debtor, Jordan, in his bankruptcy schedules.

Even if the settlement agreement were not an executory accord Jordan's misrepresentation is sufficient to rescind the agreement and vacate the dismissal.

V.

RULE 60 REQUIRES THAT THE ORDER
OF DISMISSAL BE VACATED.

The trial court's order denying Lochheads Motion to Vacate the Order of Dismissal is a final appealable order, Amica Mutual Insurance Co. v. Schettler, 100 Utah Adv. Rep. 17 (Utah App. 89).

Rule 60(b) contains seven sub parts. Jordan's actions require the court to consider subparts 3 and 7.

Part 3 authorizes the vacation of the order for fraud, misrepresentation or misconduct of the adverse party. Jordan's representation as to his assets subject to the Chapter 13 require vacation of the order since the settlement agreement upon which the order was based was based on that misrepresentation. Additionally, Jordan's failure to follow through with the terms of the settlement agreement is a breach of that agreement constituting misconduct by a party.

In the event the court determines that Jordan's actions do not meet the criteria of Rule 60(b)(3), Rule 60(b)(7) requires that the order be vacated. The case was dismissed in reliance upon Jordan's performance which did not occur.

In Robinson v. Myers, 599 P.2d 513, 515 (Utah 1979) this court suggested that on a Rule 60(b) motion the appropriate inquiry is why a party failed to respond. In this case the reason is that the opposing party breached a contract. The consideration for that contract was the dismissal of this case. Having breached he is not entitled to retain his consideration, dismissal of the suit.

In Haner v. Haner, 373 P.2d 577, 578 (Utah 1962) this court described the rule for considering Rule 60(b) motions:

"It seems more realistic to say that when it appears that the processes of justice have been so completely thwarted or distorted as to persuade the court that in fairness and good conscience the judgment should not be permitted to stand, relief should be granted."

By the Haner standard the dismissal below should be vacated.


CONCLUSION

The preamble to Rule 60(b) refers to its purpose ". . . in the furtherance of justice" The record shows that Jordan evaded Lochheads security interest and breached his contract with them. He failed to respond or appear when the trust deed was foreclosed. Once he was served he evaded the issues. When the matter was pressed he filed bankruptcy. From within bankruptcy he attempted to negotiate a settlement which the court would not let him keep.

Literally years after Jordan commenced his shenanigans the Lochheads said, one last time, we will settle this matter if you settle it now. Jordan failed to meet the terms of this agreement, as he had with past

agreements, and the Lochheads said enough is enough. They are entitled to pursue their initial claim and this court should direct the trial court to allow them to do so.

DATED this 16 day of February, 1990.


ROBERT H. WILDE
Attorney for Appellants

ATTACHMENTS

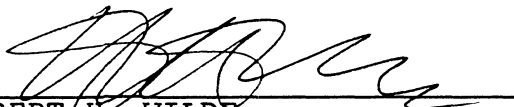
Minute Entry of November 16, 1989
Order of November 22, 1989
Transcript of Hearing

CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the foregoing APPELLANT'S BRIEF to be deposited in the United States Mail, postage prepaid, to:

Frederick N. Green
GREEN & BERRY
Attorneys for Respondent
10 Exchange Place, Suite 528
Salt Lake City, Utah 84111

on this 16 day of February, 1990.


ROBERT H. WILDE

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

LOCHHEAD, PAUL R	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 850908354 CV
	:	DATE 11/16/89
VS	:	HONORABLE PAT B BRIAN
	:	COURT REPORTER BRAD YOUNG
JORDAN, STEPHEN C	:	COURT CLERK EHM
DEFENDANT	:	

TYPE OF HEARING: HEARING
PRESENT: PLAINTIFF DEFENDANT

P. ATTY. ROBERT H. WILDE
D. ATTY. FREDERICK N. GREEN

THIS MATTER COMES NOW BEFORE THE COURT FOR HEARING ON PLAINTIFFS
MOTION TO VACATE. APPEARANCES AS SHOWN ABOVE. MOTION IS ARGUED
AND SUBMITTED TO THE COURT. THE COURT RULES AS FOLLOWS:

MOTION TO VACATE IS DENIED. COURT ORDERS COUNSEL FOR THE
DEFENDANT TO OBTAIN \$8,000.00 ON OR BEFORE NOVEMBER 20,
1989 @5:00 P.M. COUNSEL FOR THE DEFENDANT WILL HAND CARRY
THE CHECK TO COUNSEL FOR THE PLAINTIFF.
INTEREST WILL BE CALCULATED AT THE LEGAL RATE FROM AUGUST
10, 1989 THRU OCTOBER 20, 1989. CHECK FOR THE INTEREST
SHOULD BE HAND DELIVERED BY COUNSEL FOR THE DEFENDANT TO
COUNSEL FOR THE PLAINTIFF BY NOVEMBER 20, 1989 @ 5:00 P.M.
COUNSEL FOR THE DEFENDANT WILL PREPARE THE ORDER BY 11-22-89.

