

2002

Gary M. Eyre, Gary Elliot Eyre v. Milbank Insurance : Reply Brief

Utah Court of Appeals

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Roger Bullock; Strong and Hanni; Attorne for Appellees.

Robert Breeze; Attorney for Appellants.

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BEFORE THE UTAH COURT OF APPEALS

GARY M. EYRE, father and natural)
guardian of GARY ELLIOTT EYRE, a)
minor, and GARY ELLIOTT EYRE,)
individually, and Does I-X,)

Third Party Plaintiffs,)
and Appellants,)

vs.)

MILBANK INSURANCE, and)
Does I-X)

Third Party Defendants/Appellees.)

Court of Appeals
Case No. 20020898-CA

REPLY BRIEF OF APPELLANT

**APPEAL FROM THIRD DISTRICT COURT OF SALT LAKE
COUNTY, STATE OF UTAH, JUDGE ROGER LIVINGSTON
PRESIDING, WHEREIN THE TRIAL COURT DETERMINED
THAT THERE HAD NOT BEEN AN "OCCURRENCE" UNDER
THE INSURANCE POLICY**

ROBERT BREEZE #4278
402 East 900 South #1
Salt Lake City, Utah 84111
Telephone: (801) 322-2138

Attorney for Third Party Plaintiffs/
Appellants

Roger Bullock
STRONG & HANNI
Nine Exchange Place, Sixth Floor
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

Attorney for Milbank Insurance Company

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Telephone: (801) 532-7080

Attorney for Milbank Insurance Company

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CONSTITUTIONAL PROVISIONS

None.

STATUTORY PROVISIONS

None.

ADDENDUM

A-1 Affidavit of Michael Holman.

A-2 Letter from Milbank's counsel.

BEFORE THE UTAH COURT OF APPEALS

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guardian of GARY ELLIOTT EYRE, a)	
minor, and GARY ELLIOTT EYRE,)	
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and Appellants,)	
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)	
MILBANK INSURANCE, and)	Court of Appeals
Does I-X)	Case No. 20020898-CA
)	
Third Party Defendants/Appellees.))	Priority Classification No.
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THIRD DISTRICT COURT OF SALT LAKE
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PRESIDING, WHEREIN THE TRIAL COURT DETERMINED
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ARGUMENT

POINT I

THE APPEAL WAS TIMELY FILED

Rule 4(a) of the Utah Rules of Criminal Procedure provides that the notice of appeal must be filed within 30 days after the date of entry of the judgment or order appealed from.

The record shows that Milbank submitted a proposed order 8-19-02. It appears that the trial court signed that order on August 21, 2002 however the order was never placed in the file. (See Exhibit 1, Affidavit of Michael Holman.)

Counsel for the accused student made diligent efforts to keep track of the original order. Counsel's secretary was informed on multiple occasions by the trial court's clerk that the order submitted on August 19, 2002 had not been signed. The lack of signing of this order, or its absence from the file, is confirmed by the letter from Milbank's counsel, attached hereto as Exhibit 2.

Following the trial court review of the objections to Milbank's proposed order the trial court signed the order and judgment on October 4, 2002 and that pleading went into the file. Note on the docket text attached as Exhibit 3 that when the court signed the October 4, 2002 order this signing was reflected in the docket text on the October 4, 2002 entry. Comparing this entry with the August 19 and 21, 2002 entries on the docket text shows that there is no indication that the order had been signed.

This case involves a scenario where a judgment was apparently signed on August 19, 2002 but not entered on the docket or placed in the file until some unknown later date. Meanwhile the parties continue to litigate the question of whether the proposed judgment accurately reflected the trial court ruling. A judgment is not "entered" when no one knows or reasonably could know that the order has been signed.

This case is far different from *Auto Control Prods. Corp., v. Tel-Tech. Inc.*, 780 P.2d 1258 (Utah 1989) where the attorney for a party can be accused of failing to

periodically check with the court as to the date of entry of judgment. This instant appeal involves a case where the counsel for the accused did in fact exercise extreme diligence in keeping track of the original order which was signed but not placed in the file.

Rule 58A© of the Utah Rules of Civil Procedure provides in relevant part that “A judgment is complete and shall be deemed entered for all purposes, ... , when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.” The same rule at subsection (d) provides that the party preparing the judgement shall serve a signed copy on the opposing party pursuant to Rule 5 of the Utah Rules of Civil Procedure. This subsection goes on to provide that subsection © shall not affect the time for filing a notice of appeal.

As evidenced by Exhibit One and Two, Milbank could not give notice of the entry of the judgment because Milbank also could not find out if the judgment had been signed.

This court should either hold that the entry of the judgment did not occur until October 4, 2002 or remand for a hearing on how exactly the August 19, 2002 order was signed but not reflected in the docket text or placed in the court file.

