2011

Central Utah Water Conservancy District, A Water Conservancy Distrcit organized under the laws of the State of Utah v. Shane King, as Trustee and/or Fiduciary Owner of Stepping Stone Trust : Brief of Appellant

Utah Supreme Court

Perrin R. Love; Wendy Bowden Crowther; Clyde Snow, and Sessions; Attorney for Plaintiff.
Gordon A. Madsen; Robert C. Cummings; Attorney for Defendant.

IN THE SUPREME COURT OF THE STATE OF UTAH

CENTRAL UTAH WATER CONSERVANCY DISTRICT, A Water Conservancy District organized under the laws of the State of Utah,	)	APPELLANT'S BRIEF
Plaintiff and Appellee,	)	
vs.	)	Supreme Court Case No. 20110618-SC
SHANE KING, as Trustee and/or Fiduciary Owner of Stepping Stone Trust,	)	
Defendant and Appellant.	)	

APPEAL FROM A DECISION OF THE UTAH COURT OF APPEALS
BEFORE JUDGES MCHUGH, THORNE AND VOROS

GORDON A. MADSEN
ROBERT C. CUMMINGS
Attorneys for Defendant and Appellant
1224 Chandler Drive
Salt Lake City, UT 84111
801-364-3431

PERRIN R. LOVE
WENDY BOWDEN CROWTHER
CLYDE SNOW & SESSIONS
Attorneys for Plaintiff and Appellee
201 South Main Street, 13th Floor
Salt Lake City, UT 84111
801-322-2516

IN THE SUPREME COURT OF THE STATE OF UTAH

CENTRAL UTAH WATER CONSERVANCY DISTRICT, A Water Conservancy District organized under the laws of the State of Utah,	)	
	)	APPELLANT'S BRIEF
Plaintiff and Appellee,	)	
vs.	)	Supreme Court Case No. 20110618-SC
SHANE KING, as Trustee and/or Fiduciary Owner of Stepping Stone Trust,	)	
	)	
Defendant and Appellant.	)	

APPEAL FROM A DECISION OF THE UTAH COURT OF APPEALS
BEFORE JUDGES MCHUGH, THORNE AND VOROS

GORDON A. MADSEN
ROBERT C. CUMMINGS
Attorneys for Defendant and Appellant
1224 Chandler Drive
Salt Lake City, UT 84111
801-364-3431

PERRIN R. LOVE
WENDY BOWDEN CROWTHER
CLYDE SNOW & SESSIONS
Attorneys for Plaintiff and Appellee
201 South Main Street, 13th Floor
Salt Lake City, UT 84111
801-322-2516

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

IN THE SUPREME COURT OF THE STATE OF UTAH

CENTRAL UTAH WATER CONSERVANCY DISTRICT, A Water Conservancy District organized under the laws of the State of Utah,	)	BRIEF OF APPELLANT
Plaintiff and Appellee,	)	
vs.	)	Supreme Court Case No. 20110618-SC
SHANE KING, as Trustee and/or Fiduciary Owner of Stepping Stone Trust,	)	
Defendant and Appellant.	)	

JURISDICTION OF THE SUPREME COURT

The Supreme Court has jurisdiction of this proceeding pursuant to 78A-3-102 (3)(a) and (5) UCA, and pursuant to Order of the Supreme Court dated and entered October 5, 2011, granting the Petition for Certiorari of Defendant and Appellant, Shane King, as Trustee and/or Fiduciary Owner of Stepping Stone Trust (hereinafter "King").

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

SOLE ISSUE:

The sole issue presented for review pursuant to the aforesaid Order of the Supreme Court granting King's Petition for Certiorari is:

> "Whether the Court of Appeals erred in dismissing Petitioner's appeal without prejudice on the ground the order denying a motion for new trial did not satisfy the requirements of this Court's decision in *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, 201 P.3d 966, and rule 7(f)(2) of the Rules

of Civil Procedure."

STANDARD OF APPELLATE REVIEW FOR SAID ISSUE:

The standard of review is stated in *Code v. Utah Dep't of Health*, 2007 UT 43, 162 P.3d 1097, 1098:

> "'Whether appellate jurisdiction exists is a question of law which we review for correctness, giving no deference to the decision below.' *Pledger v. Gillespie*, 1999 UT 54, ¶ 16, 982 P.2d 572."

STATEMENT SHOWING THAT ISSUE WAS PRESERVED FOR APPEAL

The aforesaid issue arose in the Court of Appeals and not in the trial court, and the error was duly preserved by timely petition for certiorari. The Court of Appeals decision dismissing King's appeal without prejudice is found at 2011 UT App 200, and was entered on June 23, 2011. Petition for Certiorari was filed within the prescribed 30 day period on July 20, 2011.

CONTROLLING PROVISIONS OF CONSTITUTIONS, STATUTES, ORDINANCES, AND REGULATIONS

Rule 7(f)(2) Utah Rules of Civil Procedure:

> "Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object."

STATEMENT OF THE CASE

NATURE OF THE CASE. This action was brought by plaintiff and

Appellee, Central Utah Water Conservancy District (hereinafter "District"), seeking to condemn six waterfront lots belonging to King located in the Crescent Lakes Subdivision which is a 107 lot subdivision located along the shore of the Big Sandwash Reservoir at Upalco in Duchesne County, Utah. (Complaint filed 4/20/06.) (R. 3)

COURSE OF PROCEEDINGS. This action was commenced April 19, 2006. (R. 38) Prior to trial, King served a motion in limine and supporting memorandum and ex parte application for leave to file over-length memorandum and notice to submit same on July 31, 2010 , seeking among other things to preclude the District's appraiser from using five sales as comparables which sales occurred in 1995, eleven years prior to the commencement of this action. (Motion in Limine, Memorandum of Points and Authorities in Support of Motion in Limine, Defendant's Application to File Over-Length Memorandum in Support of Motion in Limine and Notice to Submit same were filed August 2, 2010, however originals do not appear to be in the record and have apparently been misfiled in the district court clerk's office in Duchesne. Unless the clerk's office can locate the originals, duplicates will need to be substituted pursuant to Rule 11(h) U. Rules of App. P., however, said documents are not necessary to a consideration of the jurisdictional issue now before this court.) (R.286, 287)

The motion in limine was argued before Hon. Edwin T. Peterson on September 20, 2010, and granted in part, but denied as to said five sales. (Minute Entry 09/20/10) (R. 441) The case was tried to a jury before Judge Peterson on October 12, 13 and 14 of 2010 on the sole issue of valuation. (Minute Entry and Minutes of Jury Trial dated

October 12, 13 and 14 of 2010.) (R. 632, 637 and 667)

DISPOSITION IN THE LOWER COURTS

DISPOSITION IN DISTRICT COURT: A jury verdict for King was returned for $56,100. (Special Verdict filed 10/14/10.) (R. 638) Final Judgment of Condemnation was entered for $56,100 plus interest at 8% per annum on $27,700 thereof on November 8, 2010. (Final Judgment of Condemnation filed 11/08/10, and Appendix Doc. 1.) (R. 696) King served a motion for a new trial with supporting memorandum with oral argument requested on November 19, 2010. (Motion and Memorandum filed 11/22/10.) (R. 700, 702) After briefing, Notice to Submit was filed December 22, 2010. (Notice to Submit filed 12/22/10.) (R. 746) The District Court prepared, signed and filed its own order entitled "RULING AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL" denying motion for a new trial on February 8, 2011. (Ruling and Order on Defendant's Motion for a New Trial filed 02/08/ll, and Appendix Doc. 2.) (R. 756) Notice of Appeal to the Utah Supreme Court was filed on March 9, 2011. (Notice of Appeal filed 03/09/ll, and Appendix Doc. 3.) (R. 758, 760)

DISPOSITION IN UTAH COURT OF APPEALS:

The appeal was to the Supreme Court, and Docketing Statement, Request for Transcript and Letter containing reasons why appeal should be retained by the Supreme Court were filed in the Supreme Court. The Supreme Court raised no issue of lack of jurisdiction while the case was in that court, however on April 5, 2011, by order of the Supreme Court the appeal was transferred to the Court of Appeals. (R. 771) On April

11, 2011, a Sua Sponte Motion for Summary Disposition was filed in the Court of Appeals. (Appendix Doc. 4.) On April 29, 2011, Appellant's Memorandum Opposing Dismissal of Appeal was filed in the Court of Appeals. Appellee filed no response thereto. On June 23, 2011, a Per Curiam Decision of the Court of Appeals was filed as 2011UT App 200, ordering the appeal "dismissed without prejudice to the filing of a timely appeal from a final order." (Appendix Doc. 5.) (R. 779) No petition for rehearing was filed, and this Petition for Certiorari was filed on July 20, 2011.

STATEMENT OF FACTS

Since this petition relates to jurisdiction and not to the merits of the case, the relevant jurisdictional facts are already set forth in the preceding sections of this brief. Nevertheless, to assist the court the full text of the ruling and order prepared, signed and filed by the District Court on February 8, 2011 (Appendix Doc. 2) (R. 756), and entitled "RULING AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL" is as follows:

> "This matter is before the Court on the Defendant's Motion for a new Trial.
>
> "Under rule 24 of the Utah Rules of Criminal [*sic*] Procedure, a new trial may be granted 'in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.' The Defendant raises two (2) general areas of concern in the motion for a new trial, both of which involve rulings made in either pre-trial hearings or at trial. It should be noted that Defendant was given the opportunity to fully argue the issues prior to the Court ruling on them, and to make objection to those rulings thereby creating a record for appeal during the course of the litigation. Defendants [*sic*] motion for a new trial therefore consists wholly of issues which were argued and ruled upon. The Court, having considered the issued [*sic*] raised by Defendant in the motion for a new trial finds

nothing in the various rulings that justify a new trial. The issues raised by Defendant may be the appropriate basis for an appeal of those rulings but does not provide a basis for a motion for a new trial. As previously noted each issue raised by Defendant was fully argued during the hearing(s) on those issues, therefore the Court would not be assisted by redundant oral argument of those issues and will rule on the motion without oral argument.

"The Defendant's Motion for a New Trail is denied.

"Dated this 8th day of February, 2011.

"BY THE COURT:

/S/ Edwin T. Peterson

EDWIN T. PETERSON, District Court Judge"

It appears the District Court identified the foregoing documents as a ruling and an order to direct and inform counsel that no further order was being required, and no other order was prepared by either party.

SUMMARY OF ARGUMENTS

POINT 1. THE COURT OF APPEALS ERRED IN DISMISSING KING'S APPEAL WITHOUT PREJUDICE ON THE GROUND THE ORDER DENYING A MOTION FOR NEW TRIAL DID NOT SATISFY THE REQUIREMENTS OF *GIUSTI V. STERLING WENTWORTH* AND RULE 7(f)(2) OF THE RULES OF CIVIL PROCEDURE.

A. DECISION AND STATED GROUNDS OF COURT OF APPEALS:

The Court of Appeals stated that it dismissed this appeal without prejudice, because it felt compelled to do so because of the Supreme Court's decision in *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, 201 P.3d 966, stating that said decision "created a bright line rule for litigants because '[t]he strict application of rule 7(f)(2)'" supports

finality and prevents confusion. The Court of Appeals concluded that the order denying the motion for a new trial was not final, and they therefore had no jurisdiction and had no other option than to dismiss the appeal.

The decision in *Giusti* however was based upon the Supreme Court's decision in *Code v. Utah Dep't of Health*, supra, which preserved a long standing exception to any such "bright line," and the Court of Appeals ignores *Code* and said exception.

B. JUDGE PETERSON'S "RULING AND ORDER" WAS CLEAR AND EXPLICIT, BUT IN ADDITION THIS CASE FALLS WITHIN THE EXCEPTION ACKNOWLEDGED AND PRESERVED IN *CODE* AND WHICH WAS NOT CHANGED BY *GIUSTI.*

It is King's contention that the Court of Appeals erred in two respects. First, that when Judge Peterson's entitled his denial of King's motion for a new trial as a "Ruling and Order" it met the requirements of the general rule as established by Rule 7(f)(2) as interpreted by *Code* and *Giusti*, and second, this case involves "preservation" of jurisdiction and thus falls within an exception to the general rule which exception was explained and preserved in *Code*, and not eliminated by *Giusti.*

Rule 7(f)(2) requires the parties to submit an order "unless otherwise directed by the court." *Code* interpreted this requirement at ¶3 this way:

> "It is the district court's role to clearly direct that no order needs to be submitted; otherwise, an order is required. A court should include this explicit direction whenever it intends a document - to constitute its final action. Otherwise, rule 7(f)(2) requires the preparation and filing of an order to trigger finality for purposes of appeal." (Emphasis added.)

Giusti also uses the term "explicitly" but it appears that all that is intended thereby is that

the district court convey a "clear" direction to the lawyers as to what is required. Since Judge Peterson entitled his document "Ruling and Order," it must have been for a reason. That reason is that he was thereby telling the lawyers that this was not just a ruling, but that it was also the order formalizing and finalizing that ruling for all purposes. The parties understood clearly what the court was telling them, and no one is quarreling with jurisdiction except the Court of Appeals. What the Court of Appeals is in effect saying is that "clear" is not enough. They are saying that the district court judge has to use the magic words "no other order is required" or appellate jurisdiction cannot exist.

In any event this case falls withing an exception to the general rule of *Code* and *Giusti*, which we now discuss.

C. HOLDING IN *CODE* ACKNOWLEDGES AND PRESERVES EXCEPTION TO THE GENERAL RULE:

Code was in the Supreme Court On Certiorari to the Utah Court of Appeals, and the decision of the Court of Appeals was reversed. In *Code* the District Court had entered a memorandum decision dismissing plaintiff's complaint. The defendant in that case (prevailing party on said motion) did not prepare a separate order, but plaintiff did, and the same was duly entered, and plaintiff based her appeal on the latter. The Court of Appeals held that the time for appeal ran from the entry of the Memorandum Decision and not from the entry of the later order, and that plaintiff's appeal was therefore untimely. The Supreme Court reversed.

Code however expressly acknowledged an exception to its general

rule for cases where the issue was "preservation" of the appeal. *Code* cited *Dove v. Cude*, 710 P.2d 170 (Utah 1985) and *Cannon v. Keller*, 692 P.2d 740 (Utah 1984), which held that when the ruling 'constituted a resolution of the dispute' [*Dove*] or 'specifie[d] with certainty a final determination of the rights of the parties,'[*Cannon*] appellate jurisdiction was proper, and the *Code* decision held that "While these cases remain good authority for that purpose, we decline to use their analysis to bar appeal rights, as the analysis of the court of appeals would do."

D. HOLDING IN *GIUSTI* EXTENDS *CODE* TO ORDERS OF ALL KINDS BUT DOES NOT ELIMINATE EXCEPTION AS PRESERVED IN *CODE*, WHERE ISSUE IS PRESERVATION OF APPEAL:

The strict rule of *Code* thus applies to cases contesting jurisdiction , and *Giusti* adopts the same general rule but in ¶ 36 clarifies that the strict rule of *Code* "applies to all final decisions not just to a "memorandum decision." Thus *Giusti* clarifies that the *Code* rule is not limited to memorandum decisions, but that clarification does not purport to eliminate the exception as set out in *Code* for cases involving preservation of jurisdiction.

E. COURT OF APPEALS LACKS AUTHORITY TO OVERRULE SUPREME COURT DECISIONS IN *DOVE V. CUDE* AND *CANNON V. KELLER* AS PRESERVED IN *CODE*:

If the Supreme Court intended by the ruling in *Giusti* to overrule *Code* in any respect, but through oversight did not do so, then it would appear that only the Supreme Court can correct such an oversight, and the Court of Appeals cannot do it for them.

After being reversed in *Code*, the Court of Appeals claims to be on board with Supreme Court in *Giusti*, but in dismissing the current appeal the Utah Court of Appeals

goes too far, and now refuses to acknowledge the exception created by *Code* for cases involving preservation of jurisdiction, and this case therefore falls squarely within Rule 46 (a)(2) of the Utah Rules of Appellate Procedure, which provides for Supreme Court review:

> "When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court."

F. COURT OF APPEALS' DECISION SETS AN UNNECESSARY AND UNWISE PRECEDENT:

The Court of Appeal in dismissing the current appeal is stating in effect that unless the lower court uses the magic words "no other order is necessary" that the appellate courts have no jurisdiction under any circumstances. That is an unnecessary and unwise restriction on jurisdiction, which seeks to preclude the appellate courts, now and forever apparently, from applying practical solutions where they are called for, as in *Dove* and *Cannon* and in the present case.

G. THE COURT OF APPEALS' DECISION CREATES CONFUSION:

The decision of the Court of Appeals does not eliminate confusion, but rather has created confusion where none existed. Before the current decision of the Court of Appeals, it was clear that for purposes of opposing jurisdiction, it was necessary to show compliance with Rule 7(f)(2), but such a showing was not necessary in preservation cases. The Court of Appeals has now held that strict requirement applies to both cases opposing jurisdiction and to cases preserving jurisdiction, but since the Court of Appeals

cannot overrule decisions of the Supreme Court, their decision does not technically overrule the *Code* exception, but as a practical matter a litigant confronted with a preservation of appeal case, is left to ponder whether the *Code* exception is the law or whether this decision of the Court of Appeals seemingly overruling the *Code* exception is now being accepted by the Supreme Court as the law.

H. *GIUSTI* AND *CODE* WERE INTENDED TO PREVENT INJUSTICE NOT TO FOSTER IT:

Both *Giusti* and *Code* were cases where the prevailing party was attempting to have the appellate court throw out the loser's appeal on the basis that the appeal was untimely. In effect the court in *Giusti* and *Code* was refusing to disallow an appeal when the losing party had done all that could reasonably have been expected of them, and those decisions were designed to prevent injustice.

We are not dealing with that situation in the present appeal. The issue here is whether an appeal timely taken and which was (1) based upon a "Ruling and Order" which was clearly and explicitly intended as a final order, (2) which unequivocally denied the motion for new trial which is all it needed to do, (3) where no one was in fact misled and (4) where no one is contesting jurisdiction should be gratuitously dismissed. Surely, the Supreme Court answered this in the negative in *Code.*

ARGUMENTS

POINT 1. THE COURT OF APPEALS ERRED IN DISMISSING KING'S APPEAL WITHOUT PREJUDICE ON THE GROUND THE ORDER DENYING A MOTION FOR NEW TRIAL DID NOT SATISFY THE REQUIREMENTS OF *GIUSTI V. STERLING WENTWORTH* AND RULE 7(f)(2) OF THE RULES OF CIVIL

PROCEDURE.

A. DECISION AND STATED GROUNDS OF COURT OF APPEALS:

The Court of Appeals has dismissed this appeal without prejudice. It did so apparently based upon the belief of the panel that it was compelled to do so by the Supreme Court's decision in *Giusti v. Sterling Wentworth Corp.* , supra. The Court of Appeals held at ¶5 including therein a quote from *Giusti*:

> "The supreme court created a bright line rule for litigants because '[t]he strict application of rule 7(f)(2) supports the judicial policy favoring finality, and it prevents the confusion that often leads - as it has here - to additional litigation when parties are left to divine when a court's decision has triggered the appeal period.' *Id.* ¶ 36., the order denying the motion for a new trail is not final for purposes of appeal, and this court is required to dismiss the appeal. *See Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah Ct. App.1989) (stating that if the court lacks jurisdiction over an appeal, it has only the authority to dismiss the action)."

The decision in *Giusti* was actually based upon the Supreme Court's decision in *Code v. Utah Dep't of Health*, supra.. At ¶ 23 the court in *Giusti* held:

> "That rule [Rule 7(f)(2)], along with our holding in *Code v. Utah Depot of Health*, establish that the July judgment was necessary, and therefore, Giusti's appeal was timely."

Giusti further holds at ¶25: "The plain language of the rule [Rule 7(f)(2)], along with our decision in *Code*, support Giusti's argument." Again at ¶29 *Giusti* holds: "This result is supported by our recent decision in *Code*, in which we explained the correct application of rule 7(f)(2)."

This case thus involves the correct interpretation of said Rule 7(f)(2) as interpreted by *Giusti* and *Code*.

B. JUDGE PETERSON'S "RULING AND ORDER" WAS CLEAR AND EXPLICIT, BUT IN ADDITION THIS CASE FALLS WITHIN THE EXCEPTION ACKNOWLEDGED AND PRESERVED IN *CODE* AND WHICH WAS NOT CHANGED BY *GIUSTI*.

It is King's contention that the Court of Appeals erred in two respects. First, that when Judge Peterson's entitled his denial of King's motion for a new trial as a "Ruling and Order" it met the requirements of the general rule as established by Rule 7(f)(2) as interpreted by *Code* and *Giusti*, and second, this case involves "preservation" of jurisdiction and thus falls within an exception to the general rule which exception was explained and preserved in *Code*, and not eliminated by *Giusti*.

Rule 7(f)(2) requires the parties to submit an order "unless otherwise directed by the court." *Code* interpreted this requirement at ¶3 this way:

> "It is the district court's role to clearly direct that no order needs to be submitted; otherwise, an order is required. A court should include this explicit direction whenever it intends a document - to constitute its final action. Otherwise, rule 7(f)(2) requires the preparation and filing of an order to trigger finality for purposes of appeal." (Emphasis added.)

Thus *Code* equates "clearly" with "explicitly." *Black's Law Dictionary* (6th Ed.) does the same by defining "explicit" this way:

> "Not obscure or ambiguous, having no disguised meaning or reservation. Clear in understanding."

Giusti at ¶3 states:

> "First, or broad holding in *Code* is inclusive of *all* final district court decisions, regardless of how they are styled. We held that 'whenever' a court intends any 'document' to constitute its final action, the court must explicitly direct that no additional order is necessary."

Giusti in using the word "explicitly" does not appear to be attempting to give it any other meaning than that given it in *Code*, to-wit: "clearly." In short, if it is clear it is explicit. Why did Judge Peterson entitle the document "Ruling and Order?" It appears evident that he used that phrase to "direct" the parties that this was not just a ruling, but that it was also the order formalizing and finalizing that ruling for all purposes. When a judge uses those words, can counsel tell him that he is not being clear enough? Judge Peterson surely wasn't telling the lawyers "Gentlemen, there are rulings, and then there are orders, and then there are orders on top of orders. My document covers the first two, but you need to prepare the third one." What he is clearly telling the lawyers is that this is the ruling and the order thereon and that ends it. The parties so understood it, and no one is quarreling with jurisdiction except the Court of Appeals, which appears to be saying that clear is not enough, and that the district court has to use the magic words "no other order is required" or appellate jurisdiction cannot exist. We think that is not what *Code* and *Giusti* stand for.

In addition to the foregoing, however this case comes within an exception to the general rule of *Code* and *Giusti* which we now discuss:

C. HOLDING IN *CODE* ACKNOWLEDGES AND PRESERVES EXCEPTION TO THE GENERAL RULE:

Code was in the Supreme Court On Certiorari to the Utah Court of Appeals, and the decision of the Court of Appeals was reversed. In *Code* the District Court had entered a memorandum decision dismissing plaintiff's complaint. The defendant in that case (prevailing party on said motion) did not prepare a separate order, but plaintiff did, and

the same was duly entered, and plaintiff based her appeal on the latter. The Court of Appeals held that the time for appeal ran from the entry of the Memorandum Decision and not from the entry of the later order, and that plaintiff's appeal was therefore untimely. The Supreme Court reversed and held the appeal timely.

The general rule of *Code* however only applies to cases involving the issue of barring the appeal, because *Code* expressly acknowledged an exception to that general rule for cases where the issue was "preservation" of the appeal. *Code* held at ¶ 8:

> "We recognize that this court has, on occasion, determined that finality supporting appellate jurisdiction exists by looking to the content and effect of a signed memorandum decision or minute entry. *Dove v. Cude*, 710 P.2d 170, 171 n. 1 (Utah 1985); *Cannon v. Keller*, 692 P.2d 740, 741 n. 1 (Utah 1984). In those cases, we suggested that when the ruling 'constituted a resolution of the dispute' or 'specifie[d] with certainty a final determination of the rights of the parties,' appellate jurisdiction was proper. *Dove*, 710 P.2d at 171 n.1; *Cannon*, 692 P.2d at 741 n. 1. Review of those cases makes clear that they resulted in the *preservation* of the appeal rights of the parties. While these cases remain good authority for that purpose, we decline to use their analysis to bar appeal rights, as the analysis of the court of appeals would do." (Emphasis added.)

Thus, the Supreme Court clearly holds that *Dove v. Cude,* supra, and *Cannon v. Keller, supra,* remain good authority" where the issue is "preservation" of appeal rights.

Dove at Note 1 of that decision held that a signed "minute entry" was sufficient to confer jurisdiction on the appellate court because it "constituted a resolution of the dispute by precluding a trial setting and reimposing the default judgment." Likewise, *Cannon* at Note 1 of that decision held that a signed "Memorandum Decision" was

sufficient to confer jurisdiction where "the ruling specifies with certainty a final determination of the rights of the parties and is susceptible of enforcement." We are dealing in this appeal now before this court, with a Rule 59 U.R.C.P. motion for a new trial, which was not involved in either *Giusti* or *Code*. All that was required in this case was a granting or denial of the motion. The "Ruling and Order On Defendant's Motion For A New Trial" by the trial court unequivocally denies the motion for a new trial, and thereby accomplishes the only thing that it needed to accomplish, and thus readily meets the requirements of *Dove* and *Cannon*, and so comes within the exception as spelled out in *Code* and which is in no way nullified by *Giusti,* and thus remains "good authority."

It appears clear that what the Supreme Court was saying in *Code* is that appellate jurisdiction will be upheld in preservation of jurisdiction cases when the lower court ruling "constituted a resolution of a dispute" [*Dove*] or when such ruling "specifies with certainty a final determination of the rights of the parties and is susceptible of enforcement" [*Cannon*], but that the Supreme Court will not use the analysis in *Dove* and *Cannon* "to bar appeal rights," and therefore in cases involving barring appeal rights, the appeal time runs from the lower court's own order only if it was an order prepared and submitted with an original memorandum or the lower court's own order clearly (expressly) informs counsel that nothing further is being required. Otherwise the appeal time runs from entry of an order thereafter prepared by one of the parties.

D. HOLDING IN *GIUSTI* EXTENDS *CODE* TO ORDERS OF ALL KINDS BUT DOES NOT ELIMINATE EXCEPTION AS PRESERVED IN *CODE*, WHERE ISSUE IS PRESERVATION OF APPEAL:

The general rule of *Code* as applicable to cases contesting jurisdiction is set forth at ¶ 6:

> "The plain language of rule 7(f)(2) does not permit overriding the requirement of an order by implication or inference. Either an order must be submitted by the prevailing party or the court must give the parties *explicit* direction that no order is required. We see no benefit to a system in which parties must guess, on a case-by-case basis, whether a judge's language in a memorandum decision 'implies],' 'inciters],'or 'contemplate]' further action by the parties."

In short *Giusti* adopts the same general rule but in ¶ 36 clarifies the *Code* rule as follows:

> "While we spoke in terms of a memorandum decision because that was the issue before us in *Code*, we take this opportunity to clarify that the rule's requirements and the policy supporting the rule apply to *all* final decisions, regardless of how they are styled."

Thus *Giusti* clarifies that the *Code* rule is not limited to memorandum decisions, but that clarification does not purport to eliminate the exception as set out in *Code* for cases involving preservation of jurisdiction.

E. COURT OF APPEALS LACKS AUTHORITY TO OVERRULE SUPREME COURT DECISIONS IN *DOVE V. CUDE* AND *CANNON V. KELLER* AS ACKNOWLEDGED AND PRESERVED IN *CODE*:

If the Supreme Court intended by the ruling in *Giusti* to overrule *Code* in any respect, but through oversight did not do so, then it would appear that only the Supreme Court can correct such an oversight, and the Court of Appeals cannot do it for them. We trust however that the Supreme Court meant what it said when it acknowledged the *Code* exception, and that there was no oversight in not overruling the *Code* exception in *Giusti*.

After being reversed in *Code*, the Court of Appeals claims to be on board with

Supreme Court in *Giusti*, but in dismissing the current appeal the Utah Court of Appeals goes too far, and now refuses to acknowledge the exception created by *Code* for cases involving preservation of jurisdiction. The Court of Appeals is saying in effect that *Dove* and *Cannon* are not good law, and we will go along with *Giusti* but we refuse to acknowledge the Supreme Court's *Code* exception. This matter therefore falls squarely within Rule 46 (a)(2) of the Utah Rules of Appellate Procedure, which provides for Supreme Court review:

> "When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court."

Since *Giusti* did not overrule the exception acknowledged in *Code*, the Court of Appeals in attempting to do so has exceeded its authority, and its decision "is in conflict with a decision of the Supreme Court."

F. COURT OF APPEALS' DECISION SETS AN UNNECESSARY AND UNWISE PRECEDENT:

The Court of Appeal in dismissing the current appeal is stating in effect that unless the lower court uses the magic words "no other order is necessary" that the appellate courts have no jurisdiction under any circumstances. That appears to be an unnecessary and unwise restriction on jurisdiction, and the Supreme Court wisely recognized in *Code* that preservation of jurisdiction cases don't involve "a system in which parties must guess, on a case-by-case basis, whether a judge's language in a memorandum decision 'implie[s],' 'invite[s],' or 'contemplate[s]' further action by the parties." Such cases

therefore do not need the "bright line" referred to by the Court of Appeals, and the preservation of the *Code* exception permits the continued application of practical solutions where they are called for, as in *Dove* and *Cannon* and in the present case.

G. THE COURT OF APPEALS' DECISION CREATES CONFUSION:

The decision of the Court of Appeals does not eliminate confusion, but rather has created confusion where none existed. Before the current decision of the Court of Appeals, it was clear that for purposes of opposing jurisdiction, it was necessary to show compliance with Rule 7(f)(2). For purposes of preserving jurisdiction, such compliance was not required where the decision ''constituted a resolution of the dispute" or "specifie[d] with certainty a final determination of the rights of the parties." The Court of Appeals has now held that strict interpretation applies to both cases opposing jurisdiction and to cases preserving jurisdiction, but since the Court of Appeals cannot overrule decisions of the Supreme Court, their decision does not technically overrule the *Code* exception, nevertheless, as a practical matter, a litigant confronted with a preservation of appeal case, is now left to ponder whether the *Code* exception is the law or whether this decision of the Court of Appeals seemingly overruling the *Code* exception is now being accepted by the Supreme Court as the law.

H. *GIUSTI* AND *CODE* WERE INTENDED TO PREVENT INJUSTICE NOT TO FOSTER IT:

Both *Giusti* and *Code* were cases where the prevailing party was attempting to have the appellate court throw out the loser's appeal on the basis that the appeal was

untimely. In both cases, instead of proceeding with the appeal on the basis of the court's own decision (minute entry in *Code* and order in *Giusti*), the losing party submitted a subsequent order and proceeded with the appeal based on the latter. The prevailing party in each case claimed that in so doing, the appeal time as measured from the court's decision (minute entry in *Code* and order in *Giusti*) had expired before the appeal was perfected. In effect the court in *Giusti* and *Code* was refusing to disallow an appeal when the losing party had done all that could reasonably have been expected of them, and were designed to prevent gross injustice.

We are not dealing with that situation in the present appeal. The issue here is whether an appeal timely taken and which was (1) based upon a "Ruling and Order" which was clearly and explicitly intended as a final order, (2) which unequivocally denied the motion for new trial which is all it needed to do, (3) where no one was in fact misled and (4) where no one is contesting jurisdiction should be gratuitously dismissed? Surely, the Supreme Court answered this question in the negative in *Code.* The Court of Appeals decision in effect uses cases designed to prevent injustice to create injustice. We certainly do not wish to imply any malice to the actions of that court or any of its members, as they no doubt felt that the "bright line" they seek is worth a few casualties along the way.

Such a destructive bright line is not necessary. Prior to the said decision of the Court of Appeals, if a litigant sought to "bar appeal rights" the litigant had to show that the order in question was submitted by one of the parties, or if the order in question was

prepared by the court, that it contains a clear (explicit) direction that no other order is necessary. In cases where no one was seeking to "bar appeal rights" appellate jurisdiction was established if the requirements of *Dove* or *Cannon* were met. This is the holding of *Code*, and this "system" [*Code* ¶ 6] appears to be totally workable, does not call for guessing, and leaves no one at risk for having chosen incorrectly.

Although Rule 7(f)(2) did not exist at the time of the decisions in *Dove* and *Cannon*, that fact was known to the Supreme Court when it decided *Code* in 2007. Had the Supreme Court intended that its strict interpretation of Rule 7(f)(2) apply equally to all cases (both those where the issue is barring the appeal as well as where the issue is preserving the appeal), the Supreme Court would not have expressly stated as it did that *Dove* and *Cannon* "remain good authority" for the purpose of "preservation" of appeals. That would seem to be the last thing the court would say.

CONCLUSION

The purpose of the general rule of *Code* and *Giusti* is to prevent a party from losing that party's appeal rights because the party "guessed" wrong as to what a "judge's language" means. That is no doubt a good rule. There is no reason however to extend it to cases where appeal rights are not on the line, and no one has been misled, and there is no problem, except the problem that will be created by an unwarranted extension of the strict rule to cases where it is not needed. Such an extension will force the parties to jump through extra hoops to get back to the same place they are now, albeit with an attendant loss of time and resources. Such a procedure would not seem to square with the

requirements of Rule 1, U.R.C.P. which provides in relevant part:

> "They [the rules] shall be liberally construed to secure the just, speedy, and inexpensive determination of every action."

Although the aforesaid exception does not appear in any way to be misleading or otherwise improper, if for any reason the Supreme Court now feels that said exception was improvident, it would appear that it should be changed by amending said Rule 7(f)(2) , not by unnecessarily dismissing appeals which have already been properly perfected. The decision of the Court of Appeal should be reversed, and King's appeal reinstated and allowed to proceed.

Dated the 9 day of Dec , 2011.

Gordon A. Madsen
Robert C. Cummings
Attorneys for Defendant and Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because:

This brief contains 6,230 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface and type style requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using WordPerfect, Version X3, font size 13, type style: Times New Roman.

Attorney for Defendant and Appellant

Dated the 9 day of Dec, 2011.

Mailed two copies of the foregoing to Perrin R. Love and Wendy Bowden Crowther, attorneys for plaintiff and appellee, at their address, One Utah Center, Thirteenth Floor, 201 So Main Street, Salt Lake City, UT 84111, postage prepaid, the 9 day of Dec, 2011.

Attorney for Defendant and Appellant

ADDENDUM

Perrin R. Love (Bar No. 5505)
Wendy Bowden Crowther (Bar No. 8842)
Joseph D. Kesler (Bar No. 12138)
CLYDE SNOW & SESSIONS
201 South Main Street
One Utah Center, Thirteenth Floor
Salt Lake City, Utah 84111
Telephone: (801) 322-2516
Facsimile: (801) 521-6280

Attorneys for Plaintiff Central Utah Water Conservancy District

IN THE DISTRICT COURT OF THE EIGHTH DISTRICT

IN AND FOR DUCHESNE COUNTY, UTAH

CENTRAL UTAH WATER CONSERVANCY DISTRICT, a Water Conservancy District organized under the laws of the State of Utah, Plaintiff, vs. SHANE KING as TRUSTEE and/or FIDUCIARY OWNER of STEPPING STONE TRUST, Defendant.	**FINAL JUDGMENT OF CONDEMNATION** Civil No. 060800063 Honorable Edwin T. Peterson

This condemnation action came on for trial beginning October 12, 2010, before the Court and jury, the Honorable Edwin T. Peterson presiding. Plaintiff Central Utah Water Conservancy District (the District") was represented by Perrin R. Love and Wendy B. Crowther of Clyde

Snow & Sessions. Defendant Shane King as Trustee and/or fiduciary owner of Stepping Stone Trust ("Stepping Stone") was represented by Gordon A. Madsen and Robert C. Cummings.

The parties concluded the presentation of evidence and rested their cases on October 14, 2010. The Court instructed the jury as to the law to be applied and counsel for each party presented closing argument.

On October 14, 2010, after due deliberation, the jury returned in open court a Special Verdict, which is incorporated by reference, in favor of Stepping Stone in total amount of $56,100.00. The Court polled the jury, and each and every juror stated affirmatively that $56,100.00 was that juror's verdict.

The Court then excused the jury. On the Special Verdict, the Court then entered in handwriting: "Total judgment of $56,100.00, plus statutory interest on [$]27,700.00 from statutorily required date." The Court signed and dated the handwritten entry of judgment.

Based upon the Special Verdict returned by the jury, the handwritten judgment entered by the Court on October 14, 2010, the Judgment entered by the Court on August 28, 2007, and the Findings of Fact and Conclusions of Law on Plaintiff's Motion for Occupancy and on Defendants' Affirmative Defenses, also entered by the Court on August 28, 2007, and with good cause appearing, the Court hereby

ORDERS, ADJUDGES, AND DECREES:

1. The Property legally described in Exhibit A to this Final Judgment of Condemnation, known as Lots 90, 91, 92, 93, 94, and 95 of the Crescent Lakes Subdivision, Duchesne County, Utah, consisting of 2.22 acres, more or less, together with all appurtenances

and improvements (the "Property"), but excluding any and all water, mineral, oil, and/or gas rights, is condemned and acquired by the District.

2. The use of the Property for reservoir purposes is a necessary public use authorized by the Utah Eminent Domain Code, Utah Code Ann. §§ 78B-6-1 et. seq.

3. Judgment is entered in favor of defendant Stepping Stone in the total amount of $56,100.00, or $27,700.00 ("Additional Just Compensation") in addition to the $28,400.00 that was previously deposited and withdrawn from Court pursuant to Utah Code Ann. § 78-34-9(3) and (6) (the predecessor statute of Utah Code. Ann. § 78B-6-510(3) and (6)).

4. Pursuant to Utah Code Ann. § 78B-6-510(5)(c), judgment shall include interest at the rate of 8% per annum on $27,700.00 of Additional Just Compensation, beginning August 1, 2006, and ending on the October 14, 2010, the date the Court entered Judgment on the jury verdict. The total amount of interest awarded pursuant to § 78B-6-510(5)(c) is $9,320.00.

5. Pursuant to Utah Code Ann. § 15-1-4, judgment shall also include post-judgment interest at the rate of $2.41% beginning on October 15, 2010, and ending on the date payment is made or tendered.

6. Each party shall bear its own fees, expenses and costs. No costs shall be awarded pursuant to Utah R. Civ. P. 54(d).

7. A copy of this Final Judgment of Condemnation shall be filed with the County Recorder of Duchesne County, State of Utah, and the rights and interests of Stepping Stone in and to the Property, except as expressly excluded herein, shall vest in the District.

[This space intentionally left blank.]

DATED this 8th day of November 2010.

BY THE COURT:

EDWIN T. PETERSON
Eighth District Court Judge

Approved as to form:

Gordon A. Madsen
Robert C. Cummings
Attorneys for Defendant Shane King as Trustee
and/or fiduciary owner of Stepping Stone Trust

Dated: 11/4/10

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

CENTRAL UTAH WATER CONSERVANCY DISTRICT, a Water Conservancy District organized under the laws of the State of Utah,, Plaintiff, vs. SHANE KING, as Trustee and/or Fiduciary Owner of Stepping Stone Trust, , Defendant.	RULING AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL Case No. 060800063 Judge EDWIN T. PETERSON

This matter is before the Court on the Defendant's Motion for a New Trial.

Under rule 24 of the Utah Rules of Criminal Procedure, a new trial may be granted "in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party." The Defendant raises two (2) general areas of concern in the motion for a new trial, both of which involve rulings made in either pre-trial hearing or at trial. It should be noted that Defendant was given the opportunity to fully argue the issues prior to the Court ruling on them, and to make objections to those rulings thereby creating a record for appeal during the course of the litigation. Defendants motion for a new trial therefore consists wholly of issues which were argued and ruled upon. The Court, having considered the issued raised by Defendant in the motion for a new trial finds nothing in the various rulings that justify a new trial. The

issues raised by Defendant may be the appropriate basis for an appeal of those rulings but does not provide a basis for a motion for a new trial. As previously noted each issue raised by Defendant was fully argued during the hearing (s) on those issues, therefore the Court would not be assisted by redundant oral argument of those issues and will rule on the motion without oral argument.

The Defendant's Motion for a New Trial is denied.

Dated this 8th day of February, 2011.

BY THE COURT:

EDWIN T. PETERSON, District Court Judge

GORDON A. MADSEN, #2048
ROBERT C. CUMMINGS, #777
Attorney for Defendant and Appellant
1224 Chandler Drive
Salt Lake City, Utah 84103
Telephone 801-364-3431

IN THE DISTRICT COURT OF THE EIGHTH DISTRICT

IN AND FOR DUCHESNE COUNTY, UTAH

CENTRAL UTAH WATER CONSERVANCY DISTRICT, A Water Conservancy District organized under the laws of the State of Utah,	)	NOTICE OF APPEAL
Plaintiff and Appellee,	)	
vs.	)	
	)	Case No. 060800063
SHANE KING, as Trustee and/or Fiduciary Owner of Stepping Stone Trust,	)	Judge Edwin T. Peterson
Defendant and Appellant.	)	

NOTICE IS hereby given that the defendant and appellant, Shane King, as Trustee and/or Fiduciary Owner of Stepping Stone Trust, by and through his attorneys of record, Gordon A. Madsen and Robert C. Cummings, hereby appeals to the Supreme Court of Utah from the above entitled District Court of the Eighth Judicial District in and for Duchesne County, Utah, (1) from the final judgment, entitled "Final Judgment of Condemnation" entered herein on November 8, 2010; (2) from the ruling of September 20, 2010 denying in part the motion in limine of defendant and appellant and

written order entered pursuant thereto on or about October 13, 2010, if any; (3) from the Order endorsed on the verdict on October 14, 2010, at the conclusion of the trial; (4) from the order denying motion for new trial of defendant and appellant, entered herein on February 8, 2011 and entitled "Ruling and Order on Defendant's Motion for a New Trial;" and (5) from any and all appealable interim or other rulings and orders in this action. This appeal is taken from said judgments, orders and rulings in their entirety, except that no appeal is taken from the portions of said motion in limine which were granted.

DATED the 8th day of March, 2011.

Gordon A. Madsen
Robert C. Cummings

GORDON A. MADSEN
ROBERT C. CUMMINGS
Attorneys for Defendant and Appellant

MAILING CERTIFICATE

Mailed copy of the foregoing Notice of Appeal together with copy of Appellate Cost Bond to Perrin R. Love and Wendy Bowden Crowther, attorneys for plaintiff and appellee, at their address, One Utah Center, Thirteenth Floor, 201 So Main Street, SLC, UT 84111, postage prepaid, the 8th day of March, 2011.

Robert C. Cummings

Attorney for Defendant and Appellant

IN THE UTAH COURT OF APPEALS

----ooOoo----

Central Utah Water Conservancy District, Plaintiff and Appellee, v. Shane King, as Trustee and/or Fiduciary Owner of Stepping Stone Trust, Defendant and Appellant.	SUA SPONTE MOTION FOR SUMMARY DISPOSITION Case No. 20110232-CA

TO THE ABOVE PARTIES AND/OR THEIR ATTORNEYS:

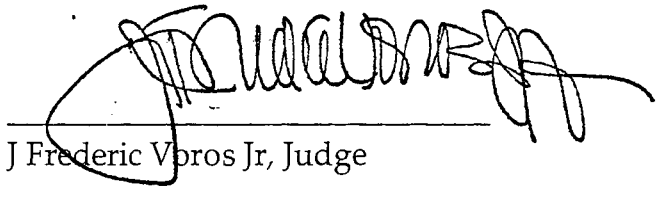
This appeal is being considered for summary disposition on the basis that this court may lack jurisdiction as the appeal does not appear to be taken from a final, appealable order. See Utah R. App. P. 3.

In order to constitute a final, appealable order, a district court's ruling or order must explicitly direct that no additional order is necessary. See Giusti v. Sterling Wentworth Corp., 2009 UT 2, ¶¶ 27-32, 201 P.3d 966. When the district court's order does not expressly state that its order is the final order of the court and that no further order need be prepared, rule 7(f)(2) of the Utah Rules of Civil Procedure requires the preparation and entry of a separate order in conformity with the district court's decision. See id. ¶ 28. The requirements of rule 7(f)(2) of the Utah Rules of Civil Procedure apply to every final decision issued by the district court. See id. ¶ 36. The district court's ruling on the motion for a new trial does not appear to comply wit this rule.

In lieu of a brief, the parties shall file a memorandum, not to exceed ten pages, explaining why summary disposition should, or should not, be granted by the court. Failure to file a memorandum may result in the dismissal of the appeal without prejudice to the filing of a timely appeal from a final order.

An original and four copies of the memorandum should be filed with the clerk of the Utah Court of Appeals on or before
May 3, 2011.

DATED this 11th day of April, 2011.



J Frederic Voros Jr, Judge

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2011, a true and correct copy of the foregoing SUA SPONTE MOTION FOR SUMMARY DISPOSITION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

PERRIN R. LOVE
WENDY BOWDEN CROWTHER
CLYDE SNOW & SESSIONS
201 S MAIN ST 13TH FLR
SALT LAKE CITY UT 84111-2216

ROBERT C. CUMMINGS
GORDON A MADSEN
ATTORNEY AT LAW
1224 CHANDLER DR
SALT LAKE CITY UT 84103

Dated this April 11, 2011.

By _____
Judicial Assistant

Case No. 20110232

IN THE UTAH COURT OF APPEALS

----ooOoo----

Central Utah Water Conservancy District, Plaintiff and Appellee, v. Shane King, as Trustee and/or Fiduciary Owner of Stepping Stone Trust, Defendant and Appellant.	)	PER CURIAM DECISION Case No. 20110232-CA FILED (June 23, 2011) 2011 UT App 200

Eighth District, Duchesne Department, 060800063
The Honorable Edwin T. Peterson

Attorneys: Gordon A. Madsen and Robert C. Cummings, Salt Lake City, for Appellant
Perrin R. Love and Wendy Bowden Crowther, Salt Lake City, for Appellee

---

Before Judges McHugh, Thorne, and Voros.

¶1 Shane King, as Trustee and/or Fiduciary Owner of Stepping Stone Trust, appeals from a November 8, 2010 judgment and a February 8, 2011 ruling on King's motion for a new trial. This matter is before the court on a sua sponte motion for summary

disposition based upon lack of jurisdiction due to the absence of a final, appealable order. We dismiss the appeal without prejudice.

¶2 Generally, "[a]n appeal is improper if it is taken from an order or judgment that is not final." *Bradbury v. Valencia*, 2000 UT 50, ¶ 9, 5 P.3d 649. In fact, this court lacks jurisdiction to consider an appeal unless it is taken from a final, appealable order. *See id.* ¶ 8.

¶3 In *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, 201 P.3d 966, the supreme court held that if a district court intends its minute entry or its self-prepared order to be final, the district court "must explicitly direct that no additional order is necessary." *Id.* ¶ 32. When the district court does not expressly direct that its order is the final order of the court, rule 7(f)(2) of the Utah Rules of Civil Procedure requires the prevailing party, or the non-prevailing party when necessary, to prepare and file an order to trigger finality for purposes of appeal. *See id.* ¶ 30.

¶4 The February 8, 2011 order denying the motion for a new trial does not satisfy the requirements set forth in *Giusti*. While the district court may have intended the order to be its final order, the district court did not expressly indicate that the order was the final order of the court and that no further order was required. Furthermore, no party prepared a final order as required by rule 7(f)(2) of the Utah Rules of Civil Procedure.

¶5 King argues that *Giusti* does not apply to this case because the rule announced in *Giusti* only applies to attempts to bar jurisdiction and not to cases meant to preserve jurisdiction. This is not the case. The supreme court created a bright line rule for litigants because "[t]he strict application of rule 7(f)(2) supports the judicial policy favoring finality, and it prevents the confusion that often leads–as it has here–to additional litigation when parties are left to divine when a court's decision has triggered the appeal period." *Id.* ¶ 36. Thus, the order denying the motion for a new trial is not final for purposes of appeal, and this court is required to dismiss the appeal. *See Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah Ct. App. 1989) (stating that if the court lacks jurisdiction over an appeal, it has only the authority to dismiss the action).

¶6 Accordingly, the appeal is dismissed without prejudice to the filing of a timely appeal from a final order.

Carolyn B. McHugh,
Associate Presiding Judge

William A. Thorne Jr., Judge

J. Frederic Voros Jr., Judge

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of June, 2011, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

PERRIN R. LOVE
WENDY BOWDEN CROWTHER
CLYDE SNOW & SESSIONS
201 S MAIN ST 13TH FLR
SALT LAKE CITY UT 84111-2216

ROBERT C. CUMMINGS
GORDON A MADSEN
ATTORNEY AT LAW
1224 CHANDLER DR
SALT LAKE CITY UT 84103

HONORABLE EDWIN T. PETERSON
EIGHTH DISTRICT, DUCHESNE
21554 W 9000 S
PO BOX 990
DUCHESNE UT 84021

EIGHTH DISTRICT, DUCHESNE
ATTN: PAT MULLINS / MIRIAM ROBERTS
21554 W 9000 S
PO BOX 990
DUCHESNE UT 84021

Deborah Hernandez
Judicial Secretary

TRIAL COURT: EIGHTH DISTRICT, DUCHESNE, 060800063
APPEALS CASE NO.: 20110232-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

Central Utah Water Conservancy District,

Plaintiff and Respondent,

v. Case No. 20110618-SC

Shane King,

Defendant and Petitioner.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on July 20, 2011.

IT IS HEREBY ORDERED, pursuant to Rule 51 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issue.

Whether the Court of Appeals erred in dismissing Petitioner's appeal without prejudice on the ground the order denying a motion for new trial did not satisfy the requirements of this Court's decision in *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, 201 P. 3d 966, and rule 7(f)(2) of the Rules of Civil Procedure.

A briefing schedule will be established hereafter.

For The Court:

Dated 10-5-11

Matthew B. Durrant
Associate Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2011, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in the Interdepartmental mail service, or hand delivered to the parties listed below:

PERRIN R. LOVE
WENDY BOWDEN CROWTHER
CLYDE SNOW & SESSIONS
201 S MAIN ST 13TH FLR
SALT LAKE CITY UT 84111-2216

ROBERT C. CUMMINGS
GORDON A MADSEN
ATTORNEY AT LAW
1224 CHANDLER DR
SALT LAKE CITY UT 84103

LISA COLLINS
COURT OF APPEALS
450 S STATE ST
PO BOX 140230
SALT LAKE CITY UT 84114-0230

EIGHTH DISTRICT, DUCHESNE
ATTN: PAT MULLINS / MIRIAM ROBERTS
21554 W 9000 S
PO BOX 990
DUCHESNE UT 84021

Dated this October 6, 2011.

By _____
Judicial Assistant

Utah Supreme Court Case No. 20110618
EIGHTH DISTRICT, DUCHESNE Case No. 060800063
Court of Appeals Case No. 20110232