

2011

In the matter of the discipline of Donald D. Gilbert, Jr., SBN 6733 v. Utah Down's Syndrome Foundation, Inc., a Utah Not for Profit Corporation : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

IN THE MATTER OF THE DISCIPLINE OF)

DONALD D. GILBERT, JR., SBN 6733)

BRIEF OF THE APPELLEE

Respondent, Third-Party Plaintiff
and Appellee,)

v.)

Trial Court No. 100401646

Appellate No. 20110004-SC

UTAH DOWN'S SYNDROME FOUNDA-
TION, INC., a Utah Not for Profit Corporation,)

Appellant and Third-Party Defendant.)

Interlocutory Appeal from the Fourth Judicial District,
Utah County, State of Utah
The Honorable Fred D. Howard

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FILED
UTAH APPELLATE COURTS

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JURISDICTION

This Court has jurisdiction over the parties pursuant to Utah Code Annotated § 78A-3-102(3)(c), and pursuant to its Order granting Appellant's Petition for Leave to File Interlocutory Appeal and pursuant to Rule 5 of the Utah Rules of Appellate Procedure (URAP).

ISSUES ON APPEAL

1. Was the Third-Party Complaint against Utah Down's Syndrome Foundation, Inc. ("UDSF") properly joined to the disciplinary action initiated by Utah State Bar (which is not a party to this appeal)?

PRESERVATION AND STANDARD OF REVIEW: The issue was expressly preserved in the ruling of the trial court which stated that this issue was a subject of its ruling. (R. 311) Both parties raise this issue in their respective briefs. The Standard of Review is whether the trial court properly permitted joinder. Interpretation of the Utah Rules of Civil Procedure ("URCP") is a question of law to be reviewed for correctness. Goldberg v. Jay Timmons & Assoc., 896 P.2d 1241, 1242 (Utah Ct. App.1995)

2. Must the Third-Party Complaint filed by Respondent, Third-Party Plaintiff and Appellee Donald D. Gilbert, Jr. ("Mr. Gilbert") be dismissed under the doctrines of either collateral estoppel or res judicata?

PRESERVATION AND STANDARD OF REVIEW: These issues were expressly preserved by the court below which stated these as issues decided in its ruling that is the subject of this appeal. (R. 311) The questions are reviewed for correctness. Miller v. USAA Cas. Ins. Co., 44 P.3d 663 (Utah 2002)

3. Was the UDSF Motion to Dismiss properly treated as a Motion for Summary Judgment and denied?

PRESERVATION AND STANDARD OF REVIEW: This question was expressly raised by the trial court as a subject of its ruling. Thus the question is preserved for correctness.

Norman v. Arnold 57 P.3d 997 (Utah 2002) (R. 311) The Standard of Review also arises from URCP Rule 56(c) which requires that “. . . the pleadings, . . . and admissions on file together with the affidavits . . . show that there is no genuine issue as to any material fact and [that UDSF is] entitled to judgment as a matter of law.”

STATEMENT OF THE FACTS

A. APPELLANT’S DEFICIENT STATEMENT OF FACTS.

The Brief of Appellant UDSF, at pages 2-7, contains a lengthy “Statement of Facts” drawn from the self-serving Affidavit of Suzanne Smith¹ filed in support of UDSF’s Motion to Dismiss in the trial court. (R. 82-87)

Clearly, UDSF failed to meet its duty to properly marshal the facts under URAP Rule 24(a)(9). The process of marshaling the evidence is fundamentally different from that of presenting evidence at trial. The challenging party must temporarily remove its own prejudices and not attempt to construe the evidence in a light favorable to the party’s own case. Child v. Child, 194 P.3d 205 (Utah Ct. App. 2003)

¹ Even if the facts set forth in the Affidavit of Suzanne Smith, the former president of UDSF, were relevant, the affidavit is inadmissible under Utah Rules of Evidence 602 because of her failure to state that she has “personal knowledge”, and Rule 56(c) that she is “competent to testify to the truth of those facts.”

Not only are UDSF's facts improperly marshaled, but most of the facts set forth in the proffered Affidavit of Suzanne Smith comprise evidence that might be offered at trial but are not relevant to the two narrow procedural issues presented by UDSF's Interlocutory Appeal now before this Court.

UDSF wholly failed to marshal the evidence supporting the trial court findings. Harris v. IES Assocs. 69 P.3d 297 (Utah 2003) UDSF completely ignored and failed to marshal the facts set forth in the Affidavit of Donald D. Gilbert, Jr. (R. 189-194)

The following are facts set forth in Mr. Gilbert's Affidavit that were omitted from the facts that UDSF should have included in Appellant's Brief in compliance with the marshaling rule:

1. Mr. Gilbert is a member in good standing of Utah State Bar. (R. 192)
2. Mr. Gilbert served as legal counsel to UP TOWN DOWNS ("UTD") and UP WITH DOWNS ("UWD") in 2006, 2007, and 2008. (R. 193)
3. Mr. Gilbert was familiar with the operations of UTD and UWD in 2006, 2007 and 2008. (R. 193)
4. UDT and UWD operated autonomously from UDSF. (R. 193)
5. UTD and UWD each elected their own officers and directors. (R. 193)
6. UTD and UWD each maintained their own checking accounts. (R. 193)
7. UTD and UWD each entered their own contracts and retained their own professional advisors. (R. 193)
8. UTD and UWD each paid their own liabilities. (R. 193)

9. Officers and Directors of UDSF did not control or operate either UTD or UWD. (R. 193)

10. UDSF officers were not authorized to sign checks on either the UTD or the UWD bank accounts. (R. 193)

11. In 2007, UDSF filed an action in the Third District against Utah Down Syndrome Association and seven individuals: Eric Holman, Cathy Collard, Pam Holman, Jill Austin, Lisa Kingsbury, Kara Olander, and Melanie Taylor entitled Utah Down's Syndrome Foundation, Inc. v. Utah Down Syndrome Association, Civil No. 070902087, Appellate No. 20110205 (the "UDSF Action")². (R. 192)

12. Judge Paul G. Maughan ordered, by default, injunctive relief against those seven named individuals on May 3, 2007, in the UDSF Action, but not against UTD, UWD or Mr. Gilbert (the "May 3 Order"). (R. 73-76) See Addendum No. 1 attached hereto.

