2016

GEORGE K. FADEL, an individual, Plaintiff, vs. DESERET FIRST CREDIT UNION, a federally chartered credit union, Defendant. : Brief of Appellee

Utah Court of Appeals

George K. Fadel; attorney for appellant.
Wallace O. Felstead, Gregory S. Moesinger; attorneys for appellee.

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IN THE UTAH COURT OF APPEALS

GEORGE K. FADEL, an individual, Plaintiff, vs. DESERET FIRST CREDIT UNION, a federally chartered credit union, Defendant.	Court of Appeals No.: 20160070-CA District Court Case No.: 150906526, formerly Civil No. 150700691

BRIEF OF APPELLEE DESERET FIRST CREDIT UNION

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JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal under Utah Code § 78A-4-103(2)(j).

PRELIMINARY STATEMENT REGARDING PARTIES AND CASE HISTORY

This appeal comes from the dismissal of George K. Fadel's ("Fadel") Complaint that he filed in the Second Judicial District Court against Deseret First Credit Union ("Desert First"). Fadel is a licensed attorney, acting *pro se.* Deseret First is represented by Wallace O. Felsted and Gregory S. Moesinger of Kirton McConkie.

Fadel's claim purportedly arises out of his former representation of Jerry W. Parkin, Successor Trustee of the Wilma G. Parkin Family Protection Trust (the "Trust"), in the matter of *Deseret First Federal Credit Union v. Jerry W. Parkin, Successor Trustee of the Wilma G. Parkin Family Protection Trust*, District Court No. 090700605, as consolidated with Civil No. 120100271, which was appealed and affirmed in *Deseret First Fed. Credit Union v. Parkin*, 2012 UT App 140, 278 P.3d 630 ("*Deseret First I*"), attached hereto as **Addendum 1**, and then again by *Deseret First Federal Credit Union v. Parkin*, 2014 UT App 267, 339 P.3d 471, *cert. denied* ("*Deseret First II*"), attached hereto as **Addendum 2** (collectively the "First Lawsuit").

STATEMENT OF THE ISSUES

Deseret First disagrees with Fadel's statement of the issues, (a) thru (f). There are really just three primary issues on appeal, as set forth below. Arguably, there is fourth issue as to whether this Court should further sanction Fadel under Rule 33 of the Utah Rules of Appellate Procedure and/or award Deseret First its attorney's fees as the

prevailing party when attorney's fees were awarded below by the district court. *See* Argument, Section IV, *infra*.

1. Whether Fadel has a claim to foreclose an attorney's lien under Utah Code § 38-2-7 when his notice of attorney's lien under Utah Code § 38-2-7(5) was filed and recorded after his client had conveyed the real property to Deseret First, and Fadel's notice of lien had been stricken, invalided, and voided *ab initio* by the court in the First Lawsuit, leaving nothing of record on the title of the real property for any priority comparison or analysis to Deseret First's claim of right.

Preservation Below/Standard of Review. Deseret First concurs that this issue was preserved below. A district court's ruling on a motion to dismiss is reviewed "for correctness, affording no deference to the district court's decision." *Turner v. Staker & Parson Co.*, 2012 UT 30, ¶ 7, 284 P.3d 600. To the extent a motion to dismiss is converted to one for summary judgment, a district court's ruling on the motion is also reviewed "for correctness." *Basic Research, LLC v. Admirable Ins. Co.*, 2013 UT 6, ¶ 5, 297 P.3d 578. Furthermore, questions of statutory interpretation are reviewed for correctness. *Turner*, 2012 UT 30, ¶ 7.

2. Whether an attorney's lien can have any priority over the subsequent owner of the real property (*i.e.*, taking it subject to the lien) when the attorney records his or her notice of attorney's lien under Utah Code § 38-2-7(5) after his or her client has already conveyed the real property to the new owner through a settlement agreement and deed.

Preservation Below/Standard of Review. Deseret First concurs that this issue was preserved below. A district court's ruling on a motion to dismiss is reviewed "for correctness, affording no deference to the district court's decision." *Turner*, 2012 UT 30, ¶ 7. To the extent a motion to dismiss is converted to one for summary judgment, a district court's ruling on the motion is also reviewed "for correctness." *Basic Research*, 2013 UT 6, ¶ 5. Furthermore, questions of statutory interpretation are reviewed for correctness. *Turner*, 2012 UT 30, ¶ 7.

3. Whether the district court abused its discretion in awarding $2,000 in attorney's fees to Deseret First under Utah Code § 78B-5-825, when the district court found that Fadel, by his Complaint, was continuing to assert claims that were frivolous and, if existed at all, belonged to his former client, and that were previously litigated and settled in the First Lawsuit, and Fadel had been previously sanctioned by the court in the First Lawsuit for repeatedly attempting to re-litigate issues and represent the Trust after he was no longer recognized as its counsel.

Preservation Below/Standard of Review. Deseret First concurs that this issue was preserved below. "Whether attorney fees are recoverable in an action is a question of law, which we review for correctness." *Softsolutions v. Brigham Young Univ.*, 2000 UT 46, ¶ 12, 1 P.3d 1095. "[A] district court's grant of attorney fees under section 78B-5-825 [is] a mixed question of law and fact." *Livingston Financial, LLC v. Migliore*, 2013 UT App 58, ¶ 4, 299 P.3d 620 (citing *Gallegos v. Lloyd*, 2008 UT App 40, ¶ 6, 178 P.3d 922). The district court's conclusion that an action is without merit is reviewed for

correctness. *Livingston*, 2013 UT App 58, ¶ 4. The factual finding that an action was not brought or asserted in good faith is reviewed under a clearly erroneous standard. *Id.*

STATUTES DETERMINATIVE OF THE APPEAL

The two statutes that are determinative of this appeal are Utah Code § 38-2-7 (the attorney's lien statute) and Utah Code § 78B-5-825 (the bad faith statute). Copies of Utah Code § 38-2-7, including the pre- and post- May 12, 2015 effective date are attached as **Addendum 3** and **Addendum 4,** respectively. A copy of the bad faith statute is attached as **Addendum 5**.

As it pertains specifically to Utah Code § 38-2-7(7), which was renumbered in 2015 as Utah Code § 38-2-7(8) and (9), breaking it apart into separate numbered paragraphs, the only difference between the two is a revision of the sentence "takes his or her interest subject to the attorney's lien" to "takes the interest subject to . . . ." (*Compare* Addendum 3, *with* Addendum 4 (emphasis added).) As noted by the district court, substantively the provision did not change. (R. at 146; R. at 176 (Hearing Transcript on Motion to Dismiss (the "Transcript"), dated Nov. 24, 2015, at 29:18-30:1-13 ("There has not been any material or substantive change in the language.") Because Fadel filed his complaint after the 2015 amendment, Deseret First generally cites to the most recent version. But irrespective of the versions, the analysis and result is the same.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Boiled down, Fadel is effectively attempting to enforce—against only Deseret First—his purported attorneys' lien in connection with his prior representation of the

Trust in the First Lawsuit, before the Honorable David R. Hamilton ("Judge Hamilton"). Fadel never represented Deseret First in any capacity.

Deseret First commenced the First Lawsuit in 2009 against the Trust to quiet title in real property that it had been using for an extended time period. It ended (or Deseret First and the Trust thought it would have ended) after a successful mediation on October 20, 2011 with Karin Hobbs, the Trust's conveying to Deseret First real property via warranty deed, and Deseret First's making a settlement payment, all on that same day. Afterward, the parties jointly filed a stipulated motion to dismiss the litigation with prejudice, as the Trust retained new counsel, David J. Shaffer, Shaffer Law Office.

Notwithstanding, for years, Fadel has tried to pursue the First Lawsuit on behalf of the Trust and on behalf of himself to set aside the settlement because he was dissatisfied with his resulting recovery under his contingency fee arrangement with the Trust. He wanted more, lots more. Three days after the mediation, on October 24, 2011, Fadel recorded a Notice of Attorney's Lien (the "Notice of Lien") with the Davis County Recorder's Office. He filed the Notice of Lien with the Court in the First Lawsuit a day later, October 25. Nothing had been filed beforehand. However, Fadel's Notice of Lien was invalidated, voided, and struck by the court in the First Lawsuit. (*See* Consolidated Findings of Fact and Order (the "Consolidated Order"), First Lawsuit, Dec. 13, 2012, R. at 40-53.) That order was affirmed on appeal. *See Deseret First II*, 2014 UT App 267.

Months after losing his appeals to this Court, Fadel filed his Complaint with the Second Judicial District Court, (R. at 1-7), which case was ultimately assigned to the Honorable Noel S. Hyde ("Judge Hyde"). By his Complaint, Fadel sought to foreclose

his attorney's lien against Deseret First and the property it received through the settlement, for money damages in excess of $100,000 for his share of "rentals," and for the district court to declare Fadel to be a one-half owner in the real property with Deseret First under his contingency agreement with the Trust. (R. at 1-7.)

Fadel's claims in the Complaint were untenable. Deseret First moved to dismiss and requested an award of attorney's fees for the prolonged battle with Fadel. (R. at 15-17; R. at 18-74.) After a full briefing, Judge Hyde heard the Motion to Dismiss on November 24, 2015. (R. at 176.) Judge Hyde granted the motion, dismissed Fadel's Complaint with prejudice, and awarded Deseret First $2,000 in attorney's fees as a sanction. (R. 125-136.) Fadel appealed. (R. at 153.)

II. COURSE OF PROCEEDINGS

1. Deseret First filed its First Lawsuit against the Trust on August 27, 2009. Deseret First was and is represented by Kirton McConkie. The Trust was initially represented by Fadel. (*See generally* Dkt. for Civ. No. 090700605.)

