2012

Don S. Redd v. Virginia Hill : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DON S. REDD, Plaintiffs and Appellee, vs. VIRGINIA HILL, Defendant and Appellant.	:	Appellate Case No.: 20120552 Trial Court No.: 110702023

BRIEF OF APPELLANT-DEFENDANT, VIRGINIA HILL

APPEAL FROM A FINAL JUDGMENT OF
THE SECOND DISTRICT COURT FOR DAVIS COUNTY,
HONORABLE JUDGE GLEN R. DAWSON, PRESIDING

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IN THE SUPREME COURT OF THE STATE OF UTAH

DON S. REDD, Plaintiff/Appellee, vs. VIRGINIA HILL, Defendant/Appellant	CERTIFICATE OF COMPLIANCE WITH RULE 24, U.R.A.P. Trial Court No. 110702023 Appellate Court No. 20120552

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DATED this 31st day of October, 2012.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Certificate of Compliance with Rule 24, U.R.A.P. was [✓] mailed, postage prepaid, [ ] sent via facsimile transmission, [ ] hand-delivered on this 1 day of November, 2012, to the following:

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LIST OF ALL PARTIES

To the best of Appellant's knowledge, all interested parties appear in the caption of this Brief.

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STATEMENT OF JURISDICTION

Appellant Virginia Hill ("Ms. Hill") appeals from a final order of the Second District Court for Davis County, Honorable Glen R. Dawson presiding. This Court has jurisdiction to hear this action pursuant to Utah Code Ann. §78A-3-102 (3) (j).

ISSUE PRESENTED FOR REVIEW

Issue: Is the Plaintiff/ Attorney entitled to a judgment against Defendant/ Client under the contingency fee "Legal Services Contract" entered into by the parties for one-third of the attorney fee award granted by the District Court in a separate proceeding, plus one-third of the whole or primary judgment?

Standard of Review: This court reviews Questions of Law for correctness, giving no deference to the lower court's legal conclusions. FN1

Issue Preserved in Trial Court: Such issue was preserved through the various filings of Ms. Hill surrounding the parties' respective motions for summary judgment (R. 77, 100, 102, 110, 123).

DETERMINATIVE RULES

The following rule has application in this appeal and is included in the Addendum due to length:

Chapter 13, Rule 1.5, Utah Code of Judicial Administration (Addendum A).

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1 *Spears v. Warr*, 44 P.3d 742, 751 (Utah 2002). See also *Emergency Physician's Integrated Care v. Salt Lake County,* 167 P.3d 1080, 1083 (Utah 2007).

STATEMENT OF THE CASE

A. Nature of the Case: Plaintiff/ Appellee, Don S. Redd ("Mr. Redd") initiated this suit by filing a Petition for Declaratory Judgment. Mr. Redd's primary claim is that in addition to receiving one-third of a judgment he aided Ms. Redd in obtaining as her attorney, he is also entitled to one-third of the attorney fees awarded to Ms. Redd in connection with such judgment.

B. Course of Proceedings: The parties each filed a motion for summary judgment, including a pleading of Stipulated Facts for Joint Motions for Summary Judgment. The trial court granted Mr. Redd's motion for summary judgment.

C. Disposition in the Trial Court: On April 20, 2012, the trial court entered its Memorandum Ruling and Final Order. Ms. Hill filed a Notice of Appeal on May 17, 2012. The Utah Supreme Court transferred the case to the Court of Appeals on July 2, 2012. On August 7, 2012, the Utah Supreme Court then vacated such transfer and chose to retain this proceeding on its docket.

STATEMENT OF RELEVANT FACTS

In the early 1990's Ms. Hill invested monies with certain individuals and/ or entities, which investment monies were not properly used for the purposes intended. Demands for the return of her money having gone unanswered, Ms. Hill eventually retained the services of Mr. Redd, attorney at law, to represent her in an action

to recover her monies. (R. 149)

As a part of securing the services of Mr. Redd a Legal Services Contract (the "Contract") was drafted by Mr. Redd, and signed by each of the parties on or about August 29, 1997. (R. 149)

A lawsuit was then filed in August, 1997 by Mr. Redd on behalf of Ms. Hill in the Fourth District Court for Juab County, against Owen A. Allred and others named in that proceeding. (R. 149)

Over approximately the next 13 years substantial and various legal proceedings ensued against the various defendants. Included in these proceedings were three appeals—two to the Utah Supreme Court and one bankruptcy appeal to the U.S. Circuit Court of Appeals. Clark Nielsen & Associates handled all of the work for the bankruptcy appeal, and Mr. Redd and Clark Nielsen & Associates together handled the work for the Utah Supreme Court appeals. In keeping with the Contract, fees for those services were fully paid by Ms. Hill separate and apart from the contingency fee that eventually became due for the judgment entered in the other proceedings in the District Court. (R.149)

Ultimately, a Judgment, and then an Amended Judgment were entered, and then finally a Second Amended Judgment was entered on April 15, 2010 for $6,144,854.79, plus interest at the rate of 2.41% per annum until paid in full, which final judgment included punitive damages against the defendants and prejudgment interest. (R. 150)

