

1990

Lon S. Nield v. Ronald A. Bieber : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

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

Michale M. Later; Bruce A. Maak; Kimball, Parr, Crockett and Waddoups; A. Dennis Norton; Snow, Christensen & Martineau; Attorneys for Plaintiffs and Appellees.

Guy R. Burningham; Utah County Attorney's Office; George M. McCune; McCune, McCune & Suzuki; Guy R. Burningham; Deputy County Attorney; Attorneys for Defendants.

Recommended Citation

Legal Brief, *Nield v. Bieber*, No. 900187.00 (Utah Supreme Court, 1990).
https://digitalcommons.law.byu.edu/byu_sc1/2987

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court 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

THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH

UTAH
DOCUMENT
KFU

-----oOo-----

50

.A10

DOCKET NO.

900187-CA

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 and
Appellees,

vs.

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

Defendants and
Appellants.

B. J. RONE, JAMES A. GREGG,
and RONALD A. BIEBER,

Third Party
Plaintiffs,
and Appellants,

vs.

ASSOCIATED TITLE COMPANY, a
Utah corporation; BRIANT
STAFFORD, an individual; et al,

Third Party
Defendants.

Case No.

910135

Decision No. None

Docket No. 900187-CA

FILED

MAR 29 1991

Clerk, Supreme Court, Utah

PETITION FOR WRIT OF CERTIORARI

From a final decision of the Utah Court of Appeals

Michael M. Later
KIMBALL, PARR, CROCKETT & WADDOUPS
Suite 1300, 185 South State
Salt Lake City, UT 84147
Attorney for Appellees

George M. McCune (A2171)
McCUNE McCUNE & SUZUKI
5243 Carpell Avenue
P. O. Box 18044
Salt Lake City, UT 84118
Attorney for Appellants

COMPLETE LIST OF ALL PARTIES TO THE PROCEEDING

PARTY	COUNSEL
LON S. NIELD PATRICIA L. NIELD NOVEMBER INVESTORS , a Utah limited partnership V. MARK PETERSON and NANCY L. PETERSON , as general partners of and on behalf of November Investors, Plaintiffs and Appellees, [OWNERS]	Michael M. Later/Bruce A. Maak KIMBALL PARR CROCKETT & WADDOUPS Suite 1300, 185 South State Box 11019 Salt Lake City, UT 84147 Telephone 801-532-7840 FAX 801-532-7750 Principal Counsel for Plaintiffs and Appellees
DAVID R. BATEMAN in his capacity as Sheriff of Utah County, Utah, Defendant, [SHERIFF]	A. Dennis Norton SNOW CHRISTENSEN & MARTINEAU 10 Exchange Place, 11th Floor Salt Lake City, UT 84111 Telephone 801-521-9000 FAX 801-363-0400 Co-Counsel for Plaintiffs and Appellees
B. J. RONE RONALD A. BIEBER RAB RANCH , a business entity JAMES A. GREGG Defendants, Third Party Plaintiffs and Appellants, [JUDGMENT CREDITORS]	Guy R. Burningham UTAH COUNTY ATTORNEY'S OFFICE Utah County Courthouse Provo, UT 84601 Telephone 801-373-5510 Attorney for Defendant Bateman
ASSOCIATED TITLE COMPANY , a Utah corporation BRIANT STAFFORD , an individual STORMY PETERSON , an individual WENDY WILSON , an individual DIANE C. GREEN , an individual D. & M. COAL COMPANY , a South Carolina corporation And other JOHN DOES and JANE DOES , whose true names are unknown at present,	George M. McCune MCCUNE MCCUNE & SUZUKI 5243 Carpell Avenue P. O. Box 18044 Salt Lake City, UT 84118-8044 Telephone 801-964-2825 FAX 801-964-0551 Attorney for Defendants Rone, Bieber, RAB Ranch & Gregg Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
QUESTIONS FOR REVIEW.....	1
OPINION OF THE COURT OF APPEALS.....	2
STATEMENT OF JURISDICTION OF THE SUPREME COURT.....	2
CONSTITUTIONAL OR STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE.....	3
CASE NATURE, COURSE AND LOWER COURT DISPOSITION.....	3
STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED...	3
ARGUMENT.....	7
POINT 1: GREAT AND IMPORTANT ISSUES REGARDING IDENTITY AND NAMES NEED TO BE DECIDED FOR THE PEOPLE OF UTAH.....	7
POINT 2: THE JURISDICTIONAL ISSUES GREATLY NEED REVIEW.....	11
POINT 3: RULE 54b CONNECTION WITH JUDICIAL LIENS AND THE RIGHT TO EXECUTION NEEDS IMMEDIATE DECISION IN THIS STATE.....	14
POINT 4: THE RELATIONSHIP OF RULES OF PROCEDURE IDENTITY NEED CLARIFICATION.....	15
POINT 5: WE NEED A RULE OF LAW PREVENTING ABUSE OF PSEUDONYMS.....	16
POINT 6: THE HIGHEST COURT NEEDS TO REVIEW RULE 33 SANCTIONS.....	17
CONCLUSION.....	18
APPENDIX.....	20

TABLE OF AUTHORITIES

Anderson v. American Society of Plastic & Reconstructive Surgeons , 148 UAR 3, 4 (Utah November 15, 1990).....	13
Brown v. Harry Heathman, Inc. , 744 P2d 1016 (Utah Ct. App. 1987).....	18
Carnes v. Carnes , 668 P2d 555 (Utah 1983).....	13
Demetropoulos v. Vreeken , 754 P2d 960 (Utah Ct. App. 1988).....	4,6,12 13,14
Drury v. Lunceford , 415 P2d 662 (Utah 1966).....	15
Marathon Steel Co. , 692 P2d 765, 767 (Utah 1984).....	15
Mel Trimble Real Estate v. Monte Vista Ranch , 758 P2d 451 (Ut. Ct. App. 1988).....	12
Peak v. State , 163 NE2d 584 (Indiana).....	10
Reed v. Reed , 154 UAR 6 (Utah February 1991).....	15
State v. Tinnin , 232 P 543 (Utah 1925).....	7
Taylor Nath'l Inc. v. Jensen Bros. Constr. Co. , 641 P2d 150 (Utah 1982).....	14

OTHER AUTHORITIES CITED

57 AJ2d Names Section 62	7
65 CJS Names Section 9(1)	10
25-1-15(2) UCA 1953 , prior to amendment.....	5
78-22-1 UCA 1953	14
Rule 1a Utah Rules of Civil Procedure	15
Rule 4 Utah Rules of Civil Procedure	16
Rule 54b Utah Rules of Civil Procedure	2,9,14 15,16
Rule 56 Utah Rules of Civil Procedure	5
Rule 62a Utah Rules of Civil Procedure	14
Rule 31 Utah Rules of Appellate Procedure	7,9,10
Rule 33 Utah Rules of Appellate Procedure	2,17 18

THE SUPREME COURT

STATE OF UTAH

-----oOo-----

LON S. NIELD, et al.,)	
)	
Plaintiffs and)	
Appellees,)	
)	
vs.)	
)	
B. J. RONE, et al.,)	Case No. _____
)	
Defendants and)	Decision No. None
Appellants.)	
)	Docket No. 900187-CA
)	
_____)	
)	
B. J. RONE, et al.,)	
)	
Third Party)	
Plaintiffs,)	
)	
vs.)	
)	
ASSOCIATED TITLE COMPANY, et al.))	
)	
Third Party)	
Defendants.)	

PETITION FOR WRIT OF CERTIORARI

QUESTIONS FOR REVIEW

1. Should the true identity and connection with the ultimate liability holder of adopted pseudonymous business names be judicially declared before rules of civil procedure pertaining to parties and service of due process are applied?

2. Is a holding in one case that a certain person was not a proper party upon whom service could be made on certain

pseudonymous business name parties **res judicata** in voiding 3 additional judgments involving different judgment defendants and also different persons who received service of process?

3. What constitutes the element of a full and fair hearing for **res judicata** collateral estoppel application and does newly found evidence bear an influence on determining a "full" or complete hearing?

4. In multiple party litigation, does a judicial lien attach and the right to execute accrue to a judgment creditor even though Rule 4b certification has not been obtained?

5. Is the appeal of appellants truly frivolous justifying Appellees a URAP 33 award of attorney fees and double costs?

OPINION OF THE COURT OF APPEALS

None

STATEMENT OF JURISDICTION OF THE SUPREME COURT

January 28, 1991 Ut. Ct. Appeals Order of Affirmance

February 20, 1991 Order Extending Time to File to March 29, 1991

78-2-2(3)(a) UCA 1953

NATURE OF THE PROCEEDING

Summary judgment granted Plaintiff Appellees ("Owners").

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES RULES AND REGULATIONS PARTLY DETERMINATIVE

25-1-15(2)	UCA 1953 before amendment	Rule 10,	URCP
25-1-13	UCA 1953 before amendment	Rule 17d,	URCP
25-6-9(1)	UCA 1953	Rule 54b,	URCP
57-1-6	UCA 1953	Rule 56,	URCP
57-3-2(1)	UCA 1953	Rule 58A,	URCP
78-22-1(1)	UCA 1953	Rule 62,	URCP
Rule 1, URCP		Rule 69,	URCP
Rule 4, URCP		Rules 31,33	URAP

STATEMENT OF THE CASE

CASE NATURE, COURSE AND LOWER COURT DISPOSITION

Action by Plaintiff Appellees ("Owners") to permanently enjoin Appellants ("Judgment Creditors") from executing and levying upon parcels of real estate to satisfy default judgments against certain pseudonymous names and two individuals.

The trial court granted Owners summary judgment. The Utah Court of Appeals affirmed the trial court in a Rule 31 hearing and also granted Appellees attorney fees and double costs on appeal.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED

There are 3 separate Judgment Creditors (Rone, Gregg, Bieber) who obtained a trial court consolidation order for execution purposes only.

Rone served one Keith Vreeken to obtain in personum jurisdiction over certain pseudonymous businesses and the real parties behind the pseudonyms. [R1653-1662, 1709-1719] Default Judgment was granted July 26, 1983 in Rone's favor against 5 pseudonyms. [R1094]

In separate lawsuits, Gregg and Bieber each served one Keith Vreeken and also one **Chris [Kris] Vreeken** as individuals and also the same two persons as representatives of pseudonyms to obtain in personum jurisdiction over certain pseudonymous businesses and the real parties behind the pseudonyms. [R1653-1662, 1709-1719] Default Judgment was granted August 25, 1983 by separate judgments in Gregg's and also Bieber's favor against

Keith Vreeken and Chris [Kris] Vreeken individually and also against the same 5 pseudonyms Rone had gained judgment against. [R1723, 1667]

Keith Vreeken had signed a Trust Deed on behalf of Red Deer Investment 6 days before he was served with the complaint in Rone's lawsuit and about a month before Keith and Chris [Kris] Vreeken were served the complaints in the Gregg and Bieber lawsuits. [R447-449]

Owners had acquired record title to 1 of the Alpine parcels in 1984 subsequent to Judgment Creditors' default judgments from a record title holder labeled Red Deer Investments and Red Deer Investments, SA. [R314] Red Deer Investments and Red Deer Investments, SA were two of the pseudonymous business names used by Judgment Debtors [R490, 501-503] but were **not** any of the pseudonyms against whom Rone, Gregg and Bieber had obtained express default judgments.

