

1990

Juanita Duncan v. Jamis M. Johnson, Kent Davis,
Richard G. Newton, and Valley Bank and Trust :
Brief of Appellant

Utah Court of Appeals

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Larry A. Steele; A. Paul Schwenke; Attorneys for Defendants.

Robert Kariya; Olga A. Bruno; Woodbury, Jensen, Kesler and Swinton P.C.; Attorneys for Appellants.

Recommended Citation

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DOCKET NO. 900541-CA
IN THE COURT OF APPEALS FOR THE STATE OF UTAH

JUANITA DUNCAN,
Plaintiff/Appellant

vs.

JAMIS M. JOHNSON, KENT DAVIS,
RICHARD G NEWTON, AND VALLEY
BANK AND TRUST,

Defendant/Appellees.

Case No. 900541-CA

District Court No. 6478

BRIEF OF APPELLANT

Appeal from a Final Order of the Fourth Judicial
District Court of Wasatch County, State of Utah
Honorable Judge George E. Ballif

Larry A. Steele
Attorney for Defendant/
Appellee Davis
319 West 100 South, Suite A
Vernal, Utah 84078

A. Paul Schwenke
Attorney for Defendant/
Appellee Johnson
P.O. Box 7853
Murray, Utah 84107

Robert Kariya
Olga A. Bruno
WOODBURY, JENSEN, KESLER
& SWINTON, P.C.
Attorneys for Plaintiff/
Appellant
265 East 100 South, Suite 300
Salt Lake City, Utah 84111

FILED

IN THE UTAH COURT OF APPEALS

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APR 15 1991

Mary E. Monahan
Mary E. Monahan
Clerk of Court
Utah Court of Appeals

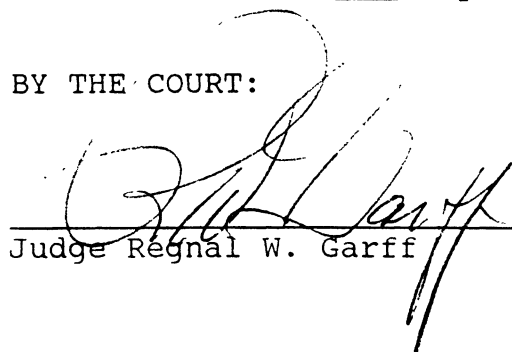
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|----------------------------------|---|--------------------|
| Juanita Duncan, |) | ORDER |
| |) | |
| Plaintiff and Appellant, |) | |
| |) | |
| v. |) | Case No. 900541-CA |
| |) | |
| Jamis M. Johnson and Kent Davis, |) | |
| |) | |
| Defendants and Appellees. |) | |

This matter is before the court upon appellant's motion to preclude appellee from oral argument filed March 11, 1991. Appellant's motion is filed pursuant to R. 26, Utah R. App. P., based upon appellee's failure to file a brief "within the applicable time period."

The court having considered the motion, and no response having been filed in opposition thereto, IT IS HEREBY ORDERED that appellant's motion is granted; appellee is hereby precluded from oral argument in this matter.

Dated this 15th day of April, 1991.

BY THE COURT:



Judge Reginal W. Garff

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

JUANITA DUNCAN,

Plaintiff/Appellant

vs.

JAMIS M. JOHNSON, KENT DAVIS,
RICHARD G NEWTON, AND VALLEY
BANK AND TRUST,

Defendant/Appellees.

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Appellee Johnson
P.O. Box 7853
Murray, Utah 84107

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WOODBURY, JENSEN, KESLER
& SWINTON, P.C.
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Appellant
265 East 100 South, Suite 300
Salt Lake City, Utah 84111

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JURISDICTION

Jurisdiction is proper in this Court under Utah Code Ann. § 78-2A-3 (2)(j) (Supp. 1990). The Supreme Court had original appellate jurisdiction under Utah Code Ann. § 78-2-2 (3)(j) (Supp. 1990), but has assigned the case for disposition in the Court of Appeals pursuant to Utah Code Ann. § 78-2-2 (4) (Supp. 1990).

ISSUE

Whether the lower court abused its discretion by approving a stipulation to which Plaintiff did not agree and which does not include essential terms which Plaintiff required as a condition to the stipulation even though no record or transcript exists regarding the hearing in which the parties presented the stipulation to the Court.

