

2001

James Ashley Fennell, II v. Edward D. Green, Neil Wall, AKA Neil J. Wall, and GMW Development Inc., DBA Ivory North : Brief of Appellee

Utah Court of Appeals

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(2)

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

JAMES ASHLEY FENNELL, II,

Plaintiff/Appellant,

vs.

EDWARD D. GREEN, NEIL WALL, aka
NEIL J. WALL, and GMW
DEVELOPMENT INC., dba IVORY
NORTH,

Defendants/Appellees.

Civil No. 000601295

Court of Appeals No. 20011029-CA

BRIEF OF APPELLEE NEIL WALL

**Appeal from Summary Judgment entered by
The Honorable Thomas L. Kay
Second Judicial District Court of Davis County, State of Utah**

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SEP 11 2002

Paulette Stagg
Clerk of the Court

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I. JURISDICTION

This Court has jurisdiction of this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2001).

II. STATEMENT OF THE ISSUES AND STANDARD OF APPELLATE REVIEW

1. This court should refuse to consider Fennell's arguments on appeal due to his failure to abide by Rule 24, Utah Rules of Appellate Procedure.

2. Fennell failed to comply with Rule 4-501(2)(B) of the Rules of Judicial Administration in opposing Wall's Motion for Summary Judgment, and therefore, Wall's Statement of Undisputed Facts was properly deemed admitted and summary judgment was appropriate. "A trial court's interpretation of a rule in the Utah Code of Judicial Administration presents a question of law reviewed for correctness." Loporto v. Hoegemann, 1999 UT App 175, ¶5, 982 P.2d 586 (quoting Hartford Leasing Corp. v. State, 888 P.2d 694, 697 (Utah Ct. App. 1994)).

3. The trial court properly granted summary judgment on Fennell's negligent failure to disclose claim. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). The appellate court reviews the facts and all reasonable inferences in a light most favorable to the losing party. See Blue Cross and Blue Shield v. State, 779 P.2d 634, 636 (Utah 1989). Moreover, the appellate court reviews the trial court's conclusions of law for correctness, affording them no deference. See id.

4. The trial court properly granted summary judgment on Fennell's intentional failure to disclose claim. See Standard of Review for Issue #3.

5. Fennell waived his breach of implied warranty claim.

III. STATEMENT OF THE CASE

In this case, James Ashley Fennell, II, ("Fennell") brought suit against Edward Green ("Green"), Neil Wall ("Wall"), and GMW Development, Inc., dba Ivory North ("GMW"). Fennell alleged causes of action for negligent failure to disclose, intentional failure to disclose, and breach of an implied warranty, as a result of an alleged landslide that occurred on his residential property. Green and Wall developed the property and subsequently sold it to GMW. GMW agreed to build a home on the property and sell it to Fennell. Fennell sued Green, Wall and GMW for the diminished value of his residential property as a result of the alleged landslide, arguing that they knew or should have known of the condition, but failed to disclose it. Green, Wall, and GMW each filed motions for summary judgment, which the trial court granted. Fennell now brings this appeal.

IV. STATEMENT OF THE FACTS

1. Wall and Green were developers of a subdivision know as Falcon Ridge Subdivision in Layton, Utah, and initially held title to lot 31. See Complaint at R.2-11.

2. In October of 1992, Wall and Green hired a professional geologist, Glenn R. Maughan (“Maughan”), to conduct a Geological Soils Investigation of Phase 2 of the subdivision, which included lot 31. See Depo. of Neil J. Wall at R.756; Depo. of Glenn Roy Maughan at R.757.

3. Maughan represented that lot 31 would be suitable for residential building. See R.759

4. Maughan never told Green or Wall that lot 31 was susceptible to landslides nor did his report caution that lot 31 was in a landslide area. See R.761

5. Maughan’s report was on file with Layton City and at all relevant times was available for public inspection. See R.763.

6. Green and Wall complied with all recommendations made by Maughan as well as recommendations from Layton City to make lot 31 safe for residential building purposes. See R.765.

7. Green and Wall sold lot 31 to GMW on July 7, 1995. See R.769-772.

8. Prior to July 5, 1995, Fennell contracted with GMW for the acquisition of lot 31 and for the construction of a home. See R.4.

9. At no time did Green and Wall enter into a contract with Fennell or even meet him. See R.776.

10. GMW constructed a home on property located at 1543 North 1050 East, Layton, Utah. GMW conveyed title to Fennell by deed dated December 22, 1995, and Fennell moved into the home at issue. See R.4-5.

11. Fennell alleges that on April 14, 1998, a landslide occurred on the back portion of the lot. See R.5

12. No one was physically injured as a result of the landslide, nor was any other property damaged or destroyed because of the landslide. See R.783.

13. Fennell then brought suit against, *inter alia*, Wall for negligent failure to disclose, intentional failure to disclose, and breach of implied warranty. See R.2-11.

14. Wall then filed a Motion for Summary seeking dismissal of all claims pertaining to him. See R.732-795.

15. On October 25, 2001, the court heard the Motion for Summary Judgment filed by, *inter alia*, Wall. At the hearing, Fennell waived his claim for breach of implied warranty. See R.1705 at pp.76-77.

16. The trial court subsequently granted Wall's Motion for Summary Judgment for the following reasons: First, the trial court determined that summary judgment was proper due to Fennell's failure to abide by Rule of Judicial Administration 4-501. See R.1705 at p.92; R.1608-09. In addition, and as a separate basis for granting summary judgment, the trial court determined that there were no genuine issues of

material fact that Wall had no knowledge of the alleged landslide condition. See R.1705 at p.92; R.1609-10. Moreover, Fennell failed to establish the existence of a legal duty on the part of Wall to communicate with him, and the economic loss doctrine prevented Fennell from recovering under any of the theories of liability that he pled. See R.1705 at pp.92-93; R.1610.

V. SUMMARY OF THE ARGUMENTS

1. This Court should refuse to consider Fennell's arguments on appeal due to his failure to abide by Rule 24, Utah Rules of Appellate Procedure. Specifically, Fennell failed to provide a coherent statement of the issues on appeal or properly cite to the record even once. Accordingly, Fennell's brief should be disregarded or stricken and this court should assume the correctness of the trial court's judgment.

2. The trial court properly granted summary judgment due to Fennell's failure to comply with Rule 4-501(2)(B) of the Rules of Judicial Administration. Fennell failed to specifically dispute any of the facts set forth by Wall in his Motion for Summary Judgment, as required by the rule, and the trial court thus correctly deemed admitted those facts. Based on those undisputed facts, the trial court then properly granted summary judgment in favor of Wall.

3. The trial court properly granted summary judgment on Fennell's negligent failure to disclose claim. First, the economic loss rule precludes Fennell from recovering economic damages in negligence claims. Second, Fennell produced absolutely

no evidence that Fennell had any knowledge of the alleged landslide condition. Finally, Fennell failed to establish a prima facie case of negligence because there was no legal duty to communicate running from Wall to Fennell.