Rone attempted to partially satisfy his default judgment by contesting garnishment priority to a bank account fund in Lehi, Utah. The priority question was never reached, but rather the Utah Court of Appeals upheld the trial court's holding that Keith Vreeken was not a proper party upon whom service could be made to acquire in personum jurisdiction over the pseudonyms against whom Rone had obtained default judgment. **Demetropoulos v. Vreeken**, 754 P2d 960 (Utah CA 1988)

In their continued efforts to satisfy their default judgments, Judgment Creditors executed upon 3 parcels of real

estate in Utah County pursuant to the statutory authority of 25-1-15(2) UCA 1953 then applicable. The real estate had been held in the pseudonymous record title of Red Deer Investments at the time Judgment Creditors had been granted their default judgments. [R1811-1815]

Owners held record title to the levied parcels at the time of execution and brought this suit to enjoin. Owners alleged no liens of the Judgment Creditors attached to the 2 Alpine parcels due to 1) invalid judgments, 2) no "final judgments", 3) no judgment debtors' interest in the real estate, and 4) **bona fide** (good faith) purchaser status of Owners. [R1]

Judgment Creditors produced Rule 56 evidence creating disputed facts regarding Judgment Debtors true identity and that Keith Vreeken, Chris [Kris] Vreeken and other family members were using various pseudonyms as camoflauge, fictitious, and assumed names having no separate legal identity status. [R470-569]

Affidavit evidence and transcripts of other US Court proceedings in Utah also filed showed pseudonymous business names against whom default judgments were entered in favor of Judgment Creditors Rone, Gregg and Bieber were adopted and used to hold property and conduct business by Keith Vreeken, Chris [Kris] Vreeken and other members of their immediate family. [R1094, 1723, 1667; First Federal Finance - R488,509-515; International Investment Conference - R535, 562; Aries + Serv, SA - R561]

Rule 56 evidence also showed Kris [Chris] Vreeken as well as Keith Vreeken were served with process individually as well as as representatives on behalf of pseudonyms against whom Judgment Creditors Gregg and Bieber had obtained default judgments [R1653-1656, 1658-1663, 1657-1662, 1709-1710, 1712-1715, 1718, 1711, 1719] and that other family members named Fred and Kurt Vreeken made general appearances through filing an answer in the Rone case. [R1078]

Officially recorded records of the Utah County Recorder were also submitted showing Keith Vreeken had in fact signed a Trust Deed on behalf of the pseudonym Red Deer Investments as an officer of said pseudonym under oath 6 days prior to being served process in the Rone case and about a month prior to being served process in the Gregg and Bieber cases. [R447-449]

Owners moved for summary judgment which was granted. The trial judge ruled there were questions regarding title to the property but no material facts left for decision "particularly in view of the Utah Court of Appeals affirmation of Judge Baliff's ruling in **Demetropoulos v. Vreeken**, 754 P.2d 960 (Utah [sic.] 1988) Civil No. (CV86-2491), finding improper service of process." [R624]

The trial judge held in his Order granting summary judgment that **all 3 separate default judgments** "are invalid due to defects in service of process and do not in any event, constitute final judgment." [R627]

Judgment Creditors appealed to the Utah Supreme Court.

The case was sent to the Utah Court of Appeals who placed the case on the URAP Rule 31 calendar. On January 28, 1991, the Utah Court of Appeals affirmed the trial court's order without opinion and also granted appellees a reasonable attorney fee and double costs on appeal under URAP Rule 33.

ARGUMENT

POINT 1: GREAT AND IMPORTANT ISSUES REGARDING IDENTITY AND NAMES NEED TO BE DECIDED FOR THE PEOPLE OF UTAH

The law is not settled in this state on how the universal principle stated in **State v. Tinnen**, 232 P 543, 545 (Utah Supreme Court 1925) is applied. In that case our supreme court recognized the universal principle of our 50 states that:

There is no question in law, either [,] as to a contract entered into by a person under an assumed or fictitious name being valid. The law looks to the identity of the individual, and when this is established [,] the act is binding upon him and others, irrespective of the name he has assumed.

This principle is well substantiated by case law throughout the United States. **See 57 AJ2d Names Section 62.**

The question is: How does "the law look to the identity of the individual?" Is a claimant required to litigate all questions of pseudonymous use, alter ego status, etc. before he can execute upon an executable interest?

Or is supplemental proceedings pertaining to executions, garnishments and attachments after judgment the proper forum to determine these issues? I am afraid as a body of judiciary as a

whole, we are not familiar enough with the relationship of proceedings to obtain satisfaction of judgments as well as we are about how to obtain judgments. We must be careful in analyzing the balances which have developed through the ages to create a fair equilibrium between the injured and the perpetrator, the public and the individual, society and the government.

Must parties and their adopted pseudonyms be judicially declared identical before rules of civil procedure are applied or can civil procedure rules be applied before such a determination?

At what course in a judicial proceeding must the alter ego of pseudonymous business names be determined before execution will lie against property held in the names of the real parties and/or their pseudonyms?

Can a judicial decision in one case declaring a certain individual ineligible to receive process on behalf of certain pseudonymous business names be used to declare different case judgments null and void when a personal judgment has been obtained against the same individual but the connection of another pseudonymous name to him has yet to be judicially declared?

If parties 1. hold title to property and 2. transact business under pseudonymous names or labels, does it have to be judicially declared that the pseudonymous names or labels and the liable parties are one and the same **before** property held in

the pseudonymous name or names can be executed upon to satisfy judgment liens?

If judgment is taken against one or more pseudonymous names or labels used by the liable parties, can execution be made on property held in the name of another pseudonymous name or label used by the liable parties **before** obtaining a declaratory judgment that the pseudonymous name under which the property executed upon is held and the liable parties are in fact one and the same?

If judgment has been taken against one or more pseudonymous names or labels used by the liable parties, does that mean execution can be made on property held in all pseudonymous names or labels used by the liable parties?

In multiple party litigation, does a judicial lien and the right to execute exist in a judgment even though Rule 54b certification has not been secured?

Is the question of true identity a genuine material fact precluding summary judgment?

How does true identity bear upon principles of service of process jurisdiction, judgment against all defendants, attachment of real property judicial liens, execution and sale, bona fide purchaser, and res judicata?

The Utah Court of Appeals, however, relegated this case to a Rule 31 disposition which by the terms of that rule of appellate procedure itself is meant for "uncomplicated factual issues . . . based on uncomplicated issues of law. . . ," where

"the substantive rules of law should be deemed settled," whereas Rule 31 disposition should not be had where there are "issues of significant public interest, issues of law of first impression, or complicated issues of fact or law."

The Utah Court of Appeals has committed a monumental error by consciously or subconsciously blinding their minds to the very basic necessary issue of identity determination in our courts of law and society thus leaving this state groping in the dark regarding the status of judgments, judicial liens and the right to execute and levy upon, garnish, and attach in the State of Utah; the forum and procedure required to determine executable property interests; and the law's remedy and balance to counter this type of classic abuse of pseudonymous names in the conduct of business and the holding of title to property.

Well has it been pronounced:

The use of fictitious names is not to be encouraged since it lends itself too readily to fraud because of the concealment involved and is likely to be used against the public interest or against private interests, particularly those of creditors or other interested parties. 65 CJS Names, Section 9(1), note 27.5 [Peak v. State, 163 NE2d. 584 (Indiana)]

But **when** certain parties take advantage of the public interest and private interest as in this case and unilaterally concoct pseudonymous labels by which they buy and sell real and personal property and do business, as in this classic circumstance here, the citizens of this state deserve and have an inalienable right to have the law clearly settled and set forth

for them. And the Utah Supreme Court needs to address this issue and most eternally the people of the State of Utah deserve to know the clear law in this respect.

The issues are squarely presented in this fact situation and the case is certainly ripe for decision. Please entertain your sacred extraordinary review power and let these issues on identity and pseudonym use be clearly settled in our state for the sake of every attorney, every citizen and every judge.

POINT 2: THE JURISDICTIONAL ISSUES GREATLY NEED REVIEW

Demetropoulous solely held that Keith Vreeken was not a proper person on whom service could be made to acquire in personum jurisdiction over 5 pseudonymous business names. It did not say that Chris [Kris] Vreeken was not a proper person on whom service could be made. Also, in 2 of the 3 Judgment Debtor default judgments, the defendants Keith Vreeken and Chris [Kris] Vreeken had service made upon them personally. They also had default judgments entered against them **personally**. Individuals as well as pseudonymous names are part of the Judgment Debtors in the Gregg and Bieber cases.

In the Rone instance, newly discovered evidence has been uncovered showing Keith Vreeken signed a Trust Deed as an officer of the pseudonym Red Deer Investments under oath 6 days prior to being served process in the Rone case. The Utah Court of Appeals stated in one of its own cases that a necessary element for a case to be res judicata to collaterally estop the litigation of the same issue in another case is a determination

POINT 1: GREAT AND IMPORTANT ISSUES REGARDING IDENTITY 11

that there was a full and fair litigation of the question in the prior case. **Mel Trimble Real Estate v. Monte Vista Ranch**, 750 P2d 451 (Utah CA 1988). But they have apparently declined to follow their own law. A factual question was set up in the Rule 56 evidence showing a "full" and "complete" hearing question. Is Rone entitled to receive that hearing on the question when new evidence is uncovered? A very important question needing decision in this state. All are entitled to know in Utah in the future what is and what is not a full and fair hearing for res judicata purposes. This question has not been dealt with in our state.

Demetropoulos has been taken much farther than it justly can be taken. If the decision of the trial court and the Court of Appeals is allowed to stand, it essentially deprives Gregg and Bieber of their judgments against Keith and Chris [Kris] Vreeken as persons and takes away possible executable property interests previously held by the pseudonym Red Deer Investments **before** the question of executable interest is heard on the merits before a jury and judge. That essentially also deprives Gregg and Bieber of their right to due process. This issue deserves to be briefed before this honorable court and a clarification made regarding the breadth and scope of res judicata as it applies to a situation like this. Here one man served process is declared an improper person to receive process on behalf of 5 pseudonymous names but in the other cases the same man was served process personally as well as on behalf of the same 5

pseudonyms.

This honorable court held in **Carnes v. Carnes**, 668 P2d 555, 557 (Utah 1983) there is a presumption that jurisdiction is proper until rebutted by clear and convincing evidence to the contrary. **Carnes** was just reaffirmed by you in **Reed v. Reed**, 154 UAR 6 (Utah February 1991). But the Court of Appeals has ignored your settled law on this point.

Also, the Court of Appeals has ignored your recent pronouncement on pre-evidentiary hearing jurisdiction in **Anderson v. American Society of Plastic & Reconstructive Surgeons**, 148 UAR 3, 4 (Utah November 15, 1990) You held there that where jurisdiction is decided on affidavits and discovery alone, the process server is only required to make a prima facie showing (presumption) of personal jurisdiction and the server's factual allegations are accepted as true unless specifically controverted by affidavits or depositions, but any disputes in the documentary evidence are resolved in the server's favor. The trial court must not weigh the evidence unless a hearing is held. And if jurisdiction turns on the same facts as the merits [which is the case in this lawsuit], an evidentiary hearing is inappropriate prior to trial because it infringes on the right to a jury trial and is an inefficient use of judicial resources. In such cases, jurisdiction is determined by trial on the merits.