2. On October 20, 2011, Deseret First and the Trust voluntarily mediated their dispute before Karin Hobbs, and on that day, the Deseret First and the Trust signed and executed a Settlement Agreement and Mutual Release (the "Settlement Agreement"), releasing, settling, and fully resolving all of the claims among them, including with respect to the ownership of and all other rights pertaining to certain real property in Davis County, State of Utah, Tax Parcel No. 03-032-0056, commonly known by the street address of 362 South Main Street, Bountiful, Utah, 84010, and more specifically identified as follows:

> Beginning at the Northeast Corner of Lot 1, Block 8, Plat "A", Bountiful Townsite Survey, in the City of Bountiful, and running thence South 4 rods; thence West 115.5 feet; thence North 4 rods; thence East 115.5 feet to the point of beginning.

(the "Property"). (*Deseret First II*, 2014 UT App 267 ¶¶ 2-3; R. at 42.) A copy of the Settlement Agreement is attached hereto as **Addendum 6**, which includes copies of the recorded deed to the Property to Deseret First, and the settlement payment from Desert First to the Trust.

3. Under the terms of the Settlement Agreement, the Trust agreed to convey the Property to Deseret First by General Warranty Deed (the "Deed") in exchange for a payment of $30,000 (the "Settlement Payment"). (R. at 42.)

4. Deseret First tendered, and the Trust accepted, the Settlement Payment on October 20, 2011 at the conclusion of the mediation. Those funds have been held in Mr. Shaffer's trust account. (R. at 42.)

5. Deseret First received the Deed on October 20, 2011 from the Trust, and Deseret First recorded the Deed with the Davis County Recorder's Office on October 21, 2011. (R. at 42.)

6. On October 24, 2011[1], Fadel recorded a Notice of Attorney's Lien (the "Notice of Lien") with the Davis County Recorder's Office. (R. at 43.)

7. Fadel filed the Notice of Lien with the district court in the First Lawsuit on October 25, 2011. (R. at 43.)

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[1] The date in paragraph 5 of the Consolidated Order contains a typo. Fadel recorded the Notice of Lien on October 24, 2011, not October 24, 2012.

8. In the Notice of Lien, Fadel understood and acknowledged that the Trust had already conveyed the Deed to Deseret First before he recorded his notice. (R. at 43.)

9. On or about November 15, 2011, Deseret First and the Trust, through Mr. Shaffer, submitted to the district court a Stipulation for Entry of Order of Dismissal with Prejudice (the "Stipulation") and a proposed Order of Dismissal with Prejudice. In addition to the signatures of Mr. Shaffer and Deseret First's counsel, the Stipulation itself was signed by Mr. Jerry Parkin, the successor trustee of the Trust. (R. at 43.)

10. On November 22, 2011, the Court signed the Order of Dismissal with Prejudice, which was entered on December 2, 2011. (R. at 44.)

11. On or about January 23, 2012, after Mr. Fadel attempted to contact the Court and/or file other papers prolonging the litigation, the Court issued a Ruling (the "First Ruling"), providing that:

> The parties resolved their dispute, signed a Settlement Agreement, and exchanged the bargained for consideration. Mr. Fadel had apparently advised his then clients (defendants) not to settle and departed the mediation. It was the defendants' decision how to resolve their case.
>
> A Substitution of Counsel was filed by David J. Shaffer, and Mr. Shaffer has signed the dismissal documents at the direction of defendants. Mr. Shaffer is recognized by the Court as defendants' counsel. Mr. Fadel has no current basis to submit pleadings on behalf of defendants. The Court will hear neither Mr. Fadel's Motion in Limine nor his Objection to the Entry of the Stipulation and Order of Dismissal with Prejudice. The Court has signed the Order of Dismissal with Prejudice based upon the Stipulation for Entry of the Dismissal with Prejudice. That order will not be disturbed.
>
> The Court will consider Plaintiff's Motion for Sanctions against Mr. Fadel and directs Mr. Fadel to respond to that motion on or before

> January 30, 2012. It is recommended that defendants and Mr. Fadel submit fee dispute issues to the Utah State Bar.

(R. at 44.)

12. On February 7, 2012, Fadel filed a Notice of Appeal, wherein he appealed, *inter alia*, "the final Order of Dismissal With Prejudice of the Honorable David R. Hamilton, District Judge, entered in this matter on December 2, 2011, and the denial of post judgment [sic] motions by ruling entered January 23, 2012." (R. at 44-45.)

13. On February 21, 2012, pursuant to Utah Code § 38-9-5, Deseret First, through its counsel, mailed and faxed Fadel a letter (the "February 21 Letter"), specifying the deficiencies in the Notice of Lien and demanding that Fadel remove the Notice of Lien from the Property within ten (10) days. (R. at 45.)

14. On March 21, 2012, Deseret First filed its Verified Petition for Summary Relief to Nullify Wrongful Lien (the "Wrongful Lien Petition").[2] (R. at 45.)

15. In the appeal, after both Deseret First and the Trust separately filed motions for summary disposition, the Utah Court of Appeals issued a Per Curiam Decision and dismissed Fadel's appeal. *See Deseret First I*, 2012 UT App 140, ¶ 6. (R. at 45.)

16. After a series of motions filed by Deseret First, the Trust (represented by Shaffer), and Fadel, an interim ruling, and two hearings, Judge Hamilton entered the Consolidated Order and sanctioned Fadel the sum of $10,000. (R. at 45-49.)

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[2] The Wrongful Lien Petition was originally filed in case number 120100271. That matter was subsequently consolidated with 090700605 on May 23, 2012 by Judge David M. Connors.

17. Specifically, Judge Hamilton found that Fadel's "Notice of Lien recorded with the Davis County Recorder on October 24, 2011, Entry No. 2623194, Book No. 5385, Page Nos. 1876-1879 against the Property was plagued by errors and failed to comply with the statutory requirements, including under Utah Code Ann. § 38-2-7." (R. at 48.)

18. Therefore, Judge Hamilton found "that the Notice of Lien is invalid, void *ab initio*, and hereby stricken." (R. at 48.)

19. In addressing the issue of sanctions, Judge Hamilton found that:

> The Court is troubled by the willful misconduct of Mr. Fadel after the settlement of this case. Without limitation to that which was set forth in the Second Ruling and on the record at the November 5, 2012 Hearing, even after being advised by the Court that he (Mr. Fadel) is not recognized as counsel for the Trust and that he has no basis to submit pleadings on behalf of the Trust or pursue claims on behalf of the Trust, Mr. Fadel has repeatedly attempted to represent the Trust in filing motions, and he has repeatedly taken positions that are frivolous, meritless, and inconsistent with the Settlement Agreement, the Order of Dismissal with Prejudice, the First Ruling, and the Second Ruling.

(R. at 48.)

20. Judge Hamilton continued:

> Moreover, Mr. Fadel has attempted to pursue--on behalf of himself and on behalf of the Trust--against the will and desire of the Trust, claims against Deseret First that, if at all, belonged to the Trust but that were resolved and released under the Settlement Agreement and then and dismissed under the Order of Dismissal with Prejudice.

(R. at 49.)

21. After considering affidavits from counsel for Deseret First and the Trust, Judge Hamilton sanctioned and entered judgment against Fadel in the amount of $5,500 for Deseret First, and $4,500 for the Trust, for a combined total of $10,000. (R. at 49.)

22. Fadel appealed the Consolidated Order, which was affirmed by this Court. *Deseret First II*, 2014 UT App 267.

23. On July 17, 2015, Fadel filed his Complaint against Deseret First in this action. (R. at 1-7.)

24. On August 11, 2015, Deseret First filed and served its Motion to Dismiss along with its memorandum in support of the motion. (R. at 15-17, 18-74.)

25. On August 18, 2015, Fadel filed and served Plaintiff's Response to Defendant's Memorandum in Support of Motion to Dismiss. (R. at 75-89.)

26. On August 25, 2015, Deseret First filed and served its Reply Memorandum in Support of Motion to Dismiss. (R. at 91-99.)

27. After the recusal of the Honorable Robert J. Dale, (R. at 90), the case was ultimately assigned to Judge Hyde, (R. at 105), who set oral argument on the Motion to Dismiss for November 24, 2015 at 11:00 a.m. (R. at 106-107.)

III. DISPOSITION OF CASE

28. On November 24, 2015, the district court heard oral argument on the Motion to Dismiss (the "Hearing"). (R. at 176; *see generally* Transcript.)

29. Judge Hyde had well read, reviewed, and familiarized himself with the proceedings in the First Lawsuit, the Complaint, and the papers submitted in connection with the Motion to Dismiss. (Transcript 1:22-2:11, 11:21-22.)

30. After a lengthy argument, (Transcript at 2:12- 23:17), Judge Hyde issued a detailed oral ruling at the Hearing, granted the Motion to Dismiss, and awarded $2,000 in attorney's fees to Deseret First under Utah Code § 78B-5-825. (Transcript 23:18-48:6.)

31. Consistent with its oral ruling, on or about January 21, 2016, the Court entered the Order of Dismissal and Award of Attorneys' Fees (the "Order of Dismissal"). (R. at 125-136.)

32. Deseret First prepared the Order of Dismissal. Though it was served upon Fadel under Rule 7, Utah Rules of Civil Procedure, he declined to approve the Order of Dismissal as to form, but he also failed to file any objection to the Order of Dismissal. (*See* R. at 111-113.)

