

2011

Lamoreaux v. Black Diamond Holdings : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DAVID LEE LAMOREAUX,

Plaintiff/Appellant,

v.

BLACK DIAMOND HOLDINGS, LLC,

Defendant/Appellee.

Case No. 20110786-CA

Trial Case No. 080500885

BRIEF OF APPELLEE

Appeal from a Final Order of the Fifth Judicial District Court, in and for Washington
County, Trial Judge the Honorable Eric A. Ludlow

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FILED
UTAH APPELLATE COURTS

MAR 01 2012

ADDITIONAL PARTIES

Following stipulations of dismissal that preceded trial, there are no remaining additional parties to the action below.

IN THE UTAH COURT OF APPEALS

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I. STATEMENT OF JURISDICTION

The Utah Supreme Court had jurisdiction over this matter pursuant to Utah Code Ann. § 78A-3-102 (3)(j). The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-4-103 (2)(j).

II. STATEMENT OF ISSUES

Defendant-Appellee Black Diamond Holdings, LLC (“Defendant” or “Black Diamond”) accepts the Statement of Issues Presented for Review in the Opening Brief of Plaintiff-Appellant David Lee Lamoreaux (“Plaintiff”¹ or “Lamoreaux”), with the following addition.

Issue 7: Is Defendant entitled to an attorney’s fee award directed against Plaintiff’s counsel when Plaintiff’s counsel has raised an issue regarding his entitlement to a contingency fee (Issue No. 6, Opening Brief at 8) in a matter where he neither has standing to appeal nor has appropriately preserved the contingency-fee issue for appeal? This issue raises questions of law, including the interpretation of Utah Code Ann. §§ 38-2-7 and 78B-5-825. *See, e.g., Alliant Techsystems, Inc. v. Salt Lake Bd. of Equalization*, 2012 UT 4, ¶17, 700 Utah Adv. Rep. 89 (“interpretation of a statute is a question of law”) (citation omitted). As for the question of preservation, the actions taken by Plaintiff’s counsel to preserve his contingency-fee argument involve questions of fact. However, for both questions of fact and law, on this issue there is no decision by the trial court for

¹ Although David Lee Lamoreaux was no longer a party to the case as of the time of the final order dismissing the action below, and Black Diamond had been substituted in as party plaintiff, for convenience Black Diamond uses the term “Plaintiff” in describing Mr. Lamoreaux herein.

this Court to review. Rather, the only relevant decision by the trial court on the question of Mr. Park's contingency fee was the invitation by the court for counsel to further raise such issues in response to Defendant's Motion to Dismiss. *See* Memorandum Decision and Order Granting Defendant's Motion to Substitute in as Party Plaintiff ("Memorandum Decision") (Aug. 11, 2011) at 7-8, Record ("R.") 000618-26, a true and correct copy of which is attached hereto as Addendum Exhibit 2. Despite this invitation, Plaintiff's counsel failed to raise the contingency-fee argument in response to Defendant's Motion to Dismiss. *See* Objection to Motion to Dismiss and Request to Submit for Decision ("Objection") (Sept. 13, 2011), R. 000635-36, a true and correct copy of which is attached hereto as Addendum Exhibit 3.

III. DETERMINATIVE PROVISIONS

Statutes or rules that are or may be determinative or of central importance to this appeal are as follows, and are attached as Addendum Exhibit. 1: Rules 69 (2003), 64 and 64E (2008) of the Utah Rules of Civil Procedure; Utah Code Ann. §§ 38-2-7 (2008), 78-23-5, 78B-5-505 (2008), 78B-5-825 (2008), 78B-5-826 (2008).

IV. STATEMENT OF CASE

A. Nature of the Case

Plaintiff's claims against Black Diamond sounded in contract, and were based on a document titled an Exclusive Right to Sell Listing Agreement & Agency Disclosure (the "Contract"), entered between Black Diamond and Prudential Cedar City on April 3, 2006. *See* R. 000006. Although the Contract was between Black Diamond and Prudential Cedar City and made no mention of fees to be paid to Lamoreaux as an

individual, Plaintiff claimed that he, as the principal broker of Prudential Cedar City, was personally entitled to the entire 8% brokerage fee identified in the Contract once the listed property sold. *See, e.g.*, Complaint at ¶ 3, R. 000002.

As set forth below in the Course of Proceedings, the issues now on appeal do not concern Plaintiff's original claims. Instead, the issues on appeal deal with a judgment creditor's execution on and public sale of Lamoreaux's claims against Black Diamond, which claims were purchased at the public sale by Black Diamond in order to dismiss the claims against itself in the instant action.

B. Course of Proceedings

Lamoreaux's Complaint against Black Diamond was filed in 2008 and the matter came to trial on February 16, 2011. *See* R. 000488. Between the filing of the Complaint and trial, on or about February 1, 2010 Darwin and Cheryl Fisher (the "Fishers") obtained a judgment against David Lamoreaux and his then-wife Diane Lamoreaux, in the amount of \$16,484.96, in Civil Action 080502955 (the "Fisher Lawsuit"). *See* R. 000515. Pursuant to that judgment, on or about January 19, 2011 the Fishers obtained a writ of execution in the Fisher Lawsuit, in order to execute upon David Lamoreaux's interests in Civil Action 080500885 (the case below against Defendant that is now at issue in this appeal—the "Black Diamond Lawsuit"). *See* R. 000517-18.

The Fishers' notice of execution on Lamoreaux's claims against Black Diamond was mailed, personally served, publicly posted and published in a local newspaper. Personal service on Mr. Lamoreaux was accomplished on February 16, 2011, which (as

noted above) was the first day of trial in the Black Diamond Lawsuit. *See* R. 000504, 000520; *see generally* R. 000493-546.²

The trial in the Black Diamond Lawsuit took place over the course of two days and at the conclusion of the second day the trial judge directed “counsel to each submit their proposed findings and orders, and any case law, to the Court by 3 p.m. on [April 1, 2011]. . . . The Court will then take this matter under advisement and render a written decision.” *See* Minutes, Bench Trial (Feb. 17, 2011); R. 000490, a true and correct copy of which is attached as Addendum Exhibit 4.

However, prior to the April 1 deadline for the submission of proposed findings of fact and conclusions of law (and, therefore, prior to the time when the trial court was to take the matter under advisement and render a judgment on the merits), on March 21, 2011, the Fishers held their public sale of Lamoreaux’s claims against Black Diamond. Lamoreaux and his counsel appeared at the sale and attempted to stop the proceedings by asserting that Lamoreaux had already transferred his interests in the Black Diamond Lawsuit, and, therefore, there was nothing left for the Fishers to sell. *See* R. 000558. When asked when the alleged transfer had occurred and to whom the transfer was made, Mr. Park either could not or would not answer. *See* Declaration of R. Daren Barney (Apr. 12, 2011) at ¶¶ 3-6, a true and correct copy of which is attached hereto as

² Such documents, consisting of Defendant’s Motion to Substitute and supporting exhibits, are unfortunately out of order in the Record; but to the best of undersigned counsel’s ability the record numbers cited herein cover the range of relevant documents.

Addendum Exhibit 5, at Exhib. 1.³ Notwithstanding Lamoreaux's attempt to halt it, the sale proceeded and Black Diamond was the successful bidder. *See* R. 000543-44. Based on its purchase at the public sale, on that same day Black Diamond filed its Motion to Substitute in as Party Plaintiff ("Motion to Substitute"). *See* R. 000505.

The next day, March 22, 2011, Defendant filed an Ex Parte Motion for Enlargement Pending Court's Order on Motion to Substitute in as Party Plaintiff ("Motion for Enlargement"), seeking an "enlargement of time for the submission by the parties of proposed findings of fact, conclusions of law, and the entry of judgment, currently scheduled for April 1, 2001," on the basis that "if successful with the [Motion to Substitute], Black Diamond will take the place of Mr. Lamoreaux as the plaintiff in this action, and will be able to obtain dismissal of this matter." Thus, until the Motion to Substitute was decided, Defendant argued that it would be inefficient to require the parties to undergo the time and expense of preparing proposed judgments. *See* Motion for Enlargement at 1-2; R. 000547-48.

On March 24, 2011, Plaintiff filed an Objection to Request for Ex Parte Order, which included an affidavit from Mr. Lamoreaux stating that prior to the time of the March 21, 2011 public sale he had already transferred his interests in the Black Diamond Lawsuit to his son, Jake Austin Lamoreaux. *See* R. 000554-55. Notwithstanding the

³ Addendum Exhibit 5 contains a true and correct copy of Defendant's Reply Memorandum in Support of Motion to Substitute in as Party Plaintiff, with accompanying exhibits. Undersigned counsel was unable to locate this Reply Memorandum in the Record prepared by the trial clerk. However, the trial court's date stamp shows that the Reply was filed one minute after Defendant's Ex Parte Motion for Permission to File Over-Length Memorandum in Support of Motion to Substitute in as Party Plaintiff (Apr. 12, 2011), which is included in the Record at R. 000596.

alleged fact that he no longer owned the claims in the Black Diamond Lawsuit, however, Mr. Lamoreaux also swore that he had not made the alleged transfer to defraud creditors because "if he is fortunate enough to get a judgment in his favor . . . he will address all the creditors if he ever receives any funds from this lawsuit." *See id.* at ¶ 7.

Later, in submitting Lamoreaux's Memorandum in Opposition to Motion to Substitute in as Party Plaintiff ("Opposition to Substitution"), Lamoreaux's counsel further clarified that in fact Lamoreaux's secret, alleged transfer to his son had taken place even before Lamoreaux was served with the notice of writ in the Fisher Lawsuit. *See* Opposition to Substitution (Apr. 4, 2011) at ¶¶ 20-21; R. 000567. Since the Fishers' service on Lamoreaux was accomplished on February 16, 2011 (the first day of trial in the Black Diamond Lawsuit), according to his own allegations and the arguments of his counsel Lamoreaux had allegedly transferred his interests in the Black Diamond Lawsuit even before trial. No notice was ever given to the trial court or to Defendant that Lamoreaux was allegedly no longer the real party in interest in the Black Diamond Lawsuit (*see* R. 000620; Addend. Exhib. 2 (Memorandum Decision) at 3), until more than a month after trial as part of Lamoreaux's creative attempts to evade the consequences of the Fishers' public sale.

On March 31, 2011, Defendant's Motion for Enlargement was granted. *See* R. 000562. According to that order, the time for submitting proposed findings of fact, conclusions of law, and judgments was either enlarged until 14 days after the trial court issued its decision on the Motion to Substitute (in the event the Motion to Substitute was denied) or was stayed indefinitely (in the event the Motion to Substitute was granted).

See id. Since the trial court had previously ruled that it would not take the merits of the case under advisement until after the parties had submitted their proposed findings of fact and conclusions of law (*see* R. 000490, Addendum Exhib. 4), the order granting Defendants' Motion for Enlargement also effectively stayed the time for the trial court to take the merits of the case under advisement.

A hearing on Defendant's Motion to Substitute was held on June 17, 2011 (*see* R. 000655, *et seq.*), a true and correct copy of the transcript of which is attached as Addendum Exhibit 6.⁴ At the conclusion of the hearing, the trial court requested proposed orders on the Motion to Substitute by July 1, 2011, and indicated that it would deal with other deadlines (the only outstanding additional deadline at that time being the submission of proposed findings of fact, conclusions of law, and judgments) after dealing with the Motion to Substitute. *See id.*, Addend. Exhib. 6 at 32, ln. 12 through 33, ln. 2.

The trial court issued its Memorandum Decision granting the Motion to Substitute on August 11, 2011. *See* R. 000618; Addend. Exhib. 2. As a result, Defendant filed a motion for voluntary dismissal under Rule 41(a)(2)(ii) of the Utah Rules of Civil Procedure ("Motion to Dismiss") on August 23, 2011. *See* R. 000627-28. On August 30,

⁴ In the interim before the June 17, 2011 hearing, the parties also briefed a Motion to Rescind Order of Judge John Walton, filed by Plaintiff on April 5, 2011. *See, e.g.*, R. 000592 (Plaintiff's Memorandum in Support of Motion to Rescind Order of Judge John Walton). It was Judge Walton who actually granted the Motion for Enlargement, following oral argument. Upon learning from court staff that Judge Ludlow was out of town for a week at a funeral, counsel for Defendant sought out Judge Walton to hear the Motion for Enlargement in late-March in order to have the Motion heard in time to be of effect prior to the April 1, 2011 deadline for the submission of proposed findings of fact and conclusions of law.

2011, Plaintiff filed its first Notice of Appeal, appealing the Memorandum Decision. See R. 000629.

The Motion to Dismiss was served on Plaintiff's counsel⁵ by mail. See R. 000628. Thus, pursuant to Rules 6(a) and 6(e) of the Utah Rules of Civil Procedure, any opposition to the Motion to Dismiss was due by September 9, 2011. No opposition was filed within the time allowed, however, so on September 12, 2011 Defendant filed a request to submit the Motion to Dismiss for decision. See R. 000631. The next day, September 13, 2011, Plaintiff's counsel filed his Objection (see R. 000635; Addend. Exhib. 3), stating in full:

The plaintiff, David Lee Lamoreaux, by his attorney, Michael W. Park, objects to the Motion to Dismiss and the Request to Submit for Decision. The Motion to Dismiss and the Request to Submit for Decision is based on the court's August 11th, 2011, Memorandum Decision and Order granting defendant's Motion to Substitute in as a Party Plaintiff. The plaintiff, David Lee Lamoreaux has appealed the Memorandum Decision and Order granting defendant's Motion to Substitute in as Party Plaintiff. The plaintiff, David Lee Lamoreaux is asking the appellate court to reverse the decision of the trial court. The Notice of Appeal was timely filed and it is plaintiff, David Lee Lamoreaux's request that the District Court take no further action until the matter is determined on appeal.

See Addend. Exhib. 3 at 1-2.

Following this Court's issuance of a sua sponte motion to dismiss based on the absence of a final order, apparently either a representative of Plaintiff or of this Court

⁵ Although Plaintiff had been dismissed as a party pursuant to the Memorandum Decision, in the same decision the trial court ordered Defendant to continue to serve all papers on Plaintiff's counsel. See R. 000625; Addend. Exhib. 2 (Memorandum Decision) at 8.

contacted the trial court and notified it of the absence of a final order. *See* R. 000645. As a result, on September 23, 2011 the trial court issued its Order Granting Motion to Dismiss (“Dismissal Order”), dismissing the Black Diamond Lawsuit in its entirety, with prejudice. *See* R. 000647.

On October 26, 2011 this Court withdrew its sua sponte motion for summary disposition, based on the entry of the Dismissal Order. However, prior to that time and no doubt to avoid prejudice in the event the first appeal were to be dismissed, Plaintiff submitted a second Notice of Appeal. *See* R. 000650. That second appeal was assigned Case No. 20110929, and has now been dismissed by this Court’s order dated December 13, 2011, for failure to file a docketing statement.

C. Disposition Below

As noted above, Plaintiff was dismissed as a party to the case and Defendant was substituted in as party plaintiff by the trial court’s order in the Memorandum Decision. *See* R. 000625; Addend. Exhib. 2 at 8. Thereafter, the trial court granted Defendant’s Motion to Dismiss by issuing the Dismissal Order. *See* R. 000647. As a result, Plaintiff’s claims against Defendant in the Black Diamond Lawsuit have been dismissed in their entirety, with prejudice.

D. Statement of Facts

Defendant limits its statement of facts herein to those issues relevant to this appeal. For this reason, Defendant does not address the underlying facts going toward the merits of Plaintiff’s claims against Black Diamond, except to note that Defendant disputes almost all of Plaintiff’s factual assertions regarding the merits, made on page 17

of Plaintiff's Opening Brief. Defendant further notes that such assertions either lack any record citation at all or merely cite to Plaintiff's Complaint, which is not an appropriate source of evidence to support such assertions. *See* Opening Brief at 17.

Plaintiff expressly concedes all of the following in his Opening Brief (all of which would be supported by the Record, even in the absence of Plaintiff's admissions):

1. The Fishers obtained a writ of execution to execute on Lamoreaux's claims against Black Diamond. *See* Opening Brief at 19-20.
2. Lamoreaux was served with the Fisher's writ but "did not file a written reply or objection to the Writ of Execution within 10 days of service of the Writ pursuant to Rule 64 E(d)(1) of the Utah Rules of Civil Procedure." *See id.* at 20.
3. The notice of sale of Lamoreaux's claims against Black Diamond was served on Lamoreaux and his counsel, as well as being publicly posted and published. *See id.*
4. The public sale was conducted on March 21, 2011 and Black Diamond was the highest bidder, "purchasing whatever interest Lamoreaux had in the instant lawsuit". *See id.* at 21.

Plaintiff implicitly concedes the following by failing to make a contrary assertion in his Opening Brief and by failing to otherwise preserve a contrary argument for appeal:

5. Aside from Plaintiff's legal argument about the ability to execute upon causes of action following the repeal of Rule 69, there was no procedural defect (or Plaintiff has waived any claim of a procedural defect) in the Fisher's obtaining a judgment against Lamoreaux, obtaining a writ of execution, providing notice of

the writ and public sale, conducting the public sale, and Defendant purchasing Lamoreaux's claims at the public sale.

6. Neither Mr. Lamoreaux, nor Jake Austin Lamoreaux (the alleged transferee of Plaintiff's claims against Black Diamond), nor any other person filed a written reply, objection, motion to discharge, or other written filing attempting to stop the execution and public sale, in either the Fisher Lawsuit or the Black Diamond Lawsuit, prior to the public sale on March 21, 2011. *See* R. 000619; Addend.

Exhib. 2 (Memorandum Decision) at 2.

7. The only attempt any person made to stop the writ process or public sale prior to the sale being conducted on March 21, 2011 was the self-help action taken by Lamoreaux and his counsel, whereby they appeared at the public sale and sought to have the sale stopped on the alleged basis that Lamoreaux had already secretly transferred his claims against Black Diamond. *See, e.g.,* Opening Brief at 16.

8. Defendant was the successful bidder at the public sale and purchased

“whatever interest Lamoreaux had in the instant lawsuit”. *See id.* at 16.

The following are relevant facts which are not conceded by Plaintiff, but which are supported by the Record:

9. Upon closing the proceedings on the final day of trial, the trial court did not take the merits of the case under advisement as asserted in the Opening Brief. *See, e.g., id.* at 15. Rather, as noted above in the Course of Proceedings section, the trial court directed “counsel to each submit their proposed findings and orders, and

any case law, to the Court by 3 p.m. on [April 1, 2011].” Only then would the court “take this matter under advisement and render a written decision.” *See* R. 000490; Addend. Exhib. 4. Plaintiff effectively conceded that the merits of the case had not yet been taken under advisement, in his Memorandum in Support of Motion to Rescind Order of Judge John Walton (“Rescission Memorandum”) (April 5, 2011). There, Plaintiff argued that the Motion for Enlargement granted by Judge Walton⁶ should be reversed, concluding as follows: “The plaintiff now pleads with the court to require the parties to file their findings of fact and conclusions of law without further delay so the case can properly be concluded.” *See* R. 000594; Rescission Memorandum at 3.

10. In submitting his Memorandum in Opposition to Motion to Substitute in as Party Plaintiff (“Opposition to Substitution”) (April 5, 2011), Plaintiff argued that substitution should not be granted, in part, because Plaintiff’s counsel had a contingency fee agreement that operated as a lien and encumbrance on Lamoreaux’s claims against Black Diamond. *See* R. 000578; Opposition to Substitution at 15. In the Memorandum Decision, the trial court concluded that Mr. Park’s contingency-fee argument was not ripe for decision and that further briefing on the issue was necessary—further briefing which the court expressly invited Mr. Park to provide in opposition to Black Diamond’s anticipated Motion to Dismiss. *See* R. 000624-25; Addend. Exhib. 2 (Memorandum Decision) at 7-8. Notwithstanding this invitation by the trial court, counsel for Plaintiff failed to

⁶ *See supra* note 4.

include any argument about contingency fees in his untimely Objection to the Motion to Dismiss. See R. 00635-36; Addend. Exhib. 3 at 1-2.

11. Neither Plaintiff nor his counsel, Mr. Park, submitted a timely opposition to the Motion to Dismiss. Further, when the Objection was belatedly filed, it failed to include either a request for an enlargement of the time to oppose the Motion to Dismiss or any attempt to show excusable neglect, under Rule 6 (b)(2) of the Utah Rules of Civil Procedure, for the failure to submit a timely opposition. See *id.*

12. Plaintiff's counsel, Mr. Park, never sought to intervene in the Black Diamond Lawsuit, in order to protect his alleged lien interest in Lamoreaux's claims against Black Diamond.

V. SUMMARY OF ARGUMENT

This appeal involves claims of error in both the Memorandum Decision and the Dismissal Order. Further, while this appeal involves multiple issues raised on behalf of Plaintiff, it also involves at least one issue brought on behalf of Plaintiff's counsel, Mr. Park (or the Park Firm).

As will be set forth below, the trial court's Memorandum Decision was correct and should be affirmed. Execution upon causes of action remains fully appropriate in Utah following the repeal of Rule 69 of the Utah Rules of Civil Procedure, and Plaintiff concedes that all appropriate procedures were followed by the Fishers in obtaining a writ of execution, noticing a public sale, and conducting the sale. Thus, the only remaining issue implicating the effectiveness of Black Diamond's purchase of Plaintiff's claims is the purported secret transfer of Plaintiff's claims from Mr. Lamoreaux to his son Jake

Lamoreaux. However, such a secret transfer—even if it actually occurred and was not fraudulent—did nothing to undermine the validity of the public sale. Rather, if Jake Lamoreaux truly obtained his father's interest in the claims against Black Diamond, he had the opportunity—and was obligated—to assert that interest by filing an objection to the writ procedure in the Fisher Lawsuit. Neither the alleged secret transfer to Jake Lamoreaux nor the self-help steps taken by Mr. Lamoreaux and his counsel at the public sale operated to render the public sale inoperative.

Once the trial court correctly determined that Black Diamond was the real party in interest owning the plaintiff-side claims against itself in the Black Diamond Lawsuit, it would have been erroneous not to allow Black Diamond to substitute in as party plaintiff in order to dismiss the case. Plaintiff's arguments to the contrary lack merit, and ultimately rest on the novel assertion that Black Diamond should have been required to proceed to obtain a judgment against itself, in order to preserve Plaintiff's counsel's opportunity to obtain a contingency fee. Such a course of action would have produced an absurd result, and would have failed to present a genuine case or controversy—as the only real party in interest in the action would have been on both the plaintiff's and defendant's side of the case.

There was no improper delay by the trial court in reaching its decisions in the Memorandum Decision and Dismissal Order, and even if there had been, given the correctness of the trial court's ultimate decisions, such delay would not have been prejudicial to Plaintiff.

Finally, the claim of Plaintiff's counsel based on his contingency fee agreement is not properly before this Court on appeal. Plaintiff's counsel has no standing to assert his own claims in this appeal, and even if he otherwise had standing he has waived his claims by failing to preserve them on appeal. Given Mr. Park's assertion—on his firm's own behalf—of an entitlement to preserve an opportunity to obtain attorney's fees, Defendant is entitled to an attorney-fee award against Plaintiff's counsel directly, under the reciprocal-attorney-fee doctrine.

VI. ARGUMENT

Defendant addresses below each of the arguments from Plaintiff's Opening Brief, in the order presented by Plaintiff. For the reasons set forth below, the decisions of the trial court were correct and should be affirmed.

A. Execution Upon Causes Of Action Remains Appropriate Under Utah Law Following The Repeal Of Rule 69.

In Issue No. 1, Plaintiff asserts that execution by a judgment creditor against the claims of a judgment debtor in another lawsuit constitutes a “sharp” and “unscrupulous” practice, which it “seems patently clear” that the drafters of the Utah Rules of Civil Procedure “no longer sanctioned” by repealing Rule 69. *See* Opening Brief at 26-27. Plaintiff provides no authority for this assertion of the drafters' intent. Moreover, Plaintiff's understanding of the state of the law in Utah following the repeal of Rule 69 is directly at odds with the operative language of the relevant, currently-applicable rules and statutory provisions. The plain language of the relevant statute and rules leaves no doubt that causes of action (except those specifically identified by statute as being excluded)

remain available for execution. Thus, Issue No. 1 fails to present a basis for reversal of the Memorandum Decision.

At the outset, Defendant acknowledges that although there are recent appellate decisions affirming the ability of a party to purchase causes of action against itself for purposes of obtaining a dismissal,⁷ such appeals appear to be from trials conducted while former Rule 69 was still in effect. Defendant is aware of no case interpreting the state of the law under the current rules, following the repeal of Rule 69 in 2004. This fact may or may not limit the precedential value of former cases such as the Utah Supreme Court's seminal decision in *Applied Medical Technologies, Inc, v. Eames*, 2002 UT 18, 44 P.3d 699. However, given the clarity of the operative language in the current statute and rules, interpretive case law is not necessary in order to conclude that causes of action remain generally available for execution and sale.

Former Rule 69 (f) contained language aimed at the officer executing a writ, directing the levy "on a sufficient amount of property, if there is sufficient property; collecting or selling the choses in action and selling the other property in the manner set forth herein. . . ." See Addend. Exhib. 1 at 1 (containing a true and correct copy of relevant portions of former Utah R. Civ. P. 69 (2003)). However, while courts often referred to this express reference to "choses in action" in Rule 69(f) as a short-hand way to demonstrate the legality of executing upon causes of action, Rule 69(f) was never the sole—or even primary—source of authority for such execution.

⁷ See, e.g., *Cosby v. Cazares*, 2010 UT App 269, 2010 Utah App. LEXIS 270 (unpublished memorandum decision).