STATEMENT OF THE CASE

On Thursday, April 5, 1990, at 2:30 p.m., Plaintiff Juanita Duncan ("Duncan"), Defendant Jamis M. Johnson ("Johnson"), and Defendant Kent Davis ("Davis") appeared at a settlement conference before the Honorable J. Robert Bullock of the Fourth Judicial District Court of Wasatch County, Utah. At the settlement conference, the parties and their counsel, after lengthy

discussion, agreed to certain monetary terms on which their dispute could be settled. As an additional essential term of the agreement, Duncan's counsel demanded that the settlement include a provision by which Davis would confess to a judgment for fraud in the event of a default under the agreement or his filing of a petition in bankruptcy. The parties did not resolve the issue in open court, but agreed that Duncan's counsel and Davis' counsel would correspond with each other to prepare language acceptable to Duncan. Duncan's counsel stressed that the settlement would be contingent on inclusion of acceptable language regarding bankruptcy and that such language would be an essential term of the settlement. It was also agreed that Duncan's counsel would submit a Stipulation and Order for Davis' counsel to review which would become the final Order in the case. These facts are more particularly set forth in the Affidavit of Robert Kariya filed in support of Duncan's Objection to the Order Dismissing Claims. A copy of the Affidavit has been attached and is incorporated herein as Exhibit "A."

Following the Settlement Conference, Duncan's counsel mailed a proposed Stipulation and Order to Larry Steele ("Steele"), counsel for Defendant Davis. The proposed Order included in paragraph 3 a confession of a "judgment for actual fraud in the event that [Davis] defaults under the terms of this Stipulation."

A copy of this proposed Stipulation and Order Dismissing Claims is attached hereto and incorporated as Exhibit "B." On April 10, 1990, Steele submitted to Duncan's counsel a proposed revision to the Order which would not require Davis to confess fraud, but which would require Duncan to prove fraud in the event of a default. Duncan's counsel objected to the revision and refused to approve the Order as to form or otherwise. Because the parties could not come to an agreement, both parties submitted their proposed Orders to the court.

On May 4, 1990, notwithstanding the absence of the approval of Duncan or her counsel, the court entered the Order Dismissing Claims prepared by Steele, which conformed to Steele's proposed revisions, which Duncan's counsel had rejected. A copy of the Order is attached hereto as Exhibit "C." The Order was not based on any written stipulation, and is not supported by a court record of any oral stipulation. The same day, the court also made a Minute Entry inviting the parties to raise any objections they may have to the Order within 15 days, with instructions that if no such objections were raised, the Order would become final. A copy of the Minute Entry is attached hereto as Exhibit "D."

On May 18, 1990, Duncan filed an Objection to Proposed Order on the ground that the Order did not properly reflect the settlement agreement of the parties. Duncan was unable to obtain

a transcript of the Settlement Conference to support her Objection because no such transcript existed due to a malfunction of the tape recorder used to record the proceedings. (See Statement Regarding Transcript of Proceedings, attached hereto as Exhibit "E"). Duncan subsequently filed a Motion to Set Aside the Judgment, to which Davis, through his counsel, responded. In a Ruling dated July 26, 1990, Judge Bullock overruled Duncan's Objection to the Order Dismissing Claims and denied the Motion to Set Aside the Order without making any specific findings of fact. A copy of the Ruling is attached hereto as Exhibit "F." It is from this Ruling that Duncan appeals to this Court.

SUMMARY OF ARGUMENT

Duncan's objection to the trial court's Order is two-fold. First, the trial court violated Rule 4-504 (8) of the Code of Judicial Administration which requires all orders based on stipulations to be supported by a written stipulation signed by the parties or their attorneys or an oral stipulation made in open court. Second, Because the parties never reached agreement on essential terms of the settlement agreement--namely, acceptable language concerning Davis' confession of a judgment for fraud in the event of his default or petition in bankruptcy--the parties never reached a binding settlement agreement.

ARGUMENT

I. THE COURT'S ORDER DID NOT COMPLY WITH RULE 4-504 OF THE CODE OF JUDICIAL ADMINISTRATION.

Rule 4-504 (8) of the Utah Code of Judicial Administration states as follows:

No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

In considering a rule of procedure almost identical to the above-quoted Rule, the Texas Supreme Court reasoned that this requirement was intended to avoid the inherent uncertainty of verbal agreements. Kennedy v. Hyde, 682 S.W.2d 525, 526-27 (Tex. 1984). Under this rule, the court concluded that an oral settlement agreement not in writing or on the record "was disputed and unenforceable at the moment its existence was denied in the pleadings." Id. at 530.

In the case at bar, the trial court failed to comply with Rule 4-504 (8). No written stipulation was ever signed by the parties or entered by the judge. Moreover, because the trial court's tape recorder malfunctioned, there is no record of a stipulation in open court to support the Order. By entering an Order unsupported by either a written stipulation or a court record, the trial court promoted exactly that which the Rule was designed to prevent: enforcement of an agreement which no reliable evidence indicated

was the intent of the parties. For this reason, the Order Dismissing Claims should be set aside.