4. The trial court also properly granted summary judgment on Fennell's intentional failure to disclose claim. First, no such cause of action exists in Utah. However, even if Fennell's claim could be characterized as a fraudulent non-disclosure claim (despite the lack of specificity in the pleading as required for an action for fraud), Wall was still entitled to summary judgment because Fennell failed to provide any evidence that Wall knew of material information and had a duty to communicate that information to Fennell.

5. Fennell waived his breach of implied warranty claim. However, even if Fennell did not waive the claim, summary judgment was proper because Utah law does not recognize a claim for breach of implied warranty for habitability or fitness for residential property.

VI. ARGUMENT

ISSUE I

THIS COURT SHOULD REFUSE TO CONSIDER FENNELLS ARGUMENTS ON APPEAL FOR FAILURE TO COMPLY WITH RULE 24 OF THE UTAH RULES OF APPELLATE PROCEDURE.

This court should not consider Fennell's arguments on appeal due to his failure to abide by Rule 24, Utah Rules of Appellate Procedure. Specifically, the rule

requires the appellant to provide a statement of the issues presented for review. See Utah R. App. P. 24(a)(5). In addition, Rule 24(e) provides: “References *shall* be made to the pages of the original record *as paginated pursuant to Rule 11(b)*” Utah R. App. P. 24(e) (2002) (emphasis added). In his brief, Fennell failed to set forth a coherent statement of the issues,¹ or even properly cite to the record once.

Utah’s appellate courts have previously “voiced their frustration with briefs which fail to comply with Rule 24,” and “have routinely refused to consider arguments which do not include a statement of the facts *properly supported by citations to the record.*” State v. Price, 827 P.2d 247, 249 (Utah Ct. App. 1992) (emphasis added); see also, e.g., Trees v. Lewis, 738 P.2d 612, 612-13 (Utah 1987) (court dismisses appeal because appellant “has not supported the facts set forth in his brief with citations to the record” as required by the Utah Rules of Appellate Procedure); Koulis v. Standard Oil Co. of California, 746 P.2d 1182, 1184 (Utah Ct. App. 1987) (“If a party fails to make a concise statement of the facts and citation of the pages in the record where those facts are supported, the court will assume the correctness of the judgment below.”); Uckerman v. Lincoln Nat. Life Ins. Co., 588 P.2d 142, 144 (Utah 1978) (providing appellate court “need not, and will not, consider any facts not *properly* cited to, or supported by, the

¹ Fennell provides the following as the statement of the issues: “There is a factual dispute of a sufficient nature to warrant the denial of Defendants’ Motions for Summary Judgment.” Fennell’s Brief at p.3. Fennell did not list as an issue his failure to abide by Rule 4-501, which was a separate basis for granting summary judgment by the trial court. To add to the problem, the issues were not more clearly identified in the body of the brief.

record) (emphasis added); Steele v. Bd. Of Rev. of Indus. Com'n, 845 P.2d 960, 962 (Utah Ct. App. 1993) (“If a party fails to provide a statement of the facts along with a citation to the record where those facts are supported, we will assume the correctness of the judgment.”). In fact, Rule 24 provides that briefs that are not in compliance “may be disregarded or stricken.” Utah R. App. P. 24(j). Accordingly, because Fennell failed to comply with the requirements of Rule 24, this court should not consider his arguments on appeal and the correctness of the trial court’s judgment should be assumed.

ISSUE II

FENNELL FAILED TO COMPLY WITH RULE 4-501(2)(B) OF THE RULES OF JUDICIAL ADMINISTRATION IN OPPOSING WALL’S MOTION FOR SUMMARY JUDGMENT, AND, THEREFORE, WALL’S STATEMENT OF UNDISPUTED FACTS WAS PROPERLY DEEMED ADMITTED AND SUMMARY JUDGMENT WAS APPROPRIATE.

Fennell contends on appeal that the trial court “abrogated its duties” in granting summary judgment based upon his failure to comply with Rule 4-501(2)(B) of the Rules of Judicial Administration.² The trial court determined that summary judgment was proper in this case because the pleadings filed and matters presented did not create genuine issues as to any material facts. See R.1607-11. Specifically, due to Fennell’s

² Fennell also contends that the trial court only granted summary judgment because “it desired a direction from the Appellate Court as to what law to apply to the facts.” Fennell’s Brief at p.10. However, it is clear that the trial court did not grant summary judgment simply to receive guidance, but gave the decision considerable thought and contemplation. The trial court stated at the end of oral arguments: “So I have done my homework before making this ruling. I don’t do it arbitrarily.” R.1705 at p.94.

failure to abide by the provisions of Rule 4-501(2)(B) in opposing Wall's Motion for Summary Judgment, the Statement of Undisputed Facts set forth by Wall were deemed admitted and summary judgment was granted. See R.1609.

Rule 4-501(2)(B) provides:

The points and authorities in opposition to a motion for summary judgment *shall* begin with a section that contains a verbatim restatement of each of the movant's statement of facts as to which the party contends a genuine issue exists followed by a concise statement of material facts which support the party's contention. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record *shall be deemed admitted* for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(Emphasis added).

In this case, it is clear that Fennell failed to comply with this rule. In responding to Wall's Motion for Summary Judgment, Fennell did not specifically dispute any of the facts set forth by Wall in support of his motion. As a result, after having read Fennell's memorandum opposing summary judgment several times, the trial court was still left to question whether Fennell contended there were any material facts in dispute. See R.1705 at pp.41-43. Fennell's counsel was then questioned by the court concerning his failure to abide by the rule, to which he acknowledged he may have been deficient. See R.1705 at p.43.

Fennell, however, now attempts to argue on appeal that he in fact complied with Rule 4-501(2)(B) as it existed at the time of briefing and arguments. See Fennell's Brief at p.20. In addition, he contends that even if he did not comply with the rule, it was improper for the trial court to grant summary judgment because "the adverse party is entitled to have the Court survey the evidence and all reasonable inferences" See id. at p.21. These arguments are simply without merit.

First, it is clear that Fennell failed to comply with Rule 4-501(2)(B) as it existed at the time of briefing or the hearing. While Fennell argues that the trial court prematurely applied the November 2001 amendments to the rule in granting summary judgment for Wall, a close examination of the rule that was in effect for October of 2001 reveals that Fennell was still required to dispute the moving party's material facts, which he failed to do. See Rule 4-501(2)(B), R. Jud. Adm. (2001). Accordingly, the trial court properly deemed Wall's facts admitted for the purpose of summary judgment. See Rule 4-501(2)(B) (providing that material facts set forth and properly supported by the movant "*shall* be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement") (emphasis added).

Second, the trial court then appropriately granted summary judgment due to Fennell's failure to comply with Rule 4-501(2)(B). Fennell argues that granting summary judgment based upon his deficiencies with Rule 4-501 deprived him of his substantive rights. See Fennell Brief at p.19. However, Utah courts have consistently noted the

importance of complying with the Rules of Judicial Administration. See, e.g., Morse v. Packer, 2000 UT 86, ¶10, 15 P.3d 1021 (noting that trial court granted summary judgment for failure to respond to Motion for Summary Judgment within 10 days as required by Rule 4-501(1)(b)); Parker v. Dodgion, 971 P.2d 496, 497 n.3 (Utah 1998) (Supreme Court noted that party’s response to Motion for Summary Judgment did not conform to Rule 4-501 because it “set forth no disputed facts and contained no numbered sentences or citations”).