13. UTD paid legal fees of \$15,000 to Mr. Gilbert in 2007. The checks were signed by Wendy Hooton and Sandra Perkes, who were not subject to the May 3 Order. (R. 191) See Addendum No. 1 attached hereto.

14. UWD paid \$9,000 to Mr. Gilbert. That check was signed by Cherish Clements, who was not subject to the May 3 Order. (R. 191) See Addendum No. 1 attached hereto.

² The UDSF Action is also on appeal to be heard in this court at the same time this court hears the appeal in the Instant Action.

15. UWD paid a further \$6,000 to Mr. Gilbert. That check was signed by Eric Holman. Though Mr. Holman had been initially enjoined, he had subsequently been re-elected and authorized by UWD to issue the check. (R. 199-201)

16. Mr. Gilbert subsequently filed a Complaint in Intervention in the UDSF Action on behalf of UTD and UWD. (R. 190)

17. Mr. Gilbert was not named as a defendant in the UDSF Action. He was never served with a Summons and Complaint to make him a party in the UDSF Action under URCP Rule 4. Nonetheless, Judge Robert Faust, to whom the UDSF Action had been reassigned, issued an ORDER AND JUDGMENT (DONALD GILBERT) ordering Mr. Gilbert to pay \$30,000 plus attorney's fees and costs to UDSF. (R. 61-64) See Addendum No. 2 attached hereto.

In addition to the facts set forth in Mr. Gilbert's affidavit, there are in the record supporting affidavits of Cherish Clements, Wendy Hooton, Lisa Kingsbury, Kathy Yerkes and Leigh Ann Schoenfield (R. 162-187), which were also presented to the Court in opposition to Appellant's Motion to Dismiss. None of the facts in those affidavits were marshaled in Appellant's Statement of Facts.

This court may properly decline to reach the merits of the UDSF Appeal because UDSF failed to fulfill its duty to marshal the evidence supporting the trial court's decision. Traco Steel Erectors, Inc. v. Control, Inc., 222 P.3d 1164 (Utah 2009).

B. APPELLEE'S STATEMENT OF FACTS

The facts properly marshaled to support the ruling of the trial court are as follows:

1. Donald D. Gilbert, Jr. is a member in good standing of Utah State Bar. (R. 194)

2. Pursuant to the claims of UDSF, Utah State Bar alleged that \$30,000 in legal fees paid by UTD and UWD to their legal counsel, Mr. Gilbert, was misuse of funds which actually belonged to UDSF. (R. 1-12)

3. In the UDSF Action, the seven named individual defendants: Eric Holman, Cathy Collard, Pam Holman, Jill Austin, Lisa Kingsbury, Kara Olander, and Melanie Taylor, were the subject to the May 3 Order issued by Judge Paul G. Maughan. (R. 73-76) See Addendum No. 1 attached hereto. The May 3 Order was entered by default against only the named defendants, and not against UTD, UWD or Mr. Gilbert, who were not parties to the UDSF Action. (R. 73-76) The defendants in the UDSF Action were represented by Graham H. Norris, Jr., not Mr. Gilbert. (R. 192)

4. Subsequently, on October 17, 2007, Judge Maughan made a ruling permitting Mr. Gilbert to represent UTD and UWD as interveners in the UDSF Action, attempting, inter alia, to set aside the earlier default May 3 Order. (R. 194-196) Judge Faust acknowledged on the record that Mr. Gilbert was entitled to be paid for legal services, but ruled that the funds used by UTD and UWD to pay Mr. Gilbert should not have been used for that purpose.³

³ Neither UTD nor UWD were parties to the UDSF action. They were not subject to the default May 3 Order issued by Judge Maughan, nor were Wendy Hooton and Sandra Perkes, who issued UTD checks or Cherish Clements, who issued a UWD check, to pay legal fees to Mr. Gilbert. One check was issued by Eric Holman. Though he was subject to the May 3 Order, he had subsequently been re-elected by UWD and authorized to issue a check to Mr. Gilbert. (R. 199-201)

5. Judge Faust ordered that the parties before him in the UDSF Action, who were subject to the May 3 Order, were to “return” to UDSF the sum of the legal fees that had been paid to Mr. Gilbert. Then, on December 21, 2007, UDSF brought a separate motion for Disgorgement of Funds to compel Mr. Gilbert to disgorge the legal fees he had been paid by UTD and UWD. (R. 142-143)

6. Though Mr. Gilbert was not a party to the UDSF Action, and had never been served with a Summons and Complaint (R. 190), Judge Robert Faust entered a money Judgment in favor of UDSF and against Mr. Gilbert on June 18, 2008. (R. 189-192) See Addendum No. 2 attached hereto. Thereafter, Mr. Gilbert was in such a state of shock, that he suffered a heart attack and a nervous breakdown. (R. 189-190)

7. When Mr. Gilbert was unable to pay the Judgment against him (R. 189-190), UDSF petitioned Utah State Bar to take disciplinary action against Mr. Gilbert. Utah State Bar then commenced this action against Mr. Gilbert in the Fourth District Court on May 13, 2010 in case No. 100401646, Judge Fred D. Howard presiding (the “Instant Action”). (R. 1-12)

The relevant procedural facts are as follows:

1. On May 13, 2010, Utah State Bar commenced its disciplinary action against Mr. Gilbert based on the complaint of UDSF that he was improperly paid certain legal fees by UTD and UWD, which were merely fictitious business names of UDSF. (R. 1-12)

