

1990

Lon S. Nield, Patricia L. Nield, November Investors,  
V. Mark Peterson and Nancy L. Peterson v. BJ Rone,  
Ronald A. Bieber, Rab Ranch, James A. Gregg, and  
David A. Bateman : Brief in Opposition to  
Certiorari

Utah Supreme Court

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BRIEF

UTAH COURT OF APPEALS  
BRIEF

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AIR  
FILE NO

900187CA

DOCKET NO. ~~910135~~

IN THE UTAH SUPREME COURT

LON S. NIELD; PATRICIA L. NIELD; )  
NOVEMBER INVESTORS, a Utah limited )  
partnership; and V. MARK PETERSON )  
and NANCY L. PETERSON, as general )  
partners of and on behalf of )  
November Investors, )

Plaintiffs/Respondents, )

v. )

B. J. RONE; RONALD A. BIEBER; RAB )  
RANCH, a business entity; JAMES A. )  
GREGG; and David A. Bateman in his )  
capacity as Sheriff of Utah )  
County, Utah, )

Defendants/Petitioners. )

Case No. 910135

Priority No. 16

BRIEF IN OPPOSITION TO  
WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI FROM FINAL  
DECISION OF THE UTAH COURT OF APPEALS

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UTAH

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**IN THE UTAH SUPREME COURT**

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### STATEMENT OF THE CASE

Plaintiffs Lon S. Nield and Patricia L. Nield ("Niels") and V. Mark Peterson and Nancy L. Peterson ("Petersons") initiated this action against petitioners Rone, Gregg and Bieber, seeking to permanently enjoin the efforts of Rone, Gregg and Bieber to foreclose on the Nield and Peterson homes pursuant to certain purported judgment liens. Rone, Gregg and Bieber counterclaimed, seeking enforcement of their purported judgment liens. Rone, Gregg and Bieber also filed a third-party complaint asserting various claims against additional parties.

The trial court entered partial summary judgment in favor of the Niels and Petersons in August, 1989, permanently enjoining Rone, Gregg and Bieber from attempts to foreclose on the Nield and Peterson homes. This ruling was certified as a final judgment pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. This judgment was affirmed by the Utah Court of Appeals, under its Rule 31 calendar, on January 28, 1991. Petitioners thereupon filed this Petition for Writ of Certiorari.

The relevant facts underlying this litigation are as follows:

In 1983, Rone, Gregg and Bieber each initiated actions in the Fourth Judicial District Court of Utah County, State of Utah, against Fred and Kurt Vreeken ("Vreekens") and a number of entities alleged to be fictitious names or sole proprietorships of the Vreekens. In each case, Rone, Gregg and Bieber alleged that the Vreekens had defrauded Rone, Gregg and Bieber of investments made with the Vreekens. In each case, Rone, Gregg and Bieber entered default judgment against several of the entities named as

defendants, but no judgment has ever been entered as to the remaining defendants in any of the three actions. [See R. 256-57, 273-74, and 295-96.]

On May 1, 1984, Judge Ballif of the Fourth District Court ruled that Rone had not properly effected service of process on the defendants in Rone's action. Thus, Rone's default judgment in that action was invalid. [R. 259-64.] Judge Ballif's ruling was affirmed by the Utah Court of Appeals in May, 1988, in Demetropoulos v. Vreeken, 754 P.2d 960 (Utah Ct. App.), cert. denied 765 P.2d 1278 (1988)<sup>1</sup>.

On September 15, 1987, three years after Judge Ballif had held Rone's default judgment to be invalid, Rone, Gregg and Bieber caused the clerk of the Fourth Judicial District Court of Utah County, Utah, to issue executions under the Rone, Gregg and Bieber judgments against, among other things, the homes of the Nields and the Petersons. [R. 353-58.] Neither the Nields nor the Petersons had been named as parties to the lawsuits initiated against the Vreekens by Rone, Gregg and Bieber. The Nields and Petersons are not named as judgment debtors in the Rone, Gregg and Bieber judgments. Utah County records do not reflect that the Vreekens have ever held an interest in the Nield and Peterson properties, nor do Utah County records show that any of the parties

