

2016

Michael Strand, Plaintiff and Appellee, vs. Nupetco Associates, LLC, Defendant and Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

MICHAEL STRAND,

Plaintiff and Appellee,

vs.

NUPETCO ASSOCIATES, LLC,

Defendant and Appellant.

BRIEF OF APPELLANT

Case No. 20151016-CA

**From Ruling and Order on Defendant's Motion for Relief
Under Rule 83 (Vexatious Litigant) dated September 29, 2015
in the Second District Court of Davis County, State of Utah
Judge David Hamilton**

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FILED
UTAH APPELLATE COURTS

APR 25 2016

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LIST OF PARTIES TO THE PROCEEDING IN SECOND DISTRICT COURT

PLAINTIFFS:

Michael Strand, individually, in his capacity as the General Partner of B. I. Associates, a Utah partnership, and in his capacity as the last surviving partner of B. I. Associates;

B. I. Associates, a Utah partnership.

DEFENDANTS:

Kent Alderman, Personal Representative of the Estate of Eleanor Amelia (Millie) Newberry Strand, Deceased;

Nupetco Associates, LLC.

TABLE OF CONTENTS

JURISDICTION OF THE UTAH COURT OF APPEALS	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.....	1
THE ISSUES WERE PRESERVED IN THE TRIAL COURT	2
RULE WHOSE INTERPRETATION IS DETERMINATIVE OF THE APPEAL.....	3
STATEMENT OF THE CASE.....	3
Nature of the Case.....	3
Course of Proceedings and Disposition in the Court Below.	4
Statement of Facts.....	4
Introduction.....	4
Facts	7
Attempts to Re-litigate the Disqualification Issue	
Four Attempts to Re-litigate Validity of November 2008 Execution Sale.....	13
Four Attempts to Re-Litigate the July 2008 Amended Summary Judgment and its Validity	15
Ownership of Pages Lane Property and Attempts to Re-Litigate Same.....	16
Facts Showing Violations of Rule 83(a)(1)(C) in the Eviction Case	19
Facts Showing Violations of Rule 83(a)(1)(C) in the Eleanor Strand Probate Case	21
SUMMARY OF ARGUMENTS	23
ARGUMENT	25
I. INTERPRETATION OF RULE 83, UTAH RULES OF CIVIL PROCEDURE.....	25
A. Interpretation of Rule 83(a)(1)(B).	25

B.	Interpretation of Rule 83(a)(1)(C)	31
II.	STRAND ATTEMPTED TO RE-LITIGATE THE DISQUALIFICATION ISSUE NUMEROUS TIMES	33
III.	STRAND ATTEMPTED TO RE-LITIGATE THE VALIDITY OF THE EXECUTION SALE ON TWO OR MORE OCCASIONS.....	35
IV.	STRAND ATTEMPTED TO RE-LITIGATE THE AMENDED SUMMARY JUDGMENT AT LEAST TWO TIMES	37
V.	STRAND ATTEMPTED TO RE-LITIGATE THE OWNERSHIP OF PAGES LANE TWO OR MORE TIMES.....	38
VI.	STRAND, IN SEVERAL ACTIONS, THREE OR MORE TIMES COMMITTED ONE OR MORE OF THE ACTS SPECIFIED IN RULE 83(a)(1)(C)	40
	CONCLUSION AND RELIEF SOUGHT	41

Addendum

- A. Rule 83, Utah Rules of Civil Procedure
- B. Decision of Trial Court: Ruling and Order on Defendant's Motion for Relief
Under Rule 83 (Vexatious Litigant)

TABLE OF AUTHORITIES

Cases

<i>Aequitas Enterprises, LLC v. Interstate Investment Group, LLC</i> , 2011 UT 82, 276 P.3d 923	25
<i>Arbrogast Family Trust v. River Crossings, LLC</i> , 2010 UT 40, 238 P. 3d 1035	25
<i>Carrier v. Pro-Tech Restoration</i> , 909 P.2d 271 (Utah App. 1995)	1, 2
<i>Copper State Thrift & Loan v. Bruno</i> , 735 P.2d 387 (Utah App. 1987).....	30
<i>Drum v. Calhoun</i> , 299 S.W. 3d 360 (Tex. App.-Dallas 2009)	27, 28, 29
<i>Mitchell v. Christensen</i> , 2001 UT 80, 31 P.3d 572	2
<i>Sandy City v. Salt Lake County</i> , 827 P. 2d 227 (Utah 1992)	30
<i>Shalant v. Girardi</i> , 253 P.3d 266 (Cal. 2011)	27
<i>State Farm Mut. Auto. Ins. Co. v. Green</i> , 2003 UT 48, 89 P.3d 97	2
<i>State of Utah, in the interest of H.J., M.J. and J.M. v. State of Utah</i> , 986 P.2d 115 (Utah App. 1999).....	29, 30

Other Authorities

<i>Encarta World English Dictionary</i> , St. Martin's Press, 1999	32
--	----

Rules

Utah Code Ann. § 78A-3-102(3)(j).....	1
Utah R. Civ. P. 47	1
Utah R. Civ. P. 54(b).....	30
Utah R. Civ. P. 62(a)	30
Utah R. Civ. P. 62(b).....	30
Utah R. Civ. P. 62(d).....	30
Utah R. Civ. P. 83(a)(1)	41
Utah R. Civ. P. 83(a)(1)(A).....	26
Utah R. Civ. P. 83(a)(1)(B).....	passim
Utah R. Civ. P. 83(a)(1)(C)	passim
Utah R. Civ. P. 83(a)(1)(D).....	32
Utah R. Civ. P. 83(a)(2)	25
Utah R. Civ. P. 83(c)(1)(B).....	26, 28
Utah R. Civ. P. 83(c)(2)	27, 28

JURISDICTION OF THE UTAH COURT OF APPEALS

Jurisdiction of this appeal is conferred on the Supreme Court by Utah Code Ann. § 78A-3-102(3)(j). The Supreme Court has transferred this appeal to the Court of Appeals.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Issue No. 1: Whether the trial court erred in ruling that Utah R. Civ. P. 83(a)(1)(B) “does not permit the Court to find that a person has re-litigated the same issue of law or fact as an issue of law or fact not raised in the case before it.” Ruling and Order on Defendant’s Motion for Relief Under Rule 83 (Vexatious Litigant) (herein, the “Rule 83 Ruling”), R. 1834 at 1837, Add. Ex. B at 4. In other words, whether the trial court erred in concluding that the phrase “the claim” as used in Utah R. Civ. P. 83(a)(1)(B) “must also be at issue in the present action.” R. 1836.

Standard of Review: Correctness. *Carrier v. Pro-Tech Restoration*, 909 P.2d 271, 272 (Utah App. 1995) (“This appeal turns on the interpretation of Rule 47 of the Utah Rules of Civil Procedure and, thus, presents a question of law” which is reviewed for correctness).

Issue No. 2: Whether the trial court erred in ruling that Michael Strand’s litigation of the issue of ownership of the Pages Lane Property cannot constitute a basis for finding him to be a vexatious litigant under Utah R. Civ. P. 83(a)(1)(B) where Nupetco demonstrated three instances of Strand’s re-litigation of that issue, acting without representation.

Standard of Review: De novo. Because the operative facts were undisputed, the hearing and decision on the Rule 83 motion were equivalent to a summary judgment matter, in which “we view the facts and all reasonable inferences drawn therefrom in the light most

favorable to [the non-moving party], and we give no deference to the trial court's decision." *State Farm Mut. Auto. Ins. Co. v. Green*, 2003 UT 48, ¶ 3, 89 P.3d 97. Whether a party is entitled to summary judgment is a question of law, which is reviewed for correctness. *See Mitchell v. Christensen*, 2001 UT 80, 31 P.3d 572.

Issue No. 3: Whether the trial court erred in ruling that Utah R. Civ. P. 83(a)(1)(C) "allows the Court to review only Mr. Strand's filings in the action in which the Rule 83 motion was brought." Rule 83 Ruling at 5.

Standard of Review: Correctness. *Carrier v. Pro-Tech Restoration*, 909 P.2d 271, 272 (Utah App. 1995) ("This appeal turns on the interpretation of Rule 47 of the Utah Rules of Civil Procedure and, thus, presents a question of law" which is reviewed for correctness).

THE ISSUES WERE PRESERVED IN THE TRIAL COURT

Nupetco asserted in its Motion for Relief Under Rule 83 (Vexatious Litigants), R. 233, and Verified Memorandum in Support of Motion for Relief Under Rule 83, R.237, and 39 exhibits thereto, R. 280 – 670 that Michael Strand ("**Strand**") is a vexatious litigant. Strand responded with Verified Memorandum in Opposition to Motion for Relief Under Rule 83, R. 853, 193 pages of exhibits, R. 909 to 1102, and Errata to Memorandum in Opposition to Motion for Relief Under Rule 83, R.1108. Nupetco filed a Reply Memorandum in Support of Motion for Relief Under Rule 83, R. 1121. A hearing on the Motion was held, R. 1305, Transcript, R. 2138. The Court entered the Rule 83 Ruling, denying Nupetco's Motion. R. 1834.

RULE WHOSE INTERPRETATION IS DETERMINATIVE OF THE APPEAL

The interpretation of Rule 83, Utah Rules of Civil Procedure is determinative of the appeal. The pertinent portions of the Rule are set forth here; due to its length, the entire Rule is set forth in the Addendum.

(a)(1) The court may find a person to be a “vexatious litigant” if the person, including an attorney acting pro se, without legal representation, does any of the following:

(a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

(a)(2) “Claim” and “claim for relief” mean a petition, complaint, counterclaim, cross claim or third-party complaint.

STATEMENT OF THE CASE

Nature of the Case.

Michael Strand (“**Strand**”), individually and in a purported representative capacity as general partner and “last surviving partner” of B. I. Associates, as well as B.I. Associates itself, commenced a quiet title action against Kent Alderman, Personal Representative (“**Alderman**”) of Strand’s mother’s estate, and Nupetco Associates, LLC (“**Nupetco**”) regarding property located in West Bountiful, Davis County, Utah, commonly called

“Pages Lane.” Nupetco had received a deed to the property from Alderman. Nupetco requested that the trial court determine that Michael Strand is a “vexatious litigant” under Rule 83, Utah Rules of Civil Procedure.

Course of Proceedings and Disposition in the Court Below.

After a hearing on Nupetco’s Motion for Relief Under Rule 83, Judge Hamilton issued a “Ruling and Order on Defendant’s Motion for Relief Under Rule 83,” (R. 1946) denying the motion. Nupetco filed a Motion for Summary Judgment and Motion to Order Release of Lis Pendens, which were opposed by Strand. After a hearing on the latter motions, Judge Hamilton granted those motions, determined that Nupetco was the owner of the property, and that “Strand (in any capacity) and B. I. Associates, as well as any person claiming by, through or under them, have no right, title, interest or estate in or to the Property.” R. 1948-49, ¶ 13. Strand appealed from that decision; his appeal was rejected March 3, 2016 in an Order of Summary Affirmance by the Court of Appeals.