POINT II.

THE COURT SHOULD DECLINE TO APPLY THE EQUITABLE DOCTRINE OF COLLATERAL ESTOPPEL TO THIS CASE

Milbank argues that this court should affirm based on a theory of collateral

estoppel. The trial court received memoranda on this subject but did not rule on the issue. For purposes of this appeal the accused minor reiterates the argument he made before the trial court.

The issue presented for consideration by the Court is whether or not the doctrine of issue preclusion, sometimes call collateral estoppel, should be applied against the child Gary E. Eyre to prevent him from claiming and proving in this action that he is not the person who assaulted Alvaro Estrada on or about January 18, 2001 at either 9:00 a.m. or 12:30 p.m.

Although varying somewhat from jurisdiction to jurisdiction the doctrine of res judicata is comprised of two components, claim preclusion and issue preclusion. Macris and Assocs., Inc. v. Neways, Inc., 16 P.2d 1214 (Ut. 2000). Both doctrines involve the important public policy of preventing the relitigation of previously litigated matters, specifically claims and issues. Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 733.

Claim preclusion bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously. Culbertson v. Bd. of County Comm'rs. 2001 UT. 108. Issues preclusion (collateral estoppel) prevents the relitigation of issues in a subsequent action.

For issue preclusion to apply three elements must be met. First, both cases must involve the same parties or the privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should

have been raised in the first action. Third, the first suit must have resulted in a final judgement on the merits.

Issue preclusion generally requires proof of four criteria:

1. The party against who issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication;
 2. The issue decided in the prior adjudication must be identical to the one presented in the instant action;
 3. The issue in the first action must have been completely, fully, and fairly litigated;
- and
4. The first suit must have resulted in a final judgment on the merits.

Culbertson.

Collateral estoppel differs from claim preclusion in that it is an equitable doctrine which should be “applied only when the alignment of the parties and the legal and factual issue raised warrant it.” Nations v. Sun Oil Co., 705 F.2d 742, 744-45 (5th Cir.) (en banc), cert. denied, 464 U.S. 893 (1983).

Some courts rephrase the foregoing to include a requirement that collateral estoppel should only be applied when “...there is no special circumstance that would make it unfair to apply the doctrine.” United States v. Shanbaum, 10 F.3d 305, 311 (5th Cir. 1994).

Being an equitable doctrine, collateral estoppel should not be applied

mechanically, but rather should be applied in a flexible and elastic manner to promote justice, not to subvert it. C.J.S., Judgments, Sec. 779 The application of collateral estoppel should not result in unfairness or injustice. C.J.S., Judgments, Sec. 782. Further, a judgment is not final if a proceeding for relief is pending. C.J.S., Judgments, 791.

The Third Party Plaintiff in this matter raises a number of reasons why collateral estoppel should not be applied as requested by Milbank.

First, there is some doubt about whether the confidential records of the Juvenile Court can even be introduced in evidence in this matter. The Second Circuit Court of Appeals so held in interpreting New York law in Green v. Montgomery, 219 F.3d 52 (2nd Cir. 2000). Utah law appears to be silent on this subject. However, important public policy considerations militate in favor of such a rule in Utah. The purpose of Juvenile Court is to aid and assist minors.

Second, the record in this matter shows an absolutely abysmal defense during the course of the Juvenile Court proceedings. The record and the facts cited supra paint a picture of a defense counsel who failed to make any effort to suppress the alleged confession, either for involuntariness or failure to provide counsel or cease the interrogation once the child had invoked his right to counsel, who only spent two and one half minutes with the child in preparation for the adjudication, who never even discussed the alleged confession with the minor, who did not move to suppress the identification of this child as the perpetrator even though the child did not even match the description of

the alleged assailant (see page one of Exhibit A attached to Milbank's Motion which shows the alleged assailant to be tall, brown eyes, black hair, skinny while this child is short, heavy set, blonde and has blue/green eyes, (Depo. Tr. 1-3-02 at 62, 81-82, attached hereto as Exhibits 16 and 17, respectively), who did not move for a continuance to gather additional evidence after the time of the alleged assault was changed from 12:30 p.m. to 9:00 a.m., the change in theory occurring on the morning of the adjudication, thereby negating the alibi evidence that the minor had brought to court in the form of a teacher who could vouch for his whereabouts at 12:30, and who did not even advise the minor that he had the right to appeal. The court should also note that there is no indication in the record that Judge Oddone ever advised the minor of the right to appeal.

The equities in this case show a child who was coerced into signing a bogus confession due to coercion and was then given a "trial" that can only be considered substandard due to the performance of the appointed counsel. When this court considers that facts in the light most favorable to the child one can only recoil in horror at the thought of what happened to this child. To now try to use collateral estoppel to prevent this child from clearing his name and to obtain a huge monetary judgment that could saddle the child with an unbearable financial burden for the rest of his life is unconscionable. Equity requires justice and fairness. There is nothing fair or just about what Milbank is trying to achieve through invoking collateral estoppel.