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<sup>1</sup> Petitioners have attached to their brief relevant orders and rulings as required by Rule 49(a)(10) of the Utah Rules of Appellate Procedure. The Nields and Petersons, therefore, have not duplicated that effort. Petitioners have, however, included only a partial copy of the Demetropoulos v. Vreeken opinion in their Appendix. The full text of that decision is set forth in the Appendix to this brief.



named in the Rone, Gregg and Bieber lawsuits have ever held an interest in the Nield and Peterson properties. [R. 317-22.] Indeed, at the initiation of Rone's lawsuit, Rone's attorney submitted an affidavit to the court in support of Rone's petition for a pre-judgment writ of attachment. In this affidavit, Rone's attorney attested that his examination of Utah County records revealed that none of the individuals or entities named as defendants in Rone's action owned any real property in Utah County. [R. 432-37.] Until the Utah County Sheriff posted notices of a sheriff's sale on the doors to their homes, the Nields and Petersons had no knowledge of the Vreekens' business dealings or the Rone, Gregg and Bieber judgments. [R. 325-27; 349-51.]

In seeking to enjoin Rone, Gregg and Bieber from foreclosing upon their homes, the Nields and Petersons argued that: (1) the Rone, Gregg and Bieber judgments were not valid because Rone, Gregg and Bieber failed to effect service of process as required under the Utah Rules of Civil Procedure; and (2) the Rone, Gregg and Bieber judgments were not final judgments and, therefore, gave rise to no judgment liens against any real property, including the homes of the Nields and Petersons. When Rone, Gregg and Bieber appealed the summary judgment against them to the Utah Court of Appeals, the Nields and Petersons moved the Court of Appeals to award them fees and costs incurred in the appeal because the Rone, Gregg and Bieber appeal was frivolous. The Utah Court of Appeals agreed, and awarded these fees and costs to the Nields and Petersons.

### ARGUMENT

In their Brief of Respondents to the Court of Appeals, the Nields and Petersons analyzed in detail the reasons why the district court properly granted summary judgment in their favor. That brief, likewise, contains a detailed statement of the reasons why an award of costs of fees in favor of the Nields and Petersons was appropriate. The Nields and Petersons will not, therefore, repeat that analysis, but instead will provide this Court with only a brief summary of these reasons and urge the Court to consult respondents' brief in the court below if the Court desires a fuller analysis of the issues.

#### I. ISSUES SURROUNDING THE VREEKENS' USE OF PSEUDONYMS ARE IRRELEVANT TO THIS LITIGATION.

Throughout this litigation, Rone, Gregg and Bieber have made a variety of arguments regarding the Vreekens' use of pseudonyms in their business dealings. [Brief of Petitioner, at 7-11, 15-17.] The point of those arguments has rarely been clear. Whether the Vreekens used a variety of false identities in order to defraud investors is simply irrelevant to the question of whether Rone, Gregg and Bieber have secured valid and final judgments against anyone that would allow them to execute on property allegedly owned by the Vreekens. Certainly, any relevant issues relating to the Vreekens' use of false identities should be raised by Rone, Gregg and Bieber in litigation against the Vreekens, rather than in litigation against innocent third parties such as the Nields and Petersons. However, petitioners have never bothered to secure judgments against the Vreekens.

## II. THE RONE, GREGG AND BIEBER JUDGMENTS ARE NOT VALID JUDGMENTS.

The Rone judgment was declared invalid by Judge Ballif of the Fourth District in 1984, a judgment that was affirmed by the Utah Court of Appeals in Demetropoulos v. Vreeken, 754 P.2d 960 (Utah Ct. App.) cert. denied, 765 P.2d 1278, (1988). Thus, this state's highest courts have already ruled that the Rone judgment is invalid. It is simply incredible that in defiance of these rulings, Rone has attempted to enforce that judgment by foreclosing on the homes of innocent third parties and continues to demand relitigation on this issue. [Brief of Petitioner, at 11.]

The reasons why service of process was defective in the Rone case have been described in detail in the Court of Appeals' opinion in Demetropoulos v. Vreeken. Exactly the same factual defects exist with respect to service of process in the Gregg and Bieber cases. The same constable effected service of process in each case, and in each case, the constable determined that service would be made on Keith or Chris Vreeken as agents for the entities named in the complaints, based on the constable's guess that Keith and Chris Vreeken were somehow connected with Fred Vreeken's business. [R. 1201-25.] A judgment, final after appeal, has been rendered in the Rone case that the constable's guess that an individual was somehow involved in a business is insufficient to establish that individual as a proper agent for service of process. Exactly the same record exists regarding service of process in the Gregg and Bieber actions.

