

1990

William Paul Barron, Jr. v. Southland Corporation : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

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

T.J. Tsakalos; Hanson, Epperson & Smith; Attorney for the Defendants

William Paul Barron, Jr.; Pro Se.

Recommended Citation

Brief of Appellant, *Barron v. Southland Corporation*, No. 900553 (Utah Court of Appeals, 1990).
https://digitalcommons.law.byu.edu/byu_ca1/2976

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU

50

.A10

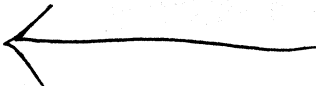

DOCKET NO.

900553-CA

IN THE UTAH COURT OF APPEALS

William Paul Barron, Jr., : BRIEF OF THE APPELLANT
Plaintiff and Appellant, :
v. : Case No. 90055³~~4~~-CA
Southland Corp., et al., :
Defendants and Appellees, :
:
:
William Paul Barron, Jr., :
Plaintiff and Appellant, :
v. : Case No. 910150-CA
Southland Corporation, 7-11 :
Stores, Kemper Group Insurance, :
Citgo Petroleum Corporation, :
Defendants and Appellees, :

WILLIAM PAUL BARRON, JR. Pro Se
11475 Holiday Way
Hillsboro OH 45133-9368
(513) 393-3925 or 372-2744



T. J. TSAKALOS, Esq. (#3289)
Attorney for the Defendants
HANSON, EPPERSON & SMITH, P.C.
4 Triad Center, Suite #500
P.O. Box 2970
Salt Lake City UT 84110-2970

FILED

JUL 31 1991

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

William Paul Barron, Jr., : BRIEF OF THE APPELLANT
Plaintiff and Appellant, :
v. : Case No. 900554-CA
Southland Corp., et al., :
Defendants and Appellees, :
:
:
William Paul Barron, Jr., :
Plaintiff and Appellant, :
v. : Case No. 910150-CA
Southland Corporation, 7-11 :
Stores, Kemper Group Insurance, :
Citgo Petroleum Corporation, :
Defendants and Appellees, :

WILLIAM PAUL BARRON, JR. Pro Se
11475 Holiday Way
Hillsboro OH 45133-9368
(513) 393-3925 or 372-2744

T. J. TSAKALOS, Esq. (#3289)
Attorney for the Defendants
HANSON, EPPERSON & SMITH, P.C.
4 Triad Center, Suite #500
P.O. Box 2970
Salt Lake City UT 84110-2970

TABLES OF CONTENTS

| | |
|--|----|
| Jurisdiction | 1 |
| Statement of Issues | 1 |
| Determinative Provisions .. Constitutional, Statutes, Ordinances, & Rules | 3 |
| Statement of the Case | 4 |
| Summary of the Argument ... | 7 |
| Details of the Argument ... | 11 |
| Introduction | 11 |
| Questions for Review ... | 18 |
| Part I | 18 |
| Part II | 31 |
| Part III | 35 |
| Conclusions | 39 |
| Motion for Judgement on the Pleadings Pursuant to Rule 29(a)(3), U.R.A.P. | 41 |
| Original Signature | 40 |
| Certificate of Mailing | 42 |
| Addendum | 43 |

TABLE OF AUTHORITIES

CASE LAW

| | | |
|-----|--|--------|
| 1. | <u>Barron v. State of California et al,</u> 89C-983-G (D.C. Utah, 1989) | 22 |
| 1A. | <u>Barron v. Charter-Summit Hospital, et al,</u> 890903923-CV (3rd Dist. Ct., Utah, 1989) | 22 |
| 2. | <u>Barron v. Dr. Thomas M. Kelly, M.D., et al,</u> 890906515-CV (3rd Dist. Ct., Utah, 1989) | 21, 39 |
| 3. | <u>Barron v. City of Midvale, et al,</u> 890903924-CV (3rd Dist. Ct., Utah, 1989) | 22 |
| 4. | <u>Barron v. Salt Lake City, Utah,</u> 109 S.Ct. 1961, 3204 (1987) | 38 |
| 5. | <u>Barron v. Utah State Tax Commision, et al,</u> 90-4092-CA (C.A. 10th Cir., 1990) | 23 |
| 6. | <u>Bawden & Associates v. Smith,</u> 624 P.2d 676 (Utah 1981) | 37 |
| 7. | <u>Blackmon v. Snelgrove,</u> 3 UT.2d 157, 280 P.2d 453 (1955) | 15, 37 |
| 8. | <u>Continental Bank & Trust Co. v. Barron,</u> 870901165-CV (3rd Cir. Ct., Utah, 1987) | 37 |
| 9. | <u>Crellin v. Thomas,</u> 247 P.2d 264 (Utah 1952) | 32 |
| 10. | <u>Davis v. Michigan Dept. of Treasury,</u> 108 S.Ct. 1008, 2868 (1987). Cited again in 109 S.Ct. 42 on Brief Amicus Curae | 23 |
| 11. | <u>Despain v. Despain,</u> 682 P.2d 849 (Utah 1984) | 28 |
| 12. | <u>Erwin v. Erwin,</u> 773 P.2d 847 (U.C.A. 1989) | 17, 34 |
| 13. | <u>First Jersery Nat'l Bank v. Dome Petroleum, Ltd.,</u> 726 F.2d 335, 338 (3rd Cir. 1983) | 28 |
| 14. | <u>Hume v. Small Claims Ct. of Murray City, Utah,</u> 590 P.2d 309 (Utah 1979) | 31 |
| 15. | <u>In the Interest of J-----,</u> 576 P.2d 1280 (Utah 1978) | 25 |

| | | |
|-----|--|----------------|
| 16. | <u>Kettner v. Snow,</u> 13 UT.2d 382, 375 P.2d 28 (1962) | 29 |
| 17. | <u>Larrabe v. Turner,</u> 25 UT.2d 248, 480 P.2d 134 (1971) | 38 |
| 18. | <u>Larson v. Collina,</u> 684 P.2d 52 (Utah 1984) | 27, 29 |
| 19. | <u>Martindale v. Adams,</u> 777 P.2d 514 (U.C.A. 1989) | 17, 34 |
| 20. | <u>Moon Lake Electric Assn. v. Ultrasystems W. Constructors, Inc.,</u> 765 P.2d 125 (UCA 1988) | 32 |
| 21. | <u>Robison v. Kelly,</u> 69 UT 376, 255 P. 30 (1927) | 25 |
| 22. | <u>Schindler v. Schindler,</u> 776 P.2d 84 (U.C.A. 1989) | 31, 32 |
| 23. | <u>Shaw v. Pilcher,</u> 9 UT.2d 222, 341 P.2d 949 (1959) | 28 |
| 24. | <u>Smith v. Shreeve,</u> 551 P.2d 1261 (Utah 1976) | 32 |
| 25. | <u>Spencer v. Industrial Commission,</u> 81 UT 511, 20 P.2d 618 (1933) | 25 |
| 26. | <u>State v. Bates,</u> (1900) 22 UT 65, 61 P. 905, 83 Am. St. R. 768 . | 25 |
| 27. | <u>Taylor v. Estate of Taylor,</u> 770 P.2d 163 (U.C.A. 1989) | 35 |
| 28. | <u>Thorley v. Kolob Fish & Game Club,</u> 13 UT.2d 294, 373 P.2d 574 (1962)..... | 32 |
| 29. | <u>Uptown Appliance & Radio Co. v. Flint,</u> 122 UT 298, 249 P.2d 826 (1952) | 32 |
| 30. | <u>Utah Power & Light Co. v. Richmond Irriga- tion Co.,</u> 80 UT 105, 13 P.2d 320 (1932) | 25 |
| 31. | <u>Warren v. Dixon Ranch Co.,</u> 123 UT 416, 260 P.2d 741 (1953) | 27, 29, 30, 32 |

| | | |
|-----|--|----|
| 32. | <u>Warren v. Robinson,</u> 21 UT 429, 61 P. 28 (1900) | 25 |
| 33. | <u>Williams v. State Farm Insurance Co.,</u> 656 P.2d 966 (Utah 1982) | 16 |

COURT RULES

Utah Rules of Civil Procedure

| | |
|-----------------------------------|-----------------------------|
| Rule 3, Commencing Action | 36 |
| Rule 4, Service of Process | 37 |
| Rule 8, Pleadings, General Form . | 15, 36, 40 |
| Rule 10, Pleadings, Form of | 15 |
| Rule 11, Sanctions, Signing | 8, 14, 15, 28, 37, 38 |
| Rule 41, Dismissal of Actions ... | 17 |
| Rule 52, Findings of Court | 17, 34 |
| Rule 59, New Trials | 1, 9, 31, 33, 40 |
| Rule 60, Relief from Judgement .. | 1, 18, 26, 27 28, 39, 40 |

Utah Rules of Evidence

| | |
|------------------------------------|------------|
| Rule 201, Judicial Notice | 24, 33, 35 |
| Rule 602, Personal Knowledge | 32 |
| Rule 701, Testimony of Lay Witness | 32 |

Utah Rules of Appellate Procedure

| | |
|-------------------------------|----|
| Rule 29, Oral Arguments | 41 |
|-------------------------------|----|

STATUTES

United States Code

11 U.S.C. § 362, Automatic Stay .. 5, 23, 31

Utah Annotated Code

§ 16-10-13, Service of Process ... 37
§ 31A-2-310, Service of Process .. 37
§ 41A-2-3, Non-Existant Statute . 37
§ 46-6-32, Accident Notification 12
§ 76-10-801, Nuisances 13, 14
§ 76-10-803, Public Nuisances 13, 14
§ 76-10-808, Civil Remedy ¹ 4, 7, 14

OTHER AUTHORITIES

Standards of Review by Steven A. Childress and
Martha S. Davis, [KF 4575 C48 (1986), § 5.2 & 5.6] 1, 2

The Federalist Papers 26

¹

All citations hereinafter also make citation by reference to § 78-38-1, Utah Annotated Code, as a parallel statute related to civil action as a remedy for relief of a nuisance under § 76-10-801, 803 or 808, U.A.C.

JURISDICTION

This appeal is from the final decision and order of the Third Judicial Circuit Court by Judge Paul G. Grant dated July 31, 1990; and the final decision and order of the same Court on Appellant's Motion for New Trial dated September 29, 1990.

STATEMENT OF THE ISSUES

1. In presenting pleadings and testimony to the trial court did the defense counsel commit "fraud upon the court" in presenting evidence to justify defense assertions for a finding of "bad faith" against the plaintiff/appellant by the trial court, or make material fact misrepresentations in the pleadings submitted or testified thereto in open court, or otherwise commit misconduct, to such a level or degree that justice would require relief to the plaintiff under Rule 60(b)(1), (3), and (7), Utah Rules of Civil Procedure, thereby rendering the judgement invalid?

The standard of review for this issue is the substantive test of material fact, clearly erroneous standard, and abuse of discretion standard.

Standards of Review, by Steven A. Childress and Martha S. Davis, [KF 4575 C48 (1986), §5.2 and § 5.6].

2. Did the plaintiff/appellant provide sufficient evidence for the trial court upon his motion for a new trial to show merit due to unforeseen circumstances under Rule 59(a)(3), Utah Rules of Civil Procedure? And did the trial court abuse

abuse its discretion in denying the plaintiff/appellants Motion for a New Trial?

The standard of Review for this issue is the abuse of discretion standard. Standards of Review, by Childress and Davis, §5.6 [KF 4575 C48 (1986)].

3. Did the trial court abuse its discretion by granting judgement against the plaintiff, when there still were motions for Rule 11 sanctions against defense counsel (which alleged bad faith representation of material facts at issue before the court) still pending when the aforesaid judgement was granted to the defendants?

The standard of review is the abuse of discretion and clearly erroneous standards. Standards of Review, by Childress and Davis, § 5.6 [KF 4575 C48 (1986)].

DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, AND RULES

The following Utah Statutes and Rules are set-forth in the addendum to this brief in Appendix K.

Statutes

| | |
|---------------------------------|-----------------------------------|
| 11 United States Code § 362 | Automatic Stay |
| Utah Annotated Code, § 16-10-13 | Service of Process |
| § 31A-2-310 | Service of Process |
| § 41-6-32 | Notice of Accident |
| § 76-10-801 | Nuisances |
| § 76-10-803 | Public Nuisances |
| § 76-10-808 | Civil Remedy Allowed ¹ |

Rules

Utah Rules of Civil Procedure

| | |
|---------|-----------------------|
| Rule 3 | Commencing Action |
| Rule 4 | Service of Process |
| Rule 8 | Pleadings, general |
| Rule 10 | Pleadings, form of |
| Rule 11 | Pleadings, sanctions |
| Rule 52 | Findings by Court |
| Rule 59 | New Trials |
| Rule 60 | Relief from Judgement |

Utah Rules of Evidence

Rule 201 Judicial Notice

Rule 602 Personal Knowledge

Rule 701 Lay Witness Testimony

Utah Rules of Appellate Procedure

Rule 29 Oral Arguments

¹ All citations in this brief hereinafter also make parallel reference to Utah Annotated Code § 78-38-1 with regards to statutory remedy to civil action for relief of damages as a result of nuisances under § 76-10-801, 76-10-803, or 76-10-808, U.A.C.

STATEMENT OF THE CASE

Nature of the Case

Plaintiff filed a claim for damages to his automobile in the Third Circuit Court stemming from a nighttime accident on the property of the defendants, and a claim for medical bills, pain and suffering stemming from aggravation of pre-existing medical conditions of the plaintiff. Plaintiff alleged that the defendants placed an obstruction in the roadway, and failed to properly make the obstruction plainly visible at night when said obstruction was painted the same color of a background light pole and similarly dark-colored gas pumps (dark green). Plaintiff argued that said conduct constituted a nuisance and a public nuisance, that breached their legal duty to provide a safe passage to plaintiff and his passengers. Plaintiff further alleged unlawful co-ercion and threat by defendants² in order to prevent the plaintiff was exercising his rights under §76-10-808, Utah Annotated Code, which specified a civil action against a defendant who maintained a nuisance to recover damages.

Course of Proceedings

Appellant filed a complaint against the appellees on October 21, 1989 for damages resulting from an accident on or about March 26-27, 1989 in Provo, Utah County, Utah. Defendant Kemper Group was dismissed from the suit on April 4, 1990. Trial was scheduled for July 16, 1990, however, due to the appellants illness and incapacity, only defense counsel appeared.

Appellant filed a Motion for New Trial and a Notice of Appeal before July 29, 1990.¹ On July 31, 1990, a judgement dismissing this action was signed by Third Circuit Court Judge Paul G. Grant. Appellants Motion for a new trial was denied on September 29, 1990. Pursuant to 11 U.S.C. § 362, an automatic stay on further proceedings was issued by the United States Bankruptcy Court for the Northern District of Texas, Dallas Division on behalf of defendant Southland Corporation. The stay was terminated by the Bankruptcy Court effective March 5, 1991, as affirmed by notice received from defense counsel on or about March 21, 1991.

Disposition at Trial Court

The trial court dismissed appellant's action with a finding of bad faith when the trial judge signed an order prepared by the defense counsel on July 31, 1990.

The trial court dismissed appellant's motion for a new trial on September 29, 1990 by a journal minute entry.

Relevant Facts

One of the central issues in this appeal involved an allegation of misrepresentation, misconduct, or "fraud upon the court". Central facts related to this allegation is testimony by the defense counsel at trial that asserted that appellants malpractice suit was dismissed (transcript: page 2, line 23-25). The trial date was July 16, 1990; the matter of Barron v. Dr. Thomas M. Kelley, MD, et al. was not dismissed until May 8, 1991, which was almost ten (10) months after the trial date.

[Transcript in Appendix D; Barron v. Kelley et al is

located in Appendix B.]

Other relevant facts will not be discussed here inasmuch as they offer interpretations and conclusions that are more correctly a part of the argument.

Since the appellant does not seek a de novo review on the merits of the original cause of action, but only to set aside the judgement, detailed facts in this matter will only be offered as they are material to the issues on appeal. The claim was based on an automobile accident on appellee's of business on or about March 26-27, 1989, at approximately 12:30 A.M. Appellant approached the pump island at an angle, and struck a black guard post that was approximately 23 inches from the gas pumps (and/or pump island). At the time of the accident, the aforesaid gas pumps were painted dark green, and the light pole beside the pumps was painted black. Appellants son was a witness and passenger at the time of the accident.

1

Appellants personal files and original papers are in storage in Salt Lake City, and the exact date is not known, but appellant believes the Motion for New Trial was filed on July 19, 1990; and the Notice of Appeal was filed on August 30, 1990 - within 30 days of the date the judgement was signed by Judge Grant.

2

See Appendix C.

SUMMARY OF THE ARGUMENT

On October 21, 1989, the appellant William Paul Barron, Jr. filed a complaint against the appellees alleging that the defendants were negligent in causing the accident by placing an unmarked, or poorly marked, obstruction in the roadway. The appellant contends that the coloring of the guard post was so indistinguishable from the background light post and gas pumps, and was, by virtue of its placement in the roadway, a nuisance to traffic. Appellant's claim for relief was based upon the provisions of § 76-10-808 of the Utah Annotated Code that provided civil remedy for relief on damages caused proximally from a nuisance. [See Appendix A.]

Appellees have asserted that appellant failed to exercise a high degree of care and proper lookout, and maintained that appellants claim for relief was frivolous and without merit. [See letter from Dennis Op1, dated November 2, 1989, Appendix C.]

Kemper Group of Insurance Companies was dismissed from the suit on April 4, 1990, because Utah law did not permit a direct action against the insurance carrier.

Trial was first scheduled for hearing in January or thereabout and was rescheduled to July 16, 1990, based upon objections raised by the appellant that discovery had not been completed.¹ The trial court sustained appellant's Motion for Order to Compel Discovery shortly before this first scheduling of trial by the

defense counsel.

Prior to the trial date the appellant filed two (2) motions for sanctions against the defense counsel pursuant to Rule 11 of the Utah Rules of Civil Procedure. The substance of the reasons for the appellants motion was the contention that the defense counsel had misrepresented material facts, statements and allegations of the complainant, or had made untrue assertions to the trial court knowing that they were not true.

Prior to the trial date the appellant had provided a large body of medical information and records, and further kept the defense counsel abreast of the current medical condition of the appellant. Appellant reported to the defense counsel in the weeks prior to the trial alternate means of communication in an emergency because appellants telephone service was disconnected.² Appellant further advised defense counsel of recent medical treatment and episodes of cardiac syncope and incapacity. The appellant made every effort to inform defense counsel of such circumstances that could delay his appearance (e.g. hospitalization), because the appellant had every intention and desire to press his claim at trial. Appellant took such precautions as he deemed prudent because the appellant was experiencing health problems immediately prior to the trial.³

On the day scheduled for trial the appellant became ill and incapacitated. Defense counsel asserted that the appellant had prosecuted this action in bad faith, and secured a judgement to

that effect on July 31, 1990. The appellant contends that at the trial defense counsel withheld knowledge of appellants medical condition as a possible explanation for non-appearance, and made several assertions to secure a finding of bad faith with full knowledge that those assertions were either completely false or misleading. On appeal appellant asserts that this misconduct, mispresentation or fraud only followed established conduct from onset of the action, and that defense counsel was fully culpable for said conduct.

Appellant further contends that the trial court⁴ knew that strong objections had been made against defense counsel's conduct, and that such conduct had a material bearing on the appellants case and the issue of appellees allegation of "bad faith" by the appellant. Armed with such knowledge, a judgement for bad faith was an abuse of discretion.

Appellant filed a motion for a new trial within the ten (10) day requirement of Rule 59(b) of the Utah Rules of Civil Procedure. The motion was filed pursuant to Rule 59(a)(3) and asserted that appellants non-appearance was an accident or surprise which ordinary prudence could not have guarded against due to appellants unforeseen incapacitation on the day of trial.

Appellant asserts that sufficient testimony of his incapacitation and medical evidence and other factors, such as loss of telephone service, existed to warrant a new trial. Further, in view of the motions for sanctions against alleged misconduct of the defense counsel, the denial of the motion by the trial court

was an abuse of discretion.

Because the appellant has relocated to Ohio, he does not seek a new trial. Appellants poverty prevents his return to Utah in the foreseeable future, therefore, he could not prosecute his claim even if the court found that a new trial was warranted. Appellant seeks only the equitable discharge from the judgement imposed by the trial court because of the misrepresentations, misconduct, or fraud of the defense counsel in securing that judgement.

-
- 1 Because appellant's papers are in storage in Utah, he can not say with certainty, the date on which appellees' counsel first certified readiness for trial, but that it was in the early part of 1990 (i.e. January or February).
 - 2 Notification to appellees' counsel in Appendix H.
 - 3 See notification in Appendix H.
 - 4 See documentation in Appendix I.

DETAIL OF THE ARGUMENT

Introduction

Appellees' counsel asserts that appellants suit was brought in bad faith [see trial transcript, page 2 line 2, Appendix D] and in the supporting memorandum for a motion for summary disposition dated June 24, 1991, and stated for the record:

In the trial court, the appellant brought a claim of questionable merit which was unsubstantiated by fact. The trial court acknowledged the meritless nature of the claim by dismissing the claim with a finding that the suit was brought in bad faith. This appeal is a continuation of questionable claims unsubstantiated by fact. [p. 4, lines 19-25.]

The appellants suit and claim arose from an accident during the night of March 26-27, 1989, when the appellant struck a post approximately 23" from either the pump island or the the gas pump¹. The accident occurred in the city of Provo, Utah, at the corner of Columbia Aveune and 1200 West at approximately 12:30 A.M.

Upon impact, both the appellant and his son were appalled because appellants auto was almost two feet away from the gas pump. After exiting vehicle they determined that the object struck was a concrete-filled metal post about two feet from the gas pumps, and was unnoticeable at night because the post was painted black, and lacked any reflective coloring, striping or other visible markings on the roadway obstruction. Additionally, Visibility was made even more difficult due to background coloring. The gas pumps were painted dark green, and the light pole

was painted black.

Appellant pulled into the 7-11 Store refueling station off Columbia Avenue northbound, and approached the pump island at an angle of approximately forty-five degrees across the parking lot. Approaching the pump island, appellant turned his vehicle in order to place his vehicle parallel to the pumps. It was at this time that the guard post was struck. At this angle of approach, the guard post was in direct alignment with the light pole, which was also painted black, and partially centered on the line-of-sight with the nearest gas pump.² Neither the appellant nor his primary witness, son Donald Eric Barron, observed any obstruction or danger in the vehicle's path of approach to the pumps prior to the impact with the guard post.

After the collision, the appellant refueled and informed the clerk on duty of the accident, and requested reporting instructions, in accordance with the provisions of § 41-6-32, Utah Annotated Code (hereinafter cited as U.A.C.) Appellant also requested that the store manager be advised to place some type of reflective markings on the post in order to avoid any further mishaps.

For the next six months appellant received no response to his claim for damages from Southland Corporation, which owns and operated the 7-11 Store in Provo, inspite of several letters and telephone calls. Finally, the appellant received a letter from Dennis Op1, insurance adjustor for Kemper Group, on November 2, 1989 [See Appendix C.] Mr. Op1 first asserted that my claim was

frivolous, and that if I pressed my claim for damages in court that they would demand a ruling of "bad faith".

Prior to initiating legal proceedings, appellant sought the advice of legal counsel, concerning this matter and proceeded upon that advice to establish the claim in court. Because of appellant's poverty, legal advice was the extent of services obtained from John W. Call, Attorney-at-Law. Appellant went to the University of Utah Law Library to research applicable statutes and case law that might be pertinent to his case. [See Appendix A.]

Based upon legal advice thus far obtained, and research³ in law performed, appellant firmly believed that the three elements of a tort action in this matter were fulfilled. In reading § 76-10-801, U.A.C. appellant learned that a nuisance was cited as "anything, item, manner, or condition whatsoever that is dangerous to human life or health", and that a public nuisance was cited in § 76-10-803, U.A.C. as "omitting to perform any duty, which ommission either annoys, injures, or endangers the comfort, repose, health or safety of three or more persons, or unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage any ... street, highway, or in any way renders three or more persons insecure in life or the use of property." These statutes outlined the existence of a legal duty from the defendants to the plaintiff.

The appellant asserted that by placing an obstruction in the path of his vehicle, and failing to properly mark that obstruction, i.e. the guard post, in such a manner to make it

visible after sunset, at night, and particularly on a moonless night that was the case on March 26-27, 1989, that the defendants breached their legal duty to the appellant and his passengers, his son and daughter, and their friend. Further, the breach of that duty placed the appellant and his passengers "insecure in life or the use of property", i.e. insecure in making a stop at a public place of business without injury or harm, and in which said negligence was the proximate cause of damage sustained to the appellants automobile. Therefore, all three elements of a tort claim against the tortfeasor, Southland Corporation dba 7-11 Stores, and Citgo Petroleum Corporation, whose product for retail sales was marketed at that location and whose gasoline pumps and elemental attachments thereto, were met in the appellants claim.