Particularly in the Gregg and Bieber cases, the question of jurisdiction cannot turn merely upon the holding in **Demetropoulos**. To let such a decision stand, denies due

process. The Court of Appeals has overstepped the normal course of judicial proceedings in considering **Demetropoulos** to resolve all the issues of jurisdiction. Extraordinary review is fervently requested.

POINT 3: RULE 54b CONNECTION WITH JUDICIAL LIENS AND THE RIGHT TO EXECUTION NEEDS IMMEDIATE DECISION IN THIS STATE

The trial court held in its order that in all 3 default judgments are invalid due to "defects in service of process and do not, in any event, constitute final judgment." If service of process requirements are not determinative, then it appears the trial court and Owners' counsel feel there is some meaning in "final judgment" as said term is used in Rule 54b.

Great stress has been put on Rule 54b by Owners' counsel. Arguments have been made that in multi party litigation, no judicial lien attaches and no rights to execute accrue to a Judgment Creditor until and unless a request has been made and a Rule 54b certification obtained. They have cited federal cases which they claim hold that liens and execution do not lie unless the certification called for in Rule 54b has been obtained.

However, the legislative statute in our state pertaining to judgment liens states judgment liens attach at the moment the judgment is docketed. **78-22-1 UCA 1953** And our civil rule of procedure Rule 62a indicates execution may issue immediately upon entry of a judgment, which has been upheld in **Taylor National Inc. v. Jensen Bros. Construction Co.**, 641 P2d 150, 154

(Utah 1982) by this honorable highest state court.

Also, in every decision to date in this state pertaining to Rule 54b, it has been held said rule is designed to avoid potential injustice caused by rigid application of the traditional single appeal of right principle. **Marathon Steel Co.**, 692 P2d 765, 767 (Utah 1984) is an example from this honorable court along with your most recent pronouncement in **Reed v. Reed**, 154 UAR 6 (February 1991).

So, do the federal inferences have any credence in our state? If they do, it has tremendous impact on all judgments throughout this state. This is a very crucial question meriting immediate review and declaration from the highest court in our state. We respectfully implore your kind graces in doing so.

**POINT 4: THE RELATIONSHIP OF RULES OF PROCEDURE WITH
IDENTITY NEED CLARIFICATION**

Rules are designed to bring a pattern of order and regularity to the courts. **Drury v. Luncford**, 415 P2d 662 (Utah 1966) according to the highest court's edict. But they are always subservient to substantive law promulgated by the sovereign (who is the people represented by its legislative representatives in our state). Rule 1a says at the beginning the rules are to be liberally construed to bring the just determination of every action. Your honorable court has just reaffirmed your recognition of this purpose in **Reed**, supra.

Many of the civil rules bear upon identity. They are written in such a way that they presume the identity of a person

POINT 3: RULE 54b CONNECTION WITH LIENS AND EXECUTIONS 15

or entity is not in question. For example, Rule 4 on service of process procedure provides for modes of service on partnerships, associations and corporations as well as on individuals. It is presumed that such entities are **de jure** legal entities. But what if a pseudonymous name appears on its face to be something it in reality is not?

Rule 54b presumes that the true identity of all parties is undisputed. But in this case, a prime example, it was a race to the courts to beat a federal agency from filing a tax lien. The federal agency could effectively preempt other creditors from priority to execution on assets by merely recording a lien. The investigation and study necessary to determine the true nature of each pseudonym or to even come to a knowledge of each pseudonym was tremendous. It was difficult to do overnight or even within several years. What should be the relationship to substantive law regarding liability of the person for the things he does under pseudonyms? Should it be required to determine identity relationships before procedural rules are applied? If the presumptions of undisputed identity cannot be overcome, is there justice in the rules?

All these questions are presented in this case. They are important and weighty questions which need decision in our state.

**POINT 5: WE NEED A RULE OF LAW PREVENTING
ABUSE OF PSEUDONYMS**

The actions of the precipitators of this case in abusing

the use of pseudonyms to their advantage and the destruction and confusion of the judicial system cannot be allowed. It should never be allowed to happen in this state again. The only way to prevent its occurrence is to pronounce clearly from the highest court of this state the rights and relationships accruing from true identity. There has been no pronouncement from this court regarding identity since 1925 which clearly sets forth how we can "look to identity" of the person. This action brings these issues to the court ripe for decision.

**POINT 6: THE HIGHEST COURT NEEDS TO REVIEW
RULE 33 SANCTIONS**

The Court of Appeals has said a lot about justification for imposition of Rule 33 sanctions, but this honorable court has not. No decision on the point can be found from this highest court. The Court of Appeals does not seem to have given that degree of consideration to this case incumbent upon the high body which it is. This nonchalantness was manifested at oral hearing when questions from the bench intimated a lack of familiarity with the content of the parties' briefs and the subconscious or conscious actions of the chairman of the panel in saying one thing regarding counsel for Judgment Creditors right to reserve time for rebuttal and then restricting him to a narrow question of Rule 33 vulnerability for 2 minutes at the end of argument without an opportunity to correct some misinformation elicited from opposing counsel. The action of the panel inferred a preconceived disposition to the issues and an

ignorance of the content of written argument.

If the question of jurisdiction turns on the same facts as the merits of the case, likewise, the appropriateness of the sanctions of Rule 33 turns on the same facts as the merits. Judgment Creditors have surely made a reasonably arguable appeal. **Brown v. Harry Heathman, Inc.**, 744 P2d 1016 (Utah CA 1987) Can the court of appeals continue to assert its sanctions at will as a deterrent to further appeal without some firm guidance from the highest court of our state? Please make some precedent on Rule 33 sanctions also.

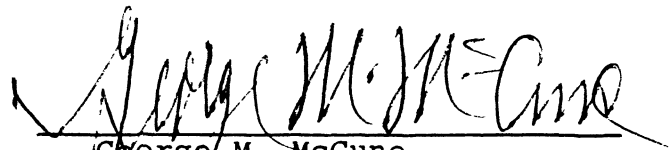
CONCLUSION

The court of appeals has left us and this state without any guidance and without any precedent settling the questions of first impression and extreme public importance raised in this case. All of the questions raised and every subsidiary question fairly embraced within them are deserving of consideration at this time by this honorable highest court of the State of Utah.

Particularly of critical importance is a pronouncement on **when** true identity needs to be judicially declared in the course of litigation. Please exercise your extraordinary review power and accept certiorari in this case.

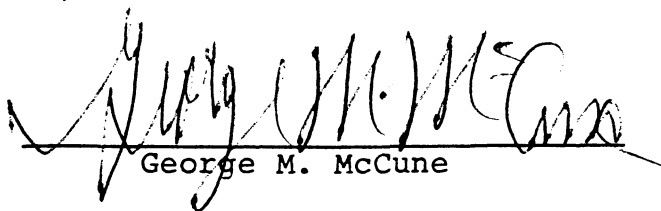
DATED this 29th day of March, 1991.

Respectfully submitted,


George M. McCune
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that four (4) copies each of the foregoing Petition for Writ of Certiorari were served upon each Appellee and other Interested Parties herein by placing four (4) copies each of said brief in a securely sealed envelope, and depositing the same in the United States mail, with first-class postage affixed, each addressed to Michael M. Later/Bruce A. Maak, KIMBALL PARR CROCKETT & WADDOUPS, Suite 1300, 185 South State, Box 11019, Salt Lake City, UT 84147; A. Dennis Norton, SNOW CHRISTENSEN & MARTINEAU, 10 Exchange Place, 11th Floor, Salt Lake City, UT 84111; and Guy R. Burningham, UTAH COUNTY ATTORNEY'S OFFICE, Utah County Courthouse, Provo, UT 84601 on this 29th day of March, 1991.


George M. McCune

APPENDIX

FRAUDULENT CONVEYANCES

25-1-15. Rights of creditors with matured claims. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person, except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase or one who has derived title immediately or mediately from such a purchaser:

- (1) have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim; or,
- (2) disregard the conveyance, and attach, or levy execution upon, the property conveyed.

A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation may retain the property or obligation as security for repayment.

History: L. 1925, ch. 42, § 9; R.S. 1933 & C. 1943, 33-1-15.

Defenses.

Defendant in suit to set aside conveyance to his wife as fraudulent may interpose defense that property is exempt from execution, and does not exceed in value his maximum homestead, and upon submission of proof thereof by defendant, court will be required to make findings with respect thereto. *Cardon v. Harper* (1944) 106 U 560, 151 P 2d 99, 154 ALR 906, following *Williams v. Peterson* (1935) 86 U 526, 46 P 2d 674.

— evidence.

Evidence in action to set aside conveyance by grantor of property of fair value of \$3,250 for \$10 and other valuable consideration to daughters, held to show that conveyance was fraudulent as to creditors. *Zuniga v. Evans* (1935) 87 U 198, 48 P 2d 513, 101 ALR 532, distinguished in 102 U 12, 126 P 2d 1063.

Garnishment proceeding.

Fact that pleadings in garnishment proceedings revealed that indebtedness sued upon was that of individuals and that those individuals had no account with garnishee bank, the only account being with corporation owned by individuals, did not make cause of action one, under this section, to set aside conveyance, and thus argument that court had never obtained jurisdiction of corporate defendant or of res since no service of summons was made upon corporation could not be maintained; the pleading sufficiently averred a sham transaction between the individuals and the corporation so that they should be considered as identical for purpose of garnishment proceedings. *Stine v. Girola* (1959) 9 U 2d 22, 337 P 2d 62.

Transfer of stock could be set aside as a fraudulent conveyance on motion in garnishment proceeding, and it was not necessary to file a separate action to obtain such relief.

Jensen v. Eames (1974) 30 U 2d 423, 519 P 2d 236.

Presumptions and burden of proof.

Where grantees were in possession of premises pursuant to duly recorded deed and were paying taxes thereon, it was incumbent upon plaintiffs, in action to set aside conveyance, to allege and prove that grantees as such did certain acts which misled plaintiffs, or held themselves out in a way that misled plaintiffs and that plaintiffs had knowledge and relied thereon. *Smith v. Edwards* (1932) 81 U 244, 17 P 2d 264.

Burden of proof is not on plaintiff to show that property, alleged to have been fraudulently conveyed, is not exempt from execution. *Cardon v. Harper* (1944) 106 U 560, 151 P 2d 99, 154 ALR 906.

Setting aside mortgage.

A creditor with a matured claim may have a mortgage, a conveyance under 25-1-1, set aside under this section to the extent necessary to satisfy his claim, where such conveyance was made without fair consideration, defined in 25-1-3, and would render the person making it insolvent. *Ned J. Bowman Co. v. White* (1962) 13 U 2d 173, 369 P 2d 962.

Collateral References.

Fraudulent Conveyances ⇐ 226 et seq.

37 CJS Fraudulent Conveyances § 306 et seq.

37 AmJur 2d 827 et seq., Fraudulent Conveyances § 157 et seq.

Admissibility of declarations of grantor or transferor on issue as to whether conveyance or transfer was in fraud of creditors, 83 ALR 1446.

Admissibility of subsequent declarations of vendor on issue whether sale was in fraud of creditors, 64 ALR 797.

Assignability of executor's or administrator's right to attack conveyance or transfer

old act

25-1-13

FRAUD

this chapter as against creditors and purchasers shall be equally void as against the heirs, successors, personal representatives or assigns of such creditors or purchasers.