In sum, the Utah Court of Appeals committed no error that would call for this Court's review in affirming that service of process was not effectively made in any of the Rone, Gregg or Bieber lawsuits and that Rone, Gregg and Bieber do not, therefore, have valid judgments that would support their execution efforts.

### III. THE RONE, GREGG AND BIEBER JUDGMENTS ARE NOT FINAL JUDGMENTS.

Under Rule 54(b) of the Utah Rules of Civil Procedure, a judgment is not final unless it resolves all claims against all parties, unless a judgment against less than all parties or as to less than all claims has been certified as final pursuant to Rule 54(b). Kennedy v. New Era Industries, Inc., 600 P.2d 534, 536-37 (Utah 1979). It is undisputed that the Rone, Gregg and Bieber default judgments were judgments entered as to less than all parties and that those judgments were not certified pursuant to Rule 54(b).

Courts have uniformly held that a judgment as to less than all claims or all parties that has not been certified as final pursuant to Rule 54(b), does not permit execution on the judgment and does not give rise to a judgment lien. Bank of Lincolnwood v. Federal Leasing, Inc., 622 F.2d 944, 951 (7th Cir. 1980); Redding & Co. v. Russwine Construction Corp., 417 F.2d 721, 727 (D.C. Cir. 1969); Gauthier v. Crosby Marine Service, Inc., 590 F. Supp. 171, 176 (E.D. La. 1984); City of Salina v. Star B, Inc., 11 Kan. App. 2d 639, 731 P.2d 1290, 1294, aff'd, 739 P.2d 933 (Kan. 1987); Arizona Farmers Prod. Credit Ass'n. v. Stewart Title & Trust of Tucson, 24 Ariz. App. 5, 535 P.2d 33, 35 (1975). Petitioners have

presented no contrary authority that would suggest that a judgment that does not satisfy the finality requirements of Rule 54(b) is enforceable. Thus, the Court of Appeals committed no error in affirming that the Rone, Gregg and Bieber judgments are not final judgments and gave rise to no judgment liens that would allow Rone, Gregg and Bieber to execute against the Nield and Peterson homes.

IV. THE RONE, GREGG AND BIEBER APPEAL REMAINS FRIVOLOUS  
AND WARRANTS A CONTINUED IMPOSITION OF SANCTIONS.

The Utah Court of Appeals concluded that the Rone, Gregg and Bieber appeal was so lacking in merit that Rone, Gregg and Bieber, rather than the Nields and Petersons, should bear the expenses incurred by the Nields and Petersons in the appeal. In their appeal to this Court, Rone, Gregg and Bieber accuse the Court of Appeals panel with a "nonchalant" attitude toward the appeal and "ignorance" of the briefs. [Brief of Petitioner, at 32-33.] These charges are unsubstantiated, and improperly demean both the Court and counsel. Rone, Gregg and Bieber point to no specifics in which they believe the Court of Appeals erred in awarding fees and costs.

The brief summary of arguments provided above hopefully demonstrates that the positions adopted by Rone, Gregg and Bieber in this litigation are without legal merit. Indeed, the attempt of Rone to collect a judgment from innocent third parties in defiance of the fact that the courts of this state have declared his judgment to be invalid constitutes the clearest possible abuse of the judicial system.

The appeal of Rone, Gregg and Bieber to the Utah Court of Appeals was without merit, the Utah Court of Appeals so held

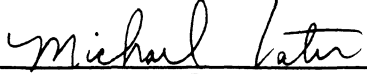
and, therefore, awarded the Nields and Petersons costs and attorney's fees incurred in that appeal. The case of Rone, Gregg and Bieber has gained no merit in being pressed one more level to an appeal before this Court. The Nields and Petersons, therefore, respectfully move this Court to deny Rone's, Gregg's and Bieber's Petition for Writ of Certiorari and to award the Nields and Petersons their costs and attorney's fees incurred in preparing this reply brief on the ground that the Rone, Gregg and Bieber appeal continues to be without merit.

