

2002

Wayne Soules v. Dale H. Curtis : Brief of Appellant

Utah Court of Appeals

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Terry M. Plant; Cory D. Memmott; Plant, Wallace, Christensen & Kanell; Attorneys for Appellee.
James C. Haskins; Thomas N. Thompson; Haskins & Associates; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *Soules v. Curtis*, No. 20020542 (Utah Court of Appeals, 2002).
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IN THE UTAH COURT OF APPEALS

WAYNE SOULES,	:	
	:	
Plaintiff/Appellant,	:	
	:	
vs.	:	Appellate Court No. 20020542-CA
	:	
DALE H. CURTIS,	:	
	:	
	:	
Defendant/Appellee.	:	Priority No. 15

APPELLANT’S ADDENDUM

APPEAL FROM THE FINAL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT,
HON. DENNIS J. FREDERICK,
DATED JUNE 12, 2002, DISMISSING
THE ABOVE CASE WITH PREJUDICE

Terry M. Plant	James C. Haskins
Cory D. Memmott	Thomas N. Thompson
PLANT WALLACE	HASKINS & ASSOCIATES
CHRISTENSEN & KANELL	357 South 200 East, Suite 300
136 East South Temple, Suite 1700	Salt Lake City, Utah 84111
Salt Lake City, Utah 84111	<i>Attorneys for Appellant</i>
<i>Attorneys for Appellee</i>	

IN THE UTAH COURT OF APPEALS

WAYNE SOULES,	:	
	:	
Plaintiff/Appellant,	:	
	:	
vs.	:	Appellate Court No. 20020542-CA
	:	
DALE H. CURTIS,	:	
	:	
	:	
Defendant/Appellee.	:	Priority No. 15

APPELLANT’S ADDENDUM

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THIRD JUDICIAL DISTRICT COURT,
HON. DENNIS J. FREDERICK,
DATED JUNE 12, 2002, DISMISSING
THE ABOVE CASE WITH PREJUDICE

Terry M. Plant
Cory D. Memmott
PLANT WALLACE
CHRISTENSEN & KANEL
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111
Attorneys for Appellee

James C. Haskins
Thomas N. Thompson
HASKINS & ASSOCIATES
357 South 200 East, Suite 300
Salt Lake City, Utah 84111
Attorneys for Appellant

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fls

TERRY M. PLANT, #2610
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PLANT, WALLACE, CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, UT 84111
Telephone: (801) 363-7611
Fax: (801) 531-9747
Attorneys for the Defendant Dale H. Curtis

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

WAYNE J. SOULES,
Plaintiff,

vs.

DALE H. CURTIS,
Defendant.

**NOTICE OF SUGGESTION OF
DEATH**

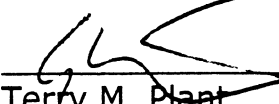
Civil No. 990903291

Honorable J. Dennis Frederick

Counsel of Record for the Defendant Dale H. Curtis ("Curtis") hereby gives notice pursuant to Utah Rules of Civil Procedure Rule 25 that Curtis died on June 20, 2001.

DATED this 7th day of December 2001.

PLANT, WALLACE, CHRISTENSEN & KANELL



Terry M. Plant
Cory D. Memmott
Attorneys for Defendant Curtis

DISTRICT COURT
02 MAR -1 PM 3:42
CLERK DEPARTMENT
KJ

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for Plaintiff Wayne J. Soules
357 South 200 East, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

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

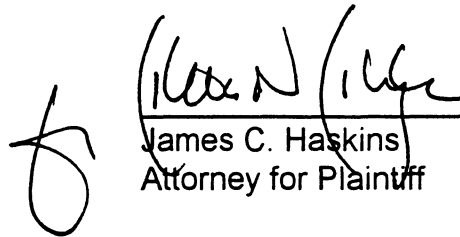
WAYNE J. SOULES,	:	MOTION TO SUBSTITUTE
	:	PROPER PARTIES FOR
Plaintiff,	:	DECEASED DEFENDANT
	:	
v.	:	
	:	
DALE H. CURTIS,	:	Civil No. 990903291
	:	
Defendant.	:	Judge J. Dennis Frederick
	:	

COMES NOW the Plaintiff and moves the Court for an Order substituting proper parties Defendant for Dale H. Curtis, and to change the caption accordingly. The Defendant's counsel filed a Notice of Suggestion of Death on or about December 7,

2
65

2001, asserting that the Defendant died on June 20, 2001. A memorandum in support of this motion, together with a proposed Order, is submitted herewith.

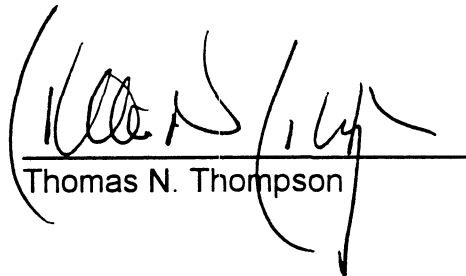
DATED this 16th day of January, 2002.


James C. Haskins
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Motion to**
Substitute Proper Parties for Deceased Defendant was served on the 1st day of
January, 2002, by mailing the same in a U.S. Postal Service postage paid envelope
addressed as follows:

Terry M. Plant, Esq.
Cory D. Memmott, Esq.
PLANT WALLACE CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111


Thomas N. Thompson

DISTRICT COURT
 32nd - 1 PH 3:42
 CLERK DEPARTMENT
 [Signature]

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
 Attorneys for Plaintiff Wayne J. Soules
 357 South 200 East, Suite 300
 Salt Lake City, UT 84111
 Telephone: (801) 539-0234
 Facsimile: (801) 539-5210

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

WAYNE J. SOULES,	:	MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO SUBSTITUTE PROPER PARTIES FOR DECEASED DEFENDANT
	:	
Plaintiff,	:	
	:	
v.	:	
DALE H. CURTIS,	:	Civil No. 990903291
	:	
Defendant.	:	Judge J. Dennis Frederick

Pursuant to Rule 25(a)(1), if a party dies and the claim is not thereby
 extinguished, a motion for substitution of the proper parties must be filed with the Court
 within 90 days after the filing of a suggestion of death with the Court. On or about
 December 7, 2001, the Defendant's counsel filed a Notice of Suggestion of Death,
 asserting that the Defendant Dale H. Curtis died on June 20, 2001. Accordingly, the
 plaintiff has filed this motion to bring the proper parties before the Court.

As set forth in the Affidavit of Thomas N. Thompson, attached hereto as Exhibit

A, he examined obituary notices appearing in the Salt Lake Tribune and determined that Defendant Curtis died on June 20, 2001. Further, no probate has been filed with respect to the Estate of Defendant Curtis and it appears he died intestate. At the time of his death, the Defendant Curtis had no surviving spouse and it appears he was not at any time married; nor did he have children. Under these circumstances, pursuant to Utah Code Ann. § 75-2-103(c), his estate passed "to the descendants of the decedent's parents or either of them per capita at each generation as defined in Subsection 75-2-106(3)." That section reads, in pertinent part, as follows:

If, under Subsection 75-2-1-3(1)(c) or (d), a decedent's intestate estate or a part thereof passes "per capita at each generation" to the descendants of the decedent's deceased parents or either of them or to the descendants of the decedent's deceased paternal or maternal grandparents or either of them, the estate or part thereof is divided into as many equal shares as there are:

- (i) surviving descendants in the generation nearest the deceased parents or either of them, or the deceased grandparents or either of them, that contains one or more surviving descendants; and
- (ii) deceased descendants in the same generation who left surviving descendants, if any.

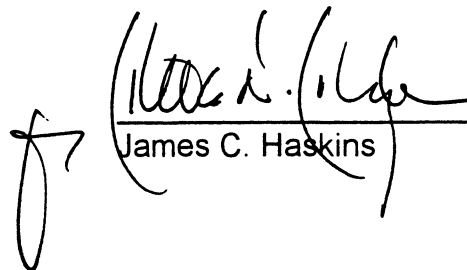
The statute goes on to allocate one share to each such surviving descendant.

At his death, Defendant Curtis was not survived by his parents, and the "generation nearest the deceased parents" consists entirely of the surviving brothers and sisters of the Defendant Curtis. There are no deceased descendants in that

generation, i.e., all of the other children of the parents of Defendant Curtis survived him and are still living. The Defendant Curtis was survived by two brothers and three sisters: N. De Von Curtis; J. Kent Curtis; Sara Flink; Rula Flink; and Barbara Inkley.

A copy of this motion has been served upon the counsel for Defendant Curtis as provided in Utah R. Civ. P. 5; and copies have been served on the heirs of the Defendant Curtis named in the preceding paragraph as provided in Utah R. Civ. P. 4 for the service of a summons. A period of fourteen days has been allowed for the presentation of any objections to the Plaintiff's motion and, in the absence of the receipt of any objections within fourteen days from the date of this motion, it respectfully submitted that this motion should be granted by the Court.