33. In the Order of Dismissal, Judge Hyde ordered and decreed as follows: (paragraph numbering is from the original Order of Dismissal, the text is verbatim):

1. Deseret First's Motion to Dismiss is GRANTED.

2. Mr. Fadel's Complaint is DISMISSED with prejudice and on the merits.

3. In ruling on and reviewing a motion to dismiss, the Court accepts as accurate or true all factual allegations of the Complaint, and the Court must determine, based upon those allegations, whether they support a claim for relief.

4. If in that process, additional facts and allegations, that are not set forth in the Complaint, are brought to the attention of the Court and

considered, then the Court will apply the standards which are utilized in ruling on a motion for summary judgment.

5. Furthermore, the factual materials are viewed in a light most favorable to the party opposing the relief, which, in this case, is Mr. Fadel.

6. In ruling on a motion to dismiss or a motion for summary judgment, the legal basis must be sufficient to support dismissal of the Complaint as a matter of law.

7. Under established case law, particularly under *Orvis v. Johnson*, 2008 UT 2, 177 P.3d 600, there are two steps that the Court must review in summary judgment matters. The Court has been presented facts which go beyond the allegations in the Complaint. Those facts have included references to the underlying bases upon which Mr. Fadel's attorneys' lien was asserted, and also facts relative to the filing of Mr. Fadel's notice of the attorneys' lien.

8. There is no dispute as to the particular or material facts that are critical for the Court's determination, including that there is no dispute that there was a mediation on October 20, 2011, and that there was a settlement that flowed from that mediation.

9. There is also no dispute that as a result of that settlement, there was an exchange between Deseret First and Jerry W. Parkin, Successor Trustee of the Wilma G. Parkin Family Protection Trust (the "Trust"), which included the payment of $30,000 by Deseret First to the

Trust, and the delivery of a General Warranty Deed by the Trust to Deseret First, all on October 20, 2011.

10. The General Warranty Deed was recorded on October 21, 2011.

11. Mr. Fadel recorded his Notice of Attorney's Lien (the "Notice of Lien") with the Davis County Recorder's Office on October 24, 2011.

12. The Court is mindful that Mr. Fadel does not agree with Deseret First's and the Trust's settlement, and Mr. Fadel has argued that settlement and dismissal should be set aside. However, those are not issues before this Court. Those were issues for the First Lawsuit, and they are left to the First Lawsuit. The filing of an action in this case does not and will not constitute a valid collateral attack on a final determination in the First Lawsuit.

13. Questions relating to the First Litigation, including as to its propriety, underpinnings of the settlement, and the events relating to the mediation, are not before the Court and not considered in these proceedings.

14. Statements made by counsel at oral argument are not evidence.

15. Furthermore, Mr. Fadel's Complaint contains many statements that are not factual allegations. The Complaint contains various

legal arguments, and such legal arguments are not presumed to be accurate, but they are simply considered like any other argument by counsel.

16. There are at least three allegations in the Complaint, specifically paragraphs 10, 12 and 13, which constitute or contain legal conclusions, not factual allegations, and which are not correct statements of the law. The Court is not persuaded by those arguments.

17. Moreover, in paragraph 13 of the Complaint, Mr. Fadel alleges, "In addition to entitlement of [Mr. Fadel] to a joint interest in the real property, the claim of the Trust to rentals is equally important and enforceable." In that paragraph, it appears that Mr. Fadel is attempting to assert a claim on behalf of the Trust, by suggesting that the Trust has an enforceable claim for rentals against Deseret First. The Trust was Mr. Fadel's former client. That representation was terminated in 2011. Mr. Fadel is not in the position to assert any claim for the Trust, and he does not stand in the shoes of the Trust.

18. That issue of asserting claims that belonged to the Trust was decided in the First Lawsuit. Mr. Fadel does not and cannot represent the interests of the Trust with respect to challenging the settlement or the other issues addressed in the First Lawsuit.

19. Those rulings have already been made and are binding on this Court.

20. *Res Judicata* applies to those questions because they were assertions of claims for the Trust addressed through the settlement and dismissal. Mr. Fadel is legally incapable of asserting claims on behalf of the Trust or that belong to the Trust. He has no standing to do so. He has no legal authorization. That lack of authorization has been confirmed and affirmed in the First Lawsuit.

21. Rather, at issue before the Court is the attorney's lien asserted by Mr. Fadel against Deseret First and its real property that was identified in, and conveyed by, the Trust's October 20, 2011 General Warranty Deed to Deseret First.

22. Consistent with the prior rulings in the First Lawsuit, Mr. Fadel did hold, at least at that time in October 2011, an attorney's lien. That attorney's lien is defined by statute in Utah Code § 38-2-7.

23. The Court notes and clarifies that Utah Code § 38-2-7 has been modified as recently as 2015. Counsel has made arguments with respect to subparagraph 7, under the prior version of the Utah Code (pre-2015). Those provisions are now found at subparagraphs 8 and 9, of the 2015 version of the Utah Code. Substantively, those provisions have not changed but have been renumbered.

24. Utah Code § 38-2-7(7), as of the time Mr. Fadel first asserted his lien, or Utah Code § 38-2-7(8) and (9) (2015), is the proper basis for the

analysis, is binding upon this Court, and it is dispositive of this case. That section of the Utah Code provides:

> Any person who takes an interest in any property, other than real property, that is subject to an attorney's lien with actual or constructive knowledge of the attorney's lien, takes his or her interest subject to the attorney's lien. An attorney's lien on real property has as its priority the date and time when a notice of lien is filed with the county recorder of the county in which real property that is subject to a lien under this section is located.

25. The attorney's lien attaches to the property of the client. It does not attach to the property of anyone other than the client.

26. The statute makes a specific exclusion from the general rule of attachment for real property. As for real property, an attorney's lien has as its priority the date and time when a notice of lien is filed or recorded with the county recorder of the county. It has no priority prior to that statutorily defined date.

27. Mr. Fadel's October 24, 2011 Notice of Lien was a nullity, and had no force and effect, based upon Judge Hamilton's Consolidated Findings of Fact and Order entered on or about December 18, 2012 (the "Consolidated Order") in the First Lawsuit.

28. There is no other notice of record of any attorneys' lien of Mr. Fadel, which has been brought to the attention of this Court.

29. Accordingly, there is no notice of record of any attorney's lien for Mr. Fadel. Based upon the absence of any notice, no priority can be established for any attorney's lien in any real property of the client (*i.e.*,

the Trust) previously represented by Mr. Fadel. It follows that no priority can be established in any real property of anyone else, including Deseret First.

30. Mr. Fadel's current assertion of the right to foreclose an attorney's lien against real property must be supported by some appropriate and legally sufficient interest in that real property. Because there is no recorded notice of lien in this case, there is not and cannot be a valid or enforceable lien on the real property currently owned by Deseret First or as identified in the General Warranty Deed that was recorded on October 21, 2011.

31. As a matter of law, Mr. Fadel has no lien on Deseret First's real property on which he could foreclose.

32. Mr. Fadel's attorney's lien in this case is not enforceable at law because it did not attach with any priority to the real property before the Trust conveyed the real property to Deseret First, based upon the specific provisions of Utah Code § 38-2-7; and further, there is nothing that has been argued to the Court as a matter of equity that would justify the extension of that lien of the real property in the hands of Deseret First.

33. Based upon all of the facts, the Complaint does not set forth a valid legal basis upon which a claim may be maintained against Deseret First.

34. In summary judgment language, there are no material facts in dispute, the legal arguments raised by Mr. Fadel are erroneous and not persuasive, and Deseret First is entitled to the requested relief—dismissal of the action with prejudice, as a matter of law.

35. Moreover, the Court determines that Utah Code § 78B-5-825 applies and requires the awarding of reasonable attorney's fees to Deseret First. That section of the Utah Code provides as follows:

> (1) In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).
>
> (2) The court, in its discretion, may award no fees or limited fees against a party under Subsection(1), but only if the court:
>
> (a) finds the party has filed an affidavit of impecuniosity in the action before the court; or
>
> (b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

36. Deseret First is the prevailing party in this matter.

37. Mr. Fadel's claims in the Complaint are without merit, based upon the legal determinations made in this case and in granting the Motion to Dismiss.

38. Furthermore, Mr. Fadel's claims in the Complaint were not brought or asserted in good faith. For example, in this case, the assertion of claims purported to be claims of the Trust, like for rentals in paragraph 13 of the Complaint, are, by definition, claims that could not be brought in

good faith, because of the rulings and orders in the First Lawsuit. Those plainly precluded Mr. Fadel from asserting or maintaining any claims on behalf of the Trust.

39. Mr. Fadel was aware of those limitations and restrictions, and to assert a claim in the face of those rulings and orders, which have been repeatedly stated and affirmed on appeal, does not and cannot constitute a good faith basis for the pursuit of those claims. Therefore, Mr. Fadel's Complaint, at least in part, has not been brought or asserted in good faith.

40. Accordingly, the Court hereby awards attorney's fees in favor of Deseret First, and against Mr. Fadel, in the amount of $2,000, for the attorneys' fees it incurred in this action.

41. On the record at the hearing, Mr. Fadel represented that he was not impecunious, and Mr. Fadel waived and renounced his right and option to submit an affidavit of impecuniosity in the action before the Court under Utah Code § 78B-5-825(2)(a).

42. The Court determines that the sum of $2,000 in sanctions and as an award of attorneys' fees to Deseret First is reasonable based upon the Court's review of the materials that have been prepared, the nature of the briefing that has been presented, the oral argument, and the overall time that has been involved. Furthermore, by comparison, $2,000 is less than the amounts previously sanctioned against Mr. Fadel in the Consolidated Order.