History: R.S. 1898 & C.L. 1907, § 2475;
C.L. 1917, § 5822; R.S. 1933 & C. 1943, 33-1-12.

25-1-13. Bona fide purchasers not affected. The provisions of this chapter shall not be construed to affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

History: R.S. 1898 & C.L. 1907, § 2476;
C.L. 1917, § 5823; R.S. 1933 & C. 1943, 33-1-13.

Collateral References.

Fraudulent Conveyances ⇨ 192.

37 CJS Fraudulent Conveyances § 282.

37 AmJur 2d 801, Fraudulent Conveyances § 121.

Necessity of participation by the grantee or transferee in the fraud of the grantor or transferor in order to avoid a voluntary conveyance or transfer as against creditors, 17 ALR 728.

Presumption and burden of proof as regards good faith and consideration on part of purchaser or one taking encumbrance subsequent to unrecorded conveyance or encumbrance, 107 ALR 502.

Right of grantee, mortgagee or transferee in instrument fraudulent as to creditors to protection to extent of consideration paid by him, 79 ALR 132.

Right of grantee, or his privies, to maintain suit or proceeding for affirmative relief, where claim is made or anticipated that conveyance was made with intention on part of grantor, but without actual fraud by grantee, to defraud former's creditors, 128 ALR 1504.

Right of grantee or transferee to be reimbursed for expenditures in payment of taxes or encumbrances on property where conveyance or transfer is in fraud of creditors, 8 ALR 527.

Rights as between creditors of fraudulent grantor, where one or more of them, in payment of or as security for his debt, receives deed or mortgage from fraudulent grantee, 114 ALR 406.

Rule 1a Utah Rules of Civil Procedure

Rule 1

PART I.

SCOPE OF RULES—ONE FORM OF ACTION.

Rule 1. General provisions.

(a) **Scope of rules.** These rules shall govern the procedure in the Supreme Court, the district courts, the circuit courts, and the justice courts of the state of Utah in all actions, suits, and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as governed by other rules promulgated by this court or enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action.

(b) **Effective date.** These rules shall take effect on January 1, 1950, and thereafter all laws in conflict therewith shall be of no further force or effect. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(Amended effective Jan 1, 1987)

25-6-9. Good faith transfer.

(1) A transfer or obligation is not voidable under Subsection 25-6-5(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Subsection 25-6-8(1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under Subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(a) the first transferee of the asset or the person for whose benefit the transfer was made; or

(b) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(3) If the judgment under Subsection (2) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to an adjustment as equities may require.

(4) Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(a) a lien on or a right to retain any interest in the asset transferred;

(b) enforcement of any obligation incurred; or

(c) a reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under Subsection 25-6-5(1)(b) or Section 25-6-6 if the transfer results from:

(a) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(b) enforcement of a security interest in compliance with Chapter 9, Title 70A, the Uniform Commercial Code.

(6) A transfer is not voidable under Subsection 25-6-6(2):

(a) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(b) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(c) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

**57-3-2. Record imparts notice — Change in interest rate —
Validity of document — Notice of unnamed inter-
ests — Conveyance by grantee.**

(1) Each document executed, acknowledged, and certified, in the manner prescribed by this title, each original document or certified copy of a document complying with Section 57-4a-3, whether or not acknowledged, each copy of a notice of location complying with Section 40-1-4, and each financing statement complying with Section 70A-9-402, whether or not acknowledged shall, from the time of filing with the appropriate county recorder, impart notice to all persons of their contents.

(2) If a recorded document was given as security, a change in the interest rate in accordance with the terms of an agreement pertaining to the underlying secured obligation does not affect the notice or alter the priority of the document provided under Subsection (1).

(3) This section does not affect the validity of a document with respect to the parties to the document and all other persons who have notice of the document.

(4) The fact that a recorded document recites only a nominal consideration, names the grantee as trustee, or otherwise purports to be in trust without naming beneficiaries or stating the terms of the trust does not charge any third person with notice of any interest of the grantor or of the interest of any other person not named in the document.

(5) The grantee in a recorded document may convey the interest granted to him free and clear of all claims not disclosed in the document in which he appears as grantee or in any other document recorded in accordance with this title that sets forth the names of the beneficiaries, specifies the interest claimed, and describes the real property subject to the interest.

History: R.S. 1898 & C.L. 1907, § 2000; C.L. 1917, § 4900; R.S. 1933 & C. 1943, 78-3-2; L. 1977, ch. 272, § 54; 1985, ch. 159, § 7; 1988, ch. 155, § 14; 1989, ch. 88, § 8.
Amendment Notes. — The 1985 amend-

ment designated the existing language as Subsection (1) and divided the formerly undivided language into two sentences, in Subsection (1), deleted "the provisions of" before "Section 70A-9-402" in the first sentence and made

CHAPTER 22

JUDGMENT

Section		Section	
78-22-1.	Lien of judgment.		conclusive against sureties on indemnity bond.
78-22-1.1.	Judgment against party dying after verdict or decision.	78-22-3.	Judgment by confession authorized.
78-22-2.	Judgment against sheriff — When	78-22-4.	Mileage allowance for judgment debtor required to appear.

78-22-1. Lien of judgment.

From the time the judgment of the district court or circuit court is docketed and filed in the office of the clerk of the district court of the county it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien. A transcript of judgment rendered in a district court or circuit court of this state, in any county thereof, may be filed and docketed in the office of the clerk of the district court of any other county, and when so filed and docketed it shall have, for purposes of lien and enforcement, the same force and effect as a judgment entered in the district court in such county. The lien shall continue for eight years unless the judgment is previously satisfied or unless the enforcement of the judgment is stayed on appeal by the execution of a sufficient undertaking as provided by law, in which case the lien of the judgment ceases.

Rule 4 Utah Rules of Civil Procedure

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;

(2) Upon an infant (being a person under 14 years) by delivering a copy to the infant and also to the infant's father, mother or guardian or, if none can be found within the state, then to any person having the care and control of the infant, or with whom the infant resides, or in whose service the infant is employed;

(3) Upon a natural person judicially declared to be of unsound mind or incapable of conducting his own affairs, by delivering a copy to the person and to the person's legal representative if one has been appointed and in the absence of such representative, to the individual, if any, who has care, custody or control of the person;

(4) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy to the person who has the care, custody, or control of the individual to be served, or to that person's designee or to the guardian or conservator of the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served;

(5) Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or other agent authorized by appointment or by law

to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, an office or place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of such office or place of business.

(6) Upon an incorporated city or town, by delivering a copy thereof to the recorder;

(7) Upon a county, by delivering a copy to the county clerk of such county;

(8) Upon a school district or board of education, by delivering a copy to the superintendent or business administrator of the board;

(9) Upon an irrigation or drainage district, by delivering a copy to the president or secretary of its board,

(10) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy to the attorney general and any other person or agency required by statute to be served, and

(11) Upon a department or agency of the state of Utah, or upon any public board, commission or body, subject to suit, by delivering a copy to any member of its governing board, or to its executive employee or secretary.

(f) **Service and proof of service in a foreign country.** Service in a foreign country shall be made as follows.

(1) In the manner prescribed by the law of the foreign country for service in an action in any of its courts of general jurisdiction; or

(2) Upon an individual, by personal delivery; and upon a corporation, partnership or association, by delivering a copy to an officer or a managing general agent, provided that such service be made by a person who is not a party to the action, not a party's attorney, and is not less than 18 years of age, or who is designated by order of the court or by the foreign court; or

(3) By any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served as ordered by the court. Proof of service in a foreign country shall be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court. When service is made pursuant to subpart (3) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(g) **Other service.** Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication, by mail, or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties. If the motion is granted, the court shall order service of process by publication, by mail from the clerk of the court, by

other means, or by some combination of the above, provided that the means of notice employed shall be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. A copy of the court's order shall be served upon the defendant with the process specified by the court.

(h) **Manner of proof.** In a case commenced under Rule 3(a)(1), the party serving the process shall file proof of service with the court promptly, and in any event within the time during which the person served must respond to the process, and proof of service must be made within ten days after such service. Failure to file proof of service does not affect the validity of the service. In all cases commenced under Rule 3(a)(1) or Rule 3(a)(2), the proof of service shall be made as follows:

(1) If served by a sheriff, constable, United States Marshal, or the deputy of any of them, by certificate with a statement as to the date, place, and manner of service.

(2) If served by any other person, by affidavit with a statement as to the date, place, and manner of service, together with the affiant's age at the time of service;

(3) If served by publication, by the affidavit of the publisher or printer or that person's designated agent, showing publication, and specifying the date of the first and last publications; and an affidavit by the clerk of the court of a deposit of a copy of the summons and complaint in the United States mail, if such mailing shall be required under this rule or by court order;

(4) If served by United States mail, by the affidavit of the clerk of the court showing a deposit of a copy of the summons and complaint in the United States mail, as may be ordered by the court, together with any proof of receipt;

(5) By the written admission or waiver of service by the person to be served, duly acknowledged, or otherwise proved.

(i) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(j) **Refusal of copy.** If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof.

(k) **Date of service to be endorsed on copy.** At the time of service, the person making such service shall endorse upon the copy of the summons left for the person being served, the date upon which the same was served, and shall sign his or her name thereto, and, if an officer, add his or her official title.

(l) **Designation of newspaper for publication of notice.** In any proceeding where summons or other notice is required to be published, the court shall, upon the request of the party applying for such publication, designate the newspaper and authorize and direct that such publication shall be made therein; provided, that the newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made and shall be published in the English language.

(Amended effective March 1, 1988, April 1, 1990)

Rule 10 Utah Rules of Civil Procedure

Rule 10. Form of pleadings.

(a) **Caption; names of parties.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of 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 this action."

(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 used for pleadings; size and style.** All pleadings and other papers filed in any action, except printed documents or other similar exhibits, shall be typewritten on good, white, unglazed paper of letter size (8½" x 11"), with a margin at the top of each page of not less than 2 inches and a left hand

Rule 17 Utah Rules of Civil Procedure

UTAH RULES OF CIVIL PROCEDURE

Rule 17

nonresident infant defendant shall have 20 days after his appointment in which to plead to the action.

(4) When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.

(d) **Associates may be sued by common name.** When two or more persons associated in any business either as a joint-stock company, a partnership or other association, not a corporation, transact such business under a common name, whether it comprises the names of such associates or not, they may be sued by such common name; and any judgment obtained against the defendant in such case shall bind the joint property of all the associates in the same manner as if all had been named defendants and had been sued upon their joint liability.

(e) **Action against a nonresident doing business in this state.** When a nonresident person is associated in and conducts business within the state of Utah in one or more places in his own name or a common trade name, and said business is conducted under the supervision of a manager, superintendent, or agent, said person may be sued in his own name in any action arising out of the conduct of said business.

Compiler's Notes. — This rule is similar to Rule 17, F.R.C.P.

Cross-References. — Guardians, § 75-5-101 et seq.
Service of process, Rule 4.

NOTES TO DECISIONS

ANALYSIS

Associates.

- Joint venture.
- Partnership.
- Unincorporated association.

Infants.

- Action for injury of minor.
- Suit by mother.
- Control by court.
- Failure to comply.
- Relief from judgment.
- Nonresident doing business in state.
- Not found.