The child in this case asserts that because of the ineffective assistance he received from appointed counsel in the juvenile court that the issue of whether he was the

person who intentionally assault Alvaro Estrada was not completely, fully and fairly litigated. “Fairly litigated” raises the specter of a due process violation. The representation that this child received, based on this record, precluded the possibility of fair litigation.

Third, the minor was deprived of his right to appeal. Neither the appointed attorney or the juvenile court judge advised the minor of his right to appeal, which he would have done, if he had been so advised.

Fourth, the judgment is not really final until the Petition for Post Conviction Relief is fully adjudicated, especially given that the child was deprived of his right to appeal. In *Bell v. Dillard Department ‘Stores, Inc.* 85 F.3d 1451 (10th Cir. 1996) the Tenth Circuit recognized that the lack of an opportunity to appeal means a litigant has not had a full and fair opportunity to litigate.

While not specifically talking about a litigant who was deprived of his right to appeal due to failure of counsel or the judge to so advise, the court does seem to approve the concept that “In similar situations where a defendant’s opportunity for appellate review has been foreclosed, Illinois courts have excepted the litigant from general collateral estoppel rules and allowed the matter to be relitigated.”, citing Henry v. Ryan, 775 F. Supp. 247, 252 (N.D. Ill. 1991).

In the Restatement of the Law, Second, Judgments, Sec. 28 it is recognized that one of the exceptions to the application of the doctrine of issue preclusion arises when “...the party sought to be precluded, as a result of ... special circumstances, did not have an

adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

POINT III.

THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO MILBANK

The factual findings to be employed and the standard of review to be applied to this case are outcome determinative however, the application, or non application of the collateral estoppel doctrine will determine which facts are to be applied.

The facts are to be viewed in the light most favorable to the non moving party.

The Appellate Court should review the applicable law de novo affording no deference to the trial court.

The base facts of this case (assuming that collateral estoppel is inapplicable), as set forth in detail in the accused minor's opening brief and his Memorandum in Opposition to Summary Judgment and supplement in his opposition to summary judgment filed in the trial court, bear little resemblance to the recitation set forth in the Milbank brief, pages 2 through 7, except with respect to the policy language.

The record reflects important facts which in fairness should be included, especially when the facts are viewed in the light most favorable to the accused minor. These facts include, but are not limited to:

1. That the alleged victim's original version of the story was that he had fallen from his wheelchair while reaching for a catheter. No reference is made to this fact in

Milbank's brief.

2. That the police never became aware of the original story.
3. That the mother then had a "vision" of something bad happening at school, followed by a claim by the alleged victim that he had been attacked by a group of boys.
4. That the police never became aware of this fact.
5. That the minor was picked from a yearbook, coerced into a confession and adjudicated culpable based upon less than excellent representation at the Juvenile Court.

In summary, the facts when viewed as they must be viewed, in the light most favorable to the accused minor, narrate a tragic story involving two teen aged males, one disabled and wheelchair bound, the other a seemingly normal teenage kid until the advent of this case.

The injured minor reached for his catheter and fell hard onto the floor of West High School. He went home and began to suffer serious symptoms which led him to be rushed to the hospital. The injured minor told his mother and the hospital staff that he had fallen from the wheelchair.

While the injured minor recovered from the injuries his mother had a "vision" that the injured minor's injuries had been occasioned by a more sinister force. First, she got the accused minor to say he had been attacked by a group of boys. Later, it became one boy. Then came the yearbook and the boy who had fallen from his wheelchair and then been manipulated by his mother into claiming an assault faced a dilemma. Tell the truth, which would require a disabled lad to contravene his loving mother and admit he had lied

about the physical attack, which attack originated in the mother's mind, or pick out a picture from the yearbook.

The accused minor was then called to the office to be interrogated by a police detective who had no idea that the original story was an accidental fall which morphed into a group attack, which then transmuted into an attack by a single boy and that all of this had resulted from the mother's "vision".

The accused student confessed falsely, under duress, based upon a promise that he would not be imprisoned if he would just say he did it.

The accused student was then adjudicated culpable by the Juvenile Court and severely punished. The quality of defense representation is already in the record and will not be discussed further, except, suffice it to say that the defense was as "in the dark" regarding the origin and source of the allegation as the police.

This litigation then ensued and ultimately, Milbank also became aware of the actual chain of events.

For purposes of Summary Judgment, unless collateral estoppel is applied against the accused student, the facts clearly show a false accusation against the accused student.