II. THE COURT'S ORDER IMPOSED A CONTRACT ON THE PARTIES WHERE NONE EXISTED.

While the law favors settlement as a form of dispute resolution, settlement agreements are contracts and are bound by basic principles of contract law. Mascaro v. Davis, 741 P.2d 938, 942 (Utah 1987); 15A Am. Jur. 2d, Compromise and Settlement, § 7 (1976). Duncan contends that sound principles of contract law compel the conclusion that the parties failed to enter a binding agreement.

Under basic contract law, no binding settlement agreement exists unless the parties reach a meeting of the minds. Cross v. District Court, 643 P.2d 39, 41 (Colo. 1982) (holding that "[i]n order for a settlement to be binding and enforceable, there must be a 'meeting of the minds' as to the terms and conditions of the compromise and settlement") (quoting H.W. Houston Construction Company v. District Court, 632 P.2d 563, 565 (Colo. 1981)); 15A Am. Jur. 2d, Compromise and Settlement, § 7 (stating that "a valid compromise requires the mutual assent of the parties, and the meeting of their minds on all the essential terms of the agreement"). When an acceptance is given on terms substantially different than those of the offer, it constitutes a counteroffer,

and does not create a contract. Fratello v. Socorro Electric Cooperative, Inc., 107 N.M. 378, 758 P.2d 792, 795 (1988) (refusing to find a valid settlement agreement where the offeree's acceptance was not unconditional, and stating that "[i]n order to constitute a binding settlement contract, there must be an unconditional acceptance of the offer made") (quoting Silva v. Noble, 85 N.M. 677, 678, 515 P.2d 1281, 1282 (1973)).

Throughout this litigation and particularly in the settlement negotiations at and prior to the Settlement Conference, Duncan has demanded that any settlement include a provision by which Davis, at such time as he should default under the settlement agreement, would confess to a judgment of fraud against him which could not be discharged in bankruptcy. Davis now contends that he has never agreed to this "essential term," and argues instead that the opposite meaning, as expressed in his proposed Order Dismissing Claims, was in fact the understanding of the parties. Davis offers, however, no evidence that Duncan or her counsel have agreed to this term, and Duncan maintains that from the outset she has refused to agree to any settlement which does not include a confession of fraud. Therefore, the parties have not reached a meeting of the minds on the essential element concerning Davis' potential bankruptcy, and the Order is thus based on an invalid settlement agreement.

Under contract law, it is also clear that no settlement agreement exists if there remains a fundamental disagreement on a substantial term. Fratello v. Socorro Electric Cooperative, Inc., 107 N.M. 378, 758 P.2d 792, 795 (1988). The court in Gaines v. Nortrust Realty Management, Inc., 422 So. 2d 1037 (Fla. App. 1982), set down the minimum requirements for a binding settlement:

a fundamental principle of the law of contracts is that there must be mutuality of agreement, and there can be no such mutuality when there is no common intention. . . . Thus, "[t]o be judicially enforceable . . . a settlement agreement . . . must be sufficiently specific as to be capable of implementation. . . .[C]ourts will not attempt to enforce a settlement agreement that is too vague or ambiguous in its meaning or effect." United Mine Workers v. Consolidation Coal Co., 666 F.2d 806, 809-10 (3d Cir. 1981). Parties to a settlement agreement must reach mutual agreement on every essential element of the proposed settlement. "For [a settlement] to be binding on the parties it should be clear that it is full and complete, covers all issues, and is understood by all litigants concerned." Cross v. Cook, 147 Ga. App. 695, 250 S.E.2d 28, 29 (1978).

422 So. 2d at 1039-40 (citations omitted).

In the case before this Court, no binding oral settlement agreement was reached because at the time of the Settlement Conference, the parties had not yet resolved whether Davis would confess a judgment of fraud in the event of default or bankruptcy. In fact, from Duncan's perspective, the entire settlement agreement was expressly conditioned on a satisfactory provision requiring such a confession of fraud. Therefore, because this substantial term remains unresolved, no binding settlement contract exists.

Duncan further contends that the trial court was without authority to impose the settlement agreement on the parties by Order. It is a well-settled proposition in Utah that a court having before it a matter may summarily enforce a settlement agreement between the parties, but that power does not allow the court to create an agreement where none exists. Tracy-Collins Bank and Trust Company v. Travelstead, 592 P.2d 605, 609 (Utah 1979) (holding that summary enforcement of settlement agreements is ill suited to "situations presenting complex factual issues related either to the formation or the consummation of the contract"). In Zions First National Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478 (Utah App. 1989), the court held that a motion to compel settlement may be granted only "if the record establishes a binding agreement and 'the excuse for non-performance is comparatively unsubstantial.'" (quoting, Tracy-Collins Bank and Trust Company v. Travelstead, 592 P.2d 605, 609 (Utah 1979)).

