

1991

## Moffit v. Barr : Brief of Appellee

Utah Supreme Court

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BRIEF

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DOCKET NO.

910290CA

IN THE UTAH SUPREME COURT

RICHARD MOFFITT and SHIRLEY  
MOFFITT,

Plaintiffs/Appellees,

vs.

ROBERT E. BARR, dba AMERICAN  
RECOVERY SERVICES,

Defendant/Appellant.

:

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:

:

:

:

Case No. ~~800111~~

91-0290-CA

Priority 16

BRIEF OF APPELLEES

APPEAL FROM A JUDGMENT IN THE THIRD JUDICIAL DISTRICT COURT  
FOR SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE PAT B. BRIAN, PRESIDING

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ATTORNEYS FOR DEFENDANT/APPELLANT

FILED

APR 29 1991

CLERK SUPREME COURT,  
UTAH

IN THE UTAH SUPREME COURT

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RICHARD MOFFITT and SHIRLEY	:	
MOFFITT,	:	
Plaintiffs/Appellees,	:	
vs.	:	Case No. 900446
ROBERT E. BARR, dba AMERICAN	:	
RECOVERY SERVICES,	:	
Defendant/Appellant.	:	Priority 16

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## STATEMENT OF JURISDICTION

The Supreme Court of the State of Utah has appellate jurisdiction over final Orders, Judgments and Decrees of the District Court in which the Court of Appeals does not have original appellate jurisdiction. The Utah Supreme Court has jurisdiction to hear this matter pursuant to Utah Code Ann. §78-2-2(3)(j) (1989).

## STATEMENT OF ISSUES

1. Did the District Court err in dismissing the Defendant, Robert E. Barr's (Barr) Counterclaim of Assault and Battery?

### Standard of Appellate Review:

Discretion of Court

Authority: UCA 78-12-29(4)

Doxey-Layton Co. v. Clark, 548 P.2d

902, 906 (Utah 1976)

2. Did the Court err in denying Barr's claim for attorney fees?

### Standard of Review: Discretion of Court

Authority: UCA 78-27-56

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Cady v. Johnson, 671 P.2d 149 (Utah 1983)

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Wa.2d 453, 458; 433 P.2d 901, 904

(Wash. 1967)

63 Am. Jur. Property, Section 44

3. Did the District Court err in granting Plaintiff's Motion In Limine and in refusing to allow the Defendant a jury instruction on the issue of self-defense?

Standard of Review: Discretion of Court

Authority: Rule 12(h) Utah Rules of Civil Procedure

Rule 8(c) Utah Rules of Civil Procedure

Rule 15(b) Utah Rules of Civil Procedure

Rule 51 Utah Rules of Civil Procedure

Equitable Life v. Cedar Brook v. Cedar

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Jensen v. Eakins, 575 P.2d 179 (Utah

1978)

Lussier v. Mau-Van Development, Inc., I.

667 P.2d 804 (Hawaii App. 1983)

4. Was the jury verdict supported by the evidence?

Standard of Review: Discretion of Court

Authority: Dixon v. Snyder, 340 P.2d 125 (Colo 1959)

Marbel v. Jensen, 53 Ut. 226, 229, 178 P.

66 (Utah 1919)

## STATUTES AND RULES

### Statutes.

1. 70A-9-102(1)(a).

(1) Except as otherwise provided in Section 70A-9-104 on excluded transactions, this chapter applies:

(A) To any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper of accounts; and also...

2. Utah Code Ann. §70A-9-503.

**70A-9-503. Secured party's right to take possession after default.**

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. ...

3. Utah Code Ann. §70A-9-507.

**70A-9-507. Secured party's liability for failure to comply with this part.**

(1) If it is established that the secured party is not proceeding in accordance with the provisions of this part, disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred, the debtor, or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time/price differential plus 10% of the cash price. ...

4. Utah Code Ann. §78-12-40 (1953).

**78-12-40. Effect of failure of action not on merits.**

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

5. Utah Code Ann. §78-27-56 (1986).

**78-27-56. Attorney's fees--Award where action or defense in bad faith--Exceptions.**

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

**Rules.**

1. Rule 8(c) and (f) Utah R. Civ. P.

(c) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly

designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(f) Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

2. Rule 12(h) Utah R. Civ. P. **Waiver of defenses.**

A party waives all defenses and objections which he does not present either by motion, as herein before provided or, if he has made no motion, in his Answer or Reply, except

(1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except

(2) That, whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action. The objection or defense, if made at trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

3. Rule 15(b) Utah R. Civ. P.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby

and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objection party to meet such evidence.

4. Rule 51 Utah. R. Civ. P. Instructions to jury;  
objection.

At the close of the evidence or at such earlier time as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in said request. The Court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally or otherwise waive this requirement. If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate Court, in its discretion and in the interests of justice, may review the giving of or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made out of the hearing of the jury.

Arguments for the respective parties shall be made after the Court has instructed the jury. The Court shall not comment on the evidence in the case, and if the Court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

## STATEMENT OF THE CASE

### **A. NATURE OF CASE**

On November 5, 1987, the Plaintiffs, Richard and Shirley Moffitt, (Moffitts) brought suit against Barr to recover the damages they had sustained as a result of Barr's wrongful repossession of their 1975 Kenworth truck. Richard Moffitt sued Barr for assault and battery because of an altercation which took place during the repossession during which Barr threatened Moffitt with a gun. In addition, Moffitt sued the Defendant for trespass to chattels, conversion, fraud, and violation of UCC Article 9, because he claimed a substantial interference in his ownership rights to the truck as a result of the repossession.

The Plaintiff, Shirley Moffitt, sued Barr for intentional infliction of emotional distress for the damages she suffered as a result of witnessing her husband threatened with a gun.

Barr counterclaimed with charges that the Moffitt's Complaint constituted an abuse of process and also countersued the Plaintiff, Richard Moffitt, for assault and battery in connection with the altercation.

### **B. COURSE OF PROCEEDINGS AND DISPOSITION**

1. The Moffitts filed their Complaint against Barr on November 5, 1987. As set forth above, the Moffitts claimed damages for assault, battery, intentional infliction of emotional distress, trespass to chattels, conversion, fraud and violation of UCC Article 9.

2. Barr filed an Answer and Counterclaim on December 23, 1987. Barr asserted counterclaims of assault, battery and abuse of process.

3. Barr filed an Amended Answer and Counterclaim on February 26, 1988. In his Answer, Barr included various additional defenses but did not include the defense of "self-defense". His Counterclaims remained the same.