This case involves a factual scenario so unusual that it is highly unlikely the insurer ever conceived of said scenario when the policy language was drafted. In essence, this case involves an accidental injury by the injured student, followed by a false claim against the insured. The accused student is entitled to a defense, and also indemnification, based upon the fact that there was an occurrence, which is an injury


occurring by accident. Further, Milbank contracted to defend frivolous and groundless lawsuits. Therefore, Milbank had an obligation to defend this case.

CONCLUSION

There was an “occurrence” because there was an accident (fall from wheelchair) which resulted in a bodily injury. Equitable principles should preclude the application of collateral estoppel. The trial court erred by granting summary and declaratory judgment to Milbank.

WHEREFORE, Third Party Plaintiff/Appellant prays that this Court reverse the trial court’s judgments or in the alternative, that this Court remand for an evidentiary hearing to establish all relevant facts related to the processing of the August 19, 2002

DATED this 28 day of April 2003.



ROBERT BREEZE
Attorney for Appellant

CERTIFICATE OF MAILING

I certify I mailed//hand delivered two true and correct copies of the foregoing to:

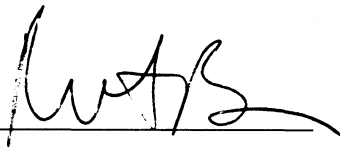
Attorney for 3rd Party Defendants/
Appellees

Roger Bullock
STRONG & HANNI
Attorney for Milbank Insurance Company
Boston Building, Sixth Floor
Nine Exchange Place
Salt Lake City, Utah 84111

Attorney for Plaintiff:

Michael a. Katz
Michael Richman & Associates
Attorney for Myrta Rosas and Alvaro Estrada
5684 South Green Street
Salt Lake City, Utah 84123

this 28 day of April 2003.



ADDENDUM

1. Affidavit of Michael Holman.
2. Letter from Milbank's counsel dated March 4, 2003.

AFFIDAVIT OF MICHAEL HOLMAN

1. My name is Michael Holman. I am employed by attorney Robert Breeze as his secretary and was so employed at the time the of the hearing on Milbank's Motion for Summary Judgment August 5, 2002.

2. After our office received the proposed Order on Summary Judgment on or about August 23, 2002 I was instructed by Mr. Breeze to contact the Court to see if an Order granting Milbank's Motion had been signed and filed with the Court.

3. Within a week after the submission of Milbank's proposed Order I called the Court to inquire if the Order had been signed and filed. I continued to contact the Court by phone and in person three times a week thereafter until the second order was signed on October 4, 2002.

4. Approximately 10 days after Milbank's "original" proposed Order was filed with the Court, I went to the Court and got a docket text printout of the case and saw an entry that an Order granting Summary Judgment in favor of Milbank had been filed. I then asked the clerk at the front counter of the civil division on the first floor of the Matheson Courthouse for a copy of the Order. The file was not downstairs and I was directed to talk to Judge Livingston's clerk on the third floor where the file was located.

5. The clerk at the front desk retrieved the file for me and I went through the entire file twice looking for the Order Granting Summary Judgment and it was not there. I then spoke to Judge Livingston's clerk, a tall blond woman in her mid thirties who I believe her name to be Sally. I explained to Sally that there was not a signed order, even an unsigned Order in the file. She also looked through the file to confirm this fact. Sally explained to me that the notation on

the docket that the Order had been filed only meant that the Order had been filed with the Court and that when the Order was signed by the judge another entry would be made on the docket indicating the Order had been signed and entered in the Court's file.

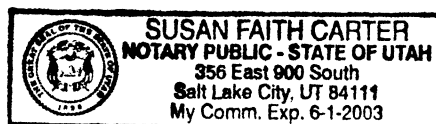
6. I made additional trips to the Court in person, and regularly called, and was unable to find any indication that the first Order had been signed or entered.

7. I have attached hereto and initialed the docket texts I obtained while trying to track the first Order.

State of Utah)
 ss
County of Salt Lake)


MICHAEL HOLMAN

SUBSCRIBED AND SWORN to before me by MICHAEL HOLMAN this 23rd day of April, 2003.





MY COMMISSION EXPIRES: 6/1/03 Notary Public, State of Utah
Residing at Salt Lake County

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

ALVARO ESTRADA vs. DOES I-X

ASE NUMBER 010906579 Personal Injury

CURRENT ASSIGNED JUDGE
ROGER A. LIVINGSTON

PARTIES

Plaintiff - MYRTA ROSAS
Represented by: A JOHN WITKOWSKI

Plaintiff - ALVARO ESTRADA

Defendant - GARY EYRE
Represented by: PAUL H MATTHEWS
Represented by: ROBERT B. BREEZE

Defendant - DOES I-X

Third Pty Defendant - MILBANK INSURANCE COMPANY
Represented by: ROGER H. BULLOCK

Third Pty Defendant - MILBANK INSURANCE COMPANY
Represented by: PETER H BARLOW

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	135.00
	Amount Paid:	135.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S