The only element missing is a proper claim for relief. Under § 76-10-808, U.A.C. state statutes provided civil remedy for relief from damages as a proximate result of negligence for maintaining a nuisance as described under the aforesaid statutes, § 76-10-801 and 76-10-803, U.A.C.

The appellant lacks formal legal training, but did graduate from Bowling Green State University maintaining a 3.850 grade point average in his major field of study. Appellant sought and obtained preliminary legal advice, and performed all relevant research into law to the best of his ability and knowledge.⁴ Rule 11, Utah Rules of Civil Procedure (hereinafter cited as U.R.C.P.), states:

The signature of an attorney or party constitutes

a certificate by him that he has read the pleading, motion, or other paper; 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, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The appellant possesses the mental faculties to make a reasonable inquiry and to perform basic legal research into his problem, after initial advice by an attorney at law, in order to formulate a good faith argument and belief upon filing his complaint with trial court. Even though the presentation may lack the polish of a seasoned attorney, and even though his pleadings may have had minor defects in form, appellant proceeded in this cause of action based upon a reasonable belief that there was a claim upon which relief was had under Utah law, and acted in every measure in good faith.

Every pleading submitted to the trial court by the appellant was made in accordance with Rule 8(a), (e)(1) and (2), and (f), Rule 10, and Rule 11, U.R.C.P. Appellants complaint and pleadings were not very technical, perhaps, in that they they may have lacked numerous citations to case law that an attorney with time and expetise may have made; but every pleading was concise in that it gave fair notice of the nature, basis, or grounds of his claim. This was sufficient unless appellant would be entitled to no relief under any state of facts which could be proved in support of his claim. Blackman v. Snelgrove, 3 Utah 2d. 157, 280, 280 P.2d 453 (1955). Further, the fundamental purpose of the liberalized

pleading rules is to afford parties the privilege of presenting whatever legitimate contentions they have pertaining to their dispute, subject only to the requirement that their adversaries have fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.

Williams v. State Farm Insurance Co., 656 P.2d 966 (Utah 1982).

The second consideration on the question whether appellant brought forth a claim of questionable merit would be determined - in normal proceedings - during the course of trial, wherein the testimony and evidence assembled by the appellant would be judged.

During the course of discovery, appellees by and through their counsel, T. J. Tsakalos #3289, were provided with maps, diagrams, and photos prepared by the appellant of the accident site, during both daylight and nighttime hours.⁵ These items were prepared to show the appellants angle of approach to the obstruction, the distances and angles involved. The appellant also provided appellees with a computer enhancement photo rendition of what the appellant saw that night, by using color copier technology at Kinko's of Salt Lake City, Inc., to render a color photo taken several weeks after the accident (which was by then painted white instead of dark green) as it looked at the time of the accident, on the moonless night of March 26-27, 1989. This color copy photograph, which was enlarged, showed the position and the alignment of the guard post to the light pole and gas pump at the

approach angle the appellant drove towards the obstruction on the night of the accident. In order to simulate a night photo, this copy was again copied with grey overtone and shading which aided appellant in showing how obscure the post would look at night when two posts of like color were aligned as they were when the appellant made his approach.⁵

Therefore, appellant would contend that appellees' averment that appellants claim had questionable merit and was unsubstantiated by fact to be wholly and totally false. Appellant would further contend that the trial court merely consented to the defense counsel averments because no specific findings of fact or law were made by the trial court on July 16, 1990, during the proceedings absented by the appellant, either orally as shown in the trial transcript, or in the entry of judgement prepared by appellees by and through counsel, as required by Rule 41(b) and Rule 52(a), U.R.C.P. Erwin v. Erwin, 773 P.2d 847 (U.C.A. 1989). Martindale v. Adams, 777 P.2d 514 (U.C.A. 1989).

1 Appellants papers and files were placed in storage upon his departure from Utah in March 1991, due to loss of lease on his residence; therefore, appellant can not say with certainty whether this 23" measurement was from the gas pump to the post or from the concrete island to the pump.

2 Another map, of approximate proportions, in order to illustrate is at Appendix F. Original papers in storage as above.

3 See case law research and correspondence in Appendix A.

4 See case law research and correspondence in Appendix A.

5 See reconstructed drawing for approximation in Appendix F. Appellant's original papers in storage in Salt Lake City.

Questions For Review

A discussion of each issue presented by the appellant on appeal will be discussed individually. Only three issues that were originally described in the Docketing Statement will be discussed hereafter, as the other issues are now moot. The questions shown hereafter exhibit changes in syntax or additional words or phrases in order to give clearer meaning to the issues that the appellant is seeking review. [These changes appeared in bold face type in the appellant's Memorandum of Points and Authorities In Support of Appellant's Objections to Appellees Motion For Summary Disposition dated July 2, 1991.]

1. In presenting pleadings and testimony to the trial court, did the defense counsel (T.J. Tsakalos #3289) commit "fraud upon the court", misrepresentation, or misconduct in presenting evidence to justify defense assertions for a finding of "bad faith" by the trial court, or make material fact misrepresentations in the pleadings submitted or testified thereto in open court, or otherwise commit misconduct, to such a level or degree that justice would require relief to the plaintiff under Rule 60(b)(1), (3), and (7), of the Utah Rules of Civil Procedure, thereby rendering the judgement against the appellant invalid?

On two separate occassions, in early January or February 1990, and October 1, 1989, the appellant entered Objections and a Motion for Sanctions under Rule 11, U.R.C.P. (see record on Appeal) against defense counsel Mr. Tsakalos #3289 for alleged misconduct, misrepresentation, and/or fraud.

The nature of these allegations was based upon appellants contention that counsel seriously misrepresented material facts or distorted plaintiff's assertions to the court. In particular,

defense counsel misrepresented the appellants claim, and the particulars of the accident, stating in various pleadings that "the plaintiff backed his cars into the gas pumps",¹ or "Mr. Barron was driving his car and ran into our pumps and sued us." (See transcript, page 2, line 16-17, Appendix D). In another pleading, Mr. Tsakalos certified to the trial court, approximately January 1990,² that the action was ready for trial. Discovery had not been completed, and several items and motions were still outstanding. At one point, appellant had to compel appellees counsel to provide discovery material by motion, which was favorably ruled upon by the trial court.

Mr. Tsakalos stated in the Memorandum (page 6, line 13-14),³ that "Neither does the statement that the appellant ran into the pumps rather than ran into a protective barrier situated next to the pumps constitutes fraud upon the court." The material facts in this case depend upon an exact set of circumstances, because in no other would the appellant have a claim upon which relief could be granted. Appellees have set forth a conclusion, then turned the facts to match that conclusion, even if it meant distorting or misrepresenting the claims and allegations made by the plaintiff.

However the most serious breach of misconduct occurred on the date set for trial on July 16, 1990. Appellees counsel made certain allegations and incorporated them as the basis for his motion to dismiss and for a finding of "bad faith" against the appellant.

In the Memorandum⁴ Mr. Tsakalos stated that he "did not intentionally misrepresent any facts pertaining to appellants'

other litigation." (Line 12-13, page 6).

The trial transcript records Mr. Tsakalos remarks as follows:

I also brought a claim for bad faith in this, your honor. Just for the record, in October of '89, he brought a malpractice suit on his own against a doctor in LDS Hospital and IHC, and that has been dismissed. On June 26, '89 he sued Charter-Summit Hospital and several people and that -- pro se, and that has been dismissed. On June 25, '89, he sued Midvale City and Midvale P.D. and that was dismissed. On October 31 of '89, he sued the State of California and the California Department of Food and Agriculture, 'cuase they stopped him at the border, wouldn't allow him to bring in fruit and vegetables. That was dismissed in the United States District Court. On November 29, '89, he re-filed that suit again and that has been dismissed. November 16, '89, he sued the State of Utah and the Utah State Tax Commission for his taxes. I think that one has been dismissed, and then he sued us when our pumps did not get out of his way, and now has not appeared. [See Appendix D, page 2, line 23, through page 3, line 13.]

At issue is whether defense counsel's representations to the trial court constituted misconduct, misrepresentations or fraud upon the court. Mr. Tsakalos contends in the Memorandum⁵ that he "had no duty to elaborate further". He has made an issue of the fact that the appellant is appearing pro se, with the implication that that fact lessens the appellant's credibility; and that the appellant was found to be in "bad faith" "in part due to numerous other suits brought by the appellant at approximately the same time." (See Memorandum⁶ page 2, line 4-6). Since he has characterized appellants other actions as frivolous and without merit, their true character and nature are material facts to that assertion to the trial court; and are reviewable under the Material Fact and Clearly Erroneous Doctrine as to their veracity.

In the course of discovery, the appellant provided defense counsel with a list of other cases,⁷ and as his testimony demonstrates he was familiar with those cases. In most normal circumstances, as he asserted, he may not have been under any obligation to explain in detail the status of other litigation by the appellant. However, the canon of ethics would require that he provide the trial court with sufficient detail to justify his conclusions, especially since he is using the weight of this evidence to show "bad faith" on the part of the appellant, and because the trial court is relying on this testimony to make a finding of "bad faith". It would follow then that whether these allegations are truthful or not, or whether their characterization is truthful or not, would have great bearing on the court's decision.

The first case cited by Mr. Tsakalos consisted to total and utter fabrication. He represented to the trial court that the matter of Barron v. Dr. Kelly, MD, et al, 890906515-CV, 3d DC, was dismissed as of trial date on July 16, 1990. In fact this case was not dismissed without prejudice until May 8, 1991; which is almost ten months later than defense counsels assertion. He is fully culpable for this falsehood made to the trial court. If he knew of the case, he should -- know the status, or could have ascertained it. [See Appendix B.]

The other assertions by Mr. Tsakalos consisted of a number of misrepresentations and distortions. He averred that in the matter

of Barron v. Charter-Summit Hosptial et al, 890903923-CV, 3d DC, was dismissed on July 31, 1989 pursuant to an agreement and settlement of all issues acceptable to the parties and a request for voluntary dismissal under Rule 41(a)(1), U.R.C.P. This does not follow appellees characterization of "bad faith". [Appendix G]

In the matter of Barron v. The City of Midvale Utah et al, 890903924-CV, 3d DC, a stipulation and motion for voluntary dismissal under Rule 41(a)(1), U.R.C.P. was signed January 18, 1990, said action having been fully compromised to the satisfaction of all parties. Again, the facts of this case do not follow the appellee's characterization of "bad faith". [See Appendix G.]

In the matter of Barron v. The State of California et al, 89-C-983-G and 89-C-1056-S, DC of Utah, a number of misrepresentations and falsehoods occur. Mr. Tsakalos averred that the nature of this claim was a suit "'cause they stopped him at the border, wouldn't allow him to bring in fruit and vegetables". The case was docketed under the heading "CONSPIRACY AGAINST CITIZENS RIGHTS", and was characterized as a civil rights action for illegal search and seizure. Appellees characterized this suit as a frivolous matter over fruits and vegetables in order to affirm their contention of "bad faith." However, in the Memorandum Decision and Order dismissing the action on August 15, 1990, by Judge Greene of the United States District Court, District of Utah, Central Division, the court held that the appellant acted with "sincerity and earnestness" (See Order, page 2, line 17, Appendix G). Further, Mr. Tsakalos characterized this case as two separate filings; one which was filed on October 31, 1989, and promptly

dismissed and then re-filed again on November 29, 1989. The true facts in this matter are that the Clerk of Court inadvertently filed a second copy as an original action. This was corrected by an Order of Consolidation, which was entered on January 19, 1990. [See Order of Consolidation, Appendix G.] This situation is similar to this appeal when the Clerk of Court entered this appeal a second time, when the automatic stay imposed by the U.S. Bankruptcy Court in Dallas under 11 U.S.C. § 362 was lifted on March 5, 1991. The original appeal, which was first filed on August 30, 1990, and the "second" appeal were consolidated. Even in this case, Mr. Tsakalos misrepresented the facts to support a conclusion that could not be sustained by those facts.

In the matter of Barron v. The State of Utah, and the Utah Tax Commission, CA 90-4092, 10th Cir., was presented with some doubt as to its status. This was the only case which was properly noted by the appellee's counsel. This suit involved issues concerning state taxation of federal retiree's compensation which were raised in the decision of the United States Supreme Court in Davis v. Michigan. This case was dismissed for lack of jurisdiction by the U.S. District Court after the trial date, and affirmed by the 10th Circuit Court of Appeals on February 29, 1991. The misrepresentation by appellee's counsel, however, was to characterize this case also as one based in frivolity and wholly without merit. In fact the case presented by the appellant was patterned after a similar case in the state courts, and was an extension of the Supreme Court's Davis v. Michigan decision to the situation in Utah. [See Appendix G.]

In the course of discovery, appellee's counsel requested, and was provided with detailed medical records and information on the appellant's medical history and condition. He specifically requested information on how the appellant was disabled, or incapacitated by his condition.

Additionally, counsel for the appellees was advised in June 1990, that the appellant had been ill during the past month (i.e. from approximately May 1, 1990 to June 1, 1990), and had been incapacitated with cardiac syncope. He was also advised that the appellant no longer had telephone service; and that should any situation arise where contact with the appellant was necessary, then appellee's counsel was advised to make contact through the appellants apartment manager.

It can be argued that the adversary counsel is not obligated to perform the complaintant's duties; however, the canon of ethics require one to advise the court fully of all material facts. Then counsel may argue his interpretation of those facts.⁸

For the record, the appellant also advised the court of this change in circumstance. In rendering any decision against the appellant, the trial court must weigh all facts before it, and to do otherwise is an abuse of discretion. Certainly the trial court may take judicial notice of two unresolved motions for sanctions made by the appellant, and suporting documentation which included reference to the appellant's health status and poverty, and particularly specific notations in correspondence and courtesy copies of materials sent to the trial judge pursuant to Rule 201

of the Utah Rules of Evidence (hereinafter cited as U.R.E.) [See Appendix I.] Warren v. Robinson, 21 Utah 429, 61 P.2d 28 (1900). State v. Bates, 22 Utah 65, 61 P. 905, 83 Am. St. R. 768 (1900). Utah Power & Light Co. v. Richmond Irrigation Co., 80 Utah 105, 13 P.2d 320 (1932). In interest of J---, 576 P.2d 1280 (Utah 1978). Robison v. Kelly, 69 Utah 376, 255 P. 30 (1927). Spencer v. Industrial Commission, 81 Utah 511, 20 P.2d 618 (1933).

Defense counsel has asserted that this cause of action and appeal was questionable in merit, and alluded that all previous cases filed at approximately the same time period (i.e. the latter half of 1989) were all similarly without merit or frivolous. The appellant has herein demonstrated that Mr. Tsakalos made averments under oath in open court - knowingly and with malicious intent - that were total falsehoods, or so distorted as to make a false characterization of the true facts. Appellee's counsel did not make truthful and complete averments, then offer an interpretation of those facts to the trial court. Rather, facts were abused into unrecognizable forms in order to fit the characterization of the appellant throughout the course of these proceedings. Those characterizations included the bias against appellant for acting pro se, and a buffoon who ran into a well-marked structure that he should have been familiar with, and a rascallion who sought a deep-pockets suit out of poverty.

Appellant would contend that these positions are contrary to the material facts in this case and established law. Both federal and state law provide for access to impecunious litigants to the

courts. In accordance with the principles of equity and justice under English Common Law, the courts have extend poor litigants proceeding on their own more latitude in presenting their claims in order to place them in an equal footing before the court as attorneys at law. During the first half of the nineteenth century the courts drew heavily upon the Federalist Papers and other writings of our founding fathers in order to embody other principles peculiar to the American experience, and added those principles to the common law, which appellant would refer to as American common law. Although not formally recognized, or formally stated as such, these principles today are generally recognized as clichés, such as: We the people, government of -by - and for the people, due process, equal justice before the law, no man is above the law, a nation of law not of man, etc.

In the spirit of this law, the allowance for the vacation of a judgement is a creature of equity. It is designed to relieve a party from the harshness of enforcing a judgement resulting from such causes as: the wrongs of the opposing party, or misfortunes preventing the presentation of a claim or a defense.⁹

Appellant is asserting a claim for relief from the judgement under Rule 60(b), U.R.C.P. which states in part:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgement, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; ... (7) or any other reason justifying relief from the operation of

the judgement.

Appellant contends that under the provisions of Rule 60(b)(1), U.R.C.P., inadvertence, surprise, or excusable neglect would be constituted by the facts surrounding appellants absence from the trial. Appellant had begun to suffer cardiac syncope and periods of incapacity [See Appendix J], and had so informed the other parties to this case [See Appendix H]. Appellant was also without phone service in the weeks just prior to the trial date, and had so informed the other parties to this case, and had made arrangement for supplementary contact procedure in the event of emergency or necessity [See Appendix H]. Illness alone is not a sufficient excuse to make neglect a ground for vacating the judgement. Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741 (1953). However, appellant would argue that illness, incapacity as demonstrated by medical history, lack of means and time to make proper notice on the date of trial, and prior notice of such conditons that could create a problem and a proffered arrangement for emergency contact, do present sufficient cause to extend the provisions of mistake, inadvertence, surprise or excusable neglect to this situation. Larsen v. Collina, 684 P.2d 52 (Utah 1984).

Appellant contends that under the provisions of Rule 60(b)(3), U.R.C.P., the misrepresentation or misconduct by opposing counsel in presenting under oath in open court testimony that has been shown to be total fabrication or false or misleading would constitute grounds for vacating the judgement. If the court would find that these actions by opposing counsel constituted "fraud upon the court", relief from the judgement would normally proceed by means

of an independent action against opposing counsel, Mr. Tsakalos. Shaw v. Pilcher, 9 Utah 2d. 222, 341 P.2d 949 (1959). Despain v. Despain, 682 P.2d 849 (Utah 1984). Because appellant has removed from the state of Utah, is disabled for multiple causes, and is still impecunious, appellant would not be able to seek relief under this gravamen in Utah courts; therefore, appellant would argue for reversal of previous precedent for "fraud upon the court" in the particular situation of the appellant, barring of course, a favorable finding under misconduct or misrepresentation provisions of the rule.

Appellant contends that under the provisions of Rule 60(b)(7), U.R.C.P. other reasons for relief include abuse of discretion by the trial court in granting judgement. Any evidence which had a bearing on the assertions made by opposing counsel is a matter of material fact subject to review on the same standards. First Jersey National Bank v. Dome Petroleum Ltd., 726 F.2d 335, 338 (3rd Cir. 1983). These assertions were made known to the trial court via appellants motions for sanctions under Rule 11, U.R.C.P., and other documents and pleadings forwarded to the trial court in the course of these proceedings. Opposing counsel erred on the side of ethical misconduct by withholding material facts from the court in both oral testimony and written pleadings. The trial court erred in not considering the issues raised by the appellant prior to granting a judgement in favor of the appellees for appellants alleged "bad faith". This is especially the case when all previous pleadings and motions by the appellant exhibited an aggressive desire to prosecute his claim before the court.

In consideration of all the facts and circumstances, it is appropriate to review granting of the judgement under the abuse of discretion doctrine, and to set aside the judgement under one on several causes. Appellant took timely action to seek relief from the judgement by both filing a motion for new trial, and appeal from the judgement. Relief is warranted because of the harshness of enforcing the judgement because of opposing counsel's misconduct, mispresentation or fraud, and the misfortunes that prevented the presentation of the appellants claim. Warren v. Dixon Ranch Co. et al, 260 P.2d 741, 123 Utah 416 (1953). Kettner v. Snow, 13 Utah 2d. 382, 375 P.2d 28 (1962). Larsen v. Collina, 684 P.2d 52 (Utah 1984). Schindler v. Schindler, 776 P.2d 84 (Utah C.A. 1989).

- 1 Appellant removed from Utah in March 1991, and most of the papers and files were placed in storage. At this time, the appellant can not say with authority which pleadings were involved, but the two Motions for Sanctions should have the particulars, and be found in the Record on Appeal.
- 2 Exact date unknown as appellant does not have access to all papers. Personal files are in storage, and appellant can not view the record on appeal because he currently resides in Ohio.
- 3 Memorandum cited is appellees' Memorandum of Points and Authorities in Support of Appellees' Motion for Summary Disposition dated June 24, 1991.
- 4 Ibid., page 6, lines 11-13.
- 5 Ibid., page 6, line 11.
- 6 Ibid.
- 7 This list was not a comprehensive listing of cases, rather it was just a list of case titles and courts of jurisdiction, as

far as I know, or recollect.

8 Appellant does not offer any case law or other authority because appellant is not able to undertake legal research at this time, because he is not able to quickly or conveniently locate and drive to a law library with adequate resources appropriate to Utah law. This argument is made in accordance with standard ethical considerations.

9 Case citation: Warren v. Dixon Ranch Co. et al, 260 P.2d 741, 123 Utah 416 (1953).

Questions for Review, Part II

2. Did Appellant provide sufficient evidence for the trial court upon his motion for a new trial to show merit due circumstances provided for under Rule 59(a), Utah Rules of Civil Procedure? And did the trial court abuse its' discretion in denying the appellant's motion for a new trial?

Appellant was not able to be present because he was ill and incapacitated from an episode of cardiac syncope [See Appendix J] on the date scheduled for trial. Appellant filed a Motion for a New Trial pursuant to the provisions of Rule 59(a)(3), U.R.C.P. on July 19, 1991, and hand-carried the same to the court. Upon advice of legal counsel, John W. Call, appellant further filed an appeal of the judgement on or about August 30, 1990. This action was not necessary, but unknown to the appellant, because a timely motion under Rule 59 terminates the running of the time for appeal of a judgement, and does not begin to run again until the order granting or denying such a motion is entered. Hume v. Small Claims Court of Murray City, Utah, 590 P.2d 309 (Utah 1979). Appellant's motion for a new trial was denied on September 29, 1990. The appeal did not go forward at that time because the United States Bankruptcy Court for Dallas, Texas, issued an automatic stay on further proceedings against the appellees pursuant to 11 U.S.C § 362, dated October 24, 1990.

The granting of a new trial should never be merely capricious and arbitrary; but should be ordered only when sound judicial discretion, in the interest of doing justice between the parties, so requires. A decision of the trial court in this matter is a matter for review on the theory of abuse of discretion on appeal,

when appellant has made a showing of at least one of the circumstances specified in subdivision (a) of the rule. Crellin v. Thomas, 247 P. 2d 264 (Utah 1952), and Uptown Appliance & Radio Co. v. Flint, 122 Utah 298, 249 P.2d 826 (1952); Thorley v. Kolob Fish & Game Club, 13 Utah 2d 294, 373 P.2d 574 (1962); Smith v. Shreeve, 551 P.2d 1261 (Utah 1976); Moon Lake Ele. Assn. v. Ultrasystems W. Constructors, Inc., 765 P.2d 125 (Utah C.A. 1988); Schindler v. Schindler, 776 P.2d 84 (Utah C.A. 1989).

In the appellants motion, he argued that it was not illness alone that caused accident or surprise, which ordinary prudence could not have guarded against, and that his motion had merit under law in the interest of doing justice between the parties. Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741 (1953). Crellin v. Thomas, 122 Utah 122, 247 P.2d 264 (1952).

Appellant cited prior illness, and incapacitation as attested to by his apartment manager, Puyol Bang. This is the same party to whom appellant refered when a notice¹ was given to opposing counsel in June 1990 [See Appendix E]. In addition, a statement from appellants physician, previously provided to opposing counsel in response to his discovery request corroborated the contentions of appellant of incapacitation, although the physician would make no specific averments [See Appendix J].

Appellant suffered from a chronic, debilitating condition and did not seek treatment after his recovery on July 16, 1990. His affidavit and averments of the circumstances are creditable under Rule 602 and 701, U.R.E. barring objections for cause by appellees.

To the best knowledge of the appellant, and his recollections of the proceedings, the appellees made no objections to the court which were deemed creditable, because the trial court denied the appellees Motion to Quash/Strike the appellants motion for a new trial. That is, appellant believes, to his best knowledge, that appellees Motion to Strike did not raise objections to either the sufficiency of evidence to support appellants motion or show the impeachability of supporting testimony of Dr. Lowry and Puyol Bang.

Appellant contends that his illness, incapacity stemming from that illness as demonstrated by medical history and testimony of appellant's physician, the lack of means to make notice to the appellees and court of incapacity on the date of trial because telephone service had been disconnected, and prior notices given to the court and opposing counsel [See Appendix H] of potential problems resulting from appellants disability and offering a solution and point of contact through Puyol and Melanie Bang, all mitigate for a finding of surprise, inadvertence or excusable neglect. [See also Appendix E and J].