DATED this 16th day of January, 2002.


James C. Haskins

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing

Memorandum in Support of Plaintiff's Motion to Substitute Proper Parties for

Deceased Defendant was served on the 1st day of March, 2002, by mailing the

same in a U. S. Postal Service postage paid envelope addressed as follows:

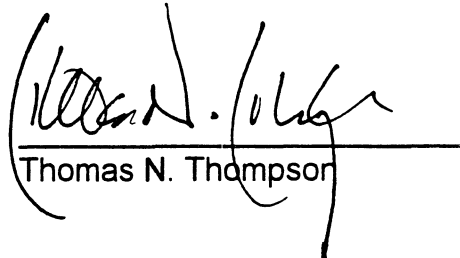
Terry M. Plant, Esq.

Cory D. Memmott, Esq.

PLANT WALLACE CHRISTENSEN & KANELL

136 East South Temple, Suite 1700

Salt Lake City, Utah 84111


Thomas N. Thompson

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for Plaintiff Wayne J. Soules
357 South 200 East, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY		
STATE OF UTAH		
WAYNE J. SOULES,	:	AFFIDAVIT OF
	:	THOMAS N. THOMPSON
Plaintiff,	:	
	:	
v.	:	
	:	
DALE H. CURTIS,	:	Civil No. 990903291
	:	
Defendant.	:	Judge J. Dennis Frederick
	:	
COUNTY OF SALT LAKE	:	
	:	ss.
STATE OF UTAH	:	

I, Thomas N. Thompson, having been first duly sworn upon my oath, hereby
depose and state as follows:

1. I am an individual above the age of 21 years who is competent to testify
as to the matters set forth herein from my own personal knowledge.
2. I am an attorney at law employed by the firm of Haskins & Associates,

P.C. I have reviewed the Suggestion of Death filed by the Defendant's counsel in this case, and it is my understanding from independently investigating the matter that the Defendant herein passed away on June 20, 2001. A copy of the death certificate for Dale Harward Curtis is attached to this affidavit.

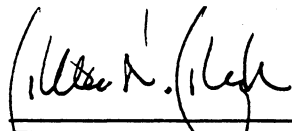
3. On January 15, 2002, I spoke by telephone with Sara Frink, who identified herself to me as the sister of the decedent, Dale H. Curtis. Ms. Frink provided me with the names and telephone numbers of each of the other four surviving siblings of decedent Dale H. Curtis, i.e., N. DeVon Curtis, J. Kent Curtis, Rula Frink, and Barbara Inkley.

4. An obituary was published in the Salt Lake Tribune for June 24, 2001, indicating that Dale Harward Curtis passed away on June 20, 2001. That obituary suggests that the decedent's parents predeceased him, and that he is survived by the siblings listed in paragraph 3, above.

5. It is necessary to substitute the names of the decedent's heirs for the decedent in this case.


FURTHER AFFIANT SAITH NOT.

DATED this 16th day of January, 2002.

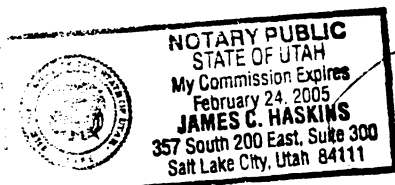


Thomas N. Thompson

Subscribed and sworn to before me this 16th day of January, 2002.



NOTARY PUBLIC IN AND FOR
THE STATE OF UTAH



796526

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
 Attorneys for Plaintiff Wayne J. Soules
 357 South 200 East, Suite 300
 Salt Lake City, UT 84111
 Telephone: (801) 539-0234
 Facsimile: (801) 539-5210

DATE 21 FEB 62 TIME 1849
 AIR 102745 CENTAUS East
 UPON GLEN FLINK (sex)
 CONSTABLE SECT. SALT LAKE COUNTY, UTAH
 SIGNED Ken Wilson

(5-1435 W.)

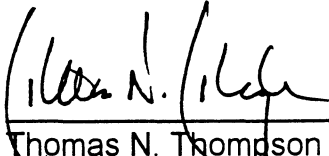
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75

Parties for Deceased Defendant; a Memorandum in Support of Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant; and the Affidavit of Thomas N. Thompson in support of said motion, copies of which are served upon you with this Notice. You have been identified as a sibling of the decedent, Dale H. Curtis, who is a proper party defendant to the above action.

Should you have any objection to this motion, you should file the same with the Clerk, Third Judicial District Court, 450 South State Street, P. O. Box 1860, Salt Lake City, Utah 84111, at any time within fourteen days after service of the attached documents upon you. In the absence of a timely objection, the Court may grant the Plaintiff's motion without further notice.

DATED this 16th day of January, 2002.



Thomas N. Thompson
Attorney for Plaintiff

ENNETH E. WILSON

duly sworn on oath and say: I am a duly appointed Deputy Constable, SALT LAKE County, State of UTAH, a citizen of the United States over the age of 21 years at the time of service herein, and not a part of or interested in the within action.

ved the within and hereto annexed,
JUSTICE
MOTION
MEMORANDUM
AFFIDAVIT

ry 31, 2002 , and served the same upon
KIRA FLINK

med party in said article(s) by serving a true copy of said article(s) for the party with

KEN FLINK (SON)
of suitable age and discretion there residing at
274 S CENTAVOS EAST, SALT LAKE CITY
his place of ABODE,

on February 21, 2002

certify that at the time of service of the said article(s), I endorsed the date and place of service and added my name and title thereto.

on February 21, 2002

Ken Wilson

Deputy

SL848

ROBERT J. "BOB" REITZ, CONSTABLE, SALT LAKE County
7304 SOUTH 300 WEST SUITE 203, MIDVALE, UTAH 84047, 255-5468

MILEAGE CHARGE:	18.00
SERVICE CHARGES:	6.00
TOTAL CHARGES:	\$24.00

NOTES

14

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796511

3 Affidavit

DATE 31 Jan ⁰² TIME 8:30pm
@ 2744 E. Fort Union Blvd.
UPON Person
CONCERNING Person SALT LAKE COUNTY, UTAH
DEPUTY lit OFFICIAL

Person served: _____

Date served: _____

Time served: _____

Address where served: _____

Served by: _____

Title: _____

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for Plaintiff Wayne J. Soules
357 South 200 East, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WAYNE J. SOULES,

Plaintiff,

v.

DALE H. CURTIS,

Defendant.

NOTICE OF
PLAINTIFF'S MOTION TO
SUBSTITUTE PROPER
PARTIES FOR DECEASED
DEFENDANT

Civil No. 990903291

Judge J. Dennis Frederick

TO: N. De VON CURTIS
2744 East Fort Union Boulevard
Salt Lake City, Utah 84121
943-5288 (E - 69105)

You are hereby notified that the Plaintiff herein, Wayne Soules, by and through
his undersigned counsel, will filed with the above court a *Motion to Substitute Proper*

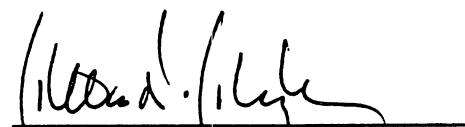
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78

Parties for Deceased Defendant; a Memorandum in Support of Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant; and the Affidavit of Thomas N. Thompson in support of said motion, copies of which are served upon you with this Notice. You have been identified as a sibling of the decedent, Dale H. Curtis, who is a proper party defendant to the above action.

Should you have any objection to this motion, you should file the same with the Clerk, Third Judicial District Court, 450 South State Street, P. O. Box 1860, Salt Lake City, Utah 84111, at any time within fourteen days after service of the attached documents upon you. In the absence of a timely objection, the Court may grant the Plaintiff's motion without further notice.

DATED this 16th day of January, 2002.



Thomas N. Thompson
Attorney for Plaintiff

Person served: _____
Date served: _____
Time served: _____
Address where served: _____
Served by: _____
Title: _____

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for Plaintiff Wayne J. Soules
357 South 200 East, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY		
STATE OF UTAH		
WAYNE J. SOULES,	:	NOTICE OF
	:	PLAINTIFF'S MOTION TO
Plaintiff,	:	SUBSTITUTE PROPER
	:	PARTIES FOR DECEASED
v.	:	DEFENDANT
	:	
DALE H. CURTIS,	:	Civil No. 990903291
	:	
Defendant.	:	Judge J. Dennis Frederick

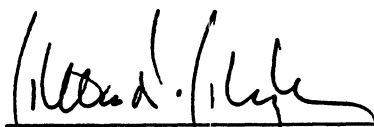
TO: N. De VON CURTIS
2744 East Fort Union Boulevard
Salt Lake City, Utah 84121
943-5288

You are hereby notified that the Plaintiff herein, Wayne Soules, by and through his undersigned counsel, will filed with the above court a *Motion to Substitute Proper*

Parties for Deceased Defendant; a Memorandum in Support of Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant; and the Affidavit of Thomas N. Thompson in support of said motion, copies of which are served upon you with this Notice. You have been identified as a sibling of the decedent, Dale H. Curtis, who is a proper party defendant to the above action.

Should you have any objection to this motion, you should file the same with the Clerk, Third Judicial District Court, 450 South State Street, P. O. Box 1860, Salt Lake City, Utah 84111, at any time within fourteen days after service of the attached documents upon you. In the absence of a timely objection, the Court may grant the Plaintiff's motion without further notice.

DATED this 16th day of January, 2002.



Thomas N. Thompson
Attorney for Plaintiff

Person served: _____
Date served: _____
Time served: _____
Address where served: _____
Served by: _____
Title: _____

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for Plaintiff Wayne J. Soules
357 South 200 East, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

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

WAYNE J. SOULES,	:	NOTICE OF
	:	PLAINTIFF'S MOTION TO
Plaintiff,	:	SUBSTITUTE PROPER
	:	PARTIES FOR DECEASED
v.	:	DEFENDANT
	:	
DALE H. CURTIS,	:	Civil No. 990903291
	:	
Defendant.	:	Judge J. Dennis Frederick

TO: N. De VON CURTIS
2744 East Fort Union Boulevard
Salt Lake City, Utah 84121
943-5288

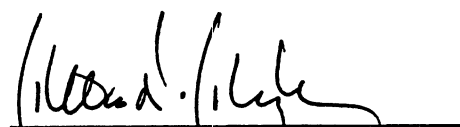
You are hereby notified that the Plaintiff herein, Wayne Soules, by and through
his undersigned counsel, will filed with the above court a *Motion to Substitute Proper*

19
82

Parties for Deceased Defendant; a Memorandum in Support of Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant; and the Affidavit of Thomas N. Thompson in support of said motion, copies of which are served upon you with this Notice. You have been identified as a sibling of the decedent, Dale H. Curtis, who is a proper party defendant to the above action.

Should you have any objection to this motion, you should file the same with the Clerk, Third Judicial District Court, 450 South State Street, P. O. Box 1860, Salt Lake City, Utah 84111, at any time within fourteen days after service of the attached documents upon you. In the absence of a timely objection, the Court may grant the Plaintiff's motion without further notice.

DATED this 16th day of January, 2002.



Thomas N. Thompson
Attorney for Plaintiff

I, **TRAVIS J. REITZ**
being first duly sworn on oath and say: I am a duly appointed Deputy Constable, SALT LAKE County, State of UTAH, a citizen
of the United States over the age of 21 years at the time of service herein, and not a part of or interested in the within action.

I received the within and hereto annexed,
**NOTICE
& MOTION
& MEMORANDUM
& AFFIDAVIT**

on **January 31, 2002**, and served the same upon
N. DE VON CURTIS

within named Defendant in said article(s) by serving a true copy of said article(s) for the defendant with

N. DE VON CURTIS (PERSONALLY)
person of suitable age and discretion there residing at
2744 E FORT UNION BLVD., SALT LAKE CITY
s/her usual place of ABODE,

on **January 31, 2002**

urther certify that at the time of service of the said article(s), I endorsed the date and place of service and added my name
and official title thereto.

on **January 31, 2002**

Travis Reitz
Deputy **SL 852**

ROBERT J. "BOB" REITZ, CONSTABLE, SALT LAKE County
7304 SOUTH 300 WEST SUITE 203, MIDVALE, UTAH 84047, 255-5468

MILEAGE CHARGE:	14.00
SERVICE CHARGES:	6.00
TOTAL CHARGES:	\$20.00

NOTES

ARTICLES SERVED: NOTICE OF PLAINTIFF'S MOTION TO SUBSTITUTE PROPER PARTIES FOR DECEASED
DEFENDANT, MOTION, MEMORANDUM AND AFFIDAVIT.

21
84

T. H. H. & Affidavit

796510

18 FEBRU 850
3130 So 8950 W
PERSON
UPON
COUNTY UTAH

Person served: 3-1-2
Date served: 3-1-2
Time served: 10:00
Address where served:
Served by:
Time:

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for Plaintiff Wayne J. Soules
357 South 200 East, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

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

WAYNE J. SOULES,

Plaintiff,

v.

DALE H. CURTIS,

Defendant.

NOTICE OF
PLAINTIFF'S MOTION TO
SUBSTITUTE PROPER
PARTIES FOR DECEASED
DEFENDANT

Civil No. 990903291

Judge J. Dennis Frederick

TO: BARBARA INKLEY
3130 South 8950 West
Salt Lake City, Utah 84044
250-2520

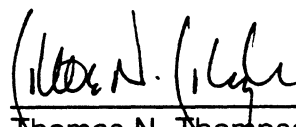
You are hereby notified that the Plaintiff herein, Wayne Soules, by and through
his undersigned counsel, will filed with the above court a *Motion to Substitute Proper*

22
85

Parties for Deceased Defendant; a Memorandum in Support of Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant; and the Affidavit of Thomas N. Thompson in support of said motion, copies of which are served upon you with this Notice. You have been identified as a sibling of the decedent, Dale H. Curtis, who is a proper party defendant to the above action.

Should you have any objection to this motion, you should file the same with the Clerk, Third Judicial District Court, 450 South State Street, P. O. Box 1860, Salt Lake City, Utah 84111, at any time within fourteen days after service of the attached documents upon you. In the absence of a timely objection, the Court may grant the Plaintiff's motion without further notice.

DATED this 16th day of January, 2002.



Thomas N. Thompson
Attorney for Plaintiff

Person served: _____
Date served: _____
Time served: _____
Address where served _____
Served by: _____
Title: _____

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for Plaintiff Wayne J. Soules
357 South 200 East, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

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

WAYNE J. SOULES,	:	NOTICE OF
	:	PLAINTIFF'S MOTION TO
Plaintiff,	:	SUBSTITUTE PROPER
	:	PARTIES FOR DECEASED
v.	:	DEFENDANT
	:	
DALE H. CURTIS,	:	Civil No. 990903291
	:	
Defendant.	:	Judge J. Dennis Frederick

TO: BARBARA INKLEY
3130 South 8950 West
Salt Lake City, Utah 84044
250-2520

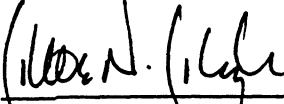
You are hereby notified that the Plaintiff herein, Wayne Soules, by and through
his undersigned counsel, will filed with the above court a *Motion to Substitute Proper*

24
87

Parties for Deceased Defendant; a Memorandum in Support of Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant; and the Affidavit of Thomas N. Thompson in support of said motion, copies of which are served upon you with this Notice. You have been identified as a sibling of the decedent, Dale H. Curtis, who is a proper party defendant to the above action.

Should you have any objection to this motion, you should file the same with the Clerk, Third Judicial District Court, 450 South State Street, P. O. Box 1860, Salt Lake City, Utah 84111, at any time within fourteen days after service of the attached documents upon you. In the absence of a timely objection, the Court may grant the Plaintiff's motion without further notice.

DATED this 16th day of January, 2002.



Thomas N. Thompson
Attorney for Plaintiff

Person served: _____
Date served. _____
Time served: _____
Address where served: _____
Served by: _____
Title: _____

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for Plaintiff Wayne J. Soules
357 South 200 East, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

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

WAYNE J. SOULES,	:	NOTICE OF
	:	PLAINTIFF'S MOTION TO
Plaintiff,	:	SUBSTITUTE PROPER
	:	PARTIES FOR DECEASED
v.	:	DEFENDANT
	:	
DALE H. CURTIS,	:	Civil No. 990903291
	:	
Defendant.	:	Judge J. Dennis Frederick

TO: BARBARA INKLEY
3130 South 8950 West
Salt Lake City, Utah 84044
250-2520

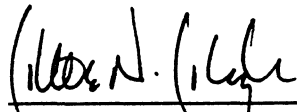
You are hereby notified that the Plaintiff herein, Wayne Soules, by and through
his undersigned counsel, will filed with the above court a *Motion to Substitute Proper*

26
89

Parties for Deceased Defendant; a Memorandum in Support of Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant; and the Affidavit of Thomas N. Thompson in support of said motion, copies of which are served upon you with this Notice. You have been identified as a sibling of the decedent, Dale H. Curtis, who is a proper party defendant to the above action.

Should you have any objection to this motion, you should file the same with the Clerk, Third Judicial District Court, 450 South State Street, P. O. Box 1860, Salt Lake City, Utah 84111, at any time within fourteen days after service of the attached documents upon you. In the absence of a timely objection, the Court may grant the Plaintiff's motion without further notice.