	Amount Due:	120.00
	Amount Paid:	120.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY

	Amount Due:	15.00
	Amount Paid:	15.00
	Amount Credit:	0.00
	Balance:	0.00

ASE NOTE

CEEDINGS

31-01 Judge FREDERICK assigned. evangelb
31-01 Filed: Complaint No Amount evangelb
31-01 Fee Account created Total Due: 120.00 evangelb
31-01 COMPLAINT - NO AMT S Payment Received: 120.00 evangelb
Note: Code Description: COMPLAINT-NO AMT SPC
31-01 Judge LIVINGSTON assigned. evangelb
31-01 Filed: Complaint evangelb
27-01 Filed return: Summons heaths
Party Served: EYRE, GARY
Service Type: Personal
Service Date: August 22, 2001
10-01 Filed: Motion to Dismiss Pursuant to Rules 12(b)(6) and christef
12(b)(7) URCP.
10-01 Filed: Memorandum in Support of Motion to Dismiss Pursuant to christef
Rules 12(b)(6) and 12(b)(7) URCP.
24-01 Filed: Motion For Order To Amend Complaint lynm
28-01 Filed: Notice to Submit for Decision to file Amended Complaint. christef
01-01 Filed: Objection to Notice to Submit for Decision. christef
01-01 Filed: Memorandum in Opposition to Motion for Order to Amend
Complaint. christef
04-01 Minute Entry - MOTION TO AMEND COMPLAINT christef
Judge: ROGER A. LIVINGSTON
Clerk: christef
Court grants Plaintiff's motion to amend complaint over the
objection to the notice to submit for decision filed by Attorney
for the Defendant. Attorney for the plaintiff to prepare the
order.
17-01 Filed: Order Granting Leave To Amend Complaint lynm
24-01 Filed return: Summons to Gary Eyre christef
Party Served: Gary Eyre
Service Type: Personal
Service Date: October 18, 2001
07-01 Filed: Affidavit of Impecuniosity. christef
07-01 Filed: Third Party Complaint. christef
07-01 Filed: Answer betsync
GARY EYRE
09-01 Filed: Answer to First Amended Complaint christef
GARY EYRE
06-01 Filed return: Summons christef
Party Served: CT Corp, receptionist
Service Type: NonPersonal
Service Date: November 07, 2001
10-01 Filed: Answer of Third Party Defendant Milbank Insurance

Company.	DOES I-X	christer:
2-19-01	Filed: Notice of Deposition of Gary Elliott Eyre.	christer
2-27-01	Filed: Amended Notice of Deposition of Gary Elliott Eyre.	christer
1-03-02	Filed order: Stipulated Case Management Order Judge rlivings Signed January 02, 2002	lynm
1-03-02	Filed: Certificate of Service.	christer
1-08-02	Filed: Plaintiff's Designation of Fact Witnesses.	christer
1-09-02	Filed: Certificate Of Service Of Rule 26 Initial Disclosures Of Third Party Defendant Milbank Insurance Company	lynm
1-24-02	Filed: Stipulation of Dismissal Without Prejudice.	christer
1-24-02	Filed: Certificate of Service of Designation of Fact Witnesses of Third Party Defendant Milbank Insurance Company.	christer
1-24-02	Filed: Third Party Plaintiff Gary E. Eyre's Certificate of Initial Disclosure and Further Disclosures.	christer
1-24-02	Filed: Third Party Plaintiff Gary E. Eyre's Designation of Fact Witnesses.	christer
1-31-02	Filed order: Order Of Dismissal Without Prejudice Judge rlivings Signed January 31, 2002	lynm
1-31-02	Case Disposition is Dismissed Disposition Judge is ROGER A. LIVINGSTON	lynm
3-29-02	Filed: Plaintiff's Designation of Expert Witnesses.	christer
4-01-02	Filed: Third Party Plaintiff Gary E. Eyre's Notification of Expert Witness.	christer
4-01-02	Filed: Certificate of Delivery of Notice of Third Party Plaintiff's Expert.	christer
5-16-02	Filed: Notice of Taking Deposition (3).	christer
5-17-02	Filed: Notice of Taking Deposition.	christer
5-20-02	Filed: Amended Notice of Taking of Deposition.	christer
5-21-02	Filed: Motion For Summary Judgment Of Third Party Defendant Milbank Insurance Company	lynm
5-21-02	Filed: Memorandum Of Third Party Defendant Milbank Insurance Company In Support Of Its Motion For Summary Judgment	lynm
5-21-02	Filed: Request For Hearing On Milbank Insurance Company's Motion For Summary Judgment	lynm
5-29-02	Filed: Gary E. Eyre's Oppositoin to Milbank's Motion for Summary Judgment.	christer
5-29-02	Filed: Motion for Hearing on Third Party Defendant's Motion for Summary Judgment.	christer
5-30-02	Filed: Motion for Order Granting Leave to Amend Third Party Complaint to Name Additional Third Party Defendant.	christer
5-30-02	Filed: Complaint of Third Party Plaintiff Gary Elliott Eyre Against Third Party Defendant Kim Rilling.	christer
5-06-02	Filed: Notice of Hearing.	christer
5-06-02	MOTION FOR SUMMARY JUDGMENT scheduled on August 05, 2002 at 10:00 AM in Third Floor - W39 with Judge LIVINGSTON.	lynm