Even though defense counsel asserts that Rule 59(a)(3), U.R.C.P. is usually construed as requiring accident or surprise at trial, appellant would contend that the principle is equally valid when applied to the situation under appeal where the matter of appellant's non appearance is caused by accident or surprise.

Further, under Rule 201, U.R.E. judicial notice should have been made of previous pleadings (i.e. motions for sanctions), and other papers alluding to misconduct by opposing counsel, and for the sake of justice and equity considering the past aggressiveness

and apparent desire to prosecute appellants claim, taking all facts into consideration it was an abuse of discretion for the trial court not to grant a new trial under the circumstances to the appellant.

Rule 52(a), U.R.C.P. states in part:

In all actions tried upon the facts without a jury or with and advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, ... The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the grounds for its decisions on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

No written findings were made, and only an journal minute entry of oral decision to deny appellant's motion for a new trial was ever received. The rule and case law require that the facts be stated specially and conclusions of law be entered separately. Erwin v. Erwin, 773 P.2d 847 (Utah C.A. 1989); Martindale v. Adams, 777 P.2d 514 (Utah C.A. 1989).

Because appellant is unable to prosecute the original claim against the appellees at the present time for reasons of poverty, distance from Utah, and disability, appellant seeks a finding on this issue in the event that circumstances should change in the near future, and for precedential value.

1

Copy of note made is not dated, therefore, appellant can not state with certainty when sent, except a notice that dicoverly documents were sent to opposing counsel was filed with the Clerk of Courts as required under the rules.

Questions for Review: Part III

3. Did the trial court abuse its discretion by granting a judgement to the appellees when two motions for sanctions against the appellees' counsel under Rule 11, U.R.C.P. were still pending and unresolved at the time of the trial?

Contrary to the assertions of opposing counsel, the grounds that were cited by appellant as material and germane to this appeal formed the core of the same argument for the imposition of sanctions against appellees' counsel, Mr. T. J. Tsakalos #3289. The principle argument for sanctions was the deliberate misrepresentation of facts and other distortions that appellant alleged were made in bad faith and interposed for improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Whether specific conduct amounts to a violation of this rule is a question of law for the trial court to render a decision thereon. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah C.A. 1989). To avoid, slight, or ignore appellants most serious concerns is an abuse of discretion.

This assertion is even more apparent when viewed with the consideration that the judgement rendered in favor of the appellees was wholly reached on a finding of "bad faith" on the part of the appellant under the same rule. Appellant would contend that under Rule 201, U.R.E. judicial notice should have been made of allegations by appellant of "bad faith" by the opposing counsel, and therefore, should have been addressed and resolved prior to any finding against appellant, and judgement entered therefrom.

It is simply inappropriate, and unjust to the appellant, to merely presume that his allegations or concerns lack credibility simply because he lacks formal legal training, or acts in the matter before the court pro se because his poverty prevents the hire of an attorney.¹ It is equally inappropriate, and unjust to the appellant, to presume greater credibility to opposing counsel merely because he is an attorney at law. Federal and state law provide that impecunious litigants shall have equal access to the courts. Appellant contends that equal access is effectively denied when the trial court imposes an onus or bias against poor litigants, or those that proceed pro se.² Precisely because such persons lack formal legal training, greater latitude is and should be granted to harmless errors committed by such persons; the same latitude is not appropriate to attorneys whose training and experience lend themselves to presentation of appellees defenses.

In the motions for sanctions, and other pleadings before the court, the appellant complained of several actions by opposing counsel which appellant held to be improper, harassing, and intended solely to increase costs of litigation. Two examples are offered. When appellant initiated litigations against the appellees, service of summons required three separate requirements. The title of the case was captioned as required under Rule 3(a) and Rule 8(f), U.R.C.P. in order to give fair notice of the nature and basis for the litigations, and the type of litigation, to all the defendants being brought into the cause of action; variance between

title of the summons and the title of the complaint was not required in order to show separate requirements under the Rules and statutes for personal service. Bawden & Associates v. Smith, 624 P.2d 676 (Utah 1981); Blackham v. Snelgrove, 3 Utah 2d 157, 280 P.2d 453 (1955). Appellant made personal service on two defendants, Southland Corportation and 7-11 Stores, under the provisions of Rule 4(d), U.R.C.P. Separate service was required by statute under different circumstances. Personal service upon the state insurance commissioner pursuant to § 31A-2-310, U.A.C. was required for defendant Kemper Group; and personal service upon the director of business regulations pursuant to § 16-10-13, U.A.C. was required for defendant Citgo Petroleum Corporation. Opposing counsel prematurely filed a Motion to Quash service of process, and further cited within the motion appellants failure to comply with a statute that did not exist: §41A-2-3. Appellant failed to comprehend that counsel had miscited § 31A-2-310, and because counsel was an attorney, presumed he complained of some requirement that appellants legal research may have overlooked. Both actions, required additional time at the University of Utah Law Library in order to ascertain what failure of appellant was complained, and the filing of additonal pleadings in the form of objections, and a motion for a more definate statement.

Secondly, discovery as required under the appellant's motion to compel discovery affirmed by the trial court had not been completed, and certain motions, including the appellant's motions for sanctions under Rule 11, were still pending before the court,

when appellees' counsel certified to the trial court readiness for trial. Rule 11, U.R.C.P. assert that Mr. Tsakalos' signature on this pleading consisted by him that he had read the pleading and that is was correct. Counsel knew that the aforesaid items were deficient, and that the case was not ready for trial at that time when he signed the certification to that effect.

Appellant contends that these facts support a finding that the trail court abused its discretion by not ruling on the Motion for Sanctions under Rule 11 prior to granting a judgement to the appellees against the appellant for reasons of "bad faith", when "bad faith" constituted the same grounds for relief as claimed in appellant's motion.

1 In a previous matter before Judge Grant, the appellant was the defendant in Continental Bank & Trust Co. v. Barron, 870901165-CV, and in this case had also sought the advice of legal counsel, John W. Call, prior to asserting his defense in the matter acting pro se. Upon legal advice, the appellant argued on the doctrine of accord and satisfaction, and offered in testimony and evidence those items suggested by the appellant's counsel. Without any foundation for the remark, Judge Grant after ruling against appellant told the appellant that he should seek legal counsel to defend an action in court. In the appellant's mind, and opinion formed that Judge Grant did not rule as he did based on the sufficiency of the argument or evidence, but because of a bias against the appellant solely because he acted due to his poverty pro se in defending the action, and was opposed by an attorney at law. [The presumption seemed an extention of legal principle in Larrabee v. Turner, where a police officer's testimony has greater credibility that the citizen, to the credibility of an attorney at law vs. a lay citizen, which was cited by the Utah Court of Appeals in the matter of Barron v. Salt Lake City, Utah, 109 S.Ct. 1961, 3204 (1988).]

2 Ibid.

CONCLUSION

Appellant contends that the issues before the court are matters of substance and merit directly related to the public's perception of justice and fair play. If a practicing attorney at law can deliberately misrepresent and distort material facts, utter total falsehoods (as was the case with appellees' counsel assertions in the matter of Barron v. Dr. Thomas M. Kelly, M.D. et al.), or represent circumstances in a manner inconsistent with acceptable ethics, and escape penalty or censure, then justice and equity are not served.

Appellant contends that relief from the judgement imposed by the trial court should be set aside pursuant to Rule 60(b)(1),(3), and (7), of the Utah Rules of Civil Procedure, because substantial justice to the appellant demands such a course.

Appellant contends that the trial court erred in granting the judgement to the appellees, erred in not ruling on the appellant's Motion for Sanctions Under Rule 11 against defense counsel, erred in not granting appellant a new trial. Appellant requests a favorable affirmation of these contentions.

Appellant also seeks a favorable affirmation of the points of law brought in issue and support of the findings above, specifically, that appellant as an impecunious litigant acting pro se - and others so situated - are entitled to substantial access to justice in state courts with an equal footing with lawyers, and due sufficient latitude that would entitle relief under any state of facts which could be proved in support of a claim without the

burden of exceptional forms or other requirements that could be expected of lawyers, as long as they can be construed to do substantial justice under Rule 8(f), of the Utah Rules of Civil Procedure. Secondly, that illness with other mitigating circumstances is sufficient to extend or afford the protections of Rule 59(a) and Rule 60(b), of the Utah Rules of Civil Procedure to the appellant. Further, that the preponderous of evidence, or evidence which would demonstrate to a reasonable person that one of the conditions of Rule 60(b), U.R.C.P. had been met, is sufficient for favorable affirmation of a motion made by the appellant under Rule 60. Additionally, appellant seeks affirmation that the common law of the land includes principles and ideas that are unique to the American experience, and embodied in extention of English Common Law, which should be known as American common law. And finally, appellant seeks an affirmation that the appellant acted in good faith on what his belief was formed after reasonable inquiry that the action was well grounded in fact and warranted by existing law, or good faith argument for extention, modification or reversal of existing law.

DATED this 26th day of July, 1991.

William Paul Barron, Jr.
WILLIAM PAUL BARRON, JR.

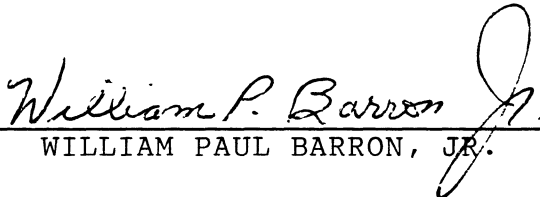
MOTION FOR JUDGEMENT ON THE PLEADINGS

Pursuant to Rule 29(a)(3), Utah Rules of Appellate Procedure, appellant in this matter requests that oral arguments in this matter be waived after briefing is completed by all parties.

Appellant currently resides with family in the State of Ohio. Appellant suffers from multiple disabilities, and has only a federal disability annuity of \$477 per month to live upon, and for the appellant to return to the State of Utah for oral arguments in this matter would create a severe hardship.

Therefore, appellant respectfully requests that this matter be decided upon arguments contained in the parties briefs and the record on appeal.

Dated this 26th day of July, 1991.


WILLIAM PAUL BARRON, JR.

CERTIFICATE OF MAILING

William P. Barron, Jr.
Acting as Attorney Pro Se
11475 Holiday Way
Hillsboro OH 45133-9368
[513] 393-3925 or 372-2744

I, William Paul Barron, Jr., certify that on the 27 th
day of July, 1991, that I served a copy of the attached
Brief of the Appellant upon T. J. Tsakalos, Esq., the counsel for
the appellees in this matter, by mailing it to him by first class
mail with sufficient postage prepaid tot he following address:

T. J. Tsakalos #3289
HANSON, EPPERSON & SMITH, P.C.
Attorneys for the Defendants
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City UT 84110-2970
(801) 363-7611


WILLIAM PAUL BARRON, JR.

ADDENDUM

| <u>Appendix</u> | <u>Title of Appendix</u> |
|-----------------|---|
| A. | Pre-Litigation Legal Research |
| B. | <u>Barron v. Dr. Kelly, MD, et al</u> |
| C. | Pre-Litigation Correspondence |
| D. | Transcript of Trial, July 16, 1990 |
| E. | Supporting Documents, New Trial Motion |
| F. | Pre-Litigation & Discovery Evidence |
| G. | Other Barron Litigation |
| H. | Memorandum to Appellees' Counsel |
| I. | Memorandum to Trial Court |
| J. | Medical Evidence & Discovery |
| K. | Determinative Provisions of Law [Verbatim] |

APPENDIX A

PRE-LITIGATION LEGAL RESEARCH

STATEMENT OF CASE SUMMARY

1. MATERIAL FACTS:

Accident occurred in Provo Utah at 7-11 Store at 1200 West and Columbia Avenue on night of March 26-27, 1989 at 1230 AM [0030 Hours]. Projection in the roadway 23" from pump (no other station situated in like manner in either Utah or Colorado, which have the post on the pump island, not the roadway). Son, Donald Hopkins in front seat and a witness. He did not see post either as it was obscured late at night, poor lighting, same color as background. [See letter to John W. Call, Attorney-at-Law, dated Sep. 2, 1990, follows.]

2. CLAIM FOR RELIEF:

Tort Action based upon Joseph v. Hustad Corporation, 454 P.2d 916-918

A. Existence of a Legal Duty:

§ 76-10-801 and 76-10-803 proscribe that nuisances which renders a highway or street unsafe for passage for 3 or more people [I, Donny, Jessica and Tanya in car], or insecure in life or use of property is prohibited.

B. Breach of Duty--Negligence:

Post 23" from pumps in highway. Post painted black, background included black lightpole in line-of-sight from plaintiff's approach and dark-green colored pumps, no reflectorization, poor lighting.

Co-ercion, threat:

Dennis Opl characterized plaintiff's claim as frivolous, and would seek "bad faith" award of attorney fees per § 78-27-56 U.A.C. Would not respond to claim made on March 29, 1989 until September 1989. [See letters dated Nov. 2, 1989 and Nov. 4, 1989 by plaintiff, follows.]

C. Damages as a Proximate Result:

Damages due to automobile accident. Mental Pain and Anguish due to stress and resulting effects on health.

3. AUTHORITY FOR RELIEF:

§ 76-10-808 U.A.C. allowed civil action against defendant who maintained a nuisance to recover damages.

APPENDIX A

PRE-LITIGATION LEGAL RESEARCH

1. TORT - 3 elements
 - A. Existence of legal duty from defendant to plaintiff
 - B. Breach of duty
 3. Damage as a proximate result

Joseph v. Hustad Corp., 454 P.2d 916-918

either: - direct invasion of some legal right
- infraction of some public duty by which special damages occurs
- violation of some private obligation by which like damages occurs

Tortfeasor- wrongdoer
liability, negligence

Palsgraph doctrine - one who is negligent is liable only for the harm or injury which is within the orbit of foreseeability and not for every injury which follows from his negligence. N/A under Utah law per John Call, Attorney.

2. STATUTES, UTAH ANNOTATED CODE

§ 41-6-32 Upon collision with other property, give notice to owner.

§ 41-6-114 Injurious materials (trash) on highways. [N/A]

§ 76-10-801 Nuisance (1) .. anything, item, manner, condition whatsoever that is dangerous to human life or health

§ 76-10-803 Public nuisance (1) omitting to perform any duty, which omission either annoys, injures, or endangers the comfort, repose, health or safety of three or more persons, or unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage any .. street, highway, or in any way renders three or more persons insecure in life or the use of property.

§ 76-10-808 Civil remedy for relief.

§ 31A-3-105 Presumption of jurisdiction (1) any insurer which provides coverage of a business activity conducted in this state is subject to the jurisdiction of the Insurance Commissioner and the courts under 31A-2-309 and 31A-2-310.

§ 31A-2-310 Summons issued by Insurance Commissioner.

§ 16-10-13 Service of process to registered agent, Division Director Dept. of Business Regulation as agents for receipt of service (2) whenever a corporation fails to appoint or maintain a registered agent, Director, Division of Corp. Com. Code is the agent upon whom any process, notice or demand may be served (two copies) [See also § 16-10-111(2) for service of process on foreign corp. (i.e. out-of-state)].

§ 16-10-111 Service as above.

§ 16-10-125 Sets fees for above @ \$10.00

Insurance Commissioner: Harold Yancey, 160 E. 300 S., SLC

Director: Peter Van Alostne, 160 E. 300 S., SLC

§ 78-27-56 In civil actions ... the court may award reasonable .. fees .. if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.

APPENDIX A: LEGAL RESEARCH

1. Standards of Review, by Steven A. Childress & Martha S. Davis
KF 4575 C48 1986 2 Vols.

§5.2 Material Fact: (Rule 56C)(Substantive test)

On review of a summary judgement, we do as the D.C. was required to do. We determine whether the record as it stands reveals any disputed issue of material fact, assume the resolution of any such issue in favor of the non-movant, and determine whether the movant is then entitled to judgement as a matter of law.

First jersey National Bank v. Dome Petroleum Ltd.
723 F.2d 335, 338 (3rd Cir. 1983)

§5.6 Abuse of Discretion:
Clearly Erroneous Standard:

Joseph v. St. Charles Parish School, 736 F.2d 1036 (5th Cir. 1984)
Calderera v. Eastern Airlines, 705 F.2d 778 (5th Cir. 1983)

Rule 60(b) Order relief from a judgement or order on grounds of mistake, excusable neglect to fraud or general fairness.

Plain Error/Manifest Miscarriage of Justice:

Clearly erroneous: based on substantial error, erroneous view of the law.

Abuse of discretion: a decision that is manifestly unreasonable, illogical, or not supported by the evidence; clearly erroneous or unjust.

De Novo: Anew, over again; a second time

De Novo trial: trying a case again as if the first trial had not taken place.

2. CASE LAW, STARE DECISIS:

247 P.2d 264

Crellin v. Thomas:

Discretion is reposed in TC to grant or deny motion for new trial on basis of newly discovered evidence... reviewed as Abuse of Discretion.

260 P.2d 741

Warrent v. Dixon Ranch Co. et al: Allowance of vacation of judgement is a creature of equity designed to relieve against the harshness of enforcing a judgement resulting from ... wrongs of the opposing party, or misfortunes preventing presentation of claim or defense. .Review as Abuse of Discretion. Excusable neglect, illness and notice given the other party.

APPENDIX A

375 P.2d 28

Kettner v. Snow: Motion must be made within 10 days. Discretion in granting new trial and relief from judgement within a reasonable time, not to exceed 3 months.

590 P.2d 309

Hume v. Small Claims Court of Murray City, Utah: timely motion for new trial terminates running time of appeal. Does not run again until such order or motion is entered.

684 P.2d 52

Larsen v. Collins: Abuse of discretion review of motion to set aside default judgement; TC discretion whether movant has shown mistake, inadvertance, surprise or excusable neglect.

765 P.2d 124

NA

776 P.2d 84

Schindler v. Schindler: must demonstrate evidence is insufficient to support findings or otherwise clearly erroneous.

APPENDIX B

Barron v. Dr. Kelly, M.D. et al.

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

| | | |
|-------------------------|---|----------------------------|
| BARRON, WILLIAM PAUL JR | : | MINUTE ENTRY |
| PLAINTIFF | : | |
| | : | CASE NUMBER 890906515 CV |
| VS | : | DATE 05/08/91 |
| | : | HONORABLE MICHAEL R MURPHY |
| | : | COURT REPORTER |
| KELLY, THOMAS M | : | COURT CLERK MPB |
| LDS HOSPITAL INC | : | |
| DEFENDANT | : | |

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY. GILSON, JAMES W.

BASED ON REVIEW OF PLAINTIFF'S REPLY TO THE COURT'S ORDER TO
SHOW CAUSE, THE COURT ORDERS THAT THIS CASE BE DISMISSED WITHOUT
PREJUDICE.

APPENDIX C

PRE-LITIGATION CORRESPONDENCE



**Lumbermens Mutual Casualty Company • American Motorists Insurance Company
American Manufacturers Mutual Insurance Company • American Protection Insurance Company**

Post Office Box 5347, Denver CO 80217 • 303 | 696-1441 FAX 303 | 745-9481

October 17, 1989

William Paul Barron, Jr.
Vista Park Apartments, No. 14
611 Park Street
Salt Lake City, Utah 84102-3332

Re: Our Insured: The Southland Corporation
Our Claim No.: 717 LN 021493 N
Date of Loss: March 27, 1989

Dear Mr. Barron:

We are in receipt of your correspondence to The Southland Corporation dated September 11, 1989, whereby you have provided them with your Affidavit and a diagram of the accident scene at the 7-Eleven Store in question.

As I thought I explained to you in our conversation of September 6, 1989, we are the liability carrier for The Southland Corporation and, therefore, if you have any questions in regard to your claim, they should be directed to us.

Therefore, at this time I would ask that all future correspondence come to my attention.

I have once again taken the opportunity to review your claim in order to determine if there is any liability on the part of The Southland Corporation.

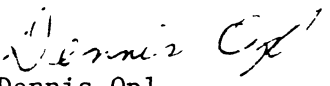
As an operator of a motor vehicle, you are under a high duty of care to maintain a proper lookout at all times while operating a motor vehicle. It is, therefore, our position that you failed to maintain a proper lookout in that you had a collision with a stationary object.

Therefore, since it appears that you were more than 50% responsible for the collision, we will be unable to offer you any type of settlement in regard to the damage to your motor vehicle.

If you have any questions regarding our decision, please do not hesitate to contact us.

Very truly yours,

On behalf of
NATIONAL LOSS CONTROL SERVICE CORPORATION


Dennis Opl
Claim Representative

William Paul Barron, Jr.
October 17, 1989
Page 2

cc: The Southland Corporation
7-Eleven Stores
Districts 1851 and 1852
5288 South 320 West, Suite B-158
Murray, Utah 84107

Attention: Allen Pack
Market Manager
South Utah - 1852

October 21, 1989

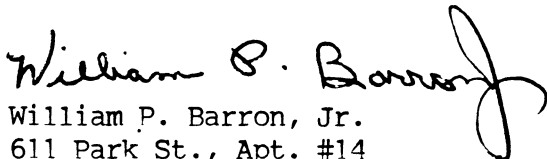
Dennis Opl
Claim Representative
National Loss Control Service Corp.
P.O. Box 5347
Denver CO 80217

Dear Mr. Opl;

You explained in your conversation of September 6, 1989, that you were the liability carrier; however, you failed to provide a means to contact you. Further, you never responded, according to Utah Law, to my claim for damages in writing.

Secondly, Utah law provides for a legal means against persons who obstruct movement of traffic in a manner calculated to induce injury or property damage. Therefore, please be advise of the attached lawsuit for violation Utah Annotated Code, § 76-10-801(1), and § 76-10-803(1)(a) and (c) inter alia.

Sincerely yours,


William P. Barron, Jr.
611 Park St., Apt. #14
Salt Lake City UT 84102-3332

1 Incl:
as

cc:
Allan Pack
Southland Corp.



Lumbermens Mutual Casualty Company • American Motorists Insurance Company
American Manufacturers Mutual Insurance Company • American Protection Insurance Company

Post Office Box 5347, Denver CO 80217 • 303 696-1441 FAX 303 745-9481

November 2, 1989

William Paul Barron, Jr.
Vista Park Apartments, No. 14
611 Park Street
Salt Lake City, Utah 84102-3332

Re: Our Insured: The Southland Corporation
Our Claim No.: 717 LN 021493 N
Date of Loss: March 27, 1989

Dear Mr. Barron:

This letter will inform you that we are in receipt of your proposed suit against our insured.

We are also in receipt of the photographs that you took on September 10, 1989, of the accident location. I also have photographs of the area as well as a diagram which gives us precise measurements of the parking lot.

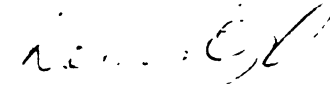
It is still our contention that our insured is not in any way liable for the damage which you sustained to your vehicle. I believe the pictures make it obvious that you were not maintaining the proper lookout when you drove into the cement poles which surround the gas island.

I am forwarding the draft of your proposed suit to our defense firm and have asked that they defend the various defendants in the event that you actually go through with your litigation.

It would appear that, based on my investigation, many of the various counts which you are alleging in your suit are frivolous and, therefore, we will be asking our attorneys to file the necessary motion so that we can collect our defense costs.

Very truly yours,

On behalf of
NATIONAL LOSS CONTROL SERVICE CORPORATION


Dennis Opl
Claim Representative

DO/jb

November 4, 1989

Dennis Opl
Claim Representative
NATIONAL LOSS CONTROL SERVICE CORPORATION
Kemper National P & C Companies
P.O. Box 5347
Denver CO 80217

Dear Mr. Opl,


By now you should be aware that formal litigation has commenced in the Third Judicial Circuit Court for the State of Utah against you and other defendants in this matter. Enclosed herein, or under separate cover, you will also find a subpoena duces tecum.

As a former investigator for the United States Government, I firmly believe that your process of investigation, or deductive reasoning are seriously flawed. If you look closely at the photographs, from the driving angle, they are nearly indistinguishable against the light poles in the pump island - as they are essentially the same color.

What is obvious - to any reasonable and competent person - is that any driver, unfamiliar with the station or the area, approaching the pump island from that angle on a dark, moonless night, would be unable to see a black post, against dark green pumps and black light post, even with maintaining the proper lookout.

As far as the threat of Rule 11 sanctions, bear in mind that you must prove my suit to be knowingly frivolous, and brought "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, and that it is not interposed for any improper purpose,..." Therefore, we'll have to let a judge and jury decide the merits of your frivolous arguments for denying a just claim.

Sincerely yours,


William P. Barron, Jr.

William P. Barron, Jr.
611 Park St. #14
Salt Lake City UT 84102-3332

cc:
John Call, Attorney-at-Law
Allan Pack, 7-11
Southland Corp.