The case at bar includes a complex array of claims for fraudulent misrepresentation against two separate defendants. Moreover, the prospect of Davis filing bankruptcy, which has been a key element of all settlement discussions throughout this case, complicates the issues even further. Although the trial court had authority to hear the case and enter judgment thereon, it did not have the authority to impose a contract on the parties absent

mutual assent. Therefore, Duncan contends that the court's entry of the Order, in the complete absence of any evidence of an agreement to which Duncan had assented, is tantamount to entry of a judgment without a hearing and a clear abuse of discretion.

Finally, Duncan notes that a settlement contract necessarily includes terms expressly required by the parties. Moreover, when a party breaches a settlement agreement, the other party has an option to rescind and proceed on the underlying claim. Butcher v. Gilroy, 744 P.2d 311, 312 n. 2 (Utah App. 1987).

In this case, any oral settlement agreement must necessarily have contained a provision, as Duncan expressly demanded, requiring Davis' confession of a fraud judgment in the event of default or bankruptcy. By submitting to the court a proposed Order with language contrary to those terms, Davis has breached any oral agreement that may have existed, and thus destroyed its binding effect.

CONCLUSION

While Duncan concedes that settlement of claims is a favorable method of dispute resolution, she contends that allowing the trial court's Order to stand would be an affront to normal settlement processes and could actually deter settlement in the future. First, the Order ignores Rule 4-504 of the Utah Code of Judicial

Administration which requires orders based on stipulations to be supported by a writing or a statement on the record. If an order can be based upon an unrecorded oral stipulation as Davis alleges, parties may be hesitant to discuss claims orally for fear that their statements may be incorporated in a final order without their consent. Rule 4-504, when applied properly, removes this danger from settlement negotiations. Duncan thus urges this Court to apply the Rule strictly to the facts of this case and set aside the trial court's Order. Second, the trial court's Order removes the element of mutual intent from the requirements for a valid settlement agreement. Because no transcript of the Settlement Conference is available, and the trial court in its denial of Duncan's Objection to the Order did not make any findings of fact, there is no evidence before this Court concerning the formation of a settlement contract other than that set forth in memoranda, affidavits, and other retrospective evidence. In this light, where no hard evidence indicates mutual intent to contract, it is clearly beyond the trial court's power to impose a contract on the parties based on its recollection of the parties' interactions. Duncan contends that the above arguments compel the conclusion that entry of the Order was an abuse of discretion and that the trial court's denial of Duncan's Motion to Set Aside the Judgment was error.

DATED this 28 day of January, 1991.

WOODBURY, JENSEN, KESLER
& SWINTON, P.C.


~~Attorneys for Appellant~~

CERTIFICATE OF MAILING

The undersigned, Robert Kariya, of the law firm of Woodbury, Jensen, Kesler & Swinton, P.C., counsel for the Plaintiff/Appellant, hereby certifies that he caused four (4) true and correct copies of the Brief of Appellant to be sent, U.S. First Class Mail, postage pre-paid, to each of the following on the 29th day of January, 1991:

Larry A. Steele, Esq.
319 West 100 South, Suite A
Vernal, Utah 84078

A. Paul Schwenke, Esq.
P. O. Box 7853
Murray, Utah 84107

WOODBURY, JENSEN, KESLER
& SWINTON, P.C.


Robert Kariya
Attorney for Appellant

EXHIBIT "A"

4. At the Settlement Conference, the parties agreed on terms regarding the payment by Defendant Davis to Plaintiff of certain sums of money for settlement of this case. However, Davis' counsel, Mr. Larry Steele, and I were to correspond with each other and prepare suitable language for a stipulation regarding the effect of a possible bankruptcy petition by Davis. I stressed at the Settlement Conference to all parties that settlement would be contingent upon the parties arriving at agreeable language in the stipulation regarding the possible bankruptcy.

5. On April 10, 1990, Mr. Steele submitted to me a proposed revision to paragraph three of the stipulation I had prepared, which would materially change the context of the stipulation and settlement of this case, by requiring Plaintiff to prove fraud in the event of Davis files or reopens a bankruptcy case. It was my understanding, and Plaintiff's requirement that Davis was to confess to a judgment for fraud, pursuant to the Settlement Conference, if he defaulted under the terms of the agreement.

6. The Order Dismissing Claims, which was apparently entered by the Court, does not reflect the terms of the settlement which Plaintiff intended or accepted at the Settlement Conference.

7. On April 17, 1990 I contacted Diane Burgener, Deputy Clerk of the Wasatch Clerk's office, and was told by Ms. Burgener that a transcript of the settlement conference could not be made

because the electronic tape recorder which was used during the conference had malfunctioned, and since no court reporter attended the conference, no record of the settlement conference was made. I confirmed this information with Ms. Burgener on May 15, 1990.

FURTHER Affiant sayeth naught.

DATED this 18th day of May, 1990.