DATED this 16th day of January, 2002.



Thomas N. Thompson
Attorney for Plaintiff

DALE HITESMAN

I am first duly sworn on oath and say: I am a duly appointed Deputy Constable, SALT LAKE County, State of UTAH, a citizen of the United States over the age of 21 years at the time of service herein, and not a part of or interested in the within action.

I have received the within and hereto annexed,
**NOTICE
& MOTION
& MEMORANDUM
& AFFIDAVIT**

January 31, 2002, and served the same upon
BARBARA INKLEY

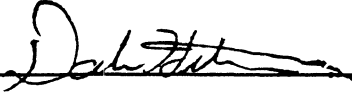
I named Defendant in said article(s) by serving a true copy of said article(s) for the defendant with

BARBARA INKLEY (PERSONALLY)
of suitable age and discretion there residing at
3130 S 8950 W, SALT LAKE CITY
usual place of ABODE,

on **February 18, 2002**

I hereby certify that at the time of service of the said article(s), I endorsed the date and place of service and added my name and official title thereto.

on **February 18, 2002**


Deputy SL 817

ROBERT J. "BOB" REITZ, CONSTABLE, SALT LAKE County
7304 SOUTH 300 WEST SUITE 203, MIDVALE, UTAH 84047, 255-5468

MILEAGE CHARGE:	18.00
SERVICE CHARGES:	6.00
<hr/>	
TOTAL CHARGES:	\$24.00

NOTES

RECEIVED THE NOTICE OF PLAINTIFF'S MOTION TO SUBSTITUTE PROPER PARTIES FOR DECEASED DEFENDANT, AND, MEMORANDUM AND AFFIDAVIT.

28
91

02 MAR -5 PM 3:50

SALT LAKE COUNTY
BY KD
DEPUTY CLERK

TERRY M. PLANT, #2610
CORY D. MEMMOTT, #8346
PLANT, WALLACE, CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, UT 84111
Telephone: (801) 363-7611
Fax: (801) 531-9747
Attorneys for the Defendant Dale H. Curtis

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

WAYNE J. SOULES,
Plaintiff,

vs.

DALE H. CURTIS,
Defendant.

**MOTION TO STRIKE
PLAINTIFF'S MOTION TO
SUBSTITUTE PARTIES**

Oral Argument Requested

Civil No. 990903291

Honorable J. Dennis Frederick


DEFENDANT Dale H. Curtis ("Curtis") hereby moves to strike the Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant because a personal representative has not been appointed, the decedent's heirs are not proper parties to this action and the Plaintiff's notice is faulty under U.R.C.P. Rule 25.

A Memorandum of Points and Authorities filed herewith support this Motion.

Pursuant to Rule 4-501(3)(B) of the Utah Rules of Judicial Administration, Curtis requests oral argument on this Motion.

DATED this 5th day of March 2002.

PLANT, WALLACE, ~~CHRISTENSEN~~ & KANELL



Terry M. Plant

Cory D. Memmott

Attorneys for Defendant Curtis

CERTIFICATE OF MAILING

I hereby certify that on this 5th day of March 2002, I mailed a true and correct copy of the foregoing document, via U.S. Mail first class, postage prepaid, to:

James C. Haskins
Thomas N. Thompson
HASKINS & ASSOCIATES
357 South 200 East, Suite 300
Salt Lake City, UT 84111-2827



02 MAR -5 PM 3:50

THIRD DISTRICT
SALT LAKE COUNTY
BY PS
DEPUTY CLERK

TERRY M. PLANT, #2610
CORY D. MEMMOTT, #8346
PLANT, WALLACE, CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, UT 84111
Telephone: (801) 363-7611
Fax: (801) 531-9747
Attorneys for the Defendant Dale H. Curtis

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

WAYNE J. SOULES,
Plaintiff,

vs.

DALE H. CURTIS,
Defendant.

**MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE
PLAINTIFF'S MOTION TO
SUBSTITUTE PARTIES**

Oral Argument Requested

Civil No. 990903291

Honorable J. Dennis Frederick

DEFENDANT Dale H. Curtis ("Curtis") hereby submits the following memorandum in support of his motion to strike the Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant.

ARGUMENT

I. THE PLAINTIFF CANNOT MOVE TO SUBSTITUTE ANY PARTY BECAUSE NO PERSONAL REPRESENTATIVE HAS BEEN APPOINTED.

The Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant must be stricken because no personal representative has been appointed and the case cannot be revived until a personal representative is appointed. The Utah Uniform Probate Code specifically states, "[n]o **proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative.**" Utah Code Ann. §75-3-104(emphasis added). In this case, Curtis is deceased and his death has been suggested upon the record pursuant to Utah Rules of Civil Procedure Rule 25. Before this case can proceed and a party substituted, a personal representative must be appointed to represent the estate of the deceased. As the Editorial Board Comment to Utah Code Ann. §75-3-104 states, "[t]his section of Part 8, Chapter 3, are designed to **force** creditors of decedents to assert their claims against duly appointed personal representatives." See Comment, Utah Code Ann. §75-3-104 (emphasis added). At this time, no personal representative has been appointed. Accordingly, this case cannot be revived and no party can be

substituted at this time. Therefore, Curtis' motion to strike the Plaintiff's Motion must be granted.

II. THE COURT MUST STRIKE THE PLAINTIFF'S MOTION BECAUSE THE DECEDENT'S HEIRS ARE NOT THE PROPER PARTY IN INTEREST.

Even assuming arguendo that a personal representative has been appointed and the case properly revived, the motion to substitute must be stricken because the Plaintiff cannot proceed against the Plaintiff's heirs. The Plaintiff has made a motion to substitute Curtis' surviving heirs. However, in order to serve such a motion, a personal representative must be appointed. See Utah Code Ann. §75-3-104. If a personal representative is appointed, the Plaintiff only has a right of action against the estate through the personal representative or against distributees. See Utah Code Ann. §75-3-104.

Moreover, the distributees of the estate are only liable to the claimant for the value of the distribution as of the time of distribution. See Utah Code Ann. §75-3-1004. The Utah Uniform Probate Code states "[n]o distributee shall be liable to claimants for amounts received as exempt property, homestead or family allowances, or for amounts in excess of the value of this distribution as of the time of distribution." Utah Code Ann. §75-3-1004.

There is no provision in the Utah Uniform Probate Code that allows a Plaintiff to assert a cause of action against a decedent's heirs. The decedent's heirs cannot be liable for Curtis' alleged negligence. The Plaintiff's cause of action lies against the estate of the decedent or his distributees. Accordingly, even assuming that a personal representative has been appointed, the Plaintiff motion to substitute Curtis' surviving heirs is not proper. Therefore, Plaintiff's motion to substitute must be stricken.

III. THE PLAINTIFF'S MOTION TO SUBSTITUTE PROPER PARTIES MUST BE STRICKEN BECAUSE IT FAILS TO PROVIDE THE PROPER NOTICE.

The Plaintiff's motion to substitute proper parties must be stricken because it fails to comply with the requirements of U.R.C.P. Rule 25. The rule states: "[t]he motion for substitution may be made by any party or by the successors or representatives of the deceased party and, **together with the notice of hearing**, shall be served on the parties as provide in Rule 5 and upon persons not parties in the manner provided in Rule 4for the service of a summons." U.R.C.P. Rule 25 (emphasis added). Even assuming arguendo that the Decedent's heirs are proper parties, the Plaintiff failed to serve upon them a "notice of hearing" in the manner provided in Rule 4 for the service of

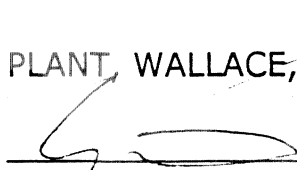
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a summons. This failure is fatal to the Plaintiff's Motion to Substitute. The Plaintiff attempts to deprive the Decedent's heir of their right to hearing on this issue by claiming that the motion will be granted in fourteen days if no objection is filed. See "Memorandum in Support of Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant" at page 3. However, the Utah Rules of Civil Procedure specifically states that the person not a party to this action must be served not only with a motion but also with a notice of hearing. The Plaintiff has failed to do so. Accordingly, the Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant must be stricken.

DATED this 5th day of March 2002.

PLANT, WALLACE, CHRISTENSEN & KANELL



Terry M. Plant
Cory D. Memmott
Attorneys for Defendant Curtis

CERTIFICATE OF MAILING

I hereby certify that on this 5th day of March 2002, I mailed a true and correct copy of the foregoing document, via U.S. Mail first class, postage prepaid, to:

James C. Haskins
Thomas N. Thompson
HASKINS & ASSOCIATES
357 South 200 East, Suite 300
Salt Lake City, UT 84111-2827

MyWilliams

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for Plaintiff Wayne J. Soules
357 South 200 East, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

JUDICIAL DISTRICT
SALT LAKE COUNTY
BY JD
DEPUTY CLERK

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

WAYNE J. SOULES,

Plaintiff,

v.

