

2018

Safe Home Control, Inc., Plaintiff/Appellant, v. Jared Munday, Defendant/Appellee : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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SAFE HOME CONTROL, INC.,

Plaintiff/Appellant,

V.

JARED MUNDAY,

Defendant/Appellee.

PUBLIC

Appellate Case No. 20180155

District Case No. 160400579

BRIEF OF APPELLEE JARED MUNDAY

Appeal from Order Granting Motion to Set Aside Judgment and Granting Attorneys' Fees, *Safe Home Control, Inc. v. Munday*, Case No. 160400579, Honorable Christine Johnson, Presiding

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DESIGNATION OF PARTIES

Pursuant to UTAH R. APP. P. 24(a)(1), the Plaintiff/Appellant to this appeal is Safe Home Control, Inc. Defendant/Appellee is Jared Munday.

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
STATEMENT OF THE ISSUES	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. Judge Johnson’s Order Regarding The Invalidity Of The Confession Of Judgment Was Correct.....	9
A. Judge Johnson Correctly Found That The Confession of Judgment Lacks A Valid Verification.	10
B. Safe Home Fails To Address Judge Johnson’s Other Findings Regarding An Inadequate Jurat.....	16
C. Judge Johnson Correctly Found That The Confession Of Judgment Was Not For A “Specified Sum.”	17
D. Rule 58A(i) Is Unconstitutional.....	22
II. The Reciprocal Attorneys’ Fees Statute Was Properly Applied by Judge Johnson.	26
III. UTAH R. APP. P. 24(A)(9) CLAIM FOR ATTORNEYS’ FEES.....	30
CONCLUSION	30
CERTIFICATE OF COMPLIANCE PURSUANT TO UTAH R. APP. P. 24(A)(11) & 24(G)	32

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Aequitas Enterprises, LLC v. Interstate Inv. Grp., LLC</i> , 2011 UT 82, 267 P.3d 923	27
<i>Alderman v. Diament</i> , 7 N.J.L. 197, 198 (1824)	10, 23
<i>Bank of America v. Adamson</i> , 2017 UT 2, 391 P.3d 196	21
<i>Bilanzich v. Lonetti</i> , 2007 UT 26, 160 P.3d 1041	26, 29
<i>Brigham Young University v. Tremco Consultants, Inc.</i> , 2007 UT 17, 156 P.3d 782	28
<i>Cadlerock Joint Venture II, LP v. Envelope Packaging of Utah, Inc.</i> , 2011 UT App 98, 251 P.3d 837	18
<i>Coast to Coast Demolition & Crushing, Inc. v. Real Equity Pursuit, LLC</i> , 226 P.3d 605 (Nev. 2010)	13
<i>Colman v. Schwendiman</i> , 680 P.2d 29 (Utah 1984)	14
<i>Connor v. Salt Lake City</i> , 28 Utah 248, 78 P. 479	15
<i>D.H. Overmyer Co. v. Frick</i> , 405 U.S. 174 (1972)	Passim
<i>Determination of Rights to Use of Water</i> , 2008 UT 25, 182 P.3d 362	10
<i>Federated Capital Corp. v. Haner</i> , 2015 UT App 132, 351 P.3d 816	4
<i>First Security Mortgage Corp. v. Hansen</i> , 631 P.2d 919 (Utah 1981)	13-14
<i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972)	23
<i>Glew v. Ohio Sav. Bank</i> , 2007 UT 56, 181 P.3d 791	30
<i>Graff v. Boise Cascade Corp.</i> , 660 P.2d 721 (Utah 1983)	14
<i>Holladay Towne Center, LLC v. Brown Family Holdings, LC</i> , 2008 UT App 420, 198 P.3d 990	
<i>Hooban v. Unicity Int'l, Inc.</i> , 2009 UT App 287, 220 P.3d 485, <i>aff'd</i> , 2012 UT 40, 285 P.3d 766	4
<i>Huish v. Sulenta</i> , 2002 WY 139, 54 P.3d 748	10, 18, 23
<i>IHC Health Servs., Inc. v. D & K Mgmt., Inc.</i> , 2003 UT 5, 73 P.3d 320	22
<i>IHC Health Servs., Inc. v. D&K Mgmt., Inc.</i> , 2008 UT 73, 196 P.3d 588	22
<i>Isbell v. County of Sonoma</i> , 21 Cal.3d 61, 577 P.2d 188 (1978)	Passim
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938)	25
<i>Lathrem v. Foreman</i> , 168 Ohio St. 186, 151 N.E.2d 905 (Ohio 1958)	10, 18
<i>Los Angeles Adjustment Bureau, Inc. v. Noonan</i> , 181 Cal. App. 2d Supp. 834 (1960)	13
<i>Mickelson v. Craigco, Inc.</i> , 767 P.2d 561 (Utah 1989)	Passim
<i>Mullins v. Bellis</i> , 90 N.Y.S. 2d 27 (City Ct. 1949)	13
<i>PC Crane Service, LLC v. McQueen Masonry, Inc.</i> , 2012 UT App 61, 273 P.3d 396	29, 30
<i>Pitts v. Pine Meadow Ranch, Inc.</i> , 589 P.2d 767 (Utah 1978)	18

<i>Provo City Corp. v. Thompson</i> , 2004 UT 14, 86 P.3d 735	4
<i>Raymond James Fin. Servcs., Inc. v. Phillips</i> , 126 S.3d 186 (Fla. 2013)	28
<i>Rose v. Office of Prof'l Conduct</i> , 2017 UT 50, 424 P.3d 134	21
<i>Sniadach v. Family Finance Corp. of Bay View</i> , 395 U.S. 337 (1969)	23
<i>Snyder v. Labor Comm'n</i> , 2017 UT App 187, 405 P.3d 084	21
<i>Spangler v. District Court of Salt Lake County</i> , 104 Utah 584, 140 P.2d 755 (1943)	14
<i>State v. Baker</i> , 963 P.2d 801 (Utah Ct. App. 1998)	16
<i>State v. Gutierrez-Perez</i> , 2014 UT 11, 337 P.3d 205	14, 16
<i>State v. Maese</i> , 2010 UT App 106, 236 P.3d 155	21, 22
<i>State v. McCormick</i> , 385 N.W.2d 121 (S.D. 1986)	25
<i>State v. Wanosik</i> , 2003 UT 46, 79 P.3d 937	25
<i>Sullivan v. Hudson</i> , 490 U.S. 877 (1989)	28
<i>Swarb v. Lennox</i> , 405 U.S. 191 (1972)	25
<i>Thorpe v. Washington City</i> , 2010 UT App 297, 243 P.3d 500	27-28
<i>Underwood Farmers Elevator v. Leidholm</i> , 460 N.W.2d 711 (N.D. 1990)	<i>Passim</i>
<i>Utah Dept. of Transp. v. Carlson</i> , 2014 UT 24, 332 P.3d 900	6
<i>Utah Nat'l Bank v. Sears</i> , 13 Utah 172, 44 P. 832 (1896)	10, 18
<i>Valcarce v. Fitzgerald</i> , 961 P.2d 305 (Utah 1998)	30
<i>Wagstaff v. Barnes</i> , 802 P.2d 774 (Utah Ct. App. 1990)	25
<i>White v. Heber City</i> , 82 Utah 547 (1933)	<i>Passim</i>
<i>Worthington & Kimball Const. Co. v. C&A Devel. Co.</i> 777 P.2d 475 (Utah 1989)	<i>Passim</i>

RULES AND STATUTES

PAGE

UTAH R. CIV. P. 1	27
UTAH R. CIV. P. 2	<i>Passim</i>
UTAH R. CIV. P. 54	<i>Passim</i>
UTAH R. CIV. P. 55	<i>Passim</i>
UTAH R. CIV. P. 58A(i)	<i>Passim</i>
UTAH R. CIV. P. 73	18-19, 31
UTAH R. APP. P. 24	30, 32
UTAH CODE ANN. §78B-5-826	<i>Passim</i>
UTAH CODE ANN. §78-27-56.5	26
CAL. CIV CODE § 1133	24

OTHER SOURCES

PAGE

BLACK'S LAW DICTIONARY (9th ed. 2009)	28
---------------------------------------	----

INTRODUCTION

Appellant Safe Home Control, Inc. (“Safe Home” or “Appellant”) has appealed a decision by the Honorable Christine Johnson setting aside a confession of judgment in Safe Home’s favor, and awarding attorneys’ fees to Appellee Jared Munday (“Munday” or “Appellee”). In a succinct and well-reasoned order, Judge Johnson found the Confession of Judgment failed to comply with Rule 58A(i) of the Utah Rules of Civil Procedure on two bases: a) the failure to have a proper verification and jurat; and b) failure to set forth a “specific sum.”¹ Judge Johnson also properly applied Utah’s statute allowing for recovery of fees based upon a writing or contract, since the contract at hand would have allowed Safe Home to recover its fees in an action for confession of judgment. As a result, this Court should affirm Judge Johnson’s decision in its entirety.