Ms. Hill then retained in the spring of 2010 the services of Wall & Wall, Attorneys at Law, to represent her in proceedings from that point forward, including the remaining issue before the District Court of attorney fees. [The right to attorney fees by Ms. Hill was granted in one of the Utah Supreme Court opinions, with the case being remanded to the District Court for a determination of those fees.] After remand from the Utah Supreme Court to the District Court the issue of attorney fees was briefed by each side, argument held, and a decisions was rendered by the District Court that fees should be based upon an hourly rate charged to Ms. Hill rather than any contingent fee amount for which she may be responsible to her attorney. (R. 150)

Ms. Hill had argued to the Fourth District Court that under Utah case law the attorney fee should be equal to one-third of the judgment award of $6,144,854.79. The District Court instead ordered that for purposes of determining attorney fees owed by the defendants to Mrs. Hill, those fees should be based upon the Lodestar formula requiring that attorney fees be based solely upon an hourly rate charge and not the one-third contingency formula. Subsequently, affidavits filed by Mr. Redd and Wall & Wall resulted in fees totaling $593,034.40, which amount was then entered as the attorney fee judgment by the Fourth District Court, plus interest on that amount at 2.41% per annum until paid in full. This did not change the fact that Ms. Hill still owed Mr. Redd one-third of the initial, primary judgment of $6,144.854.79. (R. 150-151)

Both of these judgments have now been paid in full and a Satisfaction of Judgment

has been filed with the Fourth District Court. (R. 151)

It has been Mr. Redd's subjective and personal understanding that he was to receive one-third of any and all monies paid to Ms. Hill, including one-third of any attorney fee award. (R. 151)

It has been Ms. Hill's subjective and personal understanding that the contingency fee applied only to the final, primary judgment entered by the court, and that any subsequent award of attorney fees was to compensate her to the extent of the award for the contingency fee paid to Mr. Redd. (R. 151)

Except for the Contract there is no evidence showing that at any time there was a meeting of the minds or mutual understanding by the parties as to the meaning of the wording in the Contract of, "Attorney is entitled to ONE THIRD (33/13%) of all monies paid to or in clients behalf for what ever cause related to this cause of action," as far as the wording's application to an award of attorney fees by the District Court. There are no private understandings, side agreements, or other writings evidencing any agreement for Mr. Redd's fees other than the said Contract. (R. 151)

It is not disputed that the subject Contract was willingly signed by both parties, and that Mr. Redd is due 33 1/3% of all monies collected on the primary damage award of $6,144,854.79. (R. 151-152)

It is not disputed that Ms. Hill was obligated to pay all costs for the case, including cost for the prior appellate proceedings. (R. 152)

SUMMARY OF ARGUMENT

The District Court erred in awarding Mr. Redd one-third of Ms. Hill's separate attorney fee award in addition to one-third of Ms. Hill's primary judgment because:

1) The Contract which gave him an interest in Ms. Hill's recovery was ambiguous and did not specify that he was to share in any separate attorney fee award. The Contract could reasonably be interpreted, especially by Ms. Hill a laywoman, to only allow Mr. Redd to share in a portion of the underlying judgment and not any separate award of attorney fees. In addition, as an attorney and drafter of the Contract, such ambiguity should be construed exclusively against Mr. Redd.

2) Such an award results in an unreasonable fee. Regardless of what the Contract states the courts retain the discretion to determine the reasonableness of the fee and the applicable rules limit such fee to a reasonable amount. The purpose of attorney fee awards is to compensate the client for the costs they had to incur to obtain the results, thus making the client whole. Attorney fees are not another avenue for the attorney to be supplemented or doubly awarded. Such a situation is inherently improper and unreasonable. Not only did the District court fail to find that Mr. Redd receiving compensation out of both the primary judgment and separate attorney fees to be reasonable, the District Court did not even address the issue of reasonableness of this application of the fee award.

ARGUMENT

THE DISTRICT COURT ERRED IN AWARDING MR. REDD/ATTORNEY A JUDGMENT AGAINST MS. HILL/ CLIENT UNDER THE CONTINGENCY FEE CONTRACT ENTERED INTO BY THE PARTIES FOR ONE- THIRD OF THE ATTORNEY FEE AWARD GRANTED BY THE DISTRICT COURT IN A SEPARATE PROCEEDING, PLUS ONE-THIRD OF THE WHOLE OR PRIMARY JUDGMENT.

I. The trial court erred in finding that the Contract entered into by the parties was not ambiguous despite the fact that it can be reasonably understood to have two or more plausible meanings. Furthermore, such ambiguity should be construed against Mr. Redd, an attorney and drafter of the ambiguous Contract.

A contract is ambiguous if it is unclear, omits terms, or if the terms used to express the intention of the parties may be understood to have two or more plausible meanings. FN2 In addition, it is the general rule that in construing a contract between attorney and client, doubts are resolved against the attorney and the construction adopted which is favorable to the client. FN3

This proceeding hinges around the ambiguous language contained in paragraph two (2) of the Contract between Mr. Redd and Ms. Hill. Such paragraph reads as follows:

"Attorney agrees to provide legal services in relation to this matter on a contingent fee basis which is as follows: CLIENT pays NO attorney's fees or costs unless there is some compensation received from this cause of action. Client will be responsible for all costs and out-of-pocket expenses such as depositions, filing fees, witness fees etc. from clients share of settlement proceeds. Attorney is entitled to ONE THIRD (33 1/3 %) of all monies paid to or in clients behalf for what ever cause related to this cause of action."