Real party in interest.

- Assignee.
- Corporation.
- Assignment of assets to another corporation.
- Foreign corporation.
- Shareholder.
- Insurance company.
- Joint tort-feasors.
- Partner in joint venture.
- Purpose of rule.
- Wife.
- Cited

Associates.

- Joint venture.
- Joint venturers may sue in the name of the

joint venture. *Cottonwood Mall Co. v. Sine*, 95 Utah Adv. Rep. 11 (1988).

—Partnership.

Subdivision (d) does not affirmatively allow a partnership to bring suit in its common name, but the absence of a provision specifically authorizing a lawsuit in the partnership name is not indicative of an intent to prohibit such a suit. *Gary Energy Corp. v. Metro Oil Prods.*, 114 F.R.D. 69 (D. Utah 1987).

—Unincorporated association.

Subdivision (d) does not authorize an unincorporated association to institute an action in its common name. *Disabled Am. Veterans v. Hendrixson*, 9 Utah 2d 152, 340 P.2d 416 (1959).

Infants.

—Action for injury of minor.

—Suit by mother.

Under this rule, mother as guardian ad litem for benefit of father could bring action for injuries to sixteen-year-old son where father, an immigrant, had a somewhat limited use of English and business matters were mainly handled by the mother; § 78-11-6 providing for suit by father was not exclusive remedy. *Skollingsberg v. Brookover*, 26 Utah 2d 45, 484 P.2d 1177 (1971).

Rule 54b Utah Rules of Civil Procedure

PART VII.

JUDGMENT.

Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

(1) **Generally.** Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) Costs.

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed

as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3), (4) [Deleted.]

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

(Amended effective January 1, 1985).

Rule 56 Utah Rules of Civil Procedure

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the

facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 31 Utah Rules of Appellate Procedure

Rule 31. Expedited appeals decided after oral argument without written opinion.

(a) **Motion and stipulation for expedited hearing.** After the filing of all briefs in an appeal, a party may move for an expedited decision without a written opinion. The motion shall be in the form prescribed by Rule 23 and shall describe the nature of the case, the issues presented and any special reasons the parties may have for an expedited decision. The court may dispose of any qualified case under this rule upon its own motion.

(b) **Cases which qualify for expedited decision.** Appeals involving uncomplicated factual issues based primarily on documents, summary judgments, dismissals for failure to state a claim, dismissals for lack of personal or subject matter jurisdiction, and judgments or orders based on uncomplicated issues of law are, in general, of a type which the court will consider on a motion for expedited decision. In all motions brought under this rule, the substantive rules of law should be deemed settled, although the parties may differ as to their application.

(c) **Appeals ineligible for expedited decision.** The court will not grant a motion for an expedited appeal in cases raising substantial constitutional issues, issues of significant public interest, issues of law of first impression, or complicated issues of fact or law.

(d) **Procedure if expedited motion is granted.** If a motion for expedited decision is granted, the appeal will be given an expedited setting for oral argument within 45 to 60 days from the date of the order granting the motion. Within two days after submission of the appeal, the court will conference, decide the case, and issue a written order which need not be accompanied by an opinion. Entry of the order by the clerk in the records of the court, shall constitute the entry of the judgment of the court.

(e) **Precedential effect.** Appeals decided under this rule will not stand as precedent, but, in other respects, will have the same force and effect as other decisions of the court.

(f) **Issuance of written opinion.** If it appears to the court after the case has been submitted for decision that a written opinion should be issued, the time limitation in paragraph (d) shall not apply and the parties will be so notified.

Rule 33 Utah Rules of Appellate Procedure

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) **Procedures.**

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

Rule 58A. Utah Rules of Civil Procedure

Rule 58A. Entry.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(3) It must authorize the entry of judgment for a specified sum.

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

(Amended, effective Sept. 4, 1985 and Jan. 1, 1987.)

RULINGS AND ORDERS

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
117

AUG 21 3 10 PM '89

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

LON S. NIELD, et al., :
Plaintiffs, : RULING
vs. :
DAVID R. BATEMAN in his :
capacity as Sheriff of :
Utah County, Utah; et al., : CV87-2319
Defendants. : JUDGE BOYD L. PARK

The above-entitled matter came on regularly before the Court on Plaintiffs', Lon S. Nield, Patricia L. Nield, November Investors, Mark Peterson, and Nancy L. Peterson's, Motion for Summary Judgment. The Court, having read the Motion, and Memorandum of Points and Authorities in Support of and in Opposition to the Motion, now makes the following findings and ruling:

FINDINGS

1. Plaintiffs, Lon S. Nield, Patricia L. Nield, November Investors, Mark Peterson, and Nancy L. Peterson Motioned the Court for Summary Judgment as against Defendants, B. J. Rone, Ronald A. Bieber, RAB Ranch, and James A. Gregg, on Counts I, II, III, and IV of Plaintiffs' Complaint and against Sheriff Bateman, solely as to Count II of the Complaint.

2. This Court having spent an inordinate amount of time reviewing and analyzing several cases of the Fourth District Court, to wit: Case No's. 63,505, 63,522, 63,923 and 64,055, as requested by Plaintiffs' counsel, and further having researched and evaluated numerous statutes, title reports, Affidavits, Court transcripts, Deeds, and cases cited in the parties respective Memorandums, finds that even though some factual questions still exist (particularly regarding chain of title), the Court does not believe these to be material issues of fact particularly in view of the Utah Court of Appeals affirmation of Judge Baliff's ruling in *Demetropoulos v. Vreeken*, 754 P.2d 960 (Utah 1988) Civil No. (CV86-2491), finding improper service of process.

RULING

1. Plaintiffs, Lon S. Nield, Patricia L. Nield, November Investors, Mark Peterson, and Nancy L. Peterson's, Motion for Summary Judgment is granted.

DATED this 21 day of August, 1989.



BOYD L. PARK, DISTRICT JUDGE

cc: Michael M. Later, Esq.
George M. McCune, Esq.
Guy R. Burningham, Esq.

FILED IN
4th JUDICIAL DISTRICT

JAN 20 1 42 PM '89



Bruce A. Maak, Of Counsel (A2033)
Michael M. Later (A3728)
KIMBALL, PARR, CROCKETT & WADDOUPS
185 South State Street, Suite 1300
Salt Lake City, UT 84147
Telephone: (801) 532-7840

Dennis Norton (A2425)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place
Salt Lake City, UT 84111
Telephone: (801) 521-9000

Attorneys for Plaintiffs

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

LON S. NIELD, et al.,)	
)	
Plaintiffs,)	
)	JUDGMENT
vs.)	
)	
DAVID R. BATEMAN in his)	
capacity as Sheriff of)	Civil No. CV87-2319
Utah County, Utah; et al.,)	(Judge Boyd L. Park)
)	
Defendants.)	

Plaintiffs' motion for summary judgment came before the Court for hearing on Friday, January 13, 1989. Plaintiffs sought to have this Court declare that certain judgments held by defendants did not constitute liens against plaintiffs' homes and to enjoin defendants from attempting to foreclose upon plaintiffs' homes. The Court's ruling with respect to Counts I and II of plaintiffs' Complaint resolves all issues regarding the existence

of any lien in favor of the defendants against plaintiffs' homes, there exists no good reason for delay in entry of this ruling as a final judgment and, therefore, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, the Court hereby enters judgment as follows with respect to Counts I and II of plaintiffs' Complaint:

The default judgment in favor of B. J. Rone in the case of B. J. Rone v. Kurt Vreeken, et al., Civil No. 63,522, in the Fourth Judicial District Court of Utah County, State of Utah; the default judgment in favor of Ronald A. Bieber in the case of Ronald A. Bieber dba RAB Ranch v. Kurt Vreeken, et al., Civil No. 64,055, in the Fourth Judicial District Court of Utah County, State of Utah; and the default judgment in favor of James A. Gregg in the case of James A. Gregg v. Kurt Vreeken, et al, Civil No. 63,923, in the Fourth Judicial District Court of Utah County, State of Utah, are invalid due to defects in service of process and do not, in any event, constitute final judgment. The above-listed default judgments in favor of B.J. Rone, Ronald A. Bieber, and James A. Gregg do not constitute liens against the home of Lon S. and Patricia L. Nield including the following described parcel of real property in Utah County, Utah:

Lot 1, Plat A, Shadow Mountain Estates,
Utah County, Utah according to the official plat thereof in the office of the Utah County Recorder, less and excepting

the following tract: Commencing at the Southeast corner of Lot 12, Plat A, Shadow Mountain Estates Subdivision, Alpine; thence North 11°27'56" East 325.12 feet; thence South 9°34'18" West 323.13 feet; thence West 10.90 feet to the point of beginning.

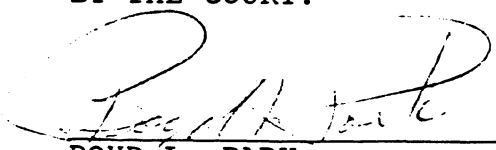
The above-listed default judgments in favor of B.J. Rone, Ronald A. Bieber, and James A. Gregg do not constitute liens against the home of Mark and Nancy L. Peterson, including the following described parcel of real property located in Utah County, Utah:

Lot 12, Plat A, Shadow Mountain Estates Subdivision, Alpine, Utah, according to the official plat thereof on file and of record in the Utah County Recorder's office.

Defendants are hereby permanently enjoined from conducting any sheriff's sale, foreclosure, or other form of execution against the Nield and Peterson homes pursuant to the above-referenced default judgments in favor of B.J. Rone, Ronald A. Bieber, and James A. Gregg.

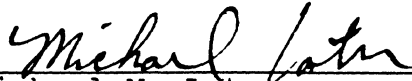
DATED this 25 day of October, 1989.

BY THE COURT:


BOYD L. PARK
District Judge

APPROVED AS TO FORM:

KIMBALL, PARR, CROCKETT & WADDOUPS



Michael M. Later
Attorneys for Plaintiffs

George L. McCune
Attorney for Defendant Rone,
Bieber, RAB Ranch and Gregg

Guy R. Burningham
Deputy County Attorney
Attorney for David R. Bateman

FILED

JAN 20 1991

Mary T. Noonan

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

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 and Appellees,)

ORDER OF AFFIRMANCE

Case No. 900187-CA

v.)
David R. Bateman, in his)
capacity as Sheriff of Utah)
County, Utah, and B. J. Rone;)
Ronald A. Bieber; RAB Ranch, a)
business entity; and James A.)
Gregg,)
Defendants and Appellants,)

B. J. Rone, James A. Gregg, and)
Ronald A. Bieber,)
Third-Party Plaintiffs,)

v.)
Associated Title Company, a)
Utah corporation; Briant)
Stafford, an individual; Stormy)
Peterson, an individual; Wendy)
Wilson, an individual; Diane C.)
Green, an individual; D. & M.)
Coal Company, a South Carolina)
corporation; and other John)
Does and Jane Does, whose true)
names are unknown at present,)
Third-Party Defendants.)


Before Judges Orme, Garff, and Bench (on Rule 31 Hearing).

The summary judgment of the trial court is affirmed.
Under Utah R. App. P. 33(a), we award appellees a reasonable
attorney fee and double costs on appeal.