APPENDIX D

TRIAL TRANSCRIPT OF JULY 16, 1990
BEFORE JUDGE PAUL G. GRANT
THIRD CIRCUIT COURT, STATE OF UTAH

ORIGINAL

EXHIBIT

1 IN THE THIRD CIRCUIT COURT, STATE OF UTAH

2 SALT LAKE DEPARTMENT, SALT LAKE COUNTY

3 -o0o-

4 WILLIAM PAUL BARRON, JR.)

5 Plaintiff,)

6 vs.)

7 SOUTHLAND CORPORATION,
8 7-11 STORES, CITGO PETROLEUM
AND KEMPER GROUP,)

9 Defendants.)

10 -o0o-

11
12 BE IT REMEMBERED that on the 16th day of July, 1990,
13 the above-entitled matter came on for hearing before the
14 Honorable Paul G. Grant, sitting as Judge in the above-named
15 Court for the purpose of this cause, and that the following
16 proceedings were had.

17 -o0o-

18 APPEARANCES:

19 For the Plaintiff:

No appearance

20 For the Defendant:

MR. T. J. TSAKALOS
Attorney at Law
4 Triad Center, #500
Salt Lake City, Utah 84180

21
22
23
24
25
ASSOCIATED PROFESSIONAL REPORTERS

10 WEST BROADWAY, SUITE 200
SALT LAKE CITY, UTAH 84101

FILED
'91 JUN 3 PM 12:55
CLERK OF THE 3RD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY
MOTION TO DISMISS
Paul G. Grant

1 he sued Charter Summit Hospital and several people and that--
2 pro se, and that has been dismissed. On June 25, '89, he sued
3 Midvale City and Midvale P.D. and that was dismissed. On
4 October 31 of '89, he sued the State of California and the
5 California Department of Food & Agriculture, 'cause they stopped
6 him at the border, wouldn't allow him to bring in fruit and
7 vegetables. That was dismissed in the United States District
8 Court. On November 29, '89, he re-filed that suit again and that
9 has been dismissed.

10 November 16, '89, he sued the State of Utah and the
11 Utah State Tax Commission for his taxes. I think that one has
12 been dismissed, and then he sued us when our pumps did not get
13 out of his way, and now has not appeared.

14 THE COURT: And your claim for attorney's fees is how
15 much?

16 MR. TSAKALOS: I will prepare an affidavit.

17 THE COURT: All right. If you'll send that with the
18 judgment.

19 MR. TSAKALOS: Thank you, your Honor.

20 (Whereupon, this hearing was concluded.)
21

22 * * *
23
24
25

C E R T I F I C A T E

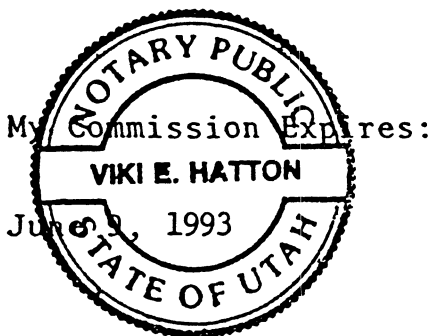
STATE OF UTAH
COUNTY OF SALT LAKE

THIS IS TO CERTIFY that WILLIAM PAUL BARRON, JR. vs.
SOUTHLAND CORPORATION was electronically recorded by the
THIRD Circuit Court, SALT LAKE COUNTY
Utah.

That the said witnesses were, before examination, duly
sworn to testify the truth, the whole truth, and nothing but
the truth in said cause.

That the said testimony of said witnesses was electronically
recorded, and thereafter caused by me to be transcribed into
type writing, and that a true, and correct transcription of
said testimony so taken and transcribed is set forth in the
foregoing pages numbered from 2 to 3, inclusive
and said witnesses testified and said as in the foregoing
annexed testimony.

WITNESS MY HAND and official seal at Salt Lake City, Utah,
this 29 day of MAY, 1991.



Viki E. Hatton
VIKI E. HATTON

APPENDIX E

SUPPORTING DOCUMENTATION FOR
APPELLANT'S MOTION FOR A NEW TRIAL

William Paul Barron, Jr. Pro Se
 611 South Park Street, Apt. #14
 Salt Lake City UT 84102-3332

IN THE THIRD JUDICIAL CIRCUIT COURT

SALT LAKE COUNTY, STATE OF UTAH

| | | |
|-------------------------------------|---|-------------------------|
| WILLIAM PAUL BARRON, JR. | : | |
| Plaintiff, | : | AFFIDAVIT IN SUPPORT OF |
| | : | MOTION FOR NEW TRIAL |
| vs. | : | |
| SOUTHLAND CORPORATION, 7-11 STORES, | : | Civil No. 893010924-CV |
| KEMPER GROUP, CITGO PETROLEUM CORP. | : | |
| Defendants, | : | Judge Paul Grant |
| | : | |

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

Pursuant to the provisions of Rule 59(a)(3) and 59(c), Utah Rules of Civil Procedure, the Plaintiff hereby offers under oath the following reasons for requesting a new trial for accident or surprise, which ordinary prudence could not have guarded against.

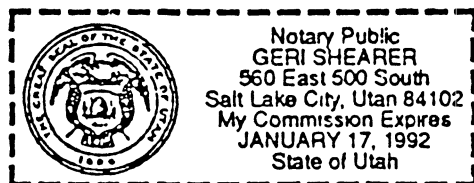
1. Due to the poverty of the Plaintiff, and his inability to pay for services, his telephone service was disconnected on June 19, 1990.
2. Due to the multiple disabilities which the Plaintiff suffers, which includes a heart condition Mitral Valve Prolapse Syndrome, Plaintiff was ill on Monday, July 16, 1990, and incapacitated by his illness.
3. Further, because Plaintiff did not have telephone service, he was neither able to summon assistance, nor advise the court or the Defendants of his inability to proceed on the trial date originally set.

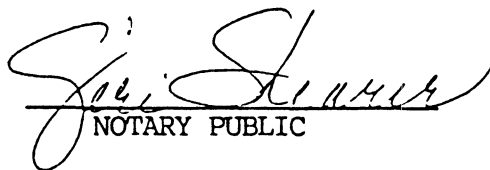
Dated this 19th day of July, 1990


 WILLIAM PAUL BARRON, JR.

Sworn to and subscribed before me, a Notary Public, this 19th day of July, 1990.

(SEAL)




NOTARY PUBLIC

A-F-F-I-D-A-V-I-T

STATE OF UTAH)
) SS:
SALT LAKE COUNTY)

I, Puyol Bang, Manager of the Vista Park Apartments at 607-611 South 540 East (Park Street), Salt Lake City, Utah 84102, have been acquainted with William Barron since May 1990, when my wife and I became the new resident managers.

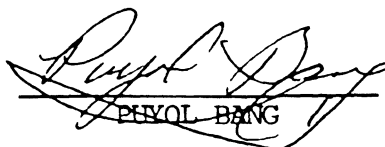
During that time, I have observed Mr. Barron become weak and ill on several occasions. Also, on several occasions I have checked on him in his apartment when he would be helping me, and find that he had collapsed on the floor and unable to stand-up.

Also, on July 21, 1990, Mr. Barron was found on the sidewalk in front of the apartment complex, and was transported by ambulance to LDS Hospital.

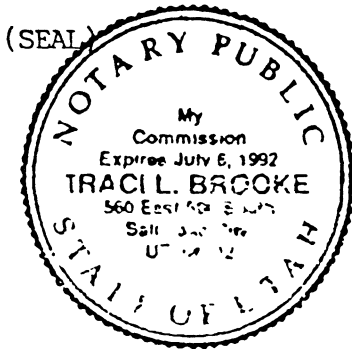
Mr. Barron seems to have good days when he is able to render assistance to me by watering the lawn, picking up trash, or sweeping; and other days when he looks and acts ill, or after working a short while begins to stumble and needed assistance back to his apartment.

On Monday, July 16, 1990, he did not come out of his apartment until in the early evening, and had been ill the night before. This was not an uncommon occurrence, and no particular alarm was attached to his absence.

Dated this 1st Day of August, 1990.


PUYOL BANG

Subscribed and sworn to before me, A Notary Public, on this 1st day of August, 1990, the aforesaid Affidavit of Puyol Bang, 607 Park St. #15, Salt Lake City, Utah 84102.



Traci L. Brooke
NOTARY PUBLIC

William Paul Barron, Jr. Pro Se
 611 Park Street, Apt. #14
 Salt Lake City UT 84102-3332
 (801) 364-5243

IN THE THIRD JUDICIAL CIRCUIT COURT

SALT LAKE COUNTY, STATE OF UTAH

| | | |
|----------------------------------|---|------------------------|
| WILLIAM PAUL BARRON, JR. | : | |
| | : | AFFIDAVIT |
| Plaintiff, | : | |
| | : | |
| vs. | : | |
| | : | |
| THE SOUTHLAND CORPORATION, ET AL | : | Civil No. 893010924-CV |
| | : | |
| Defendants, | : | Judge Grant |

INSTRUCTIONS: Please answer the following questions as fully as possible and cited any medical rationale for the opinions stated herein.

1. How long have you treated William Paul Barron, Jr.
 a: I have treated Mr. Barron since January 28, 1987.
2. What is the nature of the treatment, and diagnosis of Mr. Barron?
 a. Mr. Barron's diagnoses are: (1) Major Depression, recurrent in remission. (2) Dysthymia; and (3) Mitral valve prolapse. His treatment has included antidepressant medication and individual psychotherapy.
3. What has been the course of Mr. Barron's treatment (i.e. how well

has he responded to therapy), nature of remission and re-occurrence, and

prognosis? Mr. Barron has experienced waxing and waning symptoms of depression and cardiac symptoms, all symptoms aggravated by stress, all symptoms with at best partial response to treatment efforts. I expect that course to continue in the future.

4. Has Mr. Barron ever been diagnosed with having conflict with authority figures? If yes, specify. During his course of treatment Mr. Barron has repeated conflicts with employers and other authorities.

5. Has Mr. Barron ever been diagnosed with having a history of violent behavior, suicidal ideation, or violent ideation? If yes, specify nature and target of behavior or ideation. Mr. Barron has experienced frequent episodes of suicidal ideation and fantasies of doing violence to others, especially others in authority, though I do not recall episodes of violent behavior during the past three years.

6. In the aforesaid case Mr. Barron alleges mental anguish and suffering by Defendant's denial of a claim for damages to his automobile. Mr. Barron maintains that the denial by Kemper Insurance Group was improper, and that in the period from March 1989 to September 1989 while was waiting for a response, that he suffered extreme stress. During the period from September 1989 to October 1989, he suffered additional stress, anguish and suffering from a psychological nature due to the negative dealings with the insurance company, and with the defendants attorney thereafter. What is your medical opinion of Mr. Barron's claims, and the medical rationale for that opinion.

During the months in question, Mr. Barron's symptoms waxed and waned. He experienced a variety of stressors during the time, and also underwent a change in his antidepressant medication. While he was experiencing stress and suffering during those months, it is impossible for me to attribute any particular proportion of that suffering to his negative dealings with the insurance company and with the defendants attorney.

This statement consists of two pages, with 0 pages addended with continuation of answers to the aforesaid questions.

Dated this 2 th day of May, 1990.

Michael R. Lowry, MD
DR. MICHAEL R. LOWRY, MD.
Wasatch Canyons Professional Bldg.
5770 South 1500 West #110
Salt Lake City UT 84123

SUBSCRIBED to and sworn before me a Notary Public, this 2 th day of May, 1990, in Salt Lake City UTAH.

[SEAL]

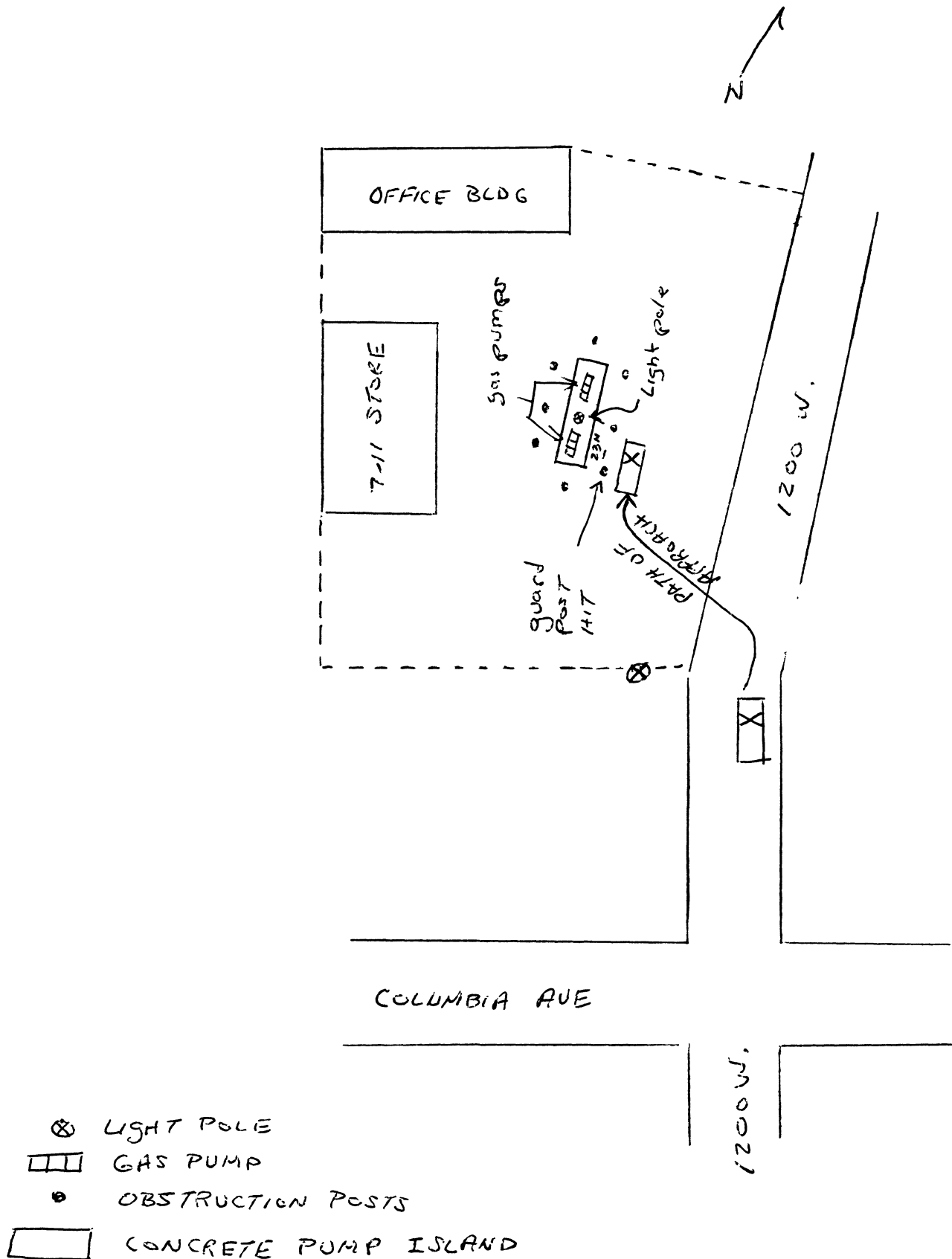
Pamela Lewis
NOTARY PUBLIC

my Commission expires
1-5-92

APPENDIX F

PRE-LITIGATION EVIDENCE AND DISCOVERY
MAPS, PHOTOS AND DIAGRAMS
PROVIDED TO APPELLEES' COUNSEL

MAP AND DIAGRAM OF ACCIDENT SCENE



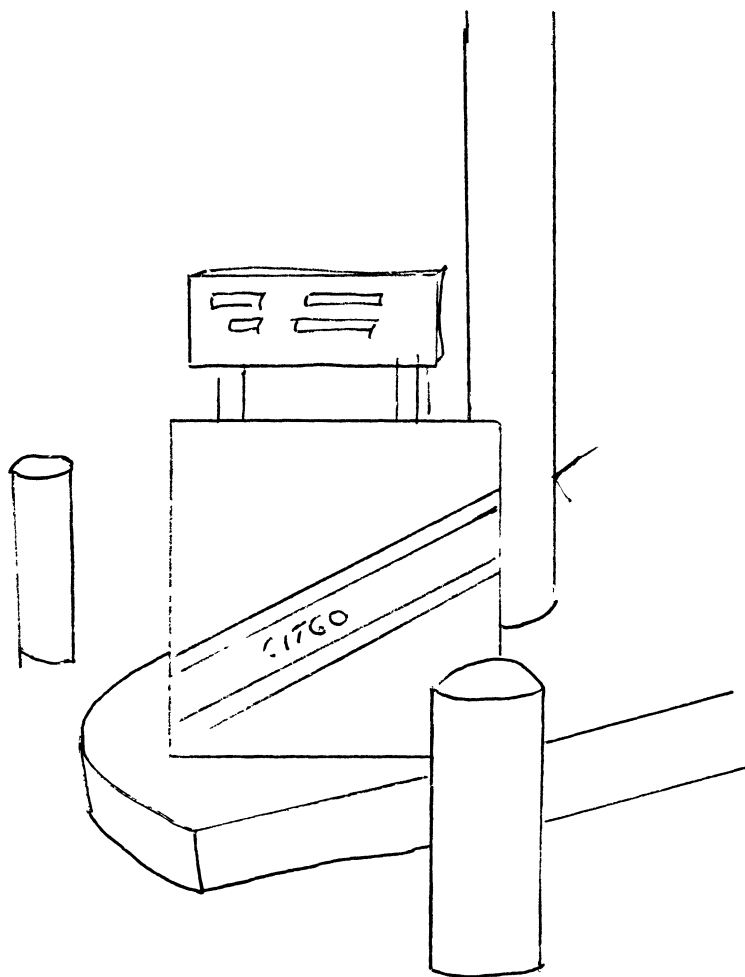


PHOTO ENLARGEMENT (REPRODUCED
ON COLOR COPIER AND SHADED
DARK GREEN) FROM ANGLE
OF APPROACH ON MARCH 26, 1989

APPENDIX G

OTHER BARRON LITIGATION CITED
BY APPELLEES' COUNSEL IN TRIAL TRANSCRIPT
ARGUING FOR DISMISSAL ON BAD FAITH GROUNDS

Barron v. State of California et al

Barron v. Charter-Summit Hospital et al

Barron v. City of Midvale et al

Barron v. State of Utah and Utah Tax Commission

MAG CLOSED
CONSOL

U.S. District Court
District of Utah (Central)

CIVIL DOCKET FOR CASE #: 89-CV-983

Barron v. Tracey, et al
Assigned to: Judge J. Thomas Greene
Referred to: Judge Ronald N. Boyce
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Filed: 10/31/89

Nature of Suit: 440
Jurisdiction: Federal Question

Cause: 18:241 Conspiracy Against Citizen Rights

WILLIAM PAUL BARRON, JR.
plaintiff

William Paul Barron, Jr.
[COR LD NTC] [PRO SE]
611 South Park Street
Apt. #14
Salt Lake City, UT 84102-3333
801-364-5243

v.

M. E. TRACEY
defendant

CALIFORNIA DEPARTMENT OF FOOD
AND AGRICULTURE INSPECTION
defendant

THE STATE OF CALIFORNIA
defendant

Proceedings include all events.
2:89cv983 Barron v. Tracey, et al

MAG
CLOSED CONSOL

10/31/89 1 Complaint filed; assigned to Judge Greene (ba)
[Entry date 11/1/89]

10/31/89 2 Motion by William Paul Barron Jr., to proceed in forma
pauperis and order (ba) [Entry date 11/1/89]

11/16/89 3 Order of Reference re: 636(b)(1)(B) signed by JTG 11/16/89
(mp) [Entry date 11/28/89]

12/4/89 -- Case referred to Judge Ronald N. Boyce (mp)

12/29/89 4 Notice of voluntary dismissal by pltf (mp)
[Entry date 1/2/90]

12/29/89 -- Case closed (mp) [Entry date 1/5/90]

1/19/90 8 Order, consolidating cases 89-C-983G and 89-C-1056S with
all further docketing to appear on 89-C-983 signed by RNB
1/19/90 (mp) [Entry date 6/19/90]

2/22/90 5 Report and Recommendations of Judge Ronald N. Boyce .
Objections to R and R due by 3/4/90 (jul)
[Entry date 2/23/90]

3/1/90 6 Objections by William Paul Barron Jr. to R&R (mp)
[Entry date 3/2/90]

4/26/90 7 Memorandum Decision granting [5-1] report and
recommendations and pltf complt is dismissed signed by
JTG (mp)

8/15/90 9 Memorandum Decision, pltf's Mot for Reconsideration be and
the same hereby is denied; dismiss of pltf's clms in federal
court is w/o prej to pursuit of such clms in state court if
such clms can properly be asserted in a court of competent
jurisdiction signed by JTG 8/14/90; cc:attys (ch)
[Entry date 8/16/90]

12/19/90 10 Notice of filing of commentary on case law by William Paul
Barron Jr. (mr) [Entry date 12/20/90]

FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH JAN 9 1990
CENTRAL DIVISION

MARKUS B. ZILMER, CLERK
BY _____
DEPUTY CLERK

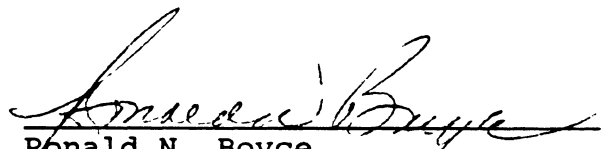
| | | |
|---------------------------|---|---------------------|
| WILLIAM PAUL BARRON, JR., |) | |
| |) | |
| Plaintiff, |) | Case No. 89-C-983-G |
| |) | and |
| vs. |) | 89-C-1056 S |
| |) | |
| THE STATE OF CALIFORNIA, |) | ORDER OF |
| et al., |) | CONSOLIDATION |
| |) | |
| Defendants. |) | |

The plaintiff, William Paul Barron, Jr., filed suite in 89-C-986G against the State of California and M.E. Tracy. Subsequently, plaintiff filed the same substantive action in 89-C-1056 S and added The California Department of Food and Agriculture Inspection. Since the actions involve common questions of law and fact, therefore, in accordance with Rule 42, F.R.C.P.,

IT IS HEREBY ORDERED that the above two actions 89-C-983 G and 89-C-1056 S are hereby consolidated. 89-C-983 G will be the operative file.

DATED this 19th day of ~~December, 1989~~ January, 1990.

BY THE COURT:


Ronald N. Boyce
United States Magistrate

8

FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH
AUG 15 1990
BY MARKUS B. ZIMMER
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

WILLIAM PAUL BARRON, JR.

Plaintiff,

vs.

THE STATES OF CALIFORNIA,
THE CALIFORNIA DEPARTMENT
OF FOOD AND AGRICULTURAL
INSPECTION, AND INSPECTOR
M.E. TRACEY,

Defendants.

MEMORANDUM DECISION
AND ORDER

Civil No. 89-C-983G

Plaintiff has submitted a document to this court which, in essence, is a motion to reconsider this court's Memorandum Decision and Order of April 23, 1990. The court has reviewed the entire file and has determined that oral argument would not be of material assistance to this court's determination. Accordingly, this court will render its decision on the basis of the existing record.

FACTUAL BACKGROUND

The instant case involves a suit¹ by William Paul Barron, under the privileges and immunities clause of the

¹ Originally there were two separate suits, 89-C-983G and 89-C-1056S. These cases were consolidated on January 19, 1990.

Fourteenth Amendment, Title 18 U.S.C. § 241 & 242 and 42 U.S.C. § 1981, 1982, and 1985(3).

In it's Memorandum Decision and Order of April 23, 1990 this court upheld the Magistrate's Report and Recommendation dismissing the plaintiff's complaint because (1) Suit in this court against the State of California and the California Department of Food and Agriculture is prohibited by the Eleventh Amendment to the United States Constitution; (2) Suit against M.E. Tracey may not be maintained in federal court because none of the jurisdictional basis alleged are valid;² (3) A Bivens type of claim under the Fourteenth Amendment may not be maintained against a state officer because Congress has provided a remedy under 42 U.S.C. § 1983 (not pleaded by plaintiff); and (4) Venue for such a claim is not in this district under 28 U.S.C. §1391 (b).

ANALYSIS

Plaintiff's Basis for Reconsideration

Because of the apparent sincerity and earnestness of plaintiff's petition, this court again will discuss the merits of

² 18 U.S.C. §241 and 242 are criminal statutes and do not provide a jurisdictional basis for a civil claims in federal court; 42 U.S.C. §1981 protects blacks, minorities and other identifiable classes of persons based on ancestry or ethnic characteristics from discrimination and grants them equal rights under the law; 42 U.S.C. 1982 relates to the equal protection rights of minorities to be treated the same as whites with reference to property; and 42 U.S.C. 1985(3) involves certain conspiracies, not involved in this claim, and requires a showing of racial or other class based discrimination. None of these statutes constitute a proper basis for jurisdiction. There is no allegation regarding race, minority status or class based discrimination.

plaintiff's claims. Plaintiff's basis for reconsideration appear to be: (1) U.C.A. 76-1-107 should provide a civil remedy for violations of 18 U.S.C. 241 and 242; (2) 42 U.S.C. 1981, 1982, 1983, and 1985 apply, regardless of the case law, to everyone without a showing of minority status or discrimination; (3) The Constitution itself gives authority to the proposition that the 14th-16th amendments negate the 11th amendment; (4) The actions of the inspector were clearly illegal; and (5) Service of process was proper.