In this case, having deemed admitted the facts set forth by Wall, the trial court then properly granted summary judgment in favor of Wall. According to Wall’s undisputed facts, he hired a geologist to inspect the soil, he had no knowledge--actual or constructive--of an alleged landslide condition, he had no contract with Fennell, and he complied with all applicable regulations. See R.1165-1167. Simply stated, admitting those undisputed facts for purposes of summary judgment pursuant to Rule 4-501, the trial court properly concluded that Fennell could not recover under any theory of liability against Wall and that judgment should be entered as a matter of law.

ISSUE III

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON FENNELLS’ NEGLIGENT FAILURE TO DISCLOSE CLAIM.

As a separate basis for granting summary judgment, the trial court also concluded that Fennell’s negligent failure to disclose claim failed as a matter of law for three reasons. First, the economic loss rule precludes Fennell from recovering economic

damages in negligence claims. Second, there was absolutely no evidence that Wall had any knowledge of the alleged landslide condition. Third, Fennell could not establish a prima facie case of negligence because there was no duty running from Wall to Fennell.

A. The Economic Loss Rule Precludes Recovery of Economic Damages in Negligence Claims.

The trial court in this case properly determined that “the only issues of damage involved are those of economic loss for which no recovery is available under the theories pled by the plaintiff in this action” R.1610. The economic loss rule adopted by Utah courts prohibits the recovery of economic losses under non-intentional tort claims. See American Towers Owners Ass’n, Inc. v. CCI Mechanical, Inc., 930 P.2d 1182, 1189 (Utah 1996); see also, East River S.S. Corp. v. Transamerican Delaval, Inc., 476 U.S. 858, 866-75, 106 S. Ct. 2295, 2300-04, 90 L.Ed.2d 865 (1986). In American Towers, a condominium owners’ association brought suit against, *inter alia*, the contractors for design and construction defects in the plumbing and mechanical systems of a condominium complex. See 930 P.2d at 1184. The association had no contract with any of the defendants. See id. at 1187. The allegations were for, among other things, negligence, and the damages sought included the diminution in value of the condominiums. See id. at 1188. The trial court in American Towers dismissed the association’s negligence claims based on the economic loss rule. See id. at 1188-89. The Utah Supreme Court affirmed, declaring:

The policy reasons supporting the economic loss rule are sound . . . [C]ontract principles resolve issues when the product does not meet the user's expectations, while tort principles resolve issues when the product is unsafe to person or property.

. . . The law of torts imposes no standards upon the parties' performance of the contract; the only standards are those agreed upon by the parties. . . . Otherwise, the extension of tort law would result in "liability to an indeterminate amount for an indeterminate time to an indeterminate class."

Id. at 1190 (quotation omitted). The court further stated that "economic damages are not recoverable in negligence absent [a claim for] physical property damage or bodily injury." Id. at 1189.

As a result of the Utah Supreme Court's limiting recovery of economic losses to contract claims, economic losses cannot be recovered in a negligence action. Fennell seeks economic damages based on negligent failure to disclose, but he is precluded from doing so by the economic loss rule. Summary judgment in favor of Wall was therefore was appropriate.

In addition, like the plaintiff in American Towers, Fennell does not seek damages to property that fits under any exception to the economic loss rule. The "other property" exception discussed in American Towers applies only when property other than property included in the integrated unit is damaged. See id. at 1191. The "other property" exception to the economic loss rule does not include component parts of finished products, like land and components used in the construction of a dwelling. See

id. (citing Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc., 620 So.2d 1244, 1247 (Fla. 1993)). The American Towers court found the reasoning in Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 374 S.E.2d 55 (Va. 1998), applicable and instructive, and pronounced:

The plaintiffs here allege nothing more than disappointed economic expectations. . . . The package included land, design services, and construction of a dwelling . . . The package is alleged to have been defective--one or more of its component parts was sufficiently substandard as to cause damage to other parts. The effect of the failure . . . was to cause a diminution in the value of the whole This is a purely economic loss, for which the law of contracts provides the sole remedy.

American Towers, 930 P.2d at 1191 (quoting Sensenbrenner, 374 S.E.2d at 58).

Just like in Sensenbrenner, Fennell does not allege damages beyond damage to the component parts of the integrated unit covered by the contract between Fennell and GMW. Accordingly, Fennell's negligence claim is not covered by the "other property" exception and summary judgment was proper.

B. There Was No Evidence That Wall Had Any Knowledge Of An Alleged Landslide Condition.

The trial court determined that summary judgment was also proper because Fennell produced no evidence that Wall had any knowledge of an alleged landslide condition at the time the subdivision was platted and the subject lot was sold to GMW. See R.1609-10. In this case, Fennell argues that Wall knew or should have known of a landslide condition, and that he subsequently breached a duty by failing to disclose the

condition to Fennell. However, upon examining the record, it is clear that Wall took all appropriate measures to determine the stability of the land on the subject lot and did not know of an alleged landslide condition.

Wall employed Maughan, a professional geologist and soils expert, to compose a written report about the property. See R.756-57. In his report, Maughan never indicated that the land was unstable or unsuitable for building because of any risk of landslides. See R.759, 761. In fact, the lack of any report to Wall that a landslide was possible on the property is not surprising, given that Maughan himself did not believe the lot posed a landslide threat. Referring to the subject lot at his deposition, Maughan testified as follows:

Q. And you felt there was not a slide in that area, that the stream had simply undercut it?

A. That's right. But to protect it we put the slope back so they—to allow for future sloughing.

Q. Okay. So when you finished up with your analysis of this subdivision, you did not believe this area was a slide area in any of the lots, and that the only are where there had been some movement was on lot 21,³ and that's because the stream had undercut the bank down below?

A. That's right.

Q. Is that a fair statement?

³ Lot 21 is now known as Lot 31, the subject lot of this litigation.

A. Yes.

R.827. Maughan then again confirmed his opinion that the subject lot was not a slide area and that he did not caution in his report of any potential landslide conditions on Lot 31.

Q. . . . So my question is: If you'd had some data or an opinion that this was a landslide area, you certainly would have put that in your report and told somebody about it; is that true?

A. That's true.

R.1190.

Simply stated, given the fact that the expert Green and Wall hired to perform the soil tests did not know of a landslide condition, it would be unreasonable to impute knowledge of the condition to Wall. There is absolutely no support for Fennell's contention that Wall had any information that lot 31 was located in a slide area. Therefore, Wall could not have withheld that information from either GMW or Fennell, and Wall was entitled to summary judgment on the failure to disclose claims.

C. Fennell Failed To Establish A Prima Facie Case of Negligence Because Wall Had No Duty To Communicate With Him.

The trial court also determined that Fennell failed to establish a legal duty on the part of Wall to communicate with him. See R.1610. For causes of action based in negligence, the plaintiff must establish a *prima facie* case of negligence. See Bansansine v. Bodell, 927 P.2d 675, 676 (Utah Ct. App. 1996).

