

1990

J Rodney Dansie, Individually and as Guardian, ad litem for Tiffany Dansie v. John C. Thomas, Joe Totoria, Elvira Totoria, Kenneth Norton, William Turner, Thomas B. Shirley : Brief of Appellant

Utah Supreme Court

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Larry R. Keller; Attorney for Respondent/Defendant.

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BRIEF

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IN THE SUPREME COURT OF UTAH

J. RODNEY DANSIE, Individually  
and as Guardian, ad litem  
for TIFFANY DANSIE,

Plaintiff/Appellant.

VS.

JOHN C. THOMAS, JOE TOTORIA,  
ELVIRA TOTORIA, KENNETH NORTON,  
WILLIAM TURNER, THOMAS B. SHIRLEY,

Defendants/Respondents.

APPELLANT'S BRIEF

Case No: 900244

Priority Classification  
16

APPEAL FROM A FINAL ORDER DENYING PLAINTIFF/APPELLANT'S  
MOTION FOR RELIEF FROM JUDGMENT AND TO ALTER OR AMEND JUDGMENT,  
dated April 26, 1990, from a Judgement dated April 5, 1990,  
awarding the Defendant/Respondent, William Turner attorney's fees  
and costs in the amount of \$5,008.72, pursuant to Section 78-27-  
56, U.C.A.

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH,  
HONORABLE LEONARD H. RUSSON, PRESIDING.

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FEB 28 1991

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IN THE SUPREME COURT OF UTAH

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for TIFFANY DANSIE,	)	APPELLANT'S BRIEF
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Plaintiff/Appellant.	)	
	)	
vs.	)	
	)	
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ELVIRA TOTORIA, KENNETH NORTON,	)	
WILLIAM TURNER, THOMAS B. SHIRLEY,	)	Priority Classification
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IN THE SUPREME COURT OF UTAH

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WILLIAM TURNER, THOMAS B. SHIRLEY,	)	Priority Classification
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**JURISDICTION**

This Appeal is taken pursuant to Utah Code Annotated, Sec. 78-2-2(3)(j) and Sec. 3 of Article VIII of the Utah Constitution.

**NATURE OF PROCEEDINGS**

This Appeal is from a Final Order denying Plaintiff/Appellant's Motion for Relief from judgment and to alter or amend judgment dated April 26, 1990, from a judgment dated April 5, 1990, awarding the Defendant/Respondent William Turner, attorney's fees and costs in the amount of \$5,008.72 pursuant to Section 78-27-56, U.C.A.

**STATEMENT OF ISSUES ON APPEAL**

1. Was the award of attorney's fees and costs to Defendant/Respondent William Turner proper under Section 78-27-56, U.C.A. 1953?

2. If so, is the amount of attorney's fees proper in that the award included Defendant/Respondent William Turner's fee for pursuing his Counter Claim?

3. Did the trial court err in not awarding Plaintiff/Appellant J. Rodney Dansie's attorney's fees under Section 78-27-56, U.C.A.?

#### **DETERMINATIVE STATUTES AND RULES**

This case is governed by Section 78-27-56, Utah Code Annotated, 1953 as amended and by Rules 59 and 60, Utah Code Annotated 1953 as amended.

#### **STATEMENT OF THE CASE**

The Plaintiff/Appellant filed suit against six (6) individual Defendants, including Defendant/Respondent William Turner, alleging that the Defendant's have battered, assaulted and intentionally inflicted emotional distress upon both of the Plaintiffs/Appellants. (R.2-6). In addition, the Plaintiffs/Appellants sought punitive damages against all Defendants. (R.6). The Defendants filed counterclaims for defamation of character, negligent infliction of emotional distress, intentional infliction of emotional harm, malicious abuse of process, and assault. (R.23-37). The majority of Defendants' counterclaims were dismissed upon Plaintiff's/Appellant's Motion for Partial Summary Judgment prior to trial. (R.274). The Defendant/Respondent William Turner,

maintained his counterclaim for assault through the conclusion of his testimony at trial. (T.R.12). In chambers and without a record, Defendant/Respondent William Turner's counterclaim was withdrawn. (This was never told to Plaintiff/Appellant). The Honorable Leonard H. Russon directed a verdict of no cause of action as to the Defendant/Respondent William Turner, (T.R.12) and the jury after a six day trial found no cause of action as to the other Defendants. (R.332-338).

The Defendants made a motion for attorney's fees, pursuant to Section 78-27-56, U.C.A., seeking \$24,576.30 for Defendant Kenneth Norton (George T. Naegle, Esq.) and \$4,587.35 each for Defendants John Thomas, Joe Totorica, Respondent William Turner and Thomas B. Shirley for a total of \$18,349.40 (as per affidavit of Larry R. Keller) for a grand total of \$42,925.70. (R.452-461). The Plaintiffs made a similar motion under 78-27-56, U.C.A., seeking \$30,170.75 against the Defendants. (R.484). Judge Russon granted the motion as to Defendant/Respondent William Turner only, and awarded judgment for \$4,587.35 in legal fees and \$421.37 in costs against Plaintiff/Appellant J. Rodney Dansie, based upon Section 78-27-56, U.C.A. (bad faith), and denied the other motions including Plaintiff/Appellant J. Rodney Dansie's motion. No findings of fact or conclusions of law were prepared. (R.510).



### STATEMENT OF FACTS

1. On or about December 21, 1988, Rod Dansie and Tiffany Dansie filed a Complaint against the Defendants. The Complaint was prepared and filed by the law firm of McMurray, McMurray, Dale & Parkinson. (R.2-7).

2. On or about January 20, 1989, the Defendants John C. Thomas, Joe Totorica, Elvira Totorica, Kenneth Norton, William Turner, and Thomas B. Shirley, filed a Counterclaim in the above-entitled matter alleging that Plaintiff Rod Dansie assaulted them, was guilty of malicious abuse of process, had intentionally inflicted emotional distress upon them, had negligently inflicted emotional distress upon them, and was guilty of defamation of character by the filing of Plaintiff's lawsuit. (R.23-38).

3. By letter dated March 1, 1989, Rod Dansie advised his homeowners insurance carrier, Utah Farm Bureau Insurance Company, of the Counterclaim and requested coverage and defense of the Counterclaim.

4. Because the Counterclaim included a claim for negligent infliction of emotional distress, Utah Farm Bureau agreed to defend the Counterclaim pursuant to a "reservation of rights."

5. By letter dated May 17, 1989, Utah Farm Bureau assigned the matter to its insurance defense counsel, Morgan & Hansen and retained Morgan & Hansen to defend the Counterclaim. Morgan & Hansen entered their appearance as co-counsel for Plaintiffs on June 7, 1989. (R.87).

6. As discovery progressed, it became apparent that it would be necessary to present Plaintiff's version of what actually happened in order to properly defend the Counterclaim. So as to avoid duplication of effort and with the consent of Plaintiff and his insurer, Utah Farm Bureau, it was agreed that Morgan & Hansen would be sole counsel for Plaintiff and present his case and version of what happened in connection with its defense efforts.

7. On or about October 23, 1989, Defendants Joe Totorica, Elvira Totorica, and John C. Thomas made a Motion for Leave to Amend their Counterclaim to include a Sixth Cause of Action for Malicious Prosecution. (R.117-120).

8. On or about October 27, 1989, Defendant Kenneth Norton joined in that Motion for Leave to Amend Counterclaim to include a Sixth Cause of Action for malicious prosecution. (R.142,143).

9. On or about November 15, 1989, by Minute Entry, the Court ruled that Defendants' Motion to Amend their Counterclaim to allege a cause of action of malicious prosecution be denied for the reasons set forth in Plaintiff/Appellant's Response Memorandum. (R.146).

10. On or about January 2, 1990, Plaintiff/Appellant submitted a Motion for Partial Summary Judgment asking that the Counterclaim of the Defendants/Respondents be dismissed. (R.214-229).

11. On January 22, 1990, the Court, in response to said

Motion for Partial Summary Judgment, dismissed Defendant/Respondent's counts for malicious abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress and defamation of character. The Court allowed the assault cause of action to go forward to trial. (R.271-275).

12. The Defendant Kenneth Norton withdrew his counterclaim for assault the day that trial began.

13. The Defendant William Turner withdrew his counterclaim for assault following his direct examination and the majority of Plaintiff's cross-examination of him.

14. Following a six-day trial, the jury returned a no cause-of-action verdict with respect to the counterclaim for assault of the Defendants Joe Totorica, Elvira Totorica, John Thomas, and Thomas B. Shirley. (R.395-405).

15. Plaintiff had an open offer to Defendants from the conclusion of the trial to not pursue costs or attorney's fees if the Defendants would not pursue costs or attorney's fees. The Court said it to be in the best interests of all parties concerned that this matter be brought to a conclusion without further action tending to aggravate the open wounds between the parties. Defendants rejected Plaintiff's offer, insisting that Plaintiff also must agree to stay out of the High Country Estates subdivision and to contract out all work of operation of the Foothills Water Company which necessitates Mr. Dansie entering the subdivision.

16. In spite of this Court's counsel and advice to "bury the hatchet," counsel for Defendants are insistent on pursuing an award of attorney's fees in this matter. (T.R.17-19).

17. All parties, including the Defendants, were represented by lawyers retained by insurance companies, by reason of their homeowners policies of insurance.

#### SUMMARY OF ARGUMENT

The emmense weight of evidence, as set forth in this brief, establishes that Respondent's counterclaims against Mr. Dansie were brought in bad faith and were without merit, therefore, the appellant should be awarded attorney's fees. (Sec. 78-27-56, U.C.A.).

The trial court abused it's descretion when it awarded attorney's fees to Respondent William Turner, since there was not sufficient factual evidence on the record to justify and meet the required elements set out by the Supreme Court of Utah in Cady v. Johnson, (671, p.2d 149, Utah 1983) to allow the trial court to award attorney's fees. (Sec. 78-27-56, U.C.A.).

The facts in the record simply do not support the elements necessary to find that the Appellant's claims against Defendant William Turner, were meritless and were brought in bad faith. Appellant's conduct did not rise to a level of lack of good faith. There was no evidence that Appellants lacked an honest belief in their claims, that they had an intent to take an unconsionable advantage of Defendants, nor that they had intent

to or knowledge that their suit would hinder, delay or defraud Defendants.

At the very least, in light of the fact that the jury called the case a "draw" and no one won and in light of the fact all parties had insurance representation, and Plaintiff's claim and Defendants' counter claim resulted in no course of action, each party should be required to bear his or her own fees and costs. This is what the trial court counseled at the conclusion of the trial. (Ct. p.16-19). The Court awarded attorneys fees to Defendant/Respondent Turner and the Court should also award attorneys fees to Appellant, since Mr. Turner's counter claims were dismissed and Defendant's award of fees included attorney's fees to pursue those counter claims.