As to plaintiff's first objection, regardless of whatever the effect of U.C.A. 76-1-107³ may be in state court, sections 241 and 242 of Title 18 United States Code do not confer jurisdiction in federal court.⁴

As to plaintiff's second objection, that 42 U.S.C. 1981, 1982, 1983, and 1985 apply to his claims and to everyone without a showing of minority status, regardless of contrary case

³ U.C.A. 76-1-107 provides in pertinent part:

(c) This act does not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, impeachment, or other remedy authorized by law to be recovered or enforced in a civil action, administrative proceeding, or otherwise, regardless of whether the conduct involved in the proceeding constitutes an offense defined in this code.

⁴ See Christian Populist Party of Arkansas v. Secretary of State of Arkansas, 650 F. Supp. 1205 (D.C.E.D. Ark. 1987); Garrison v. Newell, 55 F.R.D. 550 (D.C. Va 1972).

law, this is simply not the law. The law clearly requires a showing of minority status or discrimination.⁵

As to plaintiff's third objection, that the Constitution itself gives authority to the proposition that the 14th-16th amendments negate the 11th amendment, once again there is no authority for this extreme and groundless proposition. This court again rejects the argument.

As to plaintiff's fourth objection, that the actions of the inspector were illegal, such is irrelevant because this court's decision and the magistrate's decision were based on lack of jurisdiction to pursue such a claim in federal court.

As to plaintiff's fifth objection, that service of process was proper, such is irrelevant because this court's decision and the magistrate's decision were based on lack of jurisdiction and not failure of service of process.


Based upon the court's analysis,

IT IS HEREBY ORDERED that the plaintiff's Motion for Reconsideration be and the same hereby is denied. Dismissal of plaintiff's claims in federal court is without prejudice to pursuit of such claims in state court if such claims can properly be asserted in a court of competent jurisdiction.

⁵ See Saint Francis College v. Al-Khazraji, __ U.S. __, 107 S.Ct. 2022 (1987); City of Memphis v. Greene, 451 U.S. 100 (1981); Silkwood v. Kerr-McGee, 637 F. 2d 743 (10th Cir. 1980).

IT IS SO ORDERED.

DATED: August 14, 1990.



J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

COPIES TO:

ch

United States District Court
for the
District of Utah
August 16, 1990

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:89-cv-00983

True and correct copies of the attached were mailed by the clerk to the following:

William Paul Barron Jr.
611 South Park Street
Apt. #14
Salt Lake City, UT 84102-3333

DISTRICT COURT

AUG 9 3 26 PM '89

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY

BY M. F.
DEPUTY CLERK

WILLIAM PAUL BARRON, JR., PRO SE
Vista Park Square Apartments #14
611 Park Street
Salt Lake City, Utah 84102-3332
(801) 364-5243

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

WILLIAM PAUL BARRON, JR.,

Plaintiff,

vs.

CHARTER-SUMMIT HOSPITAL,
BARRY ADAMS, BRENDON (SURNAME
UNKNOWN), JERRY LARCHER, SCOTT
DAVIS, and DOES UNKNOWN,

Defendants.

VOLUNTARY DISMISSAL

No. 890903923CV
Judge Homer F. Wilkinson

William P. Barron, Jr., acting pro se, hereby voluntarily
dismisses with prejudice his Complaint in the above-entitled
action pursuant to Rule 41(a)(1), Utah Rules of Civil Procedure.

DATED this 31st day of July, 1989.

William P. Barron, Jr.
WILLIAM P. BARRON, JR.

FILED DISTRICT COURT
Third Judicial District

AUG 11 1989

By MEF Deputy Clerk

DAVID W. SLAGLE A2975
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendants
Eleventh Floor,
Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: 521-9000

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

WILLIAM PAUL BARRON, JR.,

Plaintiff,

vs.

CHARTER-SUMMIT HOSPITAL,
BARRY ADAMS, BRENDON (SURNAME
UNKNOWN), JERRY LARCHER, SCOTT
DAVIS, and DOES UNKNOWN,

Defendants.

JUDGMENT OF DISMISSAL


No. 890903923CV
Judge Homer F. Wilkinson

It appearing to the Court that the plaintiff in the
above-captioned claim has filed a Voluntary Dismissal pursuant
to Rule 41(a)(1), Utah Rules of Civil Procedure, and good
cause appearing therefor, it is

ORDERED, ADJUDGED AND DECREED that the above-captioned
case be and the same hereby is dismissed with prejudice,
the parties to bear their own costs.

DATED this 10 day of August, 1989.

BY THE COURT:


HOMER F. WILKINSON
DISTRICT JUDGE

I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH.

DATE:

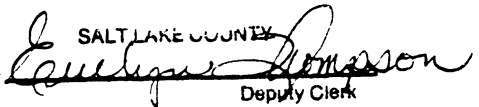
July 2, 1991

DEPUTY COURT CLERK

FILED DISTRICT COURT
Third Judicial District

JAN 24 1990

ALLAN L. LARSON #A1896
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendants
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

By  SALT LAKE COUNTY
Deputy Clerk

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

WILLIAM PAUL BARRON, JR.,

Plaintiff,

STIPULATION, MOTION AND
ORDER OF DISMISSAL

vs.

THE CITY OF MIDVALE UTAH,
THE CITY OF MIDVALE POLICE
DEPARTMENT, OFFICERS WILLIAM
NILES, STRONG AND SGT. LLOYD,
AND DOES UNKNOWN,

Civil No. 890903924

Judge Timothy R. Hanson

Defendants.

STIPULATION AND MOTION

The above-named plaintiff and defendants hereby stipulate and move that plaintiff's Complaint and Amended Complaint as against said defendants be dismissed with prejudice, each of the parties to bear their own costs incurred, said action having been fully compromised to the satisfaction of all parties.

Dated this 18th day of January, 1990.

William Paul Barron, Jr.
William Paul Barron, Jr.

SNOW, CHRISTENSEN & MARTINEAU

By Allan L. Larson
Allan L. Larson
Attorneys for Defendants

ORDER

Based upon the foregoing Stipulation and Motion, and good cause appearing therefor, it is hereby

ORDERED that plaintiff's Complaint and Amended Complaint be dismissed with prejudice, each of the parties to bear their own costs incurred.

Dated this 24 day of January, 1990.

BY THE COURT:

Timothy R. Hanson
Timothy R. Hanson
District Court Judge

Emili J. Thompson
Emili J. Thompson

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE: July 2, 1991

Deborah J. Thurman
DEPUTY COURT CLERK

June 7, 1991

APPENDIX B-4/1

Hon. James K. Logan, Esq.
Circuit Court Justice
United States Court of Appeals
10th Circuit Court
1961 Stout Street
Denver CO 80294

Dear Sir:

I am writing in reference to your decision in Barron v. Utah and Utah State Tax Commission, Case No. 90-4092, from the United States District Court for the Central Division of the District of Utah, dated February 29, 1991. The basis of your decision is that "Barron has not shown that an adequate remedy is unavailable in the state courts."

I had originally intended to file an appeal with the United States Supreme Court. The basis would be that (1) because of the Court's decision in the Davis decision, Utah's claim for exemption from jurisdiction in federal courts under 28 U.S.C. § 1341 is lacking merit precisely because of the Davis decision, or a good faith argument for a change, should the Court be inclined to uphold the Defendants' position; and (2) that adequate remedy is lacking in Utah State Courts for impecunious litigants.

With regard to the latter, and with reference to the aforesaid reasoning in your decision, I would offer the following example. In 1988, I attempted to initiate proceedings for malpractice and breach of fiduciary trust (i.e. unauthorized disclosure of medical information and records) by a doctor. Under Utah law, a prelitigation panel review by the Utah Department of Commerce, Division of Professional & Occupational Licensing is required prior to initiating any claim for malpractice in Utah State Courts. Papers were prepared and delivered to the appropriate agency as required under Rule 4 of the Rules of Civil Procedure by a third party. For the next three years, repeated attempts to procure the required panel review met with no success. I personally made several appearances before Loretta Jiron, the panel review secretary; and finally had a review scheduled in October 1990. On the day in question, I was the only person to make an appearance; Ms. Jiron informed me that they would need to re-schedule. History repeated itself, until on May 10, 1991, the action was dismissed without prejudice by Judge Murphy.

I would submit that just because a remedy is proscribed and available under Utah law in the state courts, if that remedy is not upheld both the agencies charged with providing the remedy or recourse, then "adequate remedy is unavailable in the state courts." State and federal law provide that all citizens shall enjoy equal access to the courts and justice, not just to those who can afford to procure the services of an attorney. Therefore,

it logically follows that if the playing field is rendered level in this regard, then higher courts must assure that all citizens are receiving equal access and protection of the law, and that the lower courts and state agencies are holding true to the duty imposed upon them by the people as expressed by their agents, state and federal legislators.

I am not requesting a reconsideration. Since leaving Utah, I have neither the health nor capacity to continue, and shall defer to the state case to present these issues promulgated by the Davis decision in hopes that the matter may again find a favorable hearing before the U.S. Supreme Court.

Sincerely Yours,

William P. Barron, Jr.
11475 Holiday Way
Hillsboro OH 45133-9368
(513) 393-3925

CC:

1. R. Paul Van Damm, Utah Attorney General
2. Steven A. Trost, Utah Bar Association
3. Hon. Norman Bangerter, Governor, State of Utah
4. Judge David Sam, U.S. District Court
5. Judge J. Thomas Green, U.S. District Court

APPENDIX H

MEMORANDUM TO APPELLEES' COUNSEL

- COPY -

June —, 1990

To: T.J. Tsakalos,

Enclosed, items requested by
you under discovery. Please be
advised I have no phone now.
message or contact thru APT.
Manager Melvinie Bang at:

NOTE: I have been ill alot
lately & syncope & taken to
LOS Hospital. Hope to be
well enough for trial date
7-16-90 sans requesting a
postponement for illness.
W. Barron

APPENDIX I

MEMORANDUM TO TRIAL COURT

October 29, 1989

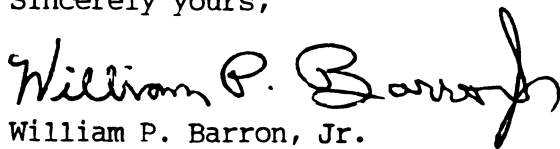
Hon. Judge Grant
Third Judicial Circuit Court
455 South 200 East, 5th Floor
Salt Lake City UT 84111

Dear Sir;

I rechecked with the Secretary of State on two defendants in this matter, Kemper Group and Citgo Petroleum. Both have no registered agents in Utah. Kemper is the liability insurance carrier for the primary defendant: Southland Corporation dba Seven-Eleven Food Stores. Southland has a marketing agreement with Citgo, but Citgo itself, does not "technically" do business in Utah, and voluntarily withdrew its registration some time ago.

Therefore, by my understanding of Rule 4(f)(2), mail service on Kemper and Citgo is proper, and hence the attached motion. If service upon Southland, as you suggested Friday, is effective service upon the other Defendants, then all is well; if not, then would you consent to this ex parte motion for alternative service upon Kemper and Citgo.

Sincerely yours,

A handwritten signature in black ink, reading "William P. Barron, Jr." with a stylized flourish at the end.

William P. Barron, Jr.
611 Park St. #14
Salt Lake City UT 84102-3332

July 19, 1990

T. J. Tsakalos #3289
HANSON, EPPERSON, & SMITH
4 Triad Center #500
P.O. Box 2970
Salt Lake City, UT 84110-2970

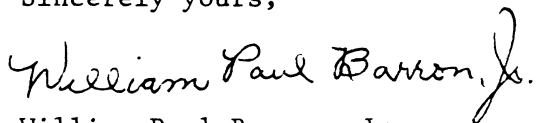
Dear Mr. Tsakalos,

In reading your judgement entry you noted that I had six cases in state and federal court dismissed as logic for a bad faith filing.

I don't suppose that you informed Judge Grant which were dismissed because of an out-of-court settlement, which are on appeal, and which were dismissed without prejudice for jurisdictional issues.

Further, I don't suppose that you informed Judge Grant about the cases which I won.

Sincerely yours,

A handwritten signature in cursive script that reads "William Paul Barron, Jr." The signature is written in dark ink and is positioned above the typed name.

William Paul Barron, Jr.
611 South Park St. #14
Salt Lake City UT 84102-3332

cc:

Judge Paul grant

2 Incl:

1. Affidavit
2. Motion for New Trial

July 31, 1990

Hon. Paul Grant, Judge
3rd Judicial Circuit Court
451 South 200 East
Salt Lake City UT 84111

RE: Barron v. Southland, Civil No. 893010924-CV
Objection to Plaintiff's Motion for a New Trial by Defendants

Your Honor,

Under Rule 59(c), Utah Rules of Civil Procedure, a Reply Memorandum is not ordinary to a Motion for New Trial; however, Mr. Tsakalos has so twisted and distorted the facts again, that I can not in good conscience remain silent.

A previous Motion for Sanctions Under Rule 11, for prior abuse of judicial process, was filed against Mr. Tsakalos, for his blatant misrepresentations in prior pleadings, was never adjudicated by the Court. In one pleading he referenced a failing on my part quoting the Utah Annotated Code for a section that can not be found therein. Counsel for the Defendants is merely carrying on the tradition previously encountered with the Defendant Kemper Group themselves. They procrastinate a reply to my claim for months, then respond by threatening me with sanctions if I challenge their decision in court. Throughout these proceedings Mr. Tsakalos has abused his privilege as an officer of the court by using inflammatory and scurrilous language in his proceedings to attack my motives and manner of obtaining a redress of grievances that the Defendants refuse to acknowledge.

His objections, to use his language, are self-serving. (1) If there have been 55 "pleadings", Mr. Tsakalos is responsible for most. He has frustrated attempted at discovery (which the Court ruled against him) and my ability to proceed with my grievance by legal trickery to shunt my claim out of the system. (2) Counsel for the Defense was provided with my medical evidence for the last 10 years or more, by actual documentation and summary, by his discovery, specifically delineating my multiple disabilities and how they affect my health. When forwarding last-minute evidence to him, I included a note, which I believe he acknowledged in an earlier pleading, of my current poor health. (3) The facts of the complaint are not so clear cut as Counsel suggests, as he conveniently failed to note that I struck a post 23" from the gasoline island - not as he alleged (this time) the gasoline island; that the post struck was painted brown and in front of a pole painted brown/black and green gas pumps; and that the accident occurred at night. (4) As previously

noted in my affidavit for a new trial, I did not appear at the trial because I was incapacitated by my condition, not to abuse or to frustrate the legal system, or to harass the Defendants, but to garner a modicum of justice.

I have enclosed two affidavits in support of these statements. One, an affidavit dated May 2, 1990 from my treating physician outlining the medical disabilities and their effect upon me. Two, an affidavit authenticating a computer enhanced photograph of the accident site, showing the accident site as it would have appeared on the night in question. As one can clearly see, the small post struck is nearly invisible in front of the pole behind it - and bear in mind that the enhancement was made from a daylight photograph. Both of these affidavits were previously served upon the defendants counsel.

Not having access to a legal dictionary at the present, I am not sure what Mr. Tsakalos is meaning when he states that my affidavit is "conclusory". I was following Rule 8(e)(1), Utah Rules of Civil Procedure to be "simple, consise and direct". Rule 59, U.R.C.P. did not specify or require evidenciary memorandum to be submitted with the Affidavit. Further, counsel had sufficient medical evidence previously gained through discovery to know of my disability and its affect (and I believe callously took advantage of that fact, to engender enough stress to produce just such an outcome).

If his objection is merely one for want of detail, it can be easily remedied. Because of my heart condition, mitral valve prolapse, I frequently suffer episodes of cardiac syncope, i.e. my heart "flutters" from arrythmias, and I collapse. [This has been documented for at least 10 years]. During the attack and for several hours thereafter, I am weak and unable to walk or get about. Certainly, it is impossible to walk or drive to the courthouse. I do not have a phone, and haven't had since it was disconnected for inability to pay on June 19, 1990. On the day of the trial, I had a syncopal episode in my apartment, collapsed and was not able to move for several hours. I did not have a phone, therefore, I could not call for assistance to get to a doctor, or oxygen (which can alleviate the symptoms quickly; nor call the court, clerk, or counsel until after I had recovered. During the preceding two weeks of the trial date, I had been ill several times, which is why I wrote Mr. Tsakalos a postit-note when remitting some last minute documents, so that he would be aware of why I might be late (although I did not consider not being able to attend, thinking it more liking collapsing in the courtroom, guaging the previous experience with Mr. Tsalkalos.)

I regret the inconvenience caused to the Court. I believe my complaint is legitimate with a good basis in case law that I've read.

For Mr. Tsakalos to request "reimbursement as a condition precedent to granting the motion for a new trial" is an unfair advantage of his position of power. The Defendants, and by and thru counsel, have tried to intimidate me from pressing a legitimate claim, and have continually harassed me with lies and inuendos, and misrepresented facts, and threats of financial harm if I presented a claim in Court. Such intimidation should not be allowed.

I will file Objections to Defendants Motion to Strike within ten (10) days, and I hope to speak with my attorney again for advice in this matter. However, due to my impecuniosity, I couldn't afford trial services, or lengthy litigation costs. At the outset it seemed a simple procedure, file the complaint and present evidence to establish one's testimony at a quickly set date. I never dreamed of all the legal trickery and shenaigans that have beset me since tangling with Mr. Tsakalos.

I have already repaired the damage to my vehicle, but the emotional trauma is irreparable.

Sincerely yours,

William P. Barron, Jr.

William Paul Barron, Jr.
611 South Park St. #14
Salt Lake City UT 84102-3332

2 Incl:
as

cc:

1. Counsel for Defendants, T.J. Tsakalos
2. John Call, Attorney-at-Law

Note:

My motion was returned 8-1-90 for \$500 fee, so I filed a Memorandum in Support when I refilled my Motion.

611 South Park St. #14
Salt Lake City UT 84102-3332

September 23, 1990

T. J. Tsakalos #3289
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Defendants
4 Triad Center, Suite #500
P.O. Box 2970
Salt Lake City UT 84110-2970

In re: Barron v. Southland Corporation, et al 893010924-CV

Dear Mr. Tsakalos,

When I graduated from Bowling Green State University in 1984 with a degree in History, I considered myself, with a 3.85 grade point average, to be reasonably intelligent. I took several courses in American Political Thought and Constitutional Law. My favorite case was Barron v. Baltimore (1833), as my forebearers not only aided the patriot cause during the War for Independence, but thereafter agitated for the rights thus gained for yeoman farmers, traders, merchants and the common people.

Since I am acquainted with the not only the writings of Adams, Burke and Locke, who our founding fathers studied when formulating our government, but also those of Washington, Paine, Jefferson, Franklin, Madison and others who drew up the blueprints of our political and legal system, I quite frankly consider myself another compatriot of their works. As Abraham Lincoln said, we have a government of the people, by the people, and for the people. Therefore, our constitution and the English Common Law of our legal system is based upon that premise; and thereby, under § 68-3-1, Utah Annotated Code, the law and the legal system rests upon the premise of law of the people, by the people, and for the people.

Something, as Jan Thompson's articles in The Deseret News attest, is out of sync with these principles. The Equal Access to Justice Act tries to address the issue of access to the judicial system, but does nothing to address the basic bias and injustice. For over 70 years, lawyers have predominated the legal system and the legislature that enacts the laws. Lawyers also are our judges. All parties to a dispute are usually from the same background: counsel for plaintiff, defendant, and the bench are lawyers. The system therefore, is stacked against those who can not afford legal representation in the system; and in my personal experience, Utah courts are extremely biased against anyone, who by necessity or choice, must act for themselves.

A case in point. Judge Grant was the jurist who presided in the matter Continental Bank v. Barron & Barron (1988). Before proceeding, I spoke with my attorney, John W. Call. HENRIKSEN, HENRIKSEN, & CALL, who reviewed the claim and advised me that I had a case under the doctrine of accord and satisfaction; aided me in defining the areas that I needed to research and study. I did this at the

University of Utah Law Library, and proceeded in court by myself as I could not afford John's services as a barrister. I believe I presented the facts in court in line with the legal advice given in an intelligent and adequate manner. I was shocked, but not surprised, after summations when Judge Grant ruled against me then told me that I "should seek legal advice!"

Not stated, but surely apparent, was Judge Grant's assumption and bias that as a non-attorney, I didn't know what I was talking about; and the bias that only attorneys should be in court, except small claims, which is not really a court but a circus presided over by lawyers.

Case in point: Barron v. Pacific Management (1987). This was prosecuted in small claims, and I did the legal research at the U. I won the case under the doctrine of trespass to personality, but the judgement was only \$80 against a loss of \$1,500-2,000 value of my car. The lawyer who presided, from what I was told, had substantial investment in real estate and stock holdings in a property management firm, and should have recused. No appeal on the merits of the judgement, mitigated against my \$400/month disability payment, was possible at the time.

Throughout the course of these proceedings I never expected an easy victory, however, I did expect that professional ethics might have averted some of the abuses I was subjected too.

1. You prepared the first certificate of readiness for trial that had facts that were knowingly presented which were false.
2. Judge Grant ignored entirely an earlier Motion for Sanctions for the aforesaid insult, and denied a request for a More Definite Statement, when I pursued the meaning of a pleading of yours to a reference to § 41A-2-3, U.A.C. in a Motion to Quash as to Kemper Group. No such statute exists, according to my own and staff research at the UNIVERSITY LAW LIBRARY.
3. You presented distorted information to justify a claim to "bad faith" on my part.

Which cases did you justify to Judge Grant as indicative of "bad faith" because they were dismissed? Not one had a finding of bad faith, to the contrary. Were these among those presented:

- a. Barron v. The State of Utah et al (USDC UT 1990) - The court held that plaintiff was barred jurisdictionally under 28 U.S.C. § 1341. Plaintiff appealed to 10th Circuit Court of Appeals arguing grant of jurisdiction under 4 U.S.C. §111 and the Supreme Court's decision in Davis v. Michigan (1989).
- b. Barron v. Office of Personnel Management et al (USDC UT 1989) - Parties had come to agreement, and federal defendants agreed to waive collection action. Plaintiff's claims were settled by other Defendants.
- c. Barron v. State of California et al (USDC UT 1990) - The court dismissed for lack of jurisdiction. Reconsidered "because of the apparent sincerity and earnestness of plaintiff's petition", the court ordered "Dismissal of Plaintiff's claims in federal court is without prejudice to pursuit of such claims in state court if such claims can properly be asserted in a court of competent jurisdiction."

d. Barron v. The City of Midvale et al (DC UT 1990) - Stipulation, Motion and order of Dismissal ... with prejudice, ... said action having been fully compromised to the satisfaction of all parties.

e. Barron v. Charter-Summit Hospital et al (DC UT 1990) - Voluntary Dismissal by Plaintiff pursuant to Rule 41(a)(1), U.R.C.P. as said action had been fully compromised to the satisfaction of all parties.

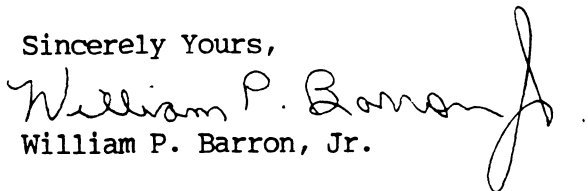
f. Barron v. Salt Lake City, Utah (109 S.C.Rpts. 1968)- Certiori denied. This is a technical loss because I made a mistake in the appeals process, and delayed the filing to the U.S. Supreme Court. It was a moral victory, however, because a direct result of this suit is the signs you now see by the Clerk of Courts window concerning giving procedural advise. Also, because of this suit and complaints generated therefrom, Hon. Maurice Jones is a more pleasant and able juris based upon my recent observations.

A principle of my religion teaches that we must deal honestly with all men. This is an article of faith that I ever endeavor to uphold. I do not undertake legal action lightly. I research the matter at the University law library to see what the case law and statutes relate about my problem, and I seek advice from my Stake President, who is a competent attorney-at-Law from all indications, as appropriate. I am keenly sensitive to injustice, having been exposed to enough injustice in the 20 years since my return from the Vietnam War; but I **never** undertake an action in Bad Faith.