4. On January 3, 1990, the Moffitts filed a Motion to Dismiss Barr's Second and Third Counterclaims of assault and battery on the grounds that they had not been filed within the relevant statute of limitations. The Court ruled on Moffitts' Motion on February 12, 1990 and dismissed Barr's Second and Third Counterclaims

5. On December 14, 1989, Barr filed a Motion for Partial Summary Judgment requesting that Moffitts' fourth and fifth causes of action of conversion and trespass to chattels be dismissed. The Court granted Barr's Motion and dismissed the claims of conversion and trespass for chattels.

6. The case was set for a trial by jury on June 11, 1990. Prior to the start of trial, the Moffitts filed a Motion in Limine which requested that the Court restrict Barr from producing evidence or argument concerning the defense of "self-defense" because it had not been pled in the Barr's Answer. The Moffitts' Motion In Limine was granted. The Court did, however, authorize Barr to tell his side of the story concerning the incident in question but did not authorize him to argue "self-defense" to the jury.

7. The case was tried before a jury on June 11, 1990 and the jury returned with a verdict in favor of Richard Moffitt. The jury awarded Moffitt compensatory damages in the amount of \$7000.00 and punitive damages in the amount of \$9000.00. After the jury had been released, Barr made a Motion Notwithstanding the Verdict and asked for a reduction of the award of punitive and compensatory damages. The Court denied Defendants' Motion.

8. Judgment against Barr was entered pursuant to the jury verdict on June 14, 1990. Thereafter, the Defendant filed Motions for a New Trial, To Vacate Judgment and for Amendment of Judgment. All of Defendant's Motions were thereafter denied by the Court.

9. The Defendant filed his Notice of Appeal on or about September 24, 1990.

#### **C. STATEMENT OF FACTS**

1. During the year 1981, Richard Moffitt purchased a 1975 Kenworth truck, VIN144540S. Moffitt used this truck as a long haul truck driver and the truck constituted his sole source of income. (Trial Transcript p. 8; Affidavit of Richard Moffitt, p. 59, Court file).

2. In May or April or 1984, Mr. Moffitt leased his truck to Jim Jeffries and worked for him as a driver. (Trial Transcript pp. 7-10).

3. During April of 1984, the engine in Moffitt's truck failed and necessitated repairs costing \$13,000.00. (Affidavit of Richard Moffitt, Court file p. 59, Trial Transcript p. 21).

4. In order to finance the repairs, Moffitt obtained financial assistance from Mr. Jeffries. In order to assure the repayment of such assistance, Moffitt gave Jeffries the title to his truck to hold as security. In order to do so, Moffitt signed the title to Jeffries in blank. At no time did Moffitt intend or agree to give Jeffries his truck. (Affidavit of Richard Moffitt, Court file p. 60).

5. After Moffitt had given Jeffries the title to his truck, Jeffries sold the truck to Chopping Motors Company in Wyoming. (Affidavit of Richard Moffitt, Court file p. 60).

6. Moffitt was not aware that the truck had been sold and at no time had given his permission for the same. He continued in possession of the truck until November 5, 1984 when the Defendant took the truck from him. (Affidavit of Richard Moffitt p. 60, Trial Transcript pp. 8-11).

7. During the period from April 1984 until November 1984, Moffitt drove the truck for Jeffries. During such time, Jeffries did not ask for the return of the truck nor did he ever tell Moffitt that he was not to have the truck. (Trial Transcript pp. 11 and 12).

8. On November 6, 1984 at approximately midnight, Barr and his employees came to the Moffitts' home in West Valley City with a wrecker truck to take the 1975 Kenworth truck from Moffitt. Moffitt was awakened by the noise and went outside to see what was happening. (Trial Transcript p. 13).

9. Upon leaving the house, Moffitt found that the wrecker operator was hooking chains to the back of his truck. Upon confronting the wrecker driver as to what was happening, the driver stated "we are taking, or repossessing, this truck". (Trial Transcript p. 16).

10. At the time of the repossession, the truck had been parked in front of the Moffitt residence for three to four days. Moffitt was in between runs and had been asked to haul another load that day. (Trial Transcript p. 17).

11. Moffitt had not been informed prior to this time that his truck was to be taken nor did he have any notice that his truck was to be removed. (Trial Transcript p. 17).

12. After Moffitt had talked with the wrecker driver, he met with Barr. Barr indicated that the truck was being repossessed on orders from Jim Jeffries. Moffitt stated that Jeffries did not own the truck and could not take the vehicle. In response, Barr stated that he had Repossession Order and showed Moffitt some papers. Barr also stated that he was an officer of the law and showed Moffitt a badge and I.D. (Trial Transcript pp. 19, 20 and 29).

13. After Barr had shown Moffitt the alleged Repossession Order, Moffitt entered the driver's side of the truck and sat down in the driver's seat. Barr followed and climbed over the top of Moffitt and ended up sitting with his legs across Moffitt. Thereafter, he attempted to shove Moffitt out of the truck. (Trial Transcript pp. 24-26).

14. When Barr's efforts to dislodge Moffitt proved unsuccessful, Barr pulled a gun, cocked it, and put it to Moffitt's head, telling him in no uncertain words to leave the truck because he was not going to fight with him. (Trial Transcript pp. 25 and 26).

15. At the time Barr held the gun to his head, Moffitt felt as though he was going to be shot and was scared. Mrs. Moffitt, who was standing on the ground outside of the truck, was a witness to what was happening and went into hysterics. (Trial Transcript pp. 26 and 27).

16. As a result of his wife's pleadings, Moffitt left the truck. At the time, Moffitt felt sick because he didn't know what to do. He didn't have any money and didn't have a job anymore. He did not sleep that night. (Trial Transcript pp. 27 and 28).

17. Barr subsequently took the truck and left. (Trial Transcript pp. 27, 28).

#### SUMMARY OF ARGUMENTS

The Moffitts oppose Barr's arguments as follows:

1. Barr waived his right to claim "self-defense". The District Court properly ruled on all matters touching on Barr's claim of self-defense. First, the Court correctly dismissed Barr's second and third counterclaims of assault and battery because they had not been timely filed. Second, the Court properly granted Moffitts' Motion In Limine to exclude evidence, argument and instructions relating to "self-defense" because Barr had failed to plead the same in his answer. Third, Barr's counterclaims of

assault and battery cannot be considered a substitute for the affirmative defense of "self-defense" pursuant to Rule 8(c) of the Utah Rules of Civil Procedure because "self-defense" was not mistakenly pled as a counterclaim. Fourth, the Court properly refused to instruct the jury on "self-defense" because of Barr's failure to plead the same, his failure to object to the Court's refusal to do so after the close of evidence, and his failure to make a motion to conform the pleadings to the evidence as set forth in Rule 15(b) of the Utah Rules of Civil Procedure.