A prima facie case of negligence requires proof of four elements. (1) Defendant owed plaintiff a duty of care; (2) defendant breached that duty; (3) defendant's breach of duty was the actual and proximate cause of plaintiff's injury; and (4) plaintiff suffered damages as a result of defendant's breach of duty.

Id.; see also Clark v. Farmers Ins. Exch., 893 P.2d 598, 600-601 (Utah Ct. App. 1995).

Furthermore, when a negligence claim is predicated on a failure to act, the plaintiff bears the burden of establishing a special relationship between the parties, creating a duty of the defendant to the plaintiff. See DCR, Inc. v. Peak Alarm Co., 663 P.2d 433, 434 (Utah 1983).

Plaintiff's negligence claim in this case fails as a matter of law because there is no duty running from Wall to Fennell. "Duty is an essential element of negligence." Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993). "Absent a showing of a duty [the plaintiff] cannot recover." Rollins v. Peterson, 813 P.2d 1156, 1159 (Utah 1991) (quoting Beach v. University Utah, 726 P.2d 413 (Utah 1986)). "Duty is 'a question of whether the defendant is under any obligation for the benefit of a particular plaintiff'" Ferre v. State, 784 P.2d 149, 151 (Utah 1989) (quotation omitted). "The issue of whether a duty exists is entirely a question of law to be determined by the court." Id. (citations omitted). "The law imposes upon one party an affirmative duty to act only when certain special relationships exist between the parties." Beach, 726 P.2d at 415.

Fennell contends, however, that such a duty was created by the Utah Supreme Court in Loveland v. Orem City Corp. 746 P.2d 763 (Utah 1987). In Loveland, purchasers of a home brought an action against the land developer and others for wrongful death of their child that drowned in a canal near their home. See id. The court, determining that a developer “should not be subject to liability for all misfortune that might befall a purchaser,” found that a developer has a limited duty to disclose material information to “‘his purchaser.’” Id. at 769 (quoting Anderson v. Bauer, 681 P.2d 1316, 1323 (Wyo. 1984)). More specifically, a developer’s duty to disclose to his purchaser only extends to information the developer knows or should know about the property that makes it unsuitable for residential building. See id. (quoting Anderson, 681 P.2d at 1323). Thus, under Loveland, any duty of disclosure owed by Wall would have been to GMW—not to Fennell. Therefore, because Wall was under no obligation to disclose to Fennell anything he allegedly knew regarding a landslide condition, Fennell failed to establish a prima facie case of negligence and summary judgment was proper.

Two additional points on this issue: Utah appellate courts have previously determined that “the duty to disclose in a vendor-vendee transaction exists only where a defect is not discoverable by reasonable care,” Maack v. Resource Design & Construction, Inc., 875 P.2d 570, 579 (Utah Ct. App. 1994), or where the deficiencies “are easily discernible during an ordinary and reasonable investigation by the purchaser and that are in fact known by the purchaser.” Loveland, 746 P.2d at 769. Here, the soils

report that contains the information that Fennell alleges Wall failed to disclose was in fact a matter of public record on file with Layton City, and Fennell could have obtained it at any time. Since the information was discoverable by Fennell, the law does not impose upon Wall a duty to disclose. See id.

Moreover, even if the court finds that a duty of care does exist, Fennell still cannot prove a *prima facie* case of negligence since there was no breach of the duty of care. Wall did everything that a reasonable person would do in his situation, as it is undisputed that he arranged for the soils reports to be done on the property by a professional geologist, filed the reports with Layton City, and complied with all of the recommendations of the reports and Layton City officials to make the lot buildable. Simply stated, even if there was a duty of care, Wall did not breach it and Fennell's negligence claim fails as a matter of law.

ISSUE IV

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON FENNELLS INTENTIONAL FAILURE TO DISCLOSE CLAIM.

The trial court also properly granted summary judgment on Fennell's intentional failure to disclose claim. The trial court held:

As a matter of law, plaintiff has also failed to state a claim in his pleadings for fraudulent non-disclosure and further, even if such a cause of action had been pled, there has been a failure to establish that the alleged non-disclosed information was known to Green and Wall. Further, plaintiff has failed to establish a legal duty on the part of Green and Wall to communicate with the plaintiff.

R.1610.

In this case, Fennell pled a cause of action for intentional failure to disclose. See R.7. However, that cause of action does not exist in Utah. As the trial court noted, the more appropriate cause of action would have been for fraudulent non-disclosure, which Fennell did not plead, and thus, summary judgment was appropriate. Even if, however, Fennell intended to plead a cause of action for fraudulent non-disclosure, summary judgment would still appropriate because he was required to allege fraud with particularity, which he has not done. See Utah R. Civ. P. 9(b) (“In all averments of fraud or mistake, the circumstances constituting fraud or mistake *shall be stated with particularity.*”) (emphasis added).

Turning to the merits, however, the Utah Supreme Court discussed the issue of fraudulent non-disclosure in First Security Bank of Utah N.A. v. Banberry Development, 786 P.2d 1326 (Utah 1990). There, the court held that a cause of action for fraudulent non-disclosure requires that the non-disclosed information be material, known to the party failing to disclose, and that there must also be a duty to communicate. See id. at 1328; see also Maack v. Resource Design & Constr., Inc., 875 P.2d 570, 578 (Utah Ct. App. 1994). In this case, Fennell cannot demonstrate that the alleged non-disclosed information was known to Wall or that Wall had a duty to communicate with Fennell.

As was more fully set forth above, Fennell presented no evidence to establish that Wall had knowledge of the alleged landslide condition (let alone clear and convincing evidence) or that, even if Wall did have knowledge, that he also had a duty to communicate the landslide information to Fennell. See Andalex Resources, Inc. v. Myers, 871 P.2d 1041, 1046 (Utah Ct. App. 1994) (providing clear and convincing standard must be considered in determining whether motion for summary judgment should be granted on fraud claim). Again, given the evidence presented regarding the measures taken by Wall to ensure the property's stability and the remote relationship of Wall to Fennell, the trial court properly concluded that there was not sufficient evidence to sustain a cause of action for fraudulent non-disclosure even if it had properly been pled by Fennell.

ISSUE V

FENNEL WAIVED HIS BREACH OF IMPLIED WARRANTY CLAIM.

In his Complaint, Fennell stated a cause of action for breach of implied warranty. See R.9-10. However, at the hearing on the motions for summary judgment, Fennell specifically abandoned this cause of action.

MR. WELLS: For the third time, we're not dealing with habitability of the residence. We're dealing with the condition of the land.

THE COURT: So is that an implied warranty or not?

MR. WELLS: It's not an implied warranty in terms of dealing with habitability.

THE COURT: Okay, so is that under a negligent failure to disclose or an intentional failure to disclose or an implied warranty theory?

MR. WELLS: It's not an implied warranty, it's failure to disclose.

R.1705 at pp.76-77.