Under a plain-language review,⁸ former Rule 69 (f) did not read as a grant of authority to execute on causes of action. Rather, it was a subsection buried in the middle of a lengthy rule regarding writ procedure generally, and it only incidentally mentioned collecting and selling causes of action as an example, in the context of the process to be used by an officer in levying against the judgment debtor's property. *See generally* Utah R. Civ. P. 69(f) (2003); Addend. Exhib. 1 at 1-4. The somewhat secondary nature of the reference in Rule 69(f) to executing on causes of action was at least partially, implicitly acknowledged by the court in *Applied Medical Technologies*. *See Applied Med. Techs.*, 2002 UT 18 at ¶ 11 ("Rule 69(b) of the Utah Rules of Civil Procedure provides, 'A writ of execution may be used to levy upon all of [a] judgment debtor's personal property and real property which is not exempt from execution under state or federal law.' Utah R. Civ. P. 69(b). Accordingly, under Rule 69(f) of the Utah Rules of Civil Procedure, a sheriff or constable, pursuant to a writ of execution, may levy upon the nonexempt property and sell it at a sheriff's sale.") (bracketing in original; emphasis added). This placement of an incidental reference to causes of action, in a middle subsection of a very

⁸ *See, e.g., Drew v. Lee*, 2011 UT 15, ¶ 16, 250 P.3d 48, 52 ("When we interpret a rule of civil procedure, we look to the express language of the rule and to cases interpreting it. Like statutes, we read each term in the rule according to its ordinary and accepted meaning.") (quotation and citations omitted); *Cox v. Kramer*, 2003 UT App 264, ¶ 10, 76 P.3d 184, 187 ("When interpreting court rules, we apply our rules of statutory construction with an understanding that rules, like statutes, are passed as a whole and not in parts or sections.") (quotation omitted); *Summit Water Distribution Co. v. Summit County*, 2005 UT 73, ¶ 17, 123 P.3d 437, 442 ("It is well settled in this court that our goal when interpreting a statute 'is to give effect to the legislative intent, as evidenced by the [statute's] plain language, in light of the purpose the statute was meant to achieve.'") (bracketing in original; quoting *Foutz v. City of S. Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171).

long and complicated rule of procedure, however, is hardly the sole source of authority for execution.

Rather, the primary source of authority to execute on causes of action under Rule 69 (again; under a plain-language analysis) came from Rule 69(b), in conjunction with Utah Code Ann. § 78-23-5. Pursuant to Rule 69(b), “[a] writ of execution may be used to levy upon all of the judgment debtor’s personal property . . . which is not exempt from execution under state or federal law.” See Addend. Exhib. 1 at 1 (emphasis added). And, pursuant to section 78-23-5, causes of action (at least generally) were not identified as types of personal property subject to exemption from execution. See, e.g., Utah Code Ann. § 78-23-5 (1999),⁹ Addend. Exhib. 1 at 7-8. Indeed, pursuant to section 78-23-5(1)(ix), certain causes of action related to personal injury and wrongful death claims were exempted from execution. See *id.* This legislative expression of specific exclusions as to particular types of causes of action required the conclusion that the legislature did not intend to exclude all causes of action generally—otherwise, the specific exclusions would be nonsensical.¹⁰

⁹ The 1999 version is relied upon herein because that is the last year where amendments are reflected in former section 78-23-5 prior to the 2004 repeal of Rule 69.

¹⁰ See, e.g., *State ex rel. Z.C.*, 2007 UT 54, ¶ 6, 165 P.3d 1206, 1208 (“When examining the statutory language we assume the legislature used each term advisedly and in accordance with its ordinary meaning.”) (quotation omitted); *Olsen v. Eagle Mt. City*, 2011 UT 10, ¶ 9, 248 P.3d 465, 469 (“when the words of a statute consist of ‘common, daily, nontechnical speech,’ they are construed in accordance with the ordinary meaning such words would have to a reasonable person familiar with the usage and context of the language in question.”) (quoting *O’Dea v. Olea*, 2009 UT 46, ¶ 32; footnote omitted); *Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980) (“[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and that interpretations are to be avoided which render some part of a provision nonsensical or

This broader framework of Rule 69 (b) and Utah Code Ann. § 78-23-5—not merely the specific language in Rule 69(f)—provided the authority for executing on causes of action. If all personal property “which is not exempt from execution” could be executed upon, and causes of action (generally) were not identified in the statute as being exempt from execution, then causes of action (except as noted in the statute) were subject to execution. *Cf., e.g., Snow, Nuffer, Engstrom & Drake v. Tanasse*, 1999 UT 49, ¶ 10, 980 P.2d 208, 210 (“The *Denham* court interpreting Nevada law, held that, absent direct language to the contrary, *all* causes of action are subject to execution. *See Denham*, 262 Cal. Rptr. at 152. Like Nevada, Utah’s rules of civil procedure contain no direct language exempting causes of action from execution. *See Utah R. Civ. P. 69.*”) (underline emphasis added; italics in original; footnote omitted).

Critically, this framework of Rule 69 (b) and Utah Code Ann. § 78-23-5 remained in place in 2008 and remains in place today. Specifically, even though Rule 69 has been repealed, under current Rule 64¹¹ the definition of “property” subject to writs (including writs of execution—*see* Rule 64 E(a); Addend. Exhib. 1 at 17) includes “the defendant’s property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.” *See*

absurd.”) (bracketing in original; citations omitted); *see also, e.g., Black’s Law Dictionary* (6th ed.) at 403 (*expressio unius est exclusio alterius* is the “maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another.”).

¹¹ “Current” for purposes of this appeal meaning the rules operative in 2008 when Mr. Lamoreaux initiated the Black Diamond Lawsuit.

Utah R. Civ. P. 64(a)(9) (2008); Addend. Exhib. 1 at 13. A cause of action comfortably fits within the category of personal, intangible property, “whether due or to become due.”

The difference between former Rule 69(f) and current Rule 64 (a)(9) is thus akin to the difference between the former rule specifying execution upon motorcycles and the current rule replacing such specificity with a provision allowing execution upon all motorized transportation—causes of action, like metaphorical motorcycles, are still included in the types of property subject to execution.

Moreover, just as causes of action generally were not among the exemptions identified in Utah Code Ann. § 78-23-5, the current statutory provision in Utah Code Ann. § 78B-5-505 contains essentially identical language to the former statute. It continues to specify that certain claims related to personal injury and wrongful death are exempted from execution and continues to not exclude causes of action generally. See section 78B-5-505(1)(x) (2008), Addend. Exhib. 1 at 9-10. By the interaction of Rule 64 (a)(9) and Utah Code Ann. § 78B-5-505, a cause of action remains subject to execution because it is not statutorily identified as being “exempt from seizure.” The plain language of Rule 64 and section 78B-5-505 therefore compels the conclusion that causes of action remain subject to execution regardless of the repeal of Rule 69. As the trial court correctly put it: “If the relevant rule provides that all property may be executed upon unless it is exempt from seizure, and no provision identifies choses in action as being exempt from seizure, then it follows that choses in action may be executed upon.”

R. 000621; Addend. Exhib. 2 (Memorandum Decision) at 4.

Finally, Plaintiff's argument based on *American Jurisprudence* is also misplaced. Plaintiff cites 30 Am. Jur. 2d, *Executions* for the proposition that "the general rule is that one may not execute upon a chose in action," and appears to relate this citation with the "sharp practices" which are "no longer expressly authorized by the Utah Rules of Civil Procedure. See Opening Brief at 26. What Plaintiff fails to acknowledge, however, is that the only reason given by *American Jurisprudence* for excluding causes of action is that causes of action are considered to be intangible personal property, and at common law intangible personal property was not subject to execution. See 30 Am. Jur. 2d., *Executions and Enforcements of Judgments* § 142 (2005) ("Under the common law, a writ of execution can not be levied against a mere contractual right or chose in action; rather, intangible property had to be reached through actions of equitable origin, such as a creditor's bill. Under the modern view, state legislatures may make incorporeal or intangible property, including choses in action owned by the debtor, subject to levy under execution") (footnotes omitted). See Addend. Exhib. 5 at Exhib. 5.

Making "intangible property . . . subject to levy under execution" is precisely what was accomplished (or clarified) by Rule 64 (a)(9)'s definition of "property" subject to writs as being "the defendant's property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant." See Utah R. Civ. P. 64(a)(9) (2008); Addend. Exhib. 1 at 13.

In sum, Plaintiff's Issue No. 1 lacks merit. The trial court was correct to conclude in the Memorandum Decision that causes of action, generally, remain subject to

execution notwithstanding the repeal of Rule 69. See R. 000620-23; Addend. Exhib. 2 (Memorandum Decision) at 3-5.

B. The Trial Court Was Not Required To Hold An Evidentiary Hearing Prior To Granting The Motion To Substitute; The Validity Of Plaintiff's Purported Transfer Was Not At Issue.

In Issue No. 2, Plaintiff argues that the trial court abused its discretion in granting the Motion to Substitute without first holding an evidentiary hearing. See Opening Brief at 7. Specifically, Plaintiff argues that a hearing (or separate trial) was required in order to determine Lamoreaux's intent in allegedly transferring his claims to his son, and whether "Lamoreaux held any interest [in the claims against Black Diamond] at the time of the execution or sale and whether the assignment of his interest was valid or otherwise a fraudulent transfer." See, e.g., *id.* at 28-29.

Plaintiff's argument misses the point. Defendant is admittedly skeptical of whether Plaintiff really did attempt to transfer his claims to his son prior to trial (or at any time), and at least equally skeptical of the legitimacy of such transfer if the attempt in fact occurred. As noted above, at the March 21 public sale Plaintiff's counsel failed to identify either the alleged transferee or when the transfer allegedly occurred. See section IV. B., *supra*. Even more troubling, in the very affidavit where Mr. Lamoreaux swore that he no longer owned the claims against Black Diamond at the time of the public sale, he also swore that "if he is fortunate enough to get a judgment in his favor . . . he will address all the creditors if he ever receives any funds from this lawsuit." See R. 000554-55. Such blatant contradictions strike Defendant as sufficient for the trial court to have

disregarded Lamoreaux's affidavit in its entirety and therefore find that Plaintiff failed to submit any evidence in support of his alleged transfer of claims to his son.

Notwithstanding Defendant's skepticism, however, the validity or invalidity of Plaintiff's alleged transfer was never really at issue in the Motion to Substitute. Rather, Defendant's counsel stipulated in the June 17 hearing on the Motion to Substitute that "we can just assume for purposes of our motion that [Mr. Lamoreaux's alleged transfer to his son] was a non-fraudulent transfer. It doesn't matter. Notice was sent out. And, certainly, in this case where the alleged new owner of the interest is Mr. Lamoreaux's own son, there would have been a way for him to present himself, file the objection, request the hearing, do all of the things that the writ process allows for you to proceed and have a hearing before an execution is accomplished." See R. 000655; Addend. Exhib. 6 (June 17, 2011 Hrg. Trnscrpt.) at 16, ln. 22 through 17, ln. 5. Likewise, the trial court concluded in the Memorandum Decision that:

Rules 64 and 64E contain the procedure not only for a party to obtain a writ and seize property, but also for a defendant or interested third party to fight the issuance of the writ and seizure of the property. In such circumstances and under the facts of the present case, **the effectiveness or ineffectiveness of Mr. Lamoreaux's purported transfer of his choses in action to his son is irrelevant.**

* * *

Mr. Lamoreaux's arguments [that he no longer owned his causes of action at the time the writ was issued] are unavailing, however, because the writ procedures in Rules 64 and 64E apply not only to Mr. Lamoreaux but also to his son Jake, the purported transferee of Mr. Lamoreaux's claims against Black Diamond. Specifically, under Rule 64 (e)(1) "[a]ny person claiming an interest in the property has the

same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security,” and “[a]ny claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.” The Court can find no support for the proposition that merely having Plaintiff and his counsel appear at the public auction and orally assert that Plaintiff no longer owned the claims is sufficient to satisfy the requirements of Rules 64 and 64E. Such an extrajudicial approach is not exercising “the same rights and obligations as the defendant with respect to the writ.” **If Jake Lamoreaux wished to assert that the writ should not have issued or that the sale should not have proceeded because he, not his father, owned the claims against Black Diamond, he should have filed a reply under Rule 64 E(d) or utilized the procedures under Rule 64(f).** Having failed to do so, Jake Lamoreaux cannot now assert that the writ procedure was deficient or ineffective.

R. 000622-24; Addend. Exhib. 2 (Memorandum Decision) at 5-7 (emphasis added).

Thus, the validity of the secret alleged transfer is not at issue. Instead, the issue is the applicability of Rules 64 and 64E of the Rules of Civil Procedure. Plaintiff has failed to even acknowledge the trial court’s Memorandum Decision in this regard, much less attempt to persuasively argue why the requirements of Rules 64 and 64E did not apply to Jake Lamoreaux, as the alleged transferee of Mr. Lamoreaux’s claims. The trial court correctly determined that such rules did apply, and that having failed to utilize the procedures available to object to the writ, “both Plaintiff and Jake Lamoreaux have waived any objection they may have had to the [public] sale.” *Id.* at 7.

C. The Trial Court Did Not Abuse Its Discretion In Granting The Motion To Substitute; For The Court To Have Refused To Substitute After Determining That Black Diamond Was The Real Party In Interest Owning Plaintiff's Claims Would Have Been An Abuse Of Discretion.

Plaintiff asserts in his Issue No. 3 that the trial court abused its discretion in granting the Motion to Substitute. *See* Opening Brief at 7-8. More specifically, Plaintiff argues that substitution under Rule 25 (c) of the Rules of Civil Procedure is discretionary, and that “the equities weighed against substitution of any party for the Plaintiff” because the “action had been completed up through a trial on the merits” and “the appropriate action would have been for the Court to deny the motion to substitute but rather to rule on the merits of the action.” *See* Opening Brief at 32.

First of all, Defendant does not necessarily agree that the trial court had discretion on this issue. If, as a technical legal matter, the court’s decision granting the Motion to Substitute was discretionary, on the facts of this case the trial court was required to exercise its discretion in the manner that it did. But assuming *arguendo* that Plaintiff is correct and the decision on the Motion to Substitute was a discretionary, that conclusion would require Plaintiff to marshal the evidence in support of the trial court’s decision, which Plaintiff has failed to do. *See, e.g., United Park City Mines Co. v. Sticking Mayflower Mt. Fonds*, 2006 UT 35, ¶ 37, 140 P.3d 1200 (“As we have previously explained, parties who ask this court to consider fact-sensitive questions—including those questions reviewed under an abuse of discretion standard--have a duty to marshal all the evidence that formed the basis for the trial court’s ruling.”) (citing *Chen v. Stewart*, 2004 UT 82, n.14, 100 P.3d 1177).

Moreover, this section of the Opening Brief does not focus on the validity of Black Diamond's purchase of Lamoreaux's claims at the public sale (to argue, for example, that the equities weighed against substitution because Black Diamond's purchase was somehow invalid). Rather, in this section Plaintiff argues that even if Black Diamond's purchase was effective (so that, as it necessarily follows, Black Diamond was the real party in interest on the plaintiff's side of the case), it still would have been appropriate for the trial court to proceed to rule on the merits, against the real-party-in-interest plaintiff's wishes, and "[t]hereafter, . . . the resulting judgment (if any) could have been addressed in numerous ways, including the filing of a satisfaction thereof." See Opening Brief at 32-33.

In other words, Issue No. 3 is really about Mr. Park's claim to a contingency fee. If the trial court concluded—as it did—that Black Diamond's purchase of Lamoreaux's claims was effective and that as a result Black Diamond was the real party in interest owning Plaintiff's claims, pursuing the charade of proceeding to render a decision on the merits would have been of no benefit to Mr. Lamoreaux (or his son), notwithstanding Lamoreaux's continued nominal status as party plaintiff. Nor, of course, would proceeding to render a decision on the merits have been of benefit to Defendant—either Black Diamond would obtain a judgment as plaintiff against itself as defendant or as defendant it would defeat the claims against itself that it held as plaintiff. If a judgment were entered in favor of Black Diamond as the successor to Lamoreaux's claims, however, Mr. Park could seek to argue that he was entitled to 33% of the amount of that judgment. See, e.g., Opening Brief at 38 ("By so dismissing the action, Black Diamond

effectively constructively discharged the Park Firm, without cause and without paying any compensation.”).

To thus state the reality of what is at stake in Issue No. 3 renders much of the basis for rejecting Issue No. 3 subject to the arguments raised in section VI. F. below, specifically addressed at Mr. Park’s personal claims. However, Defendant will also address the merits of Issue No. 3 in this section.

Plaintiff’s Rule 25 argument fails to take account of the fact that civil actions are to be “prosecuted in the name of the real party in interest” and may be “dismissed on the ground that it is not prosecuted in the name of the real party in interest” as long as “a reasonable time has been allowed after objection . . . for joinder or substitution of, the real party in interest . . .” Utah R. Civ. P. 17(a) (2008). Moreover, while a typical assignee or transferee (as the new real party in interest) may or may not care about being named as a party—so that an objection under Rule 17(a) may or may not be lodged, in this case Black Diamond certainly did care. Black Diamond’s interests in the lawsuit were directly opposed to those of Lamoreaux (not to mention being directly opposed to Mr. Park’s desire for a contingency fee at Black Diamond’s expense). As the owner of Lamoreaux’s claims—the only real party in interest on the plaintiff’s side of the case—Black Diamond wished for those claims to be dismissed.

Other than to facilitate Mr. Park’s novel attempt to obtain a contingency fee under such an arrangement, Defendant cannot make sense of Plaintiff’s theory that Mr. Lamoreaux should have been allowed to continue to prosecute the case on behalf of Black Diamond. Perhaps most fundamentally among its problems, Plaintiff’s theory fails

to account for the requirement of an actual case or controversy between the parties, which the case lacked once Black Diamond became the real party in interest on both the plaintiff's and defendant's sides of the case. *Cf., e.g., Shipman v. Evans*, 2004 UT 44, ¶ 32, 100 P.3d 1151, 1157 (“the presence of a justiciable controversy” identified as “the keystone [of] our judicial framework”) (citation omitted).

Even putting aside justiciability, however, Plaintiff has identified no reason why the trial court would use any discretion it possessed to deny Black Diamond's attempt to step in as plaintiff if in fact—as the trial court found—Mr. Lamoreaux's claims now belong to Black Diamond. The mere fact that the case had proceeded to trial does not make it any more reasonable for the judge to use his discretion to require an unwilling party to press forward and obtain a judgment against itself. Moreover, Rule 25 (c) may speak in discretionary terms but the terms of Rule 24(a) are mandatory. *See Utah R. Civ. P. 24(a)* (2008) (“Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction . . . and he is so situated that the disposition of the action may . . . impair or impede his ability to protect that interest . . .”). Defendant could not conceivably have relied on Mr. Lamoreaux or his counsel to protect its interests, and Black Diamond required intervention on the plaintiff's side of the case in order to ensure that the claims against itself were dismissed.

Finally, under the relevant case law interpreting former Rule 69 (which authority remains (at a minimum) persuasive on this issue given the current state of the law, as cited in section VI. A. above, allowing for the continued execution and sale of causes of

action), there is no consideration given to any potential argument under Rule 25 (c). Rather, “[g]iven that choses in action are amenable to execution under rule 69(f)” (now Rules 64, 64E, and section § 78B-5-505—as argued above) “it follows that a defendant can purchase claims, i.e., choses in action, pending against itself and then move to dismiss those claims.” *Applied Med. Techs.*, 2002 UT 18 at ¶ 13. (citations omitted). “Indeed, causes of action are regularly sold . . . [and] [o]nce acquired by another, the new litigant has the right to determine the course and scope of the litigation of the claims purchased, including the right to move to dismiss the pending claims.” *Id.* at ¶ 17 (emphasis added; citations omitted).

Thus, to the extent the trial court had any discretion, it would have been an abuse of that discretion for the court not to have granted the Motion to Substitute on the facts of this case. Plaintiff’s Issue No. 3 therefore fails to identify an appropriate basis for reversal of the Memorandum Decision.

D. The Trial Court Correctly Determined That Lamoreaux’s Actions Seeking To Undermine The Effectiveness Of The Writ Procedure Constituted An Impermissible Collateral Attack.

Plaintiff asserts in Issue No. 4 that the trial court erred in concluding that Lamoreaux’s actions taken in this case constituted an impermissible collateral attack on the judgment of a sister court. See Opening Brief at 8. This assertion is further enlarged in the argument section of the brief into two sub-arguments: 1) that Lamoreaux’s actions did not constitute a collateral attack (*see* Opening Brief at 33); and 2) even if Lamoreaux’s actions did constitute a collateral attack, such an attack was permissible

because the Fisher's execution and sale were void given the fact that "Utah law no longer authorizes the execution upon a chose in action" *See id.* at 34.

As for the second sub-argument, Defendant has already addressed above the legality of execution upon causes of action under current Utah law. As for the first sub-argument, Plaintiff attempts to parse words by claiming that Lamoreaux never collaterally attacked the "judgment" of the trial court in the Fisher Lawsuit. *See id.* at 33. That statement is possibly true; however, it fails to address the trial court's actual language in the Memorandum Decision. In the Memorandum Decision, the trial court held "as a threshold matter" that any arguments about

defects in the procedure employed by the Fishers in obtaining the writ, providing notice or conducting the sale, belonged in the Fisher Lawsuit. **By ignoring the writ procedure in that case and instead attacking the effectiveness of the writ in this case, Plaintiff is seeking to collaterally attack the judgment and orders of a sister court.** Such a collateral attack is inappropriate. *See, e.g., RMA Ventures Cal. v. SunAmerica Live Ins. Co.*, 576 F.3d 1070, 1076 (10th Cir. 2009) (the validity of a writ of execution cannot be questioned collaterally (citing *Edmonston v. Sisk*, 156 F.2d 300, 302 (10th Cir. 1946))).

R. 000623; Added. Exhib. 2 (Memorandum Decision) at 6 (emphasis added).

Whether or not Plaintiff is correct about not collaterally attacking the judgments of a sister court, Plaintiff certainly did collaterally attack the orders of the trial court in the Fisher Lawsuit, specifically the order granting a writ of attachment and allowing the execution and sale process to go forward. Upon learning of the Fishers' writ of attachment, Plaintiff ignored the available remedies under Rules 64 and 64E and instead secretly (allegedly) transferred his claims in the Black Diamond Lawsuit to his son, then proceeded

to trial in the Black Diamond Lawsuit as if the claims were still his own and did nothing in either the Fisher Lawsuit or the Black Diamond Lawsuit to notify the parties of any objection to the execution and sale procedure, only to show up on the day of the public sale and assert that there was nothing to be sold because he had already secretly transferred the Black Diamond claims. Such action was not only collateral to the Fisher Lawsuit, it was completely extrajudicial to either the Fisher Lawsuit or the Black Diamond Lawsuit. As the trial court below correctly held: "The Court can find no support for the proposition that merely having Plaintiff and his counsel appear at the public auction and orally assert that Plaintiff no longer owned the claims is sufficient to satisfy the requirements of Rules 64 and 64E. Such an extrajudicial approach is not exercising 'the same rights and obligations as the defendant with respect to the writ.'" R. 000624; Addend. Exhib. 2 (Memorandum Decision) at 7 (quoting Utah R. Civ. P. 64(e)(1)).

Finally, from a policy perspective if Plaintiff's argument were correct, the entire execution and public sale process would be frustrated (at least as far as unsecured personal property goes). If a judgment debtor can escape execution and sale of his property merely by secretly transferring title to it, the rules of civil procedure governing the obtaining of writs of execution and conducting public sales would be of no effect. The trial court was correct, then, in concluding that once Mr. Lamoreaux withdrew his objection about publication of the notice of sale (leaving him with no preserved objection under Rules 64 and 64E), the sale was valid and effective, whether as against Mr. Lamoreaux or his son. *See* R. 000623-24; Addend. Exhib. 2 (Memorandum Decision) at

6-7.

E. The Trial Court Did Not Abuse Its Discretion In The Timing Of Its Decision-Making.

In Issue No. 5, Plaintiff asserts that the trial court abused its discretion by failing to render a decision “on the merits of the action after more than six months when the trial court took the matter under advisement on February 16, 2011.” Opening Brief at 8. Plaintiff’s argument section goes on to elaborate that the abuse of discretion consisted of both the “unnecessary delays and a failure to decide cases which are ripe for decision” and the error of granting the “substitution of Black Diamond as a party plaintiff and dismiss[ing] the action without deciding the case on the merits.” *See id.* at 36.

Insofar as Plaintiff’s argument is focused on the substance of the trial court’s decision-making, such matters are addressed elsewhere in this brief. Focusing on the timing issue alone, it clear that Plaintiff fails to raise any instance of actual error, much less reversible error.

Issue No. 5 is another instance where because Plaintiff has invoked the abuse-of-discretion standard of review, Plaintiff was required to marshal the evidence. *See, e.g., United Park City Mines Co.*, 2006 UT 35 at ¶ 37. Plaintiff has failed to marshal. To the contrary, on the only fact Plaintiff attempts to identify regarding timing, Plaintiff repeatedly misstates the fact. *See, e.g.*, Opening Brief at 8 (court allegedly took the matter under advisement); *id.* at 15 (same); *id.* at 30, 34 (same). As noted above, the trial court did not take the merits of the case under advisement at the close of the second day of trial. Instead, Judge Ludlow directed “counsel to each submit their proposed findings and orders, and any case law, to the Court by 3 p.m. on [April 1, 2011]. . . . The Court

will then take this matter under advisement and render a written decision.” See R.

000490; Addend. Exhib. 4 (Minutes, Bench Trial).¹²

If Plaintiff considered it excessive for the court to allow roughly 45 days¹³ for the parties to submit proposed findings of fact and conclusions of law, his counsel should have objected at the time of the court’s February 17 decision. There is no record that he did so, however, nor does Plaintiff present such an argument in the Opening Brief. Once the April 1 deadline was set (after which the trial court had intended to take the merits of the case under advisement), there was little the trial court could have done to expedite matters further. First, the public sale and Motion to Substitute operated to intervene in the schedule. Then the Motion for Enlargement was filed. And finally Plaintiff filed his Motion to Rescind the order granting the Motion for Enlargement. See *generally* section IV. B. (Course of Proceedings) above. The trial court could not simply ignore these matters, and in the circumstances of the case, six months was not excessive to achieve a final resolution.

Moreover, if the trial court’s decisions on the Motion to Substitute and Motion to Dismiss were correct, any delay in the decision-making could not have prejudiced

¹² Pursuant to Rule 3-101(1) of the Judicial Counsel Rules of Judicial Administration, a matter is considered to be under advisement “when the entire case or any issue in the case has been submitted to the judge for final determination.” Given the trial court’s direction for counsel to submit proposed findings and orders, and any case law, before the judge would consider the matter for a final, written decision, under the applicable rule the trial court did not take the matter under advisement on February 17, 2011.

¹³ Also pursuant to Rule 3-101, the shortest period of time to issue a decision after taking a matter under advisement, beyond which a judge’s performance evaluation may be affected, is two months. See Rule 3-101(2)(c)(i).

Plaintiff. If Plaintiff was going to lose these motions, he received no harm from losing them in six months rather than two.

F. The Trial Court Did Not Err In Dismissing The Case Following The Grant Of The Motion To Substitute, Thereby Precluding Mr. Park From Potentially Obtaining A Contingency Fee.

Plaintiff's final issue, Issue No. 6, is the issue raised directly on behalf of Plaintiff's counsel. The argument alleges error in the trial court's decision to issue the Dismissal Order following substitution of the Defendant as party plaintiff "without ruling on the merits . . . , thereby effectively precluding counsel for the Plaintiff . . . from receiving any compensation" See Opening Brief at 37.