GREEN & BERRY
FREDERICK N. GREEN (1240)
Attorneys for Defendant
528 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

NOV 22 1989

S, *E. J. HANVON*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PAUL R. LOCHHEAD and
PENNY LOCHHEAD,

ORDER

Plaintiffs,

vs.

Civil No. C85-8354

STEPHEN C. JORDAN,

Judge Richard H. Moffat

Defendant.

The above-entitled matter having come on regularly for hearing before the Honorable Judge Pat B. Brian, on the 16th day of November, 1989, the parties being represented by their counsel of record, and the matter having been argued and submitted to the Court for decision, and good cause otherwise appearing it is, hereby,

ORDERED, ADJUDGED AND DECREED, as follows:

1. That Plaintiffs' Motion to Vacate Order is, and is hereby, denied.

2. That Defendant shall, through his counsel of record, cause to be hand delivered to Plaintiffs' counsel, the following:

(a) A check in the amount of \$8000 payable to the Plaintiffs; and

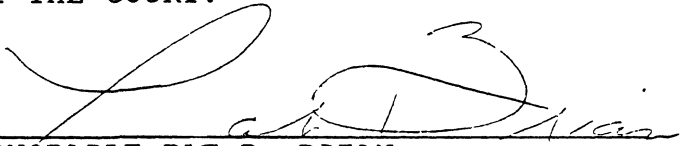
(b) A check representing legal interest from August 10 until November 20, 1989 in the amount of \$268.26.

3. That both checks referred to above shall be certified and shall be delivered no later than 5:00 p.m. November 20, 1989.

4. That Defendant's counsel is directed to prepare this Order and submit it to the Court no later than 12:00 noon, November 22, 1989.

DATED THIS 22^{AB} day of November, 1989.

BY THE COURT:


HONORABLE PAT B. BRIAN
DISTRICT COURT JUDGE

Approved as to form:

HH Miles

STATE OF UTAH)
)
) :ss
COUNTY OF SALT LAKE)
)

That she is employed in the offices of GREEN & BERRY,
attorneys for Defendant herein, that she served the attached
Order upon the following parties by placing a true and correct
copy thereof in an envelope addressed to:

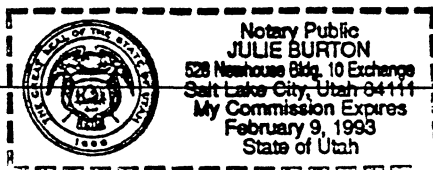
and depositing the same, sealed, with first class postage prepaid therein, in the United States Mail at Salt Lake City, Utah on the 20 day of November, 1989.

Mary C. Wardell

My Commission Expires:

Julie Burton

Notary Public
Residing in Salt Lake
County, State of Utah



COPY

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

* * *

PAUL R. LOCHHEAD and
PENNY LOCHHEAD,

Plaintiffs,

-vs-

STEPHEN C. JORDAN,

Defendant.

:
:
:
: Case No. C85-8354
:
: Honorable Pat B. Brian
:
: COURT PROCEEDINGS
:
:

* * *

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Salt Lake City, Utah

November 16, 1989

* * *

A P P E A R A N C E S

For the Plaintiffs: Robert H. Wilde
6925 Union Park Center, Suite 490
Midvale, Utah 84047

For the Defendant: Frederick N. Green
528 Newhouse Building
Salt Lake City, Utah 84111



BRAD J. YOUNG
OFFICIAL COURT REPORTER

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P R O C E E D I N G S

THE COURT: Paul R. Lochhead and Penny Lochhead vs. Stephen Jordan, C85-8354. Counsel will state an appearance.

MR. WILDE: Robert Wilde for the plaintiffs, your Honor.

MR. GREEN: Frederick N. Green appearing for the defendant.

THE COURT: To begin the hearing, the Court is going to read a letter dated October 2, authored by Mr. Green, to the judge of this court. "The plaintiffs have brought a motion to vacate an order, based upon a stipulation of the parties. Because the motion did not cite its compliance to rule 4-501, nor apparently contain a memorandum in support thereof, the defendants objected. The objection was in reply to the motion. The plaintiffs have since replied to the objection and filed a notice to submit and proposed order. The defendant objects to this and the objection is enclosed. As you can see, this is all very confusing. I would suggest the entire matter be scheduled for oral argument so we can sort this out and see where everybody stands prior to any more memoranda being filed. Sincerely, Frederick N. Green."