#### CONCLUSION

The Nields and Petersons respectfully request this Court to deny Rone's, Gregg's and Bieber's Petition for Writ of Certiorari. The ruling of the Utah Court of Appeals that the Rone, Gregg and Bieber judgments are not valid or final and can, therefore, support no judgment liens against the Nield and Peterson homes was clearly correct. The merits of the case are so clear that the Court of Appeals likewise correctly concluded that an imposition of sanctions under Rule 33 of the Utah Rules of Appellate Procedure was appropriate. Finally, the Nields and Petersons respectfully move this Court to confirm the judgment of the Court of Appeals by awarding further sanctions under Rule 33 to reimburse the Nields and Petersons for their fees and costs incurred in the preparation of this brief.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of May, 1991.

KIMBALL, PARR, WADDOUPS, BROWN & GEE

  
\_\_\_\_\_  
MICHAEL M. LATER  
Attorneys for Respondents

## APPENDIX



Dale and Kathy  
DEMETROPOULOS, Plaintiffs,

v.

Fred VREEKEN, et al., Defendants.

Deseret Bank, Garnishee.

B.J. RONE, Plaintiff in Intervention  
and Appellant,

v.

Dale and Kathy DEMETROPOULOS,  
Defendants in Intervention and  
Respondents.

No. 860031-CA.

Court of Appeals of Utah.

May 11, 1988.

Creditors disputed relative priority of their prejudgment writs of attachment and garnishment. The Fourth District Court, Utah County, George F. Ballif, J., held for first creditor, and appeal was taken. The Court of Appeals, Orme, J., held that even if judgment creditors' prejudgment writ of attachment was invalid, their postjudgment writ of garnishment had priority over second creditor's prejudgment writ of garnishment where second creditor's judgment against debtors was invalid for lack of jurisdiction due to insufficiency of service of process.

Affirmed.

Jackson, J., concurred and filed opinion.

### 1. Appeal and Error ¶766

Court of Appeals would reach merits of appeal notwithstanding inadequacies of appellant's brief. Court of Appeals Rule 24(k).

1. "Inadequate appellate briefs which do not significantly assist the Court in disposing of the case before it have proven to be a significant problem. In order to alleviate this concern, this Rule clearly specifies the required contents and order of each brief." Utah R.App.P. 24 advisory committee note. See Note 3, *infra*.

2. "It may be said that a brief is as effective as it is helpful in deciding the question or questions

### 2. Garnishment ¶107

Even if judgment creditors' prejudgment writ of attachment was invalid, their postjudgment writ of garnishment had priority over second creditor's prejudgment writ of garnishment for second creditor's judgment against debtors was invalid for lack of jurisdiction due to insufficiency of service of process; second creditor's prejudgment writ of garnishment was provisional remedy which did not itself entitle second creditor to provisionally garnished property. Rules Civ.Proc., Rule 64D(a)(i).

George M. McCune, Salt Lake City, for appellant, Rone.

Robert H. Wilde, Murray, for respondent, Demetropoulos Cook & Wilde.

Before ORME, JACKSON and  
BILLINGS, JJ.

### OPINION

ORME, Judge:

This case involves a dispute over the validity of respondents' prejudgment writ of attachment and the priority of appellant's prejudgment writ of garnishment. Despite the inadequacy of appellant's brief, we reach the merits of his appeal and affirm.

### INADEQUACY OF APPELLANT'S BRIEF

While numerous issues are raised on appeal, appellant's brief has not been of much help to the court in disposing of the case before it.<sup>1</sup> The purpose of a brief is to enlighten the court and elucidate the issues rather than confuse the court and obscure the issues.<sup>2</sup> In this respect, one court has

presented. Hence, the crucial importance of properly phrasing or stating the question or issue raised on the appeal cannot be overemphasized. By a proper presentation of pertinent authority, counsel should demonstrate and persuade the court that the answer submitted in the brief is warranted, if not absolutely required, by the governing principles of law." *Re, Effective*

observed that "[i]f the court is not supplied with the proper tools to decide cases, then extremely valuable time, already severely rationed, must be diverted from substantive work" into less productive tasks. *Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404, 407 (3d Cir.1980).