DALE H. CURTIS,

Defendant.

OPPOSITION TO
DEFENDANT'S MOTION TO
STRIKE PLAINTIFF'S MOTION
TO SUBSTITUTE PARTIES

Civil No. 990903291

Judge J. Dennis Frederick

COMES NOW the Plaintiff, Wayne Soules, by and through his undersigned counsel, and opposes the Defendant's Motion to Strike the Plaintiff's Motion to Substitute Parties.

The Defendant relies on Utah Code Ann. § 75-3-104 for the proposition that, because the decedent's heirs failed to appoint a personal representative for him, the instant case may not go forward. Nothing in the cited section requires such a result. Section 75-3-104 reads, in its entirety, as follows:

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No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this chapter 3. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in section 75-3-1004 or from a former personal representative individually liable as provided in section 75-3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

The instant case was commenced, not against the estate of the decedent, but against a living defendant who subsequently died. Utah R. Civ. P. 25 provides a procedure for substitution of the proper parties "if . . . the claim is not thereby extinguished." The Defendant's position, apparently, is that, because no personal representative has yet been appointed, the claim of the Plaintiff is extinguished as a matter of law. The Defendant's position is without merit.

First, actions for injuries to persons do survive the death of the wrongdoer: Utah Code Ann. § 78-11-12 expressly so provides:

Causes of action arising out a personal injury to the person or death caused by the wrongful act or negligence of another do not abate upon the death of the wrongdoer or the injured person. The injured person or the personal representatives or heirs of the person who died have a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages, subject to Subsection (1)(b).

Second, it is clear that the formal appointment of a personal representative is not

required to occur prior to filing the necessary motion to substitute the proper parties, but is a mere formality which may occur after the filing of that motion. As of this date, three of the decedent's heirs at law have been served with the motion to substitute them as proper parties; the other heirs appear to be evading process. Because of this, the Plaintiff will shortly consider moving the Court to permit service of process on the remaining heirs by publication. Once all of the heirs are served, the Plaintiff will move to appoint all of those heirs as co-personal representatives of the Estate of Dale H. Curtis, deceased.

In a recent case, the Utah Supreme Court has addressed the procedure to be employed in substituting parties for decedents. In *Stoddard v. Smith*, 27 P.3d 546 (Utah 2001), the Court expressed its concern that the failure of the decedent's counsel to identify a person who may be substituted as a proper party "would open the door to a tactical maneuver to place upon the plaintiff the burden of locating the representative of the estate within 90 days," *Id.* At 550, citing *Rend v. Kay*, 415 F.2d 983, 986 (D.C. Cir. 1969). While the Court rejected the view of the federal courts that identification by the decedent's counsel of a person who may be substituted is implicitly required by Rule 25, the Court also rejected any requirement that the party seeking substitution know the identity of the person to be substituted when filing the motion:

However, with or without notice of the appropriate substitute, our holding does not unduly burden the party filing the motion for substitution. Under

our interpretation of our rule 25, a party filing a motion for substitution does not have to know the identify of the person who may be substituted when filing the motion. A party, such as plaintiff in this case, may simply file a motion seeking to substitute the "Personal Representative of the Estate of the Decedent" or "John/Jane Doe." Once the motion is made, the proper person to be substituted for the decedent may be ascertained in due course, by discovery if necessary. Consequently, there is no concern that a failure to identify, in the suggestion of death, a person who may be substituted for the deceased party will result in "tactical maneuver[ing]."

Id. at 551. In the instant case, counsel for the Plaintiff ascertained the names of the Defendant's heirs at law, and thus it was unnecessary to move the Court for substitution of "John/Jane Doe," but the motion could properly seek to substitute those heirs as parties, either in their individual capacities or as subsequently appointed personal representatives of the estate. If this Court were to grant the Defendant's motion to strike as to the Plaintiff's motion, it is respectfully submitted that the Court would sanction the very "tactical maneuvering" that our Supreme Court has sought to avoid.

The Defendant also takes the novel position that, even if a personal representative is subsequently appointed, the Plaintiff may not recover against "distributees" of the estate "amounts in excess of the value of this distribution as of the time of the distribution." The Defendant cites Utah Code Ann. § 75-3-1004 in support of this proposition. Even if the Defendant's position were correct, which it is not, any such result has no bearing whatever on whether the Plaintiff's motion to substitute

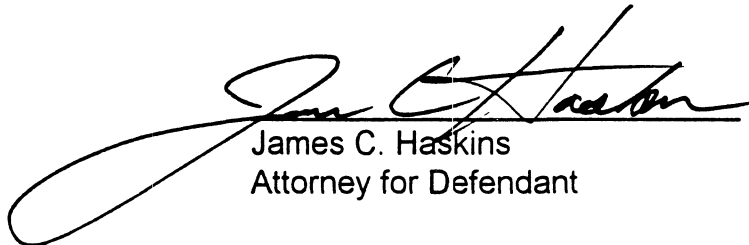
proper parties for the deceased Defendant should be stricken. In any event, the limitation in section 75-3-1004 applies only to “distributees,” and none of the decedent’s heirs qualify as such unless they can demonstrate that none of the decedent’s assets have been yet been distributed to them. This is because Utah Code Ann. § 75-1-201 defines the term “distributee” as “any person who has received property of a decedent *from his personal representative* other than as a creditor or purchaser.” (Emphasis added.) Inasmuch as no personal representative was ever appointed, it would appear that the decedent’s heirs received his property informally without any probate, and thus those heirs cannot qualify as “distributees” so as to limit their liability to amounts received by them. Thus, section 73-3-1004 simply has no application to this case.

Finally, the Defendant **suggests that** the Plaintiff’s motion must be stricken because it did not contain any notice of hearing on the Plaintiff’s motion. As the Court is aware, the Plaintiff has not yet scheduled any hearing on its motion and, when this occurs¹, the Plaintiff will insure that proper notice is given to the heirs. Thus, the Defendant’s position is not well taken.

¹The Plaintiff will schedule the necessary hearing following the Court’s ruling on the Defendant’s Motion to Strike.

For all of the foregoing reasons, it is respectfully submitted that the Defendant's motion should be denied by the Court.

DATED this 7th day of March, 2002.


James C. Haskins
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing ***Opposition to Defendant's Motion to Strike Plaintiff's Motion to Substitute Parties*** was served on the 7th day of March, 2002, by mailing the same in U.S. Postal Service postage paid envelopes addressed as follows:

Terry M. Plant, Esq.
Cory D. Memmott, Esq.
PLANT, WALLACE, CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111

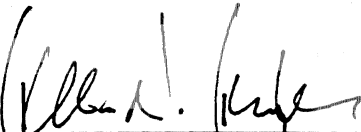
N. De Von Curtis
2744 East Fort Union Blvd.
Salt Lake City, Utah 84121

Sara Flink
10274 South 1435 West
Salt Lake City, Utah 84094

Rula Flink
1990 South 1275 East
Ogden Utah 84401

Barbara Inkley
3130 South 8950 West
Salt Lake City, Utah 84044

J. Kent Curtis
1441 West Fernwood Drive
Salt Lake City, Utah 84123



Thomas N. Thompson

K

TERRY M. PLANT, #2610
CORY D. MEMMOTT, #8346
PLANT, WALLACE, CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, UT 84111
Telephone: (801) 363-7611
Fax: (801) 531-9747
Attorneys for the Defendant Dale H. Curtis

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

WAYNE J. SOULES,
Plaintiff,

vs.

DALE H. CURTIS,
Defendant.

**REPLY IN FURTHER SUPPORT
OF MOTION TO STRIKE
PLAINTIFF'S MOTION TO
SUBSTITUTE PARTIES**

Oral Argument Requested

Civil No. 990903291

Honorable J. Dennis Frederick

DEFENDANT Dale H. Curtis ("Curtis") hereby submits the following
reply memorandum in further support of his motion to strike the Plaintiff's
Motion to Substitute Proper Parties for Deceased Defendant.