Statement of Facts.

Introduction

While there is an extensive history of litigation between Strand and Nupetco (including its subsidiary, Golden Meadows Properties, L.C., and its former Manager, Neuman C. Petty), a description of just four prior cases referred to in this Brief will be helpful in understanding the facts and claims regarding Nupetco’s motion that Strand be determined to be a “vexatious litigant.”

1. Eleanor Strand Probate Case. Vern and Eleanor Strand, as joint tenants, owned about ten acres of property in West Bountiful, Utah (“**Pages Lane**”), acquired in

1952. R. 281. They had four children, Jerry Strand, Mike Strand, Rex Strand, and Diane DiMeo. In 1982 Murray First Thrift made a loan to Vern, Eleanor, Mike, and entities in which Mike was a principal, secured by the Pages Lane property. Nupetco later purchased the loan. Vern died on February 11, 1987. R. 287. Eleanor died a few weeks later. The children took no action to administer the estate of Eleanor Strand, presumably because there was no equity in Pages Lane or other property owned by the estate. Years later when DiMeo believed that the statute of limitations precluded enforcement of Nupetco's Trust Deed, she filed a petition in 2006 seeking her appointment as personal representative of Eleanor's estate (commencing Probate Case No. 063600007 in the Second District Court for Davis County, Utah). On March 25, 2014, after resolution of the quiet title action on Pages Lane, case number 2, next below, Golden Meadows Properties, L.C. ("**Golden Meadows**") was substituted in the Eleanor Strand Probate case for Mike Strand (his inheritance having been acquired by assignment from Wayne Clark, to whom Strand had assigned it, and by execution by Golden Meadows) and for Jerry Strand and Diane DiMeo (purchased by Golden Meadows, Nupetco's subsidiary).

2. Eleanor Strand Probate Case. In the Eleanor Strand Probate case, DiMeo was granted leave to file a case to quiet title to Pages Lane. DiMeo commenced the action ("*2006 quiet title action*") in 2006, Case No. 060700354 in the Second District Court of Davis County. On cross-motions for summary judgment, Judge Morris held that Nupetco's Trust Deed was barred by the statute of limitations. Nupetco appealed. The Utah Court of Appeals reversed, holding the note secured by the Trust Deed was valid and enforceable, as Mike Strand's payments had extended the running of the statute of limitations. The case

was remanded “with instructions to grant partial summary judgment in favor of Nupetco and to reinstate Nupetco’s counterclaim seeking foreclosure of the trust deed, as well as to permit its amendment.” 2013 UT App 188, ¶ 11, 309 P.3d 251.

3. Bountiful House Eviction Case. In *Golden Meadows Properties, L.C. v. Michael Strand and Cari Allen*, in the Second District Court of Davis County, Case No. 070700488, filed August 30, 2007, Golden Meadows sought to evict Strand and Cari Allen from a house in Bountiful, Utah. This is referred to as the “*eviction case*.” As set forth below in more detail, Strand and Allen were removed from the house pursuant to an Order of Restitution, and an Amended Summary Judgment (R. 295) was entered against them on July 15, 2008. Strand appealed; the Utah Court of Appeals affirmed the Judgment. *Golden Meadows Properties LC v. Strand*, 2010 UT App 257. In another appeal, on the “disqualification” issue discussed below, Strand appealed an adverse ruling, which was affirmed by the Utah Court of Appeals, 2010 UT App 258, 241 P. 3d 371. Meanwhile, a Writ of Execution was issued and on November 24, 2008 Constable Robert J. Reitz levied upon and sold at public auction (referred to herein as the “*execution sale*”) to Golden Meadows Strand’s claims and causes of action against Neuman Petty, Nupetco, and all other “Neuman Petty entities,” including all claims asserted in *Strand v. Petty, et al.*, Civil No. 070915796, pending in the Third District Court of Salt Lake County (the “*joint venture suit*”), discussed as case number 4, immediately below. Golden Meadows filed a Motion to Determine Validity of Execution Sale , which was held valid in an Order Determining Validity of Execution Sale and Denying Motion to Set Aside Execution Sale on May 19, 2011 entered by Judge Dawson (the “**May 19 Order**”).

4. On November 6, 2007, Stand filed a Verified Complaint titled *Michael Strand, individually and as successor in interest to Mingo Oil Company, Mingo Oil Producers, and other Michael Strand entities v. Neuman Petty, Nupetco Associates, and Kamco Wyoming Corporation, and other Neuman Petty entities*, in the Third District Court of Salt Lake County, Case No. 070915796. Stand asserted a joint venture between (a) himself and/or the “Strand entities” and (b) Neuman Petty and/or the “Neuman Petty entities.” Although the defendants denied any joint venture, the case is referred to herein for convenience as the “*joint venture suit*.” The case was first assigned to Judge Iwasaki and later to Judge Kennedy. After Golden Meadows executed on Strand’s claims in the *joint venture suit*, as discussed in the *execution sale* portion of paragraph 3, above, Golden Meadows was substituted as plaintiff in Strand’s place, and Nupetco and Golden Meadows stipulated to dismissal of the case with prejudice; Judge Kennedy entered the dismissal order. R. 394. Strand missed the deadline to appeal, but filed a Motion for Relief, relying on Rule 60(b), which was denied by Judge Kennedy. Strand appealed. The Utah Court of Appeals affirmed. R. 419. Strand’s petition for certiorari to the Utah Supreme Court was denied, Case No. 20130319.

Facts

In its Memorandum in Support of Motion for Relief Under Rule 83 (R. 237), Nupetco established the following facts:

1. Golden Meadows commenced the *eviction case* against Strand on August 30, 2007, in the Second District Court for Davis County (Case No. 070700488). Strand filed a counterclaim which included a claim to quiet title to the subject property in

Bountiful, Utah (“**Bountiful House**”). After discovery, Judge Glen R. Dawson granted Golden Meadows’ Motion for Summary Judgment and issued an Order of Restitution, pursuant to which Strand was removed from the Bountiful residence. The court entered an Amended Summary Judgment (R. 295) on July 15, 2008, granting a money judgment against Strand in the amount of \$152,901.15. Strand filed a Rule 59 motion, which was denied. He then appealed. The Utah Court of Appeals affirmed the judgment. *Golden Meadows Properties, LC v. Strand*, 2010 UT App 257.

2. On October 14, 2008, in the *eviction* case, Strand filed a Motion for Disqualification Pursuant to Utah R. Civ. P. 63 (“**Motion to Disqualify**”), alleging that Judge Dawson was prejudiced against him. At the same time he filed a Rule 60(b) Motion for Relief from Judgment, which relied entirely upon the Motion to Disqualify in seeking to set aside the Amended Summary Judgment. The Motion to Disqualify was referred to Judge Thomas L. Kay, who issued a Ruling on Defendants’ Motion to Disqualify on October 31, 2008, stating, among other things, that “[T]here has been no showing that Judge Dawson had any conflict of interest or that he was biased or prejudiced.” R. 310.

3. Strand appealed from Judge Kay’s ruling on the Motion to Disqualify, and the Court of Appeals affirmed. *Golden Meadows Properties, LC v. Strand*, 2010 UT App 258, ¶ 7 (“Although we affirm on the ground that Strand’s recusal motion was untimely, we note our agreement with Judge Kay that Strand has not demonstrated that Judge Dawson was biased or prejudiced in any degree.”). The Court of Appeals added that “Judge Dawson’s prior involvement with Strand [when Judge Dawson was an Assistant U.S. Attorney] falls far short of the level of involvement mandating recusal.” *Id.* Strand’s

petition for certiorari in the Utah Supreme Court was denied. Case 20100935, 247 P.3d 774.

4. Pursuant to a Writ of Execution issued on October 7, 2008, Constable Robert J. Reitz, levied upon and sold at public auction to Golden Meadows on November 24, 2008 (the “**Execution Sale**”) any and all claims and causes of action of Michael Strand against Neuman Petty, Nupetco and all other “Neuman Petty entities,” including all claims asserted or which could have been asserted in *Strand vs. Petty, et al.*, Civil No. 070915796, pending in the Third District Court for Salt Lake County (claiming \$11 million based on an alleged joint venture to produce oil). A copy of Strand’s Complaint in that action is found at R. 313.

5. Golden Meadows filed a Motion to Determine Validity of Execution Sale on November 10, 2010. On February 24, 2011, Strand filed *pro se* a Motion to Set Aside Execution Sale. After extensive briefing on both motions, Judge Dawson issued a Ruling on April 20, 2011, and entered an Order Determining Validity of Execution Sale and Denying Motion to Set Aside Execution Sale on May 19, 2011 (the “**May 19 Order**”).

First Attempt to Re-litigate the Disqualification Issue

6. Strand attempted to re-litigate the disqualification issue in multiple instances. The first, including an appeal, arose from a *pro se* “Rule 59 Motion for a New Trial and for Findings by the Court; Correction of Record” (the “**Motion for New Trial**”) filed on June 3, 2011, seeking reconsideration of the May 19 Order.

a. In the supporting Memorandum Strand asked Judge Dawson to “disclose the information, knowledge, and disqualifying facts that may exist from [his] prior involvement in the matter of the tax indebtedness of Mingo Oil

Company” as a “former U.S. Attorney.” He complained that he had to guess “why this court is not prejudiced from its previous involvement in 1989 with Mr. Strand and his entities (Mingo Oil Company, Mingo Oil Producers, BI Associates ad MLK Investments)” R. 337.

b. The Motion for New Trial was denied by Ruling filed August 12, 2011, and by the Order Denying Motion for New Trial and for Findings by the Court entered September 2, 2011. Strand filed a Notice of Appeal on September 14, 2011. That appeal was designated as Case No. 20110839-CA.

c. In his *pro se* appeal designated as Case No. 20110839-CA, Strand identified as the “first issue” the question “[w]hether Judge Dawson’s rulings and orders are void.” Docketing Statement dated October 5, 2011 (R. 346). He argued that “the disqualification of a judge [Judge Dawson] is of a nature that cannot be waived” and that “the acts of that disqualified judge are absolutely void.” *Id.*

d. The Utah Court of Appeals issued a Per Curiam Decision on December 8, 2011, affirming Judge Dawson’s denial of a new trial. *Golden Meadows Properties, L.C. v. Strand*, 2011 UT App 421. It rejected Strand’s attempt to re-litigate the disqualification issue, saying, “Appellants also sought to revisit issues from their prior appeals in this case, including *Golden Meadows Properties, L.C. v. Strand*, 2010 UT App 258, 241 P.3d 371 [affirming denial of the Motion to Disqualify]. Because such issues were previously resolved by this court, we do not address them.”