There are several reasons why this argument should be rejected. First, an attorney who wishes to enforce a charging lien may only do so "by moving to intervene in a pending legal action in which the attorney has assisted or performed work, or by filing a separate legal action." See Utah Code Ann. § 38-2-7, Addend. Exhib. 1 at 5; see also, e.g., *Fisher v. Fisher*, 2003 UT App 91, ¶ 16, 67 P.3d 1055, 1058 ("An attorney seeking to enforce a lien must either bring a separate action to enforce his attorney lien or intervene in the underlying suit prior to judgment being entered.") (citation omitted); *Ostler v. Buhler*, 1999 UT 99, n.3, 989 P.2d 1073, 1077 ("in the absence of special circumstances requiring a contrary holding to prevent injustice, . . . counsel [should] bring a separate action against his client to determine the amount of his fee and to foreclose his charging lien if any he has.") (bracketing in original; quoting *Midvale Motors, Inc. v. Saunders*, 442 P.2d 938, 941 (Utah 1968)). Mr. Park did not seek to intervene in the action below, and it would be too late to do so now that a final order has

been entered. *See, e.g., Jenner v. Real Estate Servs.*, 659 P.2d 1072, 1074 (Utah 1983) (“Generally, the cases hold that intervention is not to be permitted after entry of judgment.”) (citation omitted). As a result, Mr. Park has no standing to pursue Issue No.

6.

Second, Mr. Park’s argument is based on the premise that by being substituted in as the party plaintiff, Black Diamond: 1) inherited Lamoreaux’s obligations under the Park Firm fee agreement, 2) had some type of duty to maintain the action through judgment in order to preserve the possibility of Mr. Park obtaining a contingency fee, and 3) by seeking dismissal “effectively constructively discharged the Park Firm, without cause and without paying any compensation” *See* Opening Brief at 38. This premise, however, is erroneous. Mr. Park has not been discharged. He continues to represent Mr. Lamoreaux. Mr. Park could not represent Black Diamond in this case because to do so would violate Rule 1.7(a)(1) of the Rules of Professional Conduct. And Black Diamond has not received any services from Mr. Park. Rather, it prevailed below in spite of Mr. Park’s services provided against its interests.

Moreover, even if Black Diamond were somehow considered to be in Lamoreaux’s shoes with regard to Mr. Park’s contingency-fee agreement, “[a] client has a right to dismiss his suit at will, even if he had a contingent-fee agreement with his lawyer and the lawyer had served notice of his attorney’s lien; and the lawyer may not compel the continuation of the lawsuit to protect his lien because the lien is inferior to the client’s right to dismiss the action.” *Alleman v. Fennell (In re Estate of Simmons)*, 841 N.E.2d 1034, 1036 (Ill. App. Ct. 5th Dist. 2005) (citations omitted); *see also Life Care*

Ctrs. of Am. v. Chiles, 674 So. 2d 873, 874 (Fla. Dist. Ct. App. 1st Dist. 1996) (no quantum meruit fee allowed following client's voluntary withdrawal from class action suit when client obtained no recovery). In this case, Mr. Park provided no work for Black Diamond, provided nothing of value to Black Diamond, Black Diamond obtained no monetary award by dismissing the case, and Black Diamond had no obligation to compensate Mr. Park for his services to Lamoreaux. Indeed, if Mr. Park's premise of "constructive discharge" were to be accepted, Mr. Park was discharged by Black Diamond with cause—Mr. Park's efforts on behalf of Lamoreaux having cost Defendants tens of thousands of dollars to defend.

If Mr. Park wanted to protect his potential ability to obtain a contingency fee, he should have assisted Lamoreaux in appropriately opposing the writ process in the Fisher Lawsuit or assisted Lamoreaux to purchase and/or locate a friendly buyer to purchase Lamoreaux's claims at the public sale. Black Diamond has no obligation to pay Mr. Park for the privilege of defeating his client's claims, and the trial court committed no error in entering the Dismissal Order following its grant of the Motion to Substitute.

Finally, and apart from the arguments raised above, Mr. Park cannot pursue Issue No. 6 because he has failed to appropriately preserve the issue on appeal. In submitting the Opposition to Substitution (R. 000564-88), Mr. Park included one paragraph among 15 pages of briefing that set out his position that substitution was improper because any transferee of Lamoreaux's claims "took the chose in action subject to the contractual agreements and encumbrances attached thereto"—specifically the lien created by the Park Firm's contingency fee agreement. *See* R. 000578; Opposition to Substitution at 15.

The full extent of counsel's argument on this issue at the June 17 hearing was as follows:

"And I don't know how they could say I would have a breach of ethics if I told Black Diamond to go ahead [presumably, with the purchase of the Lamoreaux claims] and we were going to foreclose on their property. I have had my interest for a long time. It's supported by law." (R. 000655; Addend. Exhib. 6 (Hrg. Transcript) at 24, ln. 6-10). "And they certainly haven't proven that their interest [following the purchase of Lamoreaux's claims] is above my interest, which was set forth in a written agreement which was presented to this court at trial and was entered into in 2008." *Id.* at 25, ln. 12-16.

Defendant took the position that under Plaintiff's own argument (that Mr. Park's alleged lien interest would survive the substitution of Black Diamond as the party plaintiff), the time to address the possible extinguishment of that interest, if at all, was when Black Diamond later moved to dismiss the claims against itself. In issuing the Memorandum Decision, the trial court found the following:

Mr. Park's argument regarding his contingency fee agreement is not ripe for decision. The Court reaches this conclusion both on the grounds cited by Black Diamond—i.e., that regardless of whether Mr. Park has an ongoing interest in the claims against Black Diamond, the time to address the potential extinguishment of that interest is when Black Diamond moves to dismiss the claims against itself—and also on the grounds that Mr. Park's argument has not yet been sufficiently developed to allow decision. **More complete briefing on the issue, which presumably Mr. Park will provide in response to the motion to dismiss it is anticipated that Black Diamond will file, is necessary.** For the present, the Court concludes that any ongoing interest held by Mr. Park is not sufficient to prevent the process of Rules 64 and 64E from becoming effective, and thereby allowing Black Diamond to step into the role of party plaintiff in this matter.

See R. 000624-25; Addend. Exhib. 2 (Memorandum Decision) at 7-8.

Thus, the trial court expressly invited Mr. Park to raise his contingency fee arguments in opposition to Black Diamond's Motion to Dismiss. Notwithstanding such invitation, however, neither Mr. Park (as an individual) nor Mr. Lamoreaux (through Mr. Park as counsel) submitted any timely opposition to Black Diamond's Motion to Dismiss. Moreover, when Mr. Park finally did submit the untimely Objection to the Motion to Dismiss, not only did it fail to include "more complete briefing on the issue" of the Park Firm's contingency fee argument, it failed to include any mention of that argument at all. Instead, Mr. Park merely requested on behalf of Plaintiff that the trial court wait for the conclusion of Lamoreaux's appeal of the Memorandum Decision before issuing a decision on the Motion to Dismiss. See R. 000551-52; Addend. Exhib. 3 (Objection) at

1-2.

Therefore, even if it could otherwise be argued that the trial court erred in its conclusion, in the Memorandum Decision, that Mr. Park's argument regarding his contingency fee should be reserved for later briefing of the anticipated Motion to Dismiss, such error was interlocutory and non-prejudicial. That is, even if the Memorandum Decision constituted a final decision under Rule 54(b) as against Mr. Lamoreaux, it certainly did not constitute a final decision with regard to Plaintiff's counsel's contingency fee claim. The trial court remained expressly open to hearing Mr. Park's arguments during briefing of the Motion to Dismiss. Counsel simply failed to raise such arguments. In such circumstances, Plaintiff's counsel has failed to preserve Issue No. 6 for appeal, and the contingency fee arguments could not now be raised even

if counsel otherwise had standing to do so. *See, e.g., Tschaggery v. Milbank Ins. Co.*, 2007 UT 37, ¶ 22, 163 P.3d 615, 620 (even though issue was originally raised before the trial court, failure to further pursue issue upon invitation of trial court constituted abandonment of issue).

G. Defendant Should Be Awarded Its Reasonable Attorneys' Fees Directly Against Plaintiff's Counsel, For Fees Incurred In Defending Against Mr. Park's Contingency-Fee Claim.

Plaintiff's underlying claim against Black Diamond included an argument that the Contract called for attorneys' fees for the prevailing party. *See* R. 000003-04 (Complaint). And indeed, the Contract (to which Plaintiff was not a party) did contain an attorneys' fee provision. *See* R. 000007 (Contract) at ¶ 8. Thus, Mr. Park asserted at trial that Plaintiff was not only entitled to principal and interest, but also to reimbursement of a 1/3 contingency fee in the amount \$256,140, which would be due to the Park Firm upon a successful resolution of Plaintiff's claims in the Black Diamond Lawsuit. *See* R. 000453 (Trial Memorandum) at 3.

Thus, upon prevailing in the action below, Black Diamond likely would have had a claim, as the prevailing party, to attorney's fees either directly under the Contract or under Utah's reciprocal attorney's fee statute, Utah Code Ann. § 78B-5-826 (2008). Nonetheless, Black Diamond did not pursue such a claim before the trial court given its perception of the costs and benefits, and concern with the ultimate ability to collect against Mr. Lamoreaux.

As noted in section VI. F., above, counsel for Plaintiff made only a cursory argument about his entitlement to attorney's fees in arguing the Motion to Substitute. He

then completely dropped the issue during argument on the Motion to Dismiss, notwithstanding the trial court's invitation in the Memorandum Decision to provide further argument. Thus, Plaintiff's counsel never meaningfully asserted his contingency-fee argument, on his own behalf, before the trial court.

But now Plaintiff's counsel has raised the alleged entitlement to attorney's fees as a basis for arguing that the trial court should not have granted the Motion to Dismiss without first holding a hearing to determine the quantum meruit value of Mr. Park's services and award those fees to the Park Firm. *See* Opening Brief at 38-39. Mr. Park does not raise such arguments on behalf of Plaintiff, but rather on his own (or his firm's) behalf. *See, e.g., id.* at 38 ("Despite the Park Firm specifically arguing it was entitled to its compensation, the Court dismissed the action."). Given Mr. Park's failure to raise this issue during the Motion to Dismiss (when Lamoreaux's interest in the action was no longer at issue—Lamoreaux having been dismissed as a party pursuant to the Memorandum Decision), Defendant never had the opportunity before the trial court to assert a claim for reciprocal, or prevailing party, attorney's fees directly against Plaintiff's counsel.

Reasonable, reciprocal attorney's fees against Plaintiff's counsel are appropriate because both the Contract and the contingency-fee agreement constitute "writing[s]" under section 78B-5-826, pursuant to which Plaintiff's counsel has sought to claim an entitlement to attorney's fees. Further, while section 78B-5-826 does not require a reciprocal award (*see id.*: "A court may award costs and attorney fees . . ."), such an award is appropriate in this case. Specifically, as set forth in section VI. F, there are

multiple, readily apparent reasons that Mr. Park's attorney's-fee argument fails. Plaintiff's counsel should have known about such problems with Issue No. 6 prior to briefing, given the arguments on Issue No. 6 raised in Defendant's Motion for Summary Disposition. Indeed, Plaintiff's counsel should have known of problems with Issue No. 6 even before filing this appeal, given the fact that he cited section 38-2-7 in the Opposition to Substitution (*see* R. 000578) and given the trial court's express invitation, in the Memorandum Decision, to further briefing on the issue. *See, e.g., R&R Energies v. Mother Earth Indus.*, 936 P.2d 1068, 1080 (Utah 1997) (approving fee award against counsel, and citing Rule 11 for the proposition that an attorney signing documents certifies "that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law") (emphasis added); *cf., e.g., Smith v. Batchelor*, 934 P.2d 643, 647-648 (Utah 1997) ("good faith [under Fair Labor Standards Act] requires some duty to investigate Even inexperienced businessmen cannot claim good faith when they blindly operate a business without making any investigation as to their responsibilities under the labor laws. Apathetic ignorance is never the basis of a reasonable belief."); *see also* Utah Code Ann. § 78B-5-825(1) ("court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith").

In the circumstances of this case, where Plaintiff's counsel either knew or should have known that he could not appeal the issue of his contingency fee, and where

Defendant has been required to spend unnecessary attorney's fees defending an issue that should never have been raised, an award directly against Plaintiff's counsel is appropriate.

VII. CONCLUSION

For the reasons set forth above, Defendant respectfully requests that the Memorandum Decision and Dismissal Order be affirmed, that Plaintiff's appeal be dismissed, that Defendant be awarded its reasonable attorney's fees (related to defending against the arguments raised in Issue No. 6) against Plaintiff's counsel, and that the matter be remanded for a determination of those fees.

RESPECTFULLY SUBMITTED: February 27, 2012.



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Pursuant to Rule 24(f)(1)(C), I hereby certify that the text of this Brief of Appellee consists of 11,473 words, excluding the title page, identification of parties, Table of Contents and Table of Authorities.




David L. Elmont

CERTIFICATE OF SERVICE

APPELLEES
I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLANTS were caused to be served upon the following by depositing the same in the U.S. Mail, postage prepaid, this 27th day of February 2012.

Michael W. Park, Esq.
THE PARK FIRM, P.C.
315 West Hilton Dr., Suite 4
St. George, UT 84770



David L. Elmont

ADDENDUM INDEX

Exhib. 1

Utah R. Civ. P. 69 (2003); Utah Code Ann. §§ 38-2-7 (2008), 78-23-5 (1999), 78B-5-505 (2008), 78B-5-825 (2008), 78B-5-826 (2008); Utah R. Civ. P. 64 and 64E (2008)

Exhib. 2 (R. 000618-26)

Memorandum Decision and Order Granting Defendant's Motion to Substitute in as Party Plaintiff (Aug. 11, 2011)

Exhib. 3 (R. 000551-53)

Objection to Request for Ex Parte Order (Mar. 24, 2011)

Exhib. 4 (R. 000490)

Minutes, Bench Trial (Feb. 17, 2011)

Exhib. 5

Reply Memorandum in Support of Motion to Substitute in as Party Plaintiff (Apr. 12, 2011)

Exhib. 6 (R. 000655)

Hearing Transcript (June 17, 2011)

Tab 1

Rule 69. Execution and proceedings supplemental thereto.

(a) *Availability of writ of execution.* A writ of execution is available to a judgment creditor to satisfy a judgment or other order requiring the delivery of property or the payment of money by a judgment debtor.

(b) *Property subject to execution.* A writ of execution may be used to levy upon all of the judgment debtor's personal property and real property which is not exempt from execution under state or federal law.

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

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

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

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

(e) *When writ to be returned.* The writ of execution shall be served at any time within sixty days after its receipt by the officer. It shall then be returned to the court from which it issued, and when it is returned the clerk must attach it to the record.

(f) *Service of the writ.* Unless the execution otherwise directs, the officer must execute the writ against the non-exempt property of the judgment debtor by levying on a sufficient amount of property, if there is sufficient property, collecting or selling the choses in action and selling the other property in the manner set forth herein. Levy includes the seizure of the property and holding the property in person or through one or more agents, including the judgment debtor, appointed by the officer. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within view of the officer, the officer must levy only on such part of the property as the judgment debtor may indicate, if the property indicated is amply sufficient to satisfy the judgment and costs.

When an officer has served an execution issued out of any court the officer may complete the return thereof after such date of service.

(g) *hearing*
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(g) *Notice to judgment debtor of sale and of exempt property and right to a hearing.* At the time the writ of execution is issued, the clerk shall attach to the writ a notice of execution and exemptions and right to a hearing and two copies of an application by which the judgment debtor may request a hearing.

Upon service of the writ, the sheriff or constable shall serve upon the judgment debtor, in the same manner as service of a summons in a civil action, or cause to be transmitted by both regular and certified mail, returned receipt requested, to the judgment debtor's last known address as provided by the judgment creditor, (i) the notice of execution and exemptions and right to a hearing, and (ii) the application by which the judgment debtor may request a hearing. Upon service of the writ, the sheriff or constable may also set the date of sale or delivery and serve upon the judgment debtor notice of the date and time of sale or delivery in the same manner as service of the notice of execution and exemptions and right to a hearing.

The notice of execution and exemptions that is to be served upon the judgment debtor shall indicate in substance that certain property is or may be exempt from execution including but not limited to a homestead; tools of the trade; a motor vehicle used for the judgment debtor's business or profession; social security benefits; supplemental security income benefits; veterans' benefits; unemployment benefits; workers' compensation benefits; public assistance (welfare); alimony; child support; certain pensions; part or all of wages or other earnings from personal services; certain furnishings and appliances; musical instruments; and heirlooms (each not to exceed the amount allowed by law). The notice shall also indicate that the list is a partial list and other various property exemptions may be available under federal law or the Utah exemptions statute, and that the judgment debtor must request a hearing within ten (10) days from the date of service of the notice upon the judgment debtor. For purposes of this provision, the date of service shall be the date of mailing, if mailed, or date of delivery, if hand-delivered, and no period for mailing under Rule 6(e) shall be used in computing the time period.

If the writ, the notice of execution and exemptions and right to a hearing cannot be served upon the judgment debtor in the same manner as service of a summons in a civil action, and the judgment creditor does not have available the judgment debtor's last known address, only the following notice need be published under the caption of the case in a newspaper of general circulation in each county in which the property levied upon, or some part thereof, is situated:

TO _____, Judgment Debtor:

A writ of execution has been issued in the above-captioned case, directed to the sheriff or constable of _____ County, commanding the sheriff or constable as follows:

"WHEREAS, _____ [Quoting body of writ of execution]."
 YOU MAY HAVE A RIGHT TO EXEMPT PROPERTY from the sale under statutes of the United States or this state, including Utah Code Annotated, Title 78, Chapter 23, in the manner described in those statutes.

The date of publication shall be deemed the date of service and the date of publication shall be not less than ten (10) days prior to the date of sale or delivery.

This paragraph (g) shall not be applicable to judicial mortgage foreclosure proceedings commenced under Utah Code Annotated, Title 78, Chapter 37.

(h) *Request for hearing.*

(h)(1) *Time for request.* The judgment debtor or any other person who owns or claims an interest in the property subject to execution may request a hearing to claim any exemption to the execution, or to challenge the issuance of the writ. Such request must be filed or served upon the judgment creditor or the attorney for the judgment creditor within ten (10) days of the service upon

Intervening pages intentionally omitted

(g) *Order prohibiting transfer of property.* If it appears that a person or corporation, alleged to have property of the judgment debtor or to be indebted to the judgment debtor in an amount exceeding fifty dollars, not exempt from execution, claims an interest in the property adverse to such judgment debtor or denies such indebtedness, the court may order such person or corporation to refrain from transferring or otherwise disposing of such interest or debt until such time as may reasonably be necessary for the judgment creditor to bring an action to determine such interest or claim and prosecute the same to judgment. Such order may be modified or vacated by the court at any time upon such terms as may be just.

(r) *Witnesses.* Witnesses may be required to appear and testify in any proceedings brought under this rule in the same manner as upon the trial of an issue.

(s) *Order for property to be applied on judgment.* The court or master may order any property of the judgment debtor, not exempt from execution, in the possession of the judgment debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

(t) *Appointment of receiver.* The court may appoint a receiver of the property of the judgment debtor, not exempt from execution, and may forbid any transfer or other disposition thereof or interference therewith until its further order therein; provided that before any receiver shall be vested with the real property of the judgment debtor a certified copy of the appointment shall be recorded in the office of the recorder of the county in which any real estate sought to be affected thereby is situated.

Advisory Committee Note. — The 1994 amendments constitute a substantial reorganization and revision of the rule applicable to execution. While not an exhaustive list, the Advisory Committee notes the following significant changes:

The Rule has been restructured to eliminate references to gender.

Paragraph (a) specifies that a writ of execution is available only post judgment and Paragraph (b) now states that a writ of execution may only be used to reach the judgment debtor's non-exempt real or personal property. The availability of writs of execution to reach non-exempt property, and the requirement that the judgment creditor now notify the judgment debtor of a right to exemptions, are described in several provisions of the revised rule. This change incorporates similar notice procedures now utilized in Rule 64D and alleviates constitutional due process problems in the previous rule. These constitutional issues were addressed by the United States Court of Appeals in *Aacua v. San Juan County Sheriff's Department*, 944 F.2d 691 (10th Cir. 1991), involving a similar New Mexico Rule.

Paragraph (d) retains the requirement that writs of execution be issued to and served by a sheriff or constable. A sheriff must make service in the case of real property. Paragraph (d) also allows the use of a praecipe, which is commonly executed by the judgment creditor or the judgment creditor's counsel directing the officer to specific property to be levied upon. In practice, some officers will not execute a writ of execution without an accompanying praecipe.

Paragraph (e) has been amended to allow the officer to serve the writ within sixty (60) days, although the return of the writ may be made thereafter.

Paragraph (f) now defines "levy" as the seizure of the non-exempt property and authorizes the officer to hold the property in person or through one or more agents. It is common practice for the officer to appoint a "keeper" to hold the property pending sale as it is not always practical for the officer to take physical possession of the property. Language in this paragraph on payment of the sales proceeds has now been relocated to new Paragraph (f) conducting the sale. Provisions in paragraph (f) regarding detailed procedures in event of death of the officer were deemed unnecessary and have been eliminated.

Paragraph (g) is new and provides that the clerk shall attach to the writ of execution a notice of execution and exemptions and right to a hearing, and two copies of an application by which the judgment debtor may request a hearing. A similar procedure is contained in Rule 64D. It is expected in practice that the plaintiff will provide to the clerk the materials to be attached to the writ. Official forms for the notice of execution, exemptions and right to a hearing, and the application for a hearing have been prepared by the Committee. Service of these forms may be made personally in the same manner as service of a summons in a civil action or may be transmitted by mail to the judgment debtor's last known address as provided by the judgment creditor. Notice of the time and date of sale may also be served at the same time. Paragraph (g) also contains a publication form of service if the judgment creditor's last known address is not available. This paragraph also sets forth the language to be included in the notice and application to be served upon or mailed to the judgment debtor. Paragraph (g) is not applicable to judicial mortgage foreclosure proceedings since the real

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Search Code by Key Word

<< Previous Section (38-2-6)

Next Section (38-3-1) >>

Utah

Code

Title 38 Liens

Chapter

2

Miscellaneous Liens

Section

7

Compensation -- Attorney's lien.

38-2-7. Compensation -- Attorney's lien.

(1) The compensation of an attorney is governed by agreement between the attorney and a client, express or implied, which is not restrained by law.

(2) An attorney shall have a lien for the balance of compensation due from a client on any money or property owned by the client that is the subject of or connected with work performed for the client, including, but not limited to:

- (a) any real or personal property that is the subject of or connected with the work performed for the client;
- (b) any funds held by the attorney for the client, including any amounts paid as a retainer to the attorney by the client; and
- (c) any settlement, verdict, report, decision, or judgment in the client's favor in any matter or action in which the attorney assisted, including any proceeds derived from the matter or action, whether or not the attorney is employed by the client at the time the settlement, verdict, report, decision, or judgment is obtained.

(3) An attorney's lien commences at the time of employment of the attorney by the client.

✱ (4) An attorney may enforce a lien under this section by moving to intervene in a pending legal action in which the attorney has assisted or performed work, or by filing a separate legal action. An attorney may not move to intervene in an action or file a separate legal action to enforce a lien before 30 days has expired after a demand for payment has been made and not been complied with.✱

(5) An attorney may file a notice of lien in a pending legal action in which the attorney has assisted or performed work for which the attorney has a lien under this section. In addition, an attorney may file a notice of lien with the county recorder of the county in which real property that is subject to a lien under this section is located. A notice of lien shall include the following:

- (a) the name, address, and telephone number of the attorney claiming the lien;
- (b) the name of the client who is the owner of the property subject to the lien;
- (c) a verification that the property is the subject of or connected with work performed by the attorney for the client and that a demand for payment of amounts owed to the attorney for the work has been made and not been paid within 30 days of the demand;

(d) the date the attorney first provided services to the client;

(e) a description of the property, sufficient for identification; and

(f) the signature of the lien claimant and an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents.

(6) Within 30 days after filing the notice of lien, the attorney shall deliver or mail by certified mail to the client a copy of the notice of lien.

(7) Any person who takes an interest in any property, other than real property, that is subject to an attorney's lien with actual or constructive knowledge of the attorney's lien, takes his or her interest subject to the attorney's lien. An attorney's lien on real property has as its priority the date and time when a notice of lien is filed with the county recorder of the county in which real property that is subject to a lien under this section is located.

(8) This section does not alter or diminish in any way an attorney's common law retaining lien rights.

(9) This section does not authorize an attorney to have a lien in the representation of a client in a criminal matter or domestic relations matter where a final order of divorce has not been secured unless:

- (a) the criminal matter has been concluded or the domestic relations matter has been concluded by the securing of a final order of divorce or the attorney/client relationship has terminated; and
- (b) the client has failed to fulfill the client's financial obligation to the attorney.

Renumbered and Amended by Chapter 4, 2001 General Session
Repealed and Re-enacted by Chapter 360, 2001 General Session
Download Code Section [Zipped WordPerfect 38 02 000700.ZIP](#) 3,301 Bytes

[<< Previous Section \(38-2-6\)](#)

[Next Section \(38-3-1\) >>](#)

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Gardner, 86 Utah 250, 39 P.2d 327, 103 A.L.R. 928 (1934), reh'g denied and homestead exemption to res judicata further explained in:

Existing liens on land cannot be defeated by subsequent declaration of homestead. *McMurdie v. Oburg*, 99 Utah 403, 107 P.2d 163, 132 A.L.R. 435 (1940).

Void execution sale.

Where judgment debtor selected as his home-

stead premises sold upon execution on constructive notice only, and value of such premises was within limit of homestead exemption, sale was void, and fact that judgment debtor made no objection to sale did not stop him from suing to remove cloud on title caused by sale. *Kimball v. Salisbury*, 19 Utah 161, 56 P. 973 (1898).

COLLATERAL REFERENCES

Am. Jur. 2d. --- 40 Am. Jur. 2d Homestead §§ 77 et seq., 115 et seq.

C.J.S. --- 40 C.J.S. Homesteads § 21 et seq.

78-23-5. Property exempt from execution.