2. The jury verdict was supported by substantial evidence.

The jury properly considered Moffitt's fear, anxiety, nervous shock, humiliation, and injury to his personal feelings in awarding damages. Richard Moffitt presented substantial evidence to support his claim for damages and the amount awarded was not excessive or the result of passion or prejudice.

3. Barr is not entitled to an award of attorney fees.

Barr cannot recover attorney fees under UCA 78-27-56 because the Moffitts' claims were properly grounded in law and fact and were not brought in bad faith. Additionally, Barr's Counterclaim of abuse of process was voluntarily dismissed and therefore prevents him from raising the issue.

**ARGUMENT**

**I. BARR WAIVED HIS RIGHT TO CLAIM "SELF-DEFENSE"**

Barr argues that the Court erred in refusing to allow him to advance the defense of "self-defense" and supports his argument on the following grounds:

1. The Court improperly dismissed his counterclaims of assault and battery;

2. The Court improperly granted the Moffitts' Motion In Limine and restricted him from arguing or advancing "self-defense";

3. The Court erred in not allowing a "self-defense" jury instruction.

As will be set forth hereafter, it was Barr himself who failed to properly raise "self-defense" in this case and the Moffitts should not be penalized for Barr's neglect.

**A. BARR'S COUNTERCLAIMS OF ASSAULT AND BATTERY WERE PROPERLY DISMISSED**

As set forth in the Statement of Facts, the incident which gave rise to this action took place on November 5, 1984. Subsequent thereto (February 14, 1985), the Moffitts filed suit against Barr alleging the commission of assault, battery and other torts. This suit was dismissed on December 11, 1986 because of jurisdictional problems. At no time during the pendency of this first action did Barr assert his counterclaims of assault and battery.

On November 5, 1987, almost one year after their prior action had been dismissed, the Moffitts filed the instant action. Barr filed counterclaims of assault and battery on December 23, 1987, over three years after the incident had occurred. Because the statute of limitations for assault and battery is one year, (UCA 78-12-29(4)), Barr's counterclaims were clearly time barred.

Even if the statute of limitations was stayed as Barr argues pursuant to the rationale set forth in Doxey-Layton Company v.

Clark, 548 P.2d 902, 906 (Utah 1976), the one year statute of limitations would still prevent Barr from presenting his counterclaims because a total period of over one year had elapsed before Barr's claims were filed, during which there was no action was pending. This time period is calculated as follows:

<u>PERIOD</u>	<u>ELAPSED TIME</u>
Date of Incident (November 5, 1984) to date first action filed (February 14, 1985)	101 Days
Date First Action Dismissed (December 11, 1986) until present action filed (November 5, 1987)	329 Days
TOTAL	430 Days 1 Year 65 Days

Based on the above, there is nothing in the law which excuses the Defendant's late filing. Accordingly, the Defendant's counterclaims of assault and battery were untimely filed, and properly dismissed.

**B. PLAINTIFFS' MOTION IN LIMINE WAS TIMELY FILED  
AND WELL GROUNDED**

A Motion In Limine is generally made before or at the beginning of a jury trial for a Protective Order against prejudicial evidence, argument and the like. "It serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the Court may be called upon to make during the course of trial". Lussier v. Mau Van Development, Inc., I, 667 P.2d 804 (Ha. App. 1983). A Motion In Limine is addressed to the discretion of the Court and will not be reversed in the absence of an abuse of discretion. Equitable Life v. Cedarbrook, Inc., 761 P.2d 77, 81 (Wash. App. 1988).

In the present case, Barr has raised two objections to the Moffitts' Motion In Limine, namely, (1) that the Moffitts failed to object to evidence concerning "self-defense", and (2) Barr had pled "self-defense" in his answer - through his counterclaims of assault and battery. Neither of Barr's arguments can be sustained for the following reasons:

1. The Moffitts timely objected to any evidence or argument concerning self-defense.

In ruling on the Moffitts' Motion In Limine, Judge Brian stated:

THE COURT: The Motion In Limine, unlike other dispositive motions, may be brought at any time during the proceedings. The Court finds that those motions are routinely brought during trial, in many, many cases. They are designed to define issues, to expedite the legal proceedings, and they are appropriate at any time during the proceedings.

The Court finds that the Defendant has not plead self-defense in the Answer or other responsive pleadings. The Court finds that there has been ample time, from the date the Complaint was filed until the date of trial, to amend the pleadings. The Plaintiff may have been suspicious that a defense of self-defense would be asserted. However, failure to plead self-defense in the Defendant's Answer is a barr to that defense at this time.

The Plaintiffs' Motion In Limine to preclude the Defendant from presenting testimony regarding the issue of self-defense is granted. The Defendant is ordered not to produce evidence or argument concerning self-defense. The Defendant is certainly entitled to explain the events surrounding the alleged assault and battery and the intentional infliction of emotional distress, as asserted by the Plaintiffs. However, the issue of self-defense is not legally to be advanced in these proceedings, nor is it to be submitted to the jury by way of instruction or verdict form.

MR. CASTON: Question of clarification, Your Honor. I would rather ask now than be instructed for a bench conference later. The way I understand the Court's

ruling, Mr. Barr may explain why he did what he did, is that correct?

THE COURT: The Defendant is entitled to offer an explanation. Legally, there is to be no verdict form submitted nor jury instructions to the jury, establishing his behavior as a legal defense. (pps. 64-65, Trial Transcript). (emphasis added).

As set forth above, the Court allowed Barr to explain the events surrounding the incident but was ordered not to advance the theory of self-defense or submit an instruction to the jury. Because of the Court's ruling, the Moffitts did not object to the testimony elicited from Barr concerning his recollection of the events. Furthermore, "objections need not be renewed if the prior ruling on the Motion In Limine amounted to an unequivocal holding concerning the issue raised. ... Where a hearing was held, counsel presented legal arguments, and the trial court ruled whether or not the challenged evidence would be admitted at trial, there is no necessity of further objection..." Lussier, 667 P.2d 804 at 826.

Because Judge Brian's ruling constituted an unequivocal order and the ruling was made after the presentation of legal arguments by counsel, the Moffitts were under no duty or obligation to object to Barr's testimony concerning the events, as seen by him.

2. Barr waived the affirmative defense of "self-defense."

The Court properly granted the Moffitts' Motion In Limine because the affirmative defense of "self-defense" had been waived. Rule 12(h) of the Utah Rules of Civil Procedure provides that "a party waives all defenses and objections which he does not present either by motion or... in his answer and reply..." Since the Defendant did not plead the defense of "self-defense" in his

Amended Answer, it was waived. The Plaintiffs' Motion In Limine was therefore a proper device to exclude any evidence or argument concerning "self-defense" from the jury. (A copy of the Moffitts' Motion In Limine is attached as Exhibit "A").