43. Moreover, to go through an additional process of submitting an affidavit and appearing for a hearing would likely cause Desert First to incur an amount in excess of $2,000, and it is not appropriate to impose those costs and expenses on either party. Accordingly, the sum of $2,000 is appropriate, and it avoids further litigation on whether $2,000 is reasonable.

44. This is the final ruling and order of the Court, and it shall be considered the disposition of this matter, addressing all of the issues in this case. The Court does not anticipate the submission of any further or additional documentation or consideration of these issues.

(R. at 125-136.)

34. On February 1, 2016, Fadel served his Notice of Appeal. (R at 153.)

OBJECTION TO FADEL'S STATEMENT OF RELEVANT FACTS

Deseret First objects to Fadel's Statement of Relevant Facts. (*See* Brief of Appellant ("Fadel Brief") at 7-10.) For approximately three and a half pages, Fadel asserts "as fact" various allegations and legal conclusions. However, many if not most of which are outside of the Record, his Complaint in this lawsuit, or other matters of which the Court may take judicial notice. Furthermore, Fadel's allegations lack any evidentiary support by affidavit, declaration or otherwise, and many are flat-out wrong. In fact, from Deseret First's review of Fadel's brief, not only as to the statement of facts, there was not a single citation to the Record (*i.e.*, "R. at __") in the brief.

Deseret First recognizes that both the district court on a motion to dismiss, as well as this Court, may take judicial notice of such facts as prior court orders, published

opinions, and documents that are a matter of public record. *See* Utah R. Evid. 201(b); *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 13, 104 P.3d 1226 (holding the court may consider any document that "is referred to in the complaint and is central to the plaintiff's claim," even if the plaintiff does not attach a copy of the document as an exhibit or incorporate it by reference); *BMBT, LLC v. Miller*, 2014 UT App. 64, ¶ 6, 322 P.3d 1172 (holding that the "court may take judicial notice of public records and may thus consider them on a motion to dismiss"); *see also In re FX Energy, Inc.*, Case No. 2:07-cv-874, 2009 WL 1812828, at *6 (D. Utah June 25, 2009) ("If the rule were otherwise, a plaintiff with a deficient claim would survive a motion to dismiss by not attaching a dispositive document upon which the plaintiff relied.") While Judge Hyde properly considered facts in connection with Deseret First's Motion to Dismiss, Fadel's purported statement of facts goes well beyond the Record and proper judicial notice.

SUMMARY OF THE ARGUMENT

Mr. Fadel's brief raises multiple issues but not one plausible basis for reversal. There is no need for a redo. The Order of Dismissal should be affirmed.

Though the history between Deseret First, the Trust, and its former counsel Fadel, is extensive, the issues before Judge Hyde and now this Court are relatively simple. Fadel's former client, the Trust, settled with Deseret First through a mediation on October 20, 2011. The parties signed and exchanged a settlement agreement, the Trust delivered the Deed to Deseret First, and, in exchange, Deseret First delivered a payment of $30,000 to the Trust, all on October 20, 2011. The Deed was recorded on October 21, 2011. Days later Fadel recorded his Notice of Lien with the county recorder and filed it

with the court in the First Lawsuit. That Notice of Lien was later struck, invalided, and voided *ab initio* by Judge Hamilton, which was affirmed on appeal.

After the final, arduous resolution with Fadel in the First Lawsuit, he turned around and filed his Complaint in this case against Deseret First. He did not name the Trust. His Complaint was to foreclose his attorney's lien against Deseret First, to be named as a one-half owner of the Property with Deseret First, and for money damages against Deseret First that far exceeded what he had earned under his contingency agreement with the Trust. Indeed, the monetary claim was for his professed share of rentals associated with the Property—a claim, if one existed, that solely belonged to his former client and that was settled and dismissed with prejudice in the First Lawsuit.

After hearing the motion to dismiss, Judge Hyde determined that Fadel's Notice of Lien had been stricken and, therefore, Fadel had no written instrument on which he could foreclose. In the context of Utah Code § 38-2-7, for the determination of priority in real property, he had nothing on which he could establish a date of priority.

Furthermore, any attempt to cure and record a new notice of attorney's lien at this juncture would be meaningless. That is, "[a]n attorney's lien on real property has as its priority the date and time when a notice of lien is filed with the county recorder of the county in which real property that is subject to a lien under this section is located." Deseret First recorded its Deed first and before Fadel can record any notice of attorney's lien now. Therefore, it was appropriate to dismiss Fadel's Complaint with prejudice.

But Fadel's Complaint was more than just an attempt to collect the $10,000 contingency fee that he had seemingly earned from the Trust back in 2011. He didn't ask

for $10,000, and he didn't name the Trust. Instead, Fadel asked for over $100,000 for his share of rentals associated with the Property, to be named a one-half owner of the Property with Deseret First, and for "protection of the Trust from any further claim," presumably by Deseret First under the Deed that has a warranty attached.

Fadel's exorbitant claim was frivolous, of little weight, and had no basis in law or fact. Furthermore, given the history of the First Lawsuit, Fadel's claim against Deseret First was clearly brought in bad faith. Therefore, under Utah Code § 78B-5-825, Judge Hyde appropriately awarded sanctions against Fadel in the amount of $2,000. This Court should also sanction Fadel and award Deseret First its attorney's fees for this appeal.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED FADEL'S COMPLAINT BECAUSE HIS NOTICE OF LIEN HAD BEEN STRUCK AND ANY SUBSEQUENT NOTICE OF LIEN WAS LATER IN TIME.

"First in time is first in right" is fundamental in our society. It has solved conflicts relating to treasure trove, water rights, nuisance, patents, wild animals, creditors' rights, and, as most germane here, priorities and ownership in realty. (*See generally* Lawrence Berger, *An Analysis of the Doctrine That "First in Time Is First in Right"*, 64 Neb. L. Rev. 349, (1985).) Chaos is controlled at the waiting lines at Lagoon, Megaplex, and Costco on a Saturday, under this simple truism. In American jurisprudence, the origin is at least two-centuries old. *See Pierson v. Post*, 3 Caines 175 (Sup. Ct. N.Y. 1805) (holding that the person who first mortally wounds a wild animal and continues the chase with the intent to recover it becomes the owner).

Utah courts have long-honored this principle. *See e.g, Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, ¶ 34, 5 P.3d 1206 ("Utah is a prior appropriation state, where the appropriator first in time is first in right."); *Meridian Ditch Co. v. Koosharem Irr. Co.*, 660 P.2d 217, 222 (Utah 1983) (holding "the law clearly attaches highest priority to those rights established first in time"); *Bank of Ephraim v. Davis*, 559 P.2d 538, 539 (Utah 1977) (recognizing that the bank "was first in time to record"). "Normally, competing interests in land have priority in order of their creation in point of time, following the general rule . . . first in time, superior in right." *Homeside Lending, Inc. v. Miller*, 2001 UT App 247, ¶ 17, 31 P.3d 607.

Under this same maxim of law, Fadel, with his alleged competing interest (whatever that really is) to Deseret First's claim of ownership under the Deed, has no claim in the Property because Deseret First holds priority as first in time and first in right where A) Fadel's initial Notice of Lien had been struck and invalidated in the First Lawsuit, and there is no written instrument on which he could foreclose; and where B) Fadel will forever be later in time to Desert First if he were to subsequently record a notice of lien with the Davis County Recorder. Said another way, because Fadel had not yet recorded a notice of lien before Deseret First received the Deed from the Trust, and Fadel's belatedly filed notice was invalidated by a court, Deseret First took the Property effectively without it being subject to any attorney's lien. As an attorney in Utah since 1948, Fadel should certainly understand the importance of timely filing and recording documents, as well as the "first in time is first in right" rule.

A. Fadel did not Timely File his Notice of Lien on which He could Foreclose, and his Belatedly Filed Notice of Lien had been Struck.

Judge Hyde properly analyzed the discrete and dispositive issue and dismissed the lawsuit with prejudice. By his Complaint, Fadel sought to enforce and foreclose an attorney's lien under Utah Code § 38-2-7 against Deseret First, the opposing party in the First Lawsuit. (*See* R. at 1-7; R. at 7 (requesting "judgment foreclosing the attorney's lien on the Property"); R. at 146 ("[A]t issue before the Court is the attorney's lien asserted by Mr. Fadel against Desert First and its real property that was identified in, and conveyed by, the Trust's October 20, 2011 General Warranty Deed to Deseret First."); Fadel Brief at 6.) Notably, Fadel did not bring his Complaint against his former client, the Trust, to foreclose whatever lien he might have on the Settlement Payment, but instead he brought it solely against Deseret First and the Property. (*See generally* R. 1-7.)

Utah's attorney's lien statute provides that "[a]n attorney shall have a lien for the balance of compensation due from a client on any money or property owned by the client that is the subject of or connected with the work performed for the client, including (a) any real, personal, or tangible property." Utah Code § 38-2-7(2) (emphasis added). A lien is defined as a "failure to pay money owed for property, services, or a notice of interest, a judgment, or any other encumbrance on the title, that becomes a charge against or interest in: (i) real property . . . ; (ii) personal property; or (iii) a judgment, settlement or compromise." Utah Code § 38-12-101. "An attorney's lien commences at the time of employment of the attorney by the client." Utah Code § 38-2-7(3).

The attorney's lien statute also provides that "[a]n attorney may file a notice of lien (a) in a pending legal action in which the attorney has assisted or performed work for which the attorney has a lien under this section; [and/or] (b) with the county recorder of the county in which real property that is subject to a lien under this section is located." Utah Code § 38-2-7(5); *see id.* § 38-2-7(6) (detailing what shall be included in a notice of lien). It is optional to file a notice of lien in either the pending action or with the county recorder; however, failure to do so has its consequence and may be prejudicial to the attorney, particularly with respect to real property, as that sets the date of priority.