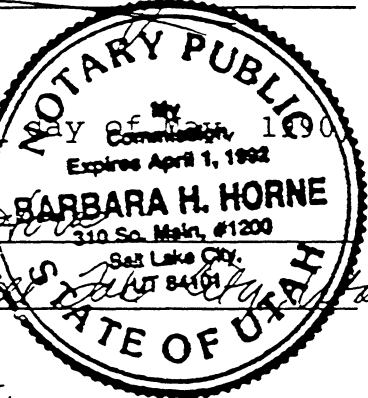
Robert Kariya
Robert Kariya

SUBSCRIBED AND SWORN before me this 18th day of May, 1990.

My Commission Expires:

April 1, 1992

Barbara H. Horne
NOTARY PUBLIC
Residing at: Salt Lake City, Utah



CERTIFICATE OF SERVICE BY MAIL

I hereby certify that true and correct copies of the foregoing Objection to Order Dismissing Claims were served, via first class U.S. mail, postage prepaid, this 18th day of May, 1990, to the following:

Larry A. Steele
Attorney for Davis
319 West 100 South, Suite A
Vernal, Utah 84078

Paul Schwenke
Attorney for Johnson
P.O. Box 57853
Murray, Utah 84107

Barbara H. Horne

rk.aff

EXHIBIT "B"

Glen W. Roberts - #4172
Robert Kariya - #4858
Olga A. Bruno - #5259
WOODBURY, JENSEN, KESLER & SWINTON
265 East 100 South, Third Floor
Salt Lake City, UT 84111
Telephone: (801) 364-1100

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

| | | |
|-----------------------|---|-----------------------------|
| JUANITA DUNCAN, |) | STIPULATION FOR SETTLEMENT |
| |) | AND ORDER DISMISSING CLAIMS |
| Plaintiff, |) | |
| |) | |
| vs. |) | Civil No. 6478 |
| |) | |
| JAMIS M. JOHNSON, and |) | Judge J. Robert Bullock |
| KENT DAVIS, |) | |
| |) | |
| Defendants. |) | |

STIPULATION

Plaintiff Juanita Duncan, Defendant Kent Davis ("Davis"), and Defendant Jamis M. Johnson ("Johnson"), in consideration of the mutual covenants and conditions herein contained and for Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby set forth their Stipulation for Settlement ("Stipulation") of the above-described matter as follows:

1. Dismissal. Plaintiff shall dismiss with prejudice any and all of her claims against Davis and Johnson; Defendant Johnson shall dismiss with prejudice any and all of his claims against

Plaintiff and Davis; and Davis shall dismiss with prejudice any and all of his claims against Plaintiff and Johnson in this matter, upon execution of this Stipulation and the transfer to Plaintiff by Davis of the consideration described in paragraph 1 (a) of this Stipulation, subject to this case being reopened for entry of judgment in favor of Plaintiff against Davis in the event that Davis does not make timely and accurate payment of \$30,000, plus interest thereon at the rate of 10% per annum payable as follows:

- a. Upon execution of this Stipulation, \$2,000 in certified funds; plus \$4,500 which shall consist of Warranty Deeds ("Deeds") conveying good and marketable title to those certain real properties located in Wasatch County, state of Utah more particularly described in Exhibit "A" attached hereto and by this reference incorporated herein; and
- b. The sum of \$200 beginning May 1, 1990, and continuing on the first day of each and every month thereafter until April 1, 1994; and
- c. The sum of \$1,000 on April 30, 1991, April 30, 1992, and April 30, 1993; and
- d. On or before May 1, 1994, the total unpaid balance of the \$30,000, which should total approximately \$23,500 on May 1, 1994 if all payments hereunder are made in a timely and accurate manner.

2. Default. In the event of the failure of Davis to fulfill his obligations and make timely payments under this Stipulation, Plaintiff shall have the right, upon filing an affidavit of such default after a period of twenty (20) days after the due date of

any payment required hereunder, without prior written notice to Davis of her intention to obtain judgment against Davis, to reopen this case and obtain an entry of judgment against Davis in the amount of \$30,000, plus interest thereon at the rate of 10% per annum, plus reasonable attorney's fees incurred herein, less any payments received by Plaintiff under the terms of this Stipulation.

3. Judgment. Davis hereby confesses judgment for actual fraud, in favor of Plaintiff in the event he defaults under the terms of this Stipulation, in the amount of \$30,000, plus interest thereon at the rate of 10% per annum, plus reasonable attorney's fees incurred herein, less any payments received by Plaintiff under the terms of this Stipulation. The judgment shall bear interest at the rate of ten percent (10%) per annum until satisfied.

4. Amendment. Any amendment, modification, termination, or rescission affecting this Stipulation shall be made in writing and signed by the parties.