3. Rule 8(c) URCP does not apply to this case.

Barr claims that pursuant to Rule 8(c) of the Utah Rules of Civil Procedure, he has pleaded the defense of "self-defense" by way of his counterclaims of assault and battery. Such an argument is insupportable because at the time of trial, Barr's counterclaims were not before the Court. The counterclaims of assault and battery had been dismissed in April of 1990 pursuant to Moffitts' Motion for Summary Judgment.

Even if Rule 8(c) were somehow construed to be applicable to this case, it would not provide Barr the relief he seeks. In order for a counterclaim to be construed as an affirmative defense under Rule 8(c), it must be shown that the party mistakenly designated the defense as a counterclaim. A plain reading of Barr's counterclaims shows that Barr did not intend to plead an affirmative defense. The counterclaims only seek the recovery of damages and they do not, in any way, state or imply that Barr's conduct was excused by that of Richard Moffitt. Furthermore, Barr has not indicated that he mistakenly designated the defense of "self-defense" as the counter-claims of assault and battery. (A copy of the Defendant's Amended Answer and Counterclaim is attached as Exhibit "B").

C. THE COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON "SELF-DEFENSE"

Barr seeks to amend his Answer to include the defense of "self-defense" pursuant to Rule 15(b) of the Utah Rules of Civil Procedure. Rule 15(b) provides: "when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings". (emphasis added). Contrary to Barr's argument, there is absolutely nothing in the record to show that the issue of "self-defense" was expressly or implicitly tried. The Moffitts' Motion In Limine and the arguments rendered in support thereof clearly show that the issue of self-defense was not expressly or implicitly tried.

Significantly, Barr never did make a motion after the close of evidence to conform the pleadings to the evidence. Had he done so, Judge Brian would have had an opportunity to correct any errors before instructing the jury. In addition, Barr failed to object to the instructions which were given to the jury and the Court's failure to instruct regarding "self-defense". Pursuant to Rule 51 of the Utah Rules of Civil Procedure, "if the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; ...no party may assign as error the giving or the failure to give an instruction unless he objects thereto". (emphasis added)

As set forth in the rule, objections to instructions, or the Court's failure to instruct, should be made before the jury retires for deliberation. The purpose for this rule "is that if the

objections call attention to error, correction may be made before the jury goes to deliberate. This is the primary function of objections, and it is not simply to lay a foundation for possible reversal by the losing party... ". (emphasis added). Hill v. Cloward, 14 Utah 2d 55, 377 P.2d 186, 188 (Utah 1962). The Defendant's failure to timely object constitutes a waiver of his "instruction" argument. Jensen v. Eakins, 575 P.2d 179 (Utah 1978).

## II. THE JURY VERDICT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

In awarding damages for assault, a jury may properly consider the Plaintiff's fear, anxiety, indignity, disgrace, nervous shock, shame, humiliation and injury to his personal feelings, among other things. Marbel v. Jensen, 53 Utah 226, 229, 178 P. 66 (Utah 1919); Dixon v. Snyder, 340 P.2d 125 (Colo. 1959). In the instant case, the Court properly instructed the jury on the issue of damages. Instruction No. 20 requests that the jury compensate the Plaintiff, Richard Moffitt, for any emotional distress, fear, anxiety, embarrassment, humiliation or loss of reputation which he sustained. (A copy of Instruction No. 20 is attached as Exhibit "C"). Contrary to Barr's argument, a substantial amount of evidence was presented to the jury in support of Moffitts' claim for damages. During his direct examination, Richard Moffitt testified as follows:

Q: What did he do after coming across you?

A: He told me he is not going to fight with me, and he pulled a gun from back here, and cocked it, and put it to my head, and told me in no uncertain words that he was not going to fight with me.

Q: Did the gun ever touch you?

A: Not that I realized, no, not that I remember. But it was here.

Q: How do you know?

A: From the street light, or the light that was in the neighbor's yard, shines through the windows, I seen the flash of the gun. I knew it was an automatic. I knew it was cocked. I knew where he was pointing it.

Q: How do you know it was cocked?

A: Because I heard it being cocked.

\* \* \*

Q: Did he touch you at any time?

A: He was sitting on top of me. His legs were across me, trying to shove me out of the truck. My hands were on the steering wheel. I looked straight ahead and told him he was not taking the truck. My wife was outside, screaming to let them have it. She went hysterical because of the gun. I didn't want them to take my truck. It was mine. You don't understand it, I guess.

Q: You mentioned Mr. Barr had touched you, I believe crawling over you. Did he touch you at any other time?

A: He was trying to shove me out of the truck, out of the seat and out the door.

Q: Was he doing that when he had the gun to your head?

A: Yes.

Q: At this time, how did you feel, Richard?

A: I felt I was going to get shot.

Q: Were you scared?

A: Yes.

Q: Did you feel that Mr. Barr intended to make good with that threat?

A: Yes, I did. (Trial Transcript pp. 25-27)

\* \* \*

Q: What did you do after the gun had been pulled?

A: I just kept telling him he wasn't taking it. Fear of being shot and going into hysterics is -- I just gave up, and I got out of the truck. I couldn't see her going through it any more.

Q: Richard, Mr. Barr's conduct of climbing over you, pulling the gun, putting it to your head, was that offensive to you?

A: Of course, it was.

Q: At that time, how did you feel? What were your feelings?

A: A little bit sick, because I didn't know what to do. I didn't have any money, and I didn't have a job anymore.

Q: Did you sleep at all that night?

A: No.

(Trial Transcript pp. 27-28)

The testimony was clear that as a result of having a gun placed at his head, the Plaintiff, Richard Moffitt, suffered fear for his life, loss of sleep and anxiety. All of these factors are properly compensable in assault cases. Barr failed to object to Instruction No. 20 and should not now be allowed to complain when the jury did as they were instructed.

**III. THE DEFENDANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES**

In order for Barr to be awarded attorney fees under §78-27-56 of the Utah Code, the following matters must be established:

1. The party awarded fees must be the prevailing party;
2. The Court must determine that the action or defense was without merit;

3. The Court must determine that the action or defense was not brought in good faith.

In the Utah case of Cady v. Johnson, 671 P.2d 149, (Utah 1983), the Utah Supreme Court defined the terms set forth in §78-27-56 as follows:

A. "WITHOUT MERIT":

The term implies bordering on frivolity. The dictionary definition of "frivolous" is "of little weight or importance having no basis in law or fact". (emphasis added) Id. at p. 151.