4-02	Filed: Amended Notice of Taking Of Deposition	lynm
4-02	Filed: Reply Memorandum in Support of Milbank's Motion for Summary Judgment.	christef
4-02	Filed: Notice to Submit for Decision Milbank's Motion for Summary Judgment.	christef
1-02	Filed: Notice Of Deposition Of Defendant Hugh Lawing	lynm
5-02	Filed: Supplemental Reply Memorandum in Support of Milbank's Motion for Summary Judgment.	christef
1-02	Filed: Gary E. Eyer's Supplement to his Opposition to Milbank's Motion for Summary Judgment.	christef
5-02	Fee Account created Total Due: 15.00	nicolel
5-02	VIDEO TAPE COPY Payment Received: 15.00	nicolel
5-02	Minute Entry - Minutes for MOTION FOR SUMMARY JUDGMENT	christef
	Judge: LIVINGSTON, ROGER A.	
	Clerk: christef	
	PRESENT	

Defendant(s): GARY EYRE
Plaintiff's Attorney(s): MICHAEL KATZ
Defendant's Attorney(s): ROBERT B. BREEZE
Other Parties: ROGER H. BULLOCK
Video
Tape Number: 080502 Tape Count: 10:01

HEARING

This case comes before the court for hearing on the Third Party Defendant's Motion for Summary Judgment.
Response by Mr. Breeze, attorney for Defendant Gary Eyre, heard.
COUNT: 10:41
Reply by Mr. Bullock.
COUNT: 10:47
Reply by Mr. Katz.
COUNT: 10:51

Court denies Motion for Summary Judgment.
Mr. Bullock to prepare order.

19-02	Filed: Letter from Roger Bullock with proposed Judgment attached	lynm
20-02	Filed: Letter from Robert Breeze Re Proposed Order	lynm
20-02	Filed: Objection to Proposed Order	lynm
21-02	Filed: Memorandum Of Milbank Insurance Company In Response To Eyre's Objection To Proposed Order	lynm
21-02	Filed: Summary Judgment In Favor Of Third-Party Defendant Milbank Insurance Company And Declaratory Judgment	lynm
21-02	Filed: Plaintiff's Request For A Ruling	lynm

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

ALVARO ESTRADA vs. DOES I-X

ASE NUMBER 010906579 Personal Injury

CURRENT ASSIGNED JUDGE
ROGER A. LIVINGSTON

PARTIES

Plaintiff - MYRTA ROSAS
Represented by: A JOHN WITKOWSKI

Plaintiff - ALVARO ESTRADA

Defendant - GARY EYRE
Represented by: PAUL H MATTHEWS
Represented by: ROBERT B. BREEZE

Defendant - DOES I-X

Third Pty Defendant - MILBANK INSURANCE COMPANY
Represented by: ROGER H. BULLOCK

Third Pty Defendant - MILBANK INSURANCE COMPANY
Represented by: PETER H BARLOW

COUNT SUMMARY

TOTAL REVENUE	Amount Due:	136.00
	Amount Paid:	136.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S	
	Amount Due: 120.00
	Amount Paid: 120.00
	Amount Credit: 0.00
	Balance: 0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY	
	Amount Due: 15.00
	Amount Paid: 15.00
	Amount Credit: 0.00
	Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	1.00
Amount Paid:	1.00
Amount Credit:	0.00
Balance:	0.00