ARGUMENT

I. THE PLAINTIFF'S MOTION TO SUBSTITUTE THE DECEDENT'S HEIRS MUST BE STRICKEN BECAUSE IT FAILS TO NAME THE PROPER PARTY.

The Plaintiff's Motion to Substitute must be stricken because it fails to name the proper party, i.e. the personal representative of the estate. Once Mr. Curtis' death was suggested on the record, the Plaintiff's cause of action continued against the personal representative of the Mr. Curtis. "The injured person . . . ha[s] a cause of action against the . . . **personal representative of the wrongdoer** for special and general damages . . ." Utah Code Ann. §78-11-12(1)(a)(emphasis added). Counsel for Mr. Curtis informed the Plaintiff that there was no personal representative of Mr. Curtis on December 18, 2001, eleven (11) days after filing the "Notice of Suggestion of Death." See December 18, 2001 letter attached hereto as Exhibit A and incorporated herein by this reference. At that time, all the Plaintiff had to do was file a Motion to Substitute the Personal Representative of the Estate even if he did not know who that individual would be.¹ See Stoddard v. Smith, 2001 UT 47,

¹ The Plaintiff alleges "tactical maneuvering" in his opposition to the motion to strike. To the contrary, the Defendant's counsel provided the Plaintiff with all the necessary information to file a proper motion to substitute in a timely manner. The Plaintiff simply chose not to do so. The Plaintiff could have moved to substitute the personal representative of the estate. The Plaintiff even could have, at any time after the notice of suggestion of death, petitioned the Court in a separate action to appoint him as personal representative of

¶19, 27 P.3d 546. However, the Plaintiff refused to do. Instead, the Plaintiff attempted to substitute the decedent's heirs as the defendants in this action. See Motion to Substitute at page 2. There is no provision in the Utah Code that allows a Plaintiff to assert a cause of action against a decedent's heirs. See Utah Code Ann. §78-11-12. The decedent's heirs cannot be liable for Curtis' alleged negligence. The Plaintiff's cause of action lies against the estate of the decedent through the personal representative or his distributees. See Utah Code Ann. §75-3-1004. Yet, the Plaintiff insists on naming the Decedent's heirs as defendants and refuses to substitute either the personal representative or the distributees of the estate as the proper party. Accordingly, the Plaintiff's motion to substitute the Decedent's heirs is improper and must be stricken. Therefore, Curtis' motion to strike the Plaintiff's Motion must be granted.

Plaintiff argues that this Court should alter his motion to substitute the descendant's heirs as a party and make it a motion that appoints the heirs as the personal representatives of the estate to comply with U.R.C.P. Rule 25. However, the Court should not alter the Plaintiff's motion to fix this fatal defect after the time to make the motion has run. Even if the Court were inclined to

the Defendant's estate. See Utah Code Ann. §75-3-203. The Plaintiff refused to do so and insisted on moving to substitute the decedent's heirs.

alter the Plaintiff's motion, it lacks the authority to appoint a personal representative in this proceeding. A proceeding to appoint a personal representative is independent of this action. See Utah Code Ann. §75-3-106. Accordingly, this Court cannot appoint a personal representative of the decedent's estate in this action because a personal representative must be appointed in a separate proceeding.

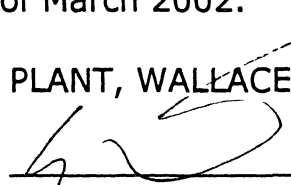
II. THE PLAINTIFF'S MOTION TO SUBSTITUTE PROPER PARTIES MUST BE STRICKEN BECAUSE IT FAILS TO PROVIDE THE PROPER NOTICE.

The Plaintiff's motion to substitute proper parties must be stricken because it fails to comply with the notice requirements of U.R.C.P. Rule 25. The rule specifically requires that the motion to substitute be serve with a notice of hearing. U.R.C.P. Rule 25. Even assuming arguendo that the Decedent's heirs are proper parties, the Plaintiff failed to serve upon them a "notice of hearing" in the manner provided in Rule 4 for the service of a summons. This failure is fatal to the Plaintiff's Motion to Substitute. The Plaintiff claims that the Court will set a hearing later and then he will provide them with the required notice. However, the plain language of U.R.C.P. Rule 25 states that a copy of the motion **"together with the notice of hearing"**

shall be served. The Plaintiff failed to serve a notice of hearing with his motion to substitute. As the Utah Supreme Court states: "the rule **requires** that the motion, '**together with the notice of hearing**, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided by Rule 4 for the service of summons.'" Stoddard v. Smith, 2001 UT 47, ¶13, 27 P.3d 546. The Plaintiff simply failed to meet this requirement. Accordingly, the Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant must be stricken.

DATED this 20th day of March 2002.

PLANT, WALLACE, CHRISTENSEN & KANELL



Terry M. Plant

Cory D. Memmott

Attorneys for Defendant Curtis

CERTIFICATE OF MAILING

I hereby certify that on this 20th day of March 2002, I mailed a true and correct copy of the foregoing document, via U.S. Mail first class, postage prepaid, to:

James C. Haskins
Thomas N. Thompson
HASKINS & ASSOCIATES
357 South 200 East, Suite 300
Salt Lake City, UT 84111-2827

My Williams

ESTABLISHED 1895
AS
STEWART & STEWART
Cory D. Memmott

LAW OFFICES
PLANT, WALLACE, CHRISTENSEN & KANELL
A PROFESSIONAL CORPORATION
136 EAST SOUTH TEMPLE, SUITE 1700
SALT LAKE CITY, UTAH 84111

TELEPHONE (801) 363-7611
FAX (801) 531-9747

December 18, 2001


James C. Haskins
HASKINS & ASSOCIATES
357 South 200 East, Suite 300
Salt Lake City, UT 84111-2827
539-5210

Re: Soules v. Curtis
PWCK #99-152

James C. Haskins:

We have received your request to provide you with the name and address of the personal representative of the deceased. Based upon the information that we have received, it is our understanding that no personal representative was appointed because the estate was not probated.

Please do not hesitate to contact me with any additional questions or concerns.

Sincerely,
PLANT, WALLACE, CHRISTENSEN & KANELL

Terry M. Plant
Cory D. Memmott

cc: Greg Sanders

CDM/sv

50
113

796512 & Affidavit
26 March 1825
1441 West Fernwood Dr
Person
Ry Willie
SALT LAKE COUNTY, UTAH

Person served: ~~NOT Served~~
Date served: ~~02 APR -1 PM 1:28~~
Time served: ~~CIVIL DEPARTMENT~~
Address where served: ~~RD~~
Served by:
Title:

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for Plaintiff Wayne J. Soules
357 South 200 East, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

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

WAYNE J. SOULES,	:	NOTICE OF
	:	PLAINTIFF'S MOTION TO
Plaintiff,	:	SUBSTITUTE PROPER
	:	PARTIES FOR DECEASED
v.	:	DEFENDANT
	:	
DALE H. CURTIS,	:	Civil No. 990903291
	:	
Defendant.	:	Judge J. Dennis Frederick

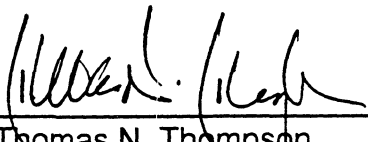
TO: J. KENT CURTIS
1441 West Fernwood Drive *Hiding*
Salt Lake City, Utah 84123
266-1327 (*W-43955*)

You are hereby notified that the Plaintiff herein, Wayne Soules, by and through
his undersigned counsel, will filed with the above court a *Motion to Substitute Proper*

Parties for Deceased Defendant; a Memorandum in Support of Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant; and the Affidavit of Thomas N. Thompson in support of said motion, copies of which are served upon you with this Notice. You have been identified as a sibling of the decedent, Dale H. Curtis, who is a proper party defendant to the above action.

Should you have any objection to this motion, you should file the same with the Clerk, Third Judicial District Court, 450 South State Street, P. O. Box 1860, Salt Lake City, Utah 84111, at any time within fourteen days after service of the attached documents upon you. In the absence of a timely objection, the Court may grant the Plaintiff's motion without further notice.

DATED this 16th day of January, 2002.



Thomas N. Thompson
Attorney for Plaintiff

I, **RAY W. WILLIAMS, JR**
being a resident of the State of UTAH, and a citizen of the United States over the age of 18 years at the time of service herein,
and not a part of or interested in the within action.

I received the within and hereto annexed,
**NOTICE
& MOTION
& MEMORANDUM
& AFFIDAVIT**

on **January 31, 2002**, and served the same upon
J. KENT CURTIS

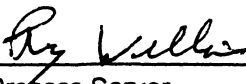
within named Witness in said article(s) by serving a true copy of said article(s) for the witness with

J. KENT CURTIS (PERSONALLY)
person of suitable age and discretion there residing at
1441 W FERNWOOD DR., SALT LAKE CITY
s/her usual place of ABODE,

on **March 26, 2002**

urther certify that at the time of service of the said article(s), I endorsed the date and place of service and added my name
d official title thereto.