- (1) (a) An individual is entitled to exemption of the following property:
 - (i) a burial plot for the individual and his family;
 - (ii) health aids reasonably necessary to enable the individual or a dependent to work or sustain health;
 - (iii) benefits the individual or his dependent have received or are entitled to receive because of disability, illness, or unemployment from any source;
 - (iv) benefits paid or payable for medical, surgical, or hospital care to the extent they are used by an individual or his dependent to pay for that care;
 - (v) veterans benefits;
 - (vi) money or property received, and rights to receive money or property for child support;
 - (vii) one clothes washer and dryer, one refrigerator, one freezer, one stove, one microwave oven, one sewing machine, all carpets in use, provisions sufficient for 12 months actually provided for individual or family use; all wearing apparel of every individual and dependent, not including jewelry or furs, and all beds and bedding for every individual or dependent;
 - (viii) works of art depicting the debtor or the debtor and his resident family, or produced by the debtor or the debtor and his resident family, except works of art held by the debtor as part of a trade or business;
 - (ix) proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of whom the individual was or is a dependent to the extent that those proceeds are compensatory;
 - (x) except as provided in Subsection (1)(b), any money or other assets held for or payable to the individual as a participant or beneficiary from or an interest of the individual as a participant or beneficiary in a retirement plan or arrangement that is described in Section 401(a), 401(h), 401(k), 403(a), 403(b), 408, 408A, 409, 414(d), or 414(e) of the United States Internal Revenue Code of 1986, as amended; and
 - (xi) the interest of or any money or other assets payable to an alternate payee under a qualified domestic relations order as those

terms are defined in Section 414(p) of the United States Internal Revenue Code of 1986, as amended.

(b) The exemption granted by Subsection (1)(a)(x) does not apply to:

(i) an alternate payee under a qualified domestic relations order, as those terms are defined in Section 414(p) of the United States Internal Revenue Code of 1986, as amended; or

(ii) amounts contributed or benefits accrued by or on behalf of a debtor within one year before the debtor files for bankruptcy.

(2) Exemptions under this section do not limit items which may be claimed as exempt under Section 78-23-8.

History: C. 1963, 78-23-5, enacted by L. 1981, ch. 111, § 5; 1989, ch. 19, § 1; 1997, ch. 138, § 2; 1998, ch. 370, § 2.

the string of sections in Subsection (1)(x). Federal Law. — The Internal Revenue Code of 1986, cited in Subsection (1), is Title 26 of the U.S. Code.

Amendment Notes. — The 1999 amendment, effective May 3, 1999, inserted "408A" in

NOTES TO DECISIONS

ANALYSIS

Waiver of exemption.

Cited.

not be supported by consideration. *Oliver v. Mitchell*, 14 Utah 2d 9, 376 P.2d 390 (1962).

Cited in *Utah Farm Prod. Credit Ass'n v. Labrum*, 762 P.2d 1070 (Utah 1988).

Waiver of exemption.

A waiver of exemption from execution need

COLLATERAL REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d Exemptions § 28 et seq. C.J.S. — 35 C.J.S. Exemptions § 39 et seq.

78-23-6. Property exempt from execution to extent necessary for support.

Besides the property specified in Section 78-23-5, an individual is entitled to exemption of the following property to the extent reasonably necessary for the support of the individual and his dependents:

- (1) money or property received, and rights to receive money or property for alimony or separate maintenance;
- (2) proceeds or benefits paid or payable on the death of an insured, if the individual was the spouse or a dependent of the insured; and
- (3) assets held, payments, and amounts payable under a stock bonus, pension, profit-sharing, annuity, or similar plan providing benefits other than by reason of illness or disability.

History: C. 1963, 78-23-6, enacted by L. 1981, ch. 111, § 6.

§ 78B-5-505. Property exempt from execution

(1)(a) An individual is entitled to exemption of the following property:

- (i) a burial plot for the individual and the individual's family;
- (ii) health aids reasonably necessary to enable the individual or a dependent to work or sustain health;
- (iii) benefits the individual or the individual's dependent have received or are entitled to receive from any source because of:

- (A) disability;
- (B) illness; or
- (C) unemployment;

(iv) benefits paid or payable for medical, surgical, or hospital care to the extent they are used by an individual or the individual's dependent to pay for that care;

(v) veterans benefits;

(vi) money or property received, and rights to receive money or property for child support;

(vii) money or property received, and rights to receive money or property for alimony or separate maintenance, to the extent reasonably necessary for the support of the individual and the individual's dependents;

(viii)(A) one:

- (I) clothes washer and dryer;
- (II) refrigerator;
- (III) freezer;
- (IV) stove;
- (V) microwave oven; and
- (VI) sewing machine;

(B) all carpets in use;

(C) provisions sufficient for 12 months actually provided for individual or family use;

(D) all wearing apparel of every individual and dependent, not including jewelry or furs; and

(E) all beds and bedding for every individual or dependent;

(ix) except for works of art held by the debtor as part of a trade or business, works of art:

(A) depicting the debtor or the debtor and his resident family; or

(B) produced by the debtor or the debtor and his resident family;

(x) proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of whom the individual was or is a dependent to the extent that those proceeds are compensatory;

(xi) the proceeds or benefits of any life insurance contracts or policies paid or payable to the debtor or any trust of which the debtor is a beneficiary upon the death of the spouse or children of the debtor, provided

that the contract or policy has been owned by the debtor for a continuous unexpired period of one year;

(xii) the proceeds or benefits of any life insurance contracts or policies paid or payable to the spouse or children of the debtor or any trust of which the spouse or children are beneficiaries upon the death of the debtor, provided that the contract or policy has been in existence for a continuous unexpired period of one year;

(xiii) proceeds and avails of any unmaturred life insurance contracts owned by the debtor or any revocable grantor trust created by the debtor, excluding any payments made on the contract during the one year immediately preceding a creditor's levy or execution;

(xiv) except as provided in Subsection (1)(b), any money or other assets held for or payable to the individual as a participant or beneficiary from or an interest of the individual as a participant or beneficiary in a retirement plan or arrangement that is described in Section 401(a), 401(b), 401(k), 403(a), 403(b), 408, 408A, 409, 414(d), or 414(e), Internal Revenue Code; and

(xv) the interest of or any money or other assets payable to an alternate payee under a qualified domestic relations order as those terms are defined in Section 414(p), Internal Revenue Code.

(b) The exemption granted by Subsection (1)(a)(xiv) does not apply to:

(i) an alternate payee under a qualified domestic relations order, as those terms are defined in Section 414(p), Internal Revenue Code; or

(ii) amounts contributed or benefits accrued by or on behalf of a debtor within one year before the debtor files for bankruptcy. This may not include amounts directly rolled over from other funds which are exempt from attachment under this section.

(2) The exemptions in Subsections (1)(a)(xi), (xii), and (xiii) do not apply to proceeds and avails of any matured or unmaturred life insurance contract assigned or pledged as collateral for repayment of a loan or other legal obligation.

(3) Exemptions under this section do not limit items that may be claimed as exempt under Section 78B-5-506.

Laws 2008, c. 3, § 801, eff. Feb. 7, 2008.

Historical and Statutory Notes

Prior Laws:

Laws 1981, c. 111, § 5.
Laws 1989, c. 19, § 1.
Laws 1997, c. 138, § 2.
Laws 1999, c. 370, § 2.

Laws 2004, c. 135, § 2.
Laws 2005, c. 234, § 1.
Laws 2007, c. 323, § 1.
C. 1953, § 78-23-5.

Law Review and Journal Commentaries

Bankruptcy exemption planning: Counseling in shades of gray. *Marker*, 21 *Utah B.J.* 20 (March/April 2008).

Title/Chapter/Section:[Go To](#)[Search Code by Key Word](#)<< [Previous Section \(78B-5-824\)](#)[Next Section \(78B-5-825.5\)](#) >>[Utah](#)
[Code](#)[Title 78B](#) Judicial Code[Chapter](#)
[5](#) Procedure and Evidence[Section](#)
825

Attorney fees -- Award where action or defense in bad faith -- Exceptions.

78B-5-825. Attorney fees -- Award where action or defense in bad faith -- Exceptions.

(1) In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

- (a) finds the party has filed an affidavit of impecuniosity in the action before the court; or
- (b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

Renumbered and Amended by Chapter 3, 2008 General Session

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5](#)[Procedure and Evidence](#)[Section
826](#)

Attorney fees -- Reciprocal rights to recover attorney fees.

78B-5-826. Attorney fees -- Reciprocal rights to recover attorney fees.

A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

Renumbered and Amended by Chapter 3, 2008 General Session

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Amendment Notes. — The 2009 amendment substituted “actions with only one party” for “small claims proceedings, in any civil action commenced after April 15, 1992 in any district court” near the beginning of Subdivision (a) and substituted “associate presiding judge, to another judge of the district, or to any judge of a court of like jurisdiction” for “Chief Justice” in Subdivision (c).

PART VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 64. Writs in general.

(a) *Definitions.* As used in Rules 64, 64A, 64B, 64C, 64D, 64E, 69A, 69B and 69C:

(a)(1) “Claim” means a claim, counterclaim, cross claim, third party claim or any other claim.

(a)(2) “Defendant” means the party against whom a claim is filed or against whom judgment has been entered.

(a)(3) “Deliver” means actual delivery or to make the property available for pick up and give to the person entitled to delivery written notice of availability.

(a)(4) “Disposable earnings” means that part of earnings for a pay period remaining after the deduction of all amounts required by law to be withheld.

(a)(5) “Earnings” means compensation, however denominated, paid or payable to an individual for personal services, including periodic payments pursuant to a pension or retirement program. Earnings accrue on the last day of the period in which they were earned.

(a)(6) “Notice of exemptions” means a form that advises the defendant or a third person that certain property is or may be exempt from seizure under state or federal law. The notice shall list examples of exempt property and indicate that other exemptions may be available. The notice shall instruct the defendant of the deadline for filing a reply and request for hearing.

(a)(7) “Officer” means any person designated by the court to whom the writ is issued, including a sheriff, constable, deputy thereof or any person appointed by the officer to hold the property.

(a)(8) “Plaintiff” means the party filing a claim or in whose favor judgment has been entered.

(a)(9) “Property” means the defendant’s property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.

(a)(10) “Serve” with respect to parties means any method of service authorized by Rule 5 and with respect to non-parties means any manner of service authorized by Rule 4.

(b) *Security.*

(b)(1) *Amount.* When security is required of a party, the party shall provide security in the sum and form the court deems adequate. For security by the plaintiff the amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a writ wrongfully obtained. For security by the defendant, the amount should be equivalent to the amount of the claim or judgment or the value of the defendant’s interest in the property. In fixing the amount, the court may consider any relevant factor. The court may relieve a party from the necessity of providing security if it appears that none of the parties will incur damages, costs or attorney fees as a result of a writ wrongfully obtained or if there exists some other substantial reason for dispensing with security. The amount of security does not establish or limit the amount of damages, costs or attorney fees recoverable if the writ is wrongfully obtained.

(b)(2) *Jurisdiction over surety.* A surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom

papers affecting the surety's liability may be served. The surety shall file with the clerk of the court the address to which the clerk may mail papers. The surety's liability may be enforced on motion without the necessity of an independent action. If the opposing party recovers judgment or if the writ is wrongfully obtained, the surety will pay the judgment, damages, costs and attorney fees not to exceed the sum specified in the contract. The surety is responsible for return of property ordered returned.

(b)(3) *Objection.* The court may issue additional writs upon the original security subject to the objection of the opposing party. The opposing party may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the writ. The burden to show the sufficiency of the security and the sufficiency of the sureties is on the proponent of the security.

(b)(4) *Security of governmental entity.* No security is required of the United States, the State of Utah, or an officer, agency, or subdivision of either, nor when prohibited by law.

(c) *Procedures in aid of writs.*

(c)(1) *Referee.* The court may appoint a referee to monitor hearings under this subsection.

(c)(2) *Hearing; witnesses; discovery.* The court may conduct hearings as necessary to identify property and to apply the property toward the satisfaction of the judgment or order. Witnesses may be subpoenaed to appear, testify and produce records. The court may permit discovery.

(c)(3) *Restraint.* The court may forbid any person from transferring, disposing or interfering with the property.

(d) *Issuance of writ; service.*

(d)(1) *Clerk to issue writs.* The clerk of the court shall issue writs. A court in which a transcript or abstract of a judgment or order has been filed has the same authority to issue a writ as the court that entered the judgment or order. If the writ directs the seizure of real property, the clerk of the court shall issue the writ to the sheriff of the county in which the real property is located. If the writ directs the seizure of personal property, the clerk of the court may issue the writ to an officer of any county.

(d)(2) *Content.* The writ may direct the officer to seize the property, to keep the property safe, to deliver the property to the plaintiff, to sell the property, or to take other specified actions. If the writ is to enforce a judgment or order for the payment of money, the writ shall specify the amount ordered to be paid and the amount due.

(d)(2)(A) If the writ is issued ex parte before judgment, the clerk shall attach to the writ plaintiff's affidavit, detailed description of the property, notice of hearing, order authorizing the writ, notice of exemptions and reply form.

(d)(2)(B) If the writ is issued before judgment but after a hearing, the clerk shall attach to the writ plaintiff's affidavit and detailed description of the property.

(d)(2)(C) If the writ is issued after judgment, the clerk shall attach to the writ plaintiff's application, detailed description of the property, the judgment, notice of exemptions and reply form.

(d)(3) *Service.*

(d)(3)(A) *Upon whom; effective date.* The officer shall serve the writ and accompanying papers on the defendant, and, as applicable, the garnishee and any person named by the plaintiff as claiming an interest in the property. The officer may simultaneously serve notice of the date, time and place of sale. A writ is effective upon service.

(d)(3)(B) *Limits on writs of garnishment.*

(d)(3)(B)(i) A writ of garnishment served while a previous writ of garnishment is in effect is effective upon expiration of the previous writ; otherwise, a writ of garnishment is effective upon service.

(d)(3)(B)(ii) Only one writ of garnishment of earnings may be in effect at one time. One additional writ of

period may be served on the garnishee while an earlier writ of continuing garnishment is in effect.

(d)(3)(C) *Return; inventory.* Within 10 days after service, the officer shall return the writ to the court with proof of service. If property has been seized, the officer shall include an inventory of the property and whether the property is held by the officer or the officer's designee. If a person refuses to give the officer an affidavit describing the property, the officer shall indicate the fact of refusal on the return, and the court may require that person to pay the costs of any proceeding taken for the purpose of obtaining such information.

(d)(3)(D) *Service of writ by publication.* The court may order service of a writ by publication upon a person entitled to notice in circumstances in which service by publication of a summons and complaint would be appropriate under Rule 4.

(d)(3)(D)(i) If service of a writ is by publication, substantially the following shall be published under the caption of the case:

To _____, [Defendant/Garnishee/Claimant];

A writ of _____ has been issued in the above-captioned case commanding the officer of _____ County as follows:

[Quoting body of writ]

Your rights may be adversely affected by these proceedings. Property in which you have an interest may be seized to pay a judgment or order. You have the right to claim property exempt from seizure under statutes of the United States or this state, including Utah Code Title 78B, Chapter 5, Part 5.

(d)(3)(D)(ii) The notice shall be published in a newspaper of general circulation in each county in which the property is located at least 10 days prior to the due date for the reply or at least 10 days prior to the date of any sale, or as the court orders. The date of publication is the date of service.

(e) *Claim to property by third person.*

(e)(1) *Claimant's rights.* Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers shall exercise those rights and obligations within the same time allowed the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.

(e)(2) *Join claimant as defendant.* The court may order any named claimant joined as a defendant in interpleader. The plaintiff shall serve the order on the claimant. The claimant is thereafter a defendant to the action and shall answer within 10 days, setting forth any claim or defense. The court may enter judgment for or against the claimant to the limit of the claimant's interest in the property.

(e)(3) *Plaintiff's security.* If the plaintiff requests that an officer seize or sell property claimed by a person other than the defendant, the officer may request at the court require the plaintiff to file security.

(f) *Discharge of writ; release of property.*

(f)(1) *By defendant.* At any time before notice of sale of the property or before property is delivered to the plaintiff, the defendant may file security and a motion to discharge the writ. The plaintiff may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the motion. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file a motion to discharge the writ on the ground that the writ was wrongfully obtained. The court shall give the plaintiff reasonable opportunity to correct a defect. The defendant shall have the order to discharge the writ upon the officer, plaintiff, garnishee and third person claiming an interest in the property.

(f)(2) *By plaintiff.* The plaintiff may discharge the writ by filing a release serving it upon the officer, defendant, garnishee and any third person claiming an interest in the property.

(f)(3) *Disposition of property.* If the writ is discharged, the court shall order any remaining property and proceeds of sales delivered to the defendant.

(f)(4) *Copy filed with county recorder.* If an order discharges a writ upon property seized by filing with the county recorder, the officer or a party shall file a certified copy of the order with the county recorder.

(f)(5) *Service on officer; disposition of property.* If the order discharging the writ is served on the officer:

(f)(5)(A) before the writ is served, the officer shall return the writ to the court;

(f)(5)(B) while the property is in the officer's custody, the officer shall return the property to the defendant; or

(f)(5)(C) after the property is sold, the officer shall deliver any remaining proceeds of the sale to the defendant.

(Added effective November 1, 2004; amended effective November 1, 2008.)

Amendment Notes. — The 2008 amendment substituted "Title 78B, Chapter 5, Part 5" for "Title 78, Chapter 23" in the last paragraph of Subdivision (d)(3)(D)(i).

Compiler's Notes. — Rule 64, F.R.C.P., provides that all remedies providing for seizure of person or property for the purpose of securing

satisfaction of judgment are available under the circumstances and in the manner provided by the law of the state in which the district court is held, including arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, subject to certain qualifications.

NOTES TO DECISIONS

Failure to file inventory and return.
Cited.

of former rule rendered the attachment proceeding void. *Bank of Ephraim v. Davis*, 581 P.2d 1001 (Utah 1978).

Failure to file inventory and return.

A failure to file an inventory and return in compliance with the mandatory requirements

Cited in *Booth v. Booth*, 2006 UT App 144, 134 P.3d 1151.

Rule 64A. Prejudgment writs in general.

(a) *Availability.* A writ of replevin, attachment or garnishment is available after the claim has been filed and before judgment only upon written order of the court.

(b) *Motion; affidavit.* To obtain a writ of replevin, attachment or garnishment before judgment, plaintiff shall file a motion, security as ordered by the court and an affidavit stating facts showing the grounds for relief and other information required by these rules. If the plaintiff cannot by due diligence determine the facts necessary to support the affidavit, the plaintiff shall explain in the affidavit the steps taken to determine the facts and why the facts could not be determined. The affidavit supporting the motion shall state facts in simple, concise and direct terms that are not conclusory.

(c) *Grounds for prejudgment writ.* Grounds for a prejudgment writ include, in addition to the grounds for the specific writ, all of the requirements listed in subsections (c)(1) through (c)(3) and at least one of the requirements listed in subsections (c)(4) through (c)(10):

(c)(1) that the property is not earnings and not exempt from execution; and
(c)(2) that the writ is not sought to hinder, delay or defraud a creditor of the defendant; and

(c)(3) a substantial likelihood that the plaintiff will prevail on the merits of the underlying claim; and

(c)(4) that the defendant is avoiding service of process; or

(c)(5) that the defendant has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, the property with intent to defraud creditors; or

(c)(6) that the defendant has left or is about to leave the state with intent to

which exceeded the amount of property it held for the debtor. *Colonial Bldg. Supply, LLC v. 1017.*

Constr. Assocs., 2008 UT App 436, 198 P.3d 436.

COLLATERAL REFERENCES

Utah Law Review. — Sniadach, Fuentes and Mitchell: A Confusing Trilogy and Utah Prejudgment Remedies, 1974 *Utah L. Rev.* 536. Note, New Standards for Child Support Enforcement in Utah, 1986 *Utah L. Rev.* 591. Am. Jur. 2d. — 6 Am. Jur. 2d Attachment and Garnishment §§ 2 to 65, 91 to 217, 332 to 342, 346 to 407, 523 et seq., 572 et seq. C.J.S. — 38 C.J.S. Garnishment §§ 1 to 22, 69 to 118, 140 to 155, 169, 170, 194 to 264, 274, 276 et seq., 293 to 295.

A.L.R. — Funds deposited in court as subject of garnishment, 1 A.L.R.3d 936.

Branch bank or main office of bank having branches, attachment and garnishment of funds in, 12 A.L.R.3d 1088.

Issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393.

Client's funds in hands of his attorney as subject of attachment or garnishment by client's creditor, 35 A.L.R.3d 1094.

Liability insurer's potential liability for failure to settle claim against insured as subject to garnishment by insured's judgment creditors, 60 A.L.R.3d 1190.

Post-Sniadach status of banker's right to set off bank's claim against depositor's funds, 65 A.L.R.3d 1284.

Special bank deposits as subject of attachment or garnishment to satisfy depositor's general obligations, 8 A.L.R.4th 998.

Garnishee's duty to give debtor notice of garnishment prior to delivery of money without judgment against the garnishee on the debt, 36 A.L.R.4th 824.

Wrongful discharge: employer's liability under state law for discharge of employee based on garnishment order against wages, 41 A.L.R.5th 31.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one joint depositor, 86 A.L.R.5th 527.

Rule 64E. Writ of execution.

(a) *Availability.* A writ of execution is available to seize property in the possession or under the control of the defendant following entry of a final judgment or order requiring the delivery of property or the payment of money.

(b) *Application.* To obtain a writ of execution, the plaintiff shall file an application stating:

(b)(1) the amount of the judgment or order and the amount due on the judgment or order;

(b)(2) the nature, location and estimated value of the property; and

(b)(3) the name and address of any person known to the plaintiff to claim an interest in the property.

(c) *Death of plaintiff.* If the plaintiff dies, a writ of execution may be issued upon the affidavit of an authorized executor or administrator or successor in interest.

(d) *Reply to writ; request for hearing.*

(d)(1) The defendant may reply to the writ and request a hearing. The reply shall be filed and served within 10 days after service of the writ and accompanying papers upon the defendant.

(d)(2) The court shall set the matter for an evidentiary hearing. If the court determines that the writ was wrongfully obtained, or that property is exempt from seizure, the court shall enter an order directing the officer to release the property. If the court determines that the writ was properly issued and the property is not exempt, the court shall enter an order directing the officer to sell or deliver the property. If the date of sale has passed, notice of the rescheduled sale shall be given. No sale may be held until the court has decided upon the issues presented at the hearing.

(d)(3) If a reply is not filed, the officer shall proceed to sell or deliver the property.

(e) *Mortgage foreclosure governed by statute.* Utah Code Title 78B, Chapter 6, Part 9, Mortgage Foreclosure, governs mortgage foreclosure proceedings notwithstanding contrary provisions of these rules.

(Repealed and reenacted effective November 1, 2004; amended effective November 1, 2008.)

Tab 2

FILED
FIFTH DISTRICT COURT

2011 AUG 11 PM 2:54

WASHINGTON COUNTY

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BY

IN THE FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

DAVID LEE LAMOREAUX,

Plaintiff,

vs.

BLACK DIAMOND HOLDINGS, LLC,

Defendant.

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT'S
MOTION TO SUBSTITUTE IN AS
PARTY PLAINTIFF**

Civil No. 080500885

Judge Eric A. Ludlow

Before the Court is the motion by Defendant Black Diamond Holdings, LLC ("Black Diamond") to substitute in as party plaintiff in this matter. The motion has been fully briefed, and oral argument was held on June 17, 2011. The parties were given until July 1, 2011 to submit proposed orders, after which the Court took the matter under advisement. Because of the importance of the Court's decision to the outcome of the case and the potential for appeal, and given the fact that the parties have not cited, nor has the Court identified, any controlling case law addressing the current version of the Utah Rules of Civil Procedure, the Court issues its order in the form of a memorandum decision.¹ For the reasons set forth below, the motion is granted and defendant Black Diamond Holdings, LLC, being the real party in interest, is

¹ The Court largely adopts Defendant's proposed order, with some emendations and deletions.

hereby substituted as the party plaintiff. Plaintiff David Lee Lamoreaux is therefore dismissed as a party to this action.

DISCUSSION AND FINDINGS OF FACT

The following are the findings of fact that the Court deems appropriate to make for purposes of deciding the motion. These findings are taken from the statements of fact and supporting documentation provided by Black Diamond, none of which were contested by

Plaintiff:

1. On or about February 1, 2010, the Fishers obtained a judgment against David Lamoreaux and Diane Lamoreaux in the amount of \$16,484.96 in Case No. 080502955 (the "Fisher Lawsuit").
2. On or about January 19, 2011, the Fishers obtained a writ of execution in the Fisher Lawsuit to execute upon David Lamoreaux's interests against Black Diamond in the instant lawsuit.
3. The writ of execution was served on Plaintiff on February 16, 2011; however, Mr. Lamoreaux claims to have transferred his interests in the instant lawsuit to his son Jake Lamoreaux some time prior to being served with the writ. February 16, 2011 was also the first day of trial in this matter, but Plaintiff did not notify the Court of his purported transfer of interest to his son.
4. Neither Plaintiff, nor his son Jake Lamoreaux, nor any other person filed a written reply, objection, or motion to discharge the writ of execution, whether in the Fisher Lawsuit or the instant action, within 10 days of service or at any time prior to the time of the public sale on

March 21, 2011.

5. On March 4, 2011, a notice of sale scheduling a public auction of the seized personal property for March 21, 2011, at 10:00 AM, was served on Plaintiff and his counsel of record in the instant action, Mr. Park. On that same day, a notice of sale was publicly posted and later published as required by Utah Rule of Civil Procedure 64.

6. On March 21, 2011, a public auction was conducted to sell all of Plaintiff's right, title, and interest in this current lawsuit.

7. Austin Anderson, representing Black Diamond, attended the auction and submitted the highest bid, \$17,383.78, which it paid to the Fishers to purchase all of Plaintiff's right, title and interest in the instant lawsuit.

8. Both Mr. Park and Plaintiff attended the public sale, and Mr. Park orally requested that the sale be cancelled or postponed, asserting that Plaintiff no longer owned the causes of action in the instant lawsuit. Neither Mr. Park nor Plaintiff identified Jake Lamoreaux as the purported transferee of the claims at the time of the sale; rather, Jake Lamoreaux was first named as a purchaser in Plaintiff's pleadings in opposition to the instant motion.

ANALYSIS

1. The executability of choses in action following the repeal of Rule 69

Under former Rule 69 of the Utah Rules of Civil Procedure, "causes of action [were] regularly sold," and "[o]nce acquired by another, the new litigant [had] the right to determine the course and scope of the litigation of the claims purchased, including the right to move to dismiss the pending claims." *Applied Med. Techs. v. Eames*, 2002 UT 18, ¶ 17, 44 P.3d 699, 702-703. Rule 69 was repealed in 2004, however, and it appears that no reported decision has addressed the current state of the law as it relates to a defendant's ability to purchase a cause of action

pending against itself for purposes of dismissing the claim.