3 NOTE

CEEDINGS

31-01 Judge FREDERICK assigned.	evangelb
31-01 Filed: Complaint No Amount	evangelb
31-01 Fee Account created Total Due: 120.00	evangelb
31-01 COMPLAINT - NO AMT S Payment Received: 120.00	evangelb
Note: Code Description: COMPLAINT-NO AMT SPC	
31-01 Judge LIVINGSTON assigned.	evangelb
31-01 Filed: Complaint	evangelb
27-01 Filed return: Summons	heaths
Party Served: EYRE, GARY	
Service Type: Personal	
Service Date: August 22, 2001	
10-01 Filed: Motion to Dismiss Pursuant to Rules 12(b)(6) and 12(b)(7) URCP.	christef
10-01 Filed: Memorandum in Support of Motion to Dismiss Pursuant to Rules 12(b)(6) and 12(b)(7) URCP.	christef
24-01 Filed: Motion For Order To Amend Complaint	lynm
28-01 Filed: Notice to Submit for Decision to file Amended Complaint.	christef
01-01 Filed: Objection to Notice to Submit for Decision.	christef
01-01 Filed: Memorandum in Opposition to Motion for Order to Amend Complaint.	christef
04-01 Minute Entry - MOTION TO AMEND COMPLAINT	christef
Judge: ROGER A. LIVINGSTON	
Clerk: christef	
Court grants Plaintiff's motion to amend complaint over the objection to the notice to submit for decision filed by Attorney for the Defendant. Attorney for the plaintiff to prepare the order.	
-17-01 Filed: Order Granting Leave To Amend Complaint	lynm
-24-01 Filed return: Summons to Gary Eyre	christef
Party Served: Gary Eyre	
Service Type: Personal	
Service Date: October 18, 2001	
-07-01 Filed: Affidavit of Impecuniosity.	christef
-07-01 Filed: Third Party Complaint.	christef
-07-01 Filed: Answer	betsyc
GARY EYRE	
-09-01 Filed: Answer to First Amended Complaint	christef
GARY EYRE	

2-06-01	Filed return: Summons Party Served: CT Corp, receptionist Service Type: NonPersonal Service Date: November 07, 2001	christer
2-10-01	Filed: Answer of Third Party Defendant Milbank Insurance Company. DOES I-X	christer
2-19-01	Filed: Notice of Deposition of Gary Elliott Eyre.	christer
2-27-01	Filed: Amended Notice of Deposition of Gary Elliott Eyre.	christer
1-03-02	Filed order: Stipulated Case Management Order Judge rlivings Signed January 02, 2002	lynm
1-03-02	Filed: Certificate of Service.	christer:
1-08-02	Filed: Plaintiff's Designation of Fact Witnesses.	christer:
1-09-02	Filed: Certificate Of Service Of Rule 26 Initial Disclosures Of Third Party Defendant Milbank Insurance Company	lynm
1-24-02	Filed: Stipulation of Dismissal Without Prejudice.	christerf
1-24-02	Filed: Certificate of Service of Designation of Fact Witnesses of Third Party Defendant Milbank Insurance Company.	christerf
1-24-02	Filed: Third Party Plaintiff Gary E. Eyre's Certificate of Initial Disclosure and Further Disclosures.	christerf
1-24-02	Filed: Third Party Plaintiff Gary E. Eyre's Designation of Fact Witnesses.	christerf
1-31-02	Filed order: Order Of Dismissal Without Prejudice Judge rlivings Signed January 31, 2002	lynm
1-31-02	Case Disposition is Dismissed Disposition Judge is ROGER A. LIVINGSTON	lynm
3-29-02	Filed: Plaintiff's Designation of Expert Witnesses.	christerf
4-01-02	Filed: Third Party Plaintiff Gary E. Eyre's Notification of Expert Witness.	christerf
4-01-02	Filed: Certificate of Delivery of Notice of Third Party Plaintiff's Expert.	christerf
5-16-02	Filed: Notice of Taking Deposition (3).	christerf
5-17-02	Filed: Notice of Taking Deposition.	christerf
5-20-02	Filed: Amended Notice of Taking of Deposition.	christerf
5-21-02	Filed: Motion For Summary Judgment Of Third Party Defendant Milbank Insurance Company	lynm
5-21-02	Filed: Memorandum Of Third Party Defendant Milbank Insurance Company In Support Of Its Motion For Summary Judgment	lynm
5-21-02	Filed: Request For Hearing On Milbank Insurance Company's Motion For Summary Judgment	lynm
5-29-02	Filed: Gary E. Eyre's Oppositoin to Milbank's Motion for Summary Judgment.	christerf
5-29-02	Filed: Motion for Hearing on Third Party Defendant's Motion for Summary Judgment.	christerf
5-30-02	Filed: Motion for Order Granting Leave to Amend Third Party	

Complaint to Name Additional Third Party Defendant. christef
0-02 Filed: Complaint of Third Party Plaintiff Gary Elliott Eyre christef
Against Third Party Defendant Kim Rilling. christef
06-02 Filed: Notice of Hearing. christef
06-02 MOTION FOR SUMMARY JUDGMENT scheduled on August 05, 2002 at
10:00 AM in Third Floor - W39 with Judge LIVINGSTON. lynn
04-02 Filed: Amended Notice of Taking Of Deposition lynn
04-02 Filed: Reply Memorandum in Support of Milbank's Motion for
Summary Judgment. christef
04-02 Filed: Notice to Submit for Decision Milbank's Motion for
Summary Judgment. christef
01-02 Filed: Notice Of Deposition Of Defendant Hugh Lawing lynn
05-02 Filed: Supplemental Reply Memorandum in Support of Milbank's
Motion for Summary Judgment. christef
01-02 Filed: Gary E. Eyer's Supplement to his Opposition to Milbank's
Motion for Summary Judgment. christef
05-02 Fee Account created Total Due: 15.00 nicolel
05-02 VIDEO TAPE COPY Payment Received: 15.00 nicolel
05-02 Minute Entry - Minutes for MOTION FOR SUMMARY JUDGMENT christef
Judge: LIVINGSTON, ROGER A.
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PRESENT