5. Effective Date. This Stipulation shall become effective upon execution by the parties to this Stipulation, on the date so executed.

6. Successors. This Stipulation shall be binding upon, and inure to the benefit of, the legal representatives, successors and assigns of the parties hereto.

7. Attorneys Fees. Each party herein shall bear its own fees and costs, including attorneys fees, incurred to date in regard to this action, except as otherwise set forth herein.

8. Notices. Any notice required or desired to given hereunder shall be deemed sufficient if sent by First Class U.S. Mail, postage prepaid, addressed to the respective parties as follows:

JUANITA DUNCAN
C/O WOODBURY, JENSEN,
KESLER & SWINTON, P.C.
265 EAST 100 SOUTH SUITE 300
SALT LAKE CITY UT 84111

KENT DAVIS
4543 HILLSIDE
VERNAL UT 84078

JAMIS M. JOHNSON
165 SOUTH WEST TEMPLE #300
SALT LAKE CITY UT 84101

DATED this ____ day of April, 1990.

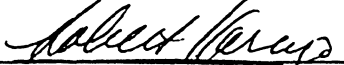
JUANITA DUNCAN

KENT DAVIS

JAMIS M. JOHNSON

APPROVED AS TO FORM:

WOODBURY, JENSEN,
KESLER & SWINTON, P.C.


By ~~Robert Kariya~~
Attorneys for Juanita Duncan

Larry A. Steele
Attorney for Kent Davis

A. Paul Schwenke
Attorney for Jamis M. Johnson

ORDER

Based upon the Stipulation for Settlement set forth above and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the claims of Plaintiff Juanita Duncan against Jamis M. Johnson and Kent Davis; and Jamis M. Johnson against Juanita Duncan in this case are hereby dismissed with prejudice, subject to the case being reopened for entry of judgment in favor of Plaintiff against Kent Davis in accordance with the terms of the Stipulation for Settlement.

ENTERED this ____ day of _____, 1990.

BY THE COURT:

Honorable J. Robert Bullock
District Court Judge

EXHIBIT "A"

That certain real property situated in Wasatch County, State of Utah and more particularly described as follows:

Lot 1

Lot 10, Block A, Soldier Summit Survey

Lot 2

Lot 15, Block 6, Soldier Summit Survey

EXHIBIT "C"

LARRY A. STEELE, #3090
Attorney for Defendant Kent Davis
319 West 100 South, Suite A
Vernal, Utah 84078
Telephone (801) 789-1301

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

| | | |
|----------------------|---|-------------------------|
| JUANITA DUNCAN, |) | |
| |) | |
| Plaintiff, |) | ORDER DISMISSING CLAIMS |
| |) | |
| vs. |) | Civil No. 6478 |
| |) | |
| JAMIS M. JOHNSON and |) | Judge J. Robert Bullock |
| KENT DAVIS, |) | |
| |) | |
| Defendants. |) | |

Plaintiff Juanita Duncan with her attorney Bob Kariya, Defendant Kent Davis ("Davis") with Larry A. Steele an attorney making a special appearance, and Defendant Jamis M. Johnson ("Johnson") with his attorney, all appearing before the Court and discussing the issues and in consideration of the mutual covenants and conditions herein contained, the parties set forth their Stipulation for Settlement ("Stipulation") on the record at a hearing held before this Court on April 5, 1990, of the above-described matters and which Stipulation entered was as follows:

1. Dismissal. Plaintiff shall dismiss with prejudice any and all of her claims against Davis and Johnson; Defendant Johnson

shall dismiss with prejudice any and all of his claims against Plaintiff and Davis; and Davis shall dismiss with prejudice any and all of his claims against Plaintiff and Johnson in this matter, upon execution of this Stipulation and the transfer to Plaintiff by Davis of the consideration described in paragraph 1 (a) of this Stipulation, subject to this case being reopened for entry of judgment in favor of Plaintiff against Davis in the event that Davis does not make timely and accurate payment of \$30,000.00, plus interest thereon at the rate of 10% per annum payable as follows:

a. Upon execution of this Stipulation, \$2,000.00 in certified funds; plus \$4,500.00 which shall consist of Warranty Deeds ("Deeds") conveying good and marketable title to those certain real properties located in Wasatch County, State of Utah, more particularly described in Exhibit "A" attached hereto and by this reference incorporated herein; and

b. The sum of \$200.00 beginning May 1, 1990, and continuing on the first day of each and every month thereafter until April 1, 1994; and

c. The sum of \$1,000.00 on April 30, 1991, April 30, 1992, and April 30, 1993; and

d. On or before May 1, 1994, the total unpaid balance of the \$30,000.00, which should total approximately \$23,500.00 on May 1, 1994, if all payments hereunder are made in a timely and accurate manner.