Counsel should be aware that appellate courts are beginning to overcome their trepidation about dismissing appeals and imposing sanctions for failure to comply with these procedures. For example, the court in *Kushner*, while acknowledging the "institutional" and "precedential" impact of its decision, found that counsel's "refusal, failure or unwillingness to master [the court's] procedures" necessarily required dismissal of the appeal and imposition of sanctions for failure to file an appendix in conformity with court rules. *Id.* at 407. More recently, this court chose to disregard an inadequate brief and premised its affirmance, in part, on the failure of the brief to comply with our rules. *Koulis v. Standard Oil Co.*, 746 P.2d 1182, 1185 (Utah Ct.App.1987).

The Rules of the Utah Court of Appeals set forth the general requirements to be observed by litigants bringing appeals in this court. Rule 24(k)<sup>3</sup> requires that all briefs "be concise, presented with accuracy, logically arranged with proper headings, and free from burdensome, irrelevant, immaterial or scandalous matters." While appellant's brief is free from "scandalous matters," it is not concise, logically arranged, or free from burdensome material.

Appellant's brief begins with a laborious, ten-page Statement of Facts. The state-

ment of facts is little more than a catalogue of each pleading and paper generated by the parties or the court, regardless of how inconsequential it might be, and accordingly the statement is burdened with minutia. The statement of facts contains unhelpful citations to the thousand-plus page record, such as "See pleading entitled Pre-Judgment Writ of Garnishment with answers to interrogatories dated April 25, 1983, in the court file" and "See entire court file, + R169." Confusion is engendered in this multiparty case by inconsistent references to the parties—sometimes by their names, sometimes by their designation at trial, and sometimes by their designation on appeal. See R.Utah Ct.App. 24(d).

The substance of appellant's first of nine points, mercifully reduced from some twenty identified in his docketing statement, is obscured within the 135 words it takes to make it. Point I, by no means unique among appellant's points, is captioned as follows:

DEMETROPOULOS' PRE-JUDGMENT WRIT OF ATTACHMENT AND PROCEEDINGS THEREON WERE SUBSTANTIVELY INCORRECT AND VOID BECAUSE THE WRIT AND PROCEEDINGS THEREON WERE UNAMENDABLY DEFECTIVE BECAUSE A RETURN AND INVENTORY WAS NOT FILED FOR 7 MONTHS INSTEAD OF WITHIN 20 DAYS AS REQUIRED BY RULE 64C(h), A DETAILED INVENTORY WAS NOT FILED AS REQUIRED BY RULE 64C(h), THE SERV-

effective date, all appellate procedure ... including cases presently in process." Utah R.App.P., introductory note of Supreme Court Advisory Committee on the Rules of Appellate Procedure. While the new rules were not effective until January 1985, they were prepared in draft form and circulated among the bar for comment and information well in advance of their effective date.

We acknowledge that under former Utah R.Civ.P. 75(p), which was in effect when appellant's brief was filed, the requirements for briefing were phrased somewhat differently. Nonetheless, even under that rule appellant's brief is deficient.

*Legal Writing and the Appellate Brief*, Case & Comment, July-Aug. 1984, at 9, 18.

3. Although our citations are to Rule 24 of the Rules of the Utah Court of Appeals, effective January 13, 1987, that rule does not differ from Rule 24 of the Utah Rules of Appellate Procedure, effective January 1, 1985. While it is true that appellant's brief was filed a few weeks before the Utah Rules of Appellate Procedure went into effect, it is also true that the problems inherent in the transition from the prior rules to the new appellate rules were anticipated. It was intended that "unless there is substantial prejudice in a particular case which results from the application of or compliance with these Rules, the Rules shall govern as of the

ING OFFICER FAILED TO ASK FOR A MEMORANDUM OF CREDITS ATTACHED AS REQUIRED BY RULE 64C(h), NO DEFENDANTS WERE SERVED WITH PLEADINGS WITHIN 10 DAYS OF ISSUANCE OF THE PRE-JUDGMENT ATTACHMENT IN A WAY ALLOWED BY RULE 4, AND THE WRIT THEREFORE AUTOMATICALLY DIED A JUDICIAL DEATH AT THE END OF ITS 10-DAY LIFE, AND GARNISHMENT UNDER RULE 64D WAS THE APPROPRIATE WRIT TO ISSUE TO LIEN PROPERTY IN THE HANDS OF THIRD PARTIES RATHER THAN ATTACHMENT UNDER RULE 64C.