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2 *Equitable Life & Cas. Ins. Co. v. Ross*, 849 P.2d 1187, 1192 (Utah Ct. App.1993).
3 *Parents Against Drunk Drivers v. Graystone*, 789 P.2d 52, 56 (Utah Ct. App. 1990).

[Emphasis and spellings as in original]

While the Utah appellate courts have yet to specifically address this issue, many of our neighboring states have directly done so. We would like to first invite the court's attention to the case of *Luna v. Gillingham*, 789 P.2d 801 (Wash. App. 1990). In that case the clients filed an action against their attorney claiming that he misrepresented a contingent fee agreement to them. The plaintiffs had prevailed in their lawsuit and Gillingham requested an award of attorneys fees under the applicable statutes. In his attorney fee affidavit Gillingham disclosed his agreement to pay a legal clerk (and later bar admitted attorney), Jennings, $20.00 per hour, and he also informed the court of his own hourly fee. The trial judge awarded attorney fees of $37,977.50, the full amount requested for Gillingham's and Jennings' time. The judge's oral opinion indicated that the court contemplated the fee award would apply as a credit against the contingent fee owed by the plaintiffs.

Afterwards Gillingham and Jennings met and decided how to determine the contingent fee owed by the clients, and they elected to add the attorney fee award to the base judgment award, and then take the contingent fee from that total amount because the language of the contingency agreement awarded Gillingham a percentage of "any gross recovery"—essentially the same as what Mr. Redd is attempting to do in the instant case. In *Luna*, the court construed that fee agreement as being ambiguous because it was not clear and did not define whether "gross recovery" referenced the judgment for damages alone or

the judgment plus court-awarded attorney fees. FN4 Therefore the attorney fees should not have been added to the gross recovery, but rather should have been applied as a credit against the contingent fee owed by the plaintiffs to Gillingham under the agreement. FN5

The *Luna* court observed in its opinion that, like in the instant case,

> "The Retainer Agreement does not directly address the issue of what is to be done with court-awarded attorneys' fees. Gillingham contends, however, that since it does provide he is to receive a percentage of any 'gross recovery,' there is no ambiguity. He claims that the term 'gross recovery' includes court-awarded attorneys' fees and that his contingent fee should be computed by adding the court awarded attorneys' fees to the plaintiffs' recovery." FN6

However under the same analysis as Utah courts take on ambiguous contracts, they determined that it was ambiguous because, under the circumstances, more than one possible meaning could be attributed to the "gross recovery" language of the retainer agreement, namely that it would be exclusive of court ordered attorney fees. FN7

This is the same scenario as we are faced with in this case. Mr. Redd's Contract awards him "ONE THIRD (33 1/3 %) of all monies paid to or in clients behalf for what ever cause related to this cause of action." However, it does not define whether such includes any additional awards of attorney fees or not and it can reasonably be interpreted both ways, particularly in this context of a contingency fee agreement.

The *Luna* court looked for further direction on this point to *Hamilton v. Ford Motor*

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4 *Luna,* 789 P.2d at 579-80.
5 *Id.* At 581.
6 *Id.* At 579.
7 *Id.* At 580-81.

Co. 636 F.2d 745, 748(D.C. Cir. 1980), in which " . . . the court held that the burden be placed on the attorney to provide for allocation of court-awarded attorneys' fees in the contingent fee agreement." Specifically they found that, "The client expects that the fee agreement will provide the sole source of income for the attorney. The attorney, on the other hand, has the technical knowledge and experience to be able to anticipate awards of attorneys' fees." FN8

Based upon this line of reasoning the *Luna* court held that " . . . because Gillingham failed to provide for allocation of court-awarded attorneys' fees in the contingent fee agreement, the trial court correctly ruled that the court-awarded attorneys' fees should apply as a credit to the plaintiffs in computing Gillingham's contingent fee." FN9

Construing such an agreement against the attorney, who was both the drafter and attorney is in keeping with Utah law, wherein we find that ". . . Any ambiguous term or provision should be construed against the drafter of the attorney fee agreement." FN10

From *Phillips v. Smith*, 768 P.2d 449 (Utah 1989), a case where the Utah Supreme Court denied relief to a law firm under a contingent fee agreement that failed to address subsequent representation by another firm, we find the following pronouncement by our Supreme Court:

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8 *Hamilton*, 748 F.2d at 749.
9 *Luna*, 789 P.2d at 581.
10 *Parents Against Drunk Drivers*, 789 P.2d at 56.

> "In interpreting the contract, we must be mindful of the general principle that a court will strictly construe terms in a contract against one who is "both the attorney draftsman of and a party to the instrument." *Continental Bank & Trust Co. v. Bybee,* 306 P.2d 773, 775 (1957). We also note that in the present circumstances, this principle is reinforced by the fact that the instrument at issue relates to an attorney/client contingent fee arrangement. The present Rules of Professional Conduct of the Utah State Bar require that all contingent fee agreements be in writing. That requirement, which does not apply to other types of fee arrangements, reflects in part a concern that contingent fee arrangements are particularly likely to be misunderstood by clients. That concern is enhanced where the clients are unsophisticated with respect to legal matters as in the present case. The rule is meant to ensure that clients will be fully informed as to the terms and consequences of the contingent fee agreement." FN11

For further support of Ms. Hill's position in this action, we next call this court's attention to the matter of *Chalmers v. Oregon Automobile Insurance Co.*, 502 P.2d 1378 (Oregon, 1972). In *Chalmers* the attorney had entered into a contingent fee agreement with the clients but the fee agreement failed to state any specific percentage for the contingency fee. At the same time the insureds' action against the insurer was such that reasonable attorney fees were available to the prevailing party. There being no percentage in the fee agreement the court granted a reasonable attorney fee. As is currently the situation now, the Oregon court had not previously decided how an attorney fee award should be credited to the amount owed by the client where a contingency fee agreement was in place between the client and attorney. The Oregon court noted that absent some specific language in the fee agreement itself the fee distribution terms were

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11 *Phillips*, 768 P.2d at 451.

ambiguous, the terms being subject to various interpretations.

> For example, is the attorney entitled to retain the attorney fee allowed by the court in addition to the contingent fee payable from the judgment? Or is the fee allowed by the court to be credited to the client as an offset in computing how the proceeds of the judgment are to be distributed between the client and his attorney? Or is the fee allowed by the court to be added to the amount of the judgment in determining the total amount of recovery subject to the contingent fee percentage? There may also be other possible alternatives. FN12

Based upon these circumstances, and the manifest ambiguity in the fee agreement between the plaintiffs and the attorney, the Oregon Supreme Court held as follows:

> We agree that an attorney is free (subject to the provisions of the Code of Professional Responsibility) to negotiate such terms as he and his client may agree upon with reference to the manner in which awards of attorney fees under ORS 743.114 may be considered in relation to the amount, source, and distribution of any contingent fees. In such an event, there is no element of surprise or other unfairness to the client. If, however, the contingent fee agreement makes no specific reference to any possible attorney fee which may be awarded by the court and makes no specific provision for the manner in which any such fee is to be considered in computing the amount, source, and manner of distribution of the contingent fee, we hold that any attorney fee awarded by the court shall be offset as a credit for deduction from the amount of the agreed contingent fee, as computed upon the basis of the amount of the judgment. As a result, if the attorney fee awarded by the court is larger than the contingent fee payable from the judgment, the attorney's compensation would be payable solely from the attorney fee awarded by the court and the entire amount of the judgment would be payable to the client. FN13

As an attorney taking a contingent interest in potential awards given to Ms. Hill, Mr. Redd has the duty to clearly denote in the fee agreement all potential compensation

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12 *Chalmers*, 502 P.2d at 1380.
13 *Id.* at 1381.

factors he considered and fully explain such to his client. His failure to do so is the direct result of this litigation and he should not be allowed to benefit from his own failure, particularly not at the great expense to his client.

This would seem to be in keeping with Utah law, wherein it has been announced that "[a] court will not . . . make a better contract for the parties than they have made for themselves." FN14 The Utah Court in *Rio* went on to say that, "A court will not enforce asserted rights that are not supported by the contract itself." FN15

The terms of this Contract are vague and ambiguous, and therefore Mr. Redd is seeking to read into the contract rights and an interpretation that are not supported by the Contract itself. As an attorney and drafter of such Contract, Mr. Redd should be held to a higher standard in this regard and such ambiguity should be construed against him and in favor of Ms. Hill, his laywoman client.

The trial court erred in determining that the Contract was not ambiguous and seemed to completely ignore the unique contractual relationship in this case – namely it was not two parties bargaining at arm's length, but one legally trained party with a fiduciary and ethical duty to the other that failed to define, specify or fully disclose his interpretation of the agreement they were entering into.

Given that the parties stipulated to the facts leading up to their respective motions

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14 *Rio Algom Corp. v. Jimco Ltd.*, 618 P.2d 497, 505 (Utah 1980).
15 *Id.*

for summary judgment, after finding that the Contract is ambiguous and that such should be construed against Mr. Redd, it would be proper to find as a matter of law that Ms. Hill is entitled to summary judgment on the underlying petition as prayed for in the District Court.

II. The trial court erred in failing to find that the attorney fees as proposed by Mr. Redd were unreasonable under the circumstances. In fact, the trial court did not even address such issue.

Clearly Mr. Redd believes that the Contract is fully controlling, and he cited *Kealamakia, Inc. v. Kealamakia, et al.*, 213 P.3d 13 (Utah App. 2009) to the district court for that proposition. However, it has long been held that attorney fees are always subject to review of reasonableness by the court. *Kealamakia* itself clearly states that " . . . the district court has broad discretion in determining what constitutes a reasonable fee. . . ." FN16

This position stems from Rule 1.5 of the Rules of Professional Conduct, which provides in pertinent part that "[a] lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses." The rule then goes into a variety of factors that may be considered, which factors have been discussed an amplified by our courts in numerous situations, but the section quoted is the pertinent part for this case since there is a contingent fee arrangement between the parties in this case.

In a general discussion of rights of an attorney under a fee agreement, it has been stated that:

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16 *Kealamakia,* 213 P.3d at 15.

> "Notwithstanding such statements, however, it has been said that it is ingrained in the policy of determining reasonable attorney's fees, that no matter what fee is specified in the contract, an attorney is entitled to no more than a reasonable fee, because an attorney, as a fiduciary, cannot bind his client to pay a greater compensation for his services than the attorney would have the right to demand if no contract had been made." [Emphasis added] FN17

This general rule has been followed in Utah, as well as other jurisdictions. Our Utah Court of Appeals in *Parents Against Drunk Drivers* stated, "The existence of an attorney/ client relationship is governed in Utah by both the ethical rules governing attorney conduct and contract law." FN18 This right of the court to monitor and approve fee contracts between a client and attorney is one of long standing.

In the case of *Gillette v. Newhouse Realty Co.* 282 P. 776 (Utah 1929) Gillette, an attorney, represented Bonneville Hotel Company and performed certain services under a contract with Bonneville. The defendant Newhouse Realty subsequently purchased Bonneville and agreed to be responsible for various debts of Bonneville, including debts related to injuries sustained by guests in an elevator accident. Gillette had contracted with the hotel company that they would pay him 10% of any amounts the hotel paid to the injured guests through judgment or compromise, regardless of whether the hotel was reimbursed any of such funds from the elevator manufacturer or not. The court in *Gillette* stated that, "The rule that an attorney may not by his contract of employment place

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17 7A CJS. Sec. 307, p. 588

18 *Parents Against Drunk Drivers,* 789 P.2d at 54.

himself in a position where his own interests or the interest of another, whom he represents, conflict with the interests of his client, is founded upon principles of public policy." FN19

While the facts of *Gillette* may be compared only somewhat to the instant action, viz. in the Contract with Ms. Hill, Mr. Redd contracted to receive a portion of monies that were to go to Ms. Hill to make her whole, the salient point here is that the court retained the right to deny relief under the contract because the terms were unreasonable and against public policy. Thus, the contract was not ipso facto enforceable by the attorney, but subject to review by the court for reasonableness and fairness.

This same right to monitor fee contracts has been following in many other local jurisdictions. In *Anderson v. Kenelly*, 547 P.2d 260 (Colo. App. 1976), the Colorado Court of Appeals dealt with a situation where a contingent fee agreement provided for a one-third fee in a situation where the plaintiff suing the attorney alleged that the fee was excessive in light of the work performed. The court agreed, ruling that "[u]nder its general supervisory power over attorneys as officers of the court, a court may and should scrutinize contingent fee contracts and determine the reasonableness of the terms thereof." FN20 While we do not dispute the extent of work Mr. Redd performed, nor his right to one-third of a judgment exceeding $6 million dollars, we feel that anything

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19 *Gillette*, 282 P. at 779.
20 *Anderson*, 547 P.2d at 261.

beyond that is clearly excessive, unreasonable, and subject to review by the court.

At this juncture we would like to come back again to Rule 1.5 of the Rules of Professional Conduct and its application as to reasonableness of fees. In the *Matter of Struthers*, 877 P.2d 789 (Ariz. 1994), the Arizona Supreme Court dealt with a variety of issues concerning an attorney's dealings with his client, but one issue the court felt deserved particular attention involved a situation where the attorney in the case had a *contingency fee agreement* that contracted for the attorney to take from the judgment his contingency fee PLUS any court awarded attorney fee. (This is one of the possible outcomes observed as possible interpretations in the Oregon and Washington court rulings cited above.) The Arizona court ruled as follows:

> "Such an arrangement would tend to mislead the awarding court as to Struthers' fee agreement, because a court would not award attorney's fees if it knew that the award would result in *double recovery for the attorney and no benefit to the client. The purpose of awarding fees to a successful litigant is not to provide the lawyer with a double payment bonus but to defray the client's litigation expenses*." [Emphasis added.] FN21

While this is seemingly a stricter standard than the Washington or Oregon courts took, we submit that it is the correct position to be taken on as issue such as is presented to the Court in this case. While there certainly should be no wrongdoing attached to Mr. Redd in drafting his agreement as there was in the Arizona case, the central issue still resolves around the right of the courts to determine a correct fee. As the Oregon court

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21 *Struthers,* 877 P.2d at 795.

noted in *Chalmers*, no blame should attach to the attorney in that case because the Oregon court had never ruled on the efficacy of a contingency fee contract that provided for the attorney taking the contingency fee plus some portion of the attorney fee award granted by the lower court. We find no Utah cases directly on point for this issue.

However, as the Arizona court went on to state in *Struthers* the whole concept of awarding attorney fees in any case is "to mitigate the burden of the expense of litigation to establish a just claim or as a just defense." FN22 As *Struthers* observed, such a fee arrangement is "inherently improper." FN23 If the attorney fee award is to help make the litigating party whole, then any time an attorney takes any portion of that fee award in addition to the contingency amount the fee is no longer a fee to compensate the litigating party but to some varying degree a bonus for the attorney. Thus, the fee no longer is attorney fees, but attorney's fees. This was never the intention when such an award was created by the courts and legislatures.

This, contrary to Mr. Redd's assertions, is also what we believe to be the proper interpretation *Kealamakia*. In that case the plaintiff corporation sued members of the Kealamakia family for breach of fiduciary duty, conversion, unjust enrichment, and conversion of corporate assets. The district court found that William and Nadine Kealamakia were liable for actual damages of $196,047.01, awarded punitive damages of

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22 *Id.*
23 *Id.*

$35,000.00, and awarded attorney fees. A judgment against Joseph Kealamakia was also granted for $36,403.10. A subsequent order set the amounts of the attorney fees, providing that "(1) the contingency fee agreement amount of 40% was the maximum amount that Plaintiff could recover in an attorney fee award, and (2) the 40% figure--$134,743.44—was a reasonable attorney fee under the circumstances . . . ." FN24

The defendants argued that it was improper to award attorney fees because of the contingency fee agreement which provided that the fee is to come out of the "total gross recovery." Defendants argued that a separate attorney fee award rewrites the contract, with which contention the Utah Court of Appeals disagreed. The *Kealamakia* court then stated as follows:

> "First, we note that Defendants' characterization of the language of the contingency fee agreement is incorrect. The agreement simply provides that Plaintiff must compensate its attorneys by paying them "40% of gross amounts recovered." There is no language that would require that amount to be paid from recovery as opposed to being paid from a separate award of attorney fees. Indeed, the agreement contemplates the possibility that such a separate award may be granted where it states, "In no event will you compensate us less than the amount of any attorney fees awarded by the Court." [Emphasis added.] FN25

Several paragraphs later the Utah Court of Appeals follows with this language:

> "The trial court's award of attorney fees to Plaintiff does not alter the contract between Plaintiff and its attorneys in any way. Rather, Plaintiff remains obligated to pay its attorneys according to the terms of the contingency fee agreement. The fact that the money will come in the form of a separate award, **allowing Plaintiff to be made whole**, does not change any rights or

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24 *Kealamakia,* 213 P.3d at 14.
25 *Id.* at 15.

obligations provided for in the contract." [Emphasis added.] FN26

It is here that Ms. Hill diverges with Mr. Redd in his interpretation of *Kealamakia*. Mr. Redd in this instant action takes the position that *Kealamakia* stands, in part, for the proposition that an attorney is entitled to whatever his fee contract may provide, and if it provides for a recovery from the gross recovery then that includes the attorney fee award as well, even if it does not specify such. *Kealamakia* makes no such holding. There is nothing whatsoever in the case to indicate that the attorneys for plaintiff sought to recover 40% of the base recovery PLUS 40% of the separate $134,743.44 attorney fee award granted by the district court. If such an issue ever arose between the parties it is not in any way manifested in the appellate court ruling. Indeed, what we do see in the ruling is that the separate attorney fee award was granted for the purpose of ". . . allowing Plaintiff to **be made whole**" [Emphasis added]. FN27 This necessarily implies that the attorneys were not going to receive anything from the primary judgment. This is further emphasized by *Kealamakia* wherein it is stated that ". . . we recognize the public policy that the basic purpose of attorney fees is to indemnify the prevailing party and not to punish the losing party by allowing the winner a windfall profit." FN28

In the instant action if Mr. Redd takes a percentage of the attorney fee award in addition to a percentage of the base judgment then he is thwarting the purpose of the award,

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26 *Id.* at 15-16.
27 *Id.*
28 *Id.* at 17.

that being to make the party/ client whole. The attorney fee award is for the party who incurred a bill with an attorney, not the attorney. If Ms. Hill would not have been awarded attorney fees, Mr. Redd still would be compensated through the primary judgment, he had no risk with respect to the separate attorney fee award. If Mr. Redd is awarded a share then the attorney fee award becomes a bonus to him, and the attorney fee award becomes an award for the benefit of Mr. Redd and not as compensating Ms. Hill for the costs she incurred by having to bring the suit. That is not the purpose of attorney fees. "Attorney fee awards are means to 'vindicate personal claims' rather than means to 'generate fees.'" FN29

Along this same line of thinking the U.S. Supreme Court has consistently recognized that a "reasonable" fee is one that is to be a "fully compensatory fee." FN30 For a fee to be fully compensatory the attorney representing the party should not be entitled to a share of that fee on top of a contingency fee already paid. If the attorney is so allowed, then the fee is neither fully compensatory nor reasonable.

It is well understood that ". . . a statutory fee award is separate from the plaintiff's recovery." FN31 We reiterate that an attorney fee award is an effort to make the client whole as much as possible—to compensate to some degree for the fees paid by the client to

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29 *Id.* citing *Jones, Waldo, Holbrook & McDonough v. Dawson,* 923 P.2d 1366, 1375 (Utah 1996).
30 *Hensley v. Eckerhart*, 461 U.S. 424, 425 (1983).
31 *Warnell, et al. v. Ford Motor Co., et al.,* 205 F.Supp.2d 956, 960 (No. Dist. Ill. 2002).

his or her attorney. It is not intended as an additional source of funds for the attorney in a contingency fee case. "Fees awarded out of a common fund are a substitute for, not a supplement to, a contingent fee." FN32

In the *Warnell v. Ford Motor Co.* case an award of $9 million was given to the plaintiffs' class, and an additional $3 million was awarded to cover all fees and costs. Issues developed over whether the attorneys for plaintiffs were entitled to enforce a contingency fee agreement with some of the members of the class from the $9 million *in addition* to the $3 million awarded for just such fees. This resulted, in part, in a characterization by the court of the attorney fees sought by the attorneys as being "double dipping." FN33 As the court noted in *Warnell* the award would not have been approved had the court known that the attorneys sought both the statutory attorney fee plus the contingency fee out of the underlying judgment. In examining the fees being sought by the attorneys the court in *Warnell* noted that, "This is all by way of saying that I would never have approved a settlement that required the named plaintiffs to shoulder the burden of their attorneys' fees to a significantly greater extent than the rest of the class where the class got a significantly greater benefit. **The total fees collected are thus unreasonable**." Emphasis added. FN34

While it is true that *Warnell* was a situation where the attorneys were entitled to the

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32 *Id.*
33 *Id.* at 962.
34 *Id.*

award of the court of attorney fees, the court held the attorneys were NOT entitled to a contingency on the primary award. They were not entitled to both. The facts are flipped in this case but we submit that the principle holds true for this case as well—the attorney is not entitled to both the court awarded attorney fees in addition to the contingency amount on the primary judgment, particularly when the fee agreement does not specifically delineate such.

We again emphasize that the principle behind awarding an attorney's fee is to compensate the client, not the attorney. In the U.S. Supreme Court case of *City of Burlington v. Ernest Dague, SR., et al*, 505 U.S. 557 (1992), the Court observed that " . . . this Court consistently has recognized that a "reasonable fee is to be a fully compensatory fee, and is to be calculated on the basis of rates and practices prevailing in the relevant market." FN35 Clearly a fee charged against both the principle judgment plus a portion of the attorney fee award does not result in a "full compensatory fee" since it merely enhances the standard contingent fee already being charged by the attorney at the sole expense of the client.

As this court is well aware, attorney's fees are to be reasonable. Rule 1.5(a) of the Rules of Professional Conduct in part provides that "[a] lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses." The Rule then goes on to list the various factors generally considered in determining the reasonableness of a fee. As an example where the factors were considered we cite this court to the U.S. Supreme Court case of *Blanchard v. Bergeraon*,

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35 *Burlington,* 505 U.S. at 567.

et al., 489 U.S. 87 (1989), wherein the court held that in determining whether a fee is reasonable, the court should look at the "time expended on a matter," plus the following factors:

> "(1) the time and labor; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." FN36

In this case it is the position of Mr. Redd that the fee agreement provision providing that the "[a]ttorney is entitled to ONE THIRD (33 1/3%) of all monies paid to or in clients behalf for what ever cause related to this cause of action" entitles him to one-third of the attorney fee award. This is neither reasonable, nor was it ever the understanding of Ms. Hill that she would be paying anything more than one-third of any base judgment awarded due to the cause of action filed. Any attorney fees awarded were to compensate her to some degree to the large one-third fee Mr. Redd would be receiving if they prevailed. Despite the fact that the original District Court found that a "reasonable" attorney fee for Ms. Hill was only $593,034.40, Ms. Hill has not even attempted to limit Mr. Redd's fee to such amount. Conversely, she has complied with the terms of the Contract and provided Mr. Redd with an attorney fee of more than two

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36 *Blanchard,* 489 U.S. at 91-92.

million dollars ($2,000,000.00), an amount that results in more than triple what Mr. Redd would have received by charging his hourly rate alone. Even if Mr. Redd does not receive the additional approximately $200,000.00 he is seeking in this proceeding, he has already been more than compensated. On the other hand, the untouched $593,034.40 attorney fee award does not even come close to making Ms. Hill whole – in the realm of attorney fees she is already sitting at over a 1.4 million dollar deficit.

Under such a scenario the District Court could not have correctly found that Mr. Redd sharing in the separate attorney fee award was reasonable. Compounding such error is the fact that the District Court did not even address such factor in awarding Mr. Redd the unreasonable fee.

CONCLUSION

The District Court erred in awarding Mr. Redd one-third of Ms. Hill's separate attorney fee award in addition to one-third of Ms. Hill's primary judgment because the Contract which gave him an interest in Ms. Hill's recovery was ambiguous and did not specify that he was to share in any such attorney fee award. The Contract could reasonably be interpreted, especially by Ms. Hill a laywoman, to only allow Mr. Redd to share in a portion of the underlying judgment and not any separate award of attorney fees. In addition, as an attorney and drafter of the Contract, such ambiguity should be construed exclusively against Mr. Redd.

Moreover, even if the Contract was not ambiguous, such an award results in an

unreasonable fee under the circumstances. Regardless of what the Contract states the courts retain the discretion to determine the reasonableness of the fee and the applicable rules limit such fee to a reasonable amount. The purpose of attorney fee awards is to compensate the client for the costs they had to incur to obtain the results, thus making the client whole. Attorney fees are not another avenue for the attorney to be supplemented or doubly awarded. Such a situation is inherently improper and unreasonable. The attorney fee award already does not even come close to making Ms. Hill whole, further diminishing such compensation is completely unreasonable under the circumstances. Not only did the District court fail to find that Mr. Redd receiving fees out of both the primary judgment and separate attorney fees to be reasonable, the District Court did not even address the issue of reasonableness.

For the aforementioned reasons the District Court's order should be overturned and Ms. Hill's Motion for Summary Judgment should be granted.

RESPECTFULLLY SUBMITTED this 31st day of October, 2012.

GREGORY B. WALL
Wall & Wall, a P.C.
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the foregoing Brief of Appellant was [✓] mailed, postage prepaid, [ ] sent via facsimile transmission, [ ] hand-delivered on this 1 day of November, 2012 to the following:

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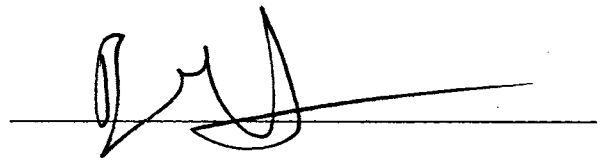

ADDENDUM A

Utah Code of Judicial Administration, Chapter 13

Rule 1.5. Fees.

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(a)(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

(a)(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(a)(3) the fee customarily charged in the locality for similar legal services;

(a)(4) the amount involved and the results obtained;

(a)(5) the time limitations imposed by the client or by the circumstances;

(a)(6) the nature and length of the professional relationship with the client;

(a)(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(a)(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(d)(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(d)(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(e)(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(e)(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and(e)(3) the total fee is reasonable.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (a)(1) through (a)(8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also

may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee but is obligated to return any unearned portion. See Rule1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fees

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated

in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

ADDENDUM B

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

DON S. REDD, Plaintiff, **vs.** VIRGINIA HILL, Defendant.	**MEMORANDUM RULING & FINAL ORDER** Case No.: 110702023 Judge: GLEN R. DAWSON

This matter is before the Court on cross motions for summary judgment. The Court having thoroughly reviewed the case file and pertinent legal authorities makes the following Ruling.

Background

The dispute in this case arises from a disagreement between the parties as to the extent to which a contingency fee agreement affects the award of attorney's fees in *Virginia Hill v. Owen Allred, et al.*, Case No. 970400153. It is not disputed that a contingency fee agreement was willingly signed by both parties and that Plaintiff is entitled to 33 1/3% of an award to Defendant of $6,144,854.79. The only dispute before the Court is whether Plaintiff should receive, pursuant to the contingency fee agreement, a further award of 33 1/3% from the $593,034.40 awarded for attorney's fees.

Analysis

"Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). In this case, the parties have submitted a stipulated set of undisputed facts. Accordingly, there is no genuine issue as to any material fact and the Court may make a judgment as a matter of law.

In general, "fee agreements between lawyers and clients should be carefully scrutinized to ensure that they are fair. . ." *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1372 (Utah 1996). When "construing a contract between attorney and client, doubts are resolved against the attorney and the construction adopted which is favorable to the client." *Id.* This rule often applies in cases where a fee agreement is alleged to contain an ambiguity. *Id.* A contract is ambiguous "if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." *Glenn v. Reese*, 2009 UT 80, ¶ 10, 225 P.3d 185 (quoting *Café Rio, Inc. v. Larkin-Gifford-Overton, LLC,* 2009 UT 27, ¶ 25, 207 P.3d 1235). If the language of the contract is unambiguous, "the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." *Id.*

The specific language of the fee agreement at issue states, "[a]ttorney is entitled to ONE THIRD (33 1/3 %) of all monies paid to or in clients behalf for what ever [sic] cause related to this cause of action." In this Court's view the language in the fee agreement is unambiguous, it

applies the contingency fee to all money paid to the client for whatever cause. The plain meaning of the contingency fee agreement is that the 33 1/3% would apply to any award or judgment, whether for general damages, punitive damages, or attorney's fees. As the language is clear, the only possible interpretation is that Plaintiff should receive 33 1/3% of the $593,034.40 in attorney's fees awarded to Defendant in the prior action.

For the forgoing reasons, Plaintiff's motion for summary judgment is granted and Defendant's motion for summary judgment is denied.

Final Order

Based on the foregoing ruling, IT IS HEREBY ORDRED that Plaintiff's Motion for Summary Judgment is GRANTED in its entirety and Defendant's Motion for Summary Judgment is DENIED.

It is FURTHERED ORDERED that Plaintiff is awarded a Declaratory Judgment in the amount of 33 1/3% of the $593,034.40 in attorney's fees awarded in *Virginia Hill v. Owen Allred, et al.*, Case No. 970400153. This Order and Judgment is a final order and no additional order is necessary.

Dated this 16th day of April 2012.

BY THE COURT:

GLEN R. DAWSON
DISTRICT COURT JUDGE

DISTRICT COURT, SECOND JUDICIAL DIST. STATE OF UTAH

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Memorandum Ruling and Final Order this 20 day of April 2012, postage prepaid, to the following:

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