2. Default. In the event of the failure of Davis to fulfill his obligations and make timely payments under this Stipulation,

Plaintiff shall have the right, upon filing an affidavit of such default after a period of twenty (20) days after the due date of any payment required hereunder, without prior written notice to Davis of her intention to obtain judgment against Davis, to reopen this case and obtain an entry of judgment against Davis in the amount of \$30,000.00, plus interest thereon at the rate of 10% per annum, plus reasonable attorney's fees incurred herein, less any payments received by Plaintiff under the terms of this Stipulation.

3. Judgment. In the event Davis defaults under the terms of this Stipulation, Davis hereby confesses judgment in the amount of \$30,000.00, plus interest thereon at the rate of 10% per annum, plus reasonable attorney's fees incurred herein, less any payments received by Plaintiff under the terms of this Stipulation. The judgment shall bear interest at the rate of ten percent (10%) per annum until satisfied. In the event Davis defaults in the performance of this Stipulation and files or reopens a bankruptcy case, Davis agrees and stipulates that any automatic stay imposed by the Bankruptcy Court will not prevent Plaintiff from entering a judgment under the terms of this paragraph and this Stipulation. By this Stipulation, Plaintiff does not waive any of her rights to present evidence of fraud in defense of any action by Davis to discharge Plaintiff's claim in bankruptcy.

4. Amendment. Any amendment, modification, termination, or

rescission affecting this Stipulation shall be made in writing and signed by the parties.

5. Effective Date. This Stipulation shall become effective upon execution by the parties to this Stipulation, on the date so executed.

6. Successors. This Stipulation shall be binding upon, and inure to the benefit of, the legal representatives, successors and assigns of the parties hereto.

7. Attorney's Fees. Each party herein shall bear its own fees and costs, including attorney's fees, incurred to date in regard to this action.

8. Notices. Any notice required or desired to be given hereunder shall be deemed sufficient if sent by First Class U. S. Mail, postage prepaid, addressed to the respective parties as follows:

Juanita Duncan
c/o WOODBURY, JENSEN, KESLER
& SWINTON, P.C.
265 East 100 South, Suite 300
Salt Lake City, Utah 84111

Kent Davis
966 North 2100 West
Vernal, Utah 84078

Jamis M. Johnson
165 South West Temple, #300
Salt Lake City, Utah 84101

Based upon the Stipulation for Settlement set forth above and

good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the claims of Plaintiff Juanita Duncan against Jamis M. Johnson and Kent Davis; and Jamis M. Johnson against Juanita Duncan in this case are hereby dismissed with prejudice, subject to the case being reopened for entry of judgment in favor of Plaintiff against Kent Davis in accordance with the terms of this Stipulation for Settlement.

ENTERED this _____ day of _____, 1990.

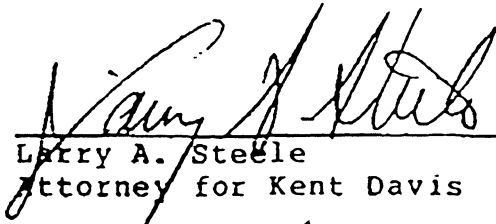
BY THE COURT:

Honorable J. Robert Bullock
District Court Judge

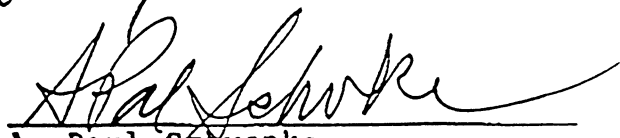
APPROVED AS TO FORM:

WOODBURY, JENSEN, KESLER
& SWINTON, P.C.

By: Robert Kariya
Attorneys for Juanita Duncan



Larry A. Steele
Attorney for Kent Davis



A. Paul Schwenke
Attorney for Jamis M. Johnson

thurs

That certain real property situated in Wasatch County, State of Utah, and more particularly described as follows:

Lot 1

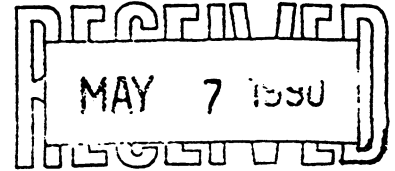
Lot 10, Block A, Soldier Summit Survey

Lot 2

Lot 15, Block 6, Soldier Summit Survey

lurs

EXHIBIT "D"



IN THE FOURTH JUDICIAL DISTRICT COURT

WASATCH COUNTY, STATE OF UTAH

JUANITA DUNCAN

Plaintiff,

Case Number: 6478

vs.

MAY 4, 1990

J. ROBERT BULLOCK, JUDGE

JAMIS M. JOHNSON and
KENT DAVIS,

MINUTE ENTRY

Defendant.