When Point I is dissected, it obviously concerns several issues. The argument under Point I is a disjointed presentation of abstract legal doctrines pertaining to garnishment and attachment. Cases are quoted and checklists from legal encyclopedias provided, with scant attention given to the facts of the instant matter and no actual analysis of those facts in light of the legal authorities excerpted. Appellant invites us to draw what he apparently regards as obvious conclusions, ending the argument under Point I with: "In the instant case, the Pre-judgment Writ of Attachment of Respondents can not have survived all of the above defects. The cites to the record made in the Statement of Facts above clearly shows that." Difficulty in following the argument is compounded by the lack of a summary of arguments as required by Rule 24(a)(8).<sup>4</sup>

4. Rule 24(a)(8), Rules of the Utah Court of Appeals, requires the brief of appellant to contain "[a] summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged."

5. Judge Re has noted in this respect that "it is counsel's responsibility to point out the error and to demonstrate that it was reversible because it affected the substantial rights of the appellant." Re, *Effective Legal Writing and the Appellate Brief*, Case and Comment, July-Aug. 1984, at 9, 18.

We concede that not every brief filed is in strict compliance with our rules. Nor is every brief we see, any more than every opinion we write, a masterpiece of legal writing. Ordinarily, however, the briefs do enable us to understand, with varying degrees of effort, what particular errors were allegedly made, where in the record those errors can be found, and why, under applicable authorities, those errors are material ones necessitating reversal or other relief.<sup>5</sup> While appellant's task has no doubt been complicated by the convoluted procedural posture of the case, appellant's brief fails to give us much help in finding the keys to understanding it.<sup>6</sup>

[1] Under Rule 24(k), briefs which are not in compliance with the requirements of our rule or are otherwise inadequate may be disregarded or stricken by the court and attorney fees can be imposed. Sympathetic to the *Kushner* court's view that "[w]e can no longer afford the effort and time to prepare counsels' case and to supply counsels' record deficiencies," 620 F.2d at 407 (quoting *United States v. Somers*, 552 F.2d 108, 115 (3d Cir.1977)), when this time can be "better spent in considering the merits of cases that are presented to us in proper form," 620 F.2d at 407, we have considered dealing with the brief in one of the ways provided in Rule 24(k). While we can be expected to become less timid in this regard over time—and as we recognize that a brief which fails to do its job is, in a sense, its own sanction—we decline to impose Rule 24(k) sanctions in this case and turn to the merits of the appeal.<sup>7</sup>

6. Our confusion might have been alleviated through oral argument, but no request was made pursuant to R.Utah Ct.App. 29(b) and no argument held. Nor did appellant submit a reply brief which might also have clarified the issues.

7. This approach is not inconsistent with this court's disposition of *Koullis v. Standard Oil Co.*, 746 P.2d 1182 (Utah Ct.App.1987). In *Koullis*, a unanimous panel found appellant's brief inadequate under Rule 24 and therefore determined to "sua sponte disregard Koullis' brief on appeal. We also assume the correctness of the judgment below, and find that Katherine Koullis ... has failed to come forward with any legally cognizable reason to excuse her delayed discovery of

MERITS OF APPEAL

Appellant has set forth various "facts" in his brief. He has not, however, "marshall[ed] all the evidence in support of the trial court's findings and then demonstrate[d] that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings." *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). Accordingly, "we take as our starting point the trial court's findings<sup>8</sup> and not [appellant's] recitation of the facts." *Id.*

Respondents Dale and Kathy Demetropoulos filed their action against various defendants and obtained a prejudgment writ of attachment. The same was served on Deseret Bank on April 12, 1983, as Deseret Bank held certain accounts in the names of some of the defendants. Appellant B.J. Rone, a creditor of some or all of these same defendants, then filed his own civil action and obtained a prejudgment writ of garnishment. He served the bank eleven days later. Before respondents' writ expired, it was extended twice, the second time indefinitely, "pending a request by the Defendants to have the matter heard." Respondents obtained judgment by default against defendants and, in execution of the judgment, promptly served the bank with a post-judgment writ of garnishment. Appellant obtained a default judgment in the action he filed a few weeks later.