However, even if this court determines that Fennell did not abandon his breach of implied warranty claim, summary judgment was also proper on that claim. Utah law does not recognize a cause of action for breach of implied warranty of habitability on purchases of real property. In American Towers, the court stated, “[A] landlord of leased residential property may be liable for breach of implied warranty of habitability. . . . However, we have not extended such a warranty to *purchasers* of residential property.” American Towers, 930 P.2d at 1193. The court then articulated its reasoning for disallowing a claim for breach of implied warranty by purchasers of residential property as follows:

The main policy reasons behind extending an implied warranty of habitability to residential leases are the unequal bargaining position of the parties and the prospective tenant's limited ability to inspect and repair the property. *These policy reasons are not present to the same degree in the purchase of residential property.* The purchaser has the right to inspect the house before the purchase as thoroughly as that individual desires, and to condition purchase of the house upon a satisfactory inspection report. Further, if there are particular concerns about a home, the parties can contract for an express written warranty from the seller. Finally, if there are material latent defects of which the seller was aware, the buyer may have a cause of action in fraud. Therefore, *the circumstances*

presented to the purchaser of a residence are not closely analogous to those of a relatively powerless lessee.

Id. (quoting Maack, 875 P.2d at 582-583).

In addition, Utah law does not recognize a cause of action for breach of implied warranty of fitness for residential property. See Snow Flower Homeowners Ass’n. v. Snow Flower, Ltd., 2001 UT App 207, 31 P.3d 576. In Snow Flower, a homeowners’ association brought suit against the developer and original seller of condominium units. See id. at ¶¶2-5. The association alleged causes of action for, among other things, breach of implied warranty and breach of implied warranty of fitness. See id. at ¶5. The trial court granted summary judgment to the defendants on all breach of implied warranty claims based on the American Towers ruling. See id. at ¶6. This Court affirmed, and in reaching its decision, stated: “Although the Association argues that its implied warranty claims are for breaches of an implied warranty and an implied warranty of fitness, we find that the Association’s claims are indistinguishable from a claim for a breach of an implied warranty of habitability.” See id. at ¶28. This court continued, “Utah does not recognize a claim for a breach of the implied warranty of habitability in the context of purchasers of residential property.” Id. at ¶30 (citing American Towers, 903 P.2d at 1193-94; Maack, 875 P.2d at 582-583).

The facts of this case are almost identical to the facts in Snow Flower. Just as the plaintiff did in Snow Flower, Fennell alleged a cause of action for breach of implied warranty of fitness because breach of implied warranty for habitability was not a

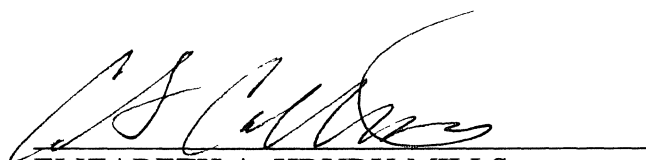
valid cause of action in Utah. However, that claim obviously cannot stand in light of this Court's statement that the two causes of action in the context of residential property are indistinguishable. Utah does not recognize a cause of action for breach of implied warranty in the context of purchasers of residential property. Fennell's breach of implied warranty claim therefore fails, and Wall was entitled to summary judgment dismissing that claim.⁴

VII. CONCLUSION

For the reasons set forth above, Wall respectfully requests that this Court affirm the summary judgment entered by the trial court, dismissing all of Fennell's claims against Wall with prejudice.

DATED this 11th day of September, 2002.

RICHARDS, BRANDT, MILLER & NELSON



ELIZABETH A. HRUBY-MILLS

BRANDON H. HOBBS

CHRISTIAN S. COLLINS

Attorneys for Defendant/Appellee Wall

⁴ In addition, Fennell had the opportunity to inspect the property as thoroughly as he wanted before the purchase, including inspecting the soils report that was on file with Layton City. He also could have bargained for express warranties covering the property before completing the purchase. Plaintiff failed to take those precautions and thus should not be allowed to now make a claim for breach of implied warranty.

CERTIFICATE OF SERVICE

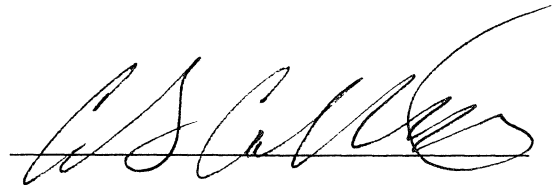
I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on the 11th day of September, 2002, to each of the following:

Paul M. Belnap
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LaVar E. Stark
Frank M. Wells
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Attorneys for Plaintiff/Appellant

A handwritten signature in black ink, appearing to read "Paul M. Belnap", written over a horizontal line.

ADDENDUM

Paul M. Belnap, #0279
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Attorneys for Defendant,
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Sixth Floor Boston Building
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Telephone: (801) 532-7080

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

JAMES ASHLEY FENNELL, II,)	
)	
Plaintiff,)	SUMMARY JUDGMENT AND
)	DISMISSAL OF EDWARD D.
vs.)	GREEN AND NEIL WALL, aka
)	NEIL J. WALL
EDWARD D. GREEN, NEIL WALL, aka)	
NEIL J. WALL and GMW DEVELOPMENT,)	Civil No. 000601295 PD
INC., dba IVORY NORTH,)	
)	Judge Thomas L. Kay
Defendant.)	

The above-entitled matter came on for hearing on the 25th day of October, 2001 at the hour of 9:00 a.m. before the Honorable Thomas L. Kay, District Court Judge on motions for summary judgment, including motions for summary judgment filed by Edward D. Green and Neil Wall, aka Neil J. Wall (hereinafter "Green and Wall").

The plaintiff was represented by his counsel of record and the defendants were represented by their counsel of record.

The Court reviewed the memoranda in support of and in opposition to the motions

and has reviewed the case law cited by the parties and having considered the same and the oral argument of counsel presented in favor of and in opposition to the motions, determined that the motions for summary judgment of Green and Wall should be and are hereby granted, dismissing the complaint of the plaintiff against them. The Court desires to set forth its reasoning for the granting of the motions for summary judgment of Green and Wall and provided explanation for the same at the time of ruling on the motions at the hearing and confirms the same as the basis for its ruling together with this statement of the reasons in this written Order.

1. The time of the motions for summary judgment was appropriate as the parties had completed their discovery in this case giving the attorneys the opportunity to know the issues and facts.

2. The Court believes that under the terms of Rule 56 of the Utah Rules of Civil Procedure, together with Rule 4-501 of the Rules of Judicial Administration, that summary judgment is warranted as the court determines from the pleadings filed and the matters presented that there are no genuine issues as to any material facts and that Green and Wall are entitled to judgment as a matter of law.

3. Rule 4-501(2)(B) is a rule that this Court has relied upon and does so in this case as a separate basis for the granting of the motions for summary judgment dismissing Green and Wall. In the materials filed by Green and Wall in support of their motions, said parties listed the facts by paragraphs which they contended were not in dispute. The rule required the plaintiff to set forth specifically:

[A] concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be

stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

The Court determines that the plaintiff failed to comply with Rule 4-501(2)(B) and therefore the facts set forth in the memoranda filed by Green and Wall in support of their motions are deemed admitted and make summary judgment proper under the facts and circumstances of the legal arguments made.