For the present, you may delight in your hallow victory. I sensed from Mr. Opl at Kemper Group Insurance, from the very beginning, that this might happen. He was adamant in the proposition that no one challenges the Insurance Company in Court without an attorney and gets away with it. The precedent would be too damaging to the business, right? After all, if an impecunious litigant acting Pro se could initiate a lawsuit, overturn the insurance companies position, force action to remove or ameliorate a road hazard and nuisance at a client business, or perhaps set a new path in stare decisis, the precedent would overwhelm the industry with other agrieved claimants who were bullied by a claims agent and insurance company, right?

Well, it ain't over until it's over, or until the fat lady sings, as the old saying goes. It is a matter of justice and principle!! Or as Davy Crockett said, "When you're right, act on it."

Sincerely Yours,


William P. Barron, Jr.

cc:

Judge Grant

John W. Call, Attorney

Jan Thompson, The Deseret News

APPENDIX J

MEDICAL EVIDENCE PROVIDED UNDER DISCOVERY
TO APPELLEES' COUNSEL AND
SUBMITTED IN SUPPORT OF MOTION FOR NEW TRIAL

WASATCH CANYONS HOSPITAL

5770 South 1500 West, Salt Lake City, Utah 84123

July 23, 1991

William P. Barron, Jr.
11475 Holiday Way
Hillsboro, OH 45133-9368

Dear Mr. Barron,

This is in response to your letter of July 2, in which you asked for an opinion from me as to whether symptoms of mitral valve prolapse can result in incapacitation and whether you actually became incapacitated on July 16, 1990.

My records show that we visited on June 4 of that year and not again until August 30. You wrote me a letter between those two visits, on August 20. I do not find details regarding the incident of July 16, 1990, in my notes or in your letter. They reflect that you were under the care of Dr. Towner at that time for evaluation of fatigue. At both of our visits you complained of a number of depressive symptoms. Your letter referred to occasional "collapses" from "fatigue, angina, or migraine pains, or whatever you call it."

I do not consider myself an expert in mitral valve prolapse and cannot provide an opinion as to whether or under what circumstances it can result in incapacitation. I can say that during your course of treatment under my supervision there were many episodes of temporary incapacitation from depression and a variety of physical symptoms including fatigue.

I hope this is of some assistance to you and hope that you are doing well.

Sincerely,


Michael R. Lowry, M.D.

MRL/ps

July 2, 1991

Dr. Michael R. Lowry, MD
Wasatch Canyons Professional bldg.
Suite 108
5770 South 1500 West
Salt Lake City UT 84123

Dear Dr. Lowry,

In preparing an appeal to the Utah Court of Appeals, the opposing counsel has complained that previous medical evidence is not sufficient to establish my contention that on July 16, 1990, I was incapacitated due to cardiac syncopy, migraine, or whatever caused the problems.

Would you provide me a statement as soon as possible [my brief must be before the Court of Appeals no later than July 26, 1991].

Specifically, you letter must address the following issues:

(1) Whether the symptoms of this condition (mitral valve prolapse) actually result in incapacitation? [I presume a summary of cardiac problems such as syncopal episodes from MVP Syndrome, brought on by physical or emotional problems, or other causes, results in incapacitation, how, duration, etc.]

(2) Your opinion as to whether the appellant actually became incapacitated on the day of the hearing (July 16, 1990). Since I did not seek medical treatment that day, and only broached the subject subsequent to the event to you on a later day, I presume he seeks corroboration that if I said I was out, and the apartment manager testified to several incidents, that these opinions be medically assessed.

I am staying at my parents at the present and if you need further information, please call (513) 393-3925.

Sincerely yours,

William P. Barron, Jr.
11475 Holiday Way
Hillsboro OH 45133-9368

cc:
T. J. Tsakalos, Attorney-at-Law

May 18, 1990

Dr. Michael R. Lowry, MD
Wasatch Canyons Hospital
Professional Bldg., Suite #108
5770 South 1500 West
Salt Lake City UT 84123-5352

Dear Dr. Lowry,

I had a court hearing on Monday concerning the dispute with Dr. Kelly and LDS Hospital and that unauthorized release of information. The hearing left me unsettled as I was not able to function properly, and become depressed afterwards.

The incidents were similar in the nature of my response, to wit:

1. Before Judge Murphy, I froze and was not able to respond to the situation, when the judge said that he was confused as to whether proper procedures were taken based upon the papers filed. This was a surprise, because each item was clearly marked, and readable; it was written in mostly plain english as I am not proficient in all the legal jargon. I was not able to respond well after that, I was stuck on the notion that I was not clear in my communication, for which I always recieved high praise and marks for in college.

2. A few weeks ago, another man and I backed into each other at a Bank parking lot. He came out of his car, and verbally machine-gunned me about how the accident was all my fault. I had only used my mirrors and had not turned my head, but he was backing out as well. Then he began to say how the police would cite me, and my insurance would go up \$250/year, etc., but he'd take \$100 and forget the whole thing. I couldn't function in the situation to defend myself, similar to the above.

3. When Ruth Ann and I were at the first custody hearing, Commissioner Peuller said that my complaint over visitation rights was "the most flagrant abuse of judicial process she (sic) ever saw", etc. Afterwards, I was almost unable to present my complaint, stumbling over words, etc.

I am not sure what is happening in these types of situation, except that my thinking and organization prepared beforehand becomes scrambled, and I don't function thereafter well. After this event has ended, I become very depressed, then very angry, like someone used or abused me.

Sincerely,

William P. Barron, Jr.
611 Park St. #14
Salt Lake City UT 84102-3332

May 13, 1990

Dr. Michael R. Lowry, MD
Wasatch Canyons Hospital
Professional Bldg, Suite #108
5770 South 1500 West
Salt Lake City UT 84123-5352

Doctor Lowry,

While I am lucid, I wanted to make you aware of my current situation and condition. In the past two weeks, I have started to slide downwards. My present condition is thus:

PHYSICAL:

1. My sleep has been somewhat erratic in the last two weeks; either I toss and turn, or sleep 12 hours or more. If it gets worse, I thought about taking $\frac{1}{2}$ tablet of klonopin (.5mg tabs) to get a little better sleep. [A full tablet gives me a good rest, but 10-12 hours long; $\frac{1}{2}$ tab is good for 6-7 hours.]

2. I wake-up with moderate to severe sciatic pain in my left leg, and lower back. It generally eases after moving around for awhile.

3. I experience angina-like pain at least once a day for the last two weeks. This is usually associated with my walking the dog.

4. I still suffer from chronic fatigue, and "muscle weakness" - or perhaps better stated, a feeling of weakness in my leg muscles, like they won't support my weight. I experience an unsteady gait, and wobbliness during these periods. Dr. Towner's exam last March reveal no evident physical cause. Again, exercise, like walking the dog (which used to invigorate me, unless prolonged) will produced this after just a few short blocks. Last fall, I was riding my bike up to 3 miles a day, or walking for an hour before adverse effects were noticed.

5. In the last two months, I have been having a severe headache about once a week that last several hours, and usually is only relieved by sleeping. The usual analgesics avail no relief. It feels like someone buried a hatchet into the crown of my head, and many times I can feel a throbbing sensation deep in my skull. A tension headache has always made my posterior neck and shoulder muscles ache, so this is different from what I have usually experienced.

6. I still have the "lightning flashes" in my head before going to sleep, and upon waking; but now have them during the day, when I get yawning and sluggish feelings with the fatigue.

EMOTIONAL:

1. I have been getting very depressed, more so as time goes by. But I have been experiencing a lot more stress in the last few weeks.
2. My feelings range more in the area of the following now: hopelessness, futility, isolation, etc.
3. I have been walking on the razor's edge with anger the past week. I received a denial on my VA appeal; when I went into the VA to discuss the reasons and rationale behind the decision, I got a little pissed-off, and threw some .45 caliber ammunition at the VA rep and told him what to do with them. [I thought the police were after me later, while waling Sarah, as three or four cars were crusing the neighborhood. But they weren't.] When I came home, I sequestered myself in bed for a few days, until it was safe to venture outside again. While locked in, I fought thoughts and feelings about improvising some munitions and assaulting the Federal Bldg. or the Courthouse, but no one would take care of Sarah, and with my polyuria, I couldn't hold hostages long enough unless it was in the bathroom. Now I'm just depressed and numb.

STRESSORS:

1. Donald went back to juvenile detention last Tuesday. He stole some money (my last \$2.00), and disappeared all day. The week before he was almost picked-up for drinking with an adult who had a case of beer and a bag of weed that was being passed around several other youngsters. Then he stayed out all night, and disappeared when he spent the weekend with his mother. When he got out of DT, he grabbed me by the neck when I didn't give him the \$50 of his paycheck that I reimbused those he stole from. (He wanted to hold the money while we went looking for shoes and clothes.)
2. Tomorrow, Donny goes back to court for possession of tobacco when he was picked up last week, and in the afternoon, I have a hearing on my dispute with LDS Hospital and Dr. Kelly over an unauthorized letter he sent to DOL five years ago.
3. The VA denied my claim for service-connected disability from agent orange and PTSD again, and my representative and I have to redo all the appeals papers again to send to the Board of Appeals in Washington, D.C. Ruth Ann has been nagging about letting her friend in the VFW take-over, and another friend who supervises the VFW service officers, based in D.C., to pitch in too!
4. Friday, I have a trial for a citation for incompetent driver. I loaned my car to a neighbor, and her husband backed into another car. His license had expired the week before on his birthday, so I was cited. (When I first let them use the car in January, they both had out-of-state, but valid licenses.) Now I could lose my driver's license, face a \$300 fine, or have my insurance cancelled. [And ever since the Prosecutor's office lost the case when I appealed to the U.S. Supreme Court two years ago, they have been itching to get even.]

5. I'm still burning over my loss in U.S. District Court, to learn that "every" and "all" in the Civil Rights Act only applies to blacks and minorities. White is black, and black is white; it's crazy when the law doesn't mean what it says in plain English. No wonder no ones trust the courts or government, like Danny DeVito said, "Q. What do you call 20,000 lawyers at the bottom of the ocean. A. A good beginning."

6. Isolation. Lots of it. I don't have friends in the usual sense of the word. No one calls or visits me on their own volition, except infrequently. I usually go wandering among acquaintances, or calling the family long distance when I need to talk with someone. I seldom socialize as I always feel like people don't like having me around, because I stutter, or sound funny, or just ain't charismatic or witty. I don't date; don't know anyone, or have the money to do so even if I was inclined; and in our stake, we're an ignored bunch anyway. Even Jessica doesn't call or come over; and Donny is out getting into trouble.

7. Losing the battle with the kids. Donny is so up-and-down, I don't know if he'll turn around or not. He picked up all my bad habits, and seems headed for bigger trouble. Jessica hasn't been around or had much contact since Donny has been here; she seems annoyed or embarrassed of me around her yuppie friends, except when they need a ride (I'm being too harsh here probably).

8. A hundred little things everyday that grate like rocks in your shoes. No wonder my memory is so bad anymore; forgetfulness can be a blessing in disguise, except I don't remember why I'm so down.

I don't understand why everything has went to seed so fast in the past few weeks. Everytime I think that things are starting to pull out, I get hit with a storm, and it all comes unraveled. If I feel in a better mood, I'm too tired to do little projects like fix and put-together a bike (it's been in pieces for 3 months), or vice-versa. I get to where I seem to manage the everyday stuff, and think I'm just about ready to hold my own again; then something happens and I can't hold it together.

Is it the medication, or I am missing something? Bob Bennett and I barely touched on survivor guilt, PTSD, and how conflict with authority may fit in, but never explored much further. [More trying to change some behaviors than learning how they came to be.] I'd go back to Dr. Towner, but I think he regards me strictly as a "nut" or "hypochondriac" case. No reason for the polyuria (diabetes seems ruled out); fatigue is pegged as mental; and heart symptoms are defined as mental, not serious, non-existent, or the luck-of-the-draw, depending upon which doctor I see.

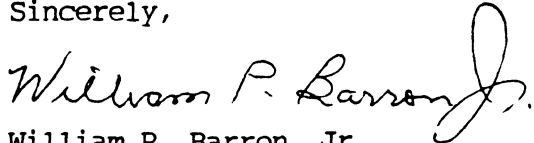
When I was having problems last fall, Dr. Walsh ran some EKG's but never informed me of the results. I got a report from Instacare on their EKG: abnormal R progression,

I hope that after next week, some of the stress will lessen, and maybe I'll start feeling better again, at least my mood. If you think I should change my medication dosage, please give me a call.

Page 4. May 13, 1990
Dr. Lowry, MD

Unless I hear otherwise, I'll continue the prozac according to our last discussion, and see you on June 4th, at 2:00 P.M.

Sincerely,

A handwritten signature in cursive script that reads "William P. Barron, Jr." The signature is written in dark ink and is positioned above the printed name and address.

William P. Barron, Jr.
611 Park St. #14
Salt Lake City UT 84102-3332

1 Incl:
as

cc:

Bishop Duane S. Smith
Dr. Kevin Walsh, MD [Intermountain Clinic]
Dr. Steven R. Towner, MD [Salt Lake Clinic]

Attending Physician's Statement

To be completed for every veteran applying for a disability payment.

Part A. Patient (Veteran) Information

(To be completed by the veteran)

- COPY -

Patient's Name BARRON, WILLIAM PAUL JR. Soc. Sec. No. 2 / 8 / 2 - / 4 / 4 - / 3 / 2 / 6 / 0 /
(Last) (First) (Middle)

Address 611 South Park St. #14, Salt Lake City UT 84102 Birth Date 8 / 23 / 48
Street City State ZIP Mo. Day Yr.

Are you presently receiving Social Security Disability Income Payments or Supplemental Security Income?

☐ / ☐ yes ☒ / ☐ no SSI discontinued after award of CSA Disability annuity
Federal Civil Service

Important: After you have completed Part A, send this form and the pre-addressed envelope from your Application Kit to your physician. Ask him or her to complete Part B of this Attending Physician's Statement as soon as possible and return it to:

THE AGENT ORANGE VETERAN PAYMENT PROGRAM
P.O. BOX 110
HARTFORD, CT 06104

Part B. Physician Information

(To be completed by the veteran's (patient's) physician ONLY)

Notice to Physicians:

Your patient (the veteran named above) has filed an Application for Disability Payments under the AGENT ORANGE VETERAN PAYMENT PROGRAM. To qualify for payments, your patient must demonstrate "total disability" as defined by the Social Security Act.

In order to evaluate this veteran's application, we need information from you regarding the diagnosis, history, present condition, and treatment of your patient's disability. We cannot begin that evaluation until we receive this Attending Physician's Statement from you.

If your patient has answered "yes" above to indicate that he or she is receiving Social Security Disability Income, you need only complete Section 1 - Diagnosis, and Section 11- Signature.

If your patient has answered "no" above, please complete the entire inside of this form, Sections 1-11.

If you have any questions while completing this form, please call the AGENT ORANGE VETERAN PAYMENT PROGRAM toll-free at 1 (800) 225-4712.

After you have completed this Statement, please place it in the pre-addressed envelope your patient should have provided you, and mail it as soon as possible to the address shown above.

Thank you.

Part B. (Continued)

Reminder: If your patient answered "yes" in Part A on the front cover, complete only Sections 1 and 11. If your patient answered "no", complete all Sections.

1. DIAGNOSIS/DIAGNOSES

(a) When did you last examine the patient? 14/6/89/

Mo. Day Yr.

(b) Your diagnosis (including any complications) Major DEPRESSION, RECURRENT,
DYSTHYMIA, MITRAL VALVE PROLAPSE

(c) Subjective symptoms (describe the disease) Periods of depression & anhedonia
withdrawal, difficulty concentrating, fatigue, hyperphagia
and hypersomnia, spells of palpitations and weakness

(d) Is condition due to accidental, self-inflicted or traumatic injury?

☒ no

☐ yes If "yes," describe the nature of the injury.

2. HISTORY

Weight _____ Height _____

(a) When did symptoms first appear or accident happen? 1/1/80 (Please list dates for various diagnoses, if appropriate.) Mo. Day Yr.

(b) When did patient cease work because of disability? 5/1/84

(c) Has patient ever had same or similar condition? Mo. Day Yr.

☒ no ☐ yes If "yes" state when and describe.

(d) Objective findings (including current X-rays, EKG's, laboratory data and clinical findings)

psychomotor retardation, sad mood, constricted effect

(e) Names and addresses of other treating physicians

3. DATES OF TREATMENT

(a) Date of first visit 1/28/87/

Mo. Day Yr.

(b) Date of last visit 4/6/89/

Mo. Day Yr.

(c) Frequency ☐ Weekly ☒ Monthly ☐ Other (Specify) _____

(d) Is patient still under your care for this condition(s)?

☒ yes

☐ no If "no," indicate date service terminated. 1/1/1/

Mo. Day Yr.

4. NATURE OF TREATMENT (Including surgery and medications prescribed, if any)

Nardil 60mg Qd
Klonopin 0.5mg qhs

5. PROGRESS

- (a) Has patient ☐ Recovered? ☐ Improved? ☒ Stabilized? ☐ Retrogressed?
(b) Is patient ☒ Ambulatory? ☐ House confined? ☐ Bed confined? ☐ Hospital confined?
(c) Has patient been hospital confined?
☒ no ☐ yes If "yes," give Name and Address of Hospital

Confined from /____/____/ through /____/____/
Mo. Day Yr. Mo. Day Yr.

If hospitalization has occurred at multiple facilities, please list them on a separate sheet of paper.

6. CARDIAC

(If Applicable)

- (a) Functional Capacity Class 1 (No limitation) ☐
(American Heart Assoc.) Class 2 (Slight limitation) ☐
Class 3 (Marked limitation) ☐
Class 4 (Complete limitation) ☐

(b) Blood Pressure (last visit) _____/_____
Systolic Diastolic

7. LIMITATIONS

- (a) What are patient's present capabilities?

Patient is capable of self-care + P/T volunteer activities

- (b) What are patient's present limitations (physical and/or mental)?

Demands of even P/T employment lead to complaints of palpitations, fatigue + depression within days or weeks

- (c) What restrictions are placed on patient?

unemployment

8. PHYSICAL IMPAIRMENT

(as defined in Federal Dictionary of Occupational Titles)

- ☐ Class 1 - No limitation of functional capacity; capable of heavy work; no restrictions. (1-10%)
☐ Class 2 - Medium manual activity. (15-30%)
☐ Class 3 - Slight limitations of functional capacity; capable of light work. (35-55%)
☐ Class 4 - Moderate limitation of functional capacity; capable of clerical/ administrative (sedentary) activity. (60-70%)
☒ Class 5 - Severe limitation of functional capacity; incapable of minimal (sedentary) activity. (75-100%)
☐ Remarks:

9. MENTAL / NERVOUS IMPAIRMENT

(if applicable)

(a) What is impact of stress on patient's daily activities?

See 7

(b) What stress and problems in interpersonal relations has patient experienced?

unvariably conflicts w authority figures

☐ Class 1 - Patient is able to function under stress and engage in interpersonal relations (no limitation).

☐ Class 2 - Patient is able to function in most stress situations and engage in most interpersonal relations (slight limitations).

☐ Class 3 - Patient is able to engage in only limited stress situations and engage in only limited interpersonal relations (moderate limitations).

☒ Class 4 - Patient is unable to engage in stress situations or engage in interpersonal relations (marked limitations).

☐ Class 5 - Patient has significant loss of psychological, physiological, personal and social adjustment (severe limitations).

☐ Remarks:

10. PROGNOSIS

(a) What is the patient's prognosis? Specify a prognosis for each of the various diagnoses listed. Use a separate sheet if necessary.

*No improvement suspected
Patient will remain dysrhythmic with episodes of cardiac
Symptoms & depression under stress*

(b) How long from now do you feel patient's maximum medical improvement will be reached?

☐ 3 months ☐ 6 months ☐ 1 year ☐ longer ☒ no improvement expected

11. SIGNATURE

(Print)

| | | |
|-----------------------------|-----------------------|----------------------------|
| <i>Michael R. Lowry MD</i> | <i>Psychiatry</i> | <i>(801) 265-3001</i> |
| Name of Attending Physician | Degree | Specialty Telephone |
| <i>5770 S. 1500W.</i> | <i>Salt Lake City</i> | <i>UT 84123</i> |
| Street Address | City or Town | State or Province Zip Code |
| <i>Michael R. Lowry MD</i> | | <i>5/20/89</i> |
| Signature | | Date |

APPENDIX K

DETERMINATIVE PROVISIONS OF LAW
[CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES]
SET OUT VERBATIM

gal claims. *Columbia Trust Co. v. Anglum*, 63 Utah 353, 225 P. 1089 (1924).

—Relief granted.

Court could administer relief according to nature of cause, whether it would have been granted in equity or at law. *Morgan v. Child, Cole & Co.*, 47 Utah 417, 155 P. 451 (1916);

Jenkins v. Nicolas, 63 Utah 329, 226 P. 177 (1924); *Trenchard v. Reay*, 70 Utah 19, 257 P. 1046 (1927); *Wasatch Oil Ref. Co. v. Wade*, 92 Utah 50, 63 P.2d 1070 (1936).

Cited in *Borland v. Chandler*, 733 P.2d 144 (Utah 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d Actions § 30.

C.J.S. — 1 C.J.S. Actions §§ 55 to 57.

Key Numbers. — Action ⇐ 22 to 25.

PART II.

COMMENCEMENT OF ACTION; SERVICE OF
PROCESS, PLEADINGS, MOTIONS AND
ORDERS.

Rule 3. Commencement of action.

(a) **How commenced.** A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons together with a copy of the complaint in accordance with Rule 4. If the action is commenced by the service of a summons and a copy of the complaint, then the complaint, the summons and proof of service, must be filed within ten days of such service. If, in a case commenced under paragraph (a)(2) of this rule, the complaint, summons and proof of service are not filed within ten days of service, the action commenced shall be deemed dismissed and the court shall have no further jurisdiction thereof; provided, however, that the foregoing provision shall not change the requirement of Utah Code Ann. Section 12-1-8 (1986).

(b) **Time of jurisdiction.** The court shall have jurisdiction from the time of filing of the complaint or service of the summons and a copy of the complaint. (Amended effective April 1, 1990.)

Advisory Committee Note. — Rule 3 constitutes a significant change from the prior rule. The rule retains service of the ten-day summons as one of two means to commence an action, but the rule requires that the summons together with a copy of the complaint be served on the defendant pursuant to Rule 4. In so doing, the rule eliminates the requirement that a copy of the complaint be deposited with the clerk for the defendant whose address is unknown. The changes in Rule 3 must be read and should be interpreted in conjunction with coordinate changes in Rule 4 and with a change in Rule 12(a) that begins the running of the defendant's 20-day response time from the service of the summons and complaint.

Paragraph (a). This paragraph eliminates the requirement that a copy of the complaint be deposited with the clerk for the defendant

whose address is unknown. Paragraph (b) of the former rule, which permitted the plaintiff to deposit copies of the complaint with the clerk for defendants not otherwise served with a copy at the time of the service of the summons, has also been eliminated. The rule requires, in effect, that both the summons and the complaint be served pursuant to Rule 4. Under a coordinate change in Rule 12(a), the defendant's time for answering or otherwise responding to the complaint does not begin to run until service of the summons and complaint pursuant to Rule 4.

Paragraph (b). This paragraph is substantially identical to paragraph (c) of the former rule.

Amendment Notes. — The 1990 amendment in Subdivision (a) inserted "together with a copy of the complaint in accordance with

Rule 4

UTAH RULES OF CIVIL PROCEDURE

between title of the summons and the title of the complaint was not a proper basis to set aside default judgment granted by trial court *Bawden & Assocs. v. Smith*, 624 P.2d 676 (Utah 1981).

Cited in *State v. Judd*, 27 Utah 2d 79, 493 P.2d 604 (1972); *State v. Poteet*, 692 P.2d 760 (Utah 1984); *Madsen v. Borthick*, 769 P.2d 245 (Utah 1988); *Phillips v. Smith*, 768 P.2d 449 (Utah 1989).

COLLATERAL REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d Courts § 143; 61A Am. Jur. 2d Pleading §§ 350 to 352; 62 Am. Jur. 2d Process § 5.

C.J.S. — 21 C.J.S. Courts § 80; 71 C.J.S. Pleading §§ 408 to 412, 72 C.J.S. Process § 3.

Key Numbers. — Courts ⇨ 21 et seq.; Pleading ⇨ 331; Process ⇨ 4 to 6.

Rule 4. Process.

(a) **Signing of summons.** The summons shall be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and served.

(b) **Time of service.** In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative. In any action brought against two or more defendants on which service has been obtained upon one of them within the 120 days or such longer period as may be allowed by the court, the other or others may be served or appear at any time prior to trial.

(c) **Contents of summons.** The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service. If service is made by publication, the summons shall briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file.