B. "GOOD FAITH"

In addition to finding the claims to lack merit, the trial court must also find that Plaintiff's conduct in bringing suit was lacking good faith.

In Tacoma Association of Creditmen v. Lester, 72 Wash. 2d 453, 458; 433 P.2d 901, 904 (Wa. 1967), the Court defined "good faith" as:

(1) an honest belief in the propriety of the activities in question;

(2) no intent to take unconscionable advantage of others;

(3) no intent to, or knowledge of the fact that the activities in question enter, delay or defraud others.

To establish lack of good faith, one must prove that one or more of these factors is lacking. Sparkman v. McClean Company and Derber, 4 Wash. App. 341, 481 P.2d 585, (Wash. 1971)". Id. at p.151.

In the instant case, Barr has failed to meet the standards set forth in Cady and §78-27-56 for the following reasons:

1. Barr was not the prevailing party.

Barr cannot recover his attorney fees under UCA §78-27-56 because he was not the "prevailing party". The jury awarded damages in favor of Richard Moffitt, not Barr.

2. The Moffitts' claims were properly grounded in law and fact.

The following review of the Moffitts' causes of action will show that they were properly grounded in law and fact.

A. Conversion - Trespass to Chattels:

The Defendant alleges that Plaintiff's actions for conversion and trespass to chattels were improper because the Defendant did not "own" the truck. Such causes of action, however, are well grounded in the law because, "the theft of goods or chattels does not divest one who owns, or has title to such property from his ownership of the property; the owner may follow and reclaim the stolen goods wherever he finds them." 63 Am. Jur. Property, §44. The sale by a thief does not vest title in the purchaser or against the owner even though the sale was made in the ordinary course of business and the purchaser acted in good faith. Eureka Springs Sales Company v. Ward, 226 Ark. 424, 290 S.W.2d 434.

At trial, the Plaintiff, Richard Moffitt, testified that he was the owner of the truck and gave the title to Jim Jeffries as collateral for a loan so that his truck could be repaired. (Trial Transcript p. 21). He testified that he did not sell or give the truck to Jeffries. Because Jeffries' conduct consisted of a theft of the truck, Moffitt was not divested of his ownership status. In light of the above, Richard Moffitt certainly had a legal and factual basis on which to ground his assertion that he still "owned" the truck.

B. FRAUD

Moffitts' cause of action for fraud is based on Barr's representation that he was an officer of the law, and that he had a "Repossession Order". (Trial Transcript p. 29-30) Such misrepresentations give factual credence to Moffitt's fraud cause of action and cannot be considered "frivolous".

C. ARTICLE 9

Section 70A-9-503, 507 of the Utah Code provides a cause of action against those who breach the peace when repossessing collateral. Contrary to Barr's assertions, a security agreement does not have to be in writing to be enforceable. Section 70A-9-102(1)(a) provides that "except as otherwise provided... this chapter applies to any transaction (regardless of its form) which is intended to create a security interest in personal property...". The Moffitt's cause of action was, therefore, well grounded in law and fact.

D. BATTERY

Both Shirley and Richard Moffitt testified that Barr drew a gun and held it in a very close proximity to Richard Moffitt's head. Testimony was also uncontroverted that there was physical contact leading up to the incident in which Barr drew his gun. (Trial Transcript p. 25-27, 57-59). Based on these facts, the Moffitts' allegation that the harmful and offensive touching occurred when the Defendant held and drew his gun at the Plaintiff's head was not frivolous or without legal or factual basis.

3. The Moffitts' claims were brought in good faith.

The most obvious reason that Barr cannot recover attorney fees under UCA §78-27-56 is a lack of any evidence that the Moffitts' lawsuit was brought in anything other than good faith. There is absolutely no evidence that the Moffitts brought their lawsuit maliciously or with the intent to defraud or take unconscionable advantage of Barr. The Moffitts' lawsuit, rather, is based on a real incident in which Barr used deadly force against the Plaintiff, Richard Moffitt.

In addition, the case of Topik v. Thurber, 739 P.2d 1101 (Utah 1987) which is cited in Barr's Brief, does not support his position. In Topik, the Court awarded the Plaintiff attorney fees because the Defendant's testimony consisted of "willful falsehoods". In the instant case, there is no such evidence.

Finally, Barr's claim for attorney fees smells of hypocrisy because all three of his counterclaims against the Moffitts were dismissed by the Court and not submitted to the jury. In April of 1990, this Court ruled that Barr's counterclaims of assault and battery were time barred due to the statute of limitations. In addition, Barr's claim of "abuse of process" was dismissed during trial when Barr indicated that the claim had not been seriously pursued. Using Barr's arguments, the Moffitts should be entitled to recover their attorney fees from Barr because Barr's counterclaims were definitely not grounded in fact. In short, Barr seeks relief from the Court with dirty hands and should not be entitled to ignore his own conduct in this litigation.

4. Barr's claim for attorney fees has already been dismissed.

On January 26, 1988, Barr filed a Counterclaim for "Abuse of Process". In his claim, Barr alleged that the Moffitts' lawsuit was brought "in bad faith, without any reasonable or probable cause, but was brought to harass the Defendant." Barr requested that the Court award him his attorney fees and other damages.

During trial, the Moffitts moved for a dismissal of the "Abuse of Process" claims. In response, Mr. Caston, attorney for Barr, stated: "... We are not pursuing our abuse of process claim today." (Trial Transcript p. 127).

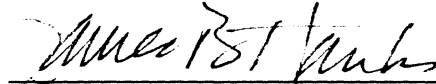
Because Barr's claim for attorney fees was dismissed at trial, the issue of attorney fees is not proper for review.

CONCLUSION

The objections that Barr has raised to this proceeding were caused by his own fault and neglect. Barr did not plead the defense of self-defense, did not object when the Court failed to instruct the jury on this defense, did not move for an amendment of the pleadings to conform with the evidence and should therefore be barred from raising "self-defense" at this time. Contrary to his arguments, there was substantial evidence to support the verdict of the jury. The placing of a gun against another's head is not an incident to be taken lightly and the jury did not do so. They sent a message to Mr. Barr that his conduct would not be tolerated in our society. For the foregoing reasons, the judgment of the lower Court should be affirmed and Defendant's appeal dismissed.

DATED this 29 day of April, 1991.

KIPP & CHRISTIAN, P.C.