#### ARGUMENT

##### **POINT I**

#### **DEFENDANTS/RESPONDENTS ARE NOT ENTITLED TO ATTORNEY'S FEES PURSUANT TO UTAH CODE ANNOTATED, SECTION 78-27-56**

As adequately set forth in Defendant Kenneth Norton's Memorandum of Points and Authorities in Support of his Motion for Attorney's Fees, (R.444-448), in order to recover for a bad faith filing under Utah Code Annotated Section 78-27-56, as interpreted by case law, the moving party must establish (1) that the action was without merit; and (2) that the action was brought in bad faith. Cady v. Johnson, 671 p.2d 149 (Utah 1983). The Court in Cady v. Johnson, (supra), made it very clear that just because a party prevails in a lawsuit does not mean that that

party is entitled to attorney's fees under UCA Section 78-27-56. (R.444-448). The Court stated as follows:

"The statute is narrowly drawn. It was not meant to be applied to all prevailing parties in all civil suits."

Id. at 151.

With respect to the first standard, that the action be "without merit," the Court stated in Cady v. Johnson, (supra), that "the term implies bordering on frivolity." The dictionary definition of "frivolous" is "of little weight or importance, having no basis in law or fact." Id. and Add. #A p.593.

Following the presentation of Plaintiff's/Appellant's case at trial, Defendants/Respondents made a Motion for a Directed Verdict on all counts. (T.R.10). The Court granted Defendants/Respondents' Motion for a Directed Verdict with respect to William Turner and with respect to the claim of assault on behalf of Tiffany Dansie against the Defendants/Respondents Joe Totorica, Elvira Totorica, Thomas B. Shirley, and Kenneth Norton. Otherwise, the Motion for directed verdict was denied. (T.R.10).

A directed verdict is only appropriate when the Court is able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented. Management Comm. v. Graystone Pines, Inc., 652 p.2d 896 (Utah 1982). The Court determined that sufficient evidence was presented, except in those areas mentioned above, for

Plaintiff's/Appellant's case to go to the jury. Defendants/ Respondents have offered no case law to support their position that in spite of the fact that their Motion for Directed Verdict was denied, attorney's fees should be awarded under UCA, Section 78-27-56. Such a position is contradictory on its face. How could a claim be "without merit" when sufficient evidence was presented to send the claim to the jury? Certainly, with respect to those claims that survived Defendants'/Respondents' Motion for Directed Verdict, Defendants'/Respondents' Motion for attorney's fees should be denied, it being impossible for the Defendants/ Respondents to meet the first requirement of such a statutory award. (Add. #A, p. 593-609, Attorney's Fees in Bad Faith, Meritless Actions).

Even in the event of the granting of a directed verdict, the conclusion does not necessarily follow that the claim was without merit. Plaintiff/Appellant was proceeding on the theory that the group of Defendants/Respondents committed an assault on him and his daughter, and thereby also intentionally caused emotional distress. Assault is committed by a person acting with the intent to cause a harmful or offensive contact with another person or to create an imminent apprehension of such a contact and the other person is thereby put in such imminent apprehension. A person commits the tort of intentional infliction of emotional distress or where any reasonable person would have known that such would result and his or her actions

are of such a nature as to be considered outrageous or intolerable in that they offend against the generally accepted standards of decency and morality. It stands to reason that if you join together with a group of people in a mob action and march down toward the victims in an angry manner, screaming and yelling and making threats, you are more likely, as a group, to cause immediate apprehension of a harmful or offensive contact and emotional distress than if you acted alone. Being involved in such a mob action certainly makes the acts more outrageous and intolerable. (Add. #A, p.598-599).

Pursuing such a legal theory which would amount to a logical extension of the case law in the State of Utah should not be punished by an award of attorney's fees. The theory was warranted by existing law or constituted a good faith argument for the extension of existing law (see Rule 11, URCP). To punish a plaintiff for attempting to pursue a good faith argument for extension of the existing law would run counter to the American legal system which is built upon the careful development of the law through the case law approach. It would be the "death knell" to our present legal system if every plaintiff who tried to pursue the broadening of legal theory was punished under a bad faith statute. (Add. #A, pp.599-602).

Even with respect to the Defendant/Respondent William Turner, Plaintiff's/Appellant's testimony brought him within that group of individuals Plaintiff recognized as having surrounded



him in front of his truck. Even though Mr. Turner did not stand face to face with Mr. Dansie, he chose to join the group, adding to the aura of fear. He stated to Mr. Dansie, according to Mr. Dansie's testimony, "We've got you now, Rod." Clearly, Mr. Turner was an active participant in the group assault.

(T.R.3,4).

Even if the Court determines that the claims that were dismissed upon Defendants'/Respondents' Motion for a Directed Verdict were without merit, the requirements of UCA, Section 78-27-56 have still not been met. (Add #A, p.601,602). In Cady v. Johnson, the Court determined that the plaintiffs there had no legal basis for recovery but went on to state that even if the claim was without merit, the trial court must also find that plaintiff's conduct in bringing his suit was lacking in good faith. Cady v. Johnson, 671 p.2d 149, 151. The Court in Cady v. Johnson, adopted the Washington Supreme Court's definition of "good faith" as follows:

(1) An honest belief in the propriety of the activities in question; (2) No intent to take unconscionable advantage of others; and (3) No intent to, or knowledge of the fact that the activities in question will hinder, delay or defraud others.

The Court went on to state that to establish lack of good faith, one must prove that one or more of these factors is lacking. Id. (Add. #A, p.599-603).

There was no evidence at trial that Mr. Dansie did not have an honest belief that William Turner assaulted him and

intentionally caused him emotional distress. Mr. Dansie testified that Mr. Turner was within close proximity to him and made the comment, "We've got you now, Rod." (T.R. p.4). There was no evidence to indicate that Mr. Dansie named Mr. Turner with the intent to take unconscionable advantage of him. Such would certainly be the case had Mr. Turner not joined with the group in coming down to participate in the "group assault." (T.R. p.3). Mr. Turner's decision to come down and be part of the fray in spite of the fact that, according to his affidavit testimony, he knew of Rod Dansie's "background and penchant for violence on occasion" (C.R.264), should bar his claim for fees. (Add. #A, p.593-610).

William Turner hardly comes to this Court asking for fees with clean hands. On the one hand, he testified that he was never closer than thirty feet from the Plaintiff, but on the other hand, in order to promote his Counterclaim, he testified in his Affidavit that "J. Rodney Dansie's outrageous and uncontrolled actions, including the waving in a threatening manner of a pan, placed myself and others in immediate apprehension that an assault would take place." (Affidavit of William Turner, paragraph 2, emphasis added). (R.264). In William Turner, we have an individual who was willing to pursue an obviously frivolous counterclaim for assault, until on direct examination he discovered the difficulty of maintaining the position that he had been personally assaulted and yet was never

close enough to Mr. Dansie to assault him. At that point, upon questioning by Mr. Keller as to why he had brought his counterclaim, Mr. Turner's answer brought to a head this contradictory and dishonest position as he responded that he did not know why he had brought the counterclaim for assault.

(T.R.10). In light of such testimony, it is the Plaintiff who should be allowed to recover attorney's fees against Mr. Turner, who according to his own testimony brought a claim for assault which was without merit and in bad faith. (Add. #A, p.593-610).

The additional count that was dismissed upon directed verdict was the claim of Tiffany Dansie that she had been assaulted by the Defendants Joe Totorica, Elvira Totorica, Kenneth Norton, William Turner and Thomas B. Shirley. Again, Plaintiff/Appellant was requesting an extension of existing law in seeking recovery under a group assault theory. Although Tiffany Dansie was in her father's truck, who testified that the group of people surrounding her father screaming and yelling at him in an uncontrolled manner, which she had not previously witnessed, placed her not only in fear for her father's safety but for her own safety as well. This mob action was a thin line away from the breaking point in which serious physical injury would have been inevitable. Tiffany Dansie was, by the actions of the Defendants/Respondents, placed in imminent apprehension of a harmful or offensive contact and suffered emotional distress by actions of the Defendants/Respondents which any reasonable person

would have known would have resulted in such emotional distress in a thirteen-year-old girl. Defendants'/Respondents' actions were outrageous and intolerable in light of the presence of this young girl. Defendants/Respondents should have been held accountable, knowing full well the aura of fear that would be created by their group action and by the natural sensitivities of a thirteen-year-old girl. The group assault theory that Tiffany Dansie was pursuing was warranted by existing law or constituted a good faith argument for the extension of existing law and was not brought "without merit." Even if the Court deems such a claim to be without merit, it was not pursued in bad faith and did not result in any increased cost to the Defendants/Respondents in defending against those claims that were not dismissed upon directed verdict. (Add. #A, p.599-601).

## POINT II

THE COUNTERCLAIM OF DEFENDANTS WAS WITHOUT MERIT AND WAS PURSUED IN BAD FAITH, WARRANTING AN AWARD OF ATTORNEY'S FEES TO PLAINTIFF/APPELLANT.

Plaintiff's/Appellant's initial Complaint was prepared and filed on or about December 21, 1988, by the firm of McMurray, McMurray, Dale & Parkinson. An Answer and Counterclaim was filed on January 20, 1989. Thereafter, by letter dated March 1, 1989, Plaintiff requested that his homeowner's insurance carrier, Utah Farm Bureau, cover and defend the Counterclaim. Utah Farm Bureau agreed to defend the Counterclaim pursuant to a "reservation of rights" and by letter dated May 17, 1989, retained its insurance

defense firm, Morgan & Hansen, to defend the Counterclaim. Pursuant thereto, Morgan & Hansen entered its appearance as co-counsel for Plaintiff on June 7, 1989. As discovery progressed, it became apparent that it was largely a duplicative effort to have separate counsel with respect to Plaintiff's claims and with respect to Plaintiff's/Appellant's defense against Defendants'/Respondents' counterclaims. Therefore, after a discussion between Plaintiff/Appellant and their insurer, it was agreed that since it would be necessary to present Plaintiff's/Appellant's version of what actually happened in order to properly defend the Counterclaim, that the law firm of Morgan & Hansen would be sole counsel for Plaintiff/Appellant and present his case and version of what happened. The Plaintiff/Appellant version of what happened, if believed, would impeach the Defendants'/Respondents' credibility as to their version of what happened as set forth in their Counterclaim and hopefully result in a no cause of action with respect to their Counterclaim, which is what the jury so determined. Thus, Morgan & Hansen set upon a course of action to defeat Defendants'/Respondents' Counterclaim. Depositions of each of the Defendants/Respondents were taken and a Motion for Partial Summary Judgment was prepared and filed, as a result of which all claims of Defendants/Respondents, except for their cause of action for assault, were dismissed. (R.271).