Safe Home now contends that the 1933 decision in *White v. Heber City* refutes Judge Johnson’s reliance on the 1989 decision in *Mickelson v. Craigco, Inc.* as to what constitutes a proper jurat and verification. Safe Home’s argument, however, ignores the Supreme Court’s decision in *Worthington & Kimball Const. Co. v. C&A Devel. Co.* 777 P.2d 475 (Utah 1989). These subsequent cases establish that an alleged verification fails when, as here, the affiant himself makes no oath or affirmation in writing. Indeed, the alleged verification in *Worthington* is remarkably similar to the one Safe Home had Munday sign. Since *Worthington* and *Mickelson* are controlling, this Court should find that the verification fails. Because *Mickelson* and *Worthington* address the issue at hand,

¹See R.984-88.

moreover, Safe Home's reliance on extra-jurisdictional cases is unavailing.

Safe Home has also ignored the dramatically changed landscape for confessions of judgment initiated by *D.H. Overmyer Co. v. Frick*, 405 U.S. 174 (1972) and *Swarb v. Lenox*, 405 U.S. 191 (1972), along with the United States Supreme Court's analysis of how Due Process restricts the procedures for judgments by confession. The earlier decisions that Safe Home cites must therefore be read against the backdrop of this modern interpretation of Due Process and limited accordingly. Indeed, the entirety of the Utah scheme for judgments by confession is invalid, under the analysis set forth in *Isbell v. County of Sonoma*, 21 Cal.3d 61, 75, 577 P.2d 188 (1978) (invalidating procedure virtually identical to UTAH R. CIV. P. 58A(i)). The critical missing factor as identified in *Isbell* is the lack of assurance that the constitutional rights to a jury trial are freely and knowingly waived.

Safe Home also fails to refute Judge Johnson's finding that the jurat was inadequate because it failed to include that Munday was signing voluntarily and that he had presented identification to the notary. Safe Home's failure to address this dispositive argument is also fatal to its appeal.

Safe Home's arguments as to the "sum certain" also ignore Judge Johnson's sound reasoning on this point. The Confession of Judgment at hand sets out no process, procedure, or calculation for additions to or deductions from the judgment amount. As Judge Johnson noted, "[t]here is no information as to how the decision on those amounts

will be made. ... Any amount that may have been paid on this debt as referenced in the Judgment is not known.”² The discretion provided Safe Home in the Confession of Judgment makes it entirely different from the process embedded in Rules 54 and 55, UTAH R. CIV. P., for judgments and default judgments in general, and Safe Home’s analogy to those rules must fail as a result.

Safe Home also argues that Munday waived his right to contest the specified sum. Safe Home, however, never presented this argument to Judge Johnson, and therefore it is Safe Home who has waived this argument.

Finally, Safe Home contends that Judge Johnson erred in awarding Munday his attorneys’ fees pursuant to UTAH CODE ANN. §78B-5-826, by claiming that the process for recording a judgment by confession is not a “civil action.” In doing so, Safe Home ignores clear Utah case law interpreting the statute at issue as implementing a simple degree of fairness and equity. Safe Home would have recovered attorneys’ fees if it was successful; indeed, it argues repeatedly that the Confession of Judgment here could be so augmented. If Safe Home could have recovered fees, so could Munday.

STATEMENT OF THE ISSUES

Generally, Munday does not take issue with Safe Home’s statement of the issues on appeal. [App. Brief, at 1-2.] Munday does, however, wish to supplement that statement with two additional matters and one other issue for the Court to consider.

First, Safe Home argues that Munday had waived his arguments as to the

² R.0986.

Confession of Judgment not being for a “sum certain.” [*Id.* at 19-20.] Safe Home, however, did not argue this point below. Among other things, Safe Home does not cite where in the record it preserved this argument.

Second, the standard of review of attorneys’ fees is correctness because Safe Home is challenging whether fees were allowable under the UTAH CODE ANN. § 78B-5-826. *See Federated Capital Corp. v. Haner*, 2015 UT App 132, ¶ 10, 351 P.3d 816 (citing *Hooban v. Unicity Int’l, Inc.*, 2009 UT App 287, ¶¶ 6–7, 220 P.3d 485, *aff’d*, 2012 UT 40, 285 P.3d 766). However, Safe Home is not challenging in this appeal the amount of fees Judge Johnson awarded to Munday.

Third, if this Court finds that Safe Home complied with the applicable Confession of Judgment statute and rule (which Munday believes the Court will not find), then Munday argues that the applicable statute and rule violates Utah and federal guarantees of Due Process. *See Isbell v. County of Sonoma*, 21 Cal.3d 61, 75, 577 P.2d 188 (1978) (invalidating procedure virtually identical to UTAH R. CIV. P. 58A(i)). “Constitutional challenges to statutes present questions of law, which [this Court] review[s] for correctness.” *Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 5, 86 P.3d 735.

STATEMENT OF THE CASE

I. The Case.

On November 18, 2015, Munday and Safe Home signed a “2016 Regional Manager Agreement,” (the “Agreement”) pursuant to which Munday agreed to provide certain services to Safe Home. [R.0010-30.] Pursuant to that Agreement, Safe Home

paid Munday a “Signing Bonus” of \$160,000. [R.0013.] Also signed at that time was paperwork ostensibly allowing Safe Home to obtain a Judgment by Confession against Munday for the \$160,000 Signing Bonus plus an unspecified amount for attorney’s fees and costs, plus interest at “the statutory post-judgment interest rate,” less amounts paid by Munday before entry of judgment. [R.0001-03.] Munday thus had no way to know how much any judgment would be at the time he signed the Agreement. Safe Home’s right to file the judgment was also contingent on Munday’s alleged breach of the Agreement, such as failing to work for the specified term.

Munday’s signature on the Judgment by Confession was notarized by Edward Michael Prignano, the general counsel for Safe Home. [R.0002.] The jurat says that the statement was “subscribed and sworn” before Mr. Prignano, but nothing says what those words mean. [See *id.*] More importantly, Munday does not himself say he swore to anything. [See *id.*]

II. The Proceedings Below

Munday stopped working for Safe Home, claiming Safe Home had breached the Agreement. [See R.0031-32.] On April 18, 2016, Safe Home attempted to have the Judgment by Confession entered. [See R.0001-03.] On April 27, 2016, Munday filed his Motion to Set the Judgment Aside. [R.0004-09.] On July 29, 2016, the Court directed that an evidentiary hearing be held in the matter. [R.0112.] Due to stipulated continuances between the parties and accepted by the Court, the hearing took place on

June 15, 2017. [R.0272-274.] The primary issues at that hearing focused on whether the Confession of Judgment provision in the Agreement was unconscionable, and whether enforcement of the Judgment by Confession would violate Due Process pursuant to *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 177, 92 S. Ct. 775 (1972). [See, e.g., R.0004-09; R.0088-100.] The parties, however, briefed a large number of issues.³

On October 20, 2017, the Honorable Christine Johnson granted Munday's Motion to Set Aside the Judgment by Confession. [R.0984-0988.] In so doing, Judge Johnson sidestepped the primary issues raised at the evidentiary hearing. Instead, Judge Johnson ruled that Safe Home failed to observe the requirements set forth in UTAH R. CIV. P. 58A(i), which sets out the requires for a judgment by confession. [R.0984-988.] Judge Johnson specifically found that Safe Home did not provide the "verified statement" by Munday that Rule 58A(i) requires, and specifically rejected the notion that the jurat in connection with the notarization of Munday's signature was sufficient. [R.0985.] Judge

³ Judge Johnson did not decide many of the issues, including the issue of unconscionability that was the subject of the evidentiary hearing and Munday's constitutional challenge. In the event this Court accepts Safe Home's arguments in this appeal, Munday respectfully submits that this case should be remanded to the District Court to consider in the first instance the additional issues briefed but not decided. See, e.g., *Utah Dept. of Transp. v. Carlson*, 2014 UT 24, ¶ 29, 332 P.3d 900 (remanding "to allow district court to address the [constitutional] issue in the first instance").

Johnson also found that the use of a formula to determine the exact amount owed, along with the lack of figures to be used in that formula, resulted in the judgment not stating the “specific sum” that Rule 58A(i) requires. [R.0986.]

Munday then filed a Motion for Attorneys’ Fees pursuant to UTAH CODE ANN. §78B-5-826, based upon the Agreement between Munday and Safe Home granted Safe Home the right to recover costs and attorneys’ fees in any action on the judgment by confession. [R.0989-997.] On November 29, 2017, Judge Johnson granted Munday’s motion in full. [R.1079-1085.] She specifically held that Munday was the “prevailing party,” that an action for a judgment by confession was a “civil action” to which §78B-5-826 applied, that Munday’s litigation strategy was appropriate, and that Munday’s evidentiary support for its motion was sufficient.⁴ [*Id.*] Safe Home filed its Notice of Appeal on February 23, 2018. [R.1196-1198.]