JAMES B. HANKS  
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed, postage prepaid on the 29 day of April, 1991, to the following:

PETER STIRBA  
BARBARA ZIMMERMAN  
STIRBA & HATHAWAY  
215 South State Street, Suite 1150  
Salt Lake City, Utah 84111



**ADDENDUM**

- (A) MOTION IN LIMINE
- (B) AMENDED ANSWER AND COUNTERCLAIM
- (C) INSTRUCTION NO. 20

FILED WITHIN COURT  
Third Judicial District

JUN 12 1990

JAMES B. HANKS (A4331)

KIPP AND CHRISTIAN, P.C.  
ATTORNEYS AT LAW  
CITY CENTRE I, #330  
175 EAST 400 SOUTH  
SALT LAKE CITY, UTAH 84111-2314  
(801) 521-3773

SALT LAKE COUNTY  
By E. Matheson  
Deputy Clerk

Attorney for Plaintiffs

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

---

RICHARD MOFFITT and SHIRLEY	:	
MOFFITT,	:	MOTION IN LIMINE
	:	
Plaintiffs,	:	
	:	
VS.	:	
	:	Case No. 870907265CV
ROBERT E. BARR, dba AMERICAN	:	
RECOVERY SERVICE,	:	
	:	Judge Pat B. Brian
Defendants.	:	

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Plaintiffs, by and through their attorney, James B. Hanks of Kipp and Christian, P.C., move the Court for an Order requiring the Defendant to limit the testimony in his case to those matters which will support the defenses set forth in his answer, and no others. In particular, the Defendant should not be entitled to produce evidence or argument concerning self-defense because it was not pled in Defendant's answer. A copy of Defendant's answer is attached as Exhibit "A".

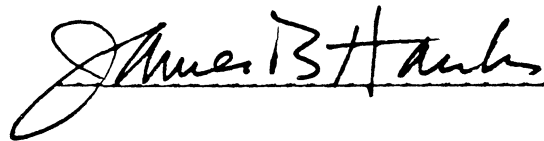
DATED this 12 day of June, 1990.

James B. Hanks  
James B. Hanks  
Attorney for Plaintiffs

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that a true and correct copy  
of the foregoing Motion in Limine, was hand-delivered on  
the 12 day of June, 1990, to the following:

Harry Caston, Esq.  
McKay, Burton & Thurman  
1200 Kennecott Building  
10 East South Temple  
Salt Lake City, Utah 84133

\_\_\_\_\_

PETER STIRBA (3118)  
R. BRET JENKINS (5094)  
McKAY, BURTON & THURMAN  
Attorneys for Defendant  
1200 Kennecott Building  
10 East South Temple Street  
Salt Lake City, Utah 84133  
Telephone (801) 521-4135

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

---

RICHARD MOFFITT and SHIRLEY :  
MOFFITT, :  
Plaintiffs, : ANSWER AND COUNTERCLAIM  
vs. :  
: Civil No. C87-07265  
ROBERT E. BARR dba AMERICAN :  
RECOVERY SERVICE, :  
Defendant. :

---

The Defendant, Robert Barr, by and through his attorney of record, answer Plaintiffs' Complaint as follows:

FIRST DEFENSE

1. Plaintiffs fail to state a claim for which relief can be granted.

SECOND DEFENSE

The Defendant answers the Plaintiffs' numbered allegations listed in their Complaint as follows:

2. The Defendant is without sufficient knowledge to form an opinion as to the allegations in paragraphs 1 and 2 of Plaintiffs' Complaint and therefore denies.

3. The Defendant admits the allegations contained in paragraph 3 of the Complaint.

4. The Defendant denies the allegations in paragraphs 4 and 5 of the Complaint.

5. The Defendant is without sufficient knowledge to form an opinion as to the allegations in paragraph 6 of the Complaint and therefore denies.

6. The Defendant denies the allegations of paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Plaintiffs' Complaint.

7. The Defendant is without sufficient knowledge to form an opinion as to the allegation in paragraph 19 that Shirley Moffitt is the wife of the Plaintiff Richard Moffitt, and therefore denies.

8. The Defendant denies the remainder of paragraph 19 of Plaintiffs' Complaint.

9. The Defendant denies the allegations in paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 of the Plaintiffs' Complaint.

10. The Defendant denies the allegations contained in paragraphs 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44 of the Plaintiffs' Complaint.

11. The Defendant denies any other allegations not expressly admitted to in this Answer.

#### THIRD DEFENSE

The Defendant affirmatively alleges as follows:

12. The Plaintiffs' claims against the Defendant are meritless and not brought in good faith.

13. The Defendant is entitled to attorney's fees under the provisions of Utah Code Ann. 78-27-56.

FIRST COUNTERCLAIM

(Abuse of Process)

14. The Plaintiffs originally initiated criminal proceedings against the Defendant based on the same facts as exist in this action.

15. The Defendant was ultimately cleared of each of the charges.

16. The Plaintiffs then filed a civil lawsuit against the Defendant in September of 1986 in Third District Court based on the same facts.

17. On December 1, 1986, the Honorable Judge Richard Moffat dismissed the lawsuit.

18. On or about November 5, 1987, the Plaintiffs filed the present Complaint based on the same facts as existed in the prior criminal action and civil suit and caused the Defendant to be served with a Summons and copy of the Complaint on December 2, 1987.

19. The Plaintiffs alleged that the Defendant wrongfully took a certain 1975 Kenworth truck, and in the process, committed an assault, battery and other violations.

20. The present lawsuit was brought by the Plaintiffs in bad faith, without any reasonable or probable cause, but was brought to harass the Defendant.

21. In bringing the lawsuit, the Plaintiffs acted maliciously and with intent to injure the Defendant by harming

his good name and reputation through the use of the judicial system.

22. The actions of the Plaintiffs constitute an abuse of the judicial system.

### SECOND COUNTERCLAIM

#### (Assault)

23. The Defendant had been hired to repossess a 1975 Kenworth Tractor from the Plaintiff.

24. On or about November 5, 1984, the Defendant, Robert Barr, was attempting to repossess the Tractor, which was located in front of the Plaintiffs' home.

25. During the procedure, the Defendant was sitting in the front driver's seat of the Tractor, and the Plaintiff, Richard Moffitt, approached the Defendant in a violent and angry manner, yelling at the Defendant that he was going to kill him.

26. The act by the Plaintiff of approaching the Defendant in an angry, violent manner, while yelling that he was going to "kill him" created reasonable apprehension and fear in the Defendant of immediate harmful contact with his person.

27. The Plaintiff's actions were intended by him to place the Defendant in apprehension and fear of immediate, harmful contact.

28. The acts of the Plaintiff caused the Defendant, Robert Barr, severe emotional trauma and fear for his life for which the Plaintiff has suffered irreparable damage.