Despite this absence of current case law on the question, the Court determines that the plain language of the applicable statute and rules render the answer to this question straightforward: the law in Utah continues to allow the execution upon and public sale of a plaintiff's chose in action. Just as the former Rule 69(b) provided that "[a] writ of execution may be used to levy upon all of the judgment debtor's personal property ... which is not exempt from execution under state or federal law," the current Rule 64E(a) continues to provide that "[a] writ of execution is available to seize property in the possession or under the control of the defendant following the entry of a final judgment," and the current Rule 64(a)(9) defines property for purposes of Rule 64E as being "the defendant's property of any type not exempt from seizure." Additionally, just as the former Utah Code Ann. § 78-23-5 (identifying exemptions from execution) did not identify choses in action as generally being exempt from execution, the current § 78B-5-505 contains essentially identical language to the former statute and still does not exempt choses in action. If the relevant rule provides that all property may be executed upon unless it is exempt from seizure, and no provision identifies choses in action as being exempt from seizure, then it follows that choses in action may be executed upon.

A broader reading of former Section 78-23-5 and current Section 78B-5-505 supports this conclusion. Pursuant to former Section 78-23-5(1)(ix) and current Section 78B-5-505(1)(x), certain causes of action related to personal injury and wrongful death claims were, and are, exempted from execution. This legislative expression of specific exclusions as to particular types of choses in action requires the conclusion that the legislature did not intend to exclude all choses in action generally—otherwise, the specific exclusions would make no sense. *See, e.g.,*

State ex rel. Z.C., 2007 UT 54, ¶ 6 (“When examining the statutory language we assume the legislature used each term advisedly and in accordance with its ordinary meaning”) (quotation omitted); *Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980) (“[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and that interpretations are to be avoided which render some part of a provision nonsensical or absurd”) (citations omitted).

Moreover, in defining property subject to execution, current Rule 64(a)(9) provides that such property “includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.” Choses in action comfortably fit within this definition, as intangible personal property. See, e.g., 30 *Am. Jur. 2d, Executions and Enforcements of Judgments* §§ 142-43 (2005).

In sum, property is generally subject to execution unless it is specifically identified as being exempt. Mr. Lamoreaux has provided no authority, nor has the Court discovered any, identifying choses in action as being exempt from seizure. Therefore, Mr. Lamoreaux’s choses in action against Black Diamond were subject to execution.

2. The procedural sufficiency of the writ, notice and public sale

Plaintiff has raised questions regard the sufficiency of the process employed by the Fishers to obtain the writ, provide appropriate notice, and conduct the public auction and sale. Rules 64 and 64E contain the procedure not only for a party to obtain a writ and seize property, but also for a defendant or interested third party to fight the issuance of the writ and seizure of the property. In such circumstances and under the facts of the present case, the effectiveness or

ineffectiveness of Mr. Lamoreaux's purported transfer of his choses in action to his son is irrelevant.

As a threshold matter the Court concludes that any defects in the procedure employed by the Fishers in obtaining the writ, providing notice or conducting the sale, belonged in the Fisher Lawsuit. By ignoring the writ procedure in that case and instead attacking the effectiveness of the writ in this case, Plaintiff is seeking to collaterally attack the judgment and orders of a sister court. Such a collateral attack is inappropriate. See, e.g., *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1076 (10th Cir. 2009) (the validity of a writ of execution cannot be questioned collaterally) (citing *Edmonston v. Sisk*, 156 F.2d 300, 302 (10th Cir. 1946)).

However, even if Mr. Lamoreaux had not waived his objections by failing to raise them before Judge Shumate in the Fisher Lawsuit, the Court would still conclude that the procedures employed by the Fishers were sufficient. Not only do the facts and documentation produced by Black Diamond support the sufficiency of the Fisher's actions, but Mr. Lamoreaux has effectively conceded such sufficiency by failing to make any objection to the procedure. The one exception to this—originally objecting to the sufficiency of proof of publication—was withdrawn by Plaintiff's counsel at oral argument.

Mr. Lamoreaux's response to this is to state that the procedural sufficiency of the writ process is irrelevant because Mr. Lamoreaux no longer owned his causes of action at the time the writ was issued, and therefore the Fishers had nothing to sell at the public auction. Mr. Lamoreaux's arguments are unavailing, however, because the writ procedures in Rules 64 and 64E apply not only to Mr. Lamoreaux but also to his son Jake, the purported transferee of Mr. Lamoreaux's claims against Black Diamond. Specifically, under Rule 64(e)(1) "[a]ny person

claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security,” and “[a]ny claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.” The Court can find no support for the proposition that merely having Plaintiff and his counsel appear at the public auction and orally assert that Plaintiff no longer owned the claims is sufficient to satisfy the requirements of Rules 64 and 64E. Such an extrajudicial approach is not exercising “the same rights and obligations as the defendant with respect to the writ.” If Jake Lamoreaux wished to assert that the writ should not have issued or that the sale should not have proceeded because he, not his father, owned the claims against Black Diamond, he should have filed a reply under Rule 64E(d) or utilized the procedures under Rule 64(f)). Having failed to do so, Jake Lamoreaux cannot now assert that the writ procedure was deficient or ineffective.

For these reasons, the Court concludes that the public sale of Plaintiff’s claims in the instant action to Black Diamond were effective, and that, in any event, both Plaintiff and Jake Lamoreaux have waived any objection they may have had to the sale. In such circumstances, Black Diamond is the real party in interest owning the plaintiff’s claims in this matter, and the Motion should be granted.

3. *Contingency fee agreement*

Finally, the Court concludes that Mr. Park’s argument regarding his contingency fee agreement is not ripe for decision. The Court reaches this conclusion both on the grounds cited by Black Diamond—i.e., that regardless of whether Mr. Park has an ongoing interest in the claims against Black Diamond, the time to address the potential extinguishment of that interest is

when Black Diamond moves to dismiss the claims against itself—and also on the grounds that Mr. Park's argument has not yet been sufficiently developed to allow decision. More complete briefing on the issue, which presumably Mr. Park will provide in response to the motion to dismiss it is anticipated that Black Diamond will file, is necessary. For the present, the Court concludes that any ongoing interest held by Mr. Park is not sufficient to prevent the process of Rules 64 and 64E from becoming effective, and thereby allowing Black Diamond to step into the role of party plaintiff in this matter.

ORDER

For the foregoing reasons, it is hereby ORDERED that Black Diamond's Motion is granted and Black Diamond is hereby named as the party plaintiff in this matter. For the same reason, David Lee Lamoreaux is hereby dismissed as party plaintiff. Notwithstanding this, in order to avoid any prejudice for purposes of appeal, Black Diamond is hereby ordered to continue to serve all filings in this matter on Mr. Park, as counsel for Mr. Lamoreaux.

Dated this 1 day of August, 2011



JUDGE ERIC A. LUDLOW

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on this 11 day of August, 2011, I provided a true and

correct copy of the foregoing **MEMORANDUM DECISION AND ORDER GRANTING**

DEFENDANT'S MOTION TO SUBSTITUTE IN AS PARTY PLAINTIFF to each of the

parties/attorneys named below by placing a copy in such attorney's file in the Clerk's Office at

the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States

Mail, first-class postage prepaid, and addressed as follows:

Michael W. Park
James M. Park
THE PARK FIRM, P.C.
315 West Hilton Drive, Suite 4
St. George, UT 84770

David L. Elmont
R. Daren Barney
BARNEY MCKENNA & OLMSTEAD, P.C.
43 South 100 East, Suite 300
St. George, Utah 84771-2710

P. J. Dawson
DEPUTY CLERK OF COURT

Tab 3

Michael W. Park (2516)
THE PARK FIRM. P.C.
315 West Hilton Drive, Suite 4
St. George, UT 84774
Telephone: (435) 673-8689
Facsimile: (435) 673-8767

Attorney for Plaintiff

FILED
FIFTH DISTRICT COURT

2011 MAR 24 PM 4: 50

WASHINGTON COUNTY

BY 

IN THE FIFTH DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

DAVID LEE LAMOREAUX,)

Plaintiff,)

v.)

BLACK DIAMOND HOLDINGS, LLC,)

Defendants.)

**OBJECTION TO REQUEST FOR
EX PARTE ORDER**

Civil No.: 080500885
Judge: Eric A. Ludlow

The Plaintiff, by his attorney, Michael W. Park, objects to the Request for Ex Parte Order. This request is made for the reason that David Lee Lamoreaux had no interest in the lawsuit against Black Diamond Holdings at the time Black Diamond Holdings claims it bought all of his interest in the lawsuit. This objection is supported by the Affidavit of Michael W. Park and the Affidavit of David Lee Lamoreaux.


There is no law that says David Lee Lamoreaux cannot transfer a chosen in action at any time and the lawsuit has no value until there is a judgment awarded. In any event, all of the people who attended the sale were told that David Lee Lamoreaux had no interest in the lawsuit.

SCANNED

In their request for an Ex Parte Order, the defendant does not set forth any law which states that this type of transfer cannot be made by David Lamoreaux.

Even if David Lamoreaux could not transfer this interest, which, in my opinion, he can, the interest of The Park Firm cannot be sold at this sale. The Park Firm has had an interest in the lawsuit since March of 2008 when it contracted with David Lee Lamoreaux to receive one-third of the funds collected.

DATED this 24th day of March, 2011



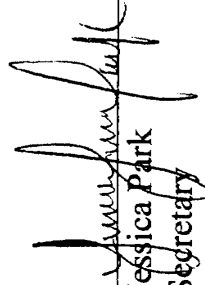
Michael W. Park
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that on this 24th day of March, 2011, I by first class mail, mailed a true and correct copy of the foregoing **OBJECTION TO REQUEST FOR EX PARTE ORDER** to the following:

DARWIN C. FISHER,
A Professional Corporation
40 N 300 E, Suite 101
St. George, Utah 84770

BARNEY McKENNA & OLMSTEAD, P.C.
David L. Elmont
R. Daren Barney
43 South 100 East, Suite 300
St. George, Utah 84771-2710


Jessica Park
Secretary

Tab 4

FIFTH DISTRICT COURT-ST GEORGE
WASHINGTON COUNTY, STATE OF UTAH

DAVID LEE LAMOREAUX, : MINUTES
Plaintiff, : BENCH TRIAL
:
vs. : Case No: 080500885 CN
BLACK DIAMOND HOLDINGS LLC, : Judge: ERIC A LUDLOW
Defendant. : Date: February 17, 2011

Clerk: tawnil

PRESENT
Plaintiff(s): DAVID LEE LAMOREAUX
Defendant(s): DAREN COUGHLIN
AUSTIN ANDERSON
Plaintiff's Attorney(s): MICHAEL W PARK
Defendant's Attorney(s): DAVID L ELMONT
Audio

Tape Number: 2A Tape Count: 9:00-10:21

TRIAL

COUNT: 9:00

Day 2

Original deposition of David Lamoreaux 10-13-09 submitted.

Howard Thayne Houston is sworn and testifies on direct examination by Mr. Elmont. Mr. Houston is declared as an expert witness.

COUNT: 9:25

Cross examination by Mr. Park

COUNT: 9:32

Witness steps down; recess

COUNT: 9:41

David Lamoreaux testifies on rebuttal.

COUNT: 9:45

Respective counsel, Mr. Park and Mr. Elmont, present their closing arguments.

COUNT: 10:17

The Court directs counsel to each submit their proposed findings and orders, and any case law, to the Court by 3 pm on 4-1-11. The Court prefers submission by pleading and hard disc in the word perfect format..

The Court will then take this matter under advisement and render a written decision. 10:21] Recess.

Tab 5

FILED

28 APR 12 PM 4:38

5TH DISTRICT COURT
ST. GEORGE

BARNEY MCKENNA & OLMSTEAD, P.C.
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Attorneys for Defendant Black Diamond Holdings, LLC

IN THE FIFTH DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

DAVID LEE LAMOREAUX,

Plaintiff,

vs.

BLACK DIAMOND HOLDINGS, LLC.,

Defendant.

**REPLY MEMORANDUM IN SUPPORT OF
MOTION TO SUBSTITUTE IN AS PARTY
PLAINTIFF**

Civil No. 080500885

The Honorable Eric A. Ludlow

Defendant Black Diamond Holdings, LLC ("Black Diamond") hereby submits this reply memorandum in support of its motion to substitute in as party plaintiff ("Motion") and in response to the Memorandum in Opposition to Motion to Substitute in as Party Plaintiff ("Opposition") filed by David Lamoreaux.

INTRODUCTION

The Opposition presents wide-ranging arguments against the Motion, from objections about the procedural sufficiency of the notice of sale of Mr. Lamoreaux's choses in action, to legal arguments about the effect of amendments to the rules of civil procedure as to whether writs of execution may be levied against choses in action. As will be set forth below, none of these arguments

are persuasive. Indeed, with the possible exception of one argument—that regarding Mr. Park's fee agreement—none of Mr. Lamoreaux's arguments are even appropriately before the Court in this case. Instead, all of Mr. Lamoreaux's arguments regarding the sufficiency and effect of the writ of execution and notice of sale belong in matter 080502955 (*Fisher v. Lamoreaux*), where the writ was issued and the sale took place. Raising such arguments in this matter constitutes an impermissible collateral attack on the judgments and orders of a sister court in a separate case.

As for Mr. Park's argument about attorney liens, the argument is, at best, premature. The instant Motion is not one for dismissal—wherein any ongoing lien interest could be extinguished or rendered moot—but rather one to be substituted in as the party Plaintiff. Assuming *arguendo* that Mr. Park purported lien interest survives the transference of Mr. Lamoreaux's causes of action, then his lien interest will remain following the grant of the Motion. Arguments about the effect of any attorney lien interest would be appropriately heard either as part of the later motion to voluntarily dismiss the action or perhaps may even require a separate lawsuit asserting a right to attorney's fees. That is, whether or not Mr. Park has an ongoing, contingent lien interest in the outcome of any judgment (or ability to contest the absence of judgment) in this case, he certainly has no interest that would prevent the transference of Mr. Lamoreaux's choses in action.

The bottom line as it relates to the Motion is that a writ was appropriately issued, Mr. Lamoreaux's choses in action were levied, a public sale was appropriately noticed and conducted, and Black Diamond appropriately purchased Mr. Lamoreaux's right to bring claims against Black Diamond in this lawsuit. In such circumstances, the Motion should be granted.

STATEMENT OF FACTS¹

1. On or about February 1, 2010, Darwin and Cheryl Fisher (the "Fishers") obtained a judgment against David Lamoreaux and Diane Lamoreaux in the amount of \$16,484.96 in civil action 080502955. (See Exhibit 1 to original memorandum accompanying Motion: "Memorandum").
2. On or about January 19, 2011, the Fishers obtained a Writ of Execution to execute upon David Lamoreaux's interests in this current lawsuit. (See Exhibit 2 of Memorandum, Writ of Execution).
3. The Writ of Execution was served on Lamoreaux and his claim in this lawsuit was seized on February 16, 2011. (See *id.*; See also Exhibit 3 of Memorandum, Notice of Execution and Seizure of Intangible Personal Property).
4. Neither David Lamoreaux nor his son Jake Austin Lamoreaux filed a written reply or objection to the Writ of Execution within 10 days of service of the Writ pursuant to Rule 64E(d)(1) of Utah Rules of Civil Procedure or at any time prior to the public sale.
5. The date Mr. Lamoreaux was served with the Writ of Execution, February 16, 2011, was the first day of the two day bench trial in this matter. Notwithstanding the fact that the Opposition avers that Mr. Lamoreaux no longer had an interest in this lawsuit as of that date (see Opposition at 4, ¶ 21), no notice was given either before or during trial that Mr. Lamoreaux was no longer the real party in interest ("RPI") in this case.
6. Indeed, the only "notice" given that Mr. Lamoreaux was no longer the RPI in this case, prior to the submission of Mr. Lamoreaux's affidavit dated March 24, 2011, was the oral

¹ Portions of these statements of fact are taken from the Opposition, in which case Black Diamond may accept the statements' truth for purposes of present argument but does not concede their truthfulness for any other purpose.

statement of Mr. Park given at the public sale on March 21, 2011, wherein Mr. Park attempted to halt the sale and stated that Mr. Lamoreaux no longer owned the causes of action in the instant lawsuit. However, when asked, Mr. Park refused to provide any information about who the actual owner was or when the purported assignment allegedly occurred. (See Declaration of R. Daren Barney "Barney Declaration," attached hereto as Exhibit 1). Even at this late date almost two months after trial, and after the submission of the Opposition and accompanying affidavits, Mr. Lamoreaux has still not provided any information about when he allegedly transferred his choses in action to his son and ceased to be the RPI. Nor has he provided any information to allow a reasonable assessment of the regularity of such alleged transfer.

7. Notwithstanding the alleged prior transfer of his rights in this action, Mr. Lamoreaux's March 24, 2011 affidavit provides that "if he is fortunate enough to get a judgment in his favor that he will address all the creditors if he ever receives any funds from this lawsuit." See Opposition at Exhib. 1 (Affidavit of David Lee Lamoreaux), ¶ 7. Further, Mr. Lamoreaux's counsel continues to file papers as if Mr. Lamoreaux remained the RPI.

8. As noted in the original Memorandum, a Notice of Sale was both publicly posted and published as required under Rule 69B(b)(2). At the time of the filing of the Motion and Memorandum the proof of publication had not yet been received from the newspaper, and therefore could not be attached as an exhibit. However, the proof of publication has since been received and is attached hereto as Exhibit 2.

ARGUMENT

As set forth in the original Memorandum, the Fishers properly executed against Mr. Lamoreaux's right, title, and interest in this lawsuit pursuant to Rules 64E and 69A of the Utah Rules

of Civil Procedure, including providing proper notice that would allow any third party claiming an undisclosed interest in the choses in action to object. Neither Mr. Lamoreaux, nor his son, nor any other person timely claimed that the Writ was wrongfully obtained, that the property seized was exempt under Rule 64E(d)(1) or otherwise appropriately objected to the notice of sale or conduct of the sale. The arguments Mr. Lamoreaux now makes for why it was unnecessary for him to object during the Writ process are unavailing. Nothing set forth in the Opposition undermines the conclusion that the writ process was appropriately followed and that Black Diamond is now the proper owner of Mr. Lamoreaux's claims in this action. For this reason, the Motion should be granted.

A. Arguments Concerning The Writ, Notice Of Sale, Or Conduct Of The Sale Belong In Case No. 080502955, Not In This Case.

As a threshold matter, every argument raised in the Opposition attacking the procedural and substantive effect of the sale belongs before Judge Shumate in *Fisher v. Lamoreaux*, Case No. 080502955, not here. That matter is where the Writ of Execution and the underlying judgment on which it was based were issued. That matter is where the process was accomplished for the Notice of Sale and the conduct of the public sale of Mr. Lamoreaux's rights to proceed against Black Diamond in this action. See generally Memorandum at Exhibs. 4-6. Anything else is an impermissible collateral attack on the judgments and decisions rendered in another case. See, e.g., *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1076 (10th Cir. Utah 2009) (the validity of a writ of execution cannot be questioned collaterally) (citing *Edmonston v. Sisk*, 156 F.2d 300, 302 (10th Cir. 1946)); see *id.* at 1076 ("A writ of execution, once issued, cannot be collaterally attacked.") (quoting 12 Wright et al. *Federal Practice and Procedure*, § 3013, at 158).

Moreover, according to Mr. Lamoreaux's affidavit, it is Jake Austin Lamoreaux who allegedly now has the interest in this case that conflicts with Black Diamond's Motion. If by his own admission David Lamoreaux no longer owns the claims in this case, Mr Lamoreaux arguably no longer has proper standing to participate in this lawsuit, and he certainly has no standing to assert the positions of Jake Lamoreaux. Jake Lamoreaux, in turn, while being held out as the purported owner of David Lamoreaux's claims against Black Diamond and ultimately the reason the Motion should not be granted, did not object to the Writ or sale, and has yet to seek to be heard on the Motion.

Such matters are threshold concerns that the Court should consider at the outset in addressing the Motion. The inappropriateness of Mr. Lamoreaux's collateral attack on the proceedings of Case No. 080502955, alone, ought to be sufficient for the Court to reject the Opposition and grant the Motion. However, given Mr. Lamoreaux's presentation of numerous arguments in the Opposition, Black Diamond considers it appropriate to also address those other arguments and will do so below.

B. Execution Of A Chose In Action Remains Permissible Under Utah Law, Even After The Repeal Of Rule 69.

Given the fundamental importance of the issue, Black Diamond will first address the ability of a creditor (in this case, the Fishers) under Utah law to obtain a writ of execution on a chose in action, rather than addressing the arguments raised in the Opposition in the order they appeared therein.

The entirety of the Opposition's argument on this issue consists of the assertion that the right to execute on a chose in action stemmed from Rule 69(f), that Rule 69 has been repealed, and that

there “is no companion rule which expressly provides for the execution upon and sale of a chose in action.” See Opposition at 14. The Opposition then goes on to speculate that the reason for the repeal of Rule 69 “seems patently clear” and that it had to do with preventing “sharp practices . . . most probably to avoid the very circumstance the Defendant seeks to create in the instant action.”

See *id.*

The Opposition’s statement of the source of authority to execute on a chose in action, however, is mistaken; and the Opposition’s speculation about the reason for repealing Rule 69 is baseless. Former Rule 69(f) did not purport to be a grant of authority to execute on choses in action. Rather, it was a subsection of a procedural rule regarding writ procedure generally, and it only incidentally mentioned collecting and selling choses in action in the context of the process to be used by an officer in levying against the judgment debtor’s property. See Utah R. Civ. P. 69 (2004), relevant portions of which are attached hereto as Exhib. 3. The somewhat incidental nature of the reference in Rule 69(f) to executing on choses in action was implicitly acknowledged by the court in *Applied Medical Technologies*. See *Applied Med. Techs. v. Eames*, 2002 UT 18, ¶ 11 (“Rule 69(b) of the Utah Rules of Civil Procedure provides, ‘A writ of execution may be used to levy upon all of [a] judgment debtor’s personal property and real property which is not exempt from execution under state or federal law.’ Utah R. Civ. P. 69(b). Accordingly, under rule 69(f) of the Utah Rules of Civil Procedure, a sheriff or constable, pursuant to a writ of execution, may levy upon the nonexempt property and sell it at a sheriff’s sale.”) (bracketing in original; emphasis added). The placement of an incidental reference to choses in action, in a middle subsection of a very long and complicated rule of procedure, is hardly the sole source of authority for executing on choses in action.

Rather, the primary source of authority to execute on choses in action under Rule 69 came from Rule 69(b), in conjunction with Utah Code Ann. § 78-23-5. Pursuant to Rule 69(b), “[a] writ of execution may be used to levy upon all of the judgment debtor’s personal property . . . which is not exempt from execution under state or federal law.” See Exhibit. 3 (emphasis added). And, pursuant to section 78-23-5, choses in action (at least generally) were not identified as types of personal property subject to exemption from execution. See, e.g., Utah Code Ann. § 78-23-5 (1999),² attached hereto as Exhibit. 4. Indeed, pursuant to section 78-23-5(1)(ix), certain causes of action related to personal injury and wrongful death claims were exempted from execution. This legislative expression of specific exclusions as to particular types of choses in action requires the conclusion that the legislature did not intend to exclude all choses in action generally—otherwise, the specific exclusions would be nonsensical. See, e.g., *State ex rel. Z.C.*, 2007 UT 54, ¶ 6 (“When examining the statutory language we assume the legislature used each term advisedly and in accordance with its ordinary meaning.”) (quotation omitted); *Olsen v. Eagle Mt. City*, 2011 UT 10, ¶ 9 (“when the words of a statute consist of ‘common, daily, nontechnical speech,’ they are construed in accordance with the ordinary meaning such words would have to a reasonable person familiar with the usage and context of the language in question.” (quoting *O’Dea v. Olea*, 2009 UT 46, ¶ 32; footnote omitted); see also, e.g., Black’s Law Dictionary (6th ed.) at 403 (*expressio unius est exclusio alterius* is the “maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another.”).

² The 1999 version is relied upon herein because that is the last year where amendments are reflected in former section 78-23-5 prior to the 2004 repeal of Rule 69.

This broader framework of Rule 69(b) and Utah Code Ann. § 78-23-5—not merely the specific language in Rule 69(f)—provided the legislative authority for executing on choses of action. If all personal property “which is not exempt from execution” could be executed upon, and choses in action were not identified in the statute as being exempt from execution, then choses in action were subject to execution. *Cf., e.g., Snow, Nuffer, Engstrom & Drake v. Tamasse*, 1999 UT 49, ¶ 10 (“The Denham court interpreting Nevada law, held that, absent direct language to the contrary, all causes of action are subject to execution. *See* Denham, 262 Cal. Rptr. at 152. Like Nevada, Utah’s rules of civil procedure contain no direct language exempting causes of action from execution. *See* Utah R. Civ. P. 69”) (emphasis added; footnote omitted).

Critically, this framework of Rule 69(b) and Utah Code Ann. § 78-23-5 remains in place today. Specifically, even though Rule 69 has been repealed, under current Rule 64 the definition of “property” subject to writs (including writs of execution—*see* Rule 64E(a)) includes “the defendant’s property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.” *See* Utah R. Civ. P. 64(a)(9).³ A chose in action is certainly personal, intangible property, “whether due or to become due.” Moreover, just as choses in action generally were not among the exemptions identified in Utah Code Ann. § 78-23-5, the current statutory provision in Utah Code Ann. § 78B-5-505 contains

³ Notably, while the Opposition is correct in observing that choses in action were not subject to execution at common law, this had nothing to do with alleged “sharp practices.” Rather, as noted in the very section of American Jurisprudence cited in the Opposition, choses in action were merely part of the broader category of “intangible personal property” that was not subject to execution. *See* 30 Am. Jur. 2d, *Executions and Enforcements of Judgments* §§ 142-43 (2005), a true and correct copy of which is attached hereto as Exhibit. 5. Rule 64’s inclusion of “personal property, tangible and intangible” as property subject to execution makes clear that Utah has abrogated the common-law rule against execution of intangible personal property such as choses in action.

essentially identical language to the former statute. It continues to specify that certain claims related to personal injury and wrongful death are exempted from execution and continues to not exclude choses in action generally. See section 78B-5-505(1)(x), attached hereto as Exhib. 6. Thus, by the interaction of Rule 64(a)(9) and Utah Code Ann. § 78B-5-505, a chose in action remains subject to execution because it is not statutorily identified as being “exempt from seizure.” The plain language of Rule 64 and section 78B-5-505 thus compels the conclusion that choses in action remain subject to execution. Put differently, if Rule 64 allows for execution on a “defendant’s property of any type not exempt from seizure,” then it is incumbent on Mr. Lamoreaux to identify where in the law choses in action are identified as “exempt from seizure.” He has not done so and cannot do so.

The Opposition’s speculation as to the reason(s) for repealing former Rule 69 is not grounded in basis of fact or law. The annotation explaining the repeal merely provides that “Rule 69, establishing procedures for writs of execution and supplemental proceedings, was repealed effective November 1, 2004. For comparable provisions, see Rules 69A to 69C.” See Utah Court Rules Annotated (2010). In other words, the entirety of the set of complicated procedures dealing with writs of execution was re-written. There was no indication that the re-writing had anything to do with “sharp practices,” and indeed far from condemning execution of choses in action as a “sharp practice,” the legislature and rules committee continued to provide for such execution, albeit under broader terms addressing all personal, intangible property, “whether due or to become due,” and by continuing to not include choses of action in section 78B-5-505’s list of exempt property.

As for what constitutes “sharp practices,” it is notable that Mr. Lamoreaux has not asserted that he failed to receive notice of the Writ or of the Notice of Sale. He had every opportunity to

take appropriate measures to ensure that the sale to Black Diamond did not take place, and if he couldn't afford to pay the judgment or bid at the public auction⁴ then Mr. Park and Mr. Lamoreaux's son—both of whom apparently assert interests in the cause of action—similarly had such opportunity. Moreover, it is interesting to hear complaints of sharp practices in circumstances where a plaintiff allegedly secretly sells his claims before trial, without providing notice either to his judgment creditor or to the Court or Black Diamond, but proceeds to trial anyway as if he still owns the claims, then comes with his counsel to try to disrupt the public sale without following any proper judicial procedure (and failing to provide any information that would allow an evaluation of his assertion that he had transferred his claims), and finally disavows any fraudulent intent because he allegedly intends to pay his creditors with the money he expects to make in the event he receives a judgment against Black Diamond (in a case where he allegedly no longer holds any interest).

C. The Writ Of Execution And Notice Of Sale Were Procedurally Appropriate, And The Sale To Black Diamond Was Effective.

The only procedural defect alleged in the Opposition was the absence of proof of publication. See Opposition at 6. As noted in the original Memorandum, notice was both posted publicly and published as required by Rule 69B(b)(2). Since the time of filing the Motion and Memorandum, the proof of publication has been received and is attached as Exhibit 2. Thus, there is no basis for the Opposition's sole procedural objection.

⁴ Incidentally, given the requirements of Rules 69A and 69B there would have been no prospect of a bidding war. Rather, the Fishers would only have been entitled to sufficient money to satisfy their judgment and cover costs, and any amount bid in excess of that would have gone to Mr. Lamoreaux. See Rule 69A(a), Rule 69B(c)(3). Thus, no party could have realistically outbid Mr. Lamoreaux as any amount he bid over the amount necessary to pay the Fishers would have gone to himself.

Moreover, the procedure employed in the Notice of Sale also extinguished any claim by Jake Austin Lamoreaux to any right in the property. Specifically, while the Opposition asserts that David Lamoreaux had no need to object to the Writ because he no longer owned the chose in action (*see* Opposition at 11-12), this fails to account for the fact that Rule 64 also provides an opportunity for third parties to object to the issuance of a writ. Specifically:

Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers shall exercise those rights and obligations within the same time allowed the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.

Utah R. Civ. P. 64(e) (emphasis added). In this case, due to the either secretive or post hoc nature of the alleged transfer to Jake Lamoreaux, there is no allegation that the Fishers had notice of any alleged interest by Jake in the chose in action. Thus, Jake Lamoreaux could not be served with the Writ, and assuming he claimed an interest, Jake had until the time the property was “sold or delivered to the plaintiff” to “exercise [the same] rights and obligations” as the defendant (David Lamoreaux) could exercise. *See id.* Those “rights and obligations” included the right to file a reply to the Writ and request a hearing (*see* Rule 64E(d)) and the likely obligation to provide security (*see* Rule 64(b)). Similarly, the process may have involved having Jake Lamoreaux named as a party defendant in the Fisher v. Lamoreaux case (*see* Rule 64(e)(2)). All of the above, of course, would have taken place in Case No. 080502955, Fisher v. Lamoreaux—not in the case of Lamoreaux v. Black Diamond.

But instead of taking the actions available under Rules 64 and 64E, Jake Lamoreaux did nothing to assert any claim to an interest in David Lamoreaux's chose in action against Black Diamond. Instead, David Lamoreaux and his attorney, Mr. Park, simply showed up at the public sale and sought to use self-help to stop the sale from going forward. Such an attempt would have been ineffective on behalf of David Lamoreaux, and it was certainly ineffective on behalf of a third party who neither appeared at the sale to assert a claim, nor sent a representative, nor was even identified at the sale by Mr. Park when specifically asked for the identify of the alleged transferee of Mr. Lamoreaux's chose in action.

Simply put, the Fishers followed appropriate procedure for obtaining the Writ, noticing the sale, and conducting the sale. Both David and Jake Lamoreaux waived any right to object to the sale based on their failure to follow the procedures established for objecting. *See, e.g., Utah R. Civ. P. 64E(d)(3)* ("If a reply [objecting to the writ] is not filed, the officer shall proceed to sell or deliver the property.").

D. Cases Should Be Prosecuted By The Real Party In Interest; Even If Substitution Under Rule 25 Is Discretionary, In This Case Not Allowing The Substitution Would Be An Abuse Of Discretion.

The Opposition relies on the language of Rule 25(c) for the argument that the substitution of parties is discretionary, and given the fact that the case has already had a trial it would be inequitable for the Court to order the substitution by granting the Motion at this late date. *See* Opposition at 7-9.

Notably, however, the Opposition ignores the requirements of Rule 17, which provides that "every action shall be prosecuted in the name of the real party in interest." Utah R. Civ. P. 17(a). Rule 17 even contemplates potential dismissal of a case when it is not prosecuted in the name of the

real party in interest as long as "a reasonable time has been allowed after objection for . . . joinder or substitution of, the real party in interest" See *id.*

Moreover, in a case such as this where the interests of Black Diamond and Mr. Lamoreaux are directly opposed, any discretion under Rule 25 exercised to prevent the RPI from participating would effectively nullify Black Diamond's right to pursue its own interests. In effect, this case would be analogous to the mandatory intervention provisions of Rule 24, where intervention as of right should be permitted "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest" See Utah R. Civ. P. 24(a). Obviously, if Mr. Lamoreaux were allowed to proceed to attempt to obtain and seek to enforce a judgment against Black Diamond, that would impede Black Diamond's ability to protect its interests. In a case where Black Diamond now appropriately owns Mr. Lamoreaux chose in action against Black Diamond, it would not be in the interests of justice to prevent Black Diamond from substituting in as the plaintiff in order to protect its interests. Black Diamond should not be required to go through the expense and risk of proceeding to the stage of the issuance of judgment on the merits. Rather, it should be allowed to substitute as the RPI plaintiff, and thereafter be allowed to seek voluntary dismissal of its claims.

E. Mr. Park's Argument About His Attorney Lien Is, At Best, Premature.

Finally, the contention that the Motion should be denied because of the alleged interest in Mr. Lamoreaux's claim held by Mr. Park is, at best, premature. That is, there may well be interesting arguments to be had about what happens to Mr. Park's contingency arrangements in the case of a voluntary dismissal where no judgment against Black Diamond is entered. However, such


arguments would belong either in the briefing of a motion to dismiss or potentially in a separate lawsuit filed by Mr. Park seeking to obtain a fee. For present purposes, however, assuming arguendo the accuracy of Mr. Park's assertion that "the transfer of the chose in action remains subject to the attorney contingency fee agreement" (*see* Opposition at 15), that position leads to the conclusion that the Motion can be granted without any harm to Mr. Park's interests. In such circumstances, the presence of Mr. Park's contingency arrangements provides no basis for rejecting the Motion.

CONCLUSION

For the foregoing reasons, the Opposition does not identify any legitimate basis to deny the Motion. Rather, as established in the original Motion and Memorandum, Black Diamond legally obtained the plaintiff's right, title, and interest in this lawsuit. As the real party in interest, Black Diamond should be substituted in as party plaintiff in the place of David Lee Lamoreaux. For these reasons, Black Diamond respectfully requests that the Motion be granted.

RESPECTFULLY SUBMITTED: April 12, 2011.

BARNEY MCKENNA & OLMSTEAD, P.C.


DAVID L. ELMONT
R. DAREN BARNEY
Attorneys for Defendant Black Diamond Holdings, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of April, 2011, I served a copy of the **REPLY
MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE IN AS PARTY
PLAINTIFF**, on the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed

to:

Michael W. Park
James M. Park
THE PARK FIRM, P.C.
315 West Hilton Drive, Suite 4
St. George, UT 84770



Legal Assistant

EXHIBIT 1

BARNEY MCKENNA & OLMSTEAD, P.C.
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R. DAREN BARNEY – 6824
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St. George, Utah 84771-2710
Telephone: (435) 628-1711
Fax: (435) 628-3318
Attorneys for Defendant Black Diamond Holdings, LLC

IN THE FIFTH DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

DAVID LEE LAMOREAUX,

Plaintiff,

vs.

BLACK DIAMOND HOLDINGS, LLC.,

Defendant.

DECLARATION OF R. DAREN BARNEY IN
SUPPORT OF REPLY MEMORANDUM IN
SUPPORT OF MOTION TO SUBSTITUTE IN
AS PARTY PLAINTIFF

Civil No. 080500885

The Honorable Eric A. Ludlow

I, R. Daren Barney, declare under the Utah Rules of Civil Procedure, the Utah Rules of Professional Conduct, and the laws of perjury of the State of Utah as follows:

1. I am counsel for defendant Black Diamond Holdings, LLC in this matter.
2. On or about March 21, 2011 I accompanied Austin Anderson of Black Diamond Holdings in attending the public auction and sale of the interests of David Lamoreaux in the above-captioned action, conducted at the Fifth District Court House.
3. At the outset of the auction, counsel for Mr. Lamoreaux, Michael Park, sought to have the auction postponed on the basis that there was no interest to be sold because Mr. Lamoreaux had allegedly already transferred that interest.
4. In response to Mr. Park's assertion, I asked him to whom Mr. Lamoreaux's interest had been transferred. Mr. Park replied he could not answer my question, even though Mr. David Lamoreaux was also present at the public auction.
5. I also asked Mr. Park when the transfer had taken place. Mr. Park said he could not

answer my question.

6. Finally, I asked Mr. Park whether there was any documentation to substantiate the transfer, and Mr. Park responded that he did not know.

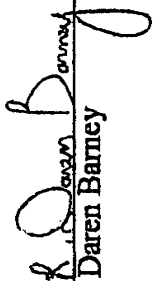

R. Daren Barney

EXHIBIT 2

PROOF
OF
PUBLICATION

STATE OF UTAH SS.
COUNTY OF WASHINGTON

I Kahillani Corpus, being duly sworn, deposes and says that I am the advertising representative of The Spectrum, a newspaper of general circulation published daily at Saint George, Washington County, State of Utah, also distributed in Iron County, and placed on Utahlegals.com; and that the notice:

PUB #: L4261

is a true copy of which is here to attached, was published in its issue dated the 20 day of March 2011 and was published again in the issues of said newspaper and Utahlegals.com dated:

for a total of 1 insertion(s) and on Utahlegals.com on the same day as the first newspaper publication and the notice remained on Utahlegals.com until the day of the scheduled foreclosure sale.

K. Corpus
Kahillani Corpus

Subscribed and sworn before me this 22nd day of March 2011.

Bonnie Thompson
NOTARY PUBLIC RESIDING
AT WASHINGTON COUNTY

ST. GEORGE OFFICE
231 E. B. George Blvd. - St. George, UT 84778
(Ph) (435) 634-6300 FAX (435) 634-6305
CEDAR CITY OFFICE
301 N. 100 W. - Cedar City, UT 84702
Office (435) 566-7498 FAX 566-7471

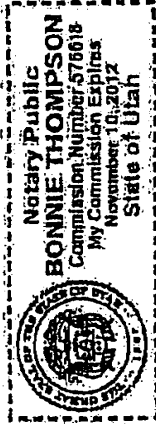


EXHIBIT 3

Rule 69. Execution and proceedings supplemental thereto.

(a) *Availability of writ of execution.* A writ of execution is available to a judgment creditor to satisfy a judgment or other order requiring the delivery of property or the payment of money by a judgment debtor.

(b) *Property subject to execution.* A writ of execution may be used to levy upon all of the judgment debtor's personal property and real property which is not exempt from execution under state or federal law.

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

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

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

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

(e) *When writ to be returned.* The writ of execution shall be served at any time within sixty days after its receipt by the officer. It shall then be returned to the court from which it issued, and when it is returned the clerk must attach it to the record.

(f) *Service of the writ.* Unless the execution otherwise directs, the officer must execute the writ against the non-exempt property of the judgment debtor by levying on a sufficient amount of property, if there is sufficient property; collecting or selling the choses in action and selling the other property in the manner set forth herein. Levy includes the seizure of the property and holding the property in person or through one or more agents, including the judgment debtor, appointed by the officer. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within view of the officer, the officer must levy only on such part of the property as the judgment debtor may indicate, if the property indicated is amply sufficient to satisfy the judgment and costs.

When an officer has served an execution issued out of any court the officer may complete the return thereof after such date of service.

(g) *hearing writ of an Upper judgment or call require judgment hearing hearing of sale time and The judgment execution trade social benefit tance other music law) vario exam with debt mail mail If can a sur the j publ in es situ*

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(g) *Notice to judgment debtor of sale and of exempt property and right to a hearing.* At the time the writ of execution is issued, the clerk shall attach to the writ a notice of execution and exemptions and right to a hearing and two copies of an application by which the judgment debtor may request a hearing.

Upon service of the writ, the sheriff or constable shall serve upon the judgment debtor, in the same manner as service of a summons in a civil action, or cause to be transmitted by both regular and certified mail, returned receipt requested, to the judgment debtor's last known address as provided by the judgment creditor, (i) the notice of execution and exemptions and right to a hearing, and (ii) the application by which the judgment debtor may request a hearing. Upon service of the writ, the sheriff or constable may also set the date of sale or delivery and serve upon the judgment debtor notice of the date and time of sale or delivery in the same manner as service of the notice of execution and exemptions and right to a hearing.

The notice of execution and exemptions that is to be served upon the judgment debtor shall indicate in substance that certain property is or may be exempt from execution including but not limited to a homestead; tools of the trade; a motor vehicle used for the judgment debtor's business or profession; social security benefits; supplemental security income benefits; veterans' benefits; unemployment benefits; workers' compensation benefits; public assistance (welfare); alimony; child support; certain pensions; part or all of wages or other earnings from personal services; certain furnishings and appliances; musical instruments; and heirlooms (each not to exceed the amount allowed by law). The notice shall also indicate that the list is a partial list and other various property exemptions may be available under federal law or the Utah exemptions statute, and that the judgment debtor must request a hearing within ten (10) days from the date of service of the notice upon the judgment debtor. For purposes of this provision, the date of service shall be the date of mailing, if mailed, or date of delivery, if hand-delivered, and no period for mailing under Rule 6(e) shall be used in computing the time period.

If the writ, the notice of execution and exemptions and right to a hearing cannot be served upon the judgment debtor in the same manner as service of a summons in a civil action, and the judgment creditor does not have available the judgment debtor's last known address, only the following notice need be published under the caption of the case in a newspaper of general circulation in each county in which the property levied upon, or some part thereof, is situated:

TO _____, Judgment Debtor.
A writ of execution has been issued in the above-captioned case, directed to the sheriff or constable of _____ County, commanding the sheriff or constable as follows:

"WHEREAS,
YOU MAY HAVE A RIGHT TO EXEMPT PROPERTY from the sale under statutes of the United States or this state, including Utah Code Annotated, Title 78, Chapter 23, in the manner described in those statutes.

The date of publication shall be deemed the date of service and the date of publication shall be not less than ten (10) days prior to the date of sale or delivery.

This paragraph (g) shall not be applicable to judicial mortgage foreclosure proceedings commenced under Utah Code Annotated, Title 78, Chapter 37.

(h) *Request for hearing.*

(h)(1) *Time for request.* The judgment debtor or any other person who owns or claims an interest in the property subject to execution may request a hearing to claim any exemption to the execution, or to challenge the issuance of the writ. Such request must be filed or served upon the judgment creditor or the attorney for the judgment creditor within ten (10) days of the service upon

Intervening pages intentionally omitted

(q) *Order prohibiting transfer of property.* If it appears that a person or corporation, alleged to have property of the judgment debtor or to be indebted to the judgment debtor in an amount exceeding fifty dollars, not exempt from execution, claims an interest in the property adverse to such judgment debtor or denies such indebtedness, the court may order such person or corporation to refrain from transferring or otherwise disposing of such interest or debt until such time as may reasonably be necessary for the judgment creditor to bring an action to determine such interest or claim and prosecute the same to judgment. Such order may be modified or vacated by the court at any time upon such terms as may be just.

(r) *Witnesses.* Witnesses may be required to appear and testify in any proceedings brought under this rule in the same manner as upon the trial of an issue.

(s) *Order for property to be applied on judgment.* The court or master may order any property of the judgment debtor, not exempt from execution, in the possession of the judgment debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

(t) *Appointment of receiver.* The court may appoint a receiver of the property of the judgment debtor, not exempt from execution, and may forbid any transfer or other disposition thereof or interference therewith until its further order therein; provided that before any receiver shall be vested with the real property of the judgment debtor a certified copy of the appointment shall be recorded in the office of the recorder of the county in which any real estate sought to be affected thereby is situated.

Advisory Committee Note. — The 1994 amendments constitute a substantial reorganization and revision of the rule applicable to executions. While not an exhaustive list, the Advisory Committee notes the following significant changes:

The Rule has been restructured to eliminate references to gender.

Paragraph (a) specifies that a writ of execution is available only post judgment and Paragraph (b) now states that a writ of execution may only be used to reach the judgment debtor's non-exempt real or personal property. The availability of writs of execution to reach non-exempt property, and the requirement that the judgment creditor now notify the judgment debtor of a right to exemptions, are described in several provisions of the revised rule. This change incorporates similar notice procedures now utilized in Rule 64D, and alleviates constitutional due process problems in the previous rule. These constitutional issues were addressed by the United States Court of Appeals in *Aracon v. San Juan County Sheriff's Department*, 944 F.2d 691 (10th Cir. 1991), involving a similar New Mexico Rule.

Paragraph (d) retains the requirement that writs of execution be issued to and served by a sheriff or constable. A sheriff must make service in the case of real property. Paragraph (d) also allows the use of a praecipe, which is commonly executed by the judgment creditor or the judgment creditor's counsel directing the officer to specific property to be levied upon. In practice, some officers will not execute a writ of execution without an accompanying praecipe.

Paragraph (e) has been amended to allow the officer to serve the writ within sixty (60) days, although the return of the writ may be made thereafter.

Paragraph (f) now defines "levy" as the seizure of the non-exempt property and authorizes the officer to hold the property in person or through one or more agents. It is common practice for the officer to appoint a "keeper" to hold the property pending sale, as it is not always practical for the officer to take physical possession of the property. Language in this paragraph on payment of the sales proceeds has now been relocated to new Paragraph (i) on conducting the sale. Provisions in paragraph (f) regarding detailed procedures in event of death of the officer were deemed unnecessary and have been eliminated.

Paragraph (g) is new and provides that the clerk shall attach to the writ of execution a notice of execution and exemptions and right to a hearing, and two copies of an application by which the judgment debtor may request a hearing. A similar procedure is contained in Rule 64D. It is expected in practice that the plaintiff will provide to the clerk the materials to be attached to the writ. Official forms for the notice of execution, exemptions and right to a hearing, and the application for a hearing have been prepared by the Committee. Service of these forms may be made personally, in the same manner as service of a summons in a civil action, or may be transmitted by mail to the judgment debtor's last known address as provided by the judgment creditor. Notice of the time and date of sale may also be served at the same time. Paragraph (g) also contains a publication form of service if the judgment creditor's last known address is not available. This paragraph also sets forth the language to be included in the notice and application to be served upon or mailed to the judgment debtor. Paragraph (g) is not applicable to judicial mortgage foreclosure proceedings since the real

EXHIBIT 4

UTAH EXEMPTIONS ACT

78-23-5

Gardner, 86 Utah 250, 39 P.2d 327, 103 A.L.R. 928 (1934), rel'g denied and homestead exemption to res judicata further explained in:

Existing liens on land cannot be defeated by subsequent declaration of homestead. *McMurdie v. Chubb*, 89 Utah 403, 107 P.2d 163, 132 A.L.R. 435 (1940).

Void execution sale.

Where judgment debtor selected as his home-

stead premises sold upon execution on constructive notice only, and value of such premises was within limit of homestead exemption, sale was void, and fact that judgment debtor made no objection to sale did not estop him from suing to remove cloud on title caused by sale. *Kimball v. Salisbury*, 19 Utah 161, 56 P. 973 (1898).

COLLATERAL REFERENCES

Ann. Jur. 2d. — 40 Am. Jur. 2d Homestead §§ 77 et seq., 115 et seq.

C.J.S. — 40 C.J.S. Homesteads § 21 et seq.

78-23-5. Property exempt from execution.

- (1) (a) An individual is entitled to exemption of the following property:
 - (i) a burial plot for the individual and his family;
 - (ii) health aids reasonably necessary to enable the individual or a dependent to work or sustain health;
 - (iii) benefits the individual or his dependent have received or are entitled to receive because of disability, illness, or unemployment from any source;
 - (iv) benefits paid or payable for medical, surgical, or hospital care to the extent they are used by an individual or his dependent to pay for that care;
 - (v) veterans benefits;
 - (vi) money or property received, and rights to receive money or property for child support;
 - (vii) one clothes washer and dryer, one refrigerator, one freezer, one stove, one microwave oven, one sewing machine, all carpets in use, provisions sufficient for 12 months actually provided for individual or family use; all wearing apparel of every individual and dependent, not including jewelry or furs, and all beds and bedding for every individual or dependent;
 - (viii) works of art depicting the debtor or the debtor and his resident family, or produced by the debtor or the debtor and his resident family, except works of art held by the debtor as part of a trade or business;
 - (ix) proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of whom the individual was or is a dependent to the extent that those proceeds are compensatory;
 - (x) except as provided in Subsection (1)(b), any money or other assets held for or payable to the individual as a participant or beneficiary from or an interest of the individual as a participant or beneficiary in a retirement plan or arrangement that is described in Section 401(a), 401(b), 401(k), 403(a), 403(b), 408, 408A, 409, 414(d), or 414(e) of the United States Internal Revenue Code of 1986, as amended; and
 - (xi) this interest of or any money or other assets payable to an alternate payee under a qualified domestic relations order as those

terms are defined in Section 414(p) of the United States Internal Revenue Code of 1986, as amended.

(b) The exemption granted by Subsection (1)(a)(x) does not apply to:

(i) an alternate payee under a qualified domestic relations order, as those terms are defined in Section 414(p) of the United States Internal Revenue Code of 1986, as amended; or

(ii) amounts contributed or benefits accrued by or on behalf of a debtor within one year before the debtor files for bankruptcy.

(2) Exemptions under this section do not limit items which may be claimed as exempt under Section 78-23-8.

History: C. 1983, 78-23-5, enacted by L. 1981, ch. 111, § 5; 1989, ch. 19, § 1; 1997, ch. 138, § 2; 1998, ch. 370, § 2.

the string of sections in Subsection (1)(x) Federal Law. — The Internal Revenue Code of 1986, cited in Subsection (1), is Title 26 of the U.S. Code.

Amendment Notes. — The 1999 amendment, effective May 3, 1999, inserted "408A" in

NOTES TO DECISIONS

ANALYSIS

Waiver of exemption.

Cited.

Waiver of exemption.

A waiver of exemption from execution need

not be supported by consideration. *Oliver v. Mitchell*, 14 Utah 2d 9, 376 P.2d 390 (1962).

Cited in *Utah Farm Prod. Credit Ass'n v. Labrum*, 762 P.2d 1070 (Utah 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d Exemptions § 28 et seq.

C.J.S. — 35 C.J.S. Exemptions § 39 et seq.

78-23-6. Property exempt from execution to extent necessary for support.

Besides the property specified in Section 78-23-5, an individual is entitled to exemption of the following property to the extent reasonably necessary for the support of the individual and his dependents:

- (1) money or property received, and rights to receive money or property for alimony or separate maintenance;
- (2) proceeds or benefits paid or payable on the death of an insured, if the individual was the spouse or a dependent of the insured; and
- (3) assets held, payments, and amounts payable under a stock bonus, pension, profit-sharing, annuity, or similar plan providing benefits other than by reason of illness or disability.

History: C. 1983, 78-23-6, enacted by L. 1981, ch. 111, § 6.

EXHIBIT 5

AMERICAN JURISPRUDENCE

SECOND EDITION

A MODERN COMPREHENSIVE TEXT STATEMENT OF
AMERICAN LAW

STATE AND FEDERAL

COMPLETELY REVISED AND REWRITTEN
IN THE LIGHT OF MODERN AUTHORITIES AND DEVELOPMENTS

Volume 30

EXECUTIONS AND ENFORCEMENTS OF JUDGEMENTS

2005

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*
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§ 141

such levy would be limited to those contents of the safe which were the property of the debtor.

b. *Incorporeal and Intangible Property*

§ 142 *Intangible property, generally; executory contracts*

Research References

West's Key Number Digest, Executions ¶ 42

Under the common law, a writ of execution can not be levied against a mere contractual right or chose in action;¹ rather, intangible property had to be reached through actions of equitable origin, such as a creditor's bill.²

Under the modern view, state legislatures may make incorporeal or intangible property,³ including choses in action owned by the debtor, subject to levy under execution,⁴ and this authority has been exercised in some instances.⁵ Thus, under these types of statutes, an executory contract constitutes property against which execution may be sought.⁶ Similarly, a writ of fieri facias creates a lien in favor of the judgment

299 N.W. 22 (1941).

¹Comm. to Use of French v. Weglein, 147 Pa. Super. 257, 24 A.2d 633 (1942). [Section 143]

²Van Ness v. Hyatt, 38 U.S. 294, 10 L. Ed. 168 (1839); Harvey v. Wright, 80 Ga. App. 232, 55 S.E.2d 835 (1949); Itasca Bank and Trust Co. v. Thorleif Larent and Son, Inc., 352 Ill. App. 3d 262, 287 Ill. Dec. 456, 816 N.E.2d 1269 (2d Dist. 2004); Artiss Mineral Feed Co., Inc. v. Farm Bureau Mut. Ins. Co., 463 N.W.2d 677 (Iowa 1990); City of Arkansas City v. Anderson, 12 Kan. App. 2d 490, 749 P.2d 505 (1988); New England Mortg. Services Co., Inc. v. Pett, 590 A.2d 1064, 15 U.C.O. Rep. Serv. 2d 649 (Me. 1991); Lynn v. International Broth. of Firemen and Oilers, 228 S.C. 267, 90 S.E.2d 204 (1955); Safeco Ins. Co. of America v. Skeen, 47 Wash. App. 196, 734 P.2d 41 (Div. 1, 1987).

³Itasca Bank and Trust Co. v. Thorleif Larent and Son, Inc., 352 Ill. App. 3d 262, 287 Ill. Dec. 456, 816 N.E.2d 1269 (2d Dist. 2004).

⁴In re Delaney, 29 B.R. 79 (Bankr. W.D. Va. 1982); Prodigy Centers/Atlanta No. 1 L.P. v. T-C Associates, Ltd., 269 Ga. 532, 501 S.E.2d 209 (1998); Artiss

Executions, Etc.

creditor only to the extent of the interest in the intangible property.

Under a view which in action are not subject to ordinary judgment upon ordinary judgment. Under a land contract, hold the legal title subject to levy under execution to contract purchaser's legal title can be co-creditors.¹⁰

The enforcement of action debtor does not the liberty of contract

§ 143 Cause of action

Research References
West's Key Number Digest

Under the modern intangible property, subject to levy under

A cause of action is a right upon which a judgment may be rendered, the seizure of the creditor a lien or suit.

While in some jurisdictions

three years; In re Apple, 233 A.D.2d 147, 64 N.Y.S.2d 64 (1st Dep't 1996) (debtor's right to purchase certain co-ownership rights to execute International Fide. Ashland Lumber Co., Inc. 463 S.E.2d 664 (1995).
¹⁰Prodigy Centers/Atlanta No. 1 L.P. v. T-C Associates, Ltd., 269 Ga. 532, 501 S.E.2d 209 (1998).

¹¹Cain & Bullman, Inc. 409 So. 2d 114 (Fla. 1st Dist. 1982).

¹²Endicott-Johnson, Smith, 266 U.S. 291, 45 Ed. 233 (1924).

Mineral Feed Co., Inc. v. Farm Bureau Mut. Ins. Co., 463 N.W.2d 677 (Iowa 1990); Applied Medical Technologies, Inc. v. Eames, 2002 UT 18, 44 P.3d 699 (Utah 2002).

¹³§ 153.

¹⁴Dodds v. Shamer, 339 Md. 540, 663 A.2d 1318 (1995); Victoria Graphics, Inc. v. Priorities Publications, Inc., 167 Misc.2d 607, 640 N.Y.S.2d 400 (N.Y. City Civ. Ct. 1995); Smith v. United States Fire Ins. Co., 128 Tenn. 436, 150 S.W. 97 (1912); Johnson v. Dahlquist, 130 Wash. 29, 225 P. 817 (1924).

¹⁵Callier v. Stanbrough, 47 U.S. 14, 6 How. 14, 13 L. Ed. 324 (1848); Rowe v. Colpoys, 137 F.2d 249, 148 A.L.R. 488 (App. D.C. 1943); Steffens v. American Standard Ins. Co. of Wis., 181 N.W.2d 174 (Iowa 1970); Dodds v. Shamer, 339 Md. 540, 663 A.2d 1318 (1995); Benton's Apparel v. Hegna, 213 Minn. 271, 7 N.W.2d 3, 143 A.L.R. 1148 (1943); Jacobs, Bell & Baumal v. Curtis, 232 N.J. Super. 155, 556 A.2d 817 (Law Div. 1989); Heinmes v. Heinmes, 70 S.D. 265, 16 N.W.2d 921 (1944).

¹⁶Westchester Fire Ins. Co. v. Heaher-gen, 632 N.W.2d 784 (Minn. Ct. App. 2001) (although statute limited actions to

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atory contracts

n not be levied against
ather, intangible prop-
table origin, such as a
ay make incorporeal or
owned by the debtor,
rity has been exercised
f statutes, an executory
ation may be sought.
ivor of the judgment

ed Co., Inc. v. Farm Bureau
Co., 462 N.W.2d 677 (Iowa
ed Medical Technologies, Inc.
002 UT 18, 44 P.3d 699 (Utah
v. Shamer, 339 Md. 540, 563
(1996); Victoria Graphics, Inc.
a Publications, Inc., 167 Misc.
0 N.Y.S.2d 400 (N.Y. City Civ.
Smith v. United States Fire
126 Tenn. 435, 150 S.W. 97
nson v. Dahlquist, 130 Wash.
817 (1924).

z v. Stanbrough, 47 U.S. 14, 6
12 L. Ed. 324 (1848); Rows v
... P.2d 249, 148 A.L.R. 488
343); Steffens v. American
Ins. Co. of Wis., 181 N.W.2d
a 1970); Dadds v. Shamer, 339
663 A.2d 1318 (1995); Bentons
v. Hegna, 213 Minn. 271,
143 A.L.R. 1148 (1942); Jacobs
animal v. Curtis, 232 N.J. Supr.
A.2d 817 (Law Div. 1989); He
Haines, 70 S.D. 265, 16 N.W.2d
4).

chester Fire Ins. Co. v. Hach
2 N.W.2d 754 (Minn. Ct. App.
through statute limited actions

EXECUTIONS, ETC.

creditor only to the extent that the judgment debtor has a possessory interest in the intangible property subject to the writ.¹

Under a view which lies somewhere between the foregoing, choses in action are not subject to seizure and sale under executions based upon ordinary judgments.²

Under a land contract, the interest of the seller, who continues to hold the legal title subject to the purchaser's equitable title, is subject to levy under execution on a judgment. It is not inconsistent with the contract purchaser's equitable rights to recognize that the seller's legal title can be conveyed, devised, encumbered, or levied on by creditors.³

The enforcement of a writ of execution against wages due the execution debtor does not constitute an unconstitutional interference with the liberty of contract between an employer and his or her employee.⁴

§ 143 Cause of action; choses in action

Research References

West's Key Number Digest, Executions § 47

Under the modern view, state legislatures may make incorporeal or intangible property, including choses in action owned by the debtor, subject to levy under execution.

A cause of action in existence prior to a judgment is personal property upon which a judgment creditor may seek execution.⁵ Otherwise stated, the seizure of a debtor's litigious right under a statute gives the creditor a lien or preference on what the debtor realizes from the suit.

While in some jurisdictions a claim or cause of action for unliqui-

ties years); In re Application of Char-
ney, 233 A.D.2d 147, 649 N.Y.S.2d 145
(1st Dep't 1996) (debtor's "insider" rights
to purchase certain cooperative apart-
ment as rights to executory contract).

International Fidelity Ins. Co. v.
Wheland Lumber Co., Inc., 250 Va. 507,
43 S.E.2d 694 (1996).

Prodigy Centers/Atlanta No. 1 L.P.
v. T-C Associates, Ltd., 269 Ga. 522, 501
S.E.2d 209 (1996).

Cain & Bulkman, Inc. v. Miss Sam,
Inc., 409 So.2d 114 (Fla. Dist. Ct. App.
5th Dist. 1982).

Endicott-Johnson Corporation v.
Smith, 266 U.S. 291, 45 S. Ct. 63, 69 L.
Ed. 833 (1924).

As to supplementary wage or income
executions, see § 668.

[Section 143]

¹In re Dulaney, 29 E.R. 79 (Bankr.
W.D. Va. 1982); Prodigy Centers/Atlanta
No. 1 L.P. v. T-C Associates, Ltd., 269
Ga. 522, 501 S.E.2d 209 (1996); Archie
Mineral Feed Co., Inc. v. Farm Bureau
Mut. Ins. Co., 462 N.W.2d 677 (Iowa
1990); Applied Medical Technologies, Inc.
v. Eames, 2002 UT 18, 44 P.3d 699 (Utah
2002).

²Archie Mineral Feed Co., Inc. v. Farm
Bureau Mut. Ins. Co., 462 N.W.2d 677
(Iowa 1990).

³Mena v. Muhleisen Properties, 652
So. 2d 65 (La. Ct. App. 5th Cir. 1995).

dated damages is not subject to execution,⁴ in others a writ of execution may encompass unliquidated tort claims.⁵ Thus, a claim for medical malpractice that is capable of being converted into a definitive judgment, although presently undetermined and unliquidated, may be deemed property under a state statutory provision governing execution sales.⁶ Similarly, a legal malpractice claim, like any other chose in action, may ordinarily be acquired by a creditor through attachment and execution.⁷ However, as a matter of public policy, a legal malpractice action which has been transferred by levy and execution sale, but which was never pursued by the original client, cannot be enforced as the decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client.⁸

In states where a cause of action for bad faith failure to settle is voluntarily assignable, and where the question has arisen, such a cause of action is subject to execution.⁹

An injured party who obtains a judgment against an insured party may levy execution on the insured's causes of action against his or her insurer. In such a case, the injured party steps into the shoes of the insured and can sue the insurer on such causes of action.¹⁰

§ 144 Salary, wages, or earnings; benefits; pensions

Research References

West's Key Number Digest, Executions ⇨ 42

Because the federal Employee Retirement Income Security Act of 1974 provisions do not provide an enforcement mechanism for collecting judgments, state law methods for collecting money generally remain undisturbed by ERISA; otherwise there would be no way to enforce a judgment won against an ERISA plan.¹

Though the restriction against alienation in the Employee Retirement

¹ writ denied, 653 So. 2d 592 (La. 1995).

² *Scarlett v. Barnes*, 121 B.R. 578 (W.D. Mo. 1990).

³ *Snow, Nuffer, Engstrom & Drake v. Tanassee*, 1999 UT 49, 980 P.2d 208 (Utah 1999).

⁴ *Woody's Olympic Lumber, Inc. v. Roney*, 9 Wash. App. 626, 513 P.2d 849 (Div. 1 1973) (such tort claim is not subject to attachment or garnishment).

⁵ *Snow, Nuffer, Engstrom & Drake v. Tanassee*, 1999 UT 49, 980 P.2d 208 (Utah 1999).

⁶ *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 985 (1992).

⁷ *Bergen v. F/V St. Patrick*, 586 F. Supp. 786 (D. Alaska 1988); *Nicholson v. St. Anne Lanes, Inc.*, 158 Ill. App. 3d 838, 111 Ill. Dec. 223, 613 N.E.2d 127 (3d Dist. 1987); *Lange v. Fidelity & Cas. Co. of New York*, 290 Minn. 61, 185 N.W.2d 881 (1971); *Rutler v. King*, 57 Mich. App. 152, 226 N.W.2d 79 (1974).

⁸ *Hunt v. Preferred Risk Mut. Ins. Co.*, 568 So. 2d 253 (Miss. 1990). [Section 144]

⁹ 29 U.S.C.A. §§ 1001 et seq.

¹⁰ *Hogle v. Hogle*, 732 N.E.2d 1278 (Ind. Ct. App. 2000).

EXECUTIONS, ET

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§ 145 Promi
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§ 146 Judgm
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¹ *Biles v. Biles*,
A.2d 153 (Ch. Div
[Section 145],

² U.S. Leather
Group, Inc., 276 F.
0003P (6th Cir. 2C
law).

³ *Erwin v. Par*
How, 197, 13 L.J.
v. Holmes, 70 S.J.
(1944).

EXHIBIT 6

PROCEDURE AND EVIDENCE

§ 78B-5-505

§ 78B-5-505. Property exempt from execution

(1)(a) An individual is entitled to exemption of the following property:

- (i) a burial plot for the individual and the individual's family;
- (ii) health aids reasonably necessary to enable the individual or a dependent to work or sustain health;
- (iii) benefits the individual or the individual's dependent have received or are entitled to receive from any source because of:

(A) disability;

(B) illness; or

(C) unemployment;

(iv) benefits paid or payable for medical, surgical, or hospital care to the extent they are used by an individual or the individual's dependent to pay for that care;

(v) veterans benefits;

(vi) money or property received, and rights to receive money or property for child support;

(vii) money or property received, and rights to receive money or property for alimony or separate maintenance, to the extent reasonably necessary for the support of the individual and the individual's dependents;

(viii)(A) one:

(I) clothes washer and dryer;

(II) refrigerator;

(III) freezer;

(IV) stove;

(V) microwave oven; and

(VI) sewing machine;

(B) all carpets in use;

(C) provisions sufficient for 12 months actually provided for individual or family use;

(D) all wearing apparel of every individual and dependent, not including jewelry or furs; and

(E) all beds and bedding for every individual or dependent;

(ix) except for works of art held by the debtor as part of a trade or business, works of art:

(A) depicting the debtor or the debtor and his resident family; or

(B) produced by the debtor or the debtor and his resident family;

(x) proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of whom the individual was or is a dependent to the extent that those proceeds are compensatory;

(xi) the proceeds or benefits of any life insurance contracts or policies paid or payable to the debtor or any trust of which the debtor is a beneficiary upon the death of the spouse or children of the debtor, provided

that the contract or policy has been owned by the debtor for a continuous unexpired period of one year;

(xii) the proceeds or benefits of any life insurance contracts or policies paid or payable to the spouse or children of the debtor or any trust of which the spouse or children are beneficiaries upon the death of the debtor, provided that the contract or policy has been in existence for a continuous unexpired period of one year;

(xiii) proceeds and avails of any unmaturred life insurance contracts owned by the debtor or any revocable grantor trust created by the debtor, excluding any payments made on the contract during the one year immediately preceding a creditor's levy or execution;

(xiv) except as provided in Subsection (1)(b), any money or other assets held for or payable to the individual as a participant or beneficiary from or an interest of the individual as a participant or beneficiary in a retirement plan or arrangement that is described in Section 401(a), 401(h), 401(k), 403(a), 403(b), 408, 408A, 409, 414(d), or 414(e), Internal Revenue Code; and

(xv) the interest of or any money or other assets payable to an alternate payee under a qualified domestic relations order as those terms are defined in Section 414(p), Internal Revenue Code.

(b) The exemption granted by Subsection (1)(a)(xiv) does not apply to:

(i) an alternate payee under a qualified domestic relations order, as those terms are defined in Section 414(p), Internal Revenue Code; or

(ii) amounts contributed or benefits accrued by or on behalf of a debtor within one year before the debtor files for bankruptcy. This may not include amounts directly rolled over from other funds which are exempt from attachment under this section.

(2) The exemptions in Subsections (1)(a)(xi), (xii), and (xiii) do not apply to proceeds and avails of any matured or unmaturred life insurance contract assigned or pledged as collateral for repayment of a loan or other legal obligation.

(3) Exemptions under this section do not limit items that may be claimed as exempt under Section 78B-5-506.

Laws 2008, c. 3, § 801, eff. Feb. 7, 2008.

Historical and Statutory Notes

Prior Laws

Laws 1981, c. 111, § 3.
Laws 1989, c. 19, § 1.
Laws 1997, c. 138, § 2.
Laws 1999, c. 370, § 2.

Laws 2004, c. 135, § 2.
Laws 2005, c. 234, § 1.
Laws 2007, c. 323, § 1.
C. 1953, § 78-23-5.

Law Review and Journal Commentaries

Bankruptcy exemption planning: Counseling in shades of gray. *Marker*, 21 *Utah B.J.* 20 (March/April 2008).

Tab 6

1

CERTIFICATE

2

STATE OF UTAH

3

COUNTY OF WASHINGTON

4

THIS IS TO CERTIFY THAT THE FOREGOING
PROCEEDINGS WERE TAKEN BEFORE ME, RUSSEL D. MORGAN, A
CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF
UTAH, RESIDING AT WASHINGTON COUNTY, UTAH;

5

THAT THE PROCEEDINGS WERE TAKEN BY ME
IN STENOTYPE FROM AN ELECTRONIC RECORDING, AND
THEREAFTER CAUSED BY ME TO BE TRANSCRIBED INTO
TYPEWRITING, AND THAT A TRUE AND CORRECT TRANSCRIPTION
OF SAID TESTIMONY SO TAKEN AND TRANSCRIBED TO THE BEST
OF MY ABILITY IS SET FORTH IN THE FOREGOING PAGES
NUMBERED FROM 3 TO 33 INCLUSIVE.

6

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/s/Russel D. Morgan
RUSSEL D. MORGAN, CSR
LICENSE #87-108442-7801

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October 27, 2011

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1 deadlines. But, right now, let's do July 1st. And that
2 will be like 5 o'clock. Okay?

3 MR. PARK: I have submitted an order, Your Honor,
4 if that's sufficient. It simply denies their motion.

5 THE COURT: That's correct. Okay?

6 MR. ELMONT: Thank you.

7 THE COURT: All right. Thank you.
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1 Lamoreaux's claims, or Mr. Lamoreaux's son's claims, or
2 whoever's claims they claim they are. Because that writ of
3 execution process goes out to the whole world by virtue of
4 the publication notice. So, we would submit respectfully,
5 Your Honor, that the motion should be granted that Black
6 Diamond should be allowed to substitute in as the real party
7 in interest as plaintiff in this action, then we'll see what
8 arguments Mr. Park has about attorneys fees when we seek to
9 dismiss. Thank you.

10 THE COURT: Mr. Park, anything else?

11 MR. PARK: No, sir.

12 THE COURT: All right. Gentlemen, I've got some
13 time vested in this case as well. I know that both of you
14 indicated you wanted the court to rule from the bench this
15 afternoon. I'm not going to do it. Okay. I know it's
16 going to make you not very happy with the court. But I
17 spent time listening to pretrial motions. I spent two days
18 on February 16th and 17th. And I'm just not comfortable
19 ruling from the bench, especially now that I have a couple
20 of cases that I need to read.

21 The court is going to give a deadline, gentlemen,
22 of July 1st. July 1st. That's two weeks. I think that's
23 acceptable. And if you'll go ahead and prepare some
24 proposed orders on the substitution issue, and after we get
25 past that issue, if we do, then we'll see about the other

1 In many ways, it would be cheaper to do it that
2 way than to have all the legal arguments associated with
3 what we did. So, all of that is protected in the rules.
4 This is not some dead of night sneaky procedure. The writ
5 of execution process is what it is. It was followed. Mr.
6 Park has now conceded it was followed by knowing the
7 publication was accomplished. And Mr. Park's interest,
8 whatever it is, is a contingent interest on a judgment being
9 entered at the end of the day. There's no judgment. We are
10 not trying to step ahead of his interests. But that's
11 something to be addressed in the motion to dismiss. For
12 purposes now, whatever he has, would remain. If he's got an
13 ongoing lien interest, and he thinks it's going to be
14 extinguished, well, it will be extinguished, if at all, at
15 the time we seek to dismiss the claim preventing him from
16 having any possibility of claiming a contingency on a
17 judgment that's awarded. That's not where we are today. We
18 are only talking about dismissal, substitution and to
19 proceed separately.

20 Again, Your Honor, I think notwithstanding the
21 fact that these are not done every day, this is not a
22 stretch. You know, this is black letter stuff. And the
23 procedure's there. The procedure was followed. Black
24 Diamond bought the interest. Black Diamond now is
25 appropriately the real party in interest with Mr.

1 The upshot of that is, Your Honor, if Mr.
2 Lamoreaux or Mr. Park or Mr. Lamoreaux's son or any other
3 person who Mr. Lamoreaux considered to be favorable to his
4 side and he thought, hey, this is a problem, the defendant
5 could buy the interest and dismiss the case, I need to have
6 somebody step in and purchase it, the upshot of it is, they
7 wouldn't have ever had any contest as to whether they would
8 win the bid. The reason for that is once Mr. Fisher's
9 interest in this case, roughly \$17,000, was satisfied, any
10 additional bid beyond that amount would have gone to Mr.
11 Lamoreaux. We couldn't bid in it. He could have bid
12 \$20 million, it would have all been money coming back to him
13 that he wouldn't ever have to pay except for that one
14 chunk --

15 THE COURT: Fine, correct.

16 MR. ELMONT: -- to go to Mr. Fisher. So, there is
17 the ability of protection. There's the ability to protect
18 equitable interest built into the system, including for Mr.
19 Park. He's the one who is now ultimately saying wait a
20 minute. You can't sell it because you are selling out my
21 lien interest. Buy it. You know, that is, that type of
22 money is not the type of a thing that we ought to be in here
23 saying wait a minute, this is unfair, he's been bled dry by
24 these defendants, and all the other things that are
25 associated.

1 way in saying that he didn't really transfer anything to his
2 son. But, in any event, there is no way to follow the
3 procedure for trialing a motion to substitute a party in
4 under Rule 25 when the party in control of the knowledge,
5 the plaintiff, hasn't told anybody what's going on. So,
6 it's just, you may have the language of Rule 25, assuming
7 you are talking about a normal circumstance where somebody
8 sells a cause of action to a party in an arm's length type
9 of transaction. Well, that's not the case when we are
10 dealing about an execution here. There's no
11 misunderstanding. Everybody knows. And the case law that
12 we cited assumes this is a person who is directly in
13 opposition to the interest of the former plaintiff who is
14 buying the case, the claims, with the specific intent of
15 dismissing them.

16 And that's the last thing I want to address. And
17 that's this sort of general equitable position that Mr. Park
18 talked about when he talks about sneaking in and trying to
19 buy out interests. We need to be clear about what happens
20 at a public sale. Mr. Fisher, who had the judgment against
21 Mr. Lamoreaux, who obtained the writ of execution and
22 proceeded to conduct the public sale, had to follow all of
23 the notice procedures in order to do that. And he did. Mr.
24 Fisher was only entitled to obtain enough money out of that
25 sale to satisfy his judgment against Mr. Lamoreaux.

1 along with a judgment against me and seeks to execute on my
2 property, and grabs the TV out of my house, and Mr. Anderson
3 wants to object to that, he's got a procedure, the time to
4 do it is within the time it's set forth in the execution
5 provisions of Rule 64. If you don't do it within that time,
6 publication is effective. The notice goes out. This is
7 plain to notice up. This happens every day. And that's the
8 only way to protect those rights.

9 So, the last couple of brief points here, Your
10 Honor. The notion that the case should proceed in Mr.
11 Lamoreaux's name, notwithstanding the fact that the real
12 party in interest is Black Diamond, who is diametrically
13 opposed to Mr. Lamoreaux's interest, and that's merely a
14 rule of discretion on Rule 25, doesn't take account of
15 Rule 17, which says that a case should proceed in the name
16 of the real party in interest. And if we are talking about
17 a court acting upon motion to substitute in a party under
18 Rule 25, well, how are we supposed to make that type of a
19 motion if we don't know that the interest had been
20 transferred? That's completely within Mr. Lamoreaux's
21 control, if he's going to be going off before trial and
22 selling his interest or transferring his interest. I don't
23 think he claims he sold them in this case. In fact, he
24 still says he's going to use the benefits, the proceeds from
25 this case to satisfy creditors, which I think goes a long

1 exercise those rights -- again referring back to the same
2 rights that the defendant has -- may exercise those rights
3 and obligations at any time before the property is sold or
4 delivered to the plaintiff."

5 Black letter law, going back to the point that I
6 raised earlier, which is, if you have a problem with the
7 written procedure, you deal with it in the context of the
8 written procedure. If you don't, you don't just get to
9 ignore it, especially in a case where Mr. Lamoreaux's son,
10 certainly, at least, had constructive notice that this thing
11 was going forward. If you want to try to gain the system,
12 not object to the writ, then just claim it's invalid in a
13 collateral attack in a separate case. That doesn't work
14 under Rule 64.

15 Rule 64E is crystal clear that in the absence of
16 an appropriate objection and the opportunity for hearing to
17 be held on whether the writ should issue notwithstanding
18 that objection, Mr. Lamoreaux's son has no claim. I mean,
19 the equivalent situation, Your Honor, is, you know, I've got
20 an expensive television that I gained from a rent-to-own
21 place. And, well, it's really not a great one because of
22 the UCC filings. But I'm buying it off of Mr. Anderson.
23 And I haven't given any notice to anyone else that that is
24 still owned by him because I only make tiny amounts of
25 payments on its total value. Well, when somebody comes

1 doesn't really leave any room at all to doubt the
2 effectiveness of the sale to Black Diamond. And that's
3 because under E1, any person claiming an interest in the
4 property has the same rights and obligations as the
5 defendant with respect to the writ and with respect to
6 providing and objecting to security.

7 Remember, one of the things that has to happen if
8 you have an objection to a writ and you have a hearing about
9 it, that security is one of the obligations that's often
10 required for the party who is seeking to object to provide.
11 Any claim made by the plaintiff and served with the writ has
12 to serve those rights and obligations within the same time
13 allowed by the defendant. That's not Mr. Lamoreaux's son,
14 because we didn't know anything about it.

15 It's interesting that Mr. Park talks about
16 sneaking in and sneaking around. I think the facts of the
17 case show who did the sneaking here. And that was this
18 purported transfer before trial and not letting anybody know
19 what was, apparently, not Mr. Lamoreaux's claims anymore.
20 So, that's not relevant. That would only be if the writ had
21 been served on that person because we knew about it or we
22 didn't know about Mr. Lamoreaux's son.

23 So, in the last sentence of Section E1 of Rule 64
24 is what applies. "Any claimant not made by the plaintiff
25 and not served with the writ and accompanying papers may

1 anything by reason of the execution sale under the rules
2 that they rely on, 64E and Rule 69, because there was
3 nothing purchased at that time.

4 Number five. My researcher says that it's no
5 longer permitted in Utah to execute on "Chose in Action."
6 Now, it doesn't seem like to me that we want to get into the
7 facts of the transfer and all of the legal issues in this
8 case when I have tried this to trial and we are ready to
9 submit findings of fact and conclusions of law and get a
10 decision. If they are correct, and they have some interest,
11 they've got to prove it. And they haven't proven it today.
12 And they certainly haven't proven that their interest is
13 above my interest, which was set forth in a written
14 agreement which was presented to this court at trial and was
15 entered into in 2008. And they knew that interest was
16 there. That's all I have, Your Honor.

17 THE COURT: All right. Mr. Elmont.

18 MR. ELMONT: Thanks, Your Honor. I'll be brief.
19 Respectfully to Mr. Park's argument on this notion that we
20 have to prove what interest we bought at the execution sale,
21 I'll just refer back to our arguments under Rule 64. But,
22 specifically, I didn't quote this before. And I think it's
23 well in line with Mr. Park's argument. Rule 64E
24 specifically addresses claims of property by a third person:
25 In this case, Mr. Lamoreaux's son. And that language

1 they did. I have an affidavit that says they didn't have an
2 interest in it. We really don't need that kind of
3 further -- well, what we would be doing is we would be
4 saying, okay. Black Diamond's part of the lawsuit -- so
5 what we are going to do there now is -- I don't know how you
6 would do that, Your Honor. And I don't know how they could
7 say I would have a breach of ethics if I told Black Diamond
8 to go ahead and we were going to foreclose on their
9 property. I have had my interest for a long time. It's
10 supported by law.