Plaintiff/Appellant incorporates his Memorandum in Support

of his Motion for Partial Summary Judgment herein for the argument that Defendants'/Respondents' Counterclaim was without merit and pursued in bad faith. Defendants'/Respondents' Counterclaim for malicious abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress and defamation of character were all dismissed. (R.271). Defendant's/Respondent's attempt to amend their Counterclaim for an additional cause of action for malicious prosecution was also denied by the Court. (R.271).

Defendant's/Respondent's bad faith in bringing such claims was brought out by Mr. Keller in direct examination as each Defendant testified that he or she only brought their Counterclaim because of the suit brought by Mr. Dansie. (T.R.10). In other words, they were motivated by revenge rather than by the good faith pursuit of claims. (Add. #A, p.597).

The counts in Defendant's/Respondent's Counterclaim that were dismissed were largely based upon the false allegation that Mr. Dansie regularly filed lawsuits similar to the one in the instant case in an effort to harass and intimidate persons who had challenged his alleged ownership of the water rights and water delivery system for Hi-Country Estates under circumstances where such lawsuits had been dismissed as being totally without merit. (Defendants'/Respondents' Counterclaim, paragraph 26). (R.31). Upon questioning of each of the Defendants/Respondents in their depositions, none were able to supply any factual basis

for this allegation in that the only suits Mr. Dansie had previously brought were for collection of unpaid standby fees of lot owners in the Hi-Country Estates. This blatantly false theme was pursued by Defendant's/Respondent's counsel throughout the trial. (Add. #B, p.1-9).

Even Defendant's/Respondent's claim for assault was exposed as having been brought in bad faith by testimony at trial. Sharon Shirley, the wife of Defendant Thomas B. Shirley, who by all testimony was the individual that Rod Dansie came the closest to during the pan-waving incident, testified that the whole incident was a laughing matter which no one took seriously and that she was never placed in fear for her personal safety as a result of the incident. James Schoudel, one of Defendants' key witnesses, also testified that people were laughing at Mr. Dansie as he was waving the pan. And yet, because the Defendants/Respondents were angry that Mr. Dansie was pursuing his claims in this matter, they elected to intentionally lie about their own personal fear of being hit by the pan. Even though Mr. Thomas, Mr. Norton, and Mr. Turner, by their own testimony, were never close enough to have any kind of fear about the pan incident, they elected to pursue such a frivolous and bad faith claim. See the depositions, (R.264), and affidavits of these Defendants. (T.R.10). If anyone should be awarded attorney's fees in this matter, it should be the Plaintiff/Appellant for having to defend against counterclaims built upon intentional lies propounded

because the Defendants/Respondents were angry at being involved in this litigation. (Add. #A, p.602).

Because of the obvious weakness of their position with respect to a claim for assault by the pan incident, the Defendants elected to pursue a theory that they had been assaulted by the vehicle of Mr. Dansie as he pulled away from the incident. (R.8). Such a theory was pursued in spite of testimony that placed all of the Defendants/Respondents, except for Kenneth Norton, to either side of the truck as it pulled away. Mr. Norton, in order to support Mr. Thomas in his claim that he was simply trying to close the door to keep Tiffany Dansie from falling out as Rod Dansie pulled away, was compelled to testify that he stood and watched the entire incident as the truck pulled away. He testified that he was not afraid of being run over and he did not step out of the way even though he was the one Defendant/Respondent in front of the truck as it pulled away.

In spite of all of the efforts of Defendant's/Respondent's counsel to attempt to paint the picture that their clients were innocent victims of Mr. Dansie's "scheme" to set up the incident in order to pursue his litigation in this matter, the real evidence clearly shows six Defendants/Respondents willing to lie based on a belief that their lies were justified because of the actions and representations of Mr. Dansie. It was apparent from the trial that Mr. Dansie was at least sincere in his beliefs and pursuit of his claims and it was equally obvious that the



Defendants'/Respondents' claims were based solely on revenge factors rather than based upon truthful pursuit of legitimate claims. (Add. #A, p.599-602), (Add. #B, p.1-9).

#### CONCLUSION

In order to recover for a Bad Faith filing under U.C.A. Section 78-27-56, as interpreted by case law, the moving party must establish: (1) that the action was without merit and (2) that the action was brought in bad faith. Just because a party prevails in a lawsuit, does not mean that that party is entitled to an award of attorney's fees. The claim was not "without merit", since it was submitted to the Jury for the group of Defendants.

The case law is that to establish lack of good faith, one must prove that one of the three factors discussed in Cady v. Johnson, (supra), is lacking. The evidence at the trial indicated that Mr. Dansie had: (1) an honest belief that Mr. Turner assaulted him and his daughter and intentionally caused emotional distress, if not alone as part of the mob group. There was (2) no intent by Mr. Dansie to take unconscionable advantage of others and there was (3) no intent or knowledge of the fact that the activities in question would hinder, delay, or defraud others. Even if the Court deems such a claim to be without merit; the claims were not pursued in bad faith and did not result in any increase of cost to the Defendants/Respondents in defending against those claims that were not dismissed upon

directed verdict. Failure to prevail in the case doesn't establish bad faith. The trial court exceeded its authority in awarding fees to the plaintiff, William Turner, and not awarding fees to Mr. Dansie for Turner's frivolous counter claims. If anyone should be awarded fees in this matter, it should be the Appellant for having to defend against counter claims built upon intentional lies propounded because the Respondants were angry at being involved in this litigation.

It is respectfully submitted that the great weight of evidence, as set forth above, affirmatively establishes that the Defendant/Respondent Counterclaims against the Plaintiff/Appellant were brought in bad faith and were without merit, and that therefore the Plaintiff/Appellant should be awarded his attorney's fees pursuant to UCA, Section 78-27-56. At the very least, in light of the fact that all parties had insurance representation, and Plaintiff/Appellant claims and Defendant/Respondent counterclaims resulted in a no cause of action, each party should be required to bear his or her own fees and costs. (Add. #B, p.1-9).

The Appellant did not appeal the special jury verdict due to the cost of another full-blown trial. The fact that Appellant failed to meet his burden of proof does not mean the assault did not happen, it only means that when the stories were retold, the jury was not convinced based on the evidence presented.

It certainly does not mean that the assault did not happen

and that Plaintiff's/Appellant's claims did not have merit partially in light of the fact in this case where all of the Defendants and most of the witnesses were people whom the Plaintiff/Appellant had participated with through a corporation. This corporation, owned by Appellant, was in collection of legal debts owed to the small water company with fifty-three (53) customers. The water company would be out of business if the debts were not collected.

The Judge directed a verdict as to Turner, but the jury decided the case with regards to the other Defendants. If the lawsuit against a group of Defendants didn't have merit, the judge wouldn't have allowed it to go to the jury.

Many of the Defendants and witnesses testified that people were laughing at Mr. Dansie as he was waving the pan. No one in this case won. "The jury called it a draw" (C.T.18), as stated by the Court. The Court counseled, "Hey, let's don't file motion against each. Let's don't stick each other with attorney's fees". This was the advise of the Court and yet Respondent/Appellant chose to ask for attorney's fees.

If one side is awarded it's attorney's fees the other side should also have fees awarded under 78-27-56 U.C.A.

The Court in this case went beyond the law in assessing attorney's fees to the Appellant and abused it's discussion in this case. There simply was not sufficient factual evidence for assessing attorneys fees to the Plaintiff/Appellant fees under U.C. annotated 78-27-56.

DATED this 25<sup>th</sup> day of February, 1991.

J. Rodney Dansie  
J. RODNEY DANSIE, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that ten (10) copies of Appellant,  
J. Rodney Dansie's Brief were hand delivered and served on the  
Clerk of the Supreme Court this 28<sup>th</sup> day of February,  
1991 four (4) copies were hand delivered and served on Larry R.  
Keller, Attorney for Repondent/Defendant, at 257 Tower, Suite  
#340, 257 East 200 South - 10, Salt Lake City, Utah 84110 this  
28<sup>th</sup> day of February, 1991.

J. Rodney Dansie  
J. RODNEY DANSIE

J. Rodney Dansie  
J. RODNEY DANSIE, Pro Se

**ADDENDUM A**

Utah Law Review

Attorney's Fees in Bad Faith

Meritis Actions p.593 -- p.610

1984 Utah Law Review

## Attorney's Fees in Bad Faith, Meritless Actions\*

In *Cady v. Johnson*,<sup>1</sup> the Utah Supreme Court interpreted for the first time a new Utah statute that allows a court to award attorney's fees for civil actions brought without merit and not asserted in good faith.<sup>2</sup> In *Cady*, the supreme court set standards for lower courts to use in determining whether to award attorney's fees under the statute.<sup>3</sup> Although the opinion clearly states that a trial court must make three distinct findings in order to authorize an award of attorney's fees,<sup>4</sup> the standards set by the supreme court are somewhat ambiguous. This comment will attempt to clarify the ambiguities of the court's opinion and make several suggestions for future application of the statute.

### I. BACKGROUND

Utah courts have traditionally adhered to the American rule that attorney's fees cannot be awarded to a prevailing party in the absence of a specific statutory provision or an agreement between the parties.<sup>5</sup> That rule is based on the assumption that imposing costs and expenses on the losing party will discourage citizens from asserting their legal rights.<sup>6</sup>

The American rule contrasts sharply with the English practice of awarding costs, including solicitor's and counsel's fees, to the prevailing party in a lawsuit.<sup>7</sup> Critics of the American rule have

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\* The author is indebted to Lon Jenkins, a 1983 graduate of the University of Utah College of Law and former staff member of the UTAH LAW REVIEW. Much of the background information used in this comment was drawn from an unpublished article written by him.

1. 671 P.2d 149 (Utah 1983).

2. Act of Mar. 23, 1981, ch. 13, § 1, 1981 Utah Laws 24 (codified at UTAH CODE ANN. § 78-27-56 (Supp. 1983)).

3. 671 P.2d at 151.

4. *Id.*

5. See, e.g., *Turtle Mgmt., Inc. v. Haggis Mgmt., Inc.*, 645 P.2d 667, 671 (Utah 1982); *Utah Farm Prod. Credit Ass'n v. Cox*, 627 P.2d 62, 66 (Utah 1981).

6. In *St. Joseph Stock Yards Co. v. Love*, 57 Utah 450, 465, 195 P. 305, 311 (1921), the Utah Supreme Court stated its rationale for adhering to the American rule: "The courts of this state are always open to all for the redress of grievances and the protection of legal rights, and in our judgment they should refrain from allowing the imposition of costs and expenses upon the losing party except such as are provided for by statute . . . ."