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20-02 Filed: Objection to Proposed Order lynn
21-02 Filed: Memorandum Of Milbank Insurance Company In Response To

	Eyre's Objection To Proposed Order		lynm
8-21-02	Filed: Summary Judgment In Favor Of Third-Party Defendant Milbank Insurance Company And Declaratory Judgment		lynm
8-21-02	Filed: Plaintiff's Request For A Ruling		lynm
9-11-02	Fee Account created	Total Due: 1.00	karries
9-11-02	COPY FEE	Payment Received: 1.00	karries
9-20-02	Filed: Memorandum of Milbank Insurance Company in Response to Eyre's Objection to Proposed Order.		chryste

LAW OFFICES

STRONG & HANNI
A PROFESSIONAL CORPORATION

SIXTH FLOOR BOSTON BUILDING
NINE EXCHANGE PLACE
SALT LAKE CITY, UTAH 84111
TELEPHONE (801) 532-7080
FACSIMILE (801) 596-1508
WWW.STRONGANDHANNI.COM

ESTABLISHED 1888

GORDON R. STRONG
(1909-1969)

GLENN C. HANNI, P.C.
HENRY E. HEATH
PHILIP R. FISHLER
ROGER H. BULLOCK
R. SCOTT WILLIAMS
DENNIS M. ASTILL
STUART H. SCHULTZ
PAUL W. HESS
PAUL M. BELNAP
STEPHEN J. TRAYNER
JOSEPH J. JOYCE
BRADLEY W. BOWEN
ROBERT L. JANICKI
PETER H. CHRISTENSEN²
KEVIN D. SWENSON
CATHERINE M. LARSON
KRISTIN A. VANORMAN
PETER H. BARLOW
STEVEN T. DENSLEY
H. SCOTT JACOBSON
ANDREW D. WRIGHT
GRADEN P. JACKSON¹
BYRON G. MARTIN
SUZETTE GOUCHER³
MICHAEL J. MILLER¹
MICHAEL K. WOOLLEY
JAMES D. FRANKOWIAK

Direct 323-2004

e-mail rbullock@strongandhanni.com

March 4, 2003

¹ ALSO MEMBER COLORADO BAR
² ALSO MEMBER OREGON BAR
³ ALSO MEMBER WASHINGTON BAR

Robert Breeze, Esq.
402 East 900 South #1
Salt Lake City, Utah 84111

Re: *Milbank State Auto adv. Eyre, Estrada, Rosas*

Dear Bob :

I have received the brief of appellant in this case and learned for the first time upon reading your brief that Judge Livingston entered the written summary judgment on August 21, 2002. As I recall, I was unable to determine from the Judge's clerk whether the first summary judgment had been signed and entered, so I submitted it a second time, and that is the one which was signed and entered on October 4, 2002.

In the interest of representing my client fully, I intend to research whether your Notice of Appeal was filed late so as to deprive the Court of jurisdiction, and if so, I expect to raise that point in my appeal brief or by motion for summary disposition.

However, my reason for writing is different. As you know, you have filed a separate action by the parents, Gary M. Eyre and Melani Eyre, Civil No. 020904618 which is pending before Judge Timothy Hansen. In the interest of judicial economy, you and I had discussed the possibility of consolidating that case with the one which is pending on appeal so they both could be decided by the same appeal. Naturally, if your appeal is going to be subject to dismissal for late filing, you will not want to consolidate the parents' action with it.

I simply want to confirm to you that at the time I raised the possibility of consolidating the two actions for decision on appeal, I was not aware that Judge Livingston had entered the earlier summary judgment so I was not aware of the possible defense of late filing of the appeal. In other words, I was not trying to gain any unfair advantage in the parents' action.

Clearly, no consolidation of the two actions would be appropriate now.

EXHIBIT NO. two

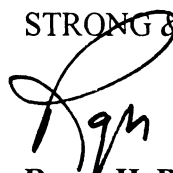
March 4, 2003

Page 2

As you know, Jim Franckowiak of my office is working on the appeal. Please contact Jim or me with any questions.

Yours very truly,

STRONG & HANNI

A handwritten signature in black ink, appearing to be 'RHB', written over the printed name 'Roger H. Bullock'.

Roger H. Bullock

RHB/kk

cc: Jim Franckowiak

004682 00014