The Utah Code expressly identifies the rights, scope, and import of a person taking an interest in property encumbered by an attorneys' lien. Specifically, "Any person who takes an interest in any property, other than real property, that is subject to an attorney's lien with actual or constructive knowledge of the attorney's lien, takes the interest subject to the attorney's lien." Utah Code § 38-2-7(8) (emphasis added).

But for real property, which is expressly excepted out of paragraph 8, the notice requirement and result is very different. "An attorney's lien on real property has as its priority the date and time when a notice of lien is filed with the county recorder of the county in which real property that is subject to a lien under this section is located." Utah Code § 38-2-7(9) (emphasis added). In other words, for determining who has the superior interest in real property, it is the priority—being first in time—based upon recording the deed of conveyance versus the notice of attorneys' lien that controls. If an attorney fails to record his or her notice of attorney's lien before the client conveys real property, then it effectively passes clear of the attorney's lien (as it has no priority).

As applicable here, Fadel had an attorney's lien for any unpaid compensation from his client the Trust, which lien commenced from the time he was employed by the Trust in the First Lawsuit. *See* Utah Code § 38-2-7(2) and (3). Fadel's attorney's lien encumbered "any money or property owned by [the Trust]," including real, personal, or intangible property, that was the subject of or connected with the First Lawsuit, so long as it belonged to the client and not conveyed to another. Utah Code § 38-2-7(2).

Deseret First and the Trust settled their dispute in the First Lawsuit over the Property through the mediation and by executing the Settlement Agreement on October 20, 2011. (R. at 42, 127; *Deseret First II*, 2014 UT App 267, ¶ 3.) On that same day, Deseret First paid $30,000 to the Trust; and, in exchange, the Trust conveyed the Property to Deseret First by a general warranty deed. (R. at 42, 127-128, *Deseret First II*, 2014 UT App 267, ¶ 3.) The Deed was recoded with the Davis County Recorder on October 21, 2011, Entry No. 2622585. Book No. 5384, Pages 2-3. (Addendum at 6 at 7-10.) Fadel recorded his Notice of Lien on October 24, 2011, as Entry No. 2623194, Book No. 5385, Pages 1876-1879. (R. at 48.)

When he did so, Fadel was aware of the conveyance because he identified the deed to Deseret First by book and page number in the Notice of Lien itself. A copy of the Notice of Lien as received by Kirton McConkie on October 25, 2011 is attached as **Addendum 7.** Fadel had not recorded a notice of attorney's lien with the county recorder nor did he file a notice of lien with the district court in the First Lawsuit before October 24, 2011. Later in the First Lawsuit, in December 2012, Judge Hamilton entered the Consolidated Order and decreed that Fadel's "Notice of Lien is invalid, void *ab initio*,

and hereby stricken." (R. at 28.) Since then, Fadel did not file or record any other notice of attorney's lien under Utah Code § 38-2-7. There is nothing of record, and he has never asserted differently.

Judge Hyde got it right. In reviewing the statute, he correctly determined that "Fadel did hold, at least at that time in October 2011, an attorney's lien. That attorney's lien is defined by statue in Utah Code § 38-2-7." (R. at 130.) Judge Hyde found that Utah Code § 38-2-7(8) and (9) "is the proper basis for the analysis, is binding upon this Court, and it is dispositive of this case." (R. at 130.)

Judge Hyde determined that an "attorney's lien attaches to the property of the client. It does not attach to the property of anyone other than the client." (R. 131; *see* Utah Code § 38-2-7(2) (property of the client). Judge Hyde continued:

> The statute makes a specific exclusion from the general rule of attachment for real property. As for real property, an attorney's lien has as its priority the date and time when a notice of lien is filed or recorded with the county recorder of the county. It has no priority prior to that statutorily defined date.

(R. at 131.)

In evaluating the undisputed material facts, Judge Hyde correctly found that "Mr. Fadel's October 24, 2011 Notice of Lien was a nullity, and had no force and effect, based upon Judge Hamilton's Consolidated Findings of Fact and Order entered on or about December 18, 2012 (the "Consolidated Order") in the First Lawsuit." (R. at 131.) There was no other notice. (R. at 131.) "[In] the absence of any notice, no priority can be established for any attorney's lien in any real property of the client (*i.e.*, the Trust) previously represented by Mr. Fadel. It follows that no priority can be established in any

real property of anyone else, including Deseret First." (R. at 131.) "Because there is no recorded notice of lien in this case, there is not and cannot be a valid or enforceable lien on [the Property]." (R. at 131.) "As a matter of law, Mr. Fadel has no lien on Deseret First's real property on which he could foreclose." (R. at 132.) Therefore, the Complaint had no valid legal basis on which the claim could be maintained against Deseret First, and Deseret First was entitled to a dismissal of the action with prejudice." (R. at 132.)

In other words, Judge Hyde dismissed Fadel's Complaint for the foreclosure of an attorney's lien in real property because Fadel had not recorded any notice of attorneys' lien (with his prior Notice of Lien being struck and invalidated). Therefore, he had "no valid legal basis on which the claim could be maintained," (R. at 132), and there was no written document or instrument to which Fadel could point for purposes of any priority comparison with Deseret First. Simply, Fadel had no boxer to enter the priority fight, and therefore loses his lien in the Property by default.

B. Any Subsequently Recorded Notice of Attorney's Lien is Too Late Because Fadel's Client Conveyed the Property to Deseret First.

Deseret First prevails for an additional reason, which is why the dismissal "with prejudice" was appropriate. As argued to the district court, (*see* R. at 31, 92-93), even if Fadel's Notice of Lien were otherwise valid and had not been struck, or if Fadel today were to file a notice of lien that did comply with Utah Code § 38-2-7(5), Deseret First's claim to the Property has absolute priority over any lien of Fadel, and Deseret First takes the Property free and clear of his lien.

Determining who has the first rights and interest in the Property is straightforward. Deseret First and the Trust settled the First Lawsuit by Deseret First's paying $30,000 in exchange for the Deed to the Property. (R. at 22; Addendum 6.) Desert First recorded the Deed on October 21, 2011. (R. at 22; Addendum 6.) Fadel filed and recorded his Notice of Lien three (3) days later, on October 24, 2011. (R. at 22; Addendum 7.) Both that Notice of Lien and any subsequently filed or recorded notice of lien is forever later in time than Deseret First's deed to the Property.

"An attorney's lien on real property has as its priority the date and time when a notice of lien is filed with the county recorder of the county in which real property that is subject to a lien under this section is located." Utah Code § 38-2-7 (9). By operation of the statute, Fadel can have no claim in the Property that is superior to Deseret First's claim of ownership of all rights, title, and interest in the Property. It follows that Fadel cannot ever foreclose on an attorney's lien on the Property against Deseret First (*i.e.*, claim an interest ahead of Deseret First in the Property) because any supporting notice of attorney's lien and corresponding interest are later in time.

Like foreclosing on a trust deed in second position, Fadel cannot diminish Deseret First's priority ownership rights, nor can he seek any payment from Deseret First or claim some co-ownership in the Property. He is too late. Fadel needed to have recorded a proper notice of attorneys' lien before his client's settlement and conveyance of the Property. Otherwise, the Property passed from the Trust to Deseret First effectively without the lien. But, Fadel was not left out of luck. His lien did attach to his client's newly gained personal property—the $30,000 in settlement proceeds that was delivered

to the Trust on October 20, 2011. Any claim he had for nonpayment should be directed there, not at Deseret First or the Property.[3]

C. Fadel's Arguments in his Brief do not Change the Outcome.

Judge Hyde correctly cut through the smoke and mirrors presented by Fadel in his Complaint, opposition to the Motion to Dismiss, and at oral argument. Even now Fadel attempts to implicitly read into Utah Code § 38-2-7(9) (or the prior version Utah Code § 39-2-7(7)) an "actual notice" exception for priority. (Fadel Brief at 16, 30.) There are at least three holes in this argument. First, it isn't there. When it comes to statutory interpretation and the goal to evince the true intent and purpose of the Legislature, "[t]he best evidence of the legislature's intent is the plain language of the statute itself." *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863.

Second, an actual notice exception does exist with respect to personal property. Utah Code § 38-2-7(8) ("actual or constructive knowledge of the attorney's lien"). So it appears that the Legislature intentionally omitted such an exception when it comes to real property, Utah Code § 38-2-7(9), which requires a notice of lien to be recorded for priority. As explained in *Marion*, the Court should "presume that the expression of one

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[3] In 2012, Judge Hamilton sanctioned Fadel $10,000, awarding $5,500 to Deseret First and $4,500 to the Trust. (R. at 48-49.) It is likely no coincidence that the sanction was the exact sum that he would have been entitled under his contingency fee agreement (*i.e.*, $10,000). These amounts were garnished or taken from the settlement proceeds and paid to Deseret First and the Trust, per the Court's sanctions. Both Deseret First and the Trust then filed notices of satisfaction with the district court. *See* Civil No. 090700605. Accordingly, there is nothing owing to Fadel from anyone. If he were to foreclose on the settlement proceeds, the Trust and/or Deseret First would be entitled to a setoff or offset of the same amount for the sanction. But as has been clear since October 2011, Fadel has wanted substantially more than the $10,000 fee under his contingency fee agreement, and he has pursued years of litigation to try and extort it.

term should be interpreted as the exclusion of another . . . [and] give effect to omissions in statutory language by presuming all omissions to be purposeful." *Id.*

Third, Fadel does not cite anywhere in the record where he alleged that Deseret First had actual notice of Fadel's attorneys' lien. At best, but without any citation to the underlying record, Fadel asserts in his brief that "The Attorney-Client Agreement was shown to the mediator by Jerry Parkin before they departed from the conference room on October 20, 2011." (Fadel Brief at 10.) But Fadel does not assert that he actually showed it to Desert First or its counsel. That is an inferential leap.