7. English courts have awarded counsel fees as a part of costs of litigation since the promulgation of the Statute of Gloucester, 6 Edw., ch. 1 (1275). Fees were originally available only to prevailing plaintiffs. A statute was passed in 1607, however, that permitted

advocated adoption of at least a modified English practice for two reasons: first, the American rule encourages intolerably congested courts;<sup>8</sup> second, an injured party can never be made whole if he must pay his own attorney's fees.<sup>9</sup>

Recognizing that the American rule had inherent problems, the federal judiciary created exceptions to the rule,<sup>10</sup> including the federal bad faith exception.<sup>11</sup> That exception authorizes a court to award attorney's fees against a party if the court determines that the party "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."<sup>12</sup> Under that exception, bad faith may be found either in actions that led to the lawsuit or in the conduct of the litigation itself.<sup>13</sup>

Similarly, a number of states have enacted statutes authorizing courts to award attorney's fees in civil actions where one party acts in bad faith or asserts a frivolous claim.<sup>14</sup> Following that

awards to prevailing defendants as well. 4 Jac., ch. 3 (1607). The current English practice essentially was established by the 1883 rewrite of the Rules of Court. Goodhart, *Costs*, 38 YALE L.J. 849, 851-72 (1929). That procedure requires a special taxing master, after the conclusion of a case, to determine the amount and appropriateness of costs to be awarded the prevailing party. For an extensive examination of the English history of costs, see *id.*

8. See Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 79-80 (1963). The American rule encourages parties with unfounded or feeble claims to bring suit in hope of recovering at least the nuisance value of the suit because such a party risks nothing but the cost of his own attorney's fees. See Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 797 (1966). Parties faced with the possibility of being charged with double attorney's fees theoretically would be deterred from asserting unfounded claims or defenses. See Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1221 (1967) (quoting *First Report of the Judicial Council of Massachusetts*, 11 MASS. L.Q. 7, 63-64 (1925)).

9. See Ehrenzweig, *supra* note 8, at 792; Note, *supra* note 8, at 1223. A party who pays substantial attorney's fees to defend himself against a frivolous suit, or one who must pay attorney's fees to recover an "airtight claim," has suffered real monetary damage.

10. See *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939) (attorney's fees may be awarded as costs in "exceptional cases and for dominating reasons of justice").

11. See *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974). The other major exception is the "common fund exception," which permits a court to assess attorney's fees against a common fund that a successful litigant has procured for the benefit of a class of individuals. *Id.*; see *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 163-68 (1939).

12. *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974) (footnote omitted).

13. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980) (quoting *Hall v. Cole*, 412 U.S. 1, 15 (1973)).

14. See, e.g., ARIZ. REV. STAT. ANN. § 12-341.01(C) (1982) (groundless and not in good faith); CAL. CIV. PROC. CODE § 128.5 (West 1982) (frivolous and not in good faith, but "frivolous" includes "not in good faith"); COLO. REV. STAT. § 13-17-101 (Supp. 1982) (frivolous); FLA. STAT. ANN. § 57.105 (West Supp. 1984) ("complete absence of a justiciable issue"); MASS. ANN. LAWS ch. 231, § 6F (Michie/Law Co-op Supp. 1983) (frivolous and not in good

trend, the Utah Legislature enacted section 78-27-56<sup>15</sup> in 1981, allowing a court to "award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith."<sup>16</sup>

## II. DECISION

In *Cady v. Johnson*,<sup>17</sup> the Utah Supreme Court considered Utah's bad faith attorney's fees statute for the first time. The plaintiffs<sup>18</sup> in *Cady* had offered their home for sale under a listing agreement with Telford Realty Company. Rich Edwards, a salesman for All Seasons Realty, prepared a written offer of purchase that was signed by defendant Jared Johnson for his mother, defendant Reta Johnson. Jared had no written power of attorney to sign the document for Reta.<sup>19</sup> Jared also gave the salesman a \$500 check, drawn on his mother's bank account, as earnest money.<sup>20</sup> The plaintiffs subsequently vacated their home.<sup>21</sup> On the closing date, the defendants did not appear, and later indicated that they did not desire to purchase the home.<sup>22</sup> The plaintiffs refused to return the earnest money and instituted suit for additional damages, or in the alternative, for equitable relief for failure to perform the contract.<sup>23</sup>

At trial, the plaintiffs' first cause of action was dismissed on their own motion,<sup>24</sup> and their second cause of action was dismissed pursuant to the statute of frauds.<sup>25</sup> The plaintiffs, therefore, were

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faith); MINN. STAT. ANN. § 549.21 (West Supp. 1984) (bad faith claim, frivolous claim, position asserted solely to harass or delay, or fraud upon the court); N.D. CENT. CODE § 28-26-01 (Supp. 1983) (frivolous); WIS. STAT. ANN. § 814.025 (West Supp. 1983-84) (frivolous, including both bad faith and meritless claims).

15. UTAH CODE ANN. § 78-27-56 (Supp. 1983).

16. *Id.* The statute applies in all civil actions "where not otherwise provided by statute or agreement." *Id.*

17. 671 P.2d 149 (Utah 1983).

18. Plaintiffs in the case were Jon and Carolyn Cady (the vendors), Telford Realty and Rich Edwards, a salesman for All Seasons Realty. Defendants were Reta Johnson and her son, Jared Johnson. *Id.* at 150.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* Plaintiffs decided, on the strength of *Andreasen v. Hansen*, 8 Utah 2d 370, 335 P.2d 404 (1959), that because they had retained the earnest money as liquidated damages, they were not entitled to additional damages. See *Cady*, 671 P.2d at 150.

25. *Cady*, 671 P.2d at 150; see UTAH CODE ANN. § 25-5-1 (1976). The vendee's son



not entitled to damages or equitable relief for breach of contract.<sup>26</sup>

In addition, the trial court granted the defendants' request for attorney's fees based on a finding that the plaintiffs had assured the judge that there would be valid issues for trial, even though they had no actionable claim.<sup>27</sup> The judge concluded that if the plaintiffs had researched the law, they would have discovered that their claims were meritless and could have saved the court time by not pursuing the case.<sup>28</sup>

The plaintiffs appealed both the summary dismissal of their second cause of action and the award of attorney's fees.<sup>29</sup> The Utah Supreme Court held that the trial court was correct in dismissing the second cause of action,<sup>30</sup> but vacated the award of attorney's fees because there was no proof that the suit was not brought in good faith.<sup>31</sup>

In vacating the award of attorney's fees, the supreme court addressed the newly enacted section 78-27-56.<sup>32</sup> It stated that for an award of attorney's fees to be made pursuant to the statute, the trial court must make three distinct findings. First, the party to whom the fees are to be awarded must prevail.<sup>33</sup> Second, the court must find that the action or defense was "without merit."<sup>34</sup> The supreme court stated that the term "without merit" was synonymous with "frivolous."<sup>35</sup> The court then set out the dictionary definition of frivolous—"of little weight or importance having no basis in law or fact"<sup>36</sup>—and held that the trial court was correct to find that the plaintiffs' causes of action were "without merit."<sup>37</sup>

Third, the trial court must find that an action or defense was not brought or asserted in good faith.<sup>38</sup> The supreme court quoted *Tacoma Ass'n of Credit Men v. Lester*,<sup>39</sup> which defined "good

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had no written power of attorney to act as her agent in signing the earnest money agreement, so there was no valid contract.

26. *Cady*, 671 P.2d at 151.

27. *Id.* at 150.

28. *Id.*

29. *Id.* at 151.

30. *Id.*

31. *Id.* at 152.

32. *Id.* at 151-52 (citing UTAH CODE ANN. § 78-27-56 (Supp. 1983)).

33. *Id.*

34. *Id.* at 151.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. 72 Wash. 2d 453, 433 P.2d 901 (1967), quoted in *Cady*, 671 P.2d at 151.

faith" as:

- (1) an honest belief in the propriety of the activities in question;
- (2) no intent to take unconscionable advantage of others; and
- (3) no intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others.<sup>40</sup>

To establish a lack of good faith under *Tacoma*, the trial court must find by "sufficient evidence"<sup>41</sup> that the party's conduct fails at least one of those three requirements.<sup>42</sup> The court in *Cady* held that although better preparation might have disclosed to plaintiffs that their claims were meritless, failure to adequately research their case did not constitute bad faith.<sup>43</sup> Further, there was no evidence that plaintiffs did not have an honest belief in their claim, that they intended to take unconscionable advantage of the defendants, or that they intended to, or knew that their suit would, hinder, delay or defraud the defendants.<sup>44</sup> Thus, because no evidence of bad faith existed, the supreme court overturned the award of attorney's fees.<sup>45</sup>

### III. ANALYSIS

#### A. Attorney's Fees Awards Under Section 78-27-56

Under the supreme court's interpretation of section 78-27-56 in *Cady*, three elements must be satisfied before a trial court may award attorney's fees.

1. *Prevailing Party*—First, an award of attorney's fees may be made only to a prevailing party.<sup>46</sup> That element was not dis-

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40. *Tacoma*, 72 Wash. 2d at 458, 433 P.2d at 904; see *Cady*, 671 P.2d at 151.

41. *Cady*, 671 P.2d at 152.

42. *Id.* at 151 (citing *Sparkman & McLean Co. v. Derber*, 4 Wash. App. 341, 481 P.2d 585 (1971)).

43. 671 P.2d at 152.

44. *Id.*

45. *Id.*

46. *Id.* (citing UTAH CODE ANN. § 78-27-56 (Supp. 1983)). In Utah, however, a party need not prevail on every issue to be considered a prevailing party. For example, in *Checketts v. Collings*, 78 Utah 93, 102, 1 P.2d 950, 953 (1931), the Utah Supreme Court held that a defendant who had lost on a counterclaim but not on the original claim was a prevailing party for purposes of cost assessment. Although the term "costs" usually does not include attorney's fees, "[w]here attorney's fees are allowed to the successful party, they are in the nature of costs and are taxable and treated as such." 20 AM. JUR. 2d *Costs* § 72 (1965). Because of this close relationship between cost assessment and attorney's fees awards, the prevailing party rationale of *Checketts* should apply to the award of attorney's fees under

cussed in *Cady* because the defendants were clearly the prevailing party.

2. *Without Merit*—Second, a court must determine that the action or defense was “without merit.”<sup>47</sup> The *Cady* opinion provides an easily understood and applied definition. A claim that is “without merit” is a “frivolous” claim.<sup>48</sup> A frivolous claim is one with “no basis in law or fact.”<sup>49</sup> That standard basically makes the “without merit” determination a question of law;<sup>50</sup> therefore, it should be fully reviewable by an appeals court.<sup>51</sup>

Although the *Cady* court cited *Can-Am Petroleum Co. v. Beck*<sup>52</sup> for the proposition that “without merit” means “bordering on frivolity,”<sup>53</sup> the court made it clear later in the opinion that a claim must be *fully* “frivolous” to be deemed “without merit.”<sup>54</sup> The broader standard, “bordering on frivolity,” would give a court greater leeway when determining whether a claim was “without merit.” That broader definition would serve as a greater deterrent to groundless lawsuits and, in that sense, would better fulfill the legislature’s intent.<sup>55</sup> The word “bordering,” however, adds greater subjectivity to the “without merit” determination. The “bordering on frivolity” standard is therefore more difficult to apply and to review. The “fully frivolous” standard is better adapted to the *Cady* court’s objectives: “[I]t adequately serves the purpose of the

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section 78-27-56.