### THIRD COUNTERCLAIM

#### (Battery)

29. While the Defendant, Robert Barr, was sitting in

the front seat of the tractor. The Plaintiff brought about a harmful and offensive contact with the Defendant's person when he climbed onto the running board of the truck and physically knocked the Defendant out of the seat.

30. The Plaintiff's actions were intended to bring about a harmful and offensive contact upon the Defendant.

31. The act of the Plaintiff, Richard Moffitt, in knocking the Defendant out of the driver's seat caused the Defendant extreme emotional distress and fear for his life and caused the Defendant irreparable damages.


WHEREFORE, Defendant prays for relief as follows:

1. Plaintiffs' action be dismissed.
2. Defendant be awarded a sum of money for general and special damages for the three counterclaims, in an amount to be determined at trial.
3. Defendant be awarded punitive damages for each counterclaim in the amount of \$50,000.00.
4. Defendant be awarded costs and attorney's fees associated with this lawsuit.
5. For other appropriate relief the Court deems just and equitable.

DATED this 23<sup>rd</sup> day of December, 1987.

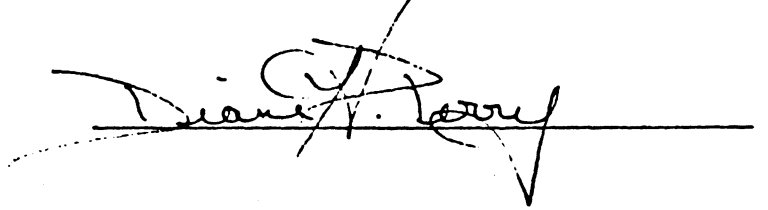
McKAY, BURTON & THURMAN

By

  
PETER STIRBA  
R. BRET JENKINS  
Attorneys for Defendant

CERTIFICATE OF MAILING

I hereby certify a true and correct copy of the foregoing ANSWER AND COUNTERCLAIM was mailed, postage prepaid, to James B. Hanks, Esq., Gateway Park, Suite 300, 563 West 500 South, Bountiful, Utah, this 23<sup>rd</sup> day of December, 1987.

A handwritten signature, "Diane J. Perry", is written over a horizontal line. The signature is in cursive and includes a large, stylized initial "D".

THIRD JUDICIAL DISTRICT COURT  
Third Judicial District

JUN 12 1990

JAMES B. HANKS (A4331)

KIPP AND CHRISTIAN, P.C.  
ATTORNEYS AT LAW  
CITY CENTRE I, #330  
175 EAST 400 SOUTH  
SALT LAKE CITY, UTAH 84111-2314  
(801) 521-3773

SALT LAKE COUNTY  
By *C. Matheson*  
Deputy Clerk

Attorney for Plaintiffs

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

---

RICHARD MOFFITT and SHIRLEY	:	
MOFFITT,	:	ORDER GRANTING MOTION
	:	IN LIMINE
Plaintiffs,	:	
	:	
VS.	:	
	:	Case No. 870907265CV
ROBERT E. BARR, dba AMERICAN	:	
RECOVERY SERVICE,	:	Judge Pat B. Brian
	:	
Defendants.	:	

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This matter having come before the Court on the 12th day of June, 1990 pursuant to Plaintiff's Motion in Limine. The Court, having heard argument from counsel and being fully informed in the premises, orders the Defendant to limit the presentation of evidence and argument in his case to those matters concerning the defenses pled in his answer. In particular, the Defendant is ordered not to produce evidence respecting the defense of self-defense.

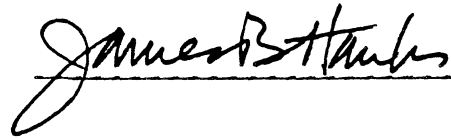
DATED this 12 day of June, 1990.

*Pat B. Brian*  
PAT B. BRIAN  
District Court Judge

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing Order Granting Motion in Limine was hand-delivered on the 12 day of June, 1990 to the following:

Harry Caston, Esq.  
McKay, Burton & Thurman  
1200 Kennecott Building  
10 East South Temple  
Salt Lake City, Utah 84133

  
\_\_\_\_\_

FILED

FILED IN CLERK'S OFFICE  
SALT LAKE COUNTY, UTAH

FEB 26 4 38 PM '88

*Janie Peterson*

PETER STIRBA (3118)  
McKAY, BURTON & THURMAN  
Attorneys for Defendant  
1200 Kennecott Building  
10 East South Temple Street  
Salt Lake City, Utah 84133  
Telephone (801) 521-4135

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

---

RICHARD MOFFITT and SHIRLEY	:	
MOFFITT,	:	AMENDED
	:	ANSWER AND COUNTERCLAIM
Plaintiffs,	:	
	:	
vs.	:	
	:	Civil No. C87-07265
ROBERT E. BARR dba AMERICAN	:	Judge Pat B. Brian
RECOVERY SERVICE,	:	
	:	
Defendant.	:	

---

Defendant Robert E. Barr answers Plaintiffs' Complaint  
as follows:

FIRST DEFENSE

Plaintiffs fail to state a claim for which relief can  
be granted.

SECOND DEFENSE

The Defendant answers the Plaintiffs' numbered alle-  
gations listed in their Complaint as follows:

1. The Defendant is without sufficient knowledge to  
form an opinion as to the allegations in paragraphs 1 and 2 of  
Plaintiffs' Complaint and therefore denies.

00023

2. The Defendant admits the allegations contained in paragraph 3 of the Complaint.

3. The Defendant denies the allegations in paragraphs 4 and 5 of the Complaint.

4. The Defendant is without sufficient knowledge to form an opinion as to the allegations in paragraph 6 of the Complaint and therefore denies.

5. The Defendant denies the allegations of paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Plaintiffs' Complaint.

6. The Defendant is without sufficient knowledge to form an opinion as to the allegation in paragraph 19 that Shirley Moffitt is the wife of the Plaintiff Richard Moffitt, and therefore denies.

7. The Defendant denies the remainder of paragraph 19 of Plaintiffs' Complaint.

8. The Defendant denies the allegations in paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 of the Plaintiffs' Complaint.

9. The Defendant denies the allegations contained in paragraphs 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44 of the Plaintiffs' Complaint.

10. The Defendant denies any other allegations not expressly admitted to in this Answer.

#### THIRD DEFENSE

Plaintiffs' claims are barred under the doctrine of res judicia.

#### FOURTH DEFENSE

Plaintiffs claims are barred under the doctrine of laches.

#### FIFTH DEFENSE

Plaintiffs' claims should be dismissed for failure to prosecute.

#### SIXTH DEFENSE

The Plaintiffs' claims against the Defendant are meritless and not brought in good faith and Defendant is entitled to attorney's fees under the provisions of Utah Code Ann. 78-27-56.