Appellant intervened in the action respondents filed to assert his entitlement to the accounts.<sup>9</sup> Intervention was denied by the district court, but was subsequently permitted pursuant to a writ of mandamus issued by the Utah Supreme Court. Appel-

lant's initial foray into the action was subsequently nullified because of his failure to comply with Utah R.Civ.P. 24(c) following issuance of the writ of mandamus. Various papers filed by him were stricken by court order because he had not first filed a complaint in intervention and paid the necessary filing fee. These oversights were ultimately corrected. The ancillary proceeding which was begun with appellant's complaint in intervention ultimately culminated in a judgment dismissing that complaint. It is from that judgment that appellant Rone appeals.

[2] Appellant claims priority to the accounts in question due to various alleged deficiencies in connection with respondents' prejudgment writ of attachment. Respondents strive to demonstrate that their prejudgment writ was proper in every material respect, but also attack the validity of appellant's prejudgment writ of garnishment and his default judgment. Their basic position is that even if their prejudgment writ was flawed, appellant's has come to have no force or effect, leaving respondents' post-judgment writ of garnishment the first, clearly valid levy on the accounts held by Deseret Bank.

The trial court's findings support the conclusion that appellant's prejudgment writ of garnishment does not have precedence over respondents' post-judgment writ of garnishment, making it unnecessary for us to decide whether respondents' prejudgment writ of attachment was valid.

Appellant purported to serve the defendants he named in his action, including the

the alleged fraud." *Id.* at 1185. Nonetheless, the panel was apparently not comfortable in premising its affirmance solely on that ground and went on to conclude that affirmance was also warranted on statute of limitation grounds. *Id.* at 1185-86.

8. We do so only insofar as the findings of fact, found both in the court's memorandum decision and its formal "Findings of Fact," are really that. Some of the "facts" set forth in the findings, prepared by respondents' counsel, are actually conclusions of law or else so broadly phrased as to be unhelpful. Finding #3, for example, reads as follows: "That the Plaintiffs' Prejudgment Writ of Attachment was substan-

tively and procedurally proper and correct in all relevant respects."

9. Appellant and respondents were victims of the same investment scam. It is regrettable that, having both succeeded in finding a liquid asset of defendants at about the same time, they were unable to devise an equitable method of sharing the prize rather than engaging in a costly, "winner-take-all" contest. Astoundingly, in view of the modest size of the garnished accounts and amounts invested, their procedural battles generated some seven hundred pages in court filings.

defendants whose accounts were garnished, by service upon one Keith Vreeken, who was not himself named as a defendant.<sup>10</sup> However, the court noted in its memorandum decision that "[n]o proof exists in the record other than the constable's guess that Keith Vreeken was the agent of or had any managerial control for the business entities" whose accounts were seized. The court formally found that Keith Vreeken was not "an officer, managing agent, general agent or any other agent authorized to receive service for any relevant Defendant herein nor that he was a clerk, cashier, chief clerk [or] person having the management, direction or control of any property of any such Defendant." There is adequate support in the record for this finding. The defendants in question were found to be "sole proprietorships," not corporations, and no assumed name certificates or filings of any sort had been made concerning them. Thus, no public record showed that Keith Vreeken was registered agent for them or otherwise affiliated with them. The bank's representative testified that Keith Vreeken was not on the signature cards for the accounts, although others with that same last name apparently were.<sup>11</sup>

Appellant disputes the finding concerning Keith Vreeken's status, but also contends that any problems with his service of process on the defendants are inconsequential since service of his prejudgment writ of garnishment was duly made on the bank. This fact does not save appellant. A prejudgment writ of garnishment is a provisional remedy only, "available as a means

of attachment of intangible property ... before judgment, in cases in which a writ of attachment is available under Rule 64C." Utah R.Civ.P. 64D(a)(i). Such a prejudgment writ merely commands the garnishee to retain the property "until further order of the court." Utah R.Civ.P. 64D(e)(i). Only if the plaintiff ultimately obtains a valid judgment against the defendant is he or she entitled to some or all of the provisionally garnished property.<sup>12</sup> See Utah R.Civ.P. 64D(j). See also Utah R.Civ.P. 64C(k).

In this case, the court properly concluded that the default judgment obtained by appellant in the action he filed was invalid for lack of jurisdiction due to the insufficiency of service of process on the defendants in that action. The provisional remedy of a prejudgment writ of garnishment in that same action ceased to have any further effect upon entry of that "judgment"<sup>13</sup> and could be properly disregarded by the court in determining who was entitled to the accounts, leaving respondents entitled to the accounts pursuant to their post-judgment writ of garnishment.