47. *Cady*, 671 P.2d at 151 (citing UTAH CODE ANN. § 78-27-56 (Supp. 1983)).

48. *Id.*

49. *Id.* To use commonly understood legal concepts, a claim having “no basis in law” is one that would be properly subject to a Rule 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6). Similarly, a claim having “no basis in fact” would be the proper subject of a motion for summary judgment. See, e.g., FED. R. CIV. P. 56.

50. See *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 623 (1943) (“Judgment [under Rule 12(b)(6) and Rule 56 of the Federal Rules of Civil Procedure] is authorized only where the moving party is entitled to judgment as a matter of law . . .”).

51. See *Automotive Mfr’s Warehouse, Inc. v. Service Auto Parts, Inc.*, 596 P.2d 1033, 1036 (Utah 1979). Although the decision whether to award attorney’s fees under section 78-27-56 is within the trial judge’s discretion, the issue of whether the claim or defense was frivolous should be considered a separate question of law. Similarly, the issue of whether a party has acted in bad faith should be considered a separate question of fact. See *infra* notes 87-90 and accompanying text.

52. 331 F.2d 371 (10th Cir. 1964).

53. *Cady*, 671 P.2d at 151 (quoting *Can-Am.*, 331 F.2d at 372) (emphasis added).

54. *Id.* at 152.

55. One of the purposes of the statute is to reduce congestion in the courts by encouraging settlement. Statement of Rep. Hillyard, Third Reading of H.B. 100, 44th Utah Leg., Gen. Sess. (Feb. 5, 1981) (H.R. Recording Tape No. 6, side 1).

statute . . . and is clearly understood."<sup>56</sup> Parties therefore should not be misled by the "bordering on frivolity" language in the *Cady* opinion; an action or defense must be fully "frivolous" to be held "without merit."<sup>57</sup>

3. *Bad Faith*—Finally, the trial court must find that the losing party's conduct lacked good faith before attorney's fees may be awarded.<sup>58</sup> Bad faith<sup>59</sup> conduct may occur during the following two time frames: The period leading up to a suit and during the suit.<sup>60</sup> A finding of bad faith is based on the subjective intent of the party, and is usually determined from all of the facts and circumstances of the litigation, rather than from application of any strict legal test.<sup>61</sup> Thus, the bad faith determination is a question of fact and should be granted substantial deference on appeal.<sup>62</sup>

The *Cady* court provided guidelines for determining a party's good faith by setting out the definition of good faith used in *Tacoma*.<sup>63</sup> Good faith thus defined consists of these three factors: An honest belief in the claim; no intent to take unconscionable advantage of the opposing party; and no intent to, or knowledge that the proceedings, will hinder, delay or defraud the other party.<sup>64</sup> The *Cady* court stated that to find bad faith, "sufficient evidence"<sup>65</sup> must "affirmatively establish"<sup>66</sup> that a party failed to satisfy at least one of those three tests.<sup>67</sup> Although the court's opinion provides those basic guidelines, more explanation is needed.

First, the type of conduct being evaluated to determine bad faith is unclear from the opinion. Bad faith generally consists of a party's improper actions or motives that lead to a lawsuit, or improper conduct during the litigation.<sup>68</sup> The Utah statute indicates

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56. *Cady*, 671 P.2d at 151.

57. See *supra* notes 47-51 and accompanying text.

58. *Cady*, 671 P.2d at 151.

59. For purposes of UTAH CODE ANN. § 78-27-56 (Supp. 1983), the court treats "lack of good faith" and "bad faith" as synonymous. *Cady*, 671 P.2d at 151-52.

60. Cf. *Hall v. Cole*, 412 U.S. 1, 15 (1973) ("bad faith" may be found . . . in the actions which led to the lawsuit [and] in the conduct of the litigation").

61. Cf. *Cady*, 671 P.2d at 152 ("sufficient evidence" must "affirmatively establish" that a party has acted in bad faith).

62. See *infra* notes 87-91 and accompanying text.

63. *Cady*, 671 P.2d at 151 (quoting *Tacoma*, 72 Wash. 2d at 458, 433 P.2d at 904); see *supra* notes 39-42 and accompanying text.

64. See *Cady*, 671 P.2d at 151.

65. *Id.* at 152.

66. *Id.*

67. *Id.*

68. See *Hall v. Cole*, 412 U.S. 1, 15 (1973).

that for a trial court to award attorney's fees, it must determine that "an action or defense [was not] brought or asserted in good faith."<sup>69</sup> That language can be interpreted in two different ways. The word "asserted" could be interpreted as relating only to the word "defense," and therefore, the party's bad faith must in some sense motivate the entire action or defense before attorney's fees may be assessed. That interpretation basically would make section 78-27-56 a statute awarding attorney's fees for malicious prosecution.<sup>70</sup> Although the *Cady* court stated that "the trial court must . . . find that plaintiff's conduct in *bringing* suit was lacking in good faith,"<sup>71</sup> the intended reach of the statute seems broader. That interpretation therefore should be rejected.

Alternatively, the word "asserted" could be interpreted as referring to the party's conduct *during* the litigation. Under that interpretation, the question of good faith would be divorced from the "without merit" determination. The court first would determine whether the action or defense was "without merit" and then determine whether the party's conduct evidenced bad faith either in the actions or motives that led to the lawsuit,<sup>72</sup> or in the conduct of the litigation.<sup>73</sup> That interpretation should be correct because the third element of the *Tacoma* test, "no intent to . . . hinder [or] delay . . . others,"<sup>74</sup> seems applicable to conduct during the litigation. Although the Utah statute is "narrowly drawn,"<sup>75</sup> that construction is not unduly broad. The court must still find that an action or defense is "without merit" and that the litigant acted in "bad faith."

Second, the factors used to determine when bad faith is present are unclear from the *Tacoma* guidelines. The *Cady* court stated that the evidence must "affirmatively establish" a party's

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69. UTAH CODE ANN. § 78-27-56 (Supp. 1983).

70. Malicious prosecution is an action for the recovery of damages to person, property or reputation that have proximately resulted from a previous civil or criminal proceeding prosecuted unsuccessfully, without probable cause and with malice. 54 C.J.S. *Malicious Prosecution* § 1 (1948). Attorney's fees are normally an element of damages. *Id.* § 113. Under Utah law, malice can be inferred from filing a complaint without probable cause. See *Potier v. Utah Driv-Ur-Self System, Inc.*, 11 Utah 2d 133, 135, 355 P.2d 714, 716 (1960).

71. *Cady*, 671 P.2d at 151 (emphasis added).

72. See UTAH CODE ANN. § 78-27-56 (Supp. 1983) ("action or defense . . . not brought . . . in good faith").

73. See *id.* ("action or defense . . . not . . . asserted in good faith"). This interpretation corresponds to the federal bad faith exception. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 756 (1980) (quoting *Hall v. Cole*, 412 U.S. 1, 15 (1973)).

74. *Tacoma*, 72 Wash. 2d at 458, 433 P.2d at 904.

75. *Cady*, 671 P.2d at 151.

lack of good faith<sup>76</sup> and held that mere failure to investigate the validity of the claim did not show bad faith under the *Tacoma* standard.<sup>77</sup> Thus, the first clear test established by *Cady* is that negligent investigation of a claim does not, by itself, show bad faith.<sup>78</sup> Because a party rarely will admit that its motives for litigation are improper,<sup>79</sup> courts usually are required to consider surrounding facts and circumstances to make subjective determinations of bad faith.<sup>80</sup> Several factors may provide guidance in those determinations. For example, courts have found bad faith where a party (1) has been defiant and uncooperative during litigation,<sup>81</sup> (2) has been unresponsive to the demands of judicial process,<sup>82</sup> (3) has made motions solely for the purpose of delay,<sup>83</sup> (4) has attempted to use judicial process for purposes other than obtaining the claimed relief,<sup>84</sup> or (5) has been "stubbornly litigious."<sup>85</sup> Each

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76. *Id.*

77. *Id.* at 152.

78. *See id.*

79. *But see* *Ryan v. Hatfield*, 578 F.2d 275, 277 (10th Cir. 1978) (plaintiff admitted before an investigating committee that suit was brought only to obtain defendant's testimony for use in another pending suit); *Scheriff v. Beck*, 452 F. Supp. 1254, 1257 (D. Colo. 1978) (defendant's evidence showed that plaintiff admitted his plan to harass defendant by instituting expensive litigation).

80. *See Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 481 (4th Cir. 1951) ("in suit at equity where taxation of such costs is essential to doing of justice, [attorney's fees] may be allowed in special cases"); *see also* *Gazan v. Vadsco Sales Corp.*, 6 F. Supp. 568, 568 (E.D.N.Y. 1934) (special fact that plaintiff merely lent his name to suit, but was otherwise uninvolved with the litigation, warranted award under federal bad faith exception).

81. *Red School House, Inc. v. Office of Economic Opportunity*, 386 F. Supp. 1177, 1193 (D. Minn. 1974).

82. *See* *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 755-56 (1980); *United States v. Reserve Mining Co.*, 412 F. Supp. 705, 712-13 (D. Minn.), *aff'd*, 543 F.2d 1210 (8th Cir. 1976).

83. *Browning Debenture Holders' Comm. v. DASA Corp.*, 605 F.2d 35, 40 & n.5 (2d Cir. 1978).

84. *Ryan v. Hatfield*, 578 F.2d 275, 277 (10th Cir. 1978).

85. The Utah Supreme Court awarded attorney's fees against a "stubbornly litigious" party who acted in bad faith in *American States Ins. Co. v. Walker*, 26 Utah 2d 161, 486 P.2d 1042 (1971). The fee award in *Walker* resulted from application of UTAH CODE ANN. § 78-33-10 (1977), which states: "In any proceeding under this chapter [concerning declaratory judgments] the court may make such award of costs as may seem equitable and just." In *Walker*, the court interpreted "costs" to include attorney's fees. There, the plaintiff-insurer refused to cover an insured's daughter who was involved in an automobile accident. The other party to the accident had a writ of garnishment issued to the insurer. Upon receipt of the garnishment, the insurer instituted a declaratory judgment action. At trial on the garnishment, the insurer was found liable to the insured's daughter. 486 P.2d at 1043. Additionally, the court awarded attorney's fees against the insurer on the declaratory judgment action. The court reasoned that rather than instituting the declaratory judgment action, the insurer simply could have answered the garnishment and raised its arguments in that case. The court concluded that the only purpose for the hasty commencement of the

of those factors could constitute bad faith under the *Tacoma* standard, but each provides a more concrete focus for use in making the bad faith determination.<sup>86</sup>

*B. Standard of Review for a Bad Faith Finding*

A final question raised by the *Cady* opinion is the standard of review applied to the trial court's finding of bad faith. Although the *Cady* court set out the *Tacoma* standards as a guideline, the trial court's finding of bad faith necessarily will be based in part on a determination of the party's subjective intent. That finding is essentially a finding of fact and is fundamentally different from a finding of frivolousness, which is based on objective legal standards. When the determination is essentially factual, the appellate court should not substitute its judgment for that of the trial court.<sup>87</sup> The trial court will be witness to the courtroom conduct of the party charged with bad faith. The appellate court will have only the record before it.<sup>88</sup> Thus, if the trial judge is left with the conviction that a finding of bad faith is warranted, applying the *Tacoma* standards<sup>89</sup> and the factors set out above,<sup>90</sup> he should

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declaratory judgment action was to harass the plaintiff and force the plaintiff to expend money on counsel. Inferring that improper purpose, the court awarded counsel fees. *Id.* at 1044. *Walker* suggests that instituting a second lawsuit, rather than pursuing the original lawsuit to its full conclusion, demonstrates bad faith.

It is arguable that *Walker* applied a less restrictive bad faith standard than is permissible under section 78-27-56. While the court could infer the requisite improper motive, section 78-27-56 also requires a determination that the action was without merit. There is no indication that the declaratory judgment action in *Walker* was unfounded; on the contrary, it clearly seemed to have merit. Therefore, under section 78-27-56, the *Walker* result may well have been different.

86. The court presumably would hold that "self-induced myopia" concerning the merit of an asserted claim or defense would constitute bad faith. See *Cady*, 671 P.2d at 152 (citing *Catanzaro v. Masco Corp.*, 423 F. Supp. 415 (D. Del. 1976)). "Self-induced myopia," however, probably could be inferred only in the most egregious cases. "Self-induced myopia" would seem to require a party to act with a "conscious purpose to avoid learning the truth." See *United States v. Jewell*, 532 F.2d 697, 704 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976). When a person commits a criminal act with such a purpose, coupled with a high probability of certain facts being true, he can be held to have acted "knowingly." *Id.* at 700, 704. A finding that an attorney had asserted a claim or defense on behalf of his client with a conscious purpose to avoid learning whether the claim or defense had merit might justify not only an award of attorney's fees, but also a disciplinary action against the attorney. See *infra* text accompanying note 126.

87. *General Ins. Co. of America v. Lewis*, 121 Utah 440, 441, 243 P.2d 433, 434 (1952).

88. *Cf. McBride v. McBride*, 581 P.2d 996, 997 (Utah 1978) (due deference should be given to findings of the trial judge who sees and hears the witnesses).

89. See *supra* notes 39-42 and accompanying text.

90. See *supra* notes 81-86 and accompanying text.

make a specific statement of his finding and reasons, cast in the terms of the *Tacoma* standard. Such a finding should be overturned on appeal only if the trial court abused its discretion.<sup>91</sup>

#### IV. FUTURE ISSUES UNDER SECTION 78-27-56

Several other questions not discussed in *Cady* are left open by the new Utah statute.

##### A. *Partial Attorney's Fees Awards*

The first issue is whether a court can award partial attorney's fees on a finding that one of several causes of action or defenses is without merit and not asserted in good faith. Section 78-27-56 provides that the court "may" award attorney's fees if the elements of the statute are satisfied.<sup>92</sup> As a matter of statutory interpretation, use of the word "may" grants courts discretion in applying a provision,<sup>93</sup> suggesting that the court's range of options should be broad enough to allow a partial award of attorney's fees. If courts are willing to award partial attorney's fees, unfounded claims and defenses may be removed from court. Because of the stringent requirements that must be satisfied to justify an award under the statute, however, parties should not be deterred from pursuing legitimate claims and defenses.

Case law on that point is in conflict. One Colorado case that allowed an award of partial attorney's fees, *Morton v. Allied Stores Corp.*<sup>94</sup> was cited in *Cady*.<sup>95</sup> That case focused on the Colorado statutory counterpart to Utah's bad faith attorney's fees statute.<sup>96</sup> Under that statute, a court must award attorney's fees if the action is adjudged "frivolous."<sup>97</sup> Courts, however, may use their discretion when determining the *amount* of attorney's fees to be awarded.<sup>98</sup>

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91. *Cf. Williams v. Shearwood*, No. 18512, Slip op. at 2 (Utah Aug. 15, 1984) (in divorce proceedings, court stated that "[w]ith respect to the award of attorney fees . . . it is within the discretion of the trial court, on examination of the facts, to determine if the circumstances warrant an award of fees against one of the parties and in favor of the other. . . . We will not overturn the award, finding no abuse of discretion").

92. UTAH CODE ANN. § 78-27-56 (Supp. 1983).

93. *See AM. JUR. 2d Statutes* § 22 (1974).

94. 90 F.R.D. 352 (D. Colo. 1981).

95. *Cady*, 671 P.2d at 151.

96. *Morton*, 90 F.R.D. at 358; *see* COLO. REV. STAT. §§ 13-17-101 to -106 (Supp. 1982).

97. COLO. REV. STAT. §§ 13-17-101(1),(3) (Supp. 1982); *see Morton*, 90 F.R.D. at 358.

98. COLO. REV. STAT. § 13-17-102(1) (Supp. 1982) ("The court may exercise its discretion in determining whether attorney fees are to be awarded and as to the amount thereof so that manifest injustice may be avoided") (emphasis added); *see Morton*, 90 F.R.D. at



In *Morton*, the Colorado Federal District Court determined that one of two claims asserted by the plaintiff was frivolous, and therefore ordered an award of approximately one-half of the attorney's fees incurred by the defendant in defense of the suit.<sup>99</sup>

Similarly, under the federal bad faith exception, attorney's fees for the entire litigation are awarded only if the action is brought in bad faith,<sup>100</sup> or bad faith pervades the entire litigation.<sup>101</sup> If the bad faith is found in conduct during the trial, courts have limited awards "to those expenses reasonably incurred to meet the other party's groundless bad faith procedural moves."<sup>102</sup> Thus, under the federal bad faith exception, partial awards actually may be the norm.

*Johns Hopkins University v. Hutton*<sup>103</sup> indicates the alternative point of view. In that case, an action brought under federal securities law, the district court stated that the plaintiff was not entitled to attorney's fees where it was not shown that the "totality" of the defense bordered on frivolity or was made in bad faith.<sup>104</sup> That holding can be distinguished. Under securities law, no finding of bad faith is required to allow an award of costs and attorney's fees to a prevailing party.<sup>105</sup> A Utah court, however, must make a specific finding of bad faith before awarding fees under section 78-27-56.<sup>106</sup> That distinction is critical. The Utah statute is punitive in nature,<sup>107</sup> and it is reasonable to punish a litigant with a partial assessment of attorney's fees when part of an action is without merit and not pursued in good faith.

The partial award would make the statute much more effective in saving court time. Parties would be encouraged to realistically evaluate the merit of each claim or defense they intend to

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358.

99. *Morton*, 90 F.R.D. at 358. The court determined that manifest injustice would result if the court awarded the defendant all the attorney's fees incurred in defending the suit when only one of the plaintiff's claims was frivolous. *Id.*

100. See *Browning Debenture Holders Comm. v. DASA Corp.*, 560 F.2d 1078, 1089 (2d Cir. 1977).

101. See *id.*

102. *Id.*

103. 297 F. Supp. 1165 (D. Md. 1968), *aff'd in part and rev'd in part*, 422 F.2d 1124 (4th Cir. 1970) (court of appeals reversed district court's order of summary judgment of the case in chief).

104. *Id.* at 1234.

105. 15 U.S.C. § 77k(3) (1982). The suit or defense must have been "without merit." *Id.*

106. See UTAH CODE ANN. § 78-27-56 (Supp. 1983).

107. Cf. *People v. Eatherton*, 119 Ill. App. 3d 174, 456 N.E.2d 327, 330 (1983) (such statutes are intended to penalize parties who bring frivolous lawsuits).

argue before a court, and to assert only the valid claims or defenses available, rather than to use a shotgun approach. Thus, presentation of some cases would be streamlined. At the same time, because the finding of bad faith is required, parties would not be deterred from asserting valid claims. In the short run, determining whether each cause of action or defense is "without merit and not brought or asserted in good faith"<sup>108</sup> will prolong litigation. Over the long run, however, substantial time savings may be achieved as unfounded claims are not pursued. Thus, the statute, case law, and public policy all indicate that partial awards should be allowed under the statute.

### *B. Awards Assessed Against Attorneys*

Another issue raised by the Utah statute and not discussed in *Cady* is whether an award of attorney's fees under the statute may be assessed against the losing attorney rather than his client. Section 78-27-56 allows a court to award attorney's fees to a prevailing party, but the statute does not specify against whom the award is to be assessed.<sup>109</sup> In *Roadway Express, Inc. v. Piper*,<sup>110</sup> the United States Supreme Court held that in limited circumstances courts could assess an award of attorney's fees against opposing counsel under the federal bad faith exception.<sup>111</sup>

The lawyers in *Roadway* unreasonably extended the court proceedings.<sup>112</sup> They consistently ignored court deadlines, refused to answer certain interrogatories, failed to appear for depositions, and failed to file briefs requested by the district court.<sup>113</sup> The court dismissed their class action suit with prejudice<sup>114</sup> and assessed attorney's fees against the lawyers.<sup>115</sup> Although the specific theory that the district court used to justify the fee assessment was overturned

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108. UTAH CODE ANN. § 78-27-56 (Supp. 1983).

109. *Id.*

110. 447 U.S. 752 (1980).

111. *Id.* at 764-67. Although Justices Stewart, Rehnquist and Stevens did not join in this portion of the opinion, *id.* at 764 n.11, and Chief Justice Burger dissented, *id.* at 772, Justice Blackmun joined this portion of the Court's opinion in his concurrence, *id.* at 769, giving the Court a majority. Therefore, Part III of the opinion concerning a court's inherent power to assess fees against an opposing attorney under the federal bad faith exception constitutes a holding of the Court.

112. *See id.* at 754-57.

113. *Id.* at 755.

114. *Id.*

115. *Id.* at 756.

on appeal,<sup>116</sup> the Supreme Court upheld the power of courts to assess fees directly against counsel under the federal bad faith exception.<sup>117</sup>

There are several reasons why an award against counsel is justified. First, "[t]he power of a court over members of its bar is at least as great as its authority over litigants."<sup>118</sup> State courts also should have that power.<sup>119</sup> Second, an attorney is in a better position than his client to assess the merits of a legal claim because of his legal training.<sup>120</sup> Further, the attorney is generally free to exercise his discretion in the procedural conduct of a trial. Therefore, in circumstances such as those present in *Roadway*, it is more appropriate to assess the award of attorney's fees against the losing party's counsel than against the losing party. The Utah statute is silent on that question, but the *Roadway* rationale seems to afford a sufficient basis for a judge to make such an award under the proper circumstances.<sup>121</sup>

### C. Section 78-27-56 and Attorney Disciplinary Action

A third issue raised by the statute and not discussed in *Cady* is the relationship between section 78-27-56 and Disciplinary Rule 7-102(A)(1) and (2) of the Revised Rules of Professional Conduct of the Utah State Bar.<sup>122</sup> Specifically, the question is whether an award of attorney's fees under section 78-27-56 should provide a basis for a disciplinary action under Utah's rules of professional conduct.

First, *Cady* makes clear that negligent research of a case, by itself, will not support an award of fees under section 78-27-56.<sup>123</sup>

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116. *Id.* at 756-57, 767.

117. *Id.* at 766-67. The case then was remanded to the district court to consider whether a finding of bad faith was warranted. *Id.* at 767-68.

118. *Id.* at 766 (footnote omitted).

119. *See id.* ("If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial process").

120. *See* Comment, *Awards of Attorneys' Fees Against Attorneys*. *Roadway Express, Inc. v. Piper*, 60 B.U.L. Rev. 950, 963-64 (1980).

121. Under Rule VII(g) of the Rules of Discipline of the Utah State Bar, an attorney can be ordered to make restitution for damage caused by his unprofessional conduct. Attorney's fees for bad faith litigation could be assessed against an attorney under that provision after a disciplinary proceeding. RULES OF DISCIPLINE OF THE UTAH STATE BAR Rule VII(g) (1979 & 1981). *See infra* notes 122-29 and accompanying text.

122. REVISED RULES OF PROFESSIONAL CONDUCT OF THE UTAH STATE BAR DR 7-102(A)(1) & (2) (1977).

123. *Cady*, 671 P.2d at 152.

Under Disciplinary Rule 7-102(A)(2), an attorney is subject to discipline if he "[k]nowingly advance[s] a claim or defense that is unwarranted under existing law, . . . [unless] it can be supported by good faith argument for an extension, modification, or reversal of existing law."<sup>124</sup> Although not explicitly stated in the *Cady* opinion, the conduct of an attorney who knowingly asserts an unwarranted claim would fail both the *Cady* without merit test<sup>125</sup> and the first element of the *Tacoma* test because the attorney does not have "[a]n honest belief in the propriety of the activities in question."<sup>126</sup> Furthermore, if an attorney's conduct is the result of "self-induced myopia" concerning the merits of his client's claim, he could be held to have acted knowingly.<sup>127</sup> In those situations, both an award of attorney's fees under section 78-27-56 and a disciplinary action under Disciplinary Rule 7-102(A)(2) are justified.

Second, if bad faith conduct during the litigation gives rise to an award of attorney's fees under section 78-27-56, the attorney also may be subject to discipline under Disciplinary Rule 7-102(A)(1).<sup>128</sup> Under that provision, an attorney shall not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."<sup>129</sup>

Two points should be made about that provision. First, not only is the attorney subject to discipline for knowingly violating Disciplinary Rule 7-102(A)(1), but he also is liable for reckless failure to discover his client's improper purpose for bringing suit.<sup>130</sup> The statute uses an objective standard to determine whether an action is taken "merely to harass or injure," namely, whether its tendency to do so is obvious.<sup>131</sup> Second, although the statute's scope seems narrow, because the action must be taken "merely" to harass or injure another, an award of fees under section 78-27-56 will indicate that that standard has been satisfied in a broader

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124. REVISED RULES OF PROFESSIONAL CONDUCT OF THE UTAH STATE BAR DR 7-102(A)(2) (1977).

125. *Cady*, 671 P.2d at 151.

126. *Tacoma*, 72 Wash. 2d at 458, 433 P.2d at 904; see *Cady*, 671 P.2d at 151-52.

127. See *supra* note 86.

128. REVISED RULES OF PROFESSIONAL CONDUCT OF THE UTAH STATE BAR DR 7-102(A)(1) (1977).

129. *Id.*

130. The attorney shall not "take . . . action . . . when it is *obvious* that such action would serve merely to harass or maliciously injure another." *Id.* (emphasis added).

131. *Id.*

range of circumstances. Because the standard of liability under Disciplinary Rule 7-102(A)(1) is objective, it will be difficult for an attorney to answer in defense of his action that his subjective purpose for pursuing a cause of action that has been held frivolous under section 78-27-56 was for a reason other than to "harass or maliciously injure" the other party. Thus, in many circumstances, an award of attorney's fees under section 78-27-56 for pursuit of a frivolous claim coupled with bad faith conduct during the litigation will provide a basis for a disciplinary proceeding under Disciplinary Rule 7-102(A)(1).

*D. Section 78-27-56 and the Erie Doctrine*

A final issue not addressed by the *Cady* court is whether the new Utah bad faith attorney's fees statute should apply in federal diversity cases under the *Erie* doctrine.<sup>132</sup> If section 78-27-56 is interpreted to be equivalent to the federal bad faith exception, that question may be purely academic.<sup>133</sup> If the award of attorney's fees under a statute such as section 78-27-56 is a substantive right of damages, the state statute should be applied when a federal court sits in diversity.<sup>134</sup> Otherwise, the federal court would be free to disregard the statute and follow federal practice.

In *Alyeska Pipeline Service Co. v. Wilderness Society*,<sup>135</sup> the United States Supreme Court indicated that state laws granting or denying the right to attorney's fees that reflect substantial state policies, and that do not run counter to federal statutes or rules of court, should be followed when a federal court sits in diversity.<sup>136</sup> Therefore, at first glance it would seem that a federal court would be bound to apply the Utah statute when it sits in diversity. The Utah State Legislature deliberately passed a statute that changed settled prior law,<sup>137</sup> indicating that section 78-27-56 reflects a substantial policy of Utah and reflects legislative intent to grant a sub-

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132. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

133. However, if the Utah statute is interpreted as requiring bad faith to have pervaded the entire litigation, and awards may not be based on bad faith conduct during the litigation, the Utah statute would be a narrower exception to the American rule than the federal bad faith exception. See *supra* notes 69-70, 100-102 and accompanying text.

134. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975) (suggesting that federal courts in diversity cases should follow state statutes allowing or denying awards of attorney's fees).

135. 421 U.S. 240 (1975).

136. *Id.* at 259 n.31.

137. See *supra* notes 5-6 and accompanying text.

stantive right. In *Wetzel v. Goldsmith (In re Comstock)*,<sup>138</sup> however, the federal bankruptcy court for the district of Idaho held that an Idaho statute similar to the Utah bad faith attorney's fees statute<sup>139</sup> would not apply in a diversity case, despite the Supreme Court's statement in *Alyeska*.<sup>140</sup> The court reasoned that the Idaho bad faith statute "does not grant a substantive right for additional relief in specific actions. It deals instead with the inherent right of courts to control, when circumstances demand, vexatious practices before them."<sup>141</sup> The award of attorney's fees under section 78-27-56, as indicated by use of the word "may," is discretionary with the court.<sup>142</sup> It is difficult to argue that one has a substantive right to damages when the award of fees is discretionary.

The distinction between substantive and procedural laws, however, "was never intended to serve as a talisman" for answering *Erie* questions.<sup>143</sup> Rather, an *Erie* question must be answered by considering "the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws."<sup>144</sup> Both the federal judiciary and Utah courts may award attorney's fees for bad faith litigation. Application of the federal bad faith exception, therefore, will not encourage forum shopping. If the bad faith conduct occurs prior to the litigation, a court could award attorney's fees under either federal<sup>145</sup> or Utah law.<sup>146</sup> Further, it is not likely that the choice to use a federal forum will be made based on a party's bad faith conduct during litigation because that conduct will not have been manifested until after the forum choice is made. Finally, neither the character nor result of the litigation will materially differ if the federal bad faith exception is used.<sup>147</sup> Small variations in the situations in which attorney's fees for bad faith litigation are awarded do not "raise the sort of equal protection problems which troubled the Court in *Erie*."<sup>148</sup>

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138. 16 Bankr. 206 (Bankr. D. Idaho 1981).

139. See IDAHO CODE § 12-121 (1979), limited by IDAHO R. CIV. P. 54(e)(1).

140. *In re Comstock*, 16 Bankr. at 209-10.

141. *Id.* at 209.

142. See *supra* note 93 and accompanying text.

143. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (for purposes of the *Erie* doctrine, "[i]t is . . . immaterial whether statutes of limitations are characterized as substantive or procedural . . .") (quoted language is drawn from *Hanna v. Plumer*, 380 U.S. 460 (1965)).

144. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

145. See *Hall v. Cole*, 412 U.S. 1, 15 (1973).

146. See *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983).

147. *Hanna v. Plumer*, 380 U.S. at 467.

148. *Id.* at 468.

Thus, section 78-27-56 probably should not be applied in diversity cases, and federal courts should be free to use the federal bad faith exception instead.

#### V. CONCLUSION

Utah's bad faith attorney's fees statute is a narrow exception to the American rule. The court can award fees only to a prevailing party, and only after finding that the opposing party has both asserted a frivolous claim or defense and has acted in bad faith. Once those findings are made, however, the judge has substantial discretion. He may make an award of partial attorney's fees. He also may assess the award against the opposing counsel rather than the opposing party. Courts should not hesitate to use their power under the statute once its elements are satisfied. Bad faith litigation is a burden on both courts and prevailing parties, and the legislature has wisely sought to discourage such practices.

R. GERARD LUTZ

**ADDENDUM B**

Verified Memorandum in Support of Plaintiff's Motion  
for Relief from Judgment or Order or in the  
Alternative to Alter or Amend the Judgment

Civil Case No: 880908191



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

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J. RODNEY DANSIE, individually	)	VERIFIED
and as guardian ad litem for	)	MEMORANDUM IN SUPPORT
TIFFANY DANSIE,	)	OF PLAINTIFF'S MOTION
	)	FOR RELIEF FROM JUDGMENT
Plaintiff,	)	OR ORDER OR, IN THE
	)	ALTERNATIVE, TO ALTER OR
vs.	)	AMEND THE JUDGMENT
	)	
JOHN C. THOMAS, JOE TOTORICA,	)	Civil No. 880908191
ELVIRA TOTORICA, KENNETH	)	
NORTON, WILLIAM TURNER, THOMAS	)	
B. SHIRLEY,	)	Judge Leonard H. Russon
	)	
Defendants.	)	

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Plaintiff, by and through his attorney, Dennis R. James of Morgan & Hansen, submits the following Memorandum in support of his Motion for Relief from Judgment or Order pursuant to Rule 60(b)(7) of the Utah Rules of Civil Procedure and in support of his Motion to Alter or Amend the Judgment pursuant to Rule 59 of the Utah Rules of Civil Procedure.