(d) **By whom served.** The summons and complaint may be served in this state or any other state or territory of the United States, by the sheriff or constable, or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by any other person 18 years of age or older at the time of service, and not a party to the action or a party's attorney.

(e) **Personal service.** Personal service shall be made as follows:

- (1) Upon any individual other than one covered by subparagraphs (2), (3) or (4) below, by delivering a copy of the summons and/or the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and/or the complaint to an agent authorized by appointment or by law to receive service of process;

NOTES TO DECISIONS

ANALYSIS

Motions

- Amendments
- Prayer for relief
- New trial
- Particularization
- Setting aside conditional order

Orders

- Correction
- Cited

Motions.

—Amendments.

—Prayer for relief.

Although a trial court may deny a motion to amend the complaint for a movant's failure to present a written motion and a proposed amended complaint, that rule does not apply to the prayer for relief because, under Rule 54(c), the prayer does not limit the relief which the court may grant. *Behrens v. Raleigh Hills Hosp.*, 675 P.2d 1179 (Utah 1983).

—New trial.

—Particularization.

Only purpose for requiring particularization of grounds for motion for new trial is to inform court and other party of theories upon which new trial is sought, where defendant filed affi-

davit with motions setting forth theories, and judgment had been on pleadings, court and parties were sufficiently advised as to grounds for motion. *Howard v. Howard*, 11 Utah 2d 149, 356 P.2d 275 (1960).

—Setting aside conditional order.

Where court on own initiative lowered from \$2,000 to \$1,000 value of building as found by jury and entered conditional order granting new trial unless plaintiff consented to reduction, court could restore jury findings under authority of this Rule, since plaintiff filed motion to set aside conditional order for new trial within ten days. *National Farmers' Union Property & Cas. Co. v. Thompson*, 4 Utah 2d 7, 286 P.2d 249, 61 A.L.R.2d 635 (1955).

Orders.

—Correction.

Where judge made perfunctory or clerical mistake resulting from erroneous assumption that order prepared by counsel correctly reflected judgment of Supreme Court and trial court, judge could correct order on his own motion. *Meagher v. Equity Oil Co.*, 5 Utah 2d 196, 299 P.2d 827 (1956).

Cited in *Boskovich v. Utah Constr. Co.*, 123 Utah 387, 259 P.2d 885 (1953), *Thomas v. Heirs of Braffet*, 6 Utah 2d 57, 305 P.2d 507 (1956).

COLLATERAL REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d *Motions, Rules, and Orders* § 1 et seq., 61A Am. Jur. 2d *Pleading* §§ 1 et seq., 238.

C.J.S. — 60 C.J.S. *Motions and Orders* § 1 et seq., 71 C.J.S. *Pleading* §§ 63 to 210, 140 et seq., 211 et seq.

A.L.R. — *Proceeding for summary judgment*

as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Key Numbers. — *Motions* ⇨ 1 et seq.; *Pleading* ⇨ 381.2 to 186, 187 et seq.

Rule 8. General rules of pleadings.

(a) **Claims for relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) **Defenses; form of denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a

part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) **Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(d) **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) **Pleading to be concise and direct; consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) **Construction of pleadings.** All pleadings shall be so construed as to do substantial justice.

Compiler's Notes. — This rule is substantially the same as Rule 8, F.R.C.P.

Cross-References. — Amended and supplemental pleadings, Rule 15.

Arbitration, § 78-31a-1 et seq.

Comparative negligence, § 78-27-38.

Counterclaim and cross-claim, Rule 13.

Creditors, assignment for benefit of, § 6-1-1 et seq.

Defenses and objections, Rule 12.

Fee for filing cross-claim or counterclaim, §§ 78-3-16.5, 78-4-24, 78-6-14; Appx. G, Code of Judicial Administration.

Fellow servant defined, § 34-25-2.

Form of pleadings, Rule 10.

Forms intended to indicate simplicity and brevity of statement, Rule 84.

Forms of answers, Forms 21, 22.

Hearing of certain defenses before trial, Rule 12(d).

Interpleader, Rule 22.

Motions, forms for, Forms 20, 23, 24.

Numbered paragraphs, Rule 10(b).

One form of action, Rule 2.

Reply to answer, order for, Rule 7(a).

Security interest, enforceability of, § 70A-9-203.

Special forms of pleadings and writs abolished, Rule 65B(a).

Statute of frauds, generally, § 25-5-1 et seq.

Statute of frauds, investment securities, § 70A-8-319.

Statute of frauds, sales, § 70A-2-201.

Statute of frauds, Uniform Commercial

~~executor or administrator of plaintiff who pro-~~
~~ceeded to bring the action in that capacity with-~~
~~out previous valid appointment. 27 A.L.R.4th~~
~~108.~~

Key Numbers. — Associations ⇨ 20(5);
 Corporations ⇨ 513(4), 514; Damages ⇨ 142;

Libel and Slander ⇨ 77 et seq., 90 et seq.; Lim-
 itation of Actions ⇨ 183; Parties ⇨ 72 to 74;
 Pleading ⇨ 8(1), (9), (13), (14), (15), (16), (18),
 14, 32, 39, 46, 59, 63; Quieting Title ⇨ 34(3);
 Statutes ⇨ 280.

Rule 10. Form of pleadings and other papers.

(a) **Caption; names of parties; other necessary information.** All pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, the file number, the name of the pleading or other paper, and the name, if known, of the judge to whom the case is assigned. In the complaint, the title of the action shall include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action." Every pleading and other paper filed with the court shall also state the name, address, telephone number and bar number of any attorney representing the party filing the paper, which information shall appear in the top left-hand corner of the first page. Every pleading shall state the name and address of the party for whom it is filed; this information shall appear in the lower left-hand corner of the last page of the pleading.

(b) **Paragraphs; separate statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by reference; exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading, or in any motion. An exhibit to a pleading is a part thereof for all purposes.

(d) **Paper quality, size, style and printing.** All pleadings and other papers filed with the court, except printed documents or other exhibits, shall be typewritten, printed or photocopied in black type on good, white, unglazed paper of letter size (8 1/2" x 11"), with a top margin of not less than 2 inches above any typed material, a left-hand margin of not less than 1 inch, a right-hand margin of not less than one-half inch, and a bottom margin of not less than one-half inch. All typing or printing shall be clearly legible, shall be double-spaced, except for matters customarily single-spaced or indented, and shall not be smaller than pica size. Typing or printing shall appear on one side of the page only.

(e) **Signature line.** Names shall be typed or printed under all signature lines, and all signatures shall be made in permanent black or blue ink.

(f) **Enforcement by clerk; waiver for pro se parties.** The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with this rule, the clerk shall accept the filing but may require counsel to substitute properly prepared papers for noncon-

forming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(g) **Replacing lost pleadings or papers.** If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(Amended effective Jan. 1, 1983; April 1, 1990.)

Advisory Committee Note. — As a general matter, Rule 10 deals with the form of papers filed with the court — both “pleadings” as defined in Rule 7(a) and “other papers filed with the court,” including motions, memoranda, discovery responses, and orders. The changes in the present rule were promulgated to clarify ambiguities in the prior rule and to address specific problems encountered by the courts. Paragraphs (b), (c) and (e) of the rule were not changed, except that paragraph (e) was redesignated as (g) and new paragraphs (e) and (f) were added.

Paragraph (a). This paragraph specifies requirements for captions in every paper filed with the court. In addition to the other requirements, the caption must contain the name of the judge to whom the case is assigned, if the judge's name is known at the time the paper is filed. In the top left-hand corner of the first page, each paper must state identifying information concerning the attorney representing the party filing the paper. Finally, every pleading must state the name and current address of the party for whom it is filed; this information should appear on the lower left-hand corner of the last page. This information need not be set forth in papers other than pleadings.

Paragraph (d). The changes in this paragraph make it clear that papers filed with the court must be “typewritten, printed or photocopied in black type.” The Advisory Committee considered suggestions from different groups that so-called “dot matrix” printing be specifically allowed or specifically prohibited. The Advisory Committee, however, settled on the requirements that “typing or printing shall be clearly legible ... and shall not be smaller than pica size.” If typing or printing on papers filed

with the court complies with these standards, the papers should not be deemed to violate the rule merely because they were prepared in a dot matrix printer. As currently written, this paragraph also removes any confusion concerning the top margin and left margin requirements (now 2 inches and 1 inch respectively), and this paragraph imposes new requirements for right and bottom margins (both one-half inch).

Paragraph (e). This paragraph, which is an addition to the rule, requires typed signature lines and signatures in permanent black or blue ink.

Paragraph (f). The changes in this paragraph make it clear that the clerk must accept all papers for filing, even though they may violate the rule, but the clerk may require counsel to substitute conforming for nonconforming papers. The clerk is given discretion to waive requirements of the rule for parties who are not represented by counsel; for good cause shown, the court may relieve parties of the obligation to comply with the rule or any part of it.

Amendment Notes. — The 1990 amendment added “and other papers” to the rule catchline and added similar language in two places in Subdivision (a); in Subdivision (a), added the last phrase in the subdivision heading, added the last two phrases in the first sentence, deleting “and a designation as in Rule (7)(a),” added the last two sentences, and made stylistic changes; rewrote Subdivision (d); added Subdivisions (e) and (f); and redesignated former Subdivision (e) as Subdivision (g).

Compiler's Notes. — This rule is similar to Rule 10, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Exhibits.

—Use as pleadings.
Cited.

Exhibits.

—Use as pleadings.

While an exhibit may be considered as a part

of a pleading to clarify or explain the same, an exhibit to a pleading cannot serve the purpose of supplying necessary material averments nor can the content of the exhibit be taken as part of the allegations of the pleading itself. *Girard v. Appleby*, 660 P.2d 245 (Utah 1983).

Cited in State ex rel. Cannon v. Leary, 646 P.2d 727 (Utah 1982).

COLLATERAL REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d Pleading §§ 23 to 56, 69, 117.

C.J.S. — 71 C.J.S. Pleading §§ 5, 9, 63 to 98, 371 to 375, 418.

A.L.R. — Propriety of attaching photographs to a pleading, 33 A.L.R.3d 322.

Key Numbers. — Pleading ⇨ 4, 13, 15, 38½ to 75, 307 to 312, 340.

Rule 11. Signing of pleadings, motions, and other papers; sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; 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, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(Amended, effective Sept. 4, 1985.)

Compiler's Notes. — This rule is substantially similar to Rule 11, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Amendment of complaint.

Violation.

—Question of law.

—Sanctions.

Cited.

Amendment of complaint.

Amendment by an attorney of the facts stated in a complaint was sufficient to establish those facts as they would have been by a verified complaint before the changes made by this rule making verification unnecessary.

Calder v. Third Judicial Dist. Court ex rel. Salt Lake County, 2 Utah 2d 309, 273 P.2d 168 (1954).

Violation.

—Question of law.

Whether specific conduct amounts to a violation of this rule is a question of law. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989).

—Sanctions.

This rule gives trial courts great leeway to tailor the sanction to fit the requirements of

Rule 41. Dismissal of actions.**(a) Voluntary dismissal; effect thereof.**

(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) **By order of court.** Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **Involuntary dismissal; effect thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) **Dismissal of counterclaim, cross-claim, or third-party claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) **Costs of previously-dismissed action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

instructions *Morgan v Quailbrook Condominium Co*, 704 P 2d 573 (Utah 1985)

Written instructions.

—Failure to tender.

—Waiver.

Where plaintiff had failed to tender a written instruction on burden of proof he could not claim error in the lack of such instruction *Fuller v Zinik Sporting Goods Co*, 538 P 2d 1036 (Utah 1975)

Cited in *Wellman v Noble*, 12 Utah 2d 350, 366 P 2d 701 (1961), *Hill v Cloward*, 14 Utah 2d 55, 377 P 2d 186 (1962), *Ortega v Thomas*, 14 Utah 2d 296, 383 P 2d 406 (1963), *Meier v Christensen*, 15 Utah 2d 182, 389 P 2d 734

(1964), *Memmott v United States Fuel Co*, 22 Utah 2d 356, 453 P 2d 155 (1969), *Telford v Newell J Olsen & Sons Constr Co* 25 Utah 2d 270, 480 P 2d 462 (1971), *Flynn v W P Harlin Constr Co*, 29 Utah 2d 327 509 P 2d 356 (1973), *McGinn v Utah Power & Light Co*, 529 P 2d 423 (Utah 1974), *Henderson v Meyer*, 533 P 2d 290 (Utah 1975), *Lamkin v Lynch*, 600 P 2d 530 (Utah 1979), *State v Hall*, 671 P 2d 201 (Utah 1983), *Highland Constr Co v Union Pac R R*, 683 P 2d 1042 (Utah 1984), *Gill v Timm*, 720 P 2d 1352 (Utah 1986), *Penrod v Carter*, 737 P 2d 199 (Utah 1987), *King v Fereday*, 739 P 2d 618 (Utah 1987), *State v Cox*, 751 P 2d 1152 (Utah Ct App 1988), *Ramon ex rel Ramon v Farr*, 770 P 2d 131 (Utah 1989)

COLLATERAL REFERENCES

Am. Jur. 2d. — 75 Am Jur 2d Trial § 573 et seq

C.J.S. — 88 C J S Trial §§ 266 to 448

A.L.R. — Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A L R 3d 501

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A L R 3d 10

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A L R 3d 88

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A L R 3d 170

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A L R 3d 1081

Verdict-urging instructions in civil case

stressing desirability and importance of agreement, 38 A L R 3d 1281

Verdict urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A L R 3d 845

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A L R 3d 1154

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A L R 3d 128

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A L R 3d 102

Federal Rules of Civil Procedure construction and effect of provision in Rule 51 and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A L R Fed 310

Key Numbers. — Trial ⇌ 182 to 296

Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A, in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of

fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

Amendment Notes. — The 1986 amendment, in Subdivision (a), deleted "and" preceding "in granting" in the first sentence, inserted the third and fifth sentences, rewrote the sixth sentence and added the last sentence.

Compiler's Notes. — This rule is similar to Rule 52, F.R.C.P.

Cross-References. — Masters, Rule 53.

NOTES TO DECISIONS

ANALYSIS

Adoption.

- Abandonment of contract.
 - Advisory verdict.
 - Breach of contract.
 - Child custody.
 - Contempt.
 - Credibility of witnesses.
 - Denial of motion.
 - Divorce decree modifications.
 - Easement.
 - Evidentiary disputes.
 - Juvenile action.
 - Material issues.
 - Harmless error.
 - Submission by prevailing party.
 - Court's discretion.
 - Water dispute.
 - Findings of state engineer.
- Amendment.**
- Motion.
 - Conformance with original findings.
 - New trial.

- Notice of appeal.
- Time.
- Tolling of appeal period.
- When made.
- Overruling or vacation.
- Another district judge.
- Lack of notice.
- Child custody awards.
- Criminal cases.
- Effect.
- Preclusion of summary judgment.
- Failure to object to findings.
- How findings entered.
- Judicial review.
- Standard of review.
- Conclusions of law.
- Criminal trials.
- Findings of facts by jury.
- Juvenile proceedings.
- Purpose of rule.
- Stipulations.
- Sufficiency.
- Allegations of pleadings.
- Burden on appeal.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Compiler's Notes. — This rule is similar to Rule 59, F.R.C.P.

Cross-References. — Fee for filing motion for new trial, § 21-2-2.

Harmless error not ground for new trial, Rule 61.

Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

Quotient verdicts, 8 A.L.R.3d 335.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in

case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Key Numbers. — New Trial ⇌ 13 et seq., 110, 116.

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Advisory Committee Note. — This rule is the federal rule, verbatim Utah Rules of Evi-

dence (1971) was not as specific, but Rule 106 is otherwise in accord with Utah practice

COLLATERAL REFERENCES

Utah Law Review. — Utah Rules of Evidence 1983 1985 Utah L. Rev. 63, 73

ARTICLE II. JUDICIAL NOTICE.

Rule 201. Judicial notice of adjudicative facts.

(a) **Scope of rule.** This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When discretionary.** A court may take judicial notice, whether requested or not.

(d) **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Advisory Committee Note. — This rule is the federal rule, verbatim, and consolidates the law of judicial notice formerly contained in Rules 9 through 12, Utah Rules of Evidence (1971) and in Utah Code Annotated, § 78-24-1 [78-25-1] (1953) [superseded by this rule] into one broadly defined rule. The Utah Supreme Court has stated the rule with reference to judicial notice in *Little Cottonwood Water Co. v. Kimball*, 76 Utah 243, 267, 289 Pac. 116 (1930) where the court stated "In short, a court is presumed to know what every man of ordinary intelligence must know about such things." See also *DeFusion Co. v. Utah Liquor Control Comm'n*, 613 P.2d 1120 (Utah 1980).

Subdivision (a) "governs only judicial notice of adjudicative facts," and does not deal with instances in which a court may notice legislative facts, which is left to the sound discretion of trial and appellate courts. Compare Rule 12,

Utah Rules of Evidence (1971). Since legislative facts are matters that go to the policy of a rule of law as distinct from the true facts that are used in the adjudication of a controversy they are not appropriate for a rule of evidence and best left to the law-making considerations by appellate and trial courts.

Subdivision (b) is in accord with the *Little Cottonwood Water Co.* case, supra, and the substance of Rule 9(1) and (2), Utah Rules of Evidence (1971). Utah law presumes that the law of another jurisdiction is the same as that of the State of Utah and judicial notice has been taken from the law of other states and foreign countries. *Lamberth v. Lamberth*, 550 P.2d 200 (Utah 1976), *Maple v. Maple*, 566 P.2d 1229 (Utah 1977). The Utah court has taken judicial notice under Rule 9(2), Utah Rules of Evidence (1971) of the rules and regulations of the Tax Commission. *Nelson v. State*

cess right to a fair trial *State v. Fulton*, 742 P 2d 1208 (Utah 1987), cert. denied, — U S —, 108 S Ct 777, 98 L Ed 2d 864 (1988)

COLLATERAL REFERENCES

Utah Law Review. — Utah Rules of Evidence 1983, 1985 Utah L Rev 63, 66

Journal of Contemporary Law. — Comment, Victims of Child Sexual Abuse in the Courtroom: New Utah Rules and Their Constitutional Implications, 15 J Contemp L 81 (1989)

A.L.R. — Admissibility of affidavit to impeach witness, 14 A L R 4th 828

Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial, 15 A L R 4th 1043

Instructions to jury as to credibility of child's testimony in criminal case, 32 A L R 4th 1196

Deaf-mute as witness, 50 A L R 4th 1188

Dead man's statutes as affected by Rule 601 of the Uniform Rules of Evidence and similar state rules, 50 A L R 4th 1238

Contingent fee informant testimony in state prosecutions, 57 A L R 4th 643

Witnesses' child competency statutes, 60 A L R 4th 369

Rule 602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Advisory Committee Note. — This rule is the federal rule, verbatim, and embodies the substance of Rule 10 [Rule 19], Utah Rules of Evidence (1971).

NOTES TO DECISIONS

ANALYSIS

Incomplete memory
Cited

Incomplete memory.

This rule merely requires that the witness have had the opportunity and the capacity to

perceive the events in question. Testimony of a witness need not be excluded if the witness's memory of the subject matter of the testimony is less than complete. *State v. Eldredge*, 773 P 2d 29 (Utah 1989)

Cited in *State v. Jones*, 656 P 2d 1012 (Utah 1982)

COLLATERAL REFERENCES

Utah Law Review. — Note, Hypnosis and the Defendant's Right to Testify in a Criminal Case, 1989 Utah L Rev 545

Rule 603. Oath or affirmation.

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Advisory Committee Note. — This rule is the federal rule, verbatim. The oath or affirmation need not be in any special form but only such as to awaken the conscience of the witness and impress the witness with the duty to

testify truthfully. The rule is a modified version of Rule 18, Utah Rules of Evidence (1971)

Cross-References. — Administration and form of oath or affirmation, §§ 78-7-17, 78-24-16 to 78-24-19

ARTICLE VII.

OPINIONS AND EXPERT TESTIMONY.

Rule 701. Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Advisory Committee Note. — This rule is the federal rule, verbatim, and is substantially the same as Rule 19, Utah Rules of Evidence (1971) Rule 56(1), Utah Rules of Evidence (1971), contained similar language

NOTES TO DECISIONS

ANALYSIS

Pregnancy
Relation to expert testimony

Pregnancy.

The admission of a mother's testimony on the subject of gestation period of her pregnancy was not error *Roods v Roods*, 645 P 2d 640 (Utah 1982)

Relation to expert testimony.

Trial court properly admitted testimony of a security guard, who compared a photograph of a footprint to the footprints that he saw at burglarized premises. The fact that a question might be capable of scientific determination does not make lay opinion inadmissible if the provisions of this rule are met. *State v Ellis*, 748 P 2d 188 (Utah 1987)

COLLATERAL REFERENCES

A.L.R. — Ability to see, hear, smell, or otherwise sense, as proper subject of opinion by lay witness, 10 A L R 3d 258

Competency of nonexpert's testimony based on sound alone as to speed of motor vehicle involved in accident, 33 A L R 3d 1405

Admissibility of nonexpert opinion testi-

mony as to weather conditions, 56 A L R 3d 575

Competency of nonexpert witness to testify, in criminal case, based upon personal observation, as to whether person was under the influence of drugs, 21 A L R 4th 905

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise

Advisory Committee Note. — This rule is the federal rule verbatim. Rule 56(2), Utah Rules of Evidence (1971) was substantially the same

Cross-References. — Blood tests to determine parentage, expert testimony, §§ 78-25-18 to 78-25-23, 78-45a-7 to 78-45a-10

Discovery of expert's opinion Rule 26(b)(4) U R C P

Drug paraphernalia expert opinion in determining nature of object as § 58-37a-4

Pretrial conference, consideration of limiting number of expert witnesses, Rule 16, U R C P

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Appeal and Error §§ 691 to 701. **Key Numbers.** — Appeal and Error ⇐ 756, 758 3.
C.J.S. — 5 C.J.S. Appeal and Error §§ 1316 to 1332

Rule 28. Prehearing conference.

The court may direct the attorneys for the parties to appear before the court, a justice, judge, or an appointed referee for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court, justice, judge, or appointed referee shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered, and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

Rule 29. Oral argument.

(a) **In general.** Oral argument will be allowed in all cases unless the court concludes:

- (1) The appeal is frivolous; or
- (2) The dispositive issue or set of issues has been recently authoritatively decided; or
- (3) The facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(b) **Priority of argument.** Cases shall be scheduled for oral argument in accordance with the following list of priorities:

- (1) Appeals from convictions in which the death penalty has been imposed;
- (2) Appeals from convictions in all other criminal matters;
- (3) Appeals from habeas corpus petitions and other post-conviction proceedings;
- (4) Appeals from orders concerning child custody or termination of parental rights;
- (5) Matters relating to the discipline of attorneys;
- (6) Matters relating to applicants who have failed to pass the bar examination;
- (7) Petitions for review of Industrial Commission orders;
- (8) Appeals from the orders of the Juvenile Court;
- (9) Appeals from actions involving public elections;
- (10) Petitions for review of Public Service Commission orders;
- (11) Appeals from interlocutory orders;
- (12) Questions certified to the Supreme Court by a court of the United States;
- (13) Original writ proceedings;
- (14) Petitions for certiorari that have been granted;
- (15) Petitions to review administrative agency orders not included within other categories; and

(16) Any matter not included within the above categories.

(c) **Notice by clerk and request by a party for argument; postponement.** Not later than 30 days prior to the term of court in which a case is to be submitted, the clerk shall give notice to all parties that oral argument is to be permitted, the time and place of oral argument, and the time to be allowed each side. Oral argument shall proceed as scheduled unless all parties waive the same in writing filed with the clerk not later than 15 days from the date of the clerk's notice. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.

(d) **Order and content of argument.** The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records or authorities.

(e) **Cross and separate appeals.** A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross-appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

(f) **Non-appearance of parties.** If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case may be decided on the briefs, or the court may direct that the case be rescheduled for argument.

(g) **Submission on briefs.** By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(h) **Use of physical exhibits at argument; removal.** If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the argument. After the argument, counsel shall remove the exhibits from the courtroom unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

Advisory Committee Note. — The former practice was to presume that argument was waived unless requested. The amendments change the practice to presume that argument is requested unless expressly waived.

The rule incorporates the oral argument priority classification formerly found in the administrative orders of the Supreme Court.

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — The Utah Court of Appeals, 1988 Utah L. Rev. 150

Am. Jur. 2d. — 5 Am. Jur. 2d Appeal and Error §§ 697 to 699

C.J.S. — 5 C.J.S. Appeal and Error § 1401.
Key Numbers. — Appeal and Error ¶ 824

by narrow formalistic interpretations which disregarded the spirit and letter of the section. *Wright v. Union Cent. Life Ins. Co.*, Ind.1940, 61 S.Ct. 196, 311 U.S. 273, 85 L.Ed. 184, 44 Am Bankr.Rep.N.S. 280, rehearing denied 61 S.Ct. 445, 312 U.S. 711, 85 L.Ed. 1142.