SUMMARY OF ARGUMENT

Judge Johnson’s orders below were correct.

1) There was not a valid statement verified by Munday along with the

⁴ This is far from the first judgment by confession proceeding that Safe Home has lost on nearly identical paperwork. *See e.g. Safe Home v. Grenny*, Case No. 170400797, *Safe Home v. Lee*, Case No. 170400702, *Safe Home v. Elgin*, Case No. 170400746, *Safe Home v. Clyde*, Case No. 170400314, *Safe Home v. Van Oakes*, Case No. 170400176, *Safe Home v. Sprinkle*, Case No. 140401152. [*See* R.0502-0504.]

Confession of Judgment. A basic requirement of a judgment by confession is that it be accompanied by a “statement[] verified by the defendant[.]” UTAH R. CIV. PROC. 58A(i). Utah law is clear that in order for there to be a valid verification, the affiant must himself or herself affirm the contents of the document under written oath. *See Mickelson v. Craigco, Inc.*, 767 P.2d 561, 564 (Utah 1989); *Worthington & Kimball Const. Co. v. C&A Devel. Co.*, 777 P.2d 475, 477 (Utah 1989). Here, the notary, and not Munday, signed after “Subscribed and Sworn” making this case distinctly similar to *Worthington*. Because of this, *White v. Heber City*, 82 Utah 547 (Utah 1933), Safe Home’s primary case, is inapposite.

2) The jurat did not contain necessary statements, including statements that Munday signed the papers voluntarily, or that Munday provided proof of his identity to the notary. Safe Home does not argue this issue on appeal, and the judgment should be affirmed on this ground alone.

3) The Confession of Judgment did not contain the necessary “specified sum” that UTAH R. CIV. P. 58A(i)(1) requires. By its express terms, and as Judge Johnson found, the Confession of Judgment had discretionary language allowing for increases and deductions of unspecified amounts. There was no method delineated in the Confession of Judgment for calculating what payments or other deductions would be made.

4) Safe Home’s waiver argument as to the “specified sum” was not presented to the district court. As a result, this waiver argument is itself waived.

5) The entire scheme for confession of judgments is unconstitutional as violative of Due Process. Because a confession of judgment waives the constitutional right to a jury trial, the waiver must be knowing and voluntary. The California Supreme Court ruled that a virtually identical statutory scheme was facially unconstitutional due to the lack of anything to suggest that defendant knowingly and voluntarily waived this important right. Munday respectfully asks this Court to take this opportunity to strike down UTAH R. CIV. PROC. 58A(i), assuming it finds that Safe Home has otherwise complied with the statute.

6) Judge Johnson appropriately awarded attorneys' fees pursuant to UTAH CODE ANN. §78B-5-826, and Safe Home's argument that a Confession of Judgment is not a "civil action" cannot withstand scrutiny. Among other things, that statute's use of the phrase "civil action" must be read in conjunction with Rule 58A and the UTAH R. CIV. P. overall. This includes Rule 2, which states "[t]here shall be one form of action to be known as 'civil action.'" Safe Home also does not argue that if the statute applies, Judge Johnson incorrectly used her discretion in awarding fees. Safe Home also does not argue on appeal that the amount of fees awarded was incorrect.

ARGUMENT

I. Judge Johnson's Order Regarding The Invalidity Of The Confession Of Judgment Was Correct.

The United States Supreme Court has called a judgment by confession "the loosest way of binding a man's property that was ever devised in any civilized country." *D.H.*

Overmyer Co., 405 U.S. at 177 (quoting *Alderman v. Diament*, 7 N.J.L. 197, 198 (1824)). As a result, judgments by confession are disfavored. *Huish v. Sulenta*, 2002 WY 139, 54 P.3d 748, 752-53. Statutes and rules for a confession of judgment are also “viewed with skepticism” and “strictly construed.” *Underwood Farmers Elevator v. Leidholm*, 460 N.W.2d 711, 713 (N.D. 1990) (interpreting Rule 68 of North Dakota Rules of Civil Procedure); *Huish*, 54 P.3d at 752-53. Poorly drafted procedures for judgment by confession do not pass Constitutional muster. *Isbell*, 21 Cal.3d at 75 (invalidating procedure virtually identical to UTAH R. CIV. P. 58A(i)). A party seeking a judgment by confession must also strictly comply with the statutory process. *Utah Nat’l Bank v. Sears*, 13 Utah 172, 177, 44 P. 832 (1896). Failure to do so renders the judgment void. *Id. Accord Lathrem v. Foreman*, 168 Ohio St. 186, 151 N.E.2d 905 (Ohio 1958).

A. Judge Johnson Correctly Found That The Confession of Judgment Lacks A Valid Verification.

A valid judgment by confession requires a statement verified by the defendant. UTAH R. CIV. P. 58A(i). The Utah Supreme Court has held that for there to be a valid verification, “(1) there must be a correct written oath or affirmation, and (2) it must be signed by the affiant in the presence of a notary or other person authorized to take oaths, and (3) the latter must affix a proper jurat.” *Mickelson*, 767 P.2d at 564. A simple notarization does not suffice. *Determination of Rights to Use of Water*, 2008 UT 25, ¶ 18, 182 P.3d 362.

As Judge Johnson noted, the Confession of Judgment at issue does not have a

valid verification. In *Worthington*, 777 P.2d 475, the Utah Supreme Court addressed a situation similar to that here. There, the affiant signed a notice of lien. He, however, “did not sign a correct written oath in the presence of a notary.” *Id.* at 477. As the Utah Supreme Court noted, “[a]ffixed below the claimant’s signature the following certification appears:

STATE OF UTAH)

County of *Salt Lake*)

On this *13th* day of *January 1982*, Personally appeared before me Edwin N. Kmball [sic], who duly acknowledged to me that he has executed this notice and that he has read the contents thereof, that the same is true of his own knowledge.

/s/ Arnold Allred

Notary Public

residing at: *6586 W. 3500 S.*

(seal)

My Commission expires

18 Sept 85

”5

Id. As the Supreme Court found:

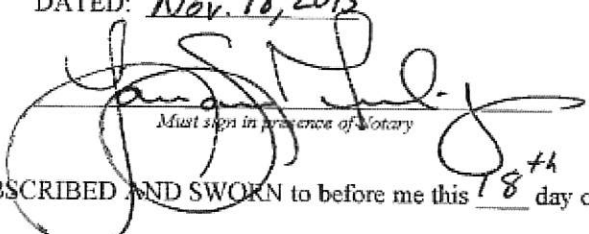
The foregoing was not signed by the claimant, but was signed instead by the notary public. It is a certification by a notary public that the claimant acknowledged to him that he executed the notice of lien, that he had read the contents, and that the same were true. However, in order to have a valid verification it is the claimant, and not the notary, who must sign that the contents are true.

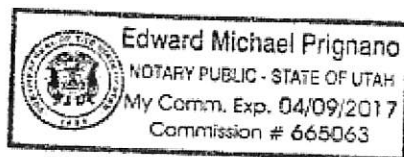
Id.

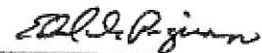
⁵ This certification is an image from *Worthington* as displayed on Westlaw.

As in *Worthington*, Munday did not validly verify the Confession of Judgment.

The signature blocks on the Confession here are:

DATED: Nov. 18, 2015

Must sign in presence of Notary
SUBSCRIBED AND SWORN to before me this 18th day of November, 2015.




NOTARY PUBLIC

[R.0002.]

In other words, Munday signed above a line stating, “Must sign in presence of Notary.” And then the notary, Safe Home’s counsel, Mr. Prignano, asserts that the information was subscribed and sworn to him. Munday did not sign any written oath or affirmation. With a striking resemblance to the invalid verification in *Worthington*, this Court should reach the same conclusion as the Supreme Court did there.

To avoid the clear facial failing of the Confession of Judgment, Safe Home contends that Rule 58A(i)(2) has no requirement for a verification to be under “oath or affirmation.” [App. Br. at 12.] The Utah Supreme Court, however, has defined specifically what is required for there to be a “valid verification,” which includes “a correct written oath or affirmation[.]” *Mickelson*, 767 P.2d at 564. Rule 58A(i)(2)’s use of “verification” directly imports the Supreme Court’s definition for “valid verification”

as defined in *Mickelson* and subsequently used in *Worthington*.⁶

Safe Home's argument that *Mickelson* hinged upon the mechanic's lien statute requiring a verification to be under "the oath [of the claimant]"⁷ ignores the holding of *Mickelson*. The issue there was whether the verification "was invalid [because the claimant] admittedly did not make an oral averment as to the truthfulness of [the lien's] contents to the notary public before whom he appeared." *Id.* at 563. Even with statutory language requiring an oath, the Supreme Court held "[t]here is no minimum requirement that an oath be administered to the affiant or that the affiant must speak an oral oath or affirmation or raise his or her hand." *Id.* at 564 (overruling prior precedent to the contrary). In other words, the Supreme Court dismissed the formalities of an *oral* oath, but specifically reaffirmed precedent regarding "the form of verification[,]" *in writing*, which is required for there to be compliance with the applicable statute requiring "verification." *Id.* (citing *First Security Mortgage Corp. v. Hansen*, 631 P.2d 919 (Utah

⁶ *Los Angeles Adjustment Bureau, Inc. v. Noonan*, 181 Cal. App. 2d Supp. 834, 839 (1960), cited by Safe Home (App. at 13-14), is inapplicable as the California Supreme Court subsequently invalidated a procedure similar to Rule 58A. *Isbell*, 21 Cal.3d at 75. The other cases Safe Home cites – *Coast to Coast Demolition & Crushing, Inc. v. Real Equity Pursuit, LLC*, 226 P.3d 605 (Nev. 2010) and *Mullins v. Bellis*, 90 N.Y.S. 2d 27 (City Ct. 1949) – directly conflict with Utah Supreme Court precedent.

⁷ App. Br. at 12.

1981); *Graff v. Boise Cascade Corp.*, 660 P.2d 721 (Utah 1983)). Thus, *Mickelson* holds that a proper verification requires a written oath, regardless of formalities as to oral oaths. *See Mickelson*, 767 P.2d at 564-65 (J. Zimmerman, concurring) (discussing “technical swearing requirements”); *id.* at 566 (J. Durham, concurring) (“I do not join the Court wherein it fails and refuses to follow likewise good precedent which invalidates the notice of a mechanic’s lien which is not verified under oath.”).

Subsequently, the Supreme Court has stated as much. In *State v. Gutierrez-Perez*, 2014 UT 11, 337 P.3d 205, the Supreme Court held that the *Mickelson* “requirements were clearly set forth in order to establish a rule for a valid **verification**.” *Id.* at ¶ 11 (emphasis in original; citation omitted). And subsumed within those requirements is “that ‘there must be a correct **written** oath or affirmation.’” *Id.* (citation omitted; emphasis added).

Finally, Safe Home puts much emphasis on the 1933 decision in *White v. Heber City*, 26 P.2d 333 (1933). [App. Br. at 12-13.] Safe Home’s reliance is misplaced for multiple reasons. First, Safe Home fails to discuss, let alone cite, subsequent decisions from the Utah Supreme Court, including *Worthington & Kimball Const. Co.*, 777 P.2d 475, which directly impact the issues here. Second, the *Mickelson* court, while not directly overruling *White*, discussed *White* in the same breath as *Spangler v. District Court of Salt Lake County*, 104 Utah 584, 140 P.2d 755 (1943) and *Colman v. Schwendiman*, 680 P.2d 29 (Utah 1984), both of which *Mickelson* overruled. *See* 767

P.2d at 564. At a minimum, *Mickelson* must be read to limit the extent of *White*.

Third, *White*'s holding is inapplicable to the facts here. In *White*, the main issue was what constituted a proper "verification" for the presentation of a claim to a city, so that the city could decide whether to accept or reject the claim. The City claimed that the verification standard should be the same as required for verification of pleadings, and that the verification at hand did not meet this standard. The court in *White* rejected this argument, saying that "such particularity was not required with respect to a claim presented to a municipality, as opposed to a claim in court." 26 P.2d at 335. The Utah Supreme Court noted the "principal purpose" of the statute was "'to afford the proper officers an opportunity to look into the facts and circumstances connected with the occurrence; to preserve the evidence of the existing conditions; to determine the liability of the municipality; and, in case liability exists, to effect a settlement without resort to litigation.'" *Id.* (citing *Connor v. Salt Lake City*, 28 Utah 248, 78 P. 479, 481). Considering the principal purpose, the Supreme Court held that "[i]t is not seriously contended that the time, place, and circumstances of the injury and damage were not sufficiently stated. Thus, 'the principal purpose' as stated in *Connor* requiring the presentation of a claim was accomplished." *Id.*

Thus, *White* is limited to cases involving the presentation of claims to a governmental agency. It has nothing to do with the verification required for papers filed in Court – particularly when those papers serve as the only basis for a judgment.

Moreover, even if *White* somehow applied, Safe Home fails to explain how the verification here was sufficient to meet the principal purpose of Rule 58A(i). Indeed, subsequent decisions, including *Mickelson* and *Worthington*, have specifically stated that for there to be a proper verification, there must be a written oath signed by the person in question. *See, e.g., Gutierrez-Perez*, 2014 UT 11, ¶ 11.

B. Safe Home Fails To Address Judge Johnson’s Other Findings Regarding An Inadequate Jurat.

Safe Home fails to appeal Judge Johnson’s finding that the Confession of Judgment failed to have a proper jurat. As Judge Johnson found, the Confession had “no indication that the statement was voluntarily signed[]” and “there is no indication that the signer of the document produced evidence of his identity.” [R.0985.] Safe Home’s failure to provide any argument as to this point is fatal to its appeal. This court has “made clear that an appellant must address all of the circumstances upon which the court’s decision [below] was based.” *State v. Baker*, 963 P.2d 801, 810 (Utah Ct. App. 1998) (refusing to consider propriety of trial court’s sentencing decision because defendant challenged only two of four findings upon which the sentencing decision was based).⁸

⁸ Safe Home’s failure to address the jurat argument is even more curious considering that Munday argued the very issue in his Rule 10 Motion to this Court. [See App. Docket, 04/04/2018, at 12-13.]

C. Judge Johnson Correctly Found That The Confession Of Judgment Was Not For A “Specified Sum.”

Rule 58A(i) requires that a confession of judgment “concisely state the claim and that the specified sum is due or to become due[]” and that “[i]f the judgment is for the purpose of securing the plaintiff against a contingent liability, the statement must state concisely the claim and that the specified sum does not exceed the liability.” UTAH R. CIV. P. 58A(i)(1)-(2). In addressing the first prong, Judge Johnson applied a common-sense approach to the “specific sum” requirement. As she held:

The equation given here to figure out the amount owed does not amount to a “specific sum.” It includes that certain amounts “may” be augmented. There is no information as to how the decision on those amounts will be made. The amount of attorneys’ fees and costs is unspecified. Any amount that may have been paid on this debt as referenced in the Judgment is not known. There was no final specified amount here for Munday to verify, had the statement been properly verified. Rule 58A requires that the “specified sum” be verified, and this judgment fails to meet that requirement.

[R.0986.]

Safe Home does not address Judge Johnson’s analysis. Rather, Safe Home latches onto one phrase: “final specified amount[.]” [App. Br. at 15.] In doing so, Safe Home ignores that its Confession of Judgment contains discretion and lacks any method of calculating the “specified sum.”

Rather than address Judge Johnson’s analysis, Safe Home focuses on general judgments under Rule 54 and default judgments under Rule 55, along with the attorneys’ fees motions under Rule 73. [App. Br. at 15-18.] Safe Home’s argument ignores the distinctive nature of confessions of judgment, which the United States Supreme Court

called “the loosest way of binding a man’s property that was ever devised in any civilized country.” *D.H. Overmyer Co.*, 405 U.S. at 177 (citation omitted). Because confessions of judgment deprive a debtor of all due process, courts strictly scrutinize the entry of such judgments. *See, e.g., Huish*, 54 P.3d at 752-53; *Leidholm*, 460 N.W.2d at 713; *Isbell*, 21 Cal.3d at 75; *Utah Nat’l Bank*, 13 Utah at 177; *Lathrem*, 168 Ohio St. at 188.

On the other hand, with default judgments, a party has been served notice, had an opportunity to defend, and has otherwise not appeared. *See* UTAH R. CIV. P. 55(a). Moreover, Rule 55 requires an evidentiary hearing if, among other reasons, a claim is not for a “sum certain.” *Id.* at 55(b)(2). In addressing this provision, the Utah Supreme Court has required that a plaintiff put forth “credible evidence” of the claimed amount, even if the complaint sets forth a certain sum. *See Cadlerock Joint Venture II, LP v. Envelope Packaging of Utah, Inc.*, 2011 UT App 98, ¶¶ 11-13, 251 P.3d 837 (discussing Supreme Court precedent). For example, in *Pitts v. Pine Meadow Ranch, Inc.*, the Utah Supreme Court reversed a default judgment where the complaint set forth damages of \$16,000 for damage to real property, with \$5,000 being the value of destroyed trees and punitive damages of \$10,000. 589 P.2d 767, 768-69 (Utah 1978). Even with numbers set forth in the complaint, the Utah Supreme Court reversed the entry of a default judgment and sent the matter back to the trial court. *Id.* at 769.⁹

⁹ Rules 54 and 73 are inapposite. In both contexts, judgments have been entered after full litigation. Furthermore, Rule 73 contemplates motion practice to determine the amount

As noted above, the calculation set forth in the Confession of Judgment is not for a “sum certain” or “specified sum.” It allowed for augmentation by discretion. It did not provide any method of calculation. And there was no statement as to payments applied.¹⁰

Safe Home points to “Representative Confessions of Judgment entered in Utah” in support of its argument that common-sense allegedly dictates confessions of judgment may be augmented. [App. 19, Ex. E.] Safe Home’s “representative” sample, however, omits numerous directly relevant decisions. In the following cases, as provided to Judge Johnson below [see R.0502-504],¹¹ judges rejected Safe Home’s confessions of judgment on similar grounds as Judge Johnson did here: *Safe Home v. Elgin*, Case No. 170400746; *Safe Home v. Clyde*, Case No. 170400314; *Safe Home v. Van Oakes*, Case No.

of attorneys’ fees, including an opportunity to oppose. *See generally* UTAH R. CIV. P. 73.

¹⁰ In the District Court, Munday argued that \$80,000 of the signing bonus was paid to buy him out of a previous contract, thus benefiting Safe Home. Munday sought a credit for that amount. [See, e.g., R.0289-290; R.0464; R.0471; R.0473; R.808.] Thus, there was a dispute as to what payments had been made, if Munday was liable, further rendering the Confession of Judgment lacking a “specified sum.”

¹¹ While Safe Home has cherry-picked confession of judgment cases from across the State, Munday provided Judge Johnson with all of the cases in which Safe Home filed a seemingly identical confession of judgment, at that point in time, including the decisions reached by each district court judge. [See *id.*]

170400176; and *Safe Home v. Sprinkle*, Case No. 140401152. [See R.0502-0504.] And there are other similar cases, including: *Swick v. Preble*, Case No. 160400551 (4th Jud. Dist., J. Taylor) [Munday App'x at 1] and *ARM Security, Inc. v. Gines*, Case No. 160401127 (4th Jud. Dist., J. Low) [Munday App'x at 2].

As to those cases submitted by Safe Home, a review of the confessions of judgment at issues show at least some are different from Safe Home's discretionary and facially inadequate Confession at issue here. For example, in *Cedar Springs Homeowners Association, Inc. v. Graham*, Case No. 150700893, the signed Confession provided a balance owing and set forth a method for computing a remaining balance, including that Cedar Springs would file "an affidavit stating the delinquent balance owing by Graham." [Munday App'x. at 3.] Likewise, in *American Management Services, Inc. v. Houston*, Case No. 160500018, the Confession of Judgment had a specific itemization for fees and interest, along with specific payments to be applied. [Munday App'x at 4.] Those judgments are thus distinguishable from the one at hand, which contains no provision for a declaration or determination of figures to be used in the formula.¹²

Safe Home also argues that even if the augmentation portions of the Confession of

¹² In each of the district court cases cited by Safe Home, not one defendant appeared with counsel to contest the entry of judgment. Counsel has reviewed each docket for each case, and there is no attorney designation for any of the debtors. As such, judgments were entered without any challenge.

Judgment are invalid, that the Confession of Judgment should still stand. [App. Br. at 19.] Safe Home has not developed this argument sufficiently to be addressed on appeal. An issue is inadequately briefed if “the argument merely contains bald citations to authority [without] development of that authority and reasoned analysis based on that authority.” *Bank of America v. Adamson*, 2017 UT 2, ¶ 11, 391 P.3d 196 (alteration in original) (citation and internal quotations marks omitted). While inadequate briefing is not “an absolute bar to review of an argument on appeal,” a party that “fails to adequately brief an issue will almost certainly fail to carry its burden of persuasion[.]” *Rose v. Office of Prof'l Conduct*, 2017 UT 50, ¶ 64, 424 P.3d 134 (citations and internal quotation marks omitted).¹³

The argument fails in any event. Safe Home fails to explain how the augmentation is separable from the Confession of Judgment overall. Moreover, Safe Home ignores that Munday contended below that he deserved, at a minimum, a credit for \$80,000. Therefore, not only is the augmentation suspect, but so is the principal amount.¹⁴

¹³ Cited in *Snyder v. Labor Comm'n*, 2017 UT App 187, ¶ 13, 405 P.3d 084. Moreover, Safe Home did not present this argument to the District Court either waiving right to review on appeal. See *infra* p. 22 (citing *State v. Maese*, 2010 UT App 106, ¶ 13, 236 P.3d 155).

¹⁴ See *supra* Note 10 (providing citations to where Munday argued below he deserved an \$80,000 credit, at a minimum).

Finally, Safe Home did not raise its “waiver” argument to the trial court. Therefore, the issue is not properly on appeal. *Maese*, 2010 UT App 106, ¶ 13 (“[I]n order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” (citation and internal quotation marks omitted)). Again, even if the Court addresses the argument, it fails. First, Safe Home cites no case where waiver was applied to a confession of judgment. Second, Safe Home bears the burden of proof to prove waiver. *See, e.g., IHC Health Servs., Inc. v. D&K Mgmt., Inc.*, 2008 UT 73, ¶ 16, 196 P.3d 588. Moreover, “waiver is an intensely fact dependent question.” *Id.* (citing *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2003 UT 5, ¶ 7, 73 P.3d 320) (alteration omitted). Safe Home is improperly making this factually-sensitive inquiry in the first instance in the Court of Appeals, and its argument on this point should be rejected accordingly.

D. Rule 58A(i) Is Unconstitutional.

As currently written, UTAH R. CIV. P 58A(i), which sets out the procedure for a judgment by confession, violates the Due Process of the United States Constitution. In particular, the Rule fails to require the plaintiff to place evidence before the Court of the defendant’s knowing and voluntary waiver of the right to notice and an opportunity to be heard as to the amount owed. *Isbell v. County of Sonoma*, 21 Cal.3d 61, 577 P.2d 188 (1978).

As previously noted, the United States Supreme Court has called a judgment by

confession “the loosest way of binding a man's property that was ever devised in any civilized country.” *D.H. Overmyer Co.*, 405 U.S. at 177 (quoting *Alderman*, 7 N.J.L. at 198). As a result, judgments by confession are disfavored. *Huish*, 54 P.3d at 752-53. Indeed, statutes and rules for a confession of judgment are “viewed with skepticism” and “strictly construed.” *Leidholm*, 460 N.W.2d at 713 (interpreting Rule 68 of North Dakota Rules of Civil Procedure); *Huish*, 54 P.3d at 752-53.

The statutory process for anything that works a summary deprivation of property, even if that deprivation is temporary, must satisfy Due Process by allowing for notice and an opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67 (1972) (invalidating certain processes for prejudgment writs of replevin); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969) (invalidating procedure for summarily garnishing wages before judgment). There can be exceptions only for “extraordinary situations,” *Fuentes*, 407 U.S. at 90-91, or when there is a clear, knowing, and voluntary waiver of that right to process, *D.H. Overmyer Co.*, 405 U.S. at 184. Conversely, the process for a judgment by confession is invalid if the summary process fails to obtain evidence of one of these two exceptions.

Isbell v. County of Sonoma, 21 Cal.3d 61 (1978) is the lead case to evaluate a confession of judgment statute for Due Process concerns. In that case, the California Supreme court invalidated a statute substantially similar to the one here. Both the California confession of judgment statute and Rule 58A(i) allow for a judgment to be

entered based on a writing, signed by the defendant under oath. The judgment must be for a specified sum, must state concisely the facts out of which it arose, and show that the sum is justly due. *Compare* former CAL. CIV CODE § 1133 (quoted in *Isbell*, 21 Cal.3d at 67 n.3) *with* UTAH R. CIV. P. 58A(i).

The California Supreme Court held that the debtor's "execution of the confession of judgment ... fails to establish a *knowing* and *intelligent* waiver of constitutional rights. *Isbell*, 21 Cal.3d at 70 (emphasis in original)). It also noted that the statute did not provide for a case-by-case review to determine the validity of the waiver. *Id.* at 71. It also said that the ability to seek post-judgment relief is an insufficient cure because it does not occur at a "meaningful time." *Id.* at 71-72.¹⁵ As such, the California statute for judgments by confession was unconstitutional.

Rule 58A(i) violates the *Isbell* prescription for Due Process. The Rule does not require prejudgment notice and an opportunity to be heard before judgment by confession is entered. The only evidence required is a "verified statement" by defendant as to certain facts, with nothing additional to show the confession is knowing and voluntary. Nothing in the rule provides for a case by case determination of the waiver's validity. Rule 58A(i) also says that the court clerk "must sign the judgment for the specified sum." As *Isbell*

¹⁵ The California Supreme Court's ruling was also strictly prospective in nature and did not affect judgments entered before that time. *Isbell*, 21 Cal.3d at 74-75. Munday similarly seeks only prospective relief here.

notes, the risk of an involuntary or knowing waiver is high, and the signed statement (which need not be made with the assistance of counsel) is not in and of itself proof of a valid waiver. *Isbell*, 21 Cal.3d at 64, 70-71. As *Isbell* also notes, the right to a motion to set aside the judgment is insufficient to cure the deficiency. *Id.* at 75. As such, Rule 58A(i) fails to pass constitutional muster, and the judgment at hand must be set aside.

Even if the statute or rule authorizing judgments by confession passes Constitutional muster, no such judgment is valid unless the defendant voluntarily, intelligently, and knowingly waived his or her Due Process rights to prejudgment notice and a hearing. *D.H. Overmyer Co.*, 405 U.S. at 187; *Swarb v. Lennox*, 405 U.S. 191 (1972). As a result, the Court must conduct a “case-by-case, fact-specific review” of the facts leading to the judgment by confession whenever that judgment is challenged. *Leidholm*, 460 N.W.2d at 714. The creditor also bears the burden of proof to establish the validity of the waiver. *Isbell*, 21 Cal.3d at 75. This is because the waiver is of a constitutional right. *State v. McCormick*, 385 N.W.2d 121, 124 (S.D. 1986). *See also State v. Wanosik*, 2003 UT 46, ¶ 15, 79 P.3d 937 (prosecution bears burden of proving waiver of constitutional rights; voluntarily absence of presence from hearing may not be presumed). In addition, the Courts must “indulge every reasonable presumption against the waiver of fundamental constitutional rights.” *Wagstaff v. Barnes*, 802 P.2d 774, 778 (Utah App. 1990) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). *See also D.H. Overmyer Co.*, 405 U.S. at 186 (no presumed acquiescence of the loss of fundamental

rights).¹⁶

II. The Reciprocal Attorneys' Fees Statute Was Properly Applied by Judge Johnson.

Pursuant to the Reciprocal Fee Statute, “a court may award costs and attorney fees to a prevailing party in a civil action if two main conditions are met.” *Bilanzich v. Lonetti*, 2007 UT 26, ¶ 14, 160 P.3d 1041. The first condition is that “the civil action must be ‘based upon any written contract,’ and the second is that the contract “must ‘allow at least one party to recover attorney’s fees.’” *Id.* (quoting UTAH CODE ANN. §78–27–56.5 (prior version of §78B–5–826). A prerequisite to either of these conditions, moreover, is that the party requesting fees prevail in a civil action based upon a written agreement. *See* UTAH CODE ANN. §78B–5–826 (providing that the court may award attorney fees to a “party that prevails”).

Safe Home argues that a proceeding for a confession of judgment does not constitute a “civil action” as the Reciprocal Fee Statute uses that term. Common sense, however, suggests the opposite. As Judge Johnson succinctly stated:

While [the Confession of Judgment] rule of civil procedure allows litigants to bypass the initial stages of a civil case and proceed straight to judgment,

¹⁶ There are no findings in the record of Munday’s knowing and voluntary waiver of his constitutional rights as Judge Johnson did not need to reach the issue. Therefore, at a minimum, the case should be remanded for consideration of Munday’s constitutional challenge as well as for findings as to knowing and voluntary waiver.

that does not change the fact that a confession of judgment, once entered, is a civil judgment which is subject to collection pursuant to civil procedural rules. Indeed, as noted by Munday, in Utah there is only “one form of action to be known as a ‘civil action.’” URCP 2. The rule which permitted Safe Home’s Confession of Judgment is included among the rules of procedure which govern civil actions. Furthermore, a confession of judgment fits well within the boundaries of a ‘civil judgment’ as defined by Black’s Law Dictionary: “any judicial proceeding, which, if conducted to determination, will result in a judgment or decree. The action is said to terminate at judgment.” BLACK’S LAW DICTIONARY (10th ed. 2014).

[R.1081.]

The Rules of Civil Procedure should be read as a whole. *Aequitas Enterprises, LLC v. Interstate Inv. Grp., LLC*, 2011 UT 82, ¶ 17, 267 P.3d 923. UTAH R. CIV. P. 2 states: “There shall be one form of action to be known as ‘civil action.’” Likewise, Utah R. Civ. P. 1 states that the Rules “shall be liberally construed and applied to achieve the just, speedy, and inexpensive determination of every action.” From these bedrock principles the remaining rules flow, including Rule 58A. Therefore, the use of “civil action” in Rule 58A and, by extension UTAH CODE ANN. §78B–5–826, must be ascribed an expansive interpretation to include all proceedings before a civil court within the state.

Safe Home fails to cite any cases interpreting UTAH CODE ANN. §78B–5–826. Rather, Safe Home latches onto the phrase “civil action” and then cites cases in other contexts. Neither case cited by Safe Home, however, reaches the result it seeks. For example, *Thorpe v. Washington City*, 2010 UT App 297, 243 P.3d 500, involved the question of whether a notice of claim under the Governmental Immunity Act was enough to satisfy bringing a “civil action.” *Id.* at ¶ 14. The Court of Appeals answered

negatively and held that “the Legislature consciously selected the term ‘civil action’ and intended that it be used in accordance with its common and accepted meaning.” *Id.* at ¶ 15. The “common and accepted meaning” of “civil action” is, at a minimum, that used in UTAH R. CIV. P. 2. Moreover, “Black’s Law Dictionary defines ‘civil action’ as ‘[a]n action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation.’” *Raymond James Fin. Servcs., Inc. v. Phillips*, 126 S.3d 186, 190 (Fla. 2013) (citing BLACK’S LAW DICTIONARY 34 (9th ed. 2009)). *See also Sullivan v. Hudson*, 490 U.S. 877, 894 (1989) (similar). This definition fits squarely with UTAH R. CIV. P. 2.

Safe Home’s reliance on *Brigham Young University v. Tremco Consultants, Inc.*, 2007 UT 17, 156 P.3d 782, is equally unavailing. In the cited portion, ¶¶ 46-47, this Court rejected BYU’s attempts to “enforce[] claims [against shareholders of a dissolved corporation] in summary collection proceedings.” *Id.* at ¶ 47. This Court stated that “a civil action means a proceeding subject to the full spectrum of due process safeguards.” *Id.* In stating its concern over shareholders not receiving appropriate due process in the type of proceeding at hand, this Court held that it did “not believe that the legislature intended, or that our constitution would permit, an enforcement proceeding against a non-party shareholder to take place in the setting of a post-judgment collection effort.” *Id.* Neither case addresses the actual scope of what constitutes a “civil action” and, more precisely, whether a confession of judgment falls within that purview. As detailed above,

it clearly does. *See, e.g.*, UTAH R. CIV. P. 2.¹⁷

Furthermore, Safe Home fails to address the policy underlying UTAH CODE ANN. §78B–5–826. The purpose of this statute is to eliminate “unequal exposure to the risk of contractual liability for attorney fees.” *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶ 77, 201 P.3d 966 (quoting *Bilanzich*, 2007 UT 26, ¶ 19). The statute thus “affords to the party not benefited by a contractual attorney fee provision the same access to attorney fees that the provision explicitly affords to the other party.” *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012 UT App 61, ¶ 23, 273 P.3d 396. While discretionary, the Utah Supreme Court has explained that “to creat[e] a level playing field,” the “courts should award fees liberally under [the statute] where pursuing or defending an action results in an unequal exposure to the risk of contractual liability for attorney fees.” *Bilanzich*, 2007 UT 26, at ¶¶ 18, 19. As Judge Johnson correctly found, Safe Home’s argument would reach an absurd result that is an affront to the policy underlying UTAH CODE ANN. §78B–5–826, which is to implement a level playing field.

Overall, Judge Johnson’s conclusion is sound:

¹⁷ More particularly, a properly drafted and implemented process for confession by judgment also provides the due process safeguards that troubled the Court in *Tremco*. As shown below, Rule 58A(i) is *not* that properly drafted statute. The fact that the current scheme does not satisfy Due Process, however, means that the judgment at hand should be set aside regardless.

While Utah's Rules of Civil Procedure permit litigants to seek a judgment without filing a complaint, that does not change the fundamental nature of what confessions of judgment are. They are civil actions governed by civil procedural rules. Moreover, Safe Home's interpretation directs an absurd result, where it is permitted to seek attorney's fees [o]n its claim, while denying the defendant those same fees should the defendant prevail. This would thwart the policy behind the reciprocal attorney fees statute, which is intended to eliminate unequal exposure to the risk of contractual liability for attorney fees.

(*Id.* at 3-4 (citing *PC Crane Service, LLC*, 2012 UT App 61, ¶ 23.) Munday respectfully submits that this Court should reach the same conclusion.

III. Utah R. App. P. 24(a)(9) Claim for Attorneys' Fees.

Pursuant to UTAH R. APP. P. 24(a)(9), Munday is entitled to his attorneys' fees if he prevails on this appeal. Judge Johnson awarded Munday his attorneys' fees below pursuant to UTAH CODE ANN. §78B-5-826. "[W]hen a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." *Holladay Towne Center, LLC v. Brown Family Holdings, LC*, 2008 UT App 420, ¶ 22, 198 P.3d 990 (citing *Valcarce v. Fitzgerald*, 961 P.2d 305, 319 (Utah 1998)). If this Court affirms Judge Johnson's order, including the award of attorneys' fees, then Munday respectfully requests that this Court remand this case to Judge Johnson solely for a determination of Munday's reasonable attorneys' fees incurred on defending this appeal. *See Glew v. Ohio Sav. Bank*, 2007 UT 56, 181 P.3d 791, 798 (granting attorneys' fees on appeal, with remand to District Court to determine amount).

CONCLUSION

Safe Home wants to saddle Munday with a six-figure judgment based upon a

flawed Confession of Judgment. Judge Johnson correctly found that the Confession of Judgment at issue failed in several respects, including a lack of valid verification by Munday. On appeal, Safe Home relies upon *White v. Heber City* from 1933. In doing so, Safe Home ignores Supreme Court precedent from over a half-century later. Safe Home's attempt to distinguish *Mickelson*, upon which Judge Johnson relied, fails based upon the holding in *Mickelson*. While Safe Home focuses on "oath or affirmation," the *Mickelson* Court specifically held that all that is needed is a valid written oath – signed by the defendant himself – for there to be a valid verification. The Confession of Judgment fails in that regard.

Even if there was a valid verification (which there was not), Safe Home fails to address Judge Johnson's order in regards to the missing elements of the jurat. Failing to address that issue on appeal dooms Safe Home's appeal.

In regards to the "specified sum" requirement, Safe Home completely disregards Judge Johnson's sound, common-sense reading of the Confession of Judgment here as impermissibly allowing for discretion, among other flaws. Safe Home opts to make a technical argument about "specified sums" being augmented, pointing to Rules 54, 55, and 73, UTAH R. CIV. P. But even those rules do not provide Safe Home with the support it seeks. Under those rules, there is due process allowed by, at a minimum, an evidentiary hearing. Here, Safe Home wants to strip Munday of all process, and allow for unfettered augmentation of the stated sum in the Confession of Judgment. Indeed,

even the principal amount stated in the Confession of Judgment, \$160,000, is contested because Munday argued below that, at a minimum, he should be afforded an \$80,000 credit. Safe Home fails to address this issue.

Finally, Judge Johnson properly awarded fees and costs to Munday. Judge Johnson rejected Safe Home's argument that a Confession of Judgment does not constitute a "civil action," and Safe Home does not provide any persuasive basis on appeal for this Court to find otherwise. Among other reasons, UTAH R. CIV. P. 2 states that there is one form of action – a "civil action." Safe Home entirely fails to address, let alone even cite, Rule 2. Moreover, Safe Home's argument ignores the primary purpose behind UTAH CODE ANN. §78B-5-826 – to level the playing field. If Safe Home prevailed, it most certainly would have sought fees. There is no sound reason to deprive Munday of the same possibility.

In sum, this Court should: 1) deny Safe Home's Appeal; and 2) remand this case to the District Court for a determination of fees incurred on appeal.

CERTIFICATE OF COMPLIANCE PURSUANT TO UTAH R. APP. P. 24(a)(11) & 24(g)

By signing below, the signor certifies that Defendant/Appellee Jared Munday's opposition brief complies with UTAH R. APP. P. 24(g). The typeface is 13-point font, Times New Roman. The Microsoft Word "word count" tool indicates that the brief has 8,192 words.

DATED this 31st day of October, 2018.

CARMAN LEHNHOFF ISRAELSON, LLP

/s/ Dallis N. Rodhe

Electronically signed with permission

Dallis N. Rohde

THE SALT LAKE LAWYERS



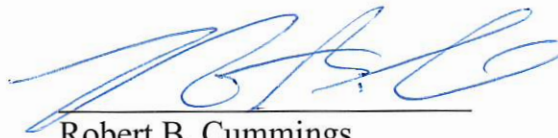
Robert B. Cummings

*Attorneys for Defendant/Appellee Jared
Munday*

**CERTIFICATE OF COMPLIANCE PURSUANT TO UTAH R. APP. P. 21(g),
24(a)(11) & 24(g)**

By signing below, the signor certifies that Defendant/Appellee Jared Munday's opposition brief complies with UTAH R. APP. P. 24(g). The typeface is 13-point font, Times New Roman. The Microsoft Word "word count" tool indicates that the brief has 8,192 words. Likewise, pursuant to UTAH R. APP. P. 21(g), by signing below, the signor certifies that the brief contains no non-public information.

THE SALT LAKE LAWYERS



Robert B. Cummings

*Attorneys for Defendant/Appellee Jared
Munday*

ADDENDUM

IN THE UTAH COURT OF APPEALS

---oooOooo---

<i>SAFE HOME CONTROL, INC.,</i>)	
)	
)	
Plaintiff/Appellant,)	PUBLIC
)	
)	Appellate Case No. 20180155
v.)	
)	District Case No. 160400579
<i>JARED MUNDAY,</i>)	
)	
)	
Defendant/Appellee.)	
)	

BRIEF OF APPELLEE JARED MUNDAY -- ADDENDUM

Appeal from Order Granting Motion to Set Aside Judgment and Granting Attorneys' Fees, *Safe Home Control, Inc.*, Case No. 160400579, Honorable Christine Johnson, Presiding

MITCHELL A. STEPHENS
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E-mail: robert@thesaltlakelawyers.com
Attorneys for Defendant/Appellee Jared Munday

EXHIBIT “1”

JUN 20 2016

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

Alan Swick,	:	
Plaintiff	:	Ruling Denying Judgment by Confession
vs.	:	Date: June 20, 2016
Roger J. Preble,	:	Case Number: 160400551
Defendant	:	Division VII: Judge James R. Taylor

This matter is before the Court because the Plaintiff has asked the Court to enter judgment. The Plaintiff has filed a "Confession of Judgment", without further complaint or pleading and has submitted the proposed judgment. There is nothing in the Court file to indicate that any summons or other process has been provided to the Defendant. The "Confession of Judgment" includes the statement that the Defendant "hereby authorizes and consents to the entry of Judgment by Confession against him in the principal amount of \$10,000 "plus interest thereon at the statutory post-judgment interest rate until paid . . . less such amounts as the Judgment Debtor shall have paid to Judgment Creditor between the date of execution of the Confession of Judgment and the date the Judgment maybe filed with the Court." The stipulation also states that "[i]t is further agreed that the Judgment Amount shall be determined by subtracting those payments, if any, that Judgment Creditor receives from Judgment Debtor after the date of this Confession of Judgment, and adding attorneys' fees, costs, and any applicable interest on said amount." The statement includes a stipulation that "[j]udgment creditor hereby expressly

stipulates and agrees that the sum that is specified as the Judgment Amount shall be deemed to be “justly due” and shall be deemed to constitute “a specified sum” within the scope of the Utah Rules of Civil Procedure.”

The “Confession of Judgment” was signed on October 16, 2012 and filed with the Court on April 13, 2016.

Rule 58A, URCP, authorizes the Court to enter judgment based upon confession of the Defendant where authorized by statute. Judgment by confession is authorized by U.C.A. § 78B-5-205. A party seeking judgment by confession must file a statement, verified by the defendant, which includes a concise statement of the specified sum due and authorizes judgment for the specified sum.

In this case the stipulation recites the amount due at the time of the stipulation but leaves it to the Plaintiff, or the Court, to calculate the balance due upon default. The judgment, based upon default determined without any mechanism for recourse or review, would be entered, again, without any mechanism for review or even objection. This Court is of the view that such a one-sided arrangement without even the possibility of notice and opportunity to be heard on the critical questions of default and the balance due violates the fundamental notion of due process. Indeed, due process of law requires, at a minimum, “adequate notice to those with an interest in the matter and an opportunity for them to be heard in a meaningful manner” and is “owed in every instance” before a person may be deprived of property. Brigham Young Univ. v. Tremco

Consultants, Inc., 2007 UT 17, ¶ 28, 156 P.3d 782. The Court recognizes that the parties may have made a contract, in this case signed a promissory note (which has not been provided to the Court) to settle an apparently disputed sum. The Court has no intention of ignoring the contract. However, in this case there is an additional duty for the Plaintiff and the Court to give credit for payments made during the nearly 4 year period between execution of the Confession of Judgment and filing with the Court. A request for judgment, even for the designated sum but without any credit for payments is an implicit assertion that no payments have been made but without any proof or way to establish that critical fact.

In order to preserve due process and ensure that the authority of the Court is not arbitrarily imposed, the Court will require that adequate notice be given of the Plaintiff's intent to seek judgment without any credit for any payments. Moreover, since the "Confession of Judgment" is not for a sum certain but, rather, for an amount to be calculated it is the conclusion of this Court that commencement of this action must begin by obtaining jurisdiction upon the Defendant through service of process as outlined in Rules 3 and 4, URCP, together with the payment of an appropriate filing fee.

The immediate request for execution of the proposed judgment is denied.

Dated this 20th day of June, 2016



Judge James R. Taylor
Fourth Judicial District Court



EXHIBIT “2”

The Order of the Court is stated below:

Dated: March 23, 2017
03:07:15 PM

/s/ Thomas Low
District Court Judge



Christopher J. Cheney, #15572
OLSEN SKOUBYE & NIELSON, LLC
999 Murray Holladay Road, Suite 200
Salt Lake City, Utah 84117
Telephone: (801) 365-1030
Facsimile: (801) 365-1031
Email: chris@osnlaw.com
Attorneys for Defendant

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

<p>ARM SECURITY, INC.,</p> <p>Plaintiff,</p> <p>v.</p> <p>ADDISON GINES,</p> <p>Defendant.</p>	<p>RULING & ORDER</p> <p>(Dismissal of Plaintiff's Claims)</p> <p>Civil No. 160401127</p> <p>Judge: Thomas Low</p>
--	--

Having reviewed Addison Gines' motion to dismiss filed on January 27, 2017, and pursuant

to the oral arguments held on February 24, 2017, the Court makes the following RULINGS and ORDER.

RULING

1. Rule 58A(i) of the Utah Rules of Civil Procedure requires that the defendant authorize the entry of the judgment for a specified sum.
2. The confession of judgment in this case anticipated that Defendant would satisfy the liability it was created to represent and, therefore, not be filed.
3. It is disputed in this case whether Defendant satisfied any portion of the liability represented by the confession of judgment.
4. Under these circumstances, Defendant is entitled to be sued for breach of contract or unjust enrichment, or some other cause of action so that he can defend against a judgment entering for the full amount represented by the confession of judgment.
5. Allowing the confession of judgment to enter without affording Defendant the right to defend himself as to the merits or amounts of the liability would violate his rights to due process.

ORDER

Based on the foregoing, THE COURT HEREBY ORDERS:

1. Addison's motion requesting the Court dismiss this action is GRANTED.
2. This case is DISMISSED WITHOUT PREJUDICE.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2017, a true and correct copy of the foregoing RULING & ORDER (Dismissal of Plaintiff's Claims) was delivered to the party identified below by electronic email delivery for approval as to form.

I hereby further certify that on this 23rd day of March, 2017, a true and correct copy of the foregoing

EXHIBIT “3”

RICHARD W. JONES - #3938
RJONES@UTAHATTORNEYS.COM
TAYLOR R. JONES - #14690
TJONES@UTAHATTORNEYS.COM
HELGESEN, HOUTZ & JONES
ATTORNEY FOR PLAINTIFF
5732 SOUTH 1475 EAST, SUITE 200
SOUTH OGDEN, UTAH 84403
TELEPHONE: (801) 479-4777

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

CEDAR SPRINGS HOMEOWNERS
ASSOCIATION, INC,

Plaintiff,

vs.

LINDA KAY GRAHAM,

Defendant.

JUDGMENT BY CONFESSION

Case No.

Judge:

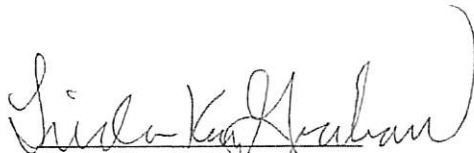
Defendant Linda Kay Graham, pursuant to the provisions of Utah Code Ann. § 78B-5-205 and Rule 58A of the Utah Rules of Civil Procedure, hereby confesses judgment in favor of Cedar Springs Homeowners Association, Inc in the amount of \$1,209.92. This sum is the balance justly due as of June 24, 2014, for homeowner association fees owed by Defendant to Cedar Springs Homeowners Association, Inc. Defendant hereby authorizes the Court to enter judgment for Cedar Springs Homeowners Association, Inc and against Defendant, Linda Kay Graham, in the amount of


be entered for Cedar Springs and against Graham for the remaining balance. The remaining balance shall be computed as follows: \$1,209.92, less those payments received from Graham that are to applied to the delinquent balance. If a Judgment by Confession is submitted to the Court by Cedar Springs, it shall be supported by an affidavit stating the delinquent balance owing by Graham.

4. Should Cedar Springs obtain a Judgment by Confession as provided herein, Cedar Springs shall be entitled to augment the Judgment by the amount of attorney fees and costs incurred by Cedar Springs in collecting the judgment by execution or otherwise, as shall be established by affidavit.
5. Pursuant to the Federal Service Member's Civil Relief Act, 50 U.S.C. §520, the defendant states that defendant is not in the military service.

DATED this 14th day of ^{Aug}~~July~~, 2014.

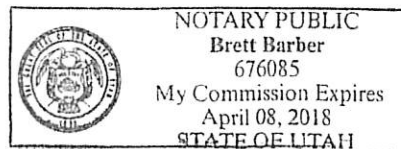
HELGESEN, HOUTZ & JONES


Linda Kay Graham


RICHARD W. JONES
Attorney for Cedar Springs
Homeowners Association, Inc

Individual Acknowledgment

STATE OF UTAH)
 SS.
COUNTY OF ut)



The foregoing Settlement Stipulation was executed before me this 14th day of Aug, 2014, by Linda Kay Graham, whose identity was made known to me.

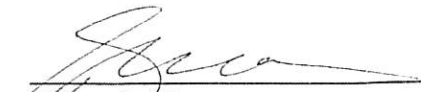

Notary Public

EXHIBIT “4”

American Management Services
50 E. 100 S. Suite 100 A
St. George, UT 84770
Telephone: (435)-688-8443
Facsimile: (435)-688-8423
Email: megan@amssg.net

IN THE FIFTH JUDICIAL DISTRICT COURT
OF WASHINGTON COUNTY, STATE OF UTAH

AMERICAN MANAGEMENT SERVICES, INC.
a Utah Corporation
Plaintiff,
vs.

CONFESSION OF JUDGMENT

CRYSTAL F. HOUSTON

~~529-23-2149~~

Defendants

Civil No. ~~2011-00000~~

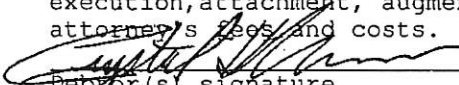
Judge:

The Defendant CRYSTAL F. HOUSTON hereby execute and consent to
Judgment by Confession as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

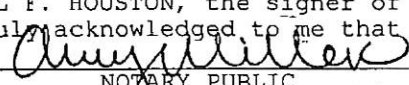
1. Plaintiff is granted judgment against Defendant, based on
Defendants failure to pay the balance on the account with the
Plaintiff, together with costs as set forth below.
2. Itemization of amounts awarded are as follows: Principal: \$607.58
Collection Costs: \$ 1091.29, Interest Fees: \$1246.47, NSF Fees: \$0.00,
Check Service Fee: \$0.00, \$0.00, Damages: \$0.00,
TOTAL: \$2945.34
3. The total Judgment amount of \$2945.34 shall bear interest at the
legal rate.
4. The Judgment shall be augmented in the amount of Plaintiff's costs
and reasonable attorney's fees, pursuant to **Rule 73 of the Utah Rules
of Civil Procedure**, expended in collecting said Judgment by execution
or otherwise as shall be established by affidavit.
5. ~~The Plaintiff will agree not to file the Judgment by confession
with the Court as long as the Defendant pays as follows:~~

The defendant will pay a minimum of \$50.00, per month
by the 4/25/2011 and every 30 day(s) after until paid in full.
In the event that the debtor misses a payment or pays late,
the Plaintiff may file the judgment by confession with the Court
and seek all remedies available by law, including but not
limited to, garnishment, supplemental proceedings, writ of
execution, attachment, augmentation of judgment for post-judgment
attorney's fees and costs.

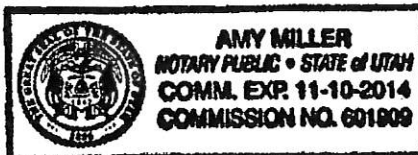
 this 3 day of June 2011.
Debtor(s) signature

_____ this ____ day of _____, 2011.
Debtor(s) signature

On the 3rd day of June, 2011 personally appeared before me
CRYSTAL F. HOUSTON, the signer of the foregoing instrument,
who duly acknowledged to me that he/she executed the same.


Residing at: SWICU - S6, UT

NOTARY PUBLIC



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was filed with the Court of Appeals via personal filing. I further certify that a true and correct copy of the foregoing was sent via U.S. Mail and email to:

Mitchell A. Stephens
Justin L. James
Hatch James & Dodge, PC
10 West Broadway, Ste. 400
Salt Lake City, UT 84101
E: mstephens@hjdllaw.com
E: jjames@hjdllaw.com

DATED this 31st day of October, 2018

THE SALT LAKE LAWYERS



Robert B. Cummings