FACTS

This Court in its Judgment on Jury Verdict submitted by

Attorney Larry R. Keller and purportedly signed by the Court on April 2 or April 3, 1990, ordered Plaintiff to pay attorney's fees to the Defendant William Turner in an amount in excess of \$5,000. Plaintiff has brought a Motion pursuant to Rule 60(b)(7) and Rule 59 of the Utah Rules of Civil Procedure requesting that the Court reconsider this order for fees.

#### ARGUMENT

Rule 60(b)(7) of the Utah Rules of Civil Procedure provides as follows:

"On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (7) any other reason justifying relief from the operation of the judgment."

Plaintiff's request for this Court to reconsider its award of fees under Utah Code Ann. § 78-27-56 (bad faith action) is based upon the arguments as set forth below. For purposes of clarity and in order to present this Memorandum as a Verified Memorandum, it is set forth in first person format by Plaintiff's counsel, Dennis R. James.

#### POINT 1

**The Order for Fees Is Contrary to the Court's  
Closing Plea to the Parties  
to "Bury the Hatchet" and  
to Not Pursue Post-trial Motions**

The Court, at the close of trial and after dismissal of the jury, lectured to the parties to this litigation. The Court

counseled all parties that it was time to "bury the hatchet" and, although the Court acknowledged that it had earlier suggested that it would entertain motions for fees, the Court expressed a hope that such motions would not be brought. Subsequent to trial, I devoted a significant amount of time counseling with Plaintiff to follow the Court's admonition.

I made an offer to Defendants' counsel that I would not pursue motions for costs and fees if they did not. Defendants' counsel represented to me that if Plaintiff dropped his criminal action, it would go a long way in showing Plaintiff's good faith and would reduce the incentive of the insurance companies they represented to seek fees.

I counseled Plaintiff to this effect and assumed this matter to be at an end. I was shocked to receive phone calls from Larry Keller and George Naegle wherein they represented that Rod Dansie had been in contact with the County Attorney or his Deputy Attorneys and had insisted that they carry forward with the criminal action. They represented that Rod Dansie had told the County Attorneys that the reason he had been unsuccessful in the civil matter was because his attorney had not performed well enough against Mr. Keller. Mr. Keller and Mr. Naegle said that since it appeared Mr. Dansie wasn't going to quit, the insurance companies were insisting that they go forward with their motions

for fees.

I called Mr. Dansie who denied the representations of Mr. Keller and Mr. Naegle. I then contacted Richard S. Sheppard, Division Chief at the Salt Lake County Attorney's Office to see if Rod Dansie had contacted him since the conclusion of the civil trial, or if Rod had contacted any of the Deputy County Attorneys under Mr. Sheppard who had any possible connection, past or present, with the Dansie criminal matter. After reviewing his phone log and after questioning his Deputy Attorneys, he reported back to me that Rod Dansie had not been in contact with anyone at the County Attorney's Office to the best of their records and recollection since the conclusion of the civil trial on February 14, 1990.

I contacted Rod Dansie about his intent to carry the criminal matter forward. He said he had none, but thought that he had no control over the County Attorney's Office once the Complaint had been filed. I arranged, with Rod's consent, a meeting with Dick Sheppard. Rod and I met with him on Friday, March 2, 1990 and explained the situation and our concerns and desires, and he agreed to dismiss the criminal action.

I called Mr. Naegle and Mr. Keller to report that the criminal action would be dismissed the following Monday. They had already commenced their motions for fees and in one of my

most disappointing experiences as an attorney in eleven years of practice, they insisted on carrying their motions forward. They represented that the insurance companies were insisting that they do so. I say disappointing because the decision to further "stir the water" in this matter was, to some degree, based upon the outright lie that Rod Dansie had insisted on the criminal matter going forward and because bringing such motions was contrary to the spirit of conciliation and brought to naught all of my time and efforts in working with Rod on a new, less combative course of action in his life.

If equities are a factor at all in the Court's determination, the good that can possibly come from Rod Dansie being made to pay, if it is even possible, \$5,000 to William Turner's insurance company is grossly outweighed by the harm that will result. Not only will all of my efforts with Rod be undone, but I see terrible potential damage to a family. The Dansies were "beat up" badly enough through this trial. Many lessons were indelibly imprinted on their minds. There were terrible financial costs in a home where they could not be afforded and even worse, there were severe emotional costs.

As for legal grounds, the transcript of Rod Dansie's testimony which has been ordered and which will supplement this Memorandum as soon as it is available, clearly reflects that his

action against William Turner was not brought in bad faith. Perhaps it was without merit, but it was not brought in bad faith. (See Cady v. Johnson, 671 P.2d 149.)

The Defendants, contrary to the picture that was attempted to be painted, were not innocent victims of this litigation. This is equally true of William Turner, a man willing to rig his water line to bypass the meter because he felt Public Service Commission-approved rates were unconstitutional, a man willing to bring a counterclaim alleging that Rod Dansie regularly files lawsuits similar to this one, but who, in his deposition, was unable to give a single example of such actions (see pages 58 and 59 of William Turner's deposition), a man willing to sign an affidavit under oath that he was placed in immediate apprehension of his personal safety by the waving of the pan, but who then gave opposite testimony in his deposition and at trial as he attempted to hold on to two conflicting positions, that he was never close enough to Rod to assault him but that he was close enough to Rod to be assaulted. An innocent victim is not someone who marches down the street with an angry mob and adds to the apprehension of the situation by making a threatening, inciting statement to the effect, "We've got you now, Rod."

This is a plea to the Court to reconsider its award of attorney's fees in this matter. If the Court is not inclined to

eliminate them completely, then the plea is to reduce them significantly, especially in light of the fact that Larry Keller's bills accompanying his affidavit clearly include time devoted to his pursuit of a counterclaim which cannot be considered in an award of fees under U.C.A. § 78-27-56. His bills include, among other things, time devoted to preparation of the counterclaim, the entire trial time, and time devoted at the depositions of Defendants whose depositions I took for the purpose of seeking the dismissal of their counterclaims. He is asking for credit at \$115 per hour which is far in excess of the standard rate for insurance defense work in the State of Utah.

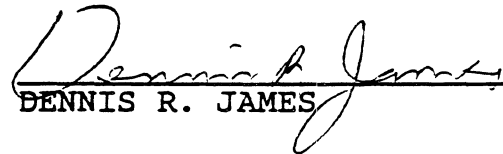
If the Court is insistent on holding to its decision to award fees against Mr. Dansie, I would request a reconsideration of the Court's decision with respect to awarding an equal amount of fees in favor of Mr. Dansie for having had to defend against Mr. Turner's counterclaim that was clearly without merit and brought in bad faith. (See my Memorandum in Opposition to Defendants' Request for Costs and Motion for Attorney's Fees and in Support of Plaintiff's Motion for Attorney's Fees.)

DATED this 6 day of April, 1990.


  
DENNIS R. JAMES

STATE OF UTAH                    )  
                                      : ss.  
COUNTY OF SALT LAKE )

Under oath, Dennis R. James states that he prepared the preceding Memorandum and that the factual allegations which he made therein are true and correct, to the best of his knowledge.

  
DENNIS R. JAMES

Subscribed and sworn to before me this 6<sup>th</sup> day of April,  
1990.

  
NOTARY PUBLIC  
Residing at: Davis County, Utah

My Commission Expires:  
8/16/90



CERTIFICATE OF HAND-DELIVERY

I certify that on this 6<sup>th</sup> day of April, 1990 a true and correct copy of the foregoing instrument was hand-delivered to the following named individuals:

Larry R. Keller  
257 Towers, Suite 340  
257 East 200 South - 10  
Salt Lake City, Utah 84110

George T. Naegle  
RICHARD, BRANDT, MILLER &  
NELSON  
Key Bank Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110

A handwritten signature in cursive script, reading "Julian M. Bayley", is written over a horizontal line.

DENNIS R. JAMES, No. 1642  
MORGAN & HANSEN  
Attorneys for Plaintiff  
136 South Main Street  
Kearns Building, Eighth Floor  
Salt Lake City, Utah 84101  
Telephone: (801) 531-7888

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

---

J. RODNEY DANSIE, individually	)	
and as guardian ad litem for	)	AFFIDAVIT OF
TIFFANY DANSIE,	)	DENNIS R. JAMES
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOHN C. THOMAS, JOE TOTORICA,	)	Civil No. 880908191
ELVIRA TOTORICA, KENNETH	)	
NORTON, WILLIAM TURNER,	)	
THOMAS B. SHIRLEY,	)	Judge Leonard H. Russon
	)	
Defendants.	)	

---

STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE )

Dennis R. James, being first duly sworn, deposes and states as follows:

1. That I never received and to this date have not received a copy of the proposed Judgment submitted by attorney Larry Keller in behalf of his clients, John C. Thomas, Joe Totorica, Elvira Totorica, William Turner, and Thomas B. Shirley.

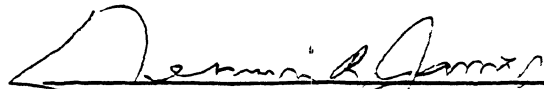
2. That I have questioned others in the law office of Morgan & Hansen, including Stephen G. Morgan, with respect to the receipt of a copy of said proposed Judgment, and no one is aware of ever receiving a copy of the proposed Judgment.

3. My motivation in taking the depositions of all of the

Defendants was to build a defense and hopefully obtain the dismissal of their counterclaims.

DATED this 3 day of April, 1990.

MORGAN & HANSEN

  
DENNIS R. JAMES  
Attorneys for Plaintiffs

STATE OF UTAH                    )  
                                      : ss.  
COUNTY OF SALT LAKE )

SUBSCRIBED AND SWORN to before me this 3rd day of April, 1990.

  
NOTARY PUBLIC  
Residing at: Summit County

My Commission Expires:

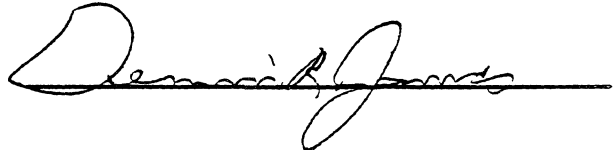
Jan. 13, 1992

CERTIFICATE OF MAILING

I certify that on this 7 day of April, 1990 a true and correct copy of the foregoing instrument was mailed by first-class mail, postage prepaid, to the following named individuals:

Larry R. Keller  
257 Towers, Suite 340  
257 East 200 South - 10  
Salt Lake City, Utah 84110

George T. Naegle  
RICHARD, BRANDT, MILLER & NELSON  
Key Bank Tower Suite 700  
50 South Main  
P.O. Box 2465  
Salt Lake City, Utah 84110

A handwritten signature in cursive script, appearing to read "Dennis R. Jones", is written over a horizontal line.