4. As a separate basis for the granting of the motions of Green and Wall, the Court has reviewed Exhibit 4 to the deposition of Neil J. Wall together with the deposition referred to and referenced by the parties of Glenn Roy Maughan. The Court determines that there are no genuine issues as to any material facts regarding the fact that at the time Maughan performed his soils studies on the lots in the proposed subdivision, including Lot 21, which became Lot 31 on the subsequent plan (see deposition Exhibits 1 and 5 of the Deposition of Neil J. Wall), Maughan was of the opinion that the area of the hill on the north side of Lot 31 was not a landslide. Accordingly, Green and Wall did not have knowledge of an alleged landslide condition as plaintiff now alleges, at the time that the subdivision was platted and the subject lot was sold to defendants GMW and Ivory North. Therefore, Green and Wall did not fail to disclose the alleged landslide condition now complained of by the plaintiff. This court determines from the facts

deemed admitted together with the facts set forth in Exhibit 4 of the Neil J. Wall deposition and the deposition of Glenn Roy Maughan, do not indicate there was a landslide condition that would have been known to Green and Wall at the times in question, as alleged by the plaintiffs.

5. As a matter of law, plaintiff has also failed to state a claim in his pleadings for fraudulent non-disclosure and further, even if such a cause of action had been pled, there has been a failure to establish that the alleged non-disclosed information was known to Green and Wall. Further, plaintiff has failed to establish a legal duty on the part Green and Wall to communicate with the plaintiff.

6. It is undisputed that Green and Wall did not sell the subject lot to the plaintiff. and plaintiff has failed to establish facts from which this court would find a legal duty to the plaintiff.

7. In the case before this court, the only issues of damage involved are those of economic loss for which no recovery is available under the theories pled by the plaintiff in this action, whether in negligence or alleged warranty proposed by plaintiff.

8. Plaintiff has not provided the Court with a basis to determine that there were any concealed conditions known to Green and Wall at the time of the sale to GMW/Ivory and further, the plaintiff was outside the land at the time of the damages alleged. Therefore, the exceptions to the doctrine of caveat emptor, urged by plaintiff do not exist in this case. Accordingly, the Court determines that the cases cited and relied upon by the parties support the granting of summary judgment to Green and Wall.

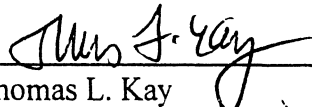
9. The Court has spent considerable time reviewing the memoranda of the parties

and the case law and in ruling on the motions at the subject hearing did so, having first fully reviewed all matters submitted and having considered the oral argument of counsel and the legal precedent and rules stated herein. Therefore, it is

HEREBY ORDERED, ADJUDGED AND DECREED that the Motions for Summary Judgment of Green and Wall are granted and the claims of the plaintiff against Green and Wall are hereby dismissed with prejudice, costs to defendants.

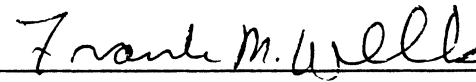
DATED this 5th day of December, 2001.

BY THE COURT:



Thomas L. Kay
Second District Court Judge

Approved as to Form:



for LaVar E. Stark
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 8 day of November, 2001 a true and correct copy of the foregoing **Summary Judgment and Dismissal of Edward D. Green and Neil Wall, aka Neil J. Wall** was served by the method indicated below, to the following:

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☐ Overnight Mail
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Billie Waggner

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P.2d 67 (1971); *Murdock v. Blake*, 26 Utah 2d 22, 484 P.2d 164 (1971); *Whitmore v. Calavo Growers*, 28 Utah 2d 165, 499 P.2d 849 (1972); *Whitmore v. Industrial Comm'n.*, 28 Utah 2d 185, 499 P.2d 1290 (1972); *Pacific Marine Schwabacher, Inc. v. Hydrosift Corp.*, 525 P.2d 615 (Utah 1974); *Midwest Realty v. City of West Jordan*, 541 P.2d 1109 (Utah 1975); *Lignell v. Berg*, 593 P.2d 800 (Utah 1979); *Lewis v. Moultrie*, 627 P.2d 94 (Utah 1981); *Eie v. St. Benedict's Hosp.*, 638 P.2d 1190 (Utah 1981); *Triple I Supply, Inc. v. Sunset Rail, Inc.*, 652 P.2d 1298 (Utah 1982); *Sears v. Riemersma*,

Bank & Trust Co., 754 P.2d 1222 (Utah 1988); *Sather v. Pitcher*, 748 P.2d 191 (Utah Ct. App. 1987); *Lloyd's Unlimited v. Nature's Way Mktg., Ltd.*, 753 P.2d 507 (Utah Ct. App. 1988); *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.*, 784 P.2d 475 (Utah Ct. App. 1989); *Prows v. State*, 822 P.2d 764 (Utah 1991); *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366 (Utah 1996); *James v. Galetka*, 965 P.2d 567 (Utah Ct. App. 1998), cert. denied, 982 P.2d 88 (Utah 1999); *Conder v. Hunt*, 2000 UT App 105, 1 P.3d 558.

COLLATERAL REFERENCES

Journal of Contemporary Law. — The Recovery of Attorney Fees in Utah: A Procedural Primer for Practitioners, 23 J. Contemp. L. 379 (1997).

Am. Jur. 2d. — 61A Am. Jur. 2d Pleading § 1 et seq.

C.J.S. — 71 C.J.S. Pleading §§ 1 to 53, 63 et seq., 99 et seq., 152 et seq., 163 et seq.

A.L.R. — Infant's misrepresentation as to his age as estopping him from disaffirming his voidable transaction, 29 A.L.R.3d 1270.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary

judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Power of court sitting as trier of fact to dismiss at close of plaintiff's evidence notwithstanding plaintiff has made out prima facie case, 55 A.L.R.3d 272.

Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 A.L.R.3d 933.

Dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties, 3 A.L.R.5th 237.

Rule 9. Pleading special matters.

(a)(1) *Capacity.* It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge, and on such issue the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(2) *Designation of unknown defendant.* When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(3) *Actions to quiet title; description of interest of unknown parties.* In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may describe such unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

(b) *Fraud, mistake, condition of the mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) *Conditions precedent.* In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made

the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) *Official document or act.* In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) *Judgment.* In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) *Time and place.* For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) *Special damage.* When items of special damage are claimed, they shall be specifically stated.

(h) *Statute of limitations.* In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

(i) *Private statutes; ordinances.* In pleading a private statute of this state, or an ordinance of any political subdivision thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

(j) *Libel and slander.*

(1) *Pleading defamatory matter.* It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(2) *Pleading defense.* In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

Compiler's Notes. — This rule is similar to Rule 9, F.R.C.P.

NOTES TO DECISIONS

Conditions precedent.

Fraud.

— Forgery.

— General accusations.

— Insufficient.

— Negligence.

— Materiality of representation

— Failure to raise.

— Waiver.

— Specific negative averment.

Libel and slander.

— Actual harm.

Mistake.

— Materiality of representation

support of his ineffective assistance claim, the appellate court would not remand the case for an evidentiary hearing. It would be improper to remand a claim under this rule for a fishing expedition. *State v. Garrett*, 849 P.2d 578 (Utah Ct. App.), cert. denied, 860 P. 943 (Utah 1993).

Allegation of prejudice required.