2. Findings

Finding that trustee will be able to pay the "economic depreciation" on the secured creditor's equipment so as to approximately preserve their status quo was not clearly erroneous. *In re Bermec Corporation*, C.A.N.Y.1971, 445 F.2d 367.

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a)(7) of this section, of the setoff of any mutual debt and claim that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities;

(7) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by said Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units; or

(8) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; and

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. If the hearing under this subsection is a preliminary hearing—

(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section; and

(2) such final hearing shall be commenced within thirty days after such preliminary hearing.

(f) The court, without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2570.

Historical and Revision Notes

Notes of Committee on the Judiciary, Senate Report No. 95-989. The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

The action commenced by the party seeking relief from the stay is referred to as a motion to make it clear that at the expedited hearing under subsection (e), and at hearings on relief from the stay, the only issue will be the lack of adequate protection, the debtor's equity in the property, and the necessity of the property to an effective reorganization of the debtor, or the existence of other cause for relief from the stay. This hearing will not be the appropriate time at which to bring in other issues, such as counterclaims against the creditor, which, although relevant to the question of the amount of the debt, concern largely collateral or unrelated matters. This approach is consistent with that taken in cases such as *In re Essex Properties, Ltd.*, 430 F.Supp. 1112 (N.D.Cal.1977), that an action seeking relief from the stay is not the assertion of a claim which would give rise to the right or obligation to assert counterclaims. Those counterclaims are not to be handled in the summary fashion that the preliminary hearing under this provision will be. Rather, they will be the subject of more complete proceedings by the trustee to recover property of the estate or to object to the allowance of a claim. However, this would not preclude the party seeking continuance of the stay from presenting evidence on the existence of claims which the court may consider in exercising its discretion. What is precluded is a determination of such collateral claims on the merits at the hearing.

[For additional discussion, see Notes of the Committee on the Judiciary, Senate Report No. 95-989, set out under section 361 of this title.]

Notes of Committee on the Judiciary, House Report No. 95-595. Paragraph (7) [of subsec. (a)] stays setoffs of mutual debts and credits between the debtor and creditors. As with all other paragraphs of subsection (a), this paragraph does

not affect the right of creditors. It simply stays its enforcement pending an orderly examination of the debtor's and creditors' rights.

Legislative Statements. Section 362(a)(1) of the House amendment adopts the provision contained in the Senate amendment enjoining the commencement or continuation of a judicial, administrative, or other proceeding to recover a claim against the debtor that arose before the commencement of the case. The provision is beneficial and interacts with section 362(a)(6), which also covers assessment, to prevent harassment of the debtor with respect to pre-petition claims.

Section 362(a)(7) contains a provision contained in H.R. 8200 as passed by the House. The differing provision in the Senate amendment was rejected. It is not possible that a debt owing to the debtor may be offset against an interest in the debtor.

Section 362(a)(8) is new. The provision stays the commencement or continuation of any proceeding concerning the debtor before the U. S. Tax Court.

Section 362(b)(4) indicates that the stay under section 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental unit's police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

Section 362(b)(6) of the House amendment adopts a provision contained in the Senate amendment restricting the exception to the automatic stay with respect to setoffs to permit only the setoff of mutual debts and claims. Traditionally, the right of setoff has been limited to mutual debts and claims and the lack of the clarifying term "mutual" in H.R. 8200 as passed by the House created an unintentional ambiguity. Section 362(b)(7) of the House amendment permits the issuance of a notice of tax deficiency. The House amendment rejects section 362(b)(7) in the Senate amendment. It would have permitted a particular gov-

16-10-13. Service of process on corporation — Registered agent or division director as agents for receipt of service.

(1) The registered agent appointed by a corporation is the agent of the corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.

(2) Whenever a corporation fails to appoint or maintain a registered agent to this state, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the director of the Division of Corporations and Commercial Code is the agent of the corporation upon whom any process, notice, or demand may be served. Service on the director of the Division of Corporations and Commercial Code of any process, notice, or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of that office, an original and one copy of the process, notice, or demand. In the event any process, notice, or demand is served on the director of the Division of Corporations and Commercial Code, he shall immediately cause one of the copies to be forwarded by registered or certified mail, addressed to the corporation at its registered office. Any service upon the director of the Division of Corporations and Commercial Code shall be returnable in not less than 30 days.

(3) The Division of Corporations and Commercial Code shall keep a record of all processes, notices, and demands served upon it under this section, and shall record the time of the service and its action on the service.

(4) Nothing contained in this section limits or affects the right to serve any process, notice, or demand required or permitted by law to be served upon a corporation in any other manner permitted by law.

History: L. 1961, ch. 28, § 13; 1979, ch. 57, § 2; 1984, ch. 66, § 84; 1985, ch. 178, § 32.

Amendment Notes. — The 1984 amendment substituted references to Division of Corporations and Commercial Code and its director for references to secretary of state throughout the section.

The 1985 amendment substituted "is the agent of the corporation" in Subsection (1) for "shall be an agent of such corporation"; substituted "fails to appoint" near the beginning of Subsection (2) for "shall fail to appoint"; substituted "is the agent of the corporation upon whom any process, notice, or demand may be served" at the end of the first sentence of Subsection (2) for "shall be an agent of such corporation upon whom any such process, notice, or demand may be served"; substituted "an original and one copy of the process, notice, or de-

mand" at the end of the second sentence of Subsection (2) for "duplicate copies of such process, notice, or demand"; deleted "thereof" in the third sentence after "one of the copies"; substituted "any service upon the director" at the beginning of the fourth sentence for "any service so had on the director"; substituted "the time of the service and its action on the service" at the end of Subsection (3) for "therein the time of such service and its action with reference thereto"; substituted "this section limits or affects" near the beginning of Subsection (4) for "this section shall limit or affect"; and made minor changes in phraseology.

Cross-References. — Assumed name, persons doing business under, § 42-2-11.

Personal service upon corporation in state, Rules of Civil Procedure, Rule 4(e)(4).

Service on foreign corporations, § 16-10-111.

31A-2-310

INSURANCE CODE

"agents" for "attorneys" in Subsections (2) and (3), and made minor stylistic changes throughout the section

Compiler's Notes. — The references to

§ 31A-15-101 in Subsection (1)(c) seem incorrect. That section deals with the purposes of Chapter 15. Section 31A-15-102 deals with assisting unauthorized insurers.

NOTES TO DECISIONS

ANALYSIS

Foreign insurance company
—Claims arising within state
Out-of-state claims

Foreign insurance company.

—Claims arising within state.

All legal service against a foreign insurance company for causes of action arising within the state of Utah is to be served on the Utah insurance commissioner. *Gibbons & Reed Co v Standard Accident Ins Co*, 191 F Supp 174 (D Utah 1960).

Out-of-state claims.

Foreign insurer with an office in Utah was served through insurance commissioner of Utah and was required to defend a cause of action arising out-of-state. *Gibbons & Reed Co v Standard Accident Ins Co*, 191 F Supp 174 (D Utah 1960).

COLLATERAL REFERENCES

Utah Law Review. — In Personam Jurisdiction Expanded: Utah's Long-Arm Statute, 1970 Utah L Rev 222

C.J.S. — 44 C J S Insurance §§ 82, 83, 84, 46 C J S Insurance § 1626

A.L.R. — Federal or state law as controlling, in diversity action, whether foreign corporation is amenable to service of process in state, 6 A L R 3d 1103

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 A L R 3d 738

Who is "general" or "managing" agent of foreign corporation under statute authorizing service of process on such agent, 17 A L R 3d 625

Validity, as a matter of due process of state statutes or rules of court conferring in personam jurisdiction over nonresident or foreign corporations on the basis of isolated

business transaction within state, 20 A L R 3d 1201

Construction and application of state statutes or rules of court predicated in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state, 23 A L R 3d 551

Jurisdictional acts described in statutes dealing with insurance contracts, 23 A L R 3d 606

Construction and application, as to isolated acts or transactions, of state statutes or rules of court predicated in personam jurisdiction over nonresidents or foreign corporations upon the doing of an act or upon doing or transacting business or "any" business, within a state, 27 A L R 3d 397

Personal liability of stockholder, officer or agent for debt of foreign corporation doing business in the state, 27 A L R 4th 387

Key Numbers. — Insurance ⇨ 16 26

31A-2-310. Procedure for service of process through state officer.

(1) Service upon the commissioner or lieutenant governor under § 31A-2-309 is service on the principal, if

(a) two copies of the process are delivered personally or to the office of the official designated in § 31A-2-309, and

(b) that official mails a copy of the process to the person to be served according to Subsection (2)(b).

(2) (a) The commissioner and the lieutenant governor shall give receipts for and keep records of all process served through them.

(b) The commissioner or the lieutenant governor shall immediately send by certified mail one copy of the process received to the person to be served at that person's last known principal place of business, residence, or post-office address. The commissioner or the lieutenant governor shall retain the other copy for his files.

(c) No plaintiff or complainant may take a judgment by default in any proceeding in which process is served under this section and § 31A-2-309 until the expiration of 40 days from the date of service of process under Subsection (2)(b).

(3) Proof of service shall be evidenced by a certificate by the official designated in § 31A-2-309, showing service made upon him and mailing by him, and attached to a copy of the process presented to him for that purpose.

(4) When process is served under § 31A-2-310, the words "twenty days" in the first sentence of Rule 12(a) of the Utah Rules of Civil Procedure shall be changed to read "forty days."

History: C. 1953, 31A-2-310, enacted by L. 1985, ch. 242, § 7; L. 1986, ch. 204, § 27. **Amendment Notes.** — The 1986 amendment, effective July 1, 1986, in Subsection (2)(b), deleted "official designated in § 31A-2-309" following "lieutenant governor" in the first sentence and substituted "commissioner or the lieutenant governor" for "official" in the second sentence.

COLLATERAL REFERENCES

C.J.S. — 44 C.J.S. Insurance § 84.
Key Numbers. — Insurance ☞ 26.

31A-2-311. Reciprocal enforcement of foreign decrees.

(1) As used in this section:

(a) "Reciprocal state" means a state whose laws contain procedures substantially similar to those specified in this section for the enforcement of decrees or orders issued by courts located in other states against an insurer authorized to do business in the reciprocal state, and which recognizes Utah as a reciprocal state under its law.

(b) "Foreign decree" means a decree or order of a court located in a reciprocal state, including a United States court located in a reciprocal state against an insurer authorized to do business in Utah.

(2) The commissioner shall determine which states qualify as reciprocal states and shall maintain a list of them.

(b) upon request and if available exhibit his operator's license to any investigating peace officer present and to the person struck or the operator or occupant of or person attending any vehicle or owner of other property damaged in the accident; and

(c) render to any person injured in the collision reasonable assistance, including the transporting, or the making of arrangements for the transporting, of the person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if the transporting is requested by the injured person.

(2) The operator of a vehicle involved in an accident resulting in injury to or death of any person or property damage to an apparent extent of \$400 or more shall immediately and by the quickest means of communication available give notice of the accident to the nearest office of an authorized law enforcement agency.

(3) When the operator of a vehicle is physically incapable of giving an immediate notice of an accident as required in Subsections (1) and (2) and there is another occupant in the vehicle at the time of the accident capable of doing so, the occupant shall give or cause to be given the notice not given by the operator.

(4) When the operator is physically incapable of making a written report of an accident when required under Section 41-6-35 and he is not the owner of the vehicle, then the owner of the vehicle involved in the accident shall within 15 days after becoming aware of the accident make the report not made by the operator.

History: L. 1941, ch. 52, § 21; C. 1943, 57-7-98; L. 1983, ch. 183, § 32; 1987, ch. 138, § 25.

Amendment Notes. — The 1987 amendment redesignated the previously undesignated provisions of this section as amended by Laws 1983, ch. 183, § 32; in Subsection (1), in the introductory paragraph substituted "operator" for "driver," inserted "or other property" following "damage to any vehicle," substituted

"operated" for "driven," in Subsection (1)(a) inserted "to any person involved" at the beginning, and in Subsection (1)(b) inserted "to any investigating peace officer present and," substituted "operator" for "driver," substituted "or owner of other property damaged in the accident" for "collided with and shall," made minor changes in phraseology and punctuation throughout Subsection (1); and added present Subsections (2) through (4).

COLLATERAL REFERENCES

Am. Jur. 2d. — 7A Am Jur 2d Automobiles and Highway Traffic § 294

A.L.R. — Validity and construction of statute making it a criminal offense for the opera-

tor of a motor vehicle not to carry or display his operator's license or the vehicle registration certificate, 6 A L.R.3d 506.

41-6-32. Collision with unattended vehicle or other property — Duties of operator.

The operator of a vehicle which collides with or is involved in an accident with any vehicle or other property which is unattended and which results in damage to the other vehicle or property shall immediately stop and either locate and notify the operator or owner of the vehicle or the owner of other property of the operator's name and address and the registration number of the vehicle causing the damage, or shall attach securely in a conspicuous place on the vehicle or other property a written notice giving the operator's

name and address and the registration number of the vehicle causing the damage. If applicable, the operator shall also give notice under Subsections 41-6-31(2) and (3).

History: L. 1941, ch. 52, § 22; C. 1943, 57-7-99; L. 1977, ch. 269, § 2; 1987, ch. 138, § 26.

Amendment Notes. — The 1987 amendment substituted "operator" for "driver" throughout the section, in the present last sentence substituted "under Subsections 41-6-

31(2) and (3)" for "as provided in Section 41-6-34" omitted the former last sentence, which read "Any person failing to comply with said requirements under such circumstances is guilty of an infraction" and made minor changes in phraseology and punctuation throughout the section

COLLATERAL REFERENCES

C.J.S. — 60 C J S Motor Vehicles § 43

Key Numbers. — Automobiles ⇐ 10

41-6-33, 41-6-34. Repealed.

Repeals. — Section 41-6-33 (L. 1941, ch. 52, § 23, C. 1943, 57-7-100), relating to accidents resulting only in damage to fixtures legally upon or adjacent to a highway, was repealed by Laws 1977, ch. 269, § 6

Laws 1987, ch. 138, § 106, repeals § 41-6-34 as last amended by Laws 1979, ch. 242, § 7, concerning reporting accidents involving injury, death, or damage of \$400 or more. For present provisions, see § 41-6-31

41-6-35. Accident reports — Duty of operator and investigative officer to forward or render.

(1) The department may request any operator of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to the apparent extent of \$400 or more to, within ten days after the request, forward a written report of the accident to the department.

(2) The department may require any operator of a vehicle involved in an accident, of which report is made under Subsection (1), to file supplemental reports when the original report is insufficient in the opinion of the department and may require witnesses of accidents to render reports to the department.

(3) A written accident report is not required under this section from any person who is physically incapable of making a report, during his period of incapacity.

(4) Every peace officer, who in the regular course of duty, investigates a motor vehicle accident described under Subsection (1), shall file a report of the accident with the department within ten days after completing the investigation. The report shall be made either at the time of and at the scene of the accident or later by interviewing participants or witnesses.

(5) The written reports required to be filed with the department by peace officers and the information in them are not privileged or confidential.

History: L. 1941, ch. 52, § 25; C. 1943, 57-7-102; L. 1949, ch. 65, § 1; 1961, ch. 86, § 1; 1969, ch. 106, § 1; 1973, ch. 82, § 1; 1979, ch. 242, § 8; 1986 (2nd S.S.), ch. 4, § 1; 1987, ch. 138, § 27.

Amendment Notes. — The 1986 (2nd S S)

amendment, effective July 1, 1986, inserted "department may request any" and substituted "to within ten days after the request" for "shall within five days after such accident" and "the accident" for "such accident" in Subsection (a), substituted "is made under Subsection (a)" for

COLLATERAL REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d Foreign Corporations § 63

C.J.S. — 20 C.J.S. Corporations § 1960
Key Numbers. — Corporations ☞ 678

PART 8

NUISANCES

76-10-801. "Nuisance" defined — Violation — Classification of offense.

(1) A nuisance is any item, thing, manner, condition whatsoever that is dangerous to human life or health or renders soil, air, water, or food impure or unwholesome.

(2) Any person, whether as owner, agent, or occupant who creates, aids in creating, or contributes to a nuisance, or who supports, continues, or retains a nuisance, is guilty of a class B misdemeanor.

History: C. 1953, 76-10-801, enacted by L. 1973, ch. 196, § 76-10-801.

Boards of health to abate, § 26-24-14
Brothels declared a nuisance, § 47-1-1

Cross-References. — Alcoholic beverages property used in connection with declared nuisance § 32A-13-6

NOTES TO DECISIONS

Civil liability for violation of section.

Defendant could be held liable under the doctrine of nuisance per se for the pollution of plaintiff's culinary water wells caused by the percolation of defendant's toxic formation waters, which were stored on defendant's land, into the subterranean water system that fed plaintiff's wells where the acts of the defendant were in violation of this section and former § 73-14-5, which was in effect at the time.

Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)

Liability for damages for injuries occasioned by fumes, gases, dust, smoke, foul air, and obnoxious odors, being cast upon one's property by another was not absolute, and law did not afford redress for every such discomfort or annoyance, extreme rights in this regard could not be enforced. *Dahl v. Utah Oil Ref. Co.*, 71 Utah 1, 11, 262 P.269 (1927)

COLLATERAL REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d Nuisances § 1, 403

C.J.S. — 66 C.J.S. Nuisances § 8

A.L.R. — Keeping pigs as a nuisance, 2 A.L.R.3d 931

Keeping poultry as nuisance, 2 A.L.R.3d 965

Electric generating plant or transformer station as nuisance, 4 A.L.R.3d 902

Keeping horses as nuisance, 27 A.L.R.3d 627

Operation of incinerator as nuisance, 41 A.L.R.3d 1009

Zoo as a nuisance, 55 A.L.R.3d 1126

Pornoshops or similar places disseminating obscene materials as nuisance, 55 A.L.R.3d 1134

Airport operations or flight of aircraft as nuisance, 79 A.L.R.3d 253

Key Numbers. — Nuisance ☞ 59

76-10-803. "Public nuisance" defined.

(1) A public nuisance is a crime against the order and economy of the state and consists in unlawfully doing any act or omitting to perform any duty, which act or omission either

(a) Annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons, or

(b) Offends public decency, or

(c) Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway, or

(d) In any way renders three or more persons insecure in life or the use of property

(2) An act which affects three or more persons in any of the ways specified in this section is still a nuisance regardless of the extent of annoyance or damage inflicted on individuals is unequal

History: C. 1953, 76-10-803, enacted by L. 1973, ch. 196, § 76-10-803.

Weeds failure to control as maintaining public nuisance, § 4-17-5

Cross-References. — Pornography offenses deemed to offend public decency § 76-10-1210

NOTES TO DECISIONS

ANALYSIS

Canals
Lawful business
Motive or intent
Prescriptive rights

Canals.

Discharge into canal waters used by three or more persons for irrigation and domestic purposes, of water that rendered canal waters unfit for such purposes created public nuisance *North Point Consol Irrigation Co v Utah & Salt Lake Canal Co*, 16 Utah 246, 52 P 168, 40 L R A 851, 67 Am St R 607 (1898)

Lawful business.

Where party so used his property as to annoy, injure, or endanger comfort, repose, health, or safety of three or more persons, his

acts were unlawful and he was liable for them, even though in committing such unlawful acts, he was in pursuit of lawful business and was conducting such business in reasonable and careful manner *People v Burtleson*, 14 Utah 258, 47 P 87 (1896)

Motive or intent.

In determining question of nuisance, motive or intent with which act complained of was committed could not be considered *People v Burtleson*, 14 Utah 258, 47 P 87 (1896)

Prescriptive rights.

There could be no prescriptive right to maintain public nuisance *North Point Consol Irrigation Co v Utah & Salt Lake Canal Co*, 16 Utah 246, 52 P 168, 40 L R A 851, 67 Am St R 607 (1898)

COLLATERAL REFERENCES

Utah Law Review. — Comment Air Pollution, Nuisance Law, and Private Litigation, 1971 Utah L Rev 142

Comment, *State v Rabe* No Preseizure Adversary Hearing Required under Nuisance Theory of Obscenity, 1971 Utah L Rev 582

Am. Jur. 2d. — 58 Am Jur 2d Nuisances §§ 35, 36

C.J.S. — 66 C J S Nuisances § 2

A.L.R. — Pornoshops or similar places disseminating obscene materials as nuisance, 55 A L R 3d 1134

Liability of private landowner for vegetation obscuring view at highway or street intersection 69 A L R 4th 1092

Key Numbers. — Nuisance ⇐ 59

action. If the action is instituted, however, to abate the distribution or exhibition of material alleged to offend public decency, the action shall be in the form prescribed by the Rules of Civil Procedure of Utah for injunctions, but no restraining order or injunction shall issue except upon notice to the person sought to be enjoined; and that person shall be entitled to a trial of the issues commencing within three days after filing of an answer to the complaint and a decision shall be rendered by the court within two days after the conclusion of the trial. As used in this part, "distribute," "exhibit," and "material" mean the same as provided in section 76-10-1201.

History: C. 1953, 76-10-806, enacted by L. Prosecution of pornography offenses by
1973, ch. 196, § 76-10-806; 1977, ch. 92, § 1. county or city attorney, § 76-10-1215.

Cross-References. — Actions to abate nuisances, § 78-38-1 et seq

COLLATERAL REFERENCES

Am. Jur. 2d. — 58 Am Jur 2d Nuisances
§§ 50, 232, 412

C.J.S. — 66 C.J.S Nuisances § 111
Key Numbers. — Nuisance ☞ 79.

A.L.R. — Business interruption, without
physical damage, as actionable, 65 A L R 4th
1126

76-10-807. Reserved.

76-10-808. Relief granted for public nuisance.

If the existence of a public nuisance as defined by Subsection 76-10-803(1)(b) is admitted or established, either in a civil or criminal proceeding, a judgment shall be entered which shall:

(a) Permanently enjoin each defendant and any other person from further maintaining the nuisance at the place complained of and each defendant from maintaining such nuisance elsewhere;

(b) Direct the person enjoined to surrender to the sheriff of the county in which the action was brought any material in his possession which is subject to the injunction, and the sheriff shall seize and destroy this material; and

(c) Without proof of special injury direct that an accounting be had and all monies and other consideration paid as admission to view any motion picture film determined to constitute a public nuisance, or paid for any publication determined to constitute a public nuisance, in either case without deduction for expenses, be forfeited and paid into the general fund of the county where the nuisance was maintained.

*See also
§ 78-3-1*

History: C. 1953, 76-10-808, enacted by L.
1977, ch. 92, § 2.

Cross-References. — Pornographic motion
picture films, § 76-10-1216 et seq

COLLATERAL REFERENCES

Utah Law Review. — Attorney's Fees in
Utah, 1984 Utah L Rev 553
Am. Jur. 2d. — 55 Am Jur 2d Mortgages
§ 625 et seq
C.J.S. — 59 C J S Mortgages § 812
A.L.R. — Attorney's compensation in ab-
sence of contract or statute fixing amount, 57
A L R 3d 475
Attorney's fees in matters involving real
property mortgages and deeds of trust, 58
A L R 3d 215
Key Numbers. — Mortgages ⊃ 581(5)

CHAPTER 38

NUISANCE, WASTE, AND OTHER DAMAGE

| Section | | Section | |
|-----------|--|-----------|--|
| 78-38-1 | "Nuisance" defined — Right of ac- tion for — Judgment | | or native vegetation into or through the state. |
| 78-38-2 | Right of action for waste — Dam- ages | 78-38-4 8 | Exemptions |
| 78-38-3 | Right of action for injuries to trees — Damage | 78-38-4 9 | Violation as misdemeanor |
| 78-38-4 | Limited damages in certain cases | 78-38-5 | Manufacturing facility in opera- tion over three years — Limited application of nuisance provi- sions |
| 78-38-4 5 | Proof of ownership required to har- vest or transport forest products or native vegetation — Defini- tions — Requirements for proof of ownership | 78-38-6 | "Manufacturing facility" defined |
| 78-38-4 6 | Enforcement | 78-38-7 | Agricultural operation of over three years duration — Appli- cation of nuisance provisions limited |
| 78-38-4.7 | Transportation of forest products | 78-38-8 | "Agricultural operation" defined |

78-38-1. "Nuisance" defined — Right of action for — Judg- ment.

Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by [the] nuisance; and by the judgment the nuisance may be enjoined or abated, and damages may also be recovered.

History: L. 1951, ch. 58, § 1; C. 1943,
Supp., 104-38-1.

Cross-References. — Criminal nuisances,
§ 76-10-801 et seq

Municipal power to declare and abate nui-
sances, § 10-8-60