2. On June 23, 2010 Mr. Gilbert filed in the Instant Action a Third-Party Complaint against UDSF (R. 30-45) seeking Declaratory Relief that UTD and UWD were not merely fictitious names of UDSF, but “had the right to pay their liabilities for legal services rendered from their own bank accounts.” (R. 42) Alternately, in the event that UTD and UWD were found to be merely fictitious names of UDSF, then the assets and liabilities (including the obligation to compensate Mr. Gilbert for legal service rendered) also belonged to UDSF. (R. 41)

3. On July 9, 2010 UDSF served an Answer to the Third-Party Complaint (R. 49-53) and on July 19, 2010, UDSF served an Amended Answer to the Third-Party Complaint. (R. 54-58)

4. Thereafter, on August 9, 2010, UDSF served its Motion to Dismiss Pursuant to Rule 12(b)(6)⁴ or, in the Alternative, Motion for Summary Judgment and Memorandum in Support of Motion to Dismiss Pursuant to Rule 12(b)(6) or, in the Alternative, Motion for Summary Judgment. (R. 59-97)

5. On August 25, 2010 Mr. Gilbert filed and served his opposition to the UDSF Motion to Dismiss, which included as Schedule 1, a list of disputes regarding facts stated by UDSF, and specific grounds for those disputes. (R. 117-137)

6. On September 7, 2010 following oral argument before Judge Fred D. Howard, the UDSF Motion to Dismiss was submitted for decision. On November 7,

⁴ Rule 12(b)(6) requires that a motion making of defenses thereunder “shall be made before pleading”. Consequently, the motion to dismiss was untimely and was properly denied.

2010 Judge Howard rendered the decision of the Fourth District Court denying UDSF's Motion to Dismiss Pursuant to Rule 12(b)(6) or, in the Alternative, Motion for Summary Judgment. (R. 306-372). See Addendum No. 3 attached hereto.

7. Upon the Motion of Utah State Bar, the Instant Action was stayed to await resolution of a related matter pending in the UDSF Action⁵. (R. 313-314) See the Order. (R. 373-377)

SUMMARY OF ARGUMENTS

I

The UDSF Motion to Dismiss under Rule 12(b)(6) was untimely and improper. It was brought after UDSF had answered the Third-Party Complaint on July 9, 2010 and further amended its Answer on July 19, 2010. Under URCP Rule 12(b)(6) such motions must be filed before any pleading is filed.

II

The UDSF moving papers were further fatally deficient as they failed to meet the requirements of Rule 12(b) that the motion to dismiss must admit the facts alleged in the Third-Party Complaint. Appellant failed to properly marshal the facts.

III

The facts alleged in the Third-Party Complaint are sufficient to state a First Cause of Action for Declaratory Relief and a Second Cause of Action for a money Judgment.

⁵ Then pending in the UDSF Action was a Motion to Vacate, Expunge or Set Aside the Order and Judgment against Donald D. Gilbert, Jr. That motion was denied. The ruling on that Motion is the subject of an appeal now pending before this Court and to be heard and determined contemporaneously with this appeal.

Mr. Gilbert sought only a declaration as to whether UTD and UWD are merely fictitious businesses of UDSF as claimed by UDSF and as alleged by Utah State Bar. The second cause of action sought to recover fees due from UDSF if UTD and UWD were found to be merely fictitious business names of UDSF.

IV

The Third-Party Complaint was properly raised in the action of Utah State Bar seeking to discipline Mr. Gilbert. URCP Rule 14 and Rule 20(a). Even if there were a misjoinder, that would not give rise to a dismissal, but instead to a severance of the Third-Party Complaint. URCP Rule 20(b)

V

Justice and Judicial Efficiency as well as common sense are all served by trying the complaint of Utah State Bar and the Third-Party Complaint of Mr. Gilbert in the same action. URCP Rule 20(a) authorizes permissive joinder in such situations.

VI

The UDSF Alternative Motion for Summary Judgment was not properly supported by admissible evidence. Evidentiary objections to the Affidavit of Suzanne Smith were properly raised below. (R. 112-133) The UDSF Motion for Summary Judgment failed to show, as URCP Rule 56(c) requires, "that there is no genuine issue as to any material fact." The affidavit of Mr. Gilbert (R. 117-137), as specifically discussed hereinabove, raised factual issues that were not and cannot be resolved in a Summary Judgment Motion.

The Rules of Res Judicata and Collateral Estoppel have no application to the Instant Action. The UDSF Action did not involve the same parties or the same issues as the Instant Action. There must have been a complete, full and fair trial in the first action leading to a final Judgment. None of those requirements were shown to have been met by the UDSF moving papers.

ARGUMENT

I

THE UDSF MOTION TO DISMISS WAS AND IS UNTIMELY AND IMPROPER

UDSF served its Answer to the Third-Party Complaint on July 9, 2010 (R. 49-53) and soon thereafter on July 19, 2010, served its Amended Answer to the Third-Party Complaint. (R. 54-58) Both of these pleadings were served before August 9, 2010, when UDSF served its MOTION TO DISMISS PURSUANT TO URCP RULE 12(b)(6), OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT. However, URCP Rule 12(b) requires that “A motion making any of these defenses shall be made before pleading if a further pleading is permitted”. (emphasis added) Consequently, the motion of UDSF to dismiss was untimely. It violated the requirements of URCP Rule 12(b). It must be denied on that ground.

II

THE UDSF MOTION TO DISMISS IS FATALY DEFICIENT FOR FAILING TO PROPERLY MARSHAL THE FACTS

The UDSF motion papers failed to meet the requirements of URCP Rule 12(b) and Rule 56, under which a motion to dismiss must admit the facts alleged in the complaint and challenge only the right to relief based on those facts. St. Benedict's Dev. Co. v. St. Benedict's Hospital, 811 P.2d 194 (Utah 1991), Russell v. Standard Corp., 898 P.2d 263 (Utah 1995)

In ruling on a Motion to Dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to plaintiff and indulge all reasonable inferences in his favor. Mounteer v. Utah Power & Light Co., 828 P. 2d 1055 (Utah 1991), Russell v. Standard Corp., *supra*.