In hearing under this rule, criminal defendant has burden of showing that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, a more favorable result would have been obtained; defendant, convicted of raping his daughter and sentenced to a term of 15 years to life, failed to demonstrate that trial or appellate counsel's ineffectiveness deprived him of the ability to raise meritorious arguments on appeal. *State v. Reyes*, 2001 UT 66, 31 P.3d 516.

Application.

Under this rule, appellate courts need no longer treat the question of an adequate record as a necessary threshold issue; if the record is inadequate in any fashion, ambiguities or defi-

performed effectively. *State v. Litherland*, 2000 UT 76, 12 P.3d 92.

Purpose.

A Rule 23B motion for remand is a specialized motion, available only in limited circumstances, to supplement the record with known facts needed for an appellant to assert an ineffectiveness of counsel claim on direct appeal, and if the facts already appearing in the record are sufficient to make the claim, a remand is not needed. If defendant merely hopes to discover evidence suggesting ineffectiveness, a remand is not allowed, because the purpose of the rule is not to hold a "mini-trial" on ineffectiveness of counsel. *State v. Johnston*, 2000 UT App 290, 13 P.3d 175.

Cited in *State v. Classon*, 935 P.2d 524 (Utah Ct. App. 1997), cert. granted, 945 P.2d 1118 (Utah 1997); *State v. Bredehoft*, 966 P.2d 285 (Utah Ct. App. 1998), cert. denied, 982 P.2d 88 (Utah 1999); *State v. Simmons*, 2000 UT App 190, 398 Utah Adv. Rep. 7; *State v. Mecham*, 2000 UT App 247, 9 P.3d 777.

Rule 24. Briefs.

(a) *Brief of the appellant.* The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, including the contents of the addendum, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(A) citation to the record showing that the issue was preserved in the trial court; or

(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(7) *A statement of the case.* The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(8) *Summary of arguments.* The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) *An argument.* The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

(10) *A short conclusion stating the precise relief sought.*

(11) *An addendum to the brief or a statement that no addendum is necessary under this paragraph.* The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) *Brief of the appellee.* The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) *Reply brief.* The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraph (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) *References in briefs to parties.* Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) *References in briefs to the record.* References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) *Length of briefs.* Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) *Briefs in cases involving cross-appeals.* If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellant shall not exceed 50 pages in length. The brief of the appellee/cross-appellant shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant and shall not exceed 50 pages in length. The appellant shall then file a brief which contains an answer to the original issues raised by the appellee/cross-appellant and a reply to the appellee's response to the issues raised in the appellant's opening brief. The appellant's second brief shall not exceed 25 pages in length. The appellee/cross-appellant may then file a second brief, not to exceed 25 pages in length, which contains only a reply to the appellant's answers to the original issues raised by the appellee/cross-appellant's first brief. The lengths specified by this rule are exclusive of table of contents, table of authorities, and addenda and may be exceeded only by permission of the court. The court shall grant reasonable requests, for good cause shown.

(h) *Briefs in cases involving multiple appellants or appellees.* In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(i) *Citation of supplemental authorities.* When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(j) *Requirements and sanctions.* All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(k) *Brief covers.* The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27.

(Amended effective October 1, 1992; July 1, 1994; April 1, 1995; April 1, 1998; November 1, 1999.)

Advisory Committee Note. — Rule 24 (a)(9) now reflects what Utah appellate courts have long held. See *In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. ' must extricate from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty.... the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.' *ONEIDA/SLIC v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in

original) (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)). See also *State ex rel. M.S. v. Salata*, 806 P.2d 1216, 1218 (Utah App. 1991); *Bell v. Elder*, 782 P.2d 545, 547 (Utah App. 1989); *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

Amendment Notes. — The 1998 amendment added the second sentence in Subdivision (e) concerning published depositions or transcripts.

The 1999 amendment added the last sentence in Subdivision (a)(9).

Rule 4-408.01. Responsibility for administration of trial courts.**Intent:**

To designate the court locations administered directly through the administrative office of the courts and those administered through contract with local government pursuant to § 78-3-21.

Applicability:

This rule shall apply to the trial courts of record and to the administrative office of the courts.

Statement of the Rule:

(1) All locations of the juvenile court shall be administered directly through the administrative office of the courts.

(2) All locations of the district court shall be administered directly through the administrative office of the courts, except the following, which shall be administered through contract with county or municipal government pursuant to § 78-3-21: Fillmore, Junction, Kanab, Loa, Manila, Manti, Morgan, Panguitch, Randolph, and Salem.

(Added effective November 15, 1995; amended effective January 27, 1997; November 1, 1998; November 1, 2001.)

Amendment Notes. — The 1998 amendment deleted “Beaver” before “Coalville” in Subdivision (2). The 2001 amendment deleted “Coalville” and “Park City” from the list in Subdivision (2).

ARTICLE 5. CIVIL PRACTICE**Rule 4-501. Motions.****Intent:**

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all trial courts of record except proceedings before the court commissioners and small claims cases. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) *Filing and service of motions and memoranda.*

(A) *Motion and supporting memoranda.* All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the “statement of material facts” as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(B) *Memorandum in opposition to motion.* The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the

clerk to submit the matter to the court for decision as provided in paragraph (1)(D) of this rule.

(C) *Reply memorandum.* The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(D) *Notice to submit for decision.* Upon the expiration of the five-day period to file a reply memorandum, either party may notify the clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The Notice to Submit for Decision shall state the date on which the motion was served, the date the memorandum in opposition, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) *Motions for summary judgment.*

(A) *Memorandum in support of a motion.* The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(B) *Memorandum in opposition to a motion.* The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a verbatim restatement of each of the movant's statement of facts as to which the party contends a genuine issue exists followed by a concise statement of material facts which support the party's contention. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) *Hearings.*

(A) A decision on a motion shall be rendered without a hearing unless ordered by the court, or requested by the parties as provided in paragraphs (3)(B) or (4) below.

(B) In cases where the granting of a motion would dispose of the action or any claim in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(C) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(D) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(E) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(F) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(G) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the court.

(H) If a hearing has been requested and the non-moving party fails to file a memorandum in opposition, the moving party may withdraw the request or the court on its own motion may strike the request and decide the motion without oral argument.

(4) *Expedited dispositions.* Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) *Telephone conference.* The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

(Amended effective January 15, 1990; April 15, 1991; November 1, 1996; November 1, 1998; April 1, 1999; April 1, 2001; November 1, 2001.)

Amendment Notes. — The 1998 amendment substituted “trial courts of record” for “district courts” in the applicability paragraph, added Subdivision (3)(h), and made a stylistic change

The 1999 amendment substituted “claim” for “issues” in Subdivision (3)(B)

The April 2001 amendment added the second sentence to Subdivision (1)(D) and made stylistic changes in the subdivision designations

The November 2001 amendment, in Subdivision (2)(B), at the end of the first sentence substituted the language beginning “contains a verbatim restatement” for “a concise statement of material facts as to which the party contends a genuine issue exists” and deleted “and, if applicable, shall state the numbered sentence or sentences of the movant’s facts that are disputed” at the end of the second sentence

NOTES TO DECISIONS

Decisions sua sponte

Purpose

Request for hearing

Supplemental memoranda.