Fadel's citation to *Potter v. Ajax Mining Co.*, 57 P. 270 (Utah 1899) is equally unavailing. Aside from having been decided more than 100 years ago and under a different set of laws, *Potter* is distinguishable on its face. In that case involving a personal injury claim on a contingency fee, the insurance adjuster and the plaintiff "collusively, fraudulently, and for the purpose of cheating and defrauding his attorneys" settled around the attorney. 57 P. at 272. Therefore, the court remanded the matter "with direction to the district court to vacate and set aside the judgment." *Id.* at 273.

That is not what happened here. Through the mediation and settlement, Fadel earned a $10,000 contingency fee. *Deseret First II*, 2014 UT App 267, ¶ 16. But he valued the case higher than his client and wanted it to proceed to trial. *See id.* at ¶ 3. After his client disagreed and settled with Deseret First through the mediation and with the assistance of attorney David Shaffer, Fadel has fought vindictively against Deseret First ever since—but not for the $10,000. No one disagreed that Fadel was entitled to a $10,000 contingency fee upon the settlement of the case (until, arguably, he was

sanctioned by Judge Hamilton). Fadel ignored the Trust's desire to settle during the mediation and now wants ten times that amount, plus a one-half ownership of the Property. (*See* R. at 1-7.) After the settlement in October 2011, Fadel could have taken his $10,000 fee and been finished, which was different than the attorney in *Potter*. As reminded in *Deseret First II*, "A lawyer is bound to "abide by a client's decision whether to settle a matter." 2014 UT App 267, ¶ 18 (citing Utah R. Prof'l Conduct 1.2(a).)

Overlooking Fadel's ethical conflict of interest problem, *Potter* is also inapposite because it dealt with an attorneys' lien on personal property—his interest in the proceeds of his client in a settlement—and not with an attorney's lien on real property conveyed by the client to the other side. In our case, there is a statute, Utah Code § 38-2-7, that squarely addresses how an attorney's lien impacts real property when it belonged to the client and after it is transferred. Under any read, *Potter* cannot trump the Legislature.

Judge Hyde did not need to address whether Deseret First is entitled to the protection under Utah Code § 57-3-103 as a possible bona fide purchaser for value, recording its Deed earlier in time. (*See* R. at 93.) Though there may be no need to reach that discussion on appeal, Deseret First paid $30,000, plus other consideration in the Settlement Agreement for the Property; and Deseret First recorded the Deed before Fadel recorded any interest of his. So any lien or ownership right that Fadel could subsequently assert or record is "void." Utah Code § 57-3-103. Thus, for a further reason, Fadel could have no attorney's lien or other claim that encumbers the Property.

Notably, Fadel's primary analysis of Utah Code § 38-2-7(9) is that it somehow conflicts with the other provisions in § 38-2-7 relating to the commencement and the

30-day requirement before recording a notice of lien. (Fadel Brief at 19.) There is no conflict. As demonstrated above, the application of the statute is straightforward. Fadel cannot establish any priority in the Property ahead of Deseret First.

Lastly, Fadel's citation to *Petrie v. General Contracting Co.*, 413 P.2d 600 (Utah 1996) is unavailing. (Fadel Brief at 18-19.) In that case, the plaintiff hired an attorney and signed a contingency fee agreement in his quiet title action, and the attorney was to receive "one-third of whatever was obtained from the defendant, whether money or property." *Petrie*, 413 P.2d at 410. At the end of the day, the plaintiff obtained title to a tract of land, and the attorney earned his fee of one-third of it. *Id.* Here, the Trust did not obtain the Property from Deseret First. To the contrary, the Trust delivered a deed to the Property to Deseret First in exchange for a $30,000 payment, and whatever fee arrangement he had applied to the $30,000 payment (as what his client received). *Petrie* merely highlights how Fadel has long been overreaching in his claims.

II. JUDGE HYDE PROPERLY AWARDED ATTORNEYS' FEES AGAINST FADEL UNDER UTAH CODE § 78B-5-825.

Akin to kicking the sleeping dog out of spite, Fadel never should have filed his Complaint against Deseret First. Section 78B-5-825 provides that "[i]n civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." *Migliore v. Livingston Financial, LLC*, 2015 UT 9, ¶ 30, 347 P.3d 394

(internal citations omitted).[4] In reviewing an award of attorney fees under Utah Code § 78B-5-825, the Court applies a two-part test. *Id.* First, to determine whether a claim is without merit, the Court should "look at whether it was frivolous or little weight or importance having no basis in law or fact." *Id.* at ¶ 31 (citing *In re Olympus Construction, LC*, 2009 UT 29, ¶ 30, 2015 P.3d 129). Second, to find that a party acted in bad faith, the Court should conclude that at least one of the following factors existed:

> (i) The party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; or (iii) the party intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others.

Id. ¶ 32 (citing *Valcarce v. Fitzgerald*, 961 P.2d 305, 315-16 (Utah 1989)). The district court's factual determination is upheld "if there is sufficient evidence in the record to support a finding that at least one of these three factors applies." *Id.* (citing *Still Standing Stable, LLC v. Allen*, 2005 UT 46, ¶ 13, 122 P.3d 556).

Deseret First prevailed in the action. (R. at 133). Judge Hyde determined that Fadel's bringing the Complaint warranted an award of attorneys' fees under Utah Code § 78B-5-825. That award of $2,000[5] should be upheld after applying the two-part test.

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[4] The code provides for an exception to the mandatory award of fees if the party files "an affidavit of impecuniosity in the action before the court." Utah Code § 78B-5-825(2)(a). Judge Hyde provided Fadel with that opportunity, which Mr. Fadel waived on the record. (R. at 134; Transcript 45:14-46:15 ("I'll represent to the Court that I'm not impecunious . . . . [and] I'm waiving that right in order to make this a final determination that's appealable.")

[5] Fadel does not appear to challenge the reasonableness of the $2,000 award. (*See generally* Fadel Brief.) Any challenge to the reasonableness would be futile. (*See* Transcript 47:1-48:6 (detailing Judge Hyde's rationale as to why the $2,000 fee was reasonable, including the time to review the materials and prepare the briefing, the added cost in preparing affidavits, and by comparison to the $10,000 sanction previously awarded by Judge Hamilton).

First, Judge Hyde found that "Fadel's claims in the Complaint [were] without merit, based upon the legal determinations made in this case." (R. at 133.) Fadel's claims against Deseret First, at least in part, were absolutely frivolous, had little weight or importance, and had no basis in law or fact. For example, in his Complaint, Fadel alleged that he "is entitled to one-half ownership in the tract as a tenant in common and to one-half of the provable rental owed by Deseret." (R. at 3.) In monetary amounts, Fadel claimed that "[his] share of rental damages, one-half could reasonably be determined at $102,000 plus interest." (R. at 7.) He also asked for reimbursement of his costs advanced in the First Lawsuit from Deseret First. (R. at 7.) And Fadel asks for that same relief in his appellate brief. (Fadel Brief at 35.) From a plain read of his contingency fee agreement, after the mutual release of all claims, the conveyance of the Property, and $30,000 payment, he was entitled to only $10,000 from the Trust. Nothing more.

The Utah Court of Appeals correctly recognized that the amount in question for the lien could only be $10,000. *Deseret First II*, 2014 UT App 267, ¶ 16 ("Fadel's contingent fee agreement with the Trust provided that he is to receive 'one-half of the amounts recovered by settlement or judgment . . . in excess of $10,000. The amounts recovered [are] to be measured by the value received in cash or property or both free from claim from Deseret [First], which could result in [Fadel] obtaining a joint interest in the land. . . .' Thus under the fee agreement, the Trust's decision to settle the litigation by selling the property to Deseret First for $30,000 meant that Fadel was entitled to a fee of $10,000.") (emphasis added).

Notwithstanding the ruling of the Utah Court of Appeals in *Deseret First II*, Fadel filed his Complaint with the district court against Deseret First (not even his former client) for an amount in excess of $102,000, plus interest, for his share of rental damages, and that the district court name Fadel as a one-half owner of the Property with Deseret First. (R. at 7.) He sought a "money judgment for Plaintiff's entitlement for rentals and damages together with interest." (R. at 7.) As icing on the cake, his Complaint concluded asking for "relief as the Court deems reasonable and appropriate including the protection of the Trust from any further claim." (R. at 7 (emphasis added).) Rentals, ownership of the Property, interest, protection of the Trust, these claims and interests of the Trust were all settled, dismissed, and released in the First Lawsuit.

This was not Fadel's first rodeo—improperly asserting these type of claims, which would have otherwise belonged to the Trust before settlement, as his own—against Deseret First. Judge Hamilton previously found that "Mr. Fadel has repeatedly attempted to represent the Trust in filing motions, and he has repeatedly taken positions that are frivolous, meritless, and inconsistent with the Settlement Agreement, the Order of Dismissal with Prejudice [and the court's other rulings]." (R. at 48.) That order was affirmed on appeal. *Deseret First II*, 2014 UT App 267. Yet, Fadel disregarded the prior sanctions and this Court's published opinion, filed this Complaint against Deseret First, and asserted the same frivolous claims for excessive amounts again. Judge Hyde called the spade a spade—claims having no basis in law or fact. (R. at 133.)