It is the Court's recollection that a stipulation of the parties was arrived at on the record on April 5, 1990, substantially as set forth in the proposed Order Dismissing Claims prepared by counsel for Kent Davis, and mailed to the Court under date of April 16, 1990.

As of this date the court has signed the propsoed order and the Court Clerk in Utah County will forward said Order to the Court Clerk in Wasatch County for filing.

Within 15 days from this date any party who contends that the original Order does not reflect the stipulation, substantially in substance and effect may file a written motion to set aside the Order, accompanied by a transcript of the proceedings. If any such motion and transcript are filed within said 15 day period, the Court will fix a time for oral argument thereon, otherwise the Order shall become final, and the parties will forthwith comply with the terms thereof.

EXHIBIT "E"

Jeffrey K. Woodbury - #4172
Robert Kariya - #4858
Olga A. Bruno - #5259
WOODBURY, JENSEN, KESLER & SWINTON
265 East 100 South, Third Floor
Salt Lake City, UT 84111
Telephone: (801) 364-1100

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

| | | |
|----------------------|---|--------------------------------|
| JUANITA DUNCAN, |) | |
| |) | STATEMENT REGARDING TRANSCRIPT |
| Plaintiff, |) | OF PROCEEDINGS |
| |) | |
| vs. |) | Civil No. 6478 |
| |) | |
| JAMIS M. JOHNSON and |) | Judge J. Robert Bullock |
| KENT DAVIS, |) | |
| |) | |
| Defendants. |) | |

Comes now the appellant, Juanita Duncan, by and through her counsel of record, Robert Kariya, of the law firm of Woodbury, Jensen, Kesler & Swinton, P.C. and pursuant to Rule 11(e)(3) of the Utah Rules of the Appellant Procedure, hereby states that Appellant cannot file a Transcript of Proceedings of the settlement conference held April 5, 1990 with the Court, because an attempted recording of the proceedings was defective and no other transcript exists.

Appellant was directed by Judge J. Robert Bullock to file a copy of the transcript of the settlement conference proceedings along with Appellant's Motion to Set Aside Appellee's proposed

Order discussing claims, pursuant to the Minute Entry, dated May 4, 1990. However, when Appellant requested a copy of the transcript from the court clerk, she discovered none existed. Consequently, Appellant is unable to request that a transcript of the April 5, 1990 proceedings be filed at this time.

DATED this 5th day of September, 1990.

WOODBURY, JENSEN, KESLER
& SWINTON, P.C.


~~Robert Kariya~~
Attorney for Appellant

CERTIFICATE OF SERVICE

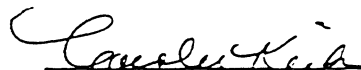
I do hereby certify that I mailed, postage prepaid by U.S. mail, a true and correct copy of the foregoing Statement of Issues on Appeal on this 5th day of September, 1990 to the following:

Larry A. Steele
Attorney for Kent Davis
319 West 100 South, Suite A
Vernal, Utah 84078

Paul Schwenke
Attorney for Jamis Johnson
P.O. Box 57853
Murray, Utah 84107

Clerk of the Utah Supreme Court
332 State Capital Building
Salt Lake City, Utah 84114

Fourth District Court Clerk
Wasatch County
25 N. Main
Heber City, Utah 84032



IN THE FOURTH JUDICIAL DISTRICT COURT

WASATCH COUNTY, STATE OF UTAH

JUANITA DUNCAN,

Plaintiff,

Case Number:

vs.

RULING

J. ROBERT BULLOCK, JUDGE

JAMIS JOHNSON,

Civil Number 6478

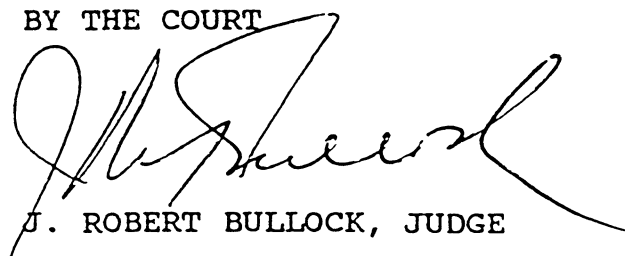
Defendant.

Counsel having requested that Plaintiff's Motion to Set Aside Order Dismissing claims be submitted to the Court for decision, and the Court having reviewed the file, including all affidavits and memoranda pertaining thereto filed herein, and having fully considered the legal positions of counsel, now rules, holds and decides as follows:

1. All objections to the Court's Order Dismissing Claims dated May 4, 1990, are overrruled.
2. Plaintiff's Motion to Set Aside said Order dated May 31, 1990, is hereby denied.

Dated at Provo, Utah, this 26th day of July, 1990.

BY THE COURT

A handwritten signature in black ink, appearing to read "J. Robert Bullock", is written over the printed name of the judge.

J. ROBERT BULLOCK, JUDGE