#### SEVENTH DEFENSE

Under Utah Code Annotated §78-12-29, Plaintiffs' claims for assault and battery are barred by statute of limitations.

#### EIGHTH DEFENSE

Plaintiff claims under their third and seventh causes of action are barred by Section 78-12-26 U.C.A. (1953), as amended.

#### NINTH DEFENSE

Plaintiffs have no standing to bring claims for trespass to chattels and conversion since Plaintiffs did not own or have a possessory right in the vehicle which was repossessed.

#### FIRST COUNTERCLAIM

(Abuse of Process)

1. The Plaintiffs originally initiated criminal proceedings against the Defendant based on the same facts as exist in this action.

2. The Defendant was ultimately cleared of each of the charges.

3. The Plaintiffs then filed a civil lawsuit against the Defendant in February of 1985 in Third District Court based on the same facts.

4. On December 1, 1986, the Honorable Judge Richard Moffat dismissed the lawsuit.

5. On or about November 5, 1987, the Plaintiffs filed the present Complaint based on the same facts as existed in the prior criminal action and civil suit and caused the Defendant to be served with a Summons and copy of the Complaint on December 2, 1987.

6. The Plaintiffs alleged that the Defendant wrongfully took a certain 1975 Kenworth truck, and in the process, committed an assault, battery and other violations.

7. The present lawsuit was brought by the Plaintiffs in bad faith, without any reasonable or probable cause, but was brought to harass the Defendant.

8. In bringing the lawsuit, the Plaintiffs acted maliciously and with intent to injure the Defendant by harming his good name and reputation through the use of the judicial system.

9. The actions of the Plaintiffs constitute an abuse of the judicial system, are willful, wanton and malicious and in reckless disregard of Defendant's rights and Defendant should be awarded punitive damages in an amount to be determined at trial.

## SECOND COUNTERCLAIM

(Assault)

10. The Defendant had been hired to repossess a 1975 Kenworth Tractor from the Plaintiff.

11. On or about November 5, 1984, the Defendant, Robert Barr, was attempting to repossess the Tractor, which was located in front of the Plaintiffs' home.

12. During the procedure, the Defendant was sitting in the front driver's seat of the Tractor, and the Plaintiff, Richard Moffitt, approached the Defendant in a violent and angry manner, yelling at the Defendant that he was going to kill him.

13. The act by the Plaintiff of approaching the Defendant in an angry, violent manner, while yelling that he was going to "kill him" created reasonable apprehension and fear in the Defendant of immediate harmful contact with his person.

14. The Plaintiff's actions were intended by him to place the Defendant in apprehension and fear of immediate, harmful contact.

15. The acts of the Plaintiff caused the Defendant, Robert Barr, severe emotional trauma and fear for his life for which the Plaintiff has suffered general and special damages.

16. As a result of Plaintiff's willful, wanton and malicious conduct, Defendant should be compensated in punitive damages in an amount to be determined at trial.

## THIRD COUNTERCLAIM

(Battery)

17. While the Defendant, Robert Barr, was sitting in the front seat of the tractor. The Plaintiff brought about a

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harmful and offensive contact with the Defendant's person when he climbed onto the running board of the truck and physically knocked the Defendant out of the seat.

18. The Plaintiff's actions were intended to bring about a harmful and offensive contact upon the Defendant.

19. The act of the Plaintiff, Richard Moffitt, in knocking the Defendant out of the driver's seat caused the Defendant extreme emotional distress and fear for his life and caused the Defendant general and special damages.

20. As a result of Plaintiff's willful, wanton and malicious conduct, Defendant should be compensated in punitive damages in an amount to be determined at trial.

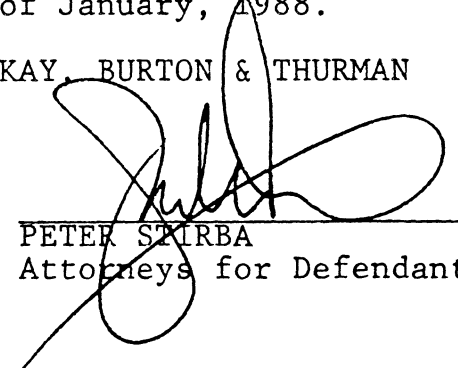
WHEREFORE, Defendant prays for relief as follows:

1. Plaintiffs' action be dismissed.
2. Defendant be awarded a sum of money for general and special damages for the three counterclaims, in an amount to be determined at trial.
3. Defendant be awarded punitive damages for each counterclaims in the amount of \$100,000.00.
4. Defendant be awarded costs and attorney's fees associated with this lawsuit.
5. For other appropriate relief the Court deems just and equitable.

DATED this 26<sup>th</sup> day of January, 1988.

McKAY, BURTON & THURMAN

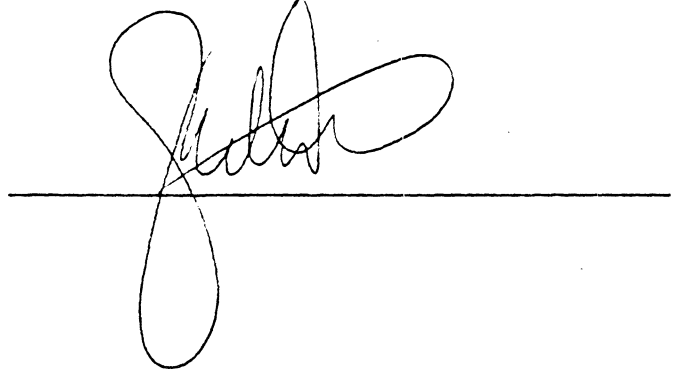
By

  
PETER STIRBA  
Attorneys for Defendant

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CERTIFICATE OF MAILING

I hereby certify a true and correct copy of the foregoing AMENDED ANSWER AND COUNTERCLAIM was mailed, postage prepaid, to James B. Hanks, Esq., Gateway Park, Suite 300, 563 West 500 South, Bountiful, Utah, this 26<sup>th</sup> day of January, 1988.



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INSTRUCTION NO. 20

If you find in favor of the Plaintiff Richard Moffit, on any of her claims, then you must assess her damages which may be actual or nominal.

To assess any actual damages, you must find from a preponderance of the evidence that the Plaintiff sustained actual damages as a proximate result of the claimed assault and/or battery.

To the extent that any actual damages have been so established by the evidence, you shall assess as the Plaintiff's actual damages, an amount which will fairly and justly compensate him for:

1. Any physical discomfort or inconveniences she may have sustained;
2. Any physical illness or injury she may have sustained;
3. Any emotional distress, fear, anxiety, embarrassment, humiliation or loss of reputation she may have