Second, Judge Hyde found that "Fadel's claims in the Complaint were not brought or asserted in good faith." Judge Hyde pointed to Fadel's Complaint that purported to

assert claims of the Trust, like for rentals, which "could not be brought in good faith, because of the rulings and orders in the First Lawsuit." (R. at 133; *see* Transcript 39:16-40:16.) Judge Hyde concluded that "Fadel was aware of those limitations and restrictions, and to assert a claim in the face of those rulings and orders, which have been repeatedly stated and affirmed on appeal, does not and cannot constitute a good faith basis for the pursuit of those claims." (R. at 133.)

Given the years of litigation and history of the First Lawsuit, including the appeals, Fadel lacked an honest belief in the propriety of his filings. He knows that his continual unrelenting pursuit of Deseret First serves only to hinder, delay, or defraud others, including wasting the time and resources of the courts, needlessly increasing the cost of litigation, and stalling the finality of this dispute that commenced in 2009 and ended in 2011 with a mediated settlement. He is without client, and he is only doing this for his own gratification to drag out this litigation until the bitter end. Therefore, Judge Hyde's award of sanctions should be upheld. As this Court said before:

> We conclude that there was no error in the district court's determination that Fadel's actions in purporting to represent the Trust, contrary to its express wishes and its own judgment of where its interests lie, warranted an award of sanctions.

Deseret First II, 2014 UT App 267, ¶ 21.

To try and establish some bases for his claims, Fadel devotes several pages of his brief in arguing why the mediation and the settlement was invalid or should be undone. (Fadel Brief at 7-12, 27-29.) That is irrelevant and not before this Court. The validity of the settlement was decided in the First Lawsuit, and notwithstanding all of his filings,

Judge Hamilton was not about to set aside the settlement or the dismissal. (*E.g.*, R. at 25.) And this Court affirmed that order on appeal. *See Deseret First II*, 2014 UT App 267.

Ostensibly to give credence to his ability to raise claims that belonged to the Trust, Fadel still does not seem to accept that he is not the counsel for the Trust. (Fadel Brief at 19 ("Fadel was replaced, but never discharged by the client, and has never withdrawn from the case.") Not only does this flaunt Judge Hamilton's order, (R. at 48 ("[Fadel] is not recognized as counsel for the Trust"), but he missed the reprimand by this Court:

> [T]he circumstances in this case precluded Fadel from continuing to represent the Trust once their views of how to proceed diverged so significantly. A lawyer is bound to "abide by a client's decision whether to settle a matter." . . . . Thus, even if the attorney believes it is in the client's best interest to continue to trial, once the attorney's advice to do so is refused, he or she must defer to the client's desire to resolve the litigation. There is no dispute that the Trust desired to settle the litigation with Deseret First for the sum of $30,000. As a result, once Fadel had given his contrary advice, he was required to either proceed in support of the Trust's wishes or withdraw from the case.
>
> Yet after the mediation, Fadel did not withdraw; rather, he put his own interest in collecting a larger fee above the Trust's decision to resolve the case short of trial. Indeed, Fadel did not seek merely to protect his attorney lien, but he instead sought to have the Trust's decision to replace him as counsel vacated and to take over the litigation by setting aside the Settlement Agreement so that he could proceed to trial against the Trust's wishes. . . . Because Fadel acted in disregard of the Trust's decision to settle the case and instead decided to pursue his own desire to take the case to trial in order to increase his potential fee, Fadel had a conflict of interest that precluded him from representing the Trust any further.

(*Deseret First II*, 2014 UT App 267, ¶¶ 18-19.) Fadel's assertion that he was not discharged by the Trust nor did he formally withdraw is immaterial. Because of his conflict of interest, he could no longer represent the Trust, and he had no basis in law or

fact to assert his claims that belonged to the Trust in the Complaint against Deseret First. Judge Hyde properly found that an award of attorney's to Deseret First was warranted.

IV. FURTHER SANCTIONS ARE APPROPRIATE UNDER RULE 33 AND THE GENERAL RULE WHERE FEES WERE AWARDED BELOW.

Fadel has been out of control since mediation of this case in October 2011. He has cost Deseret First tens of thousands of dollars in attorneys' fees, after the settlement of the case. He has been sanctioned twice, and he should be more heavily sanctioned again for appealing. Under the Utah Rules of Appellate Procedure, a party is entitled to attorney fees when an "appeal . . . is . . . frivolous . . . . [A] frivolous appeal . . . is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Utah R. App. P. 33(a) and (b); *Warner v. DMG Color, Inc.*, 2000 UT 102, ¶ 24, 20 P.3d 868.

Fadel's appeal is frivolous. Having previously been invalided and stricken, Fadel has no notice of lien on which he can assert any priority for an attorney's lien in the Property. Having been told and knowing that, he shouldn't have appealed. But more fundamentally, he continues to try to undo Deseret First's and the Trust's Settlement Agreement (for his own pecuniary gain) and asks for payment of rents, which is clearly a claim that belonged to the Trust in the First Lawsuit. (*See* Fadel Brief at 27-29; R. at 35 ("the amount of rents due").) Furthermore, Fadel continues to seek not only ownership in a Property in which he has no claim, but also monetary amounts that are more than ten times what this Court already recognized as his fee in *Deseret First II*, 2014 UT App 267, ¶ 16. Similar to *Warner*, which affirmed the district court's award of attorney's fees

under Utah Code § 78B-5-825, the Court should also find that Fadel's appeal is frivolous, for the reasons herein, "grant appellees' request for attorney fees and costs and remand to the trial court for a determination of the amount of such fees and costs." 2000 UT 102, ¶ 24. In addition, under Rule 34, "if a judgment is affirmed, costs shall be taxed against appellant." Utah R. App. P. 34(a).

Moreover, because Judge Hyde awarded Deseret First attorney's fees below, presuming it prevails here, further attorney's fees for the appeal should be included. "Generally, when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." *Robertson's Marine, Inc. v. I4 Solutions, Inc.*, 2010 UT App 9, ¶ 18, 223 P.3d 1141; *see Valcarce*, 961 P.2d at 319 (same); *Giles v. Mineral Res. Intern., Inc.*, 2014 UT App 259, ¶ 25, 338 P.3d 825 (same); *Pugh v. N. Am. Warranty Serv.*, 2000 UT App 121, ¶ 24, 1 P.3d 570 (same); Utah *Dept. of Soc. Serv. v. Adams*, 806 P.2d 1193, 1197 (Utah Ct. App. 1991) (same). Notably, *Valcarce* involved fees awarded under Utah's bad faith statute. 961 P.2d at 317-19.

There needs to be finality. The award of attorneys' fees and sanctions need to be sufficient enough to dissuade Fadel (and all other attorneys in this state) from abusing and mocking the judicial system for his own pecuniary interest and gain, as he has done.

CONCLUSION

Deseret First was first in time and, hence, first in right. The Court should affirm the Order of Dismissal and Award of Attorneys' Fees. Furthermore, the Court should determine that an additional attorney's fees reward is appropriate and remand the case back to the district court for a determination of the amount of such fees and costs.

ORAL ARGUMENT REQUESTED

Oral argument is requested to assist the Court in addressing the factual and legal issues presented on appeal.

CERTIFICATE OF COMPLIANCE

Under Rule 24(f)(1)(C) of the Utah Rules of Appellate Procedure, Deseret First certifies that the word count for this brief is approximately 12,788, as indicated in the line count of the word processing system used to prepare the brief.

DATED this 16th day of May, 2016.

KIRTON McCONKIE

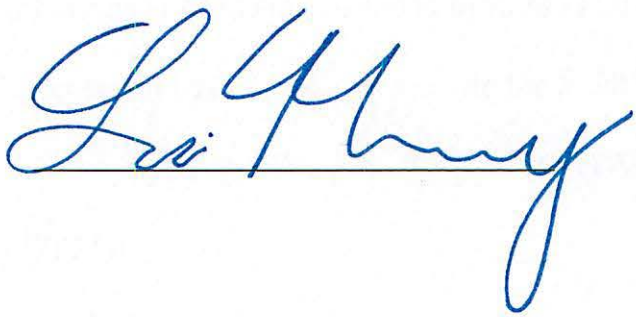
By: _____

Wallace O. Felsted
Gregory S. Moesinger
Attorneys for Appellee
Deseret First Credit Union

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of May, 2016, I mailed two (2) true and correct copies of the **BRIEF OF APPELLEE DESERET FIRST CREDIT UNION**, postage prepaid, to the following:

George K. Fadel
170 West 400 South
Bountiful, Utah 84010



6167-0161/4841-2883-1025

ADDENDUM 1

278 P.3d 630 (Mem)
Court of Appeals of Utah.

DESERET FIRST FEDERAL CREDIT UNION, Plaintiff and Appellee,
v.
Jerry W. PARKIN, Successor Trustee of the Wilma G. Parkin Family Protection Trust; and Escrow Specialists, Inc., Defendants and Appellee.
George K. Fadel, Appellant.

No. 20120110–CA.
|
May 10, 2012.

Second District, Farmington Department, 090700605; The Honorable David R. Hamilton.

Attorneys and Law Firms

George K. Fadel, Bountiful, Attorney Appellant Pro Se.

David J. Shaffer, Bountiful, for Appellee Jerry W. Parkin, Successor Trustee of the Wilma G. Parkin Family Protection Trust.

Wallace O. Felsted and Gregory S. Moesinger, Salt Lake City, for Appellee Deseret First Federal Credit Union.

Before Judges ORME, THORNE, and ROTH.