Second Attempt to Re-litigate the Disqualification Issue

7. In May of 2011, Strand filed a Civil Rights Complaint against Judge Dawson in the United States District Court for the District of Utah, Case No. 1:11-cv-00077. He alleged therein that Judge Dawson had “obvious bias and prejudice against Mr. Strand.” Strand asked the federal court to order that Judge Dawson was not qualified to act in the eviction case and prayed for an order requiring Judge Dawson to recuse himself in the eviction case. R. 354. Strand’s action was dismissed based on judicial immunity. R. 367.

Third Attempt to Re-litigate the Disqualification Issue

8. On January 17, 2012, in the *eviction case* Strand filed *pro se* a Motion for Relief from Judgment or Order and a Motion to Dismiss together with a supporting Memorandum for both motions. He argued that “Judge Dawson is not authorized to sit in this case and has an absolute legal duty to disqualify himself” R. 374. Judge Dawson treated the Motion to Dismiss as a motion for disqualification and certified such motion to Judge Kay for review under Rule 63(b)(2). On February 24, 2012, Judge Kay issued a Ruling on Petitioner’s Motion to Disqualify, denying disqualification. R. 385.

a. Strand appealed the Ruling twice. The first appeal was dismissed for lack of jurisdiction in Case No. 20120273, and his request for certiorari was denied. The second appeal resulted in an Order of Summary Affirmance (R. 390) on September 28, 2012, in Case No. 20120372. The Court of Appeals stated that Strand had provided “no explanation of how Judge Dawson’s representation of the IRS in a matter involving two Strand-owned entities that occurred prior to his appointment to the bench and almost twenty years ago required Judge Dawson to recuse himself.”

Id. Strand petitioned for rehearing and then for certiorari to the Utah Supreme Court.

Both were denied.

Fourth Attempt to Re-litigate the Disqualification Issue

9. After Golden Meadows executed on Strand's claims in the *joint venture suit*, Golden Meadows was substituted in his stead as plaintiff in that case. Judge Kennedy dismissed Strand's claims with prejudice. R. 394. Strand missed his deadline to appeal but filed a *pro se* Motion for Relief from the substitution order, relying on Rule 60(b). In his supporting Memorandum Strand argued that "Judge Dawson was automatically disqualified from the state court action at the moment it came before him and his orders are void " because of Judge Dawson's work as an Assistant U.S. Attorney in cases involving IRS matters for Strand entities. R. 398 at 403.

a. Judge Kennedy denied the Rule 60(b) motion, and Strand appealed *pro se*. In an Order of Summary Affirmance, the Court of Appeals held that the trial court ruled correctly in denying the motion. Case No. 20120738. R. 419. Strand's petition for certiorari to the Utah Supreme Court was denied in Case No. 20130319.

Fifth Attempt to Re-litigate the Disqualification Issue

10. In the *eviction case* Golden Meadows caused an execution sale to be conducted on April 22, 2014, at which Golden Meadows purchased Strand's inheritance rights, his frivolous malpractice suit against Wayne Petty and all other claims and causes of action belonging to Strand. Golden Meadows then moved for a determination of the validity of that execution sale, and Judge Dawson ruled that the sale was valid. Strand filed a Rule 59 Motion on May 15, 2014, seeking reconsideration of that ruling and supported it

with the May 20, 2014, *pro se* Affidavit of Michael Strand in Support of Rule 59 Motion. R. 424.

a. In that affidavit, Strand asserted that “Judge Dawson denied me my right to conduct an evidentiary hearing because he has an ulterior motive to preclude my evidence and my testimony,” relied upon accusations of “Judge Dawson’s judicial misconduct,” and argued that “he is mandatorily disqualified from presiding over this case.” *Id.* ¶ 14.

b. In the same affidavit Strand accused Judge Dawson of ruling based on “passion and prejudice” (*id.* ¶¶ 18(a) and 19) and “personal bias” (¶ 20), as well as “bias” and “prejudice” (¶¶ 21 and 24).

c. On May 20, 2014, in the eviction case Strand filed *pro se* the Affidavit of Cari Allen in Support of Rule 59 Motion. R. 438. It contains the following passages:

Rather than correct his wrong rulings, Judge Dawson keeps on victimizing me and Mr. Strand, and Judge Dawson keeps on allowing Golden Meadows to victimize, demean, and harass us, through their disingenuous words and their bogus actions – for his own improper personal motives and benefit. It is clear to me that there is a conspiracy between Judge Dawson, Judge Kay, and Golden Meadows (James Swindler and Wayne Petty) to continue to deprive me and Mr. Strand of our right to due process.

Id. ¶ 12.

Four Attempts to Re-litigate Validity of November 2008 Execution Sale

11. Strand attempted to re-litigate the validity of the November 2008 Execution Sale at least four times, including:

a. In his June 3, 2011, Rule 59 Motion for New Trial and supporting Memorandum filed *pro se* in the eviction case (see ¶ 6 above), Strand sought to re-litigate Judge Dawson's determination that the November 24, 2008 execution sale was valid. R. 337 at 337, 339-40.

b. When Strand's Motion for New Trial was denied, he appealed and the Court of Appeals affirmed. *Golden Meadows Properties, L.C. v. Strand*, 2011 UT App 421, December 8, 2011 (upholding the validity of the execution sale and affirming the denial of Strand's Motion for New Trial).

c. In the *joint venture suit* before Judge Kennedy, as noted above, Golden Meadows was substituted in place of Strand as plaintiff. Strand filed a *pro se* Motion for Relief relying on Rule 60(b). In his supporting Memorandum Strand argued that "Judge Dawson's orders are void," attacking Judge Dawson's determination of validity of the execution sale, as well as the original eviction ruling and money judgment contained in the Amended Summary Judgment. R. 398 at 415. Judge Kennedy denied the Rule 60(b) motion, and Strand appealed *pro se*. In an Order of Summary Affirmance, the Court of Appeals held that the trial court ruled correctly in denying the motion R. 419. Strand's petition for certiorari to the Utah Supreme Court was denied in Case No. 20130319.

d. In May of 2011, Strand filed a Civil Rights Complaint against Judge Dawson in the United States District Court for the District of Utah, Case No. 1:11-cv-00077. R. 354. He alleged therein that Judge Dawson's rulings on Strand's quiet title claim in the eviction case and on his defenses to eviction were erroneous. Strand

asked the federal court to order that any judgments and actions taken in that case should be “set aside as a violation of Plaintiffs due process rights and equal protection.” He asked for an order requiring Judge Dawson to vacate all of his orders in the eviction case. *Id.*

Four Attempts to Re-Litigate the July 2008 Amended Summary Judgment and its Validity

12. Following Judge Dawson’s Amended Summary Judgment in the eviction case on July 15, 2008 (R. 295), Strand took a *pro se* appeal, in which the Utah Court of Appeals affirmed Judge Dawson’s rulings in their entirety on September 23, 2010. *Golden Meadows Properties, L.C. v. Strand*, 2010 UT App 257. Thereafter, Strand attempted to re-litigate the Amended Judgment at least four times, acting *pro se*:

a. In the *joint venture suit* before Judge Kennedy, as noted above, Golden Meadows was substituted in place of Strand as plaintiff. On April 27, 2012 Strand filed a *pro se* Motion for Relief relying on Rule 60(b). In his supporting Memorandum (R. 398 at 415) Strand argued that “Judge Dawson’s orders are void,” attacking Judge Dawson’s Amended Summary Judgment. In particular, Strand argued that the sale of the home to Log Furniture, Inc.¹ “was a sham transaction.” R. 407. He also attacked Judge Dawson’s ruling as to the statute of limitations. Strand argued that the “judgment and orders entered by Judge Dawson are void . . . [and] do not affect title to property.” R. 415.

¹ Strand’s claim regarding Log Furniture, Inc. was addressed specifically in the Amended Summary Judgment. See R. 298, ¶ 11; R. 299, ¶ 15 including footnote 1. ¶¶ 16, 17; R. 300, ¶¶ 19-21.

b. In May of 2011, Strand filed a Civil Rights Complaint against Judge Dawson in the United States District Court for the District of Utah, Case No. 1:11-cv-00077. R. 354. He alleged therein that Judge Dawson's rulings on Strand's quiet title claim in the eviction case and on his defenses to eviction were erroneous. Strand asked the federal court to order that any judgments and actions taken in that case should be "set aside as a violation of Plaintiffs due process rights and equal protection." R. 365. He asked for an order requiring Judge Dawson to vacate all of his orders in the eviction case.

c. On May 20, 2014, before Judge Dawson in the eviction case, Strand submitted the Affidavit of Cari Allen in Support of Rule 59 Motion, which argued that Judge Dawson's July 2008 ruling that Strand's quiet title claim was barred by limitations was incorrect, resulting in a denial of due process and "victimization" of Strand and Allen. Strand, by way of Allen's affidavit, further contended that the LFI acquisition of the Bountiful home was "not [an] arm's length business transaction." R. 438 at ¶ 12, 14.

d. On October 3, 2014, Strand filed a Notice of Appeal, in which he appealed from Judge Dawson's orders entered during 2014 with respect to validity of the April 22, 2014, execution sale. His appeal is currently pending as Case No. 20140983-CA.

Ownership of Pages Lane Property and Attempts to Re-Litigate Same

13. In the Eleanor Strand Estate case, the court entered a final order entitled Determination of Heirs on March 7, 2006 ruling, among other things, that Eleanor Strand

owned the land and buildings located at 680 West Pages Lane, West Bountiful, Utah (the “Pages Lane”) at the time of her death. R. 482. In the same case, Strand filed an Affidavit in June 2007 admitting that the Property belonged to Eleanor Strand’s estate. R. 486 at ¶¶ 13 and 19. Numerous attempts to re-litigate the issue followed:

a. On January 29, 2015 Strand initiated this case in the district court by filing a *pro se* Complaint (R. 1) for himself and (in violation of the prohibition on the unauthorized practice of law) B.I. Associates, alleging that B.I. Associates is the owner of the Property and seeking quiet title to the property against Kent Alderman, as Personal Representative of the Estate of Eleanor Strand. Complaint ¶ 7. The Complaint seeks a judgment quieting title to the Pages Lane Property in B.I. Associates. *Id.* at 3-4.²

² To give context to this attempt to re-litigate, one should be aware of another action previously commenced and pursued by Strand. On November 20, 2012, Strand, using Nathan Drage as counsel, filed a Petition to Probate Will in a case entitled *In the Matter of the Estate of Vern C. Strand*, Case No. 123700456, in the Second District Court for Davis County, in which he sought to probate a will of his father, Vern Strand. R. 494. In it Strand alleged in a statement verified under oath that Vern “left property in Davis County” and provided a legal description thereof, referring to it as “the Pages Lane Property.” *Id.* at ¶¶ 5-6. The final order in Vern’s case came in Judge Dale’s ruling that the Property passed by operation of law to Eleanor Strand at the death of Vern. Order dated January 9, 2014. R. 500. Strand appealed from that Order, which was affirmed by the Utah Court of Appeals, 2015 UT App 259.

Further, despite these final determinations as to ownership of the Property, on September 24, 2014, Strand, using Nathan Drage as counsel, filed a pleading in Case No. 060700354 pending before Judge Morris (on remand from the Utah Court of Appeals, 2013 UT App 188) entitled “Answer to Nupetco Associates Counterclaim and Counterclaim.” R. 506. In that pleading Strand claimed that the Property belonged to B.I. Associates, which he claimed to be a partnership. That action was dismissed by Judge Morris on January 28, 2015. Strand’s *pro se* appeal was dismissed by Order of the Utah Court of Appeals dated May 28, 2015.

b. On February 4, 2015, Strand filed a *pro se* “Emergency Petition for Extraordinary Writ” for himself and B.I. Associates (again in violation of the prohibition against the unauthorized practice of law) in the Utah Court of Appeals. R. 541. Strand stated in that Petition that “B.I. Associates is (since 1982) and at all times herein mentioned was, the owner and actual possessor of the [Pages Lane Property].” R. 546. He argued that the Probate Court did not have jurisdiction to allow the Personal Representative to take possession of “property that belongs to nonparties to the case.” R. 554. He further argued that this Court’s order violated Strand’s and B.I. Associates’ due process rights because B.I. Associates holds the Property as a partnership asset. R.551, ¶ 19. The writ was denied by the Utah Court of Appeals in an Order filed February 13, 2015, Case No. 20150087-CA. A request for further review was denied by Order entered February 18, 2015. Strand’s Petition for Writ of Certiorari to the Utah Supreme Court was denied by Order filed July 1, 2015, Case No. 20150318-SC.

c. Also on February 4, 2015, Strand filed a *pro se* Petition for Writ of Mandamus for himself and B.I. Associates in the Utah Court of Appeals, seeking a writ compelling Judge Morris to reinstate the Strand/B.I. Associates Counterclaim described in footnote 2 above. R. 560. In it he claimed again “that the Pages Lane Property is a partnership asset of B.I. Associates.” R. 568. The writ was denied by the Utah Court of Appeals by Order filed February 23, 2015, Case No. 20150091-CA. Strand’s Petition for Writ of Certiorari to the Utah Supreme Court was denied by Order filed July 1, 2015, Case No. 20150343-SC.

Facts Showing Violations of Rule 83(a)(1)(C) in the Eviction Case

14. In its Memorandum in Support of Motion for Relief Under Rule 83 (R. 237), Nupetco showed Strand's violations of Rule 83(a)(1)(C) in the following instances:

a. *Unmeritorious Paper.* Strand filed a Motion to Set Counter Possession Bond (R. 586) and a supporting Memorandum (R. 589) on September 27, 2007, proposing a counter possession bond of \$1.00 or alternatively offering a disputed claim of Cari Allen as a form of bond. In an Order Regarding Counter Bond filed on November 6, 2007, Judge Dawson rejected both proposals and required a bond of \$6,250.00 in the form required by applicable rule (cash, corporate surety, certified funds or property bond complying with applicable rules). R. 600.

b. *Unmeritorious Paper Containing Impertinent and Immaterial Matter.* On November 9, 2007, Strand filed Defendants' Disclosure of Lay Witnesses, listing 38 witnesses and, with respect to nearly all of them, failing to provide a summary of their testimony and stating it would be determined "on deposition." R. 603. Strand took no depositions in the case and offered affidavits of only a handful of the 38 witnesses.

c. *Unmeritorious Papers for Unnecessary Discovery.* On January 8, 2008, Strand filed a Motion to Compel Answers to Interrogatories; Request for Suspension of the Court's Scheduling Order and Request for Sanctions, seeking to compel answers to all 23 of his interrogatories (amounting to 68 discrete subparts) even though nine had been fully answered, another four had been partially answered and the remainder were improperly directed at non-parties. The motion sought to

abort the Court's Scheduling Order and prolong discovery even though Strand had waited until the last day on which discovery requests were permitted to be made. Judge Dawson denied the motion in full, ruling that Strand was "abusing the discovery process" and awarded attorney fees to Golden Meadows. R. 610.

d. *Unmeritorious Papers for Unnecessary Discovery.* On January 8, 2008, Strand filed a Motion to Compel Production of Documents; Request for Suspension of the Court's Scheduling Order and Request for Sanctions, seeking to compel production of documents described in 62 requests for production, including numerous categories of documents that were not within the possession, custody or control of Golden Meadows and extensive irrelevant documentation. The motion sought to abort the Court's Scheduling Order and prolong discovery even though Strand had waited until the last day on which discovery requests were permitted to be made. Judge Dawson denied the motion in full, ruling that Strand was "abusing the discovery process" and awarded attorney fees to Golden Meadows. *Id.*

e. *Unmeritorious Papers.* Strand filed a Motion for Stay and Motion to Enlarge Time to Respond to Motion for Summary Judgment and a supporting Memorandum on January 29, 2008, asking the Court to stay the eviction case pending disposition of the above-described frivolous Motions to Compel. R. 614. Golden Meadows had filed a Motion for Summary Judgment two weeks previously, and Strand sought to delay eviction by requesting an extension of time to respond to that Motion until 15 days after a ruling on the Motions to Compel. This delay tactic failed in that the Motion to Stay was denied.

f. *Unmeritorious Papers.* Strand filed a Motion to Dismiss for Failure to Join Indispensable Parties on February 13, 2008, arguing that Golden Meadows' Complaint (which simply sought to evict Strand and Allen from the residence) should be dismissed for failure of Golden Meadows to join Nupetco, Neuman Petty, Wayne Petty and Ralph Petty. R. 621. This motion was not only frivolous but was filed in extreme bad faith in view of the fact that Golden Meadows had asserted the defense of failure to join indispensable parties in its Reply to Strand's Counterclaim. Months later (after the motion cutoff date had passed and discovery was closed), Strand attempted to have the Court punish Golden Meadows for his failure to join parties that he considered necessary to pursue his Counterclaim.

g. *Unmeritorious Papers.* Strand filed a Counter Motion for Summary Judgment. Judge Dawson denied it because it was untimely filed (long after the motion cutoff date), failed to conform to Rule 7 and "lack[ed] merit." R. 295 at 296.

Facts Showing Violations of Rule 83(a)(1)(C) in the Eleanor Strand Probate Case

15. In its Memorandum in Support of Motion for Relief Under Rule 83 (R. 237), Nupetco showed Strand's violations of Rule 83(a)(1)(C) in the following instances:

a. *Unmeritorious Papers.* In violation of Rule 11(a), Utah Rules of Civil Procedure, since he was represented by Attorney Nathan Drage at the time, Strand filed a *pro se* Motion to Disqualify Judge (R. 624) and an Affidavit in Support of Motion to Disqualify Judge on December 15, 2014, seeking to disqualify Judge Kay. That Motion had no substance and was, upon referral to Judge Morris, denied on

December 24, 2014, “[b]ecause Mr. Strand’s allegations relate only to procedural and legal determinations made by Judge Kay that do not suggest bias or partiality.” R. 623.

b. *Unmeritorious Paper for Unnecessary Discovery.* In violation of Rule 11(a), Utah Rules of Civil Procedure, since he was represented by Attorney Nathan Drage at the time, Strand (acting *pro se*) obtained issuance from the Clerk of the Court and filed and served on Tesoro Refining and Marketing Company, LLC a Subpoena on December 22, 2014. The discovery was unnecessary, by seeking private information regarding its sale of oil to Tesoro, which had no relevance whatsoever to the Probate Case. The Court quashed the Subpoena by Order Re Statement of Discovery Issues (Motion to Quash and for Protective Order) dated January 12, 2015. R. 645.

c. *Unmeritorious Papers.* In violation of Rule 11(a), Utah Rules of Civil Procedure, since he was represented by Attorney Nathan Drage at the time, Strand filed in the Probate Case a *pro se* Motion to Waive Fees on January 23, 2015, with an accompanying Affidavit Supporting Motion to Waive Fees. The Affidavit was false and substantially failed to comply with Utah Code Ann. § 78A-2-302. The Court denied the Motion to Waive Fees.

d. *Unmeritorious Papers.* In violation of Rule 11(a), Utah Rules of Civil Procedure, since he was represented by Attorney Nathan Drage at the time, Strand filed in the Probate Case a *pro se* Memorandum Demonstrating Inability to Pay Fees on February 19, 2015, in which he again failed to comply with Utah Code Ann.

§ 78A-2-302 in that, among other things, he failed to disclose his bank account balance, failed to disclose complete information regarding his business interests, including B.I. Associates, Strand Apartments and Stronghold Development.

16. On May 27, 2015 Strand filed a Verified Memorandum in Opposition to Motion for Relief Under Rule 83 (R. 853), supplemented by an errata filed on June 1, 2015 (R. 1108).

17. Nupetco filed a Reply Memorandum on June 22, 2015. R. 1121.

18. Hearing on the Rule 83 Motion was held on August 13, 2015. On September 29, 2015, Judge Hamilton issued a Ruling and Order on the Rule 83 Motion (R. 1834), in which he held “the plain language of Rule 83 does not permit the Court to find that a person has re-litigated the same issue of law or fact as an issue of law or fact not raised in the case before it” (R. 1837) and “in any action” in subparagraph (C) “allows the Court to review only Mr. Strand’s filings in the action in which the Rule 83 motion was brought.” R. 1838. Based on those conclusions, the court denied the Rule 83 Motion.

SUMMARY OF ARGUMENTS

Interpretation of Rule 83, Utah Rules of Civil Procedure, follows the rules of statutory construction. First, consideration is given to the express language of the Rule and cases interpreting it. No reported cases have been found interpreting Rule 83 in Utah. The Rule is to be read as a whole and its provisions harmonized.

Judge Hamilton did not read the Rule as a whole, but rather relied on a narrow reading of the word “claim,” which he applied to various provisions to reach unintended and unsupportable results, namely: that Rule 83 (1) “does not permit the Court to find that

a person has re-litigated the same issue of law or fact as an issue of law or fact not raised in the case before it” (R. 1837); and (2) “allows the Court to review only Mr. Strand’s filings in the action in which the Rule 83 motion was brought”. R. 1838.

Nupetco demonstrated in its Verified Memorandum in Support of Motion for Relief Under Rule 83 that Strand, acting *pro se*, without legal representation,

After a claim for relief or an issue of fact or law in the claim has been finally determined, two or more times re-litigate[d] or attempt[ed] to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

Rule 83(a)(1)(B). The foregoing requirements were satisfied with regard to four separate “claim[s] for relief or an issue of fact or law in the claim, after the claim has been finally determined”: the disqualification issue in the *eviction action*, as shown in Facts ¶¶ 6 to 10, above; regarding the validity of the *execution sale*, as shown in Facts ¶ 11, above; validity of the Amended Summary Judgment in the *eviction action*, as shown in Facts ¶ 12, above; and ownership of Pages Lane, in the Eleanor Strand Probate case, as shown in Facts ¶ 13, above.

Nupetco demonstrated in its Memorandum in Support of Motion for Relief Under Rule 83 that Strand, in two actions, had three or more times committed the acts specified in subparagraphs (a)(1)(C)(i) to (iii) of Rule 83. The two actions are the *eviction action* and the Eleanor Strand Probate Case.

This court should reverse Judge Hamilton’s Ruling on Rule 83 and declare Strand a vexatious litigant.

ARGUMENT

I. INTERPRETATION OF RULE 83, UTAH RULES OF CIVIL PROCEDURE

The interpretation of a procedural rule is done consistent with the general rules of statutory construction. *Arbrogast Family Trust v. River Crossings, LLC*, 2010 UT 40, 238 P.3d 1035. The primary rule is “When interpreting a rule of civil procedure, we look to the express language of that procedural rule and to the cases interpreting it.” *Id.* ¶ 16. Application of this principle will be limited in this case to the express language of the Rule, since this appears to be a case of first impression before the appellate courts of Utah. Another rule of interpretation is that “[w]e read the plain language of [our rules of civil procedure] as a whole and interpret [their] provisions in harmony with other [rules].” *Aequitas Enterprises, LLC v. Interstate Investment Group, LLC*, 2011 UT 82, 276 P.3d 923 (brackets as in *Aequitas*).

A. Interpretation of Rule 83(a)(1)(B).

Four of Nupetco’s claims are based upon Rule 83(a)(1)(B), which provides:

The court may find a person to be a “vexatious litigant” if the person . . . without legal representation, does any of the following:

. . .

(a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

The first phrase requires a claim or claim for relief, defined as “a petition, complaint, counterclaim, cross claim or third-party complaint” (Rule 83(a)(2)), or an issue of fact or

law in the claim to be finally determined. “Finally determined” is not defined in the Rule, and the use of that term in subparagraph (a)(1)(A) does not provide any assistance in its interpretation, which is discussed below. The “finally determined” claim or issue of fact or law in the claim is the predicate to the acts that can cause a person to be a vexatious litigant. The acts specified are that the person “two or more additional times re-litigates or attempts to re-litigate the claim, issue of fact or law, or the validity of the determination against the same party . . .” The Rule does not require that the claim is finally determined in an action where the party appeared pro se, but the subsequent re-litigation or attempts to re-litigate must be pro se.

In considering the definition of “claim” and referring to the requirement of Rule 83(c)(1)(B) that “there is no reasonable probability that the vexatious litigant will prevail on the claim,” The trial court in its Ruling concluded: “The Court assumes the term ‘the claim’ was used advisedly, and in conjunction with Rule 83(a)(1)(B), finds that the claim, or issue of fact or law in the claim, must also be at issue in the present action.” R. 1836. Since the claims asserted by Nupetco, as the bases for its Rule 83(a)(1)(B) re-litigation actions, and each arose from an earlier case, Judge Hamilton held: “the plain language of Rule 83 does not permit the Court to find that a person has re-litigated the same issue of law or fact as an issue of law or fact not raised in the case before it.” R. 1837.

On the contrary, the trial court’s interpretation failed to consider the plain language and purpose of Rule 83 as a whole, or, alternatively, did not properly apply the limiting condition of subparagraph (c)(1)(B). Nupetco recognizes possible uncertainties or

ambiguities in the Rule, but suggests those can be harmonized in considering the purpose of the Rule.

The Texas Court of Appeals, interpreting the “vexatious litigant” provisions of the Texas Civil Practice and Remedies Code, which is similar to Utah’s Rule 83, stated that “the Texas legislature sought to strike a balance between Texans’ right of access to their courts and the public interest in protecting defendants from those who abuse the Texas court system by systematically filing lawsuits with little or no merit.” *Drum v. Calhoun*, 299 S.W. 3d 360 (Tex. App.-Dallas 2009). The Supreme Court of California has stated: “The vexatious litigant statutes . . . are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants.” *Shalant v. Girardi*, 253 P.3d 266 (Cal. 2011). Those statements coincide with the obvious purposes of Utah’s Rule 83.

To harmonize subparagraphs (a)(1)(B) and (c)(1)(B), the latter should be construed to mean the “claim in the present action,” rather than the claim which has been finally determined, as the context of the “claim” addressed in each subparagraph is inconsistent with the other. This interpretation is supported by subsection (c)(2), suggesting that the finding required in (c)(1)(B) is “preliminary” and “is not a decision on the ultimate merits of the vexatious litigant’s claim.” To suggest that the word “claim” in (a)(1)(B) and (c)(1)(B) has the same meaning would thus be nonsensical, as the first has been “finally determined” while the latter use of the term is “preliminary” to “the ultimate merits of the . . . claim.”

The alternative construction, adopted by the trial court, is that the word “claim” in subparagraph (c)(1)(B) means the claim which had been finally determined as stated in subparagraph (a)(1)(B). The claims and issues Nupetco asserts under subparagraph (a)(1)(B), the disqualification issue, the execution sale issue, the Amended Summary Judgment issue, and the ownership of Pages Lane issue, had already been finally determined in other cases. If “claim” means the same claim in both parts of the Rule, then the only conclusion possible under (c)(1)(B) was that there was no probability that the vexatious litigant would prevail on the claim presented in the case *sub judice*, the case at bar. Under this interpretation, the trial court should have found the requirement of (c)(1)(B) was satisfied. But, if this analysis is followed, the provisions of (c)(2) become meaningless.

The trial court’s interpretation would require the “vexatious litigant” claim for relief under Rule 83 to be asserted in the primary action, or in his words, “the claim or issue of fact or law in the claim, must also be at issue in the present action.” Cases in California and Texas do not support that approach. The Texas Code analyzed in *Drum v. Calhoun*, 299 S.W. 3d 360 (Tex. App.-Dallas 2009) provides:

A court may find a plaintiff to be a vexatious litigant if the defendant shows that there is a reasonable probability that the plaintiff will prevail in the litigation and

- A. [similar provision to Utah’s Rule 83(a)(1)(A)]; or
- B. After a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, in propria persona, either:
 - (A) the validity of the determination against the same defendant as to who the litigation was finally determined; or
 - (B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant as to whom the litigation was finally determined; or

C. . . .

Tex. Civ. Prac. & Rem. Code Ann. § 11.054, *Drum* at 365. The appellate court referred to the statute “which allows the trial court to determine that a pro se plaintiff is a vexatious litigant if the plaintiff attempts to relitigate the validity of an adverse final determination *in a prior litigation*, or any of the claims or issues finally determined *in a prior litigation*.” *Drum* at 367 (italics added). The orders determining the plaintiff a vexatious litigant were affirmed.

The Texas court referred to “prior litigation,” while the statute does not use that term. Re-litigation, whether in the same or separate actions can be the basis of a vexatious litigant determination. Thus, if the provisions of Rule 83 are to be harmonized, as the rule of statutory construction requires, the claims in prior actions must be considered in connection with the re-litigation element of (a)(1)(B) of Rule 83.

Another question that arises in the interpretation of Rule 83(a)(1)(B) is the meaning of “finally determined.” Do those words mean when the claim or issue of law or fact in the claim has been finally determined by the trial court, in a final, appealable order? Or when all appeals have been exhausted? The words are not defined in Rule 83, but are also used in subparagraph (a)(1)(A), although that subparagraph provided no obvious assistance in interpretation. Among the cases in which the words “finally determined” were found, the most recent, *State of Utah, in the interest of H.J., M.J. and J.M. v. State of Utah*, 986 P.2d 115 (Utah App. 1999) is the most helpful, other cases being 80 to 90 years old. In this case, “finally determined” is not derived from a statute or rule of civil procedure, but is used by the Utah Court of Appeals as the description of the determination in the trial

court which creates a final, appealable order, namely in that case, whether a grandmother's legal rights and status in relation to the children had been "finally determined"; since not, "she could not have appealed [the temporary custody] order. *Id.* at 123, ¶ 31. See also ¶¶ 27 and 29.

Rule 62(a) requires the expiration of 14 days after entry of judgment before execution or other writ to enforce a judgment may issue. Otherwise, a judgment is final for purposes of execution and other writs to enforce the judgment unless a stay is imposed, as under Rule 62(b), Rule 62 (d), or in the case of multiple claims the court imposes a stay or conditions on the claim on which final judgment has been granted. Thus, even if a judgment is appealed, absent a stay it may be enforced by the judgment creditor. Rule 54(b) in effect until November 1, 2015, during the time Nupetco made its Rule 83 motion, allowed a court to enter a "final judgment" as to one or more but fewer than all of the claims.

Another reason for adopting the appealable order of the trial court as when a claim or issue of law or fact is final for purposes of Rule 83 is that "A judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition." *Copper State Thrift & Loan v. Bruno*, 735 P.2d 387, 390 (Utah App. 1987). See also, *Sandy City v. Salt Lake County*, 827 P. 2d 227, 230-31 (Utah 1992).

"Finally determined" for purposes of Rule 83 should be interpreted to mean a final determination by the trial court. Such an interpretation would foster the purposes of Rule 83 by allowing a litigant to put the question to a court whether another litigant is a

“vexatious litigant” at the earliest opportunity. Otherwise, lengthy delay may occur before the issue may be presented. For example, in the *eviction action*, the Amended Summary Judgment, entered July 15, 2008, became an appealable order on September 15, 2008 when “Defendants’ Rule 59 Motion for New Trial and Motion to Amend the Judgment . . .” was denied by Order Denying Rule 59 Motion. The Utah Court of Appeals affirmed the Amended Summary Judgment on September 23, 2010, just over two years later, and Strand’s petition for writ of certiorari was denied by the Utah Supreme Court on January 26, 2011.

B. Interpretation of Rule 83(a)(1)(C)

A person may be designated a “vexatious litigant” if, acting pro se, “In any action, the person three or more times does any one or any combination of” four specified acts, the fourth of which (a)(1)(C)(iv) is not presented in this appeal.³ There was no dispute about the specified acts. The critical issue, in the eye of the trial court, was whether the acts occurred in the Pages Lane quiet title action before it. In the Ruling, Judge Hamilton stated and held:

Reading subparagraph (C) as a whole, the Court finds that the language “in any action” allows the Court to review only Mr. Strand’s filing in the action in which the Rule 83 motion was brought. . . .

. . .

³ See Ruling, footnote 4, “for the Court to make any findings under (iv) would require the Court to take evidence to discern Mr. Strand’s intent.”

Nupetco has not argued that any of Mr. Strand's pleadings, discovery, or tactics in this action fall under subparagraph (C), although Nupetco asserts pleadings in two other actions indicate Mr. Strand is a vexatious litigant. The Court accordingly concludes that Nupetco has not shown by clear and convincing evidence that Mr. Strand is a vexatious litigant under subparagraph (C) in the present action.

R. 1950-51.

Rule 83(a)(1)(C) does not say "in the present action," but says "in any action." "Any" is defined as "a grammatical word used to indicate one, some, or several, when the quality, type, or number is not important," and "an unlimited or indefinite amount." Encarta World English Dictionary, St. Martin's Press, 1999. If its plain meaning applies, "any" cannot be restricted to the present action only.

Rule 83 looks to prior conduct to determine if a person is a vexatious litigant. Subparagraph (a)(1)(A) looks to "the immediately preceding seven years" for at least five claims for relief determined against the person. Subparagraph (a)(1)(B) will consider re-litigation of a claim previously determined. Subparagraph (a)(1)(C) specifies "in any action" the person three or more times commits any one or a combination of four specified acts, clearly anticipating, and requiring, a court's review of conduct in prior actions. Subparagraph (a)(1)(D) addresses actions in a purported court other than specifically recognized courts. All are couched to evaluate a person's prior activity to determine if the definition of "vexatious litigant" is established, for the purpose of eliminating continued improper use of the courts and costs to the courts and litigants.

“In any action” means prior and current actions in which a person, such as Strand, has committed the specified acts in the specified number of times and within any specified time limits.

II. STRAND ATTEMPTED TO RE-LITIGATE THE DISQUALIFICATION ISSUE NUMEROUS TIMES

The disqualification issue arose in the *eviction action* on the Bountiful House, commenced in 2007. Under Rule 83 (a)(1)(B), Strand’s counterclaim seeking quiet title of the Bountiful House constitutes “a claim for relief” and the July 15, 2008 Amended Summary Judgment constituted a final determination of Strand’s counterclaim.

Nupetco asserts that the quiet title claim was “finally determined” for purposes of the first phrase of Rule 83(a)(1)(B) by the Amended Summary Judgment, and that Strand two or more times re-litigated or attempted to re-litigate the validity of the judgment by challenging the authority of Judge Dawson, as asserted in the Motion to Disqualify. The Motion to Disqualify sought to have the Amended Summary Judgment nullified, thus challenging the “validity of the determination against the same party [Golden Meadows] in whose favor the claim or issue was determined.”

On October 14, 2008, Strand filed the Motion to Disqualify, which was denied by Judge Kay on October 31, 2008 and affirmed by the Utah Court of Appeals, 2010 UT App 258, filed September 23, 2010; petition for certiorari in the Utah Supreme Court was denied, 247 P.3d 774, January 26, 2011. Possible dates that Strand’s counterclaim was “finally determined” under Rule 83 in connection with the July 15, 2008 Amended Summary Judgment include: September 15, 2008 when Strand’s Rule 59 Motion for New

Trial and Motion to Amend the Judgment was denied; October 31, 2003 when the Motion to Disqualify was denied; October 31, 2008 order, the date of the decision of the Utah Court of Appeals; or January 26, 2011, the date of the denial of petition for certiorari by the Utah Supreme Court.

After all of those dates, whichever is applicable, acting *pro se*, Strand attempted to re-litigate the disqualification issue against Golden Meadows on at least five subsequent occasions:

1. In the eviction case, Motion for New Trial, June 3, 2011. See Facts, ¶ 6;
2. Civil Rights Complaint against Judge Dawson. See Facts, ¶ 7 (Although Golden Meadows was not named as a party, the relief sought was to nullify the Amended Summary Judgment. Thus, the re-litigation was “against the same party [Golden Meadows] in whose favor the claim or issue was determined.”);
3. In the eviction case, Motion for Relief from Judgment or Order and Motion to Dismiss, January 17, 2012. See Facts, ¶ 8;
4. In the joint venture suit, Motion for Relief, [date]. See Facts, ¶ 9; and
5. In the eviction case, Rule 59 Motion, May 15, 2014. See Facts, ¶ 10.

To summarize this basis for a vexatious litigant determination under Rule 83(a)(1)(B):

Element of Rule 83(a)(1)(B)	Facts
A claim for relief / issue of fact or law in the claim.	In the <i>eviction action</i> , Strand's counterclaim/Motion to Disqualify Judge Dawson
Finally determined	September 15, 2008 (denial of Rule 59 Motion for New Trial), or October 31, 2008 (denial of Motion for Disqualification), or January 26, 2011 (Strand's petition for writ of certiorari denied by Utah Supreme Court)
Re-litigated	Seven times: see Facts ¶¶ 6 to 10, above, all after the latest date under "Finally determined"
The claim, the issue of fact or law, or the validity of the determination	Motion to Disqualify Judge Dawson
Against the same party in whose favor the claim or issue was determined	Golden Meadows

Nupetco has met all of the elements of Rule 83 (a)(1)(B). Nupetco is entitled to a determination that Strand is a "vexatious litigant" and remand to the trial court for the relief authorized by Rule 83.

III. STRAND ATTEMPTED TO RE-LITIGATE THE VALIDITY OF THE EXECUTION SALE ON TWO OR MORE OCCASIONS.

At public auction on November 28, 2008, Golden Meadows purchased all claims of Strand against Neuman Petty, Nupetco, and all other "Neuman Petty entities," including all claims asserted or which could be asserted in *Strand v. Petty, et al.*, Civil No. 070915796.⁴ See Facts, ¶ 4. Golden Meadows filed a motion to determine the validity of

⁴ Judge Hamilton's Ruling at p. 3 refers to "the validity of the Execution Sale of the Bountiful residence." However, the execution sale was on Strand's claims and causes of action in the indicated case, not on the Bountiful residence.

the execution sale. Judge Dawson determined the sale was valid; an order to that effect was entered May 19, 2011.

Strand, acting pro se, attempted to re-litigate the May 19 Order or its validity in the following instances:

1. In the eviction case, June 3, 2011, Rule 59 Motion for New Trial (Facts, ¶ 12.a.);
2. Appeal from denial of Motion for New Trial; affirmed by Utah Court of Appeals (Facts, ¶ 12.b.);
3. In joint venture suit, Motion for Relief (Facts, ¶ 12.c.);
4. Civil Rights Complaint against Judge Dawson. See Facts, ¶ 7 (Although Golden Meadows was not named as a party, the relief sought was the same, to nullify the Amended Summary Judgment. Thus, the re-litigation was “against the same party [Golden Meadows] in whose favor the claim or issue was determined.”);

Nupetco satisfied the elements of Rule 83 (a)(1)(B) as shown in this summary:

Element of Rule 83(a)(1)(B)	Facts
A claim for relief or issue of fact or law in the claim.	Claim: Strand's Counterclaim in the eviction action Issue in the claim: validity of execution sale
Finally determined	May 19, 2011 (Judge Dawson's Order Determining Validity of Execution Sale)
Re-litigated	Four times: see ¶¶ 1 to 4, above and Facts ¶¶ 7 and 12.a., b., and c.
The claim, the issue of fact or law, or the validity of the determination	Validity of execution sale
Against the same party in whose favor the claim or issue was determined	Golden Meadows

Strand is a vexatious litigant. The trial court's Ruling and Order should be reversed.

IV. STRAND ATTEMPTED TO RE-LITIGATE THE AMENDED SUMMARY JUDGMENT AT LEAST TWO TIMES

The Amended Summary Judgment was entered on July 15, 2008. The Utah court of Appeals affirmed the judgment. *Golden Meadows Properties, LC v. Strand*, 2010 UT App 257, filed September 23, 2010.

Strand re-litigated or attempted to re-litigate the Amended Summary Judgment on the following occasions:

1. In the joint venture action before Judge Kennedy, April 27, 2012, Motion for Relief (Facts, ¶ 12.a.);
2. Civil Rights Complaint against Judge Dawson, May 17, 2011 (Facts, ¶ 7) (Although Golden Meadows was not named as a party, the relief sought was the same, to nullify the Amended Summary Judgment. Thus, the re-litigation was "against the same party [Golden Meadows] in whose favor the claim or issue was determined.");

3. In the eviction case, on May 20 2014, Affidavit of Cari Allen in Support of Rule 59 Motion (Facts, ¶ 12.c.); and
4. In the eviction case, Notice of Appeal (Facts, ¶ 12.d.).

Nupetco satisfied the elements of Rule 83(a)(1)(B) as shown in this summary:

Element of Rule 83(a)(1)(B)	Facts
A claim for relief or issue of fact or law in the claim.	In the <i>eviction action</i> Claim: Strand's Counterclaim Issue in the claim: validity of the Amended Summary Judgment
Finally determined	September 15, 2008 (denial of Rule 59 Motion for New Trial), or October 31, 2008 (denial of Motion for Disqualification), or January 26, 2011 (Strand's petition for writ of certiorari denied by Utah Supreme Court)
Re-litigated	Four times, see paragraphs 1 to 4, above and Facts ¶12.a., b., c., and d., all after the latest date under "Finally determined"
Against the same party in whose favor the claim or issue was determined	Golden Meadows

Strand is again a vexatious litigant. This Court should reverse the trial court and enter a decision finding that Strand is a vexatious litigant as a matter of law.

V. STRAND ATTEMPTED TO RE-LITIGATE THE OWNERSHIP OF PAGES LANE TWO OR MORE TIMES.

Judge Kay in the Eleanor Strand Probate Case determined in the Determination of Heirs in March of 2007 that Pages Lane belonged to Eleanor Strand upon the death of Vern Strand. R. 482. The "claim for relief or an issue of fact or law in the claim" was the ownership of Pages Lane; it was finally determined by the Determination of Heirs, March 7, 2006; the claim or issue in the claim was decided in favor of the Personal Representative

of the Estate of Eleanor Strand (then Diane DiMeo, later as to the events listed below, Kent Alderman). Strand has attempted to re-litigate that issue in the following ways:

1. Filing a *pro se* Complaint in this case against Kent Alderman and Nupetco on January 29, 2015, alleging that Pages Lane belongs to Strand or B.I. Associates (Facts ¶ 13.a.);
2. Filing a *pro se* Petition for Extraordinary Writ against Judge Kay, with Kent Alderman and Nupetco as parties, in the Utah Court of Appeals on February 4, 2015 (Facts ¶ 13.b.); and
3. Filing a *pro se* Petition for Writ of Mandamus against Judge Morris, with Kent Alderman and Nupetco as parties, in the Utah Court of Appeals on February 4, 2015 (Facts ¶ 13.c.).

Nupetco satisfied the elements of Rule 83 (a)(1)(B) as shown in this summary:

Element of Rule 83(a)(1)(B)	Facts
A claim for relief/issue of fact or law in the claim.	Claim: Petition for Adjudication of Intestacy, Determination of Heirs, and Formal Appointment of a Personal Representative Issue in the claim: ownership of Pages Lane
Finally determined	March 7, 2006
Re-litigated	Three times, see ¶¶ 1 to 3, above and Facts ¶ 13.a., b., and c., all subsequent to the date under “Finally determined”
Against the same party in whose favor the claim or issue was determined	Personal Representative of the Estate of Eleanor Strand

Nupetco has satisfied the requirements of Rule 83(a)(1)(B) for the Court to determine that Strand is a vexatious litigant.

VI. STRAND, IN SEVERAL ACTIONS, THREE OR MORE TIMES COMMITTED ONE OR MORE OF THE ACTS SPECIFIED IN RULE 83(a)(1)(C)

Strand, in two actions set forth below, three or more times committed an act specified in subparagraphs (a)(1)(C)(i) to (iii) of Rule 83.

A. In the Eviction Case.

In the eviction case, Strand committed the following acts, specified in subparagraph (a)(1)(C)(i) to (iii) of Rule 83:

1. September 27, 2007, Motion to Set Counter Possession Bond and supporting Memorandum, unmeritorious paper (Facts ¶ 14.a.)
2. November 9, 2007, Strand's Disclosure of Lay Witnesses, unmeritorious paper (Facts ¶ 14.b.)
3. January 8, 2008, Motion to Compel Answers to Interrogatories, unmeritorious papers for unnecessary discovery (Facts ¶ 14.c.)
4. January 8, 2008, unmeritorious papers for unnecessary discovery (Facts, ¶ 14.d.);
5. January 29, 2008, unmeritorious papers (Facts, ¶ 14.e.);
6. February 13, 2008, unmeritorious papers (Facts, ¶ 14.f.); and
7. February 21, 2008, unmeritorious papers (Facts, ¶ 14.g.).

B. Eleanor Strand Probate Case.

In the Eleanor Strand Probate case, Strand committed the following acts, specified in subparagraph (a)(1)(C)(i) to (iii) of Rule 83:

1. December 15, 2014, unmeritorious papers, *pro se* Motion to Disqualify Judge and Affidavit in Support of Motion to Disqualify Judge, although represented by attorney Nathan Drage who did not sign the motion (Facts, ¶ 15.a.);
2. Unmeritorious paper for unnecessary discovery, acting *pro se*, obtained issuance of Subpoena issued December 22, 2014, although represented by attorney Nathan Drage (Facts, ¶ 15.b.);
3. January 23, 2015, unmeritorious papers: *pro se* Motion to Waive Fees with accompanying Affidavit, although represented by attorney Nathan Drage (Facts, ¶ 15.c.); and
4. February 19, 2015, unmeritorious papers, *pro se* Memorandum Demonstrating Inability to Pay Fees, although represented by attorney Nathan Drage (Facts, ¶ 15.d.).

CONCLUSION AND RELIEF SOUGHT

Nupetco has demonstrated six instances in which Michael Strand has met the criteria to be determined to be a “vexatious litigant” under Rule 83(a)(1), Utah Rules of Civil Procedure. Four of those arise under Rule 83(a)(1)(B), as demonstrated above, and two arise under Rule 83(a)(1)(C).

This Court should rule that the trial court’s interpretation of Rule 83(a)(1)(B), that “the claim, or issue of fact or law in the claim must also be at issue in the present action,” and its interpretation of Rule 83(a)(1)(C), “that the language ‘in any action’ allows the Court to review only Mr. Strand’s filings in the action in which the Rule 83 motion was brought” were both erroneous and reverse the Ruling and Order on the Rule 83 Motion.

This Court should (1) declare that Strand is a “vexatious litigant” under Rule 83(a)(1)(B) by reason of his multiple attempts to relitigate the four matters identified by Nupetco, (2) if needed, remand to the trial court for a determination of whether Strand is a “vexatious litigant” under the criteria of Rule 83(a)(1)(C), and (3) remand to the trial court for further relief (such as prefiling orders as to future claims).

DATED this 25th day of April, 2016.

PRINCE, YEATES & GELDZAHLER

By: Wayne G. Petty
Wayne G. Petty
Attorneys for Nupetco Associates, LLC

Certificate of Compliance with Utah Rule of Appellate Procedure 24(f)(1)(A)

The undersigned certifies that the foregoing Brief, exclusive of cover sheet, table of contents, table of authorities and addendum, contains 12,030 words, 1,171 lines, as determined by the word count feature of Microsoft Word.

DATED this 25th day of April, 2016.

PRINCE, YEATES & GELDZAHLER

By: Wayne G. Petty
Wayne G. Petty
Attorneys for Nupetco Associates, LLC

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing was served on each of the following persons by depositing the same in the mail, first class postage prepaid, on April 25, 2016, addressed as follows:

Michael Strand
PO Box 1304
Centerville, UT 84014

Carol Strand

Tab A

Rule 83. Vexatious litigants.**(a) Definitions.**

(a)(1) The court may find a person to be a "vexatious litigant" if the person, including an attorney acting pro se, without legal representation, does any of the following:

(a)(1)(A) In the immediately preceding seven years, the person has filed at least five claims for relief, other than small claims actions, that have been finally determined against the person, and the person does not have within that time at least two claims, other than small claims actions, that have been finally determined in that person's favor.

(a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

(a)(1)(D) The person purports to represent or to use the procedures of a court other than a court of the United States, a court created by the Constitution of the United States or by Congress under the authority of the Constitution of the United States, a tribal court recognized by the United States, a court created by a state or territory of the United States, or a court created by a foreign nation recognized by the United States.

(a)(2) "Claim" and "claim for relief" mean a petition, complaint, counterclaim, cross claim or third-party complaint.

(b) Vexatious litigant orders. The court may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to:

(b)(1) furnish security to assure payment of the moving party's reasonable expenses, costs and, if authorized, attorney fees incurred in a pending action;

(b)(2) obtain legal counsel before proceeding in a pending action;

(b)(3) obtain legal counsel before filing any future claim for relief;

(b)(4) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any paper, pleading, or motion in a pending action;

(b)(5) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any future claim for relief; or

(b)(6) take any other action reasonably necessary to curb the vexatious litigant's abusive conduct.

(c) Necessary findings and security.

(c)(1) Before entering an order under subparagraph (b), the court must find by clear and convincing evidence that:

(c)(1)(A) the party subject to the order is a vexatious litigant; and

(c)(1)(B) there is no reasonable probability that the vexatious litigant will prevail on the claim.

(c)(2) A preliminary finding that there is no reasonable probability that the vexatious litigant will prevail is not a decision on the ultimate merits of the vexatious litigant's claim.

(c)(3) The court shall identify the amount of the security and the time within which it is to be furnished. If the security is not furnished as ordered, the court shall dismiss the vexatious litigant's claim with prejudice.

(d) Prefiling orders in a pending action.

(d)(1) If a vexatious litigant is subject to a prefiling order in a pending action requiring leave of the court to file any paper, pleading, or motion, the vexatious litigant shall submit any proposed paper, pleading, or motion to the judge assigned to the case and must:

(d)(1)(A) demonstrate that the paper, pleading, or motion is based on a good faith dispute of the facts;

(d)(1)(B) demonstrate that the paper, pleading, or motion is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(d)(1)(C) include an oath, affirmation or declaration under criminal penalty that the proposed paper, pleading or motion is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(d)(2) A prefiling order in a pending action shall be effective until a final determination of the action on appeal, unless otherwise ordered by the court.

(d)(3) After a prefiling order has been effective in a pending action for one year, the person subject to the prefiling order may move to have the order vacated. The motion shall be decided by the judge to whom the pending action is assigned. In granting the motion, the judge may impose any other vexatious litigant orders permitted in paragraph (b).

(d)(4) All papers, pleadings, and motions filed by a vexatious litigant subject to a prefiling order under this paragraph (d) shall include a judicial order authorizing the filing and any required security. If the order or security is not included, the clerk or court shall reject the paper, pleading, or motion.

(e) Prefiling orders as to future claims.

(e)(1) A vexatious litigant subject to a prefiling order restricting the filing of future claims shall, before filing, obtain an order authorizing the vexatious litigant to file the claim. The presiding judge of the judicial district in which the claim is to be filed shall decide the application. In granting an application, the presiding judge may impose in the pending action any of the vexatious litigant orders permitted under paragraph (b).

(e)(2) To obtain an order under paragraph (e)(1), the vexatious litigant's application must:

(e)(2)(A) demonstrate that the claim is based on a good faith dispute of the facts;

(e)(2)(B) demonstrate that the claim is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(e)(2)(C) include an oath, affirmation, or declaration under criminal penalty that the proposed claim is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(e)(2)(D) include a copy of the proposed petition, complaint, counterclaim, cross-claim, or third party complaint; and

(e)(2)(E) include the court name and case number of all claims that the applicant has filed against each party within the preceding seven years and the disposition of each claim.

(e)(3) A prefiling order limiting the filing of future claims is effective indefinitely unless the court orders a shorter period.

(e)(4) After five years a person subject to a pre-filing order limiting the filing of future claims may file a motion to vacate the order. The motion shall be filed in the same judicial district from which the order entered and be decided by the presiding judge of that district.

(e)(5) A claim filed by a vexatious litigant subject to a prefiling order under this paragraph (e) shall include an order authorizing the filing and any required security. If the order or security is not included, the clerk of court shall reject the filing.

(f) Notice of vexatious litigant orders.

(f)(1) The clerks of court shall notify the Administrative Office of the Courts that a pre-filing order has been entered or vacated.

(f)(2) The Administrative Office of the Courts shall disseminate to the clerks of court a list of vexatious litigants subject to a prefiling order.

(g) Statute of limitations or time for filing tolled. Any applicable statute of limitations or time in which the person is required to take any action is tolled until 7 days after notice of the decision on the motion or application for authorization to file.

(h) Contempt sanctions. Disobedience by a vexatious litigant of a pre-filing order may be punished as contempt of court.

(i) Other authority. This rule does not affect the authority of the court under other statutes and rules or the inherent authority of the court.

Tab B

IN THE SECOND JUDICIAL DISTRICT, DAVIS COUNTY
STATE OF UTAH, FARMINGTON DEPARTMENT

FILED

SEP 29 2015

SECOND
DISTRICT COURT

MIKE STRAND, INDIVIDUALLY, IN HIS
CAPACITY AS THE GENERAL PARTNER OF B.I.
ASSOCIATES, A UTAH PARTNERSHIP, AND IN
HIS CAPACITY AS THE LAST SURVIVING
PARTNER OF B.I. ASSOCIATES, A UTAH
PARTNERSHIP; AND B.I. ASSOCIATES, A
UTAH PARTNERSHIP,

Plaintiffs,

vs.

KENT ALDERMAN, PERSONAL
REPRESENTATIVE OF THE ESTATE OF ELEANOR
AMELIA (MILLIE) NEWBERRY STRAND,
DECEASED; AND NUPETCO ASSOCIATES,
LLC, FORMERLY KNOWN AS NUPETCO
ASSOCIATES, LP,

Defendants.

**RULING and ORDER ON
DEFENDANT'S MOTION FOR RELIEF
UNDER RULE 83 (VEXATIOUS
LITIGANT)**

Case No. 150700084

Judge David R. Hamilton

THIS MATTER IS BEFORE THE COURT on Defendant Nupetco Associates, LLC's ("Nupetco") Motion for Relief under Rule 83 filed with a supporting memorandum on April 22, 2015. On April 27, 2015, Plaintiff Mike Strand ("Mr. Strand") filed a memorandum in opposition, supplemented by an errata to the memorandum filed on June 1, 2015. Nupetco filed a reply memorandum on June 22, 2015. The Court heard argument on August 13, 2015. The Court, having considered the parties' arguments and supporting documentation, herein issues its Ruling and Order.

ANALYSIS

At issue in this action is whether Mr. Strand, through various actions related to his claims of ownership to real property, either individually or through his partnership B.I. Associates, qualifies as a vexatious litigant under Rule 83. Relevant to the allegations against Mr. Strand in

this motion, the Court may find a person acting “without legal representation” to be a vexatious litigant under Rule 83(a)(1)(B) if the Court finds that:

After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.¹

The Court may also find Mr. Strand is a vexatious litigant under subparagraph (C) if, “[i]n any action,”² Mr. Strand “three or more times”³ has done any of the following:

- (i) files unmeritorious pleadings or other papers;
- (ii) files pleadings or other papers that contain redundant, immaterial, impertinent, or scandalous matter;
- (iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or;
- (iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.⁴

Re-litigation of Issues of Law or Fact

Nupetco argues that Rule 83 permits the Court to review the issues of law and fact litigated in other cases, which are not issues of law and fact before the Court in the present action. Nupetco asserts that Mr. Strand has attempted to re-litigate (1) the disqualification of the Honorable Judge Dawson as a means of attacking the judgment against Mr. Strand in an eviction

¹ Utah R. Civ. P. 83(a)(1)(B).

² Utah R. Civ. P. 83(a)(1)(C).

³ Utah R. Civ. P. 83(a)(1)(C).

⁴ Utah R. Civ. P. 83(a)(1)(C). At the August 13, 2015 evidentiary hearing, counsel for Nupetco voluntarily restricted its Rule 83 Motion to subparagraph (B), re-litigation of a fact or issue, and subparagraphs (C)(i) and (ii), noting that for the Court to make any findings under (iv) would require the Court to take evidence to discern Mr. Strand’s intent.

case dealing with a piece of real property (“Bountiful residence”); (2) the validity of the Execution Sale of the Bountiful residence; (3) a July 2008 summary judgment ruling against Mr. Strand’s quiet title claim regarding the Bountiful residence; and (4) ownership of the Pages Lane Property. Many of the actions Nupetco cites are Rule 59 Motions and appeals.

Mr. Strand argues that under Rule 83(a)(1)(B), a person must attempt to re-litigate a claim to qualify as a vexatious litigant. Because the issue of Judge Dawson’s disqualification is not a claim, Mr. Strand contends, his actions in contesting the denial of his request for Judge Dawson’s recusal cannot be used to support a vexatious litigant finding.

As a threshold matter, the Court must determine whether Rule 83 permits it to review claims, issues of law or fact, and determinations in other cases but not at issue in the action in which the Rule 83 motion was brought. The Court looks to the plain language of Rule 83, reading the rule “as a whole and interpret[ing] [its] provisions in harmony with other rules.”⁵

Prior to entering an order requiring a vexatious litigant to acquire counsel, furnish security, or abide by prefiling restrictions, the Court “must find by clear and convincing evidence that the party subject to the order is a vexatious litigant and there is no reasonable probability that the vexatious litigant will prevail on the claim.”⁶ The Court assumes the term “the claim” was used advisedly, and in conjunction with Rule 83(a)(1)(B), finds that the claim, or issue of fact or law in the claim, must also be at issue in the present action. The Court notes that allowing a court to find a person to be a vexatious litigant for re-litigating issues of fact or law that are distinct and separate from those issues of fact or law raised in the case before it may lead to forum shopping or similarly undesirable behavior.

⁵ *Aequitas Enterprises, LLC v. Interstate Inv. Group, LLC*, 2011 UT 82, ¶¶ 11, 17, 267 P.3d 923.

⁶ Utah R. Civ. P. 83(c)(1).

The Court therefore concludes that the plain language of Rule 83 does not permit the Court to find that a person has re-litigated the same issue of law or fact as an issue of law or fact not raised in the case before it. Because the issues of Judge Dawson's disqualification, the validity of the Execution Sale of the Bountiful residence, and the July 2008 summary judgment ruling against Mr. Strand's quiet title claim regarding the Bountiful residence are not before the Court in this action, the Court will not review those issues to determine if Mr. Strand is a vexatious litigant.

Ownership of the Page Lane Property, however, is at issue in the present action. Mr. Strand, acting pro se, filed the present action for quiet title on January 29, 2015. The real property at issue is two parcels of land at 680 West and 1600 North, West Bountiful, Utah and 676 West 1600 North, West Bountiful, Utah, together referred to as the "Pages Lane Property." The issue of ownership of the Pages Lane Property was first determined in case no. 063600007, *In the Matter of the Estate of Eleanor Amelia ("Millie") Newberry Strand* ("Eleanor Strand probate case"). Mr. Strand was represented by John T. Caine. On March 7, 2006, the Honorable Judge Thomas Kay issued a Determination of Heirs in the Eleanor Strand probate case, finding that Eleanor Strand owned the Pages Lane Property at the time of her death.⁷

Ownership of the Pages Lane Property was again at issue in case no. 123700456, *In the Matter of the Estate of Vern C. Strand* ("Vern Strand probate case"). Mr. Strand was represented by Nathan Drage. On November 7, 2013, the Honorable Judge Robert J. Dale found that ownership of the Pages Lane Property automatically passed by operation of law from Vern Strand to Eleanor Strand upon Vern Strand's death.⁸

⁷ Determination of Heirs, case no. 063600007, ¶ 8.

⁸ Hr'g Mins., case no. 123700465, Nov. 7, 2013; Order, Jan. 9, 2014, p. 3.

As acknowledged by Nupetco at the August 13, 2015 hearing, Mr. Strand was represented by counsel in the first two actions regarding ownership of the Pages Lane Property. The plain language of Rule 83 requires that a vexatious litigant is a person acting “without representation.” The Court therefore finds that litigation of the issue of ownership of the Pages Lane Property cannot, at this time, constitute a basis for finding Mr. Strand to be a vexatious litigant under subparagraph (B).

Unmeritorious Pleadings

Subparagraph (C) permits the Court to find a person to be a vexatious litigant if the person, three or more times in any action, files unmeritorious pleadings or papers or pleadings or papers that contain redundant, immaterial, impertinent, or scandalous matter. Subparagraph (C) also provides that a court may find a person to be a vexatious litigant if he conducts unnecessary or disproportionate discovery or engages in “tactics that are frivolous or solely for the purpose of harassment or delay.”

Reading subparagraph (C) as a whole, the Court finds that the language “in any action” allows the Court to review only Mr. Strand’s filings in the action in which the Rule 83 motion was brought. The plain language of Rule 83 does not grant a district court authority to review and determine the merit of pleadings or conduct in actions not before it, and such an interpretation would lead to an absurd result.

As a practical matter, it would be difficult and unwise for the Court to review and determine whether a party’s tactics were intended to harass, or his discovery requests were disproportionate in a case not before it. What discovery is necessary varies widely among actions; likewise, a party’s conduct may be appropriate under the circumstances of one case and not another. The judge presiding over a particular action is in the best position to determine the

necessity of a party's discovery and his tactics, as well as the merit and appropriateness of the content of his pleadings.⁹

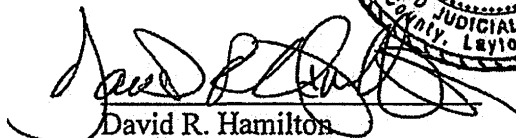
Nupetco has not argued that any of Mr. Strand's pleadings, discovery, or tactics in this action fall under subparagraph (C), although Nupetco asserts pleadings in two other actions indicate Mr. Strand is a vexatious litigant. The Court accordingly concludes that Nupetco has not shown by clear and convincing evidence that Mr. Strand is a vexatious litigant under subparagraph (C) in the present action.

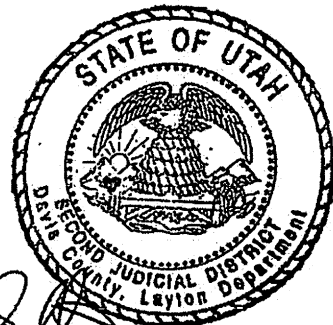
ORDER

Based on the foregoing, IT IS HEREBY ORDERED that Defendant's Motion for Relief under Rule 83 is DENIED. This Ruling and Order constitutes the Court's order on Defendant's motion; no separate order need be prepared or submitted.

DATED this 29 day of September, 2015.

BY THE COURT


David R. Hamilton
District Court Judge



⁹ Despite Nupetco's contention that the Court can review the docket and assess merit by the ultimate judgment on the claims brought in the actions cited, the Court notes that "unmeritorious" means more than a favorable judgment. *Cf.* Utah Code Ann. § 78B-5-825 (requiring a claim or defense lack merit for an award of attorney's fees under bad faith statute) and *Outsource Receivables Mgmt., Inc. v. Bishop*, 2015 UT App 41, ¶ 12, 344 P.3d 1167 (noting that an unmeritorious defense must be not only unsuccessful, but also asserted by a party who "could not have reasonably believed it to have a basis in law and fact").


MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing RULING and ORDER, postage prepaid, to the following:

James C. Swindler
Wayne G. Petty
Prince, Yeates & Geldzahler
15 West South Temple, Suite 1700
Salt Lake City, Utah 84101

Mike Strand
P.O. Box 1304
Centerville, Utah 84014

SIGNED and DATED this 29 day of September, 2015.



Judicial Assistant