When rule applies

Cited

Decisions sua sponte.

While a court may refrain from addressing a matter that is not submitted for decision under this rule, nothing in this rule or any other rule bars a court from deciding such a matter sua sponte. *Scott v. Majors*, 1999 UT App 139, 980 P2d 214, cert. denied, 994 P2d 1271 (Utah 1999)

No notice to submit for decision under this rule is required, and a trial therefore correctly determined that it could rule on pending motions sua sponte. *Scott v. Majors*, 1999 UT App 139, 980 P2d 214, cert. denied, 994 P2d 1271 (Utah 1999)

Purpose.

The purpose of the code of judicial administration is not to create or modify substantive rights of litigants, but to bring order to the manner in which the courts operate. *Scott v. Majors*, 1999 UT App 139, 980 P2d 214, cert. denied, 994 P2d 1271 (Utah 1999)

Request for hearing.

Once a request for hearing by one of the parties has been granted and the matter set for hearing, the other party has a right to rely upon such setting regardless of whether it made its

own request. *Price v. Armour*, 949 P2d 1251 (Utah 1997)

Supplemental memoranda.

The plural “memoranda” in Subdivision (1)(a) refers to all memoranda received by the court — from all parties that either oppose or support any motion — and does not mean that each party may submit more than one memorandum, thus, the trial court was well within its discretion in refusing to accept a supplemental memorandum that was submitted without prior invitation and outside the bounds of procedural rules. *Hartford Leasing Corp. v. State*, 888 P2d 694 (Utah Ct. App. 1994)

When rule applies.

Because the defendants’ Rule 56(e) objection to the plaintiff’s first affidavit was framed as a separate, written motion to strike, the plaintiff should have been given ten days to respond as prescribed by Subdivision (1)(b) of this rule. *Gillmor v. Cummings*, 806 P2d 1205 (Utah Ct. App. 1991)

Even though the trial court had considered both parties’ motions and memoranda for and against the award of attorney fees, it erred in entering its decision before the time allowed under this rule to file a reply memorandum had expired and in not reconsidering its decision by reviewing plaintiffs’ reply memorandum and revised affidavits. *American Vendure, Inc. v. Morse*, 881 P2d 917 (Utah Ct. App. 1994)

Rule 4-408. Locations of trial courts of record.

Intent:

To designate locations of trial courts of record.

Applicability:

This rule shall apply to all trial courts of record.

Statement of the Rule:

(1) Each county seat and the following municipalities are hereby designated as locations of trial courts of record: American Fork; Bountiful; Cedar City; Layton; Murray; Orem; Park City; Roosevelt; Roy; Salem; Sandy; Spanish Fork; West Valley City.

(2) Subject to limitations imposed by law, any trial court of record may hold court in any location designated by this rule.

(Added effective January 1, 1992; amended effective November 15, 1995.)

Rule 4-408.01. Responsibility for administration of trial courts.

Intent:

To designate the court locations administered directly through the administrative office of the courts and those administered through contract with local government pursuant to § 78-3-21.

Applicability:

This rule shall apply to the trial courts of record and to the administrative office of the courts.

Statement of the Rule:

(1) All locations of the juvenile court shall be administered directly through the administrative office of the courts.

(2) All locations of the district court shall be administered directly through the administrative office of the courts, except the following, which shall be administered through contract with county or municipal government pursuant to § 78-3-21: Coalville, Fillmore, Junction, Kanab, Loa, Manila, Manti, Morgan, Panguitch, Park City, Randolph, and Salem.

(Added effective November 15, 1995; amended effective January 27, 1997; November 1, 1998.)

Amendment Notes. — The 1997 amendment, in Subdivision (2), substituted “district court” for “district and circuit courts” and deleted “Castle Dale” from the listed exceptions. The 1998 amendment deleted “Beaver” before “Coalville” in Subdivision (2).

2001

ARTICLE 5. CIVIL PRACTICE

Rule 4-501. Motions.

Intent:

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all trial courts of record except proceedings before the court commissioners and small claims cases. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) *Filing and service of motions and memoranda.*

(A) *Motion and supporting memoranda.* All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and

authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(B) *Memorandum in opposition to motion.* The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(D) of this rule.

(C) *Reply memorandum.* The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(D) *Notice to submit for decision.* Upon the expiration of the five-day period to file a reply memorandum, either party may notify the clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The Notice to Submit for Decision shall state the date on which the motion was served, the date the memorandum in opposition, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) *Motions for summary judgment.*

(A) *Memorandum in support of a motion.* The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(B) *Memorandum in opposition to a motion.* The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) *Hearings.*

(A) A decision on a motion shall be rendered without a hearing unless ordered by the court, or requested by the parties as provided in paragraphs (3)(B) or (4) below.

(B) In cases where the granting of a motion would dispose of the action or any claim in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(C) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(D) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(E) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(F) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(G) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the court.

(H) If a hearing has been requested and the non-moving party fails to file a memorandum in opposition, the moving party may withdraw the request or the court on its own motion may strike the request and decide the motion without oral argument.

(4) *Expedited dispositions.* Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) *Telephone conference.* The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

(Amended effective January 15, 1990; April 15, 1991; November 1, 1996; November 1, 1998; April 1, 1999; April 1, 2001.)

Amendment Notes. — The 1998 amendment substituted “trial courts of record” for “district courts” in the applicability paragraph, added Subdivision (3)(h), and made a stylistic change.

The 1999 amendment substituted “claim” for “issues” in Subdivision (3)(B).

The 2001 amendment added the second sentence to Subdivision (1)(D) and made stylistic changes in the subdivision designations.

NOTES TO DECISIONS

Decisions sua sponte.

Purpose.

Request for hearing.

Supplemental memoranda.

When rule applies.

Cited.

Decisions sua sponte.

While a court may refrain from addressing a matter that is not submitted for decision under this rule, nothing in this rule or any other rule bars a court from deciding such a matter sua sponte. *Scott v. Majors*, 1999 UT App 139, 980 P.2d 214, cert. denied, 994 P.2d 1271 (Utah 1999).

No notice to submit for decision under this rule is required, and a trial therefore correctly determined that it could rule on pending motions sua sponte. *Scott v. Majors*, 1999 UT App 139, 980 P.2d 214, cert. denied, 994 P.2d 1271 (Utah 1999).

Purpose.

The purpose of the code of judicial adminis-

tration is not to create or modify substantive rights of litigants, but to bring order to the manner in which the courts operate. *Scott v. Majors*, 1999 UT App 139, 980 P.2d 214, cert. denied, 994 P.2d 1271 (Utah 1999).

Request for hearing.

Once a request for hearing by one of the parties has been granted and the matter set for hearing, the other party has a right to rely upon such setting regardless of whether it made its own request. *Price v. Armour*, 949 P.2d 1251 (Utah 1997).

Supplemental memoranda.

The plural “memoranda” in Subdivision (1)(a) refers to all memoranda received by the court — from all parties that either oppose or support any motion — and does not mean that each party may submit more than one memorandum; thus, the trial court was well within its discretion in refusing to accept a supplemental memorandum that was submitted without prior invitation and outside the bounds of pro-