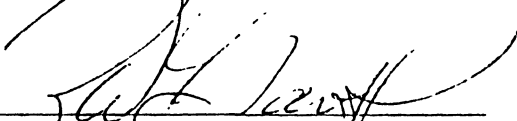
This case is remanded to the trial court to determine the amount of costs and fees awarded to appellees and whether said award should be assessed against appellants, appellants' attorney, or each of them. See Taylor v. Estate of Taylor, 770 P.2d 163, 172 (Utah Ct. App. 1989).

DATED this 28th day of January, 1991.

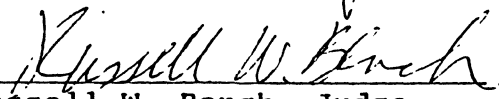
ALL CONCUR:



Gregory K. Orme, Judge



Regnal W. Garff, Judge



Russell W. Bench, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 28rd day of January, 1991, a true and correct copy of the foregoing ORDER was hand-delivered or deposited in the United States mail.

George M. McCune
Attorney at Law
Suite 17 Intrade Complex
1399 South 700 East
Box 520561
Salt Lake City, UT 84152-0561

Michael M. Later
Bruce A. Maak
Larsen, Kimball, Parr & Crockett
Attorneys at Law
185 South State, Suite 1300
Salt Lake City, UT 84111

DATED this 28rd day of January, 1991.

By


Deputy Clerk

George M. McCune (2171)
Attorney for Defendants and
 Appellants Bieber, RAB Ranch,
 Gregg, and Rone
 5243 Carpell Avenue
 Box 18044
 Salt Lake City, UT 84118-8044
 Tel. 801-964-2825
 FAX 801-964-0551

IN THE UTAH SUPREME COURT

STATE OF UTAH

-----oOo-----

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 and)
 Respondents,)

vs.)

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

Defendants and)
 Appellants.)

 B. J. RONE, JAMES A. GREGG,)
 and RONALD A. BIEBER,)

Third Party)
 Plaintiffs,)

vs.)

ASSOCIATED TITLE COMPANY, a)
 Utah corporation; BRIANT)

Case No. _____

ORDER EXTENDING
 TIME FOR FILING
 PETITION FOR
 WRIT OF CERTIORARI

STAFFORD, an individual;)
STORMY PETERSON, an individual;)
WENDY WILSON, an individual;)
DIANE C. GREEN, an individual;)
D. & M. COAL COMPANY, a South)
Carolina corporation; and other)
JOHN DOES and JANE DOES, whose)
true names are unknown at pre-)
sent,)
)
Third Party)
Defendants.)

Appellants having filed a motion pursuant to Rule 48(e) Utah Rules of Appellate Procedure, as amended, for extension of time to file a petition for writ of certiorari in this matter and good cause appearing therefor,

IT IS ORDERED that the time for filing a petition for writ of certiorari in this matter is extended from February 27, 1991 to Friday, March 29, 1991.

DATED this 20 day of February, 1991:

BY THE COURT:

/ Daniel Stewart
Justice of the Supreme Court

CERTIFICATE OF SERVICE

Mailed a copy of the foregoing pleading to the following, each in a securely sealed envelope, deposited in the United States mail on this 20th day of February, 1991:

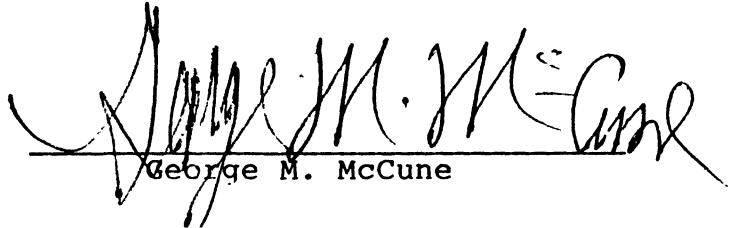
Michael M. Later/Bruce A. Maak
KIMBALL, PARR, CROCKETT & WADDOUPS
Suite 1300, 185 S. State
Box 11019
Salt Lake City, UT 84147

A. Dennis Norton
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Salt Lake City, UT 84111

Guy R. Burningham
UTAH COUNTY ATTORNEY'S OFFICE
Utah County Courthouse
Provo, UT 84601

Clerk
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, UT 84111

Clerk
Utah County
Utah County Courthouse
Provo, UT 84601


George M. McCune

COURT OPINIONS

Anderson v. American Society of Plastic & Reconstructive Surgeons, 148 UAR 3, 4 (Utah November 15, 1990)..... 13

CODE • CO
Provo, Utah

Anderson v. American Society of Plastic Surgeons

148 Utah Adv. Rep. 3

3

Cite as
148 Utah Adv. Rep. 3

**IN THE SUPREME COURT
OF THE STATE OF UTAH**

Celia ANDERSON,
Plaintiff and Appellant,
v.
**AMERICAN SOCIETY OF PLASTIC AND
RECONSTRUCTIVE SURGEONS, Dr.
Robert Goldwyn, Broadbent & Woolf, Inc., a
Utah corporation, Robert M. Woolf,
individually, and Dow Corning Corporation,
Defendants and Appellees.**

No. 870421
FILED: November 15, 1990

Third District, Salt Lake County
Honorable Leonard Russon

ATTORNEYS:

Daniel F. Bertch, Robert J. DeBry, Salt Lake
City, for Celia Anderson
P. Keith Nelson, Salt Lake City, for
Broadbent & Woolf and Robert M. Woolf
Ray R. Christensen, Salt Lake City, for Dow
Corning Corporation
Michael E. Reed, Diane M. Kehl, Chicago,
and Elliott J. Williams, Larry R. Laycock,
Salt Lake City, for American Society of
Plastic and Reconstructive Surgeons and Dr.
Goldwyn

**This opinion is subject to revision before
publication in the Pacific Reporter.**

DURHAM, Justice:

Plaintiff Celia Anderson ("Anderson") appeals the dismissal of her complaint against defendants American Society of Plastic and Reconstructive Surgeons, Inc. ("ASPRS"), and Dr. Robert Goldwyn ("Goldwyn") (collectively "defendants") for lack of personal jurisdiction. The other defendants have not contested jurisdiction. This appeal follows trial court certification of its interlocutory order under rule 54(b) of our rules of civil procedure. We vacate the trial court's order of dismissal as to both ASPRS and Goldwyn and remand for trial on the merits, with an order to postpone any ruling on personal jurisdiction until after plaintiff has presented her case.

Anderson's claims arise out of experimental therapy she received for a disfiguring condition of her face. The therapy consisted of injections of an experimental liquid silicone product into her face. The liquid silicone was produced by Dow Corning Corp. ("Dow") and injected by Dr. Robert Woolf ("Woolf") (both defendants, but not parties to this appeal). Anderson reacted severely to the silicone,

became grossly disfigured, and suffered a great deal of pain. She filed suit against Dow, Woolf, and Woolf's professional corporation for damages, alleging various causes of action.

During discovery, Anderson found out that ASPRS was involved with Dow in setting up and running the experimental silicone injection program. She also learned that Goldwyn was the medical monitor in charge of ensuring that each patient admitted to the program fell within the FDA guidelines, was an appropriate subject for the experimental therapy, and received appropriate follow-up care in the event of complications. She found that he also supervised much of the medical record keeping for the program and performed various other functions.

Anderson amended her complaint to include ASPRS and Goldwyn, claiming that she should not have received the experimental therapy because she did not fit the program's patient profile, that ASPRS--with Dow--violated federal drug law, that she did not give informed consent for the therapy because of defendants' and Dow's preparation of a defective informed consent form, and that Goldwyn was negligent in performing his monitoring duties.

Defendants moved to dismiss Anderson's complaint against them for lack of personal jurisdiction pursuant to rule 12(b)(2) of our rules of civil procedure. They argued that their conduct did not fall within the activities listed in Utah's long-arm statute and that they had insufficient contacts with this forum for it to assert jurisdiction compatible with due process requirements.

The trial court ruled on defendants' motion based on the pleadings and documentary evidence, including depositions and affidavits. It concluded that to assert jurisdiction over defendants would offend due process. It did not make any findings of fact, but in light of conflicts in the documentary evidence before it, we conclude that the court necessarily weighed the facts in order to reach its conclusions.

Anderson's allegation that the district court can assert specific personal jurisdiction over ASPRS and Goldwyn under our long-arm statute, Utah Code Ann. §78-27-24 (1987), requires a two-part inquiry. See, e.g., *Bradford v. Nagle*, 763 P.2d 791, 793 (Utah 1988). First, do her claims arise from one of the activities listed in the statute? And second, are defendant's contacts with this forum sufficient to satisfy the due process clause of the fourteenth amendment if the trial court exercises jurisdiction? An additional preliminary question is, what burden must a plaintiff bear to show that the trial court has personal jurisdiction over a defendant? We will address the preliminary question first.

In *Roskelley & Co. v. Lerco, Inc.*, 610 P.2d 1307 (Utah 1980), we held that in a pretrial

determination of jurisdiction, a plaintiff cannot rely on allegations made in the complaint if the defendant has specifically controverted alleged jurisdictional facts by affidavit. *Id.* at 1310. However, we did not answer the question of how to resolve factual disputes—such as conflicts between one witness's deposition and another's affidavit—nor did we decide how to proceed when jurisdiction turns on the same facts as the merits of the case. Both of these problems occur in Anderson's case.

We have not had occasion to address these issues before, but the federal courts have done so. Because our rule 12 is patterned after the corresponding federal rule and because the federal courts routinely apply state long-arm statutes to determine the limits of their own jurisdiction, the federal courts' reasoning is helpful. The following is our synthesis of tenth circuit reasoning on these issues as set forth by five representative cases. See *Ten Mile Indus. Park v. Western Plains Serv. Corp.*, 810 F.2d 1518, 1524 (10th Cir. 1987); *Behagen v. Amateur Basketball Ass'n*, 744 F.2d 731, 733 (10th Cir. 1984), cert. denied, 471 U.S. 1010 (1985); *Milligan v. Anderson*, 522 F.2d 1202, 1207 (10th Cir. 1975); *Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965); *Nova Mud Corp. v. Fletcher*, 648 F. Supp. 1123, 1124-25 (D. Utah 1986).

The approach taken by the federal courts is motivated by concern for flexibility, judicial economy, and preservation of substantial rights. In the federal trial court's discretion, under rule 12 it may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing. If it proceeds on documentary evidence alone (i.e., the first two methods), the plaintiff is only required to make a prima facie showing of personal jurisdiction. The plaintiff's factual allegations are accepted as true unless specifically controverted by the defendant's affidavits or by depositions, but any disputes in the documentary evidence are resolved in the plaintiff's favor. The trial court must not weigh the evidence unless a hearing is held.

Unless an evidentiary hearing is held, the plaintiff must prove jurisdiction at trial by a preponderance of the evidence after making a prima facie showing before trial. When jurisdiction turns on the same facts as the merits of the case, an evidentiary hearing is inappropriate because it infringes on the right to a jury trial and is an inefficient use of judicial resources (hearing the same evidence twice); in such cases—if the plaintiff has made a prima facie showing—jurisdiction is determined by trial on the merits. Pretrial jurisdictional decisions based on documentary evidence are reviewed de novo by the federal appellate courts.

We approve these guidelines as suitable for our trial courts. Applying them to Anderson's

case, we hold that she need only have made a prima facie showing that the trial court had personal jurisdiction over defendants in order to proceed to trial on the merits. Because the facts on which personal jurisdiction over defendants is asserted overlap the facts that will determine whether defendants are liable to Anderson, it was proper for the trial court to rule on personal jurisdiction based only on documentary evidence.