The Court has two questions. Was a motion to vacate agreed upon by the parties?

MR. GREEN: There has been no stipulation to vacate the order, your Honor.

1 MR. WILDE: No, there has been no agreement to
2 vacate.

3 THE COURT: The plaintiffs have brought a motion to
4 vacate an order based on a stipulation of the parties. What
5 was the stipulation?

6 MR. GREEN: That's confusing. The stipulation was
7 to settle the case. Based upon that stipulation an order of
8 dismissal was entered. They have now brought a motion to
9 vacate the order of dismissal. There is no stipulation to
10 vacate that order.

11 MR. WILDE: I don't believe that the letter
12 correctly states the status of the case.

13 THE COURT: Somebody ought to explain to the Court
14 what's going on.

15 MR. WILDE: Perhaps I could do that. The Court, on
16 the phone yesterday, indicated that it would be willing to
17 consider whatever additional information we wished to provide.
18 If I may approach the bench.

19 THE COURT: You may.

20 MR. WILDE: I prepared an affidavit, which covers
21 correspondence between myself and my counterpart in Arizona,
22 and also the attorney who was employed by my client in Arizona
23 in the bankruptcy. Also, we have included -- provided the
24 Court a copy of the order of September 1, 1989, in the
25 bankruptcy in Arizona, denying the motion to reopen the

1 bankruptcy, and a copy of the case of Watson vs. Hatch.

2 Essentially, what happened in this case, my clients
3 have a claim against the defendant, dating back to I believe
4 about 1985, 1986, in the amount of \$23,000, for a deficiency
5 on a trust deed note. The defendant managed to get the
6 property that that note secured released, without paying it,
7 and declined to pay thereafter, and we filed suit. Litigation
8 ensued. Mr. Jordan moved to Arizona and filed a chapter 13.

9 The Court will look at the first exhibit of the
10 affidavit, that's a letter from Mr. Newdelmon, who is
11 Mr. Jordan's attorney in Arizona, and there he states that the
12 \$8,000 offer he is making is more than my clients are going to
13 be able to get out of the chapter 13 bankruptcy. And based
14 upon those representations, settlement negotiations got
15 underway.

16 This offer, as the Court can see, was made in April
17 of 1988. Negotiations continued, and sometime, my
18 understanding, is in the summer of 1988 there was an
19 acceptance by my client of the offer to settle for \$8,000,
20 understanding on my client's part the sum would be paid in
21 fairly short order.

22 Exhibit 2 is a letter that I wrote back to
23 Mr. Hendricksen, and discussed the fact that we talked about
24 getting this \$8,000, and we thought we were going to get it
25 fairly quickly. Notice, this letter is in February of 1989.

1 We are looking eight or nine months later. We agree that we
2 had agreed at that particular time to do that.

3 Exhibit 3, however, is a letter from Mr. Hendricksen
4 back to me, saying that the proposal had been submitted to the
5 bankruptcy court, and the bankruptcy court, who had
6 Mr. Jordan's bankruptcy before it, his chapter 13, had
7 declined to allow that settlement to be made. It seems to us
8 fairly clear that at that point in time there was no more
9 settlement, because the bankruptcy court had jurisdiction over
10 Mr. Jordan and they declined to allow him to settle in that
11 fashion.

12 Look over to Exhibit 4, that's a letter from
13 Mr. Newdelmon, the defendant's Arizona counsel, back to me.
14 They still want to go through with the matter, and they want
15 us to settle it for the \$8,000.

16 Exhibit 5, we said no, we don't think that is fair.
17 We want interest. We understood we were going to be able to
18 settle, get the money fairly quickly. That has happened, so
19 we are going to settle for \$800, which is statutory 10-percent
20 interest on the \$8,000.

21 Exhibit 6 is a letter back to me.

22 Exhibit 7, these two letters essentially show that
23 we continued to dicker, to continue to negotiate the matter.

24 Exhibit 8 is my letter to Mr. Newdelmon of August 1.
25 I think this is probably the important letter. There I say to

1 Mr. Newdelman, "The Lochheads have reconsidered and are
2 willing to accept the amount of \$8,000 for settlement of the
3 above matter if that amount is received within the next ten
4 days." That language is specific. It constitutes probably
5 full 20 percent of the entire contents of the letter. We
6 said, yes, we will settle for \$8,000 if we can get it within
7 the next ten days.

8 We then prepared the stipulation and order of
9 dismissal, submitted them to Mr. Green before August 10, and
10 Mr. Green endorsed them. They were then submitted to the
11 Court. Exhibit 9 is our letter back to Mr. Newdelman
12 September 6, almost a month later, saying, We told you on
13 August 1 we are willing to settle if we can get the money
14 within ten days. The money hasn't come. Obviously, the offer
15 is withdrawn.