One further point raised by appellant merits comment. Appellant contends that the court erred in not granting his post-trial motion to amend the return of service on Keith Vreeken. It is suggested that if the return were amended, it would demonstrate that service on the defendants was actually proper, meaning appellant's judgment was valid and his prejudgment writ entitled to recognition. We are not per-

10. Appellant named as defendants Kurt Vreeken, an individual, doing business under various assumed names; Fred Vreeken, an individual, doing business under those same names; "business entities" corresponding to Kurt and Fred Vreeken's assumed names; John Andrews, Rick Ramsey and Jerry Pitts, under various assumed names; Financial Development Group, a business entity; and "several John Does, whose names are not yet known." The Deseret Bank accounts stood in the names under which Kurt and Fred Vreeken allegedly did business.

11. It is worth noting that one of them, Kurt Vreeken, had been served by the constable used by appellant on at least one prior occasion.

12. "[G]arnishment to enforce a final judgment should be distinguished from the provisional remedy of garnishment before trial, which is aimed at preserving assets of the debtor until a final decision can be had on the merits." D. Dobbs, *Remedies* 11 (1973).

13. As provided in Rule 64A, appellant's prejudgment writ of garnishment recited that it would expire in ten days from issuance unless extended. Utah R.Civ.P. 64A(3). Defendants did not appear at the hearing on whether the writ should be continued and, accordingly, by order entered at that hearing, the writ was continued "in full force and effect during the pendency [of appellant's action] or until further order of the court."

suaed. Any error in disallowing the amendment was harmless since the constable testified at length concerning the circumstances of service on Keith Vreeken. Accordingly, all relevant information was before the court anyway. Moreover, we find it difficult to see how appellant can complain in this appeal about a ruling on a motion that would have been properly raised, if at all, in another action, namely the one he brought and in which the return was filed.

The judgment appealed from is affirmed.

BILLINGS, J., concurs.

JACKSON, Judge (concurring):

By virtue of random case assignment, the burden of trying to make sense of the appellants' briefs in this case and in *Koulis v. Standard Oil Co.*, 746 P.2d 1182 (Utah App.1987), was cast upon me. No other judge of this court was honored with that dubious distinction. And I admit the likely existence of a cumulative effect upon me. In both cases, we have proceeded to decide the merits of the issues raised, in deference only to the parties and not to appellants' counsel. Charles Dickens said that one member of Parliament had a tolerable command of sentences with no meaning in them. Appellate counsel must prepare and submit briefs that are more than mere sound effects. The time will most assuredly arrive when a panel of this court will be constrained to disregard intolerable and unacceptable briefs and not reach the merits of the case.



STATE of Utah, Plaintiff and  
Respondent,

v.

Steven L. GRIFFIN, Defendant  
and Appellant.

No. 870108-CA.

Court of Appeals of Utah.

May 16, 1988.

Defendant was convicted on two counts of sexual abuse of a child following trial in Third District Court, Salt Lake County, Dean E. Conder, J., and he appealed. The Court of Appeals, Bench, J., held that: (1) defendant did not waive objections to second statement by stipulating to its admission; (2) defendant's first statement was not taken in violation of his right to counsel after arguably equivocal statement as to whether he desired assistance of counsel; but (3) manner of interrogation utilized in taking first statement was so egregious and coercive as to require suppression; and (4) defendant did not make valid waiver of his rights prior to second interview.

Reversed and remanded for new trial.

#### 1. Criminal Law ¶1044.2(2)

Defendant was not required to renew at trial his motion to suppress in order to preserve issue on appeal where there had been evidentiary hearing on suppression motion before the same judge who presided at trial.

#### 2. Criminal Law ¶899

Defendant did not waive his objections to admissibility of his second statement by stipulating to its admission in light of his pretrial suppression motion, initial objection at trial and continued assertion of statement's inadmissibility throughout trial.

#### 3. Criminal Law ¶1153(1)

Court of Appeals will not disturb trial court's determination of suppression motion unless trial court was clearly in error.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1<sup>st</sup> day of May, 1991, a true and correct copy of the foregoing Brief in Opposition of Writ of Certiorari was served by mailing a copy thereof by United States Mail, postage prepaid addressed as follows:

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