The next issue is whether defendants' actions with respect to Anderson fall within the activities enumerated in our long-arm statute. The trial court did not rule on this issue; it based its ruling on due process considerations only. Defendants argue that they did not "caus[e] any injury within this state" as required by the statute in tort and breach of warranty cases. Utah Code Ann. §78-27-24(3) (1987). Although we often assume the application of the statute—and go straight to the due process issue—because our legislature has directed us to construe it "so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution," Utah Code Ann. §78-27-22 (1987); see *Parry v. Ernst Home Center Corp.*, 779 P.2d 659, 661 (Utah 1989), we do not do so here. Whether defendants caused injury to Anderson is the central question on the merits of her claims. She is entitled to have a jury answer that question if she produces sufficient evidence. See Utah Code Ann. §§78-21-1, -2 (1987).

Anderson has made a prima facie showing that defendants caused her injuries. She has alleged that she should not have been accepted into the program, and deposition testimony shows that she did not fit the program's patient profile. Other documentary evidence shows that it was Goldwyn's responsibility to make sure that all patients admitted to the program fit the profile. This evidence supports a prima facie case of negligence against Goldwyn and an inference that ASPRS may have been negligent in its supervision of Goldwyn or in preparing guidelines for him. There is documentary evidence that ASPRS participated in the program with Dow as a cosponsor and that both may have violated duties imposed by federal drug law. There is further evidence that ASPRS participated with Dow and Goldwyn in preparing the consent form used by physicians participating in the program. Anderson has alleged that she would not have been injured because she would not have accepted the therapy if the consent form had disclosed the true nature of the risks. The sum of this and other evidence is that Anderson has made a prima facie showing that defendants caused injuries to her in this state.

The last issue is whether defendants have sufficient minimum contacts with this forum to make exercising jurisdiction over them

comport with the demands of due process imposed by the fourteenth amendment (neither party briefed state constitutional due process issues). The trial court based its decision on due process, and defendants make their main argument based on due process. Defendants argue, and the trial court ruled, that they lack sufficient contacts with Utah and this litigation to be subject to personal jurisdiction here.

We last reviewed due process requirements for personal jurisdiction in *Parry v. Ernst Home Center*.¹ Our analysis is the same here. Defendants' contacts with Utah must be "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Defendants must have "reasonably anticipate[d] being haled into court" here. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), and they must have "purposefully avail[ed]" themselves of the privilege of conducting activities here. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The trial court must also balance "the convenience of the parties" and weigh this forum's interest in asserting jurisdiction. *Mallory Eng'g, Inc. v. Ted R. Brown & Assoc.*, 618 P.2d 1004, 1008 (Utah 1980); see also *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

After reviewing the record in light of the standards articulated above, we hold that Anderson has made a prima facie showing that defendants had sufficient contacts with Utah and this litigation for assertion of personal jurisdiction consistent with due process. Facts supporting this conclusion include the following: ASPRS—(1) its committee selected Salt Lake City as a program site, (2) its committee selected Woolf as a program physician, (3) it assisted in preparing the consent form which it knew would be used in Utah, (4) it (with Dow) selected Goldwyn as monitor of treatment in the program, including anticipated treatment in Utah, (5) it investigated the potential for malpractice claims, including those that might arise in Utah, and (6) it trained Woolf, knowing he would use that training in Utah; Goldwyn—(1) helped draft the consent form, (2) supervised the proper administration of the treatment program in Utah, (3) authorized Anderson's silicone injections, and (4) assumed responsibility to monitor Anderson's treatment and to follow up if there were problems.

The foregoing facts show purposeful acts with known, significant consequences in Utah. Utah's interest in protecting Anderson from injury is compelling. Balancing all of the competing interests, we hold that it is fair to require defendants to subject themselves to trial in a Utah court for the purpose of determining whether Anderson can prove jurisdiction, and hence liability (namely, that defe-

ndants caused her injury and damages).

We vacate dismissal and remand to the trial court for trial on the merits. Because the facts supporting jurisdiction overlap the facts supporting liability, the trial court must allow defendants to renew their motion to dismiss for lack of jurisdiction at the close of Anderson's evidence.

WE CONCUR:

Gordon R. Hall, Chief Justice
Richard C. Howe, Associate Chief Justice
I. Daniel Stewart, Justice
Michael D. Zimmerman, Justice

1. Although not relevant to this case, we acknowledge the issues raised about this case by the commentary in Note, *Parry v. Ernst Home Center Corporation: The "Mauling" of Personal Jurisdiction Theory*, 1990 Utah L. Rev. 479 (authored by Marc Young).

960 Utah

754 PACIFIC REPORTER, 2d SERIES

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.

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.

MERITS OF APPEAL

Appellant has set forth various "facts" in his brief. He has not, however, "marshaled" 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 findings⁸ 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.⁹ 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.¹⁰ 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.¹¹

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.¹² 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"¹³ 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."

suaded. 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):

CODE • L.G.
Provo Utah

CODE • CO
Provo Utah

Reed v. Reed
154 Utah Adv. Rep. 6

7

Cite as
154 Utah Adv. Rep. 6

IN THE SUPREME COURT
OF THE STATE OF UTAH

Vernessa REED,
Plaintiff and Appellee,

vs.
Keith REED, Merrill W. Reed, Georga Reed
and John Does 1 through 15,
Defendants and Appellant.

No. 890446
FILED February 14, 1991

Fourth District Utah County
Honorable Cullen Y. Christensen

ATTORNEYS

Gary J. Anderson, Michael K. Black, Richard
B. Johnson Orem, for appellant
Glen Ellis, Hurricane for appellee

This opinion is subject to revision before
publication in the Pacific Reporter

HALL, Chief Justice

Defendant Keith Reed (hereinafter "defendant") appeals the trial court's order and judgment denying a motion to quash service of summons upon him and the default judgment entered against him.

Plaintiff and defendant were granted a divorce on April 15, 1987, in the Fourth Judicial District Court, Utah County. Under the terms of the divorce, plaintiff was awarded items of personal property, including a travel trailer and a four-wheel-drive pickup truck, neither of which was surrendered to plaintiff in a timely manner. The trailer was eventually returned to plaintiff by defendant's parents, Merrill Reed and Georga Reed, also named defendants in this matter.

On May 8, 1988, in an effort to recover the pickup truck, plaintiff caused the sheriff to serve the subject summons upon defendant and his parents at his parents' home in Orem, Utah, where defendant had resided during the pendency of the divorce. At the time of service, the sheriff was informed by the parents that defendant no longer lived at the residence and that they did not know where he was but thought he was out of the state. The sheriff nevertheless left defendant's copy of the summons at the parents' home and completed a return of service.

On May 25, 1988, defendant appeared specially and filed a motion to quash service. He included with the motion affidavits from himself and his parents stating that he did not live with his parents and that the service of process was not made at his usual place of

abode.

Plaintiff filed a counter affidavit stating that she saw defendant in Provo City, a city next to Orem, on May 7, 1988, the day before service at his parents' home and again on May 12, 1988, a few days after service. In addition Treasa Norton, the daughter of plaintiff and defendant also executed an affidavit stating that she had seen defendant on April 26, 1988, in the vicinity of Orem some two weeks before service of process.

On August 1, 1988, defendant requested an evidentiary hearing on the issue of service. At the hearing, which was held on September 26, 1988, defendant presented no evidence of his usual place of abode. Plaintiff, however, presented evidence that defendant had listed his parents' home as his residence on his 1986 and 1987 tax returns in addition to the information contained in the affidavits.

In a ruling dated October 3, 1988, the district court made findings of fact and conclusions of law and denied the motion to quash service. An amended default judgment was subsequently entered against defendant on November 2, 1988, on the action to recover the truck. On August 4, 1989, defendant filed a notice of appeal challenging the October 3, 1988 ruling and the November 2, 1988 judgment.

Two issues are presented on appeal: first, whether the notice of appeal was filed in a timely manner and, second, whether defendant was properly served.

I. NOTICE OF APPEAL

Plaintiff asserts that the court lacks jurisdiction to hear this appeal because defendant failed to file his notice of appeal in a timely manner. Rule 4 of the Rules of the Utah Supreme Court governs filing of a notice of appeal and states:

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the district court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from.

Plaintiff asserts that because the notice of appeal was filed on August 4, 1989, and the amended judgment against defendant was entered on November 2, 1988, the time for filing an appeal had lapsed. Plaintiff misapprehends the procedural posture of this case. Final judgment was not entered against Keith Reed until judgment was entered against the co-defendants, his parents. Utah Rule of Civil Procedure 54(b) states:

(b) Judgment upon multiple claims and/or involving multiple

parties. When more than one claim for relief is presented in an action and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.¹

It is undisputed that no 54(b) motion was made requesting the court to certify the amended default judgment against Keith Reed as final. Final judgment was entered in favor of Merrill Reed and Georga Reed, the co-defendants, on July 11, 1989.² Because the notice of appeal was filed within 30 days of the final judgment, we are not without jurisdiction to hear this appeal.

II. SERVICE OF PROCESS

Defendant claims that service was defective because the sheriff left the summons at his parents' home and it was not his usual place of abode. Utah Rule of Civil Procedure 4(e)(1) governs service of process and states that service is perfected when made "[u]pon a natural person of the age of 14 years or over, by delivering a copy thereof to him personally, or by leaving such copy at his usual place of abode with some person of suitable age and discretion there residing."

The determination of "usual place of abode" is a mixed question of law and fact.³ Here, the district court made explicit findings of fact and conclusions of law in ruling on the motion to quash. The court found, *inter alia*, that all defendants claimed that Keith Reed no longer lived with his parents, that plaintiff observed Keith Reed on May 7 and May 12 driving in town, that Keith Reed was personally seen by Treasa Norton on April 26 driving the truck in question, that sometime after February 5, 1988, Keith Reed filed his 1987 income tax return indicating his parents' address to also be his address, and that not later than June 8, 1988, Keith Reed became aware of the process served upon his parents on May 8, 1988. However, it is apparent that he became aware of the service sometime prior to May 25, 1988, since he filed a motion to

quash service on that day.

The district court's findings of fact are based upon a judgment of the credibility of the witnesses. It is the province of the trier of fact to assess the credibility of witnesses, and we will not second guess the trial court where there is a reasonable basis to support its findings.⁴ In order to challenge the court's findings of fact, the defendant must marshal all of the evidence in favor of the findings and then demonstrate that even when reviewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings.⁵ Defendant has not shouldered the burden necessary to overturn the findings of the trial court.

The district court's determination of whether, under the facts presented, defendant's parents' home fits within the definition of the usual place of abode is a question of law. When reviewing the district court's conclusions of law, we give no deference to the court but review those conclusions for correctness.⁶

The district court relied on the case of *Grant v. Lawrence*⁷ for the definition of "usual place of abode." In *Grant v. Lawrence*, this court stated:

Usual place of abode is sometimes referred to as being synonymous with domicile or permanent residence. In our judgment there is a broad distinction between domicile [sic] and usual place of abode as the latter term is used in our statute. That is, where a person abides—lives—at the particular time when the summons is served, constitutes his usual place of abode.⁸

Neither party disputes the fact that the sheriff left the summons at the home of defendant's parents and made the required return of service thereon.⁹ The sheriff's return of service of process is presumptively correct and is prima facie evidence of the facts stated therein. Stated negatively, the rule is that it is not to be presumed that an officer in serving process failed to discharge his duty.¹⁰ Thus, the burden was upon defendant to prove that service was improper. Indeed, it was defendant who requested the September 26, 1988 evidentiary hearing. At the hearing, defendant had the opportunity to present evidence of his true place of abode, if in fact it differed from that of his parents. This he failed to do. Faced with those facts, the district court concluded that the parents' home was defendant's usual place of abode.

Since the Utah Rules of Civil Procedure were patterned after the federal rules, we may examine federal decisions to determine the meaning of the rules.¹¹ In *Nowell v. Nowell*,¹² the federal Court of Appeals for the Fifth Circuit construed a similar federal provision

and noted

[N]o hard and fast rule can be fashioned to determine what is or is not a party's "dwelling house or usual place of abode" within the rule's meaning, rather the practicalities of the particular fact situation determine whether service meets the requirements of 4(d)(1).

[T]he provision concerning usual place of abode should be [construed liberally] to effectuate service if actual notice has been received by the defendant and that in the last analysis the question of service must be resolved by "what best serves to give notice to a defendant that he is being served with process, considering the situation from a practical standpoint."¹³

We also give the Utah Rules of Civil Procedure liberal construction.¹⁴ Considering the totality of the circumstances—the facts that plaintiff demonstrated defendant's presence in the community, that defendant listed his home address as that of his parents, had resided there during the pendency of the divorce, and failed to show that he lived elsewhere—the district court was justified in concluding that defendant's parents' home was his usual place of abode and that it was, in fact, the place where he lived. In addition, the likelihood of defendant appearing at the place of service in the near future, coupled with the absence of a permanent residence elsewhere, is sufficient to uphold service made at a residence maintained with a member of defendant's family even if defendant is seldom there.¹⁵

Defendant having failed to show proper service had not been made upon him, and because he, in fact, had timely notice of the pendency of the proceedings, the trial court did not err in denying the motion to quash.

Affirmed.

WE CONCUR

Richard C. Howe, Associate Chief Justice
I. Daniel Stewart, Justice
Christine M. Durham, Justice
Michael D. Zimmerman, Justice

¹ Utah R. Civ. P. 54(b).

² The trial court found that Merrill and Georga Reed had a valid and protectable security interest in the truck.

³ Although we have held that whether a person has been served with process is a question of fact, *Carnes v. Carnes*, 668 P.2d 555, 557 (Utah 1983), whether a person is properly served is a question of law.

⁴ See Utah R. Civ. P. 52(a), *State v. Ashe*, 745 P.2d 1255, 1258 (Utah 1987); *Holland v. Brown*, 15 Utah 2d 422, 394 P.2d 77, 79 (1964).

⁵ See e.g., *Gravson Roper Ltd. v. Finlinson*, 782 P.2d 467, 470 (Utah 1989).

⁶ See e.g., *Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990).

⁷ 37 Utah 450, 108 P. 931 (1910).

⁸ *Id.* at 933.

⁹ Utah Code Ann. §17-22-2 (1987).

¹⁰ *Carnes*, 668 P.2d at 557; see also 62B Am. Jur. 2d Process §110 (1990).

¹¹ See e.g., *Winegar v. Slim Olson, Inc.*, 122 Utah 487, 252 P.2d 205, 207 (Utah 1952).

¹² 384 F.2d 951 (5th Cir. 1967).

¹³ *Id.* at 953 (quoting 1 Barron & Holtzoff, *Federal Practice & Procedure* §177 at 299 (quoting *Rovinski v. Rowe*, 131 F.2d 68, 69 (6th Cir. 1942))).

¹⁴ Utah R. Civ. P. 1(a).

¹⁵ *C. Wright & A. Miller, Federal Practice and Procedures* §1096 at 76-77 (1987); see also *Skidmore v. Green*, 33 F. Supp. 527, 28 (D.C. N.Y. 1940); *Capitol Life Ins. Co. v. Rosen*, 69 F.R.D. 83, 87, 88 (D.C. Pa. 1974).

STATE v. TINNIN. (No. 4173.)

(Supreme Court of Utah. Jan. 5, 1925.)

1. False pretenses \S 7(2)—Contract entered under "fictitious" name valid.

Contract entered into under fictitious name is valid, law looking at identity of individual, not the name he has assumed; "fictitious" meaning feigned, imaginary, not real, counterfeit, fake, not genuine.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fictitious.]

2. False pretenses \S 7(2)—Conviction of felony, where accused signed fictitious name to sight draft, sustained.

Where accused passed sight draft signed by fictitious name as his own, conviction for felony, under Comp. Laws 1917, \S 8278, instead of for misdemeanor under section 8347, was proper.

Appeal from District Court, Weber County; J. N. Kimball, Judge.

Nelson G. Tinnin was convicted of crime of felony, and he appeals. Affirmed.

D. L. Oleson, of Salt Lake City, for appellant.

Harvey H. Cluff, Atty. Gen., and W. Hal. Farr, Asst. Atty. Gen., for the State.

ERICKSON, District Judge. In this action defendant was convicted in the district court of Weber county upon a charge of fel-

ony and sentenced to an indeterminate term in the state prison of the state of Utah from one to ten years, from which judgment of conviction and imprisonment he appeals to this court.

The information charges the defendant as follows:

"Nelson G. Tinnin, having heretofore been duly committed by D. R. Roberts, a committing magistrate of this county, to this court, to answer this charge, is accused by the district attorney of this judicial district, by this information, of the crime of felony, committed as follows, to wit:

"The said defendant, on February 18, 1924, at the county of Weber, state of Utah, did willfully, unlawfully, fraudulently, and feloniously make and pass a certain fictitious instrument in writing, purporting to be a sight draft for the payment of \$320 in money, drawn on the Ogden State Bank, a banking corporation with its principal place of business in Ogden, Utah, signed by R. A. Kennedy and payable to the order of Glen Bros. Roberts Piano Company, a corporation with its principal place of business at Ogden, Utah, with the intent of him the said defendant to defraud the said Glen Bros. Roberts Piano Company, there being in existence at said time no such person as R. A. Kennedy, which the defendant then and there well knew, and when the said defendant then and there well knew that said purported sight draft was fictitious, the same being in words and figures following, to wit:

"At sight pay to the order of Glen Bros. Roberts Piano Co. three hundred twenty dollars (\$320.00). For value received. Write name of your bank here: To Ogden State Bank, City. Sign here: R. A. Kennedy."

"Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Utah."

The main and principal contention of the defendant relied upon for a reversal of this case is that the evidence in the case does not prove the offense described in section 8276 of the Compiled Laws Utah 1917, of a violation of which the defendant was convicted, and which section reads as follows:

"Every person who makes, passes, utters, or publishes, with intention to defraud any other person, or who, with the like intention, attempts to pass, utter, or publish, or who has in his possession, with like intent to utter, pass, or publish, any fictitious bill, note, or check, purporting to be the bill, note, check, or other instrument in writing for the payment of money or property of some bank, corporation, co-partnership, or individual when in fact there is no such bank, corporation, co-partnership, or individual in existence, knowing the bill, note, check, or instrument in writing to be fictitious, is punishable by imprisonment in the state prison for not less than one nor more than ten years."

Appellant contends that if any violation of law was proved at all, it could not amount to more than the offense designated in section 8347 of the said Compiled Laws Utah 1917, which reads as follows:

"Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivery that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor. The making, drawing, uttering or delivering of such check, draft, or order as aforesaid shall be prima facie evidence of intent to defraud. The word 'credit' as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of such check, draft or order."

The evidence in this case shows that on the 18th day of February, 1924, the defendant was introduced to one Holland, an employee of Glen Bros. Roberts Piano Company of Ogden, Utah, whereupon the defendant advised Holland that he was desirous of purchasing a phonograph, after which a phonograph was purchased, valued at \$310, for which he gave in payment therefor his check for \$320, receiving in cash \$10 out of which he expended several dollars for some sheer music. The check was signed "R. A. Kennedy" in the presence of Holland and next day presented to the Ogden State Bank for payment, which was refused because of "R. A. Kennedy" not having an account at that bank.

The evidence further shows that on the same day the defendant issued at least two other checks to Ogden merchants in payment for purchases made and signed the same name, which checks were also presented to the bank and payment refused for the same reason as given above.

Shortly after the arrest of the defendant, he admitted that Kennedy was not his true name; that it was a fictitious one; that his true name was Tinnin. Also at the arraignment the record shows that defendant stated that he was being prosecuted under his true name, viz., Tinnin. The evidence also shows that he stated that he used the name of "Kennedy" because it was "handy."

We agree with defendant's statement that our section 8276 was recently adopted from the California Penal Code, § 476, enacted by California in 1872. Ours is exactly the same with the exception of the penalty, which is from one to fourteen years in California, and from one to ten years in Utah. The defendant undoubtedly takes the position, as claimed by him, that no conviction under that section of law has ever been had in the state of California wherein a person signed a fictitious or assumed name to an instrument and claimed the same to be his own name.

We think there is no question but that it has been held by some authorities that an instrument supposed to be fictitious must be a false instrument, and if it is understood

to be the instrument of the one who signs it his use of a fictitious name will not make it a forgery the credit having been given to him without regard to the name See section 764, vol 2 McClain on Criminal Law.

[1] There is no question in law either, as to a contract entered into by a person under an assumed or fictitious name being valid. The law looks to the identity of the individual, and when this is established the act is binding upon him and others, irrespective of the name he has assumed But here we have an action where a person, as appears from the evidence fraudulently and with intent to cheat and defraud the said Glen Bros Roberts Piano Company, signed a fictitious name to the check and passed it to the said company, and, as stated by himself, he used that name because it was "handy"

We agree with counsel for defendant that a person may rightfully assume a name which is not his own, as is frequently done in good faith, but in this case it appears that the defendant was a stranger at Ogden and in that vicinity, and that he evidently thought and believed and intended that by adopting and using the same fictitious name that it would enable him to prevent identification of himself later on when the fraud had been discovered, and which he undoubtedly knew would soon be discovered

Webster defines the word "fictitious" to mean feigned; imaginary; not real; counterfeit, false; not genuine In People v. Eppinger, 105 Cal. 36, 38 P. 538, which is a California case cited by appellant, the defendant was prosecuted under the California statute. Section 476 of the Penal Code. A reversal was had in the case because of certain allegations in the information, but the court in said case uses the following language:

"The essence of the offense created by the provisions of section 476 is the making, with an intent to defraud another, of an obligation of some 'bank, corporation, copartnership or individual,' when in fact there is no such obligor in existence"

The testimony in this case by the assistant cashier of the Ogden State Bank is to the effect that no such person as R. A. Kennedy had or kept an account at the bank upon which the check was drawn.

[2] A careful examination of all of the authorities cited by counsel for appellant in his brief fails to show that the conviction in this case was wrong, but on the contrary, we hold that the statute in question was intended by the Legislature to cover just such a case as this There was no error committed by the court in overruling and denying defendant's motion for a new trial for the reasons herein stated

The judgment of the lower court is affirmed

WEBER, C J, and GIDEON, FRICK, and CHERRY, JJ, concur

THURMAN, J, did not participate herein