16 Exhibit 10 is his letter back to me, where he
17 acknowledges that, yes, there was a deal for \$8,000. No, you
18 don't have it. He says the cashier's check was available and
19 whatever. There is no correspondence. I had no information
20 whatsoever that he needed to have the signed dismissal in his
21 office in Arizona. I am not certain what good that would do,
22 because Mr. Jordan has counsel here in Utah, Mr. Green, who
23 signed the stipulation, and the dismissal needs to be filed
24 here.

25 That's exactly what happened, and that's how the

1 case got dismissed, and we are back here today, and we filed
2 our motion to vacate on the grounds that we dismissed this
3 action based upon the assumption that they were going to
4 comply with the offer we had made to them. The offer was we
5 will be paid \$8,000 within ten days. That did not happen. I
6 note that they were not out anxiously knocking at our door.

7 I would comment to the Court that a fair amount of
8 the correspondence between Mr. Newdelman and myself has been
9 telefaxed to my office by Mr. Newdelman. Notably, the
10 assertion that we have to have the dismissal sent to my
11 office, all of those things, no correspondence whatsoever.
12 All we have is an affidavit from Mr. Newdelman's secretary,
13 saying she spoke with my secretary. We have a counter-
14 affidavit from my secretary, saying the affidavit she states,
15 it is not how things were.

16 THE COURT: The question the Court has to ask -- and
17 excuse the Court if the question is impertinent. Are counsel
18 and the parties willing to do all of this for \$800?

19 MR. WILDE: We don't see that \$800 is the issue,
20 your Honor.

21 THE COURT: What is the issue?

22 MR. WILDE: The issue is \$23,000 plus interest at
23 10 percent since 1985.

24 THE COURT: You have agreed, have you not, to
25 dismiss the case in receipt of \$8,000?

1 MR. WILDE: We agreed to dismiss the case in receipt
2 of \$8,000 if it was paid within ten days. That's the
3 reason --

4 THE COURT: Just a moment. Your agreement at one
5 time, knowing everything that apparently you thought was
6 necessary to know about the case, you agreed to dismiss it for
7 \$8,000; is that correct?

8 MR. WILDE: At that time. That's the reason we
9 provided the Court the copy of the order from bankruptcy
10 court.

11 THE COURT: As recent as August 1 of 1989, you were
12 still willing, in light of all of the information you had
13 about the case, to dismiss it for \$8,000; is that correct?

14 MR. WILDE: If it was received within ten days.

15 THE COURT: Apparently, all the Court can do is just
16 read the correspondence, and assume that there was a
17 reasonable difference of opinion on what should come first,
18 the money or the dismissal. Traditionally, those matters are
19 exchanged simultaneously. If a settlement occurs, the moving
20 party agrees to dismiss, there is a dismissal order filed, the
21 money is paid, dismissal order is recorded, and it is over.
22 The Court notes that in September, less than 30 days after you
23 wrote your letter, the money was deposited in a form of a
24 cashier's check, and the only reason that the money was not
25 tendered is because the party was waiting for an order of

1 dismissal.

2 Now, if that's all this lawsuit is about, why don't
3 you sit down and resolve it?

4 MR. WILDE: May I respond?

5 THE COURT: The Court would be very interested in
6 your response.

7 MR. WILDE: First of all, the reason that we have
8 provided the Court with the order from the bankruptcy court is
9 because that order indicates that the information we had was
10 not the correct information.

11 THE COURT: Counsel, whose responsibility is that?

12 MR. WILDE: If they are going to mislead us, it is
13 their responsibility.

14 THE COURT: Isn't your responsibility to exercise
15 due diligence when you negotiate in behalf of a client, and
16 say, You tell us we are only going to get \$8,000 out of this
17 case. The truth of the matter is we might get \$80,000. Whose
18 responsibility is that? In the negotiation process doesn't
19 that occur every day in this city and in every city in the
20 United States?

21 A. I think that misses the point. The point is
22 Mr. Jordan had stated under oath, in the bankruptcy court in
23 Arizona, what his assets were. The bankruptcy court in
24 Arizona finds in its order that the schedules reflect
25 substantial additional assets.

1 THE COURT: What date is that order?

2 MR. WILDE: September 1 of 1989.

3 THE COURT: Are you saying that you now would not
4 have sent your letter of August 1, had you known that
5 information?

6 MR. WILDE: That's exactly what I am saying.

7 THE COURT: What was available to you, through the
8 bankruptcy court, prior to August 1, in terms of verifying or
9 disaffirming representations of opposing counsel and his
10 client?

11 MR. WILDE: What was available to us was available
12 through Mr. Hendricksen. The correspondence in this file
13 indicates numerous amounts of information. I believe there
14 is, under cover of an affidavit from Mr. Newdelman, a copy of
15 a letter back to me, where he acknowledges that the
16 representation that Mr. Lochhead had from Mr. Hendricksen in
17 Arizona was less than effective, and that Mr. Hendricksen was
18 not doing anything to further his interest. I believe the
19 point, however, is completely resolved by the case of Watson
20 vs. Hatch, because in order to reach the point that I see the
21 Court going at this point in time --

22 THE COURT: The Court is not going in any direction.
23 The Court is asking some very relevant questions, to clarify
24 in the Court's mind the history of the case.

25 MR. WILDE: Fine. Let's talk about the history of

1 the case as it relates to the August-September time frame.

2 THE COURT: That's a good starting point.

3 MR. WILDE: We have a letter to them, which says we
4 will take \$8,000 if the check can be received within ten days.

5 THE COURT: What was the date of the cashier's
6 check?

7 MR. WILDE: I don't know. The point is, it was not
8 received by us nor was it tendered to us.

9 THE COURT: The Court isn't sure that isn't the
10 point. Was there a cashier's check drawn, and did the date on
11 the cashier's check comply with your ten-day demand?

12 MR. WILDE: They say that it does.

13 THE COURT: Have you checked it out?

14 MR. WILDE: It was not tendered to us until
15 September.

16 THE COURT: Have you looked at the date on the
17 check?

18 MR. WILDE: I have looked at the date on the check.
19 Certainly, it was drawn within that time period.

20 THE COURT: Then it appears to the Court that the
21 only dispute existing between the parties is, should the check
22 have been given before the order of dismissal was filed? Is
23 the Court incorrect in its analysis?

24 MR. WILDE: I believe the Court is incorrect in its
25 analysis.

1 THE COURT: Then the Court would like to have you
2 point out where the Court's reasoning is incorrect.

3 MR. WILDE: The reason the reasoning is incorrect is
4 because if we use the Court's analysis that we need to provide
5 them the dismissal before we get the check, we provided them a
6 dismissal on the 7th of August, through Mr. Green, their
7 counsel, the person who represents them in this court, where
8 the case must be dismissed. So it is fair to assume, based
9 upon the fact Mr. Newdelman's affidavits and correspondence
10 have been introduced in this case, through Mr. Green, and
11 Mr. Green and Mr. Newdelman have some sort of communication
12 relating to their common client --

13 THE COURT: Based on the history of this case, the
14 Court is not sure that's a fair assumption.

15 MR. WILDE: I don't think I want, necessarily, to
16 get into the quality of representation or the missed messages
17 on either end of this arrangement. However, it is a fact that
18 on the 7th of August, we provided to Mr. Green, in Salt Lake
19 City, for his client, the stipulation and the order. The
20 stipulation and the order were entered here.

21 THE COURT: And filed. And the case was dismissed.
22 What did you do from that day forward?

23 MR. WILDE: We waited for the money.

24 THE COURT: Did you contact counsel and ask where
25 the check was?

1 MR. WILDE: No.

2 THE COURT: Why not?

3 MR. WILDE: Frankly, I had a number of other matters
4 in the office, and then I did contact counsel. I contacted
5 Mr. Newdelman, who I understood to be the man who had the
6 check. I contacted him, and that is the letter which serves
7 as Exhibit 9, my letter to him of September 6, which says, You
8 were supposed to get us a check within ten days. We don't
9 have the check. The case has been dismissed. It was done
10 within the time frame.

11 THE COURT: Did you pick up the telephone and call
12 Salt Lake counsel and say, Where is that \$8,000?

13 MR. WILDE: No.

14 THE COURT: Why not?

15 MR. WILDE: My understanding that the check, if it
16 were to come, was going to be coming from Arizona. All of the
17 affidavits, all of the correspondence filed in this action,
18 indicated that is correct and that is the case. I think the
19 case turns on Watson vs. Hatch, which says that the Court may
20 not read into a contract between parties a reasonable time for
21 performance where there is a specific time for performance set
22 in the contract. That's exactly what happened here.

23 THE COURT: The Court agrees with you, Counsel,
24 except it appears to the Court that performance was in fact
25 complied with when the certified check was drawn within the

1 ten days that you demanded. And a simple phone call would
2 have obtained the check, and another \$1,000 or \$1,500 in legal
3 fees and court costs and all of the problems that have
4 subsequently arisen would have been eliminated.

5 The Court is miffed, frankly, that legal disputes
6 digress to this level of whatever you want to call it. If the
7 parties had agreed to a disposition, and at least the
8 compliance was threshold compliance, you want your money, the
9 check is drawn, they say the check was not tendered because
10 they didn't have the notice of dismissal, it appears to the
11 Court that reasonable people would have picked up the phone
12 and said, Look, we filed the dismissal. Where is our money?
13 And the person on the other side would say, I drew that check
14 within the ten-day period of time. It is a certified check.
15 All I want is a copy of the dismissal. And counsel would have
16 said, Fax it to me, or send it overnight, certified mail,
17 return receipt requested, and the matter would have been
18 resolved.

19 Maybe the Court is just a little bit too practical
20 in its approach. That's just exactly the way the Court sees
21 it. Now we are back in court, it has been -- we are going on
22 five months, and, basically, what we are talking about is \$800
23 in disputed interest. That \$800 has been consumed two or
24 three times. Where is the certified check today?

25 MR. GREEN: It is in Arizona, your Honor. Counsel

1 retains it down there, Mr. Newdelman, but it could be
2 transferred overnight mail very easily.

3 THE COURT: Goodness sakes, I just don't know, you
4 know, if you were arguing about the fact that there had been a
5 major noncompliance with this agreement, the Court can
6 understand you going back to square one and starting over.
7 But, as the Court reads the correspondence between counsel,
8 there is a letter dated August 1 that says the plaintiffs have
9 reconsidered and are willing to accept the amount of \$8,000
10 for settlement of the above matter, if the amount is received
11 within the next ten days. The check should be made payable
12 solely to the Lochheads. According to your own
13 representation, a certified check was drawn within the ten-day
14 period, that amount of money, and the response back is, We
15 want a copy of the dismissal. When we receive the copy of the
16 dismissal, you can get your check. I don't know why a couple
17 of phone calls weren't made and that whole business taken care
18 of.

19 MR. WILDE: May I respond?

20 THE COURT: Please.

21 MR. WILDE: Thank you. First of all, the letter of
22 August 1 does not say provide us evidence that you have an
23 \$8,000 check. It says if the check is received, received
24 meaning received by us. We did what was necessary in order to
25 accomplish those things which were required. We provided the

1 stipulation and the dismissal to Salt Lake counsel, who were
2 the only people who could have anything to do with it, since
3 Mr. Newdelman, to my understanding, is not licensed to
4 practice in the State of Utah.

5 THE COURT: When you did that, did you ask Salt Lake
6 counsel for the \$8,000 check?

7 MR. WILDE: No. We understood the check was to be
8 coming from Arizona.

9 THE COURT: When it didn't come, did you ask Salt
10 Lake counsel to follow up and get you your \$8,000 check?

11 MR. WILDE: No. We understood it was to be coming
12 from Arizona.

13 Secondly, if the Court will examine the history of
14 the relationship in these -- between these parties, as I
15 indicated to the Court yesterday in the telephone conference,
16 this has been a long history of what we consider to be
17 dilatory tactics by Mr. Jordan, and his Arizona counsel and
18 his prior counsel.

19 THE COURT: It may well be true, exactly what you
20 say, everything may be true. At some point in time you were
21 willing to overlook that. As recent as August 1 you said, We
22 have reconsidered, and we are now willing to take it.
23 Irrespective of what may have run under the bridge prior to
24 August 1, you were willing to overlook it for \$8,000.

25 MR. WILDE: For \$8,000 and no more dilatory tactics,

1 for prompt payment. Additionally, we see this as a matter
2 that is accord and satisfaction. We have said we are willing
3 to resolve all of these past problems for the payment of
4 \$8,000 timely made. My understanding of the law of accord and
5 satisfaction is if the accord is not satisfied, then the
6 claiming party may either sue on the accord and satisfaction
7 or may ignore the accord and satisfaction and go back to the
8 original obligation, which is exactly what we have chosen to
9 do.

10 THE COURT: Technically, you may be correct. The
11 Court views it in just a little bit different light. The
12 Court believes that in all of the bump and grind of the
13 profession, there ought to be, someplace conspicuously visible
14 to everyone, some good judgment and common sense. The Court
15 believes that that ought to be common with everyone. What has
16 happened to what we call good judgment and common sense?

17 If the dismissal were tendered, as you say it was,
18 one phone call would have indicated that the check was not in
19 Salt Lake. Counsel in Salt Lake would have made a telephone
20 call. The check would have been sent. The matter would have
21 been resolved. If after demand it was not sent, then you have
22 nonperformance. But to have two counsel, who are representing
23 the same client, not let the left hand know what the right
24 hand is doing, and then use that as some basis to unwind an
25 agreement that was perfectly acceptable to you before, doesn't

1 make a lot of sense to the Court.

2 MR. WILDE: Your Honor, again, the other point here
3 is that the acceptable agreement was made before we were aware
4 that the representations we had received from Mr. Jordan,
5 based on the findings of the bankruptcy court, were apparently
6 inadequate or in error or misrepresented or whatever.

7 THE COURT: Counsel, the Court understands that.
8 The Court understands precisely what you are saying. Whose
9 responsibility is it to check out that kind of information?
10 You certainly believed that opposing counsel is going to
11 advance his client's cause in his client's best interest. He
12 is going to tell you, whether it is factual or actual, that he
13 believes if you go through a proceeding you are not going to
14 get \$8,000 out of the bankruptcy court, anyway. That's his
15 opinion. If you have a differing opinion on that, then you
16 ought to check it out.

17 MR. WILDE: We perceived this rather to be a matter
18 of factual misrepresentation by Mr. Jordan. Anyway, suffice
19 it to say, I believe we have presented the Court with our
20 arguments, and we will submit the matter.

21 THE COURT: Anything further?

22 MR. GREEN: Just very briefly, your Honor. Three
23 main points. Mr. Wilde says he is not aware of the
24 requirement of Mr. Newdelman, the Phoenix lawyer --

25 THE COURT: Let the Court bring you right to the

1 point on your argument. What does fairness in this situation
2 dictate, in terms of interest from the date the check was
3 drawn and not delivered, or in terms of compensating, if you
4 will, for expenses that may have been incurred in trying to
5 get the check? As long as the Court is focused this morning
6 on what is a reasonable approach to the resolution of the
7 problem, why don't you tell the Court what you think would be
8 fair and appropriate in terms of compensating the defendant
9 for \$8,000 that he agreed to receive and hasn't received since
10 August.

11 MR. GREEN: I believe what would be fair is for him
12 to receive that \$8,000 as quickly as possible.

13 THE COURT: What else?

14 MR. GREEN: I believe it would be reasonable and I
15 dare say for the defendant to be reimbursed for his costs
16 incurred in defending this motion to vacate. That's where I
17 need to get into some of the reasons for that.

18 THE COURT: What about the plaintiff being given the
19 legal rate of interest on his money? If the check had been in
20 the bank he would have been earning interest on the \$8,000
21 since the 10th of August, would he not? It is now the middle
22 of November.

23 MR. GREEN: Two points. The defendant didn't earn
24 interest on that money. That's in that cashier's check.
25 Point number two, we tendered those funds pursuant to the

1 tender statute late in September. Number three, it has been
2 available for the plaintiff all along, and we ought not to be
3 punished because of what they have done, delaying that
4 delivery of the funds. The defendant has been punished quite
5 enough, I assure you, with the expense and inconvenience of
6 this litigation.

7 THE COURT: You may proceed.

8 MR. GREEN: Regarding the requirement of the
9 defendant's counsel in Phoenix that he receive an order of
10 dismissal, I have just reviewed the file, probably as briefly
11 as the Court has, but May 24 of 1989, Mr. Newdelman says, We
12 will pay the \$8,000. The only requirement which I impose
13 would be a stipulation of dismissal with prejudice and a
14 mutual release. Prior to that, he says, this is February 6 of
15 1989, "You will need to obtain for me either a satisfaction of
16 judgment or a stipulation for dismissal with prejudice. In
17 turn, I will prepare a mutual release."

18 THE COURT: The Court assumes that all of that stuff
19 was resolved between the parties as of August 1, 1989.

20 MR. GREEN: I believe that's correct.

21 THE COURT: Let's go from August 1.

22 MR. GREEN: From August 1, it is significant that
23 the stipulation and the order say nothing about ten days.
24 That's what I signed. They rely upon contract law. Where is
25 the contract? It is a letter from Mr. Wilde, saying, We want

1 it in ten days; in response to which there is a letter from
2 Newdelman saying, You will get it when we get the dismissal.
3 I signed the stipulation. That's all I do at this point. I
4 haven't represented him effectively since the bankruptcy was
5 filed two years ago.

6 THE COURT: The Court is aware of that. The Court
7 understands that there has been some confusion. And the Court
8 is of the opinion that the confusion can be distributed
9 equally to all counsel and parties.

10 MR. GREEN: That's one reason I am telling you that.
11 I didn't know anything about ten days at any time. I was not
12 copied on the letter to Mr. Newdelman.

13 THE COURT: Did you receive a copy of the dismissal?

14 MR. GREEN: No. No. I signed the stipulation.
15 That's all I got. I signed approving as to form on the
16 dismissal.

17 THE COURT: At least you knew there was a
18 dismissal --

19 MR. GREEN: Absolutely.

20 THE COURT: What did you do about giving up the
21 \$8,000 after you --

22 MR. GREEN: I didn't have \$8,000. I didn't know
23 what the terms were they had arranged to make payment. A
24 phone call, granted, from Mr. Wilde or Mr. Newdelman would
25 have solved that problem. If I may approach the bench with

1 tender statute late in September. Number three, it has been
2 available for the plaintiff all along, and we ought not to be
3 punished because of what they have done, delaying that
4 delivery of the funds. The defendant has been punished quite
5 enough, I assure you, with the expense and inconvenience of
6 this litigation.

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23 the stipulation and the order say nothing about ten days.
24 That's what I signed. They rely upon contract law. Where is
25 the contract? It is a letter from Mr. Wilde, saying, We want

1 we offered them the money, and September 7 Mr. Newdelman sent
2 him a letter, in response to the September 6 letter from
3 Mr. Wilde, saying the money is here. We will send it, if we
4 have the dismissal. By that time he had received, just a day
5 before, the withdrawal of the settlement. I suppose what
6 would be fair would be to put one month's interest on there.
7 There was no confusion as of September 7. We knew right where
8 we stood. Interest ought not to be tacked on. Since
9 September 6 or 7, at least this matter could have been
10 resolved, defendants were willing to resolve it, and we are
11 here on the plaintiff's motion, and I think the Court has
12 correctly analyzed that. The other point I would make is the
13 business about the misrepresentation.

14 THE COURT: Is that really necessary to argue, based
15 on what the Court has indicated its assessment of the case?

16 MR. GREEN: I don't believe so, and I don't believe
17 it is before the Court. I would submit it on that basis.

18 THE COURT: Both parties submit?

19 MR. WILDE: We will submit it, your Honor.

20 THE COURT: What is the motion before the Court?

21 MR. WILDE: The motion before the Court is to vacate
22 the dismissal which was previously entered.

23 THE COURT: Any other motions?

24 MR. GREEN: None, your Honor.

25 THE COURT: Both counsel submit on all motions

1 some additional authority, which I think you will find
2 supports the Court's point of view.

3 Contrary to what Counsel says about accord and
4 satisfaction, the Court has ruled twice now. It is the same
5 policy. These cases involve the enforcement of a settlement
6 agreement. It is the same policy that governs here, where one
7 party seeks to avoid a settlement agreement, and vacate an
8 order. The Court has ruled. And I am referring to the Tracy
9 case, the parties trying to avoid the settlement claimed that
10 counsel for the other party had not timely filed some
11 documents that were necessary for the settlement.

12 The Court rules at the very end, the summary
13 procedure is admirably suited to situations where, for
14 example, a binding settlement bargain is conceded or shown,
15 which we have here, and the excuse for nonperformance, is
16 comparatively unsubstantial. On the other hand, it is ill-
17 suited to situations presenting complex factual situations.
18 If anything, Tracy is much more complex than the case we have
19 here. The case we have here says, what came first? Should we
20 deliver the \$8,000 or get the dismissal?

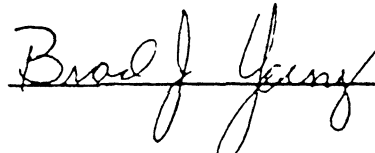
21 THE COURT: The Court is comfortable with its
22 assessment of the law, at this posture of the argument.

23 MR. GREEN: The only thing I would add, your Honor,
24 two points. In terms of fairness, it is my honest opinion
25 that the defendant has been penalized enough, especially where

C E R T I F I C A T E

I, BRAD J. YOUNG, hereby certify that on the 16th day of November, 1989, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Pat B. Brian and that the foregoing is a true and correct transcription of my stenographic notes thereof.

Dated at Salt Lake City, Utah, this 3rd day of December, 1989.

A handwritten signature in cursive script, reading "Brad J. Young", is written over a horizontal line.

BRAD J. YOUNG
OFFICIAL COURT REPORTER

1 before the Court?

2 MR. GREEN: Correct, your Honor.

3 MR. WILDE: We do.

4 THE COURT: The motion to vacate is denied. The
5 Court orders, as part of that denial, that counsel for the
6 defendant obtain \$8,000 in certified funds on or before
7 5:00 p.m., November 20, that that money, in certified funds,
8 be hand carried to counsel for the plaintiff. The Court
9 further orders that interest be calculated from August 10 to
10 November 20 at the legal rate, and that a certified check,
11 including interest at the legal rate for that period of time,
12 also be tendered to counsel for the plaintiff on or before
13 November 20, 1989, 5:00 p.m. The Court orders that counsel
14 for the defendant prepare an appropriate order, consistent
15 with the ruling of the Court. That order is to be submitted
16 to the Court on or before November 22, 1989, at 12 noon, for
17 signing and filing with the clerk. Is there anything further?

18 MR. WILDE: We don't have anything, your Honor.

19 MR. GREEN: Nothing, your Honor. Thank you.

20 (Court was in recess.)

21

22

23

24

25