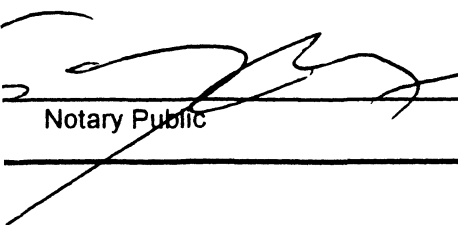
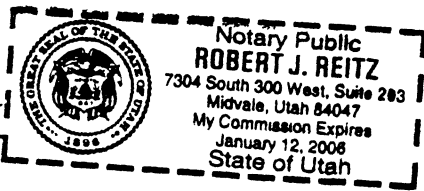
on **March 26, 2002**



Process Server

ROBERT J. "BOB" REITZ, CONSTABLE, SALT LAKE County
7304 SOUTH 300 WEST SUITE 203, MIDVALE, UTAH 84047, 255-5468

bscribed and sworn to before me this March
2002.

 _____ Notary Public		MILEAGE CHARGE: 10.00 SERVICE CHARGES: 6.00 TOTAL CHARGES: \$16.00
<hr/>		
NOTES		

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APR 29 2002
SALT LAKE COUNTY
By _____ Deputy Clerk

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

Honorable J. Dennis Frederick

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Curtis and Thomas N. Thompson of Haskins & Associates represented the Plaintiff Wayne J. Soules. The Honorable J. Dennis Frederick presided.

Based upon the pleadings, the oral argument of the parties at the hearing, the reasons specified in the memoranda supporting and opposing the motion and for good cause:

FINDINGS OF FACT

1. The Court finds that the Defendant's death was suggested on the record on December 7, 2001.
2. The Court finds that the Plaintiff is attempting to substitute the Defendant's heirs as the proper party in this action. See Affidavit of Thomas N. Thompson at ¶5 filed in support of the Motion to Substitute.
3. The Court finds that the Defendant's heirs are not the Defendant's Personal Representatives.
4. The Plaintiff's Motion to Substitute does not contain a notice of hearing.

CONCLUSIONS OF LAW

1. Upon the death of an alleged tortfeasor, the Plaintiff has a cause of action against the personal representative of the alleged tortfeasor for special and general damages. See Utah Code Ann. §78-11-12(1)(a).

2. The Plaintiff's Motion to Substitute does not seek to substitute the Decedent's personal representative and is improper and must be stricken.

3. Utah Rules of Civil Procedure Rule 25 requires that a copy of the motion to substitute be served with a notice of hearing.

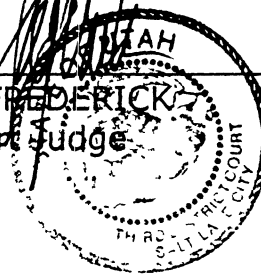
4. The Plaintiff's failure to comply with U.R.C.P. Rule 25 notice requirements is also fatal to the motion.

IT IS HEREBY ORDERED that the Defendant's Motion to Strike the Plaintiff's Motion to Substitute Heirs is GRANTED.

DATED this 19th day of April 2002.

BY THE COURT

J. DENNIS FREDERICK
District Court Judge



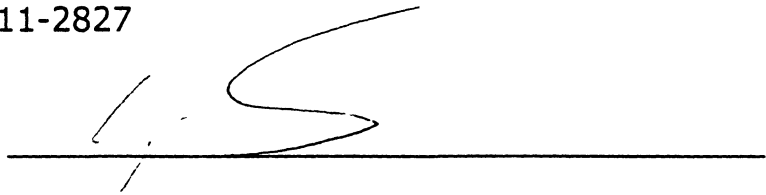
Approved as to Form

Thomas N. Thompson
Thomas N. Thompson
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on this 11th day of April 2002, I mailed a true and correct copy of the foregoing document, via U.S. Mail first class, postage prepaid, to:

James C. Haskins
Thomas N. Thompson
HASKINS & ASSOCIATES
357 South 200 East, Suite 300
Salt Lake City, UT 84111-2827

A handwritten signature, possibly reading "J. S.", is written over a horizontal line.

h>
TERRY M. PLANT, #2610
CORY D. MEMMOTT, #8346
PLANT, WALLACE, CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, UT 84111
Telephone: (801) 363-7611
Fax: (801) 531-9747
Attorneys for the Defendant Dale H. Curtis

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

WAYNE J. SOULES, Plaintiff,	U.C.R.P. RULE 25 MOTION TO DISMISS FOR FAILURE TO SUBSTITUTE PROPER PARTY
vs.	Civil No. 990903291
DALE H. CURTIS, Defendant.	Honorable J. Dennis Frederick

DEFENDANT Dale H. Curtis ("Curtis") hereby moves to dismiss this action pursuant to U.R.C.P. Rule 25.

A Memorandum of Points and Authorities filed herewith support this Motion.

DATED this 18th day of April 2002.

PLANT, WALLACE, CHRISTENSEN & KANEL

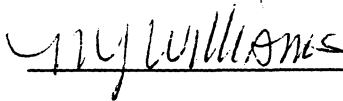


Terry M. Plant
Cory D. Memmott
Attorneys for Defendant Curtis

CERTIFICATE OF MAILING

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James C. Haskins
Thomas N. Thompson
HASKINS & ASSOCIATES
357 South 200 East, Suite 300
Salt Lake City, UT 84111-2827



TERRY M. PLANT, #2610
CORY D. MEMMOTT, #8346
PLANT, WALLACE, CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, UT 84111
Telephone: (801) 363-7611
Fax: (801) 531-9747
Attorneys for the Defendant Dale H. Curtis

WD

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

WAYNE J. SOULES,
Plaintiff,

vs.

DALE H. CURTIS,
Defendant.

**MEMORANDUM IN SUPPORT OF
U.C.R.P. RULE 25 MOTION TO
DISMISS FOR FAILURE TO
SUBSTITUTE PROPER PARTY**

Civil No. 990903291

Honorable J. Dennis Frederick

DEFENDANT Dale H. Curtis ("Curtis") hereby submits the following memorandum of points and authorities in support of his U.R.C.P. Rule 25 motion to dismiss.

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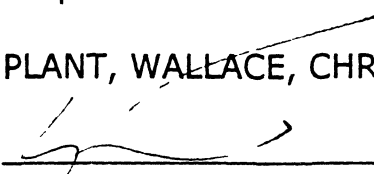
ARGUMENT

I. THE PLAINTIFF'S CAUSE OF ACTION MUST BE DISMISSED PURSUANT TO U.R.C.P. RULE 25 BECAUSE NO MOTION TO SUBSTITUTE THE DECEDENT'S PERSONAL REPRESENTATIVE WAS MADE WITHIN THE TIME LIMITS PROSCRIBED BY THE RULE.

Under U.R.C.P. Rule 25, the Plaintiff's cause of action must be dismissed because no motion to substitute the decedent's personal representative was made within the time limits proscribed by the Rule. "Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, ***the action shall be dismissed as to the deceased party.***" U.R.C.P. Rule 25 (emphasis added). The Defendant's death was suggested upon the record on December 7, 2001. The Plaintiff failed to file a motion for substitution within the time provided by U.R.C.P. Rule 25. Accordingly, the action must be dismissed. See Stoddard v. Smith, 2001 UT 47, 27 P.3d 546. Therefore, the Defendant respectfully requests that his U.R.C.P. Rule 25 motion to dismiss be granted and the case dismissed with prejudice.

DATED this 15th day of April 2002.

PLANT, WALLACE, CHRISTENSEN & KANELL



Terry M. Plant

Cory D. Memmott

Attorneys for Defendant Curtis

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of April 2002, I mailed a true and correct copy of the foregoing document, via U.S. Mail first class, postage prepaid, to:

James C. Haskins
Thomas N. Thompson
HASKINS & ASSOCIATES
357 South 200 East, Suite 300
Salt Lake City, UT 84111-2827



FILED
3RD JUDICIAL DISTRICT COURT
02 MAY 28 PM 2:20
SALT LAKE DEPARTMENT
BY KJ
CLERK

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for Plaintiff Wayne J. Soules
357 South 200 East, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

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

WAYNE J. SOULES,	:	OBJECTION TO PROPOSED
	:	ORDER OF DISMISSAL
Plaintiff,	:	
	:	
v.	:	
	:	
DALE H. CURTIS,	:	Civil No. 990903291
	:	
Defendant.	:	Judge J. Dennis Frederick
	:	

COMES NOW the Plaintiff, Wayne Soules, by and through his undersigned counsel, and objects to the Defendant's proposed Order of dismissal in this case.

The Defendant requests the Court to dismiss this case with prejudice; however, as the dismissal was not one on the merits but was based on the Court's implicit finding that the Plaintiff was required to obtain the appointment of a personal representative of the Defendant prior to seeking to substitute proper parties herein, the Petitioner would be entitled to refile this action within one year of the dismissal pursuant to the Utah

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saving statute, Utah Code Ann. § 78-12-40 (1999). That statute provides that


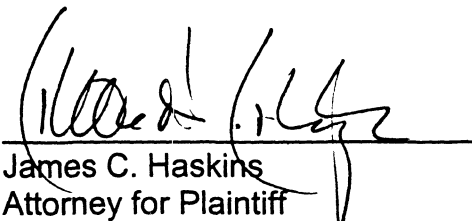
If any action is commenced within due time and a judgment thereon for the plaintiff is reserved, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff,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

A dismissal on the merits would prejudice the Plaintiff by precluding him from re-filing this action pursuant to the above statute. See, e.g., *Beaver v. Qwest, Inc.*, 31 P.3d 1147 (Utah 2001).

For the foregoing reasons, the Order of dismissal in this case should recite that the case is dismissed *without prejudice*.

In all other respects, the Plaintiff has no objection to the dismissal in this case.

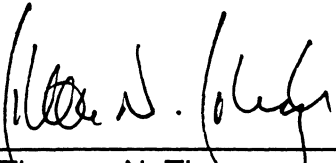
DATED this 28th day of May, 2002.

 
James C. Haskins
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ***Objection to Proposed Order of Dismissal*** was served on the 28th day of May, 2002, by mailing the same in a U. S. Postal Service postage paid envelope addressed as follows:

Terry Plant
Cory Memmott
PLANT WALLACE CHRISTENSEN AND KANELL
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111



Thomas N. Thompson

TERRY M. PLANT, #2610
CORY D. MEMMOTT, #8346
PLANT, WALLACE, CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, UT 84111
Telephone: (801) 363-7611
Fax: (801) 531-9747
Attorneys for the Defendant Dale H. Curtis

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

WAYNE J. SOULES, Plaintiff, vs. DALE H. CURTIS, Defendant.	REPLY TO PLAINTIFF'S OBJECTION TO PROPOSED ORDER OF DISMISSAL Civil No. 990903291 Honorable J. Dennis Frederick
--	--

DEFENDANT Dale H. Curtis ("Curtis") hereby submits the following
reply to the Defendant's Objection to the proposed order of dismissal.

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I. UNDER UTAH LAW, A DISMISSAL PURSUANT TO URCP RULE 25 IS AN ADJUDICATION ON THE MERITS AND A DISMISSAL IS WITH PREJUDICE.

A dismissal pursuant to URCP Rule 25 is an adjudication on the merits. The Plaintiff claims in his objection that it would be an error for this Court to execute the proposed order dismissing this matter with prejudice. The Utah Supreme Court has recently addressed the issue of whether a dismissal pursuant to URCP Rule 25 is a dismissal with or without prejudice. In the case of Donahue v. Smith, 2001 UT 46, 27 P.3d 552, the Plaintiff's complaint was dismissed with prejudice pursuant to URCP Rule 25 because the Plaintiff failed to file a motion for substitution within ninety days after the suggestion of death was filed. The Plaintiff appealed the district court decision and stated that the district court erred in dismissing the complaint with prejudice. The Utah Supreme Court upheld the district court's decision to dismiss the action with prejudice and stated:

[b]ecause the language in rule 41(b) refers only to a dismissal under rule 19(b), and because the district court granted the motion to dismiss based on plaintiff's failure to comply with rule 25, the district court properly determined that the dismissal was for a failure to 'to comply with these rules.' **Therefore, under rule 41(b), a dismissal with prejudice was presumed, and the district court was not in error to so rule.**

Donahue v. Smith, 2001 UT 46, ¶8, 27 P.3d 552 (emphasis added).

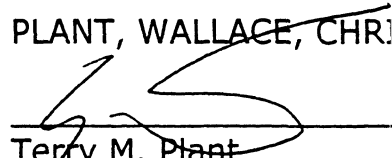
Accordingly, the Defendant's proposed order dismissing this action with

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prejudice is appropriate. Therefore, the Defendant respectfully requests that the Court enter the proposed Order of Dismissal With Prejudice, filed herewith.

DATED this 30th day of May 2002.

PLANT, WALLACE, CHRISTENSEN & KANELL


Terry M. Plant

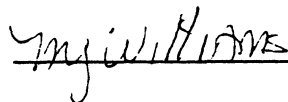
Cory D. Memmott

Attorneys for Defendant Curtis

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of May 2002, I mailed a true and correct copy of the foregoing document, via U.S. Mail first class, postage prepaid, to:

James C. Haskins
Thomas N. Thompson
HASKINS & ASSOCIATES
357 South 200 East, Suite 300
Salt Lake City, UT 84111-2827



(68)

FILED DISTRICT COURT
Third Judicial District

JUN 12 2002

SALT LAKE COUNTY

By RS
Deputy Clerk

TERRY M. PLANT, #2610
CORY D. MEMMOTT, #8346
PLANT, WALLACE, CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, UT 84111
Telephone: (801) 363-7611
Fax: (801) 531-9747
Attorneys for the Defendant Dale H. Curtis

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WAYNE J. SOULES,
Plaintiff,

vs.

DALE H. CURTIS,
Defendant.

**ORDER ON URCP RULE 25
MOTION TO DISMISS**

Civil No. 990903291

Honorable J. Dennis Frederick

DEFENDANT Dale H. Curtis ("Curtis") URCP Rule 25 Motion to Dismiss came before this Court on May 13, 2002 pursuant to Rule 4-501(1)(d) of the Utah Code of Judicial Administration.

Based upon the pleadings, the legal argument of the Defendant, no timely opposition being filed, and for good cause:

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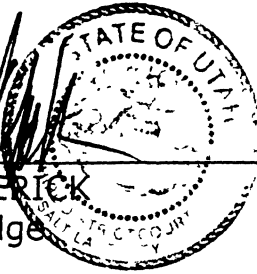
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IT IS HEREBY ORDERED that Defendant's URCP Rule 25 Motion to Dismiss is GRANTED and the above referenced case is DISMISSED WITH PREJUDICE.

DATED this 12th day of June 2002.

BY THE COURT

J. DENNIS FREDERICK
District Court Judge



Approved as to Form

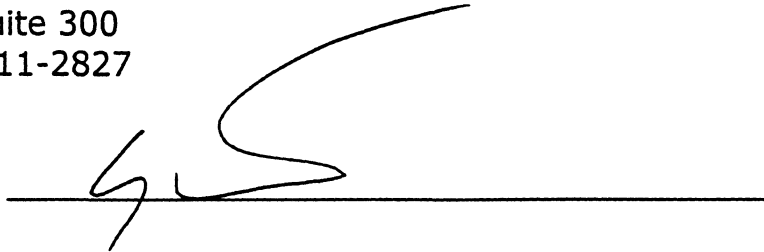
Thomas N. Thompson
Attorneys for Plaintiff

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CERTIFICATE OF MAILING

I hereby certify that on this 15th day of May 2002, I mailed a true and correct copy of the foregoing document, via U.S. Mail first class, postage prepaid, to:

James C. Haskins
Thomas N. Thompson
HASKINS & ASSOCIATES
357 South 200 East, Suite 300
Salt Lake City, UT 84111-2827

A handwritten signature, likely of James C. Haskins, is written over a horizontal line. The signature is stylized, with a large, sweeping 'S' shape.

James C. Haskins (1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for Plaintiff Wayne J. Soules
357 South 200 East, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210



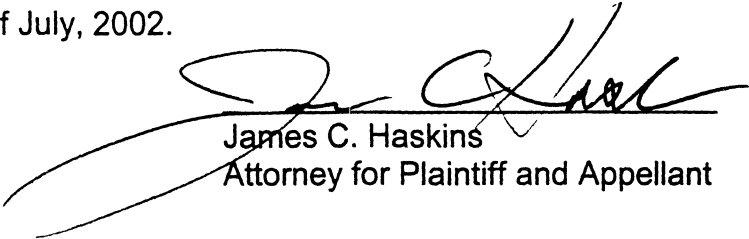
IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

WAYNE J. SOULES,	:	
	:	
Plaintiff,	:	NOTICE OF APPEAL
	:	
v.	:	
	:	
DALE H. CURTIS,	:	Civil No. 990903291
	:	
Defendant.	:	

Notice is hereby given that the Plaintiff and Appellant, Wayne J. Soules, appeals to the Utah Supreme Court from the final judgment of the Honorable J. Dennis Frederick entered in this matter on June 12, 2002.

This appeal is taken from the entire judgment.

DATED this 8th day of July, 2002.


James C. Haskins
Attorney for Plaintiff and Appellant

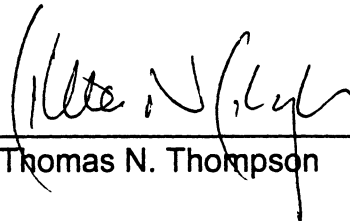
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Notice of Appeal** was served on the 9th day of July, 2002, by mailing the same in a U. S. Postal

Service postage paid envelope addressed as follows:

Terry Plant
Cory Memmott
PLANT WALLACE CHRISTENSEN AND KANELL
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111



Thomas N. Thompson