For the reasons cited above, Appellant's Statement of Facts attached to the moving papers of UDSF is irrelevant and not subject to consideration by this court or the court below with respect to the UDSF Motion to Dismiss as Appellant has failed to properly marshal the facts. The Affidavit of Suzanne Smith, which purportedly supports the motion, fails to meet the necessary standards for admission into evidence. See URCP Rule 56(c). As shown hereinabove, specific Objections were properly presented to the Court below by Mr. Gilbert. (R. 120-127)

**THE FACTS ALLEGED IN MR. GILBERT'S THIRD-PARTY
COMPLAINT ARE SUFFICIENT TO STATE CAUSES OF
ACTION FOR DECLARATORY RELIEF AND FOR A MONEY JUDGMENT**

The first cause of action in the Third-Party Complaint is a straight forward request for Declaratory Relief as to whether UTD and UWD were merely fictitious business names ("DBAs") of UDSF as alleged in Utah State Bar's Complaint. Utah Code 78B-6-401 grants to each District Court "... the power to issue declaratory judgment determining rights, status, and other relations within its jurisdiction." See URCP Rule 57, "Declaratory Judgment", and Shipman v. Evans, 100 P.3d 1151 (Utah 2004). (There must be a genuine issue of dispute between two parties to receive a declaratory judgment.)

The second cause of action is also a straight forward pleading seeking compensation for professional services rendered if the court should decide that UTD and UWD were and are merely DBAs of UDSF.

"The doctrine of apparent authority has its roots in equitable estoppel. J.H. v. West Valley City, 840 P.2d 115, 118 (Utah 1992) (Howe, Assoc. C. J. dissenting). "...it is founded on the idea that where one of two persons suffer from the wrong of a third the loss should fall on the one whose conduct created the circumstances which made the loss possible."

As tools of equity, restitution and unjust enrichment are claims and remedies employed only when no express contract is present. See Am. Towers Owners Assoc. v. CCI Mech. Inc., 930 P.2d 1182, 1183 (Utah 1996). See also Emergency Physicians

Integrated Care v. Salt Lake County, 167 P.3d 1080 (Utah 2007). (Quantum Meruit is an equitable tool that allows a plaintiff to receive restitution for the reasonable value of services provided to the defendant.)

IV

MR. GILBERT'S THIRD-PARTY COMPLAINT WAS PROPERLY RAISED IN UTAH STATE BAR'S DISCIPLINARY ACTION

Though not characterized as a URCP Rule 14 Motion, the thrust of the UDSF motion appears to be that Mr. Gilbert's Third-Party Complaint was not properly joined with the Disciplinary Action initiated by Utah State Bar.

Mr. Gilbert's claim for Declaratory Relief under Count One and Judgment against UDSF for fees earned under Count Two may properly be joined with the State Bar's Disciplinary action. The allegations of Mr. Gilbert in his Third-Party Complaint, even if it were severed or separated under URCP Rule 21, would not give rise to dismissal as sought by the UDSF motion, because "Misjoinder of parties is not ground for dismissal of an action.", but only for an order that the Third-Party Complaint "may be severed and proceeded with separately".

Though UDSF asserts a misjoinder under URCP Rule 14 because there is no "monetary" claim made by Utah State Bar against Mr. Gilbert (R. 91), such an argument reads into URCP Rule 14 language that simply is not there. URCP Rule 14 contains no provision that the claim made in the underlying complaint must be a "monetary" claim as UDSF claims. URCP Rule 14(a) actually provides as follows:

"(a) When the defendant may bring in a Third Party. Any time after commencement of the action a defendant, as a third-party plaintiff,

may cause a Summons and Complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claims against him."

Since the Utah Rules of Civil Procedure were fashioned after the Federal Rules of Civil Procedure, Main Street v. Fast Heat, Inc., 99 P.3d 801 (Utah 2004), Judge Howard properly interpreted URCP Rule 14 by reference to the nearly identical language in Rule 14 of the Federal Rules of Civil Procedure and the accompanying notes which cite Moore's Federal Practice-Civil stating that:

"the nature of the relief sought by plaintiff in the underlying action may not rob defendant of its ability to implead.

...

"Although one can argue that the plaintiff's judgment does not 'cost' the defendant anything that can be passed onto the third-party defendant, the courts have properly allowed impleader.

...

"Courts quite properly, then, conclude that the interpleader rule is to be construed liberally to achieve its goal of efficient and consistent resolution of multiparty disputes."

3 Moore's Federal Practice-Civil §14.04[2] (2010) See also Judge Howard's Ruling set forth in Addendum No. 3.

Utah State Bar's complaint alleges that Mr. Gilbert improperly received payment for legal services rendered to UTD and UWD at a time when seven individuals (but neither UTD nor UWD) were enjoined from making any such payments. Mr. Gilbert was never enjoined from receiving such payments. (R. 73-76) See Addendum No. 1. Utah State Bar's disciplinary complaint then alleges that Mr. Gilbert improperly retained the fees paid to him.

Obviously, Utah State Bar's claim rests upon the allegation that Mr. Gilbert had no right to receive or retain the fees paid to him by UTD and UWD. Thus, Utah State Bar's claim arises from a monetary claim about which UDSF complained to Utah State Bar which, in turn, brought the Instant Action, because Mr. Gilbert did not disgorge to UDSF the fees that were properly earned for legal services rendered to UTD and UWD.

The record shows that the checks written to Mr. Gilbert were issued, in each case but one, by individuals who were never subject to the May 3 Order or any injunction. The one check signer who had been subject to the Order, Eric Holman, had been subsequently re-elected by UWD and authorized by UWD to issue one check to Mr. Gilbert. There was no violation of the May 3 Order. (R. 73-76 and 190-191) See also Addendum No. 1 attached hereto.

Was Mr. Gilbert entitled to retain the fees paid to him for legal services? Even Judge Faust acknowledged in open court on March 10, 2008 that Mr. Gilbert was entitled to be paid for legal services rendered. (R. 190) Utah State Bar alleged that Mr. Gilbert was not entitled to be paid by UTD and UWD, and that is the essential claim upon which Utah State Bar's disciplinary complaint is based. If the chapters were merely DBAs of UDSF as Utah State Bar alleges, it certainly must follow that UDSF was the entity obligated to pay the fees due and payable to Mr. Gilbert for legal services properly rendered to UDSF's own fictitious business name chapters UTD and UWD.

**JUSTICE, JUDICIAL EFFICIENCY AND COMMON SENSE
ARE ALL SERVED BY TRYING UTAH STATE BAR'S COMPLAINT
AND MR. GILBERT'S THIRD-PARTY COMPLAINT IN A SINGLE TRIAL**

Even if it may first appear appropriate to sever or separate Mr. Gilbert's Third-Party Complaint from the underlying Utah State Bar⁶ complaint under URCP Rules 14, 20(b) or 21, there would then be two very similar cases to be tried separately on similar issues and with essentially the same witnesses in the UDSF Action and in the Instant Action. Aside from the risk of inconsistent judgments presented by separate cases, there is considerable loss of judicial time and resources that would arise from trying these cases separately, as essentially all the same witnesses and issues will be necessary in both trials. URCP Rule 20 governing Permissive Joinder permits the joinder of Mr. Gilbert's Third-Party Complaint to the Disciplinary Action brought by Utah State Bar.

URCP Rule 19(a), entitled "Joinder of Persons needed for just adjudication", provides in relevant part as follows: "*A person who is subject to service of process . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties,*"

As Professor Thomas observes in his treatise UTAH CIVIL PRACTICE (2010 edition) at §3.02:

"In most instances, economy for both the court and the parties is an adequate incentive to exercise the most extensive joinder of claims and remedies that is permitted under the rules."

⁶ It is important to note that Utah State Bar did not move to sever the Third-Party Complaint and is not a party to this appeal.

The trial courts can little afford to expend scarce resources in separately trying two such overlapping and similar cases raising essentially the same issues of fact and law in each case. The trial court did not abuse its discretion in permitting the joinder.

VI

THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED

URCP Rule 56 governs Motions for Summary Judgment. It requires that supporting affidavits “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” URCP Rule 56 (e)

The supporting Affidavit of Suzanne Smith does not meet the evidentiary standard required by URCP Rule 56. Ms. Smith did not swear that she has personal knowledge of the facts or that she would be competent to testify as to the facts in her affidavit. (R. 82-87) Furthermore, nearly all of the factual allegations in the Affidavit of Suzanne Smith fail to meet the requirements for admission into evidence. (R. 120-127) See the objections made by Mr. Gilbert to the Affidavit of Suzanne Smith. (R. 106-116)

A Motion for Summary Judgment must show “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. URCP Rule 56(c) Quite to the contrary, in the Instant Action, the Affidavit of Mr. Gilbert, filed and served in opposition to the UDSF Motion for Summary Judgment, raises a number of questions of fact to be determined at trial as specifically discussed hereinabove. (R. 117-137)

Where an affidavit shows on its face that there is a material issue of fact, summary judgment may not be entered, even if responsive affidavits are not filed. Frisbee v. K&K Const. Co., 676 P.2d 387 (Utah 1984)

Despite the fact that the three year old Affidavit of Suzanne Smith, upon which the moving party UDSF relied, is objectionable and inadmissible, in an abundance of caution and in order to satisfy the requirements of URCP Rule 7(c)(3)(B), Mr. Gilbert attached to his opposing papers a verbatim restatement of each of the moving party's facts that he controverted. (R. 106-115)

VII

THE RULES OF COLLATERAL ESTOPPEL AND RES JUDICATA HAVE NO APPLICATION HERE

Under URCP Rule 8(c), the Defense of Res Judicata must be raised in the Answer. Though UDSF purports to have raised Res Judicata as its SEVENTH AFFIRMATIVE DEFENSE, it has not been alleged with the particularity required of such an Affirmative Defense. See Barnard & Burk Group, Inc. v. Labor Commissioner, 122 P.3d 700 (Utah Ct. App. 2005) and Midwest Realty v. City of West Jordan, 541 P.2d 1109 (Utah 1975). See also Thomas, Utah Civil Practice (2010) § 8.02(3)(b)(ii).

Had UDSF pleaded those Affirmative Defenses with particularity, as required, it would have become clear that the UDSF Action (with seven named individual defendants) involved different parties than in the Instant Action, which does not name any of the same defendants. Even if the Affirmative Defenses had been properly pleaded, it has not been and could not be proven at this point in the proceedings by a

preponderance of evidence as required. Wagstaff v. Remco, Inc., 540 P.2d 931 (Utah 1975)

Finally, as Judge Howard properly ruled, the impleader is not barred by the doctrines of res judicata or collateral estoppel for sound legal reasons. For a claim to be precluded under the doctrine of res judicata, the following elements must be shown:

“First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.”

Macris & Associates, Inc. v. Neways, Inc., 16 P.3d 1214 (Utah 2000) (quoting Masden v. Borthick, 769 P.2d 245, 247 (Utah 1988))

For an issue to be precluded according to the principles of collateral estoppel the following elements must be shown:

“First, the issue challenged must be identical in the previous action and in the case at hand. Second, the issue must have been decided in a final judgment on the merits in the previous action. Third, the issue must have been competently, fully, and fairly litigated in the previous action. Fourth, the party against whom collateral estoppel is invoked in the current action must have been either a party or privy to a party in the previous action.”

Macris & Associates, Inc. v. Neways, Inc., 16 P.3d 1214 (Utah 2000) (quoting Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366, 1370 (Utah 1996))

See also Judge Howard’s Ruling set forth in Addendum No. 3.

The May 3 Order entered in the UDSF Action was a default order which was neither decided on the merits nor fully and fairly litigated. (R. 73-76) UDSF made no

showing that the record satisfies the necessary elements of either res judicata or collateral estoppel. Neither has application here.

CONCLUSION

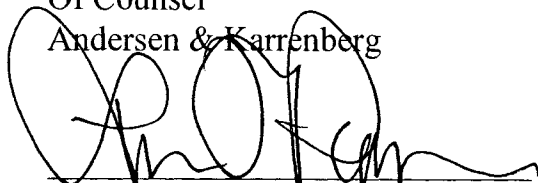
The UDSF Motion to Dismiss the Third-Party Complaint under Rule 12(b)(6) and the Alternative Motion for Summary Judgment are both without basis and were properly denied by the Fourth District Court in the ruling by Judge Fred D. Howard dated November 17, 2010. See Addendum No. 3 attached hereto. The Ruling below should be affirmed.

DATED this 13TH day of July.

RESPECTFULLY SUBMITTED,
Lynn O. Poulson
Johnson, Poulson & Coons,
a Professional Corporation

and

E. Barney Gesas
Of Counsel
Andersen & Karrenberg

A handwritten signature in black ink, appearing to read 'Lynn O. Poulson', is written over a horizontal line.

By Lynn O. Poulson, Counsel for
Respondent/Third-Party Plaintiff and
Appellee Donald D. Gilbert, Jr.

ADDENDA

Addendum No. 1. May 3, 2007 Order issued by Judge Paul G. Maughan in Utah Down's Syndrome Foundation, Inc. v. Utah Down Syndrome Association et. al. (the "May 3 Order"). (R. 73-76)

Addendum No. 2. June 18, 2008 Order and Judgment (Donald D. Gilbert) entered by Judge Robert Faust in Utah Down's Syndrome Foundation, Inc. v. Utah Down Syndrome Association et. al. (the "Judgment"). (R. 61-64)

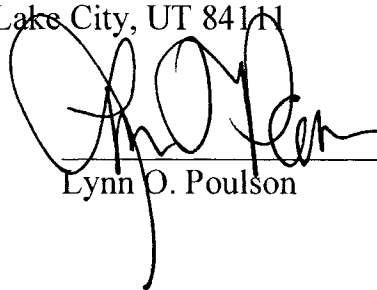
Addendum No. 3. November 7, 2010 RULING RE: MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT issued by Judge Fred D. Howard in the matter of Donald D. Gilbert, Jr. Respondent and Third-Party Plaintiff v. Utah Down's Syndrome Foundation, Inc. (the "Ruling") (R. 306-312)

CERTIFICATE OF MAILING

I certify that two true and correct copies of the Brief of the Appellee were mailed
on July 14, 2011 to the following via first-class mail, postage pre-paid:

Russell A. Cline
Crippen & Cline, L.C.
10 West 100 South, Suite 425
Salt Lake City, UT 84101

Diane Akiyama, Esq.
Office of Professional Conduct
Utah State Bar
645 South 200 East, Suite 205
Salt Lake City, UT 84111



Lynn O. Poulson

Tab 1

ADDENDUM NO. 1

Russell A. Cline (4298)
Crippen & Cline L.C.
10 West 100 South, Suite 425
Salt Lake City, Utah 84101
Telephone (801) 539-1900
Telefax (801) 322-1054

Attorney for Plaintiff

District
MAY 03 2007
SALT LAKE COUNTY
Deputy Clerk *JA*

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

UTAH DOWN SYNDROME
FOUNDATION, INC.

Plaintiff,

vs.

UTAH DOWN SYNDROME
ASSOCIATION, ERIC HOLMAN,
CATHY COLLARD, PAM HOLMAN,
JILL AUSTIN, LISA KINGSBURY,
KARA OLANDER, and
MELLANIE TAYLOR,

Defendants.

ORDER

CIVIL NO. 070902087

JUDGE: Maughan

Plaintiff's Motion for Partial Summary Judgment and Injunctive Relief in this matter having come before the Court and no timely opposition having been filed, and good cause appearing, it is hereby ordered, decreed and adjudged as follows:

1. Defendants ERIC HOLMAN, CATHY COLLARD, PAM HOLMAN, JILL AUSTIN, LISA KINGSBURY, KARA OLANDER, and MELLANIE TAYLOR do not have

the authority to act under the name of Utah Down Syndrome Foundation ("UDSF"), or its dbas (Up with Downs and Uptown Downs), in any respect, including holding themselves out as members or officers of UDSF, Up with Downs, or Uptown Downs, interfering with, communicating or commenting on UDSF elections, collecting donations under UDSF's name, accessing UDSF's bank accounts; and/or using UDSF's money, membership records or other property.

2. Defendants ERIC HOLMAN, CATHY COLLARD, PAM HOLMAN, JILL AUSTIN, LISA KINGSBURY, KARA OLANDER, and MELLANIE TAYLOR are hereby restrained from acting under the name of UDSF, Up with Downs or Uptown in any respect, and are hereby ordered to immediately:

- (a) Return all funds taken from or on deposit in Zions Bank account # 326000617 and American First Credit Union account # 746007297930 since October 20, 2006.
- (b) Return to UDSF all funds collected at the February, 2007 snowmobile fundraiser;
- (c) Return to UDSF all funds collected from the "buddy walk" fundraisers held in September/October 2006;
- (d) Return to UDSF \$50.00 collected from Jason Steelman;
- (e) Return to UDSF all funds, membership lists, and property of any kind belonging to UDSF;
- (f) Turn over to UDSF all rights and control of www.upwithdowns.com and www.uptowndowns.com, with all right, title and interest in the those websites being hereby vested

in UDSF.

(g) Are hereby restrained from acting under the name of UDSF (or its dba Uptown Downs or Up With Downs) in any respect;

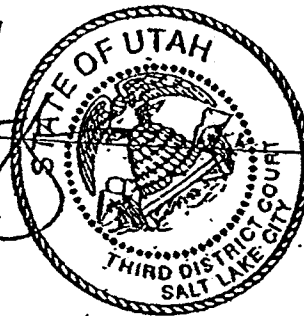
(h) Are hereby restrained from accessing Zions Bank account # 326000617 and American First Credit Union account # 746007297930 or any UDSF funds.

(i) Are hereby restrained from using UDSF's membership records or other forms, records, information belonging to UDSF in any respect.

(j) Are hereby restrained from contacting or communicating with any UDSF members in any manner whatsoever.

Dated this 30 day of April, 2007.

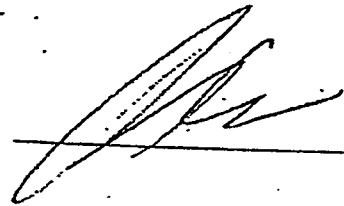
The Court



CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing, postage pre-paid on this
24 day of April, 2007 to:

Graham H. Norris, Jr.
1145 S. 800 E. #141
Orem, UT 84097

A handwritten signature in dark ink, appearing to be "G. Norris", is written over a horizontal line.

Tab 2

ADDENDUM NO. 2

FILED DISTRICT COURT
Third Judicial District

JUN 13 2008

By Rg SALT LAKE COUNTY
Deputy Clerk

Russell A. Cline (4298)
Crippen & Cline L.C.
10 West 100 South, Suite 425
Salt Lake City, Utah 84101
Telephone (801) 539-1900
Telefax (801) 322-1054

Attorney for Plaintiff

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 06/17/08

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

UTAH DOWN SYNDROME
FOUNDATION, INC.

Plaintiff,

vs.

UTAH DOWN SYNDROME
ASSOCIATION, ERIC HOLMAN,
CATHY COLLARD, PAM HOLMAN,
JILL AUSTIN, LISA KINGSBURY,
KARA OLANDER, and
MELLANIE TAYLOR,

Defendants.

ORDER AND JUDGMENT
(DONALD GILBERT)

CIVIL NO. 070902087
JUDGE: Faust

Plaintiff's Second Motion for Disgorgement of Funds having come before the Court and there being no timely opposition thereto and good cause appearing it is hereby ordered, decreed and adjudged as follows.

1. Plaintiff's Second Motion for Disgorgement of Funds is granted.

Order and Judgment (Donald Gilbert) @J



JD26691071

070902087 GILBERT, DONALD

pages:

2. Utah Down Syndrome Foundation is granted judgment against Donald Gilbert in the amount of \$30,000.00, to accrue interest at the prejudgment rate of 10% per annum on the following amounts from the following dates: on \$6,000.00 from May 10, 2007, on \$9,000.00 from June 15, 2007, on \$7,500.00 from July 25, 2007, and on \$7,500.00 from January 31, 2008, and at the post-judgment rate of interest after entry hereof.

3. Utah Down Syndrome Foundation is awarded in attorneys fees against Donald Gilbert in the amount of \$2,453.00.

4. It is further ordered that this Judgment shall be augmented in the amount of reasonable costs and attorneys fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit.

Dated this 13th day of June, 2008.


THE COURT



CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing, postage pre-paid on this
3 day of June, 2008 to:

Donald D. Gilbert
PO Box 335
American Fork, UT 84003

Kara Olander
7469 S. Locust St.
Midvale, UT 84047

Uptown Downs
c/o Wendy Hooton
3495 W. 8070 S.
West Jordan, UT 84088

Up With Downs
c/o Cherish Clements
76 S. State St.
American Fork, UT 84003

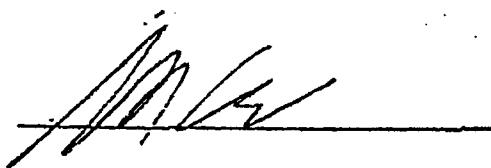
Eric Holman and Pam Holman
76 S. Center St.
American Fork, UT 84003

Cathy Collard
1032 N. Redwood Rd.
Saratoga Springs, UT 84043

Lisa Kingsbury
11996 Hidden Valley Club Dr.
Sandy, UT 84092

Mellanie Taylor
3376 W. 8350 S.
West Jordan, UT 84088

David C. Lewis
c/o Novell Law Department
1800 South Novell Place, Ste. H-54
Provo, UT 84606



Tab 3

ADDENDUM NO. 3

FILED
Fourth Judicial District Court
of Utah County, State of Utah
11/17/10 Mr. Deputy

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

<p>In the Matter of the Discipline of:</p> <p>DONALD D. GILBERT JR., SBN 6733 Respondent</p>	<p>RULING RE: MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT</p>
<p>DONALD D. GILBERT JR. Third-Party Plaintiff,</p> <p>vs.</p> <p>UTAH DOWN'S SYNDROME FOUNDATION, Third-Party Defendant.</p>	<p>Case No. 100401646</p> <p>Judge Fred D. Howard</p>

This matter comes before the Court on Third-Party Defendant Utah Down's Syndrome Foundation's ("UDSF") Motion to Dismiss Pursuant to Rule 12(b)(6), or, in the Alternative, Motion for Summary Judgment, filed on August 11, 2010. On August 25, 2010, Third-Party Plaintiff filed an Opposition to the Motion. Third-Party Defendant filed a Reply and submitted the matter for decision on September 7, 2010.

Having reviewed the parties' briefs, being fully advised in the premises, and good cause appearing, the Court now makes the following ruling:

RULING

The issues presented to the Court are whether Third-Party Plaintiff is properly joined to this action and whether the doctrines of res judicata and collateral estoppel prevent the Third-Party Plaintiff from bringing his claim against Third-Party Defendant.

The Court notes that it is treating Third-Party Defendant's Motion as a motion for summary judgment pursuant to *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835 (Utah 1996). Under that precedent "[w]hen affidavits or other evidence is presented in conjunction with a motion to dismiss under rule 12(b)(6) and the court does not exclude them, the motion is generally treated as a motion for summary judgment pursuant to Utah Rule of Civil Procedure Rule 56." *Id.* at 839 n.3. Third-Party Defendant has attached an affidavit and other material to its Motion which have not been excluded by the Court. Therefore, the Motion will be treated as a motion for summary judgment.

Under Rule 56 of the Utah Rules of Civil Procedure, on a motion for summary judgment "[t]he judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." URCP 56(c) (2010).

The parties do not dispute the facts with regard to the Motion for Summary Judgment. Third-Party Plaintiff filed a Third-Party Complaint against UDSF joining them to the law suit as

a Third-Party Defendant. The Motion having no factual dispute, the issue is whether “the moving party is entitled to judgment as a matter of law.” *Id.* Third-Party Defendant is seeking dismissal from the lawsuit arguing that Rule 14 of the Utah Rules of Civil Procedure does not allow the Third-Party Complaint to be brought against Third-Party Defendant in this case. It claims that because it is a disciplinary action and there is no monetary claim, Third-Party Defendant cannot be liable to Third-Party Plaintiff as required by Rule 14. Therefore, impleading Third-Party Defendant under Rule 14 is improper and Third-Party Defendant should be dismissed. (Mot. to Dismiss 6-7.) Defendant argues that Rule 14 does not preclude his claim because Rule 14 does not require that the underlying complaint be a claim seeking money damages. (Opp’n 4.)

Regarding third-party practice, the Court is persuaded by authority accompanying Rule 14 of the Federal Rules of Civil Procedure. The rule permits that a defendant may proceed against any person “who is or may be liable to it for all or part of the claim against it.” Utah’s Rule 14(a) is nearly identical to the wording in Rule 14 of the Federal Rules of Civil Procedure. The Court observes that the notes accompanying that rule reference *Moore’s Federal Practice - Civil*, and that treatise explains that

the nature of the relief sought by plaintiff in the underlying action may not rob defendant of its ability to implead. For example, consider a declaratory judgment case, in which [a]n insurer sues the insured, seeking a declaration that it is not obligated to cover a particular claim. The insured then impleads someone who, according to the insured, failed to obtain the proper insurance and from whom the insured will seek indemnity if the court declares that the insurer is not liable. Although one can argue that the plaintiff’s judgment does not “cost” the defendant anything that can be passed on to the third-party defendant, the courts have properly allowed impleader.

3 *Moore's Federal Practice - Civil* § 14.04[2] (2010) (citation omitted). The treatise further states that

[t]here is no doubt that use of the expansive concept of "claim," coupled with the strong policy desire for efficiency and consistency through inclusive joinder, frees impleader from historical limitations inherent in classic indemnity theories. Courts quite properly, then, conclude that the impleader rule is to be construed liberally to achieve its goal of efficient and consistent resolution of multiparty disputes.

Id.

The Court is persuaded that "Rule 14 contains no provision that the claim made in the underlying complaint must be a 'monetary' claim as UDSF claims." (Opp'n 4.) However, Third-Party Plaintiff still must assert Third-Party Defendant's derivative liability. *See Moore's Federal Practice, supra*, at §14.04[3][a].

At least three of the counts against Mr. Gilbert in the disciplinary proceeding are based on allegations that he had no right to receive or retain the funds paid to him by the Utah and Salt Lake County Chapters of UDSF ("DBAs") for his services. (Compl. 8-11.) Furthermore, it is alleged that the DBAs are not separate entities from UDSF (Compl. 2, 5), and that Mr. Gilbert has the right to receive compensation for his work for the entities (Opp'n 5). Assuming that the allegation that the DBAs are not separate legal entities from UDSF is true, then it follows that UDSF could be liable to Mr. Gilbert for unpaid fees. Under such circumstances, Mr. Gilbert's claim against UDSF is derivative of the disciplinary action against him, and the Court cannot say at this time that the impleader is improper based on Rule 14.

The Court also notes that where, as in this case, there are common issues of law and fact, namely, the status of the DBAs and Mr. Gilbert's right to receive payment, it serves important policies of efficiency and consistency by permitting UDSF to be joined to this action.

Finally, Third-Party Defendant contends that the impleader is barred by the doctrines of res judicata and collateral estoppel. *Macris* provides that a claim is precluded under res judicata when the following elements are met:

First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.


Macris & Associates, Inc. v. Neways, Inc., 2000 UT 93, P 20 (quoting *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988)). For an issue to be precluded according to the principles of collateral estoppel the following must apply:

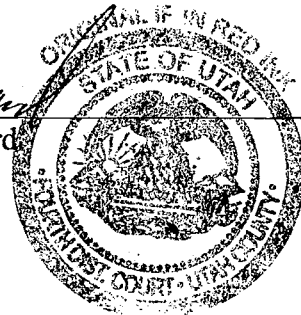
First, the issue challenged must be identical in the previous action and in the case at hand. Second, the issue must have been decided in a final judgment on the merits in the previous action. Third, the issue must have been competently, fully, and fairly litigated in the previous action. Fourth, the party against whom collateral estoppel is invoked in the current action must have been either a party or privy to a party in the previous action.

Id. at P 37 (quoting *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1370 (Utah 1996)). UDSF makes no analysis and does not show how the record satisfies the elements. Although UDSF's contention might be valid, the record is insufficient for the Court to determine that the action is barred. The Motion for Summary Judgment is, therefore, respectfully denied and Counsel for Third-Party Plaintiff is instructed to prepare an order consistent with this Ruling.

DATED this 17 day of November, 2010.

BY THE COURT:


Hon. Fred D. Howard
District Court Judge



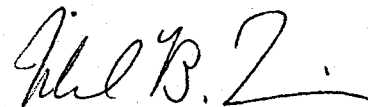
CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing ruling were mailed, postage prepaid, on the 17 day of November, 2010 to the following at the addresses indicated:

Diane Akiyama
Assistant Counsel
Office of Professional Conduct
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

Russell A. Cline
Crippen & Cline, L.C.
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Salt Lake City, Utah 84101

Lynn O. Poulson
Johnson, Poulson & Coons
1435 East 2000 North
Lehi, Utah 84043



Deputy Court Clerk