11 The next thing I did, Your Honor, is, and we'll
12 skip to, because they did argument two in my memorandum.
13 They did show where they had published. Argument three
14 relates to the rule where you are allowed to include them in
15 this lawsuit. It says transfer of interest. In case of any
16 transfer of interest, the action may be continued by or
17 against the original party unless the court, upon motion,
18 directs the person to whom the interest is transferred to be
19 substituted in the action or joined with the original party.

20 So, it's your discretion. You don't have to -- it
21 wouldn't matter if they proved to you today that they had an
22 interest. You don't have to let them in.

23 The next thing I did was in my -- well, actually,
24 I didn't do this research. But the next thing my researcher
25 did was provide in argument four that they didn't purchase

1 lawsuit. They can't ask you to come to allow them to become
2 plaintiffs in this matter and then have a whole new lawsuit.
3 That just doesn't work here, Your Honor.

4 What's happened in this case is, in 2006, the
5 evidence before you will show that Black Diamond owed David
6 Lamoreaux at least \$550,000. Now, they have starved him out
7 since 2006 until 2011, putting him at his last -- everything
8 he has. And now, they sneak in here and try to buy it
9 "Chose in Action." And, as Mr. Elmont pointed out, even the
10 statute they relied on has been repealed. And these cases
11 do not take into account that he transferred his interest.
12 I mean, they have got to show, and they can't rely on the
13 case that Mr. Fisher had, they can't say, well, you didn't
14 follow the rules in Mr. Fisher's case. They didn't buy his
15 interest. All they bought was whatever was there. And I
16 told them, there isn't anything here. And they don't care.
17 They are not interested in what's fair or what the law is.
18 They are interested in sneaking around and trying to get out
19 of this judgment.

20 In my memorandum to you, I pointed out that what
21 they are asking for is summary judgment determining that
22 they brought Mr. Lamoreaux's "Chose in Action" in this
23 lawsuit. Now, that's impossible to do at this point. They
24 have --- I mean, if we look at it as a summary judgment
25 motion, they have an affidavit that says it did and what

1 MR. PARK: Thank you, Your Honor. The way I
2 understand his argument is, whoever has the lien on Mr.
3 Lamoreaux's cause of action, "Chose in Action" or intangible
4 property, have to show up at the sale, say that the division
5 of recovery services who has sent a lien to my office, they
6 have to show up at this sale and say I have a lien on this?
7 It looks like to me, Your Honor, when Mr. Lamoreaux, what
8 they purchased is whatever Mr. Lamoreaux's interest may have
9 been. Maybe. It's not even clear that they purchased that.
10 And there was no law that says that he has to transfer his
11 interest in any manner. As you'll recall, in the case
12 before you, what the law said was to get a real estate
13 commission, you have to have it in writing. To change that,
14 you also have to have it in writing. To transfer real
15 property, you have to have some kind of a deed. They --
16 there's nothing that says Mr. Lamoreaux has to do anything
17 except transfer his interest in whatever this is.

18 Now he claims that he went, that he transferred it
19 prior to this sale. Now, all Mr. Elmont or Black Diamond
20 bought at the sale was whatever there might be. Maybe
21 there's nothing. But if they claim, if they are going to
22 claim, well, you transferred this interest without
23 consideration, that's a whole different lawsuit. Transfer
24 to defraud creditors. If they are going to claim that he
25 did this in an improper manner, that's a whole different

1 there. But the point is it's premature. If there is
2 something to be said for Mr. Park having continuing with
3 rights, then we can readress those issues when the time
4 comes for what we believe the appropriate plaintiff, Black
5 Diamond, when it seeks to dismiss the case against itself.
6 And we are not hiding any balls here. That's exactly what
7 we intend to do. We think that it's a very simple case for
8 Your Honor to conclude that that's appropriate for this
9 plaintiff to be substituted in because they are the real
10 party in interest. It's not merely a discretionary issue
11 when you have diametrically opposed interests. And the
12 former plaintiff no longer has any interest by his own
13 admission somehow, yet, is the engine that's turning to
14 proceed to have a judgment when if in fact Black Diamond is
15 the wrongful owner of those claims it's got a judgment
16 against itself.

17 So, I think, Your Honor, that lays things out.
18 I'll let Mr. Park have his opportunity to respond. And,
19 again, I will reply, unless Your Honor has any questions
20 before I sit down.

21 THE COURT: I do not. However, before, Mr. Park,
22 you stand up.

23 Mr. Shaum, I need to address you.

24 (Whereupon, a discussion took place off the record.)

25 THE COURT: Mr. Park.

1 apparently -- I'm sorry, Mr. Park's, apparently, comfortable
2 proceeding at a pace with a different real party in interest
3 and under Mr. Lamoreaux's version of the facts, and that is
4 Mr. Lamoreaux's son. Well, we are no different than Mr.
5 Lamoreaux's son in that regard. If in fact Mr. Park has a
6 legitimate lien interest, then the transfer from Mr.
7 Lamoreaux to the execution process to the public sale to
8 Black Diamond, that's still there.

9 And when we seek to dismiss, that's the
10 appropriate time for Mr. Park to raise his arguments that
11 you can't do that because you are somehow extinguishing his
12 ability to proceed. But envisioning that down the road, I
13 think Your Honor can see where that argument heads. And
14 that is, if Mr. Park has some law that says a plaintiff is
15 required to proceed with the litigation in course, it's
16 required to do everything in their diligence to make sure
17 that they get a judgment, even in this case a judgment
18 against themselves, I guess I would like to see that. That
19 would be a novel argument to be held. I don't see how that
20 would be consistent with our rules of professional ethics,
21 for one thing, to say that I have, as the attorney, have the
22 ability to force you to proceed with the case that you no
23 longer want to proceed with.

24 Now, contractual issues, rules of professional
25 responsibility, other things, no doubt, would come into play

1 been no objection that I have seen. And we'll see what Mr.
2 Park has to say beyond this idea of publication that we have
3 given proof that it was accomplished. There's been nothing
4 that I have seen that says there was anything improper in
5 the writ process. Well, if there wasn't, then the writ
6 process was final. It was valid. And it can't be
7 collaterally attacked now. So, there is no reason to
8 address that as a factual component.

9 So, I think that sort of in a broad brush captures
10 where we are with one exception: And that is Mr. Park's
11 claim that this can't go forward because he has an
12 attorney's lien.

13 THE COURT: Attorney's, right.

14 MR. ELMONT: Yes. And we address that in our
15 memoranda, Your Honor. But the short version of why Mr.
16 Park's argument doesn't avail anything for now is, all we
17 have is a motion for substitution. We don't yet have a
18 motion to dismiss. The substitution is to place another
19 person in Mr. Lamoreaux's position. If Mr. Park is right
20 that there remain a lien interest that he has that are
21 attached to the cause of action, well, then they are still
22 there. And whether or not Mr. Lamoreaux transferred to his
23 son, which I notice Mr. Park doesn't seem to object to that
24 in terms of now purportedly having the real matter in
25 interest not be here, but be someone that Mr. Lamoreaux's

1 It's doubly objectionable, both by virtue of the
2 shell game that's going on and trying to hide the interest
3 and, also, by virtue of the fact that it's brought as a
4 collateral attack in a different proceeding.

5 Mr. Park has also raised the fact that he and Mr.
6 Lamoreaux came to the public sale, and they warned him, hey,
7 he no longer owns this stuff. He's transferred it, that
8 that should have been enough for the sale to be stopped,
9 that should have been enough for Black Diamond to realize
10 that it wasn't going to buy anything of any worth. Well,
11 no. That's why there's a writ process. That's why Rule 64
12 goes through all of the ways, the timing to have service
13 accomplished, to have an opportunity for people to have time
14 to object, for there to be a hearing if somebody wants to
15 assert a third-party's interests in a claim. All of that is
16 already accounted for in the process of obtaining a writ and
17 then seeking to execute on it. And you can't just show up
18 and extrajudicially say stop the sale. And that's exactly
19 what happened in this case.

20 So, again, there is no factual argument that comes
21 in to play by virtue of what happened on the day of the sale
22 and the notice that was purportedly given by Mr. Park that
23 there was nothing legitimate to be sold. The factual
24 question is no more than was the writ process followed and
25 did you avail yourself to use the writ process? There's

1 Lamoreaux's own son, there would have been a way for him to
2 present himself, file the objection, request the hearing, do
3 all of the things that the writ process allows for you to
4 proceed and have a hearing before an execution is
5 accomplished.

6 And that's an additional element here that we need
7 to remember, Your Honor, is we have Mr. Lamoreaux arguing
8 your writ's no good because I didn't own the property
9 anymore. I didn't have any obligation to object to it. I
10 transferred it to my son. Well, not only is that making a
11 mockery, frankly, of the writ process, but it's seeking to
12 collaterally attack the writ process that was engaged in in
13 another case. If Mr. Lamoreaux's son believed he had some
14 objection to make to the way that that notice was handled or
15 the writ procedure went through, it was in Mr. Fisher's case
16 where the writ was issued that he should have made those
17 objections. So, whether or not it should have been Mr.
18 Lamoreaux making the objections or whether it should have
19 been Mr. Lamoreaux's son, the alleged transferee of the
20 interest, it's still a collateral attack that's
21 impermissible as we cite in our reply memorandum to come in
22 to a different court and say all of the writ stuff that
23 happened in that other case is no good, so these guys didn't
24 buy anything at the public auction. Just perceived to go
25 forward in this case.

1 third-party wants to come in and say, no, wait a minute,
2 that's actually mine, you can't sell that, they've got a
3 fair opportunity to do so. So, whether it's Mr. Lamoreaux's
4 son or whether that's no longer the allegation he's making,
5 if it's somebody else that he claims that he transferred
6 things to, by virtue of the execution sale process being
7 followed, and the writ process being followed, those rights
8 are extinguished. I mean, you can't -- just can't work for
9 somebody to be able to do this kind of shell game of saying,
10 aw, I think you got me on a writ of execution, but I
11 actually secretly transferred it to somebody else, so your
12 writ's no good, your sale is no good. And that's exactly
13 what's been attempted to happen here in this case by Mr.
14 Lamoreaux.

15 So, the notice provisions cover people such as Mr.
16 Lamoreaux's son even if, in fact, Your Honor were inclined
17 to believe the allegation that there was some legitimate
18 transfer that took place here, and it didn't involve a
19 fraudulent transfer, that's why I don't think there's a huge
20 factual issue to be discussed here. In terms of the things
21 that Mr. Park has talked about that require some further
22 evidentiary basis, we can just assume for purposes of our
23 motion that that was a non-fraudulent transfer. It doesn't
24 matter. Notice was sent out. And, certainly, in this case
25 where the alleged new owner of the interest is Mr.

1 Procedurally, the appropriate thing to do if defendant buys
2 a cause of action against itself, and it should be the
3 plaintiff, is to address it in that case where it seeks to
4 be the plaintiff.

5 The only procedural objection that Mr. Park raised
6 in his opposition with regard to how the notice worked with
7 regard to how the sale was conducted and the transaction was
8 concluded, was a claim that there was not publication
9 notice. And, at the time that we had initially filed our
10 motion and submitted our memorandum, although we did have an
11 allegation that there had been appropriate publication, we
12 had not yet at that time received proof of publication from
13 The Spectrum Newspaper. Subsequent to that time, we did
14 receive the proof of publication. We did supply as an
15 exhibit to our reply memorandum. And that's the only
16 procedural flaw that was ever alleged in the opposition.

17 Now, Mr. Park also makes the argument, though,
18 well, that doesn't matter with regard to Mr. Lamoreaux. He
19 didn't own the cause of action anymore. He didn't have to
20 object. He didn't have to make his own offer at the sale.
21 He was no longer the owner of the cause of action. The
22 problem is that the execution process that's set out in the
23 rules is not only meant to apply to the party being executed
24 against, it's made to apply to everybody else. That's why
25 you publish. That's why you give notice, so that if any

1 Mr. Park cited in his opposition the notion that
2 this is somehow a sharp practice to do this, and that having
3 the express language that addresses "Choses in Action" in
4 the old Rule 69 is necessary because you are deviating from
5 the common law and, now, without that express language, the
6 deviation is no longer justified. Well, I'll submit, Your
7 Honor, that he's got no legal authority in support of that.
8 There's nothing in the legislative history of the change.
9 There's nothing in any case law. As we say, there's nothing
10 that addresses it currently. But it would be a very odd
11 thing to have the rule read the way that it reads today if
12 in fact they didn't intend to include causes of action.

13 And, specifically in furtherance of that,
14 executable property does include intangible property,
15 intangible personal property, which is this is certainly a
16 category of. And that's, again, it's something that we
17 argue both in our original and especially in our reply
18 memoranda after Mr. Park raised that issue. So, that's the
19 black letter legal issue. This category of stuff is subject
20 to execution and is subject to sale.

21 Mr. Park raises some additional arguments that
22 sort of address the facts of this. But, again, at the
23 outset, just the fact that there may be factual issues
24 doesn't mean that you have to have a separate lawsuit and a
25 separate series of claims in order to expound those issues.

1 is it something that's available for execution? If you then
2 turn to Rule 64, where it defines the word property that's
3 subject to execution, it says Rule 64 (a), the property
4 means the defendant's property of any type not exempt from
5 seizure.

6 So, if you have a rule that says you can execute
7 on any property that's not exempt from seizure, you've got
8 to find something that says this type of property is exempt
9 from seizure. If you don't have anything that says "Choses
10 in Action" are exempt from seizure, then they fit within the
11 plain language of the rule that says you can execute on any
12 property and decide if they are or not exempt from seizure.
13 The statute hasn't really changed. It was recodified as
14 part of the split of 78A and 78B. But the current statute,
15 and, again, this is in our memoranda, is 78B5-505, property
16 exempt from execution. And I'll submit and let Mr. Park
17 address this issue. But there's nothing in here that would
18 give an exemption that says you can't execute on a "Chose in
19 Action". So, that's the black letter rule justification for
20 why we are able to proceed as a legal matter, is the broader
21 category of our "Choses in Action" subject to execution.
22 The answer is yes. They are under the old rule. They are
23 under the new rule. You can execute on anything that's not
24 exempt from execution. And there's nothing that says that
25 these are exempt from execution.

1 causes of action, just because it said right in it the
2 sheriff will proceed to sell "Choses in Action." They were
3 expressly included in the language. And that's no longer
4 the case under the current rules of civil procedure. But
5 you have to step back one degree below that and say, you
6 know, what really was the authority in the first instance
7 and what is the authority now? Well, the authority in the
8 first instance from Rule 69 is we cite in our reply
9 memorandum was not in the magic talismanic language that
10 says "Choses in Action." Rather, the operative language
11 always was and remains that you can execute on any property
12 that's not exempt. That's what was in effect under the old
13 cases that we have given you. And that's what remains in
14 effect as a matter of black letter law under the current
15 version of the rules. We don't have case law interpreting
16 it, but you don't need to go past the plain language that
17 when the plain language is as crystal clear as it is.

18 And, specifically, I'll point Your Honor to
19 Rule 64 and Rule 64E. And Rule 64E (a) says, "A writ of
20 execution is available to seize property in the possession
21 or under the control of the defendant following entry of a
22 final judgment or order requiring the delivery of property
23 or the payment of money."

24 So, the question there, or the statement that's
25 made there that raises a question is, is this property, and

1 yet, the argument for Mr. Lamoreaux is, you know, even
2 though I don't own it anymore, you have to proceed. There
3 has to -- it has to go forward on the judgment of the
4 merits.

5 So, I wanted to just sort of establish that at the
6 outset, Your Honor, that this is not uncommon. I would say
7 it's plain vanilla, that may be going a little bit too far,
8 but there's one quirk that maybe changes it from plain
9 vanilla to maybe vanilla bean or French vanilla. And that
10 is, Mr. Park's going to focus on this, the rule of civil
11 procedure that is cited in these cases is no longer in
12 effect. Rule 69, which was part of the reworking, when all
13 of the writ procedures got all thrown in separately back in
14 2004, even though these are newer cases, they are dealing
15 with older trials that predate the change of that rule.

16 I'm not aware of and have checked in advance of
17 this morning's hearing again to see if there's any case law
18 addressing the rule since the change. But the reason I say
19 that that doesn't really change things from plain vanilla,
20 at least, not very much, is where we focus on sort of the
21 merits of our motion and why it is that this, I think, is a
22 black letter law issue, that it's appropriate for this to
23 proceed the way that it did.

24 And that is because that old rule, Rule 69, was
25 cited as a shorthand for why it's okay to purchase these

1 We have found no Utah authority and plaintiff cites none
2 precluding the execution sale of "chose in action" against
3 defendants."

4 So, I cite all of that at the outset to just say,
5 you know, this is a common way to address a litigation in a
6 way to get rid of it without having to wait and address it
7 on the merits. In each of those cases, the dismissal was
8 done in the same case. There's no need for a separate
9 trial. There's no need for the plaintiff, or what we
10 believe should be the plaintiff, meaning Black Diamond,
11 owning the cause of action to have to go and sue Mr.
12 Lamoreaux or somebody else. For what? For declaratory
13 relief that they own a cause of action? No. That's
14 supposed to be addressed right now. And because of that
15 standing element, it doesn't make sense, as Mr. Park will
16 argue, to say that this is somehow just a matter of
17 discretion. The court can just, notwithstanding the fact
18 that Mr. Lamoreaux, even under his own version of the facts,
19 doesn't own the cause of action anymore. That it doesn't
20 matter.

21 The court can, as a matter of discretion, choose
22 to leave him in as the plaintiff or not. We are talking
23 about a case where fundamental different interests are
24 involved, where the party that we believe now owns Mr.
25 Lamoreaux's cause of action doesn't want to proceed. And,

1 not old. It's only from 2002. But here we have a 2010
2 court of appeals decision. If you flipped to the second
3 page, to the right-hand column at the top of the column you
4 would see a discussion of other cases that address this.
5 But, as it says, there's a general rule that a judgment
6 creditor can purchase any nonexempt property at a sheriff's
7 sale to satisfy the judgment that it has against the
8 judgment debtor. And, generally, a defendant can purchase
9 claims, i.e., "choses of action" pending against itself and
10 then move to dismiss those claims.

11 Finally, one last case also from 2010. Actually,
12 I'm sorry. This one's a 2009 case. And I show Your Honor
13 this one only because here we are talking about a federal
14 appellate decision. But here the additional element that's
15 brought in is a standing element. In other words, here,
16 after the defendant purchased the cause of action, but the
17 plaintiff proceeded to finish the case and then have an
18 unfavorable substantive decision, appealed it.

19 THE COURT: Question (inaudible) standing.

20 MR. ELMONT: Exactly. And the court of appeals
21 said, no, there is no standing. You didn't have those
22 claims anymore. And then cites, if you were to go to
23 page 4, under bracketed paragraph 1075, "Pursuant to Utah
24 law, defendants attempted to satisfy their money judgment by
25 purchasing plaintiff's legal right to pursue this action.

1 separate trial. There may or may not be factual issues that
2 are relevant as it comes to the way the sale is noticed or
3 the way the sale was handled or other issues. And we can
4 discuss those. But the procedure that's used is that the
5 plaintiff purchases -- or excuse me -- the defendant
6 purchases the plaintiff's claims and then proceeds in that
7 case to seek to dismiss those claims against itself. And if
8 you go down to the next page, in paragraph 11, and that's
9 the beginning of the court's analysis, you will see it's
10 citing rule of civil procedure about the writ of execution
11 and how it can be used to levy upon a judgment debtor's
12 personal property, which is not exempt from execution under
13 state or federal law.

14 Skipping down again to paragraph 13, given that
15 "chose in action" are amenable to execution under Rule 69F,
16 it follows that a defendant can purchase claims, i.e.,
17 "chose in action" pending against itself and then move to
18 dismiss those claims.

19 So, it goes on. Paragraph 17 is a further
20 explanation talking about the routineness of this. It says,
21 indeed, causes of action are regularly sold.

22 The next case that I wanted to show Your Honor is
23 not further substantive explanation of this, but, rather,
24 just to show that this is still going on. Now, the Applied
25 Medical Technologies case that I just showed Your Honor is

1 cited in our initial memorandum as sort of just the
2 shorthand justification for what we were doing. And that's
3 because this is the best explanation that the Utah Supreme
4 Court gives for how this process works. And, in this case,
5 which I won't spend a lot of time, it's in the memorandum.
6 And you can see Mr. Park's arguments. And, of course, he
7 can address them in his response. But if you were to turn
8 to page 2 of the printout, you would see that in
9 paragraph 5, meaning, you know, the court's Utah Reporter
10 citation, paragraph 5. So, that in the bracket --

11 THE COURT: Starting on January 28th?

12 MR. ELMONT: Exactly.

13 THE COURT: All right.

14 MR. ELMONT: You would see there that the party
15 that was attempting to move forward in the same manner that
16 Black Diamond, in this case, proceeded to obtain a writ of
17 execution requiring that any nonexempt property be delivered
18 to satisfy the deficiency judgment. And the service was
19 followed pursuant to the Rules of Civil Procedure. That
20 sale took place. And if you skip ahead to paragraph 7, you
21 see that, the person who purchased the claims against
22 himself. So, exactly, this scenario that Black Diamond is
23 here then moved to dismiss those claims.

24 So, from the outset, that's the first point, is
25 that we are not talking about procedure here that requires a

1 we'll go longer than that too. So --
2 MR. ELMONT: Well, Your Honor, thank you. And in
3 light of the fact that this is a different type of
4 experience for you, and in light of the fact that I think
5 the first response that someone might have when they hear
6 that somebody is purchasing an interest to be the plaintiff
7 against themselves in a lawsuit may not seem all that plain
8 vanilla procedure.
9 I wanted to jump a little bit out of order, rather
10 than discussing the mechanics of how that works, and just
11 from the outset address the sort of routineness of this type
12 of procedure. And I think it actually is routine and
13 explains case law.
14 THE COURT: It may be routine, but it's not
15 routine for the court. After we have gone through a
16 complete trial, then this thing happened, I have never seen
17 that happen before. But that's --
18 MR. ELMONT: Understood, Your Honor.
19 THE COURT: Okay.
20 MR. ELMONT: Thank you. If I can approach, I
21 would be happy to hand off --
22 THE COURT: Sure.
23 MR. ELMONT: -- even (inaudible).
24 THE COURT: You bet.
25 MR. ELMONT: This is -- this is the case that we

1

want to budget my initial time in court.

2

THE COURT: Counsel, I have all afternoon. So --

3

MR. ELMONT: I don't know that --

4

THE COURT: Mr. Olmstead might not have all afternoon.

5

6

MR. ELMONT: Mr. Anderson is the one I would worry about. I wouldn't want him to have to clock unnecessarily.

7

8

But we certainly want to have enough time. And I don't

9

intend to make reference to discussions that we had off the record except to note my understanding, based on this

10

11

morning, is that this is a new type of a proceeding in Your Honor's experience. And, given that, we would want to make

12

13

sure that we, at least, give you amply our version of things so that I hope by the time that we would be finished we

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15

could convince you what I believe is, as a matter of law, is that this is not really a close call. This is a black

16

17

letter law issue, and it's appropriate for the plaintiff to substitute in.

18

19

So, if Your Honor would like me to go ahead and

20

jump in, I will. Or if you want to set the parameters for any timing --

21

22

THE COURT: No. I don't think we have, just as long as we are done by 5 o'clock.

23

24

MR. ELMONT: Okay.

25

THE COURT: If you go longer than that, I guess

1 told everyone present that Mr. Lamoreaux had no interest in
2 the lawsuit. And Mr. Elmont filed this motion to substitute
3 in as a party-plaintiff. And I filed a memorandum and
4 objection to that, claiming what I have in my memorandum.
5 And I suppose we are here today for Mr. Elmont to go forward
6 and tell you what his motion is, then I'll respond.

7 THE COURT: Okay. Thank you. Mr. Elmont, is that
8 accurate?

9 MR. ELMONT: That is, Your Honor. And just to
10 fill in the dots that Mr. Park noted, at that public auction
11 Black Diamond did purchase, and we would argue, Mr.
12 Lamoreaux's rights to proceed as plaintiff in this case and,
13 therefore, seeks to substitute itself in as plaintiff in
14 order to dismiss the case. And, of course, as we discussed
15 in chambers, that's the nub of the issue, is whether we can
16 or can't do that. And I'll note, Your Honor, you see Mr.
17 Lamoreaux all the time. You may or may not remember Mr.
18 Anderson at the trial.

19 THE COURT: I do remember Mr. Anderson.

20 MR. ELMONT: He's here with us as well today.
21 And, yes, Your Honor, Your Honor had mentioned potentially
22 setting time for an hour. I'm happy to give as much detail
23 as is helpful to Your Honor. The only thing I would say,
24 whatever you decide on the timing, we would like, of course,
25 the chance to reply after Mr. Park is finished, so I would

1 P R O C E E D I N G S

2 THE COURT: The court is going to call David Lee
3 Lamoreaux vs. Black Diamond Holdings, LLC, 080500885.

4 The record shall reflect Mr. Michael W. Park
5 appearing on behalf of Mr. Lamoreaux. And Mr. David L.
6 Elmont appearing on behalf of Black Diamond Holdings, LLC.

7 Counsel, this matter was set for this morning at
8 10 a.m. And because I was in a motion for summary judgment
9 which lasted about two and-a-half hours, I requested counsel
10 to come back at 2 o'clock. Gentlemen, there's been some
11 agreements that have taken place since the court initially
12 took this court under advisement after trial. I wanted to
13 get the parties back before the court to discuss these
14 developments and how they impact, if at all, the court's
15 decision making process in the case.

16 Specifically, Mr. Lamoreaux, apparently, has
17 relinquished his interest in this case to Mr. Darwin Fisher.
18 Is that correct?

19 MR. PARK: No, sir.

20 THE COURT: No?

21 MR. PARK: No. Mr. Fisher had a judgment against
22 Mr. Lamoreaux.

23 THE COURT: Oh, okay.

24 MR. PARK: And he sold -- he noticed up for sale
25 Mr. Lamoreaux's interest in this lawsuit. At that sale, I

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A P P E A R A N C E S

FOR THE PLAINTIFF:

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

DAVID LEE LAMOREAUX,)
)
Plaintiff,)
) Case No. 080500885
vs.)
)
BLACK DIAMOND HOLDINGS, LLC.)
)
Defendant.)
)

BEFORE THE HONORABLE ERIC A. LUDLOW
FIFTH DISTRICT COURT
206 WEST TABERNACLE
ST. GEORGE, UTAH 84770

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTION HEARING

June 17, 2011

Reported by: Russel D. Morgan, CSR