*631 DECISION

PER CURIAM:

¶ 1 George K. Fadel filed a notice of appeal on his own behalf and purportedly on behalf of Jerry W. Parkin, Successor Trustee of the Wilma G. Parkin Family Protection Trust (Parkin). This matter is before the court on motions for summary disposition filed by Deseret First Federal Credit Union and Parkin.

¶ 2 On January 26, 2012, the district court issued a minute entry stating that Fadel was no longer counsel for Parkin and "has no current basis to submit pleadings on behalf of the defendants." Accordingly, Fadel had no right to file a notice of appeal on behalf of Parkin on February 7, 2012. As a result, the notice of appeal filed on behalf of Parkin was ineffectual in invoking the jurisdiction of this court.

¶ 3 To the extent Fadel has filed a notice of appeal on his own behalf, this court lacks jurisdiction to consider the appeal because there is no final, appealable order as it relates to Fadel. This court does not have jurisdiction to consider an appeal unless it is taken from a final judgment or order, or qualifies for an exception to the final judgment rule. *See Loffredo v. Holt,* 2001 UT 97, ¶¶ 10, 15, 37 P.3d 1070. An order "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties." Utah R. Civ. P. 54(b).

¶ 4 A motion for sanctions against Fadel is currently pending in the district court. In the January 26, 2012 ruling the district court stated that it would consider the motion and ordered Fadel to file a response to the motion. Thus, to the extent that Fadel filed the notice of appeal on his own behalf, there remain issues for the district court to resolve. Accordingly, this court lacks jurisdiction to hear this appeal. When this court lacks jurisdiction, it must dismiss the appeal. *See Loffredo,* 2001 UT 97, ¶ 11, 37 P.3d 1070.

¶ 5 Both Deseret First and Parkin have requested attorney fees in this matter under rule 33 of the Utah Rules of Appellate Procedure. The district court has not yet issued any ruling on Deseret First's request for sanctions based upon Fadel filing papers in the district court on behalf of Parkin. If the district court determines that Fadel violated rule 11 of the Utah Rules of Civil Procedure, then the district court may also award attorney fees incurred by Deseret First and Parkin associated with responding to this appeal.

¶ 6 The appeal is dismissed without prejudice to the filing of a timely appeal after the district court enters a final, appealable order.

All Citations

278 P.3d 630 (Mem), 708 Utah Adv. Rep. 8, 2012 UT App 140

End of Document

ADDENDUM 2

339 P.3d 471
Court of Appeals of Utah.

DESERET FIRST FEDERAL CREDIT UNION, Plaintiff and Appellee,
v.
Jerry W. PARKIN, Defendant and Appellee.
George K. Fadel, Proposed Intervenor and Appellant.

No. 20130010–CA.
|
Nov. 14, 2014.

Synopsis

Background: Purported purchaser brought quiet title action against vendor, and after vendor dismissed its attorney, he moved to intervene. The Second District Court, Farmington Department, David R. Hamilton, J., denied attorney's motion to intervene, struck his complaint in intervention, and sanctioned attorney. Attorney appealed.

Holdings: The Court of Appeals, Roth, J., held that:

[1] attorney was not entitled to intervene;

[2] award of sanctions was within the District Court's authority; and

[3] attorney's actions warranted sanctions.

Affirmed.

Attorneys and Law Firms

*472 George K. Fadel, Appellant Pro Se.

Wallace O. Felsted and Gregory S. Moesinger, for Appellee Deseret First Federal Credit Union

David J. Shaffer, for Appellee Jerry W. Parkin.

Judge STEPHEN L. ROTH authored this Memorandum Decision, in which Judge GREGORY K. ORME and Senior Judge JUDITH M. BILLINGS concurred. [1]

Memorandum Decision

ROTH, Judge:

¶ 1 George K. Fadel appeals from three district court orders. First, he contends the district court erred in denying his motions to intervene in litigation between Jerry W. Parkin, as successor trustee for the Wilma G. Parkin Family Protection Trust (the Trust), and Deseret First Federal Credit Union (Deseret First). Second, he challenges the court's decision to strike his corresponding complaint in intervention. Finally, he challenges the district court's entry of rule 11 sanctions against him. We affirm.

¶ 2 In August 2009, Deseret First filed suit against the Trust to quiet title to a parcel of land that Deseret First claimed it had purchased from the Trust several years earlier through an installment contract. The Trust hired Fadel, an attorney, on a contingent fee arrangement to represent it in the suit. In the written client agreement, the Trust agrees to pay Fadel "one-half of the amounts recovered by settlement or judgment ... in excess of $10,000." The fee agreement further provides that recovery in the form of property "could result in [Fadel] obtaining a joint interest in the land with the Trust[ ]" to the extent of the agreed-upon fee.

¶ 3 Against Fadel's advice, the Trust entered into mediation with Deseret First on October 20, 2011. Fadel attended a portion of the mediation but was not present for its conclusion. [2] The mediation resulted in an agreement (the Settlement Agreement) whereby the Trust agreed to sell the disputed parcel to Deseret First for $30,000, a sum lower than Fadel believed could be obtained if the case proceeded to trial. The Trust hired new counsel, David Shaffer, and on November 15, 2011, the Trust, through Shaffer, and Deseret First filed a stipulated motion to dismiss the quiet title suit with prejudice. Although he was aware of the settlement and that he had been replaced as counsel on the case, Fadel then filed a motion in limine, purportedly on behalf of the Trust. [3] Fadel also filed an objection to his client's stipulated request for dismissal on the basis that "it is best for all concerned that the case be tried for the benefit of the Trust beneficiaries as well as for the attorney's fee." In response, Deseret First filed a motion for sanctions against Fadel. The motion cited rule 11 of the Utah Rules of Civil Procedure and the inherent authority of the court to regulate the conduct of attorneys as bases for sanctioning Fadel for his continued attempts to act

as counsel when his client had replaced him with another attorney.

¶ 4 On December 2, 2011, the district court entered an order dismissing the case. The order did not address the motion for sanctions *473 against Fadel. Despite the dismissal, in January 2012, Fadel queried the district court regarding the status of his earlier motions and sought to file additional documents on behalf of the Trust. At that point, the court issued a ruling (the First Ruling), noting that "[t]he parties resolved their dispute" even though "Mr. Fadel had apparently advised his then clients [the Trust] not to settle." The court concluded that "[i]t was the [Trust's] decision how to resolve the[ ] case. A Substitution of Counsel was filed," and "Mr. Shaffer is recognized by the Court as [the Trust's] counsel. Mr. Fadel has no current basis to submit pleadings on behalf of [the Trust]." The court then stated that it would not consider any of the documents filed by Fadel after he had been replaced as counsel but that it would consider Deseret First's motion for sanctions. The court directed Fadel to respond to the sanctions motion by the end of January. Fadel did not file a response.

¶ 5 On August 1, 2012, the court held a hearing on the motion for sanctions. At the hearing, the district court asked Fadel to explain whom he thought he was representing when he filed the motion in limine and the objection to the request for dismissal in light of the fact that the Trust "wanted to settle this case" and "there was a settlement agreement that was signed off by [Fadel's] former clients." The court also inquired about Fadel's motivation for having filed an appeal of the dismissal of the case on the Trust's behalf,[4] given that he had acknowledged being aware of the Trust's desire to settle the case. Fadel responded that because he had never been properly replaced as the attorney of record and because he was not present for the mediation's resolution, no valid settlement of the case was possible. Fadel also admitted that he was pursuing his own interest in the contingent fee and argued that the Trust could not settle the case without his consent because of that fee arrangement.

¶ 6 Following the hearing, the court entered a ruling (the Second Ruling), granting the motion for sanctions on the basis that Fadel had violated rule 11 of the Utah Rules of Civil Procedure. Specifically, the court concluded that "it was not reasonable under the circumstances for Mr. Fadel to believe he had authority to file on behalf of his former client and that he had no evidentiary basis for his contentions in those filings because he had already been replaced as counsel." The court then instructed both Deseret First and the Trust to submit affidavits regarding their attorney fees.

¶ 7 Approximately one week later, Fadel filed a motion, under rule 24(a) of the Utah Rules of Civil Procedure, to intervene as a party in this litigation. Deseret First opposed intervention and filed a second request for sanctions against Fadel. Fadel responded with a second motion to intervene and a complaint in intervention. Deseret First then moved to strike the complaint in intervention.

¶ 8 On November 5, 2012, the district court held a hearing on all pending motions. At the hearing, Fadel stated that he was appearing on behalf of himself as intervenor and, despite the court's First Ruling, on behalf of the Trust in the Deseret First–Trust lawsuit as well. The district court then issued a written decision addressing the issues raised in both the August and November hearings. In its Consolidated Findings of Fact and Order (the Order), the court decided that the settlement was valid and that it "would not disturb its [First] Ruling ..., which resolved the issue of enforcing the parties' Settlement Agreement." Thus, because a judgment of dismissal had already been entered and " 'intervention is not to be permitted after entry of judgment,' " *Fisher v. Fisher*, 2003 UT App 91, ¶ 18, 67 P.3d 1055 *474 (quoting *Ostler v. Buhler*, 1999 UT 99, ¶ 9 n. 3, 989 P.2d 1073), the court denied Fadel's motions to intervene as untimely and struck his complaint in intervention. Consistent with the Second Ruling, the Order also required that Fadel pay attorney fees to Deseret First and the Trust as a sanction for his

> willful misconduct ... after the settlement of this case.... [E]ven after being advised by the court that he (Mr. Fadel) is not recognized as counsel for the Trust and that he has no basis to submit pleadings on behalf of the Trust or pursue claims on behalf of the Trust, Mr. Fadel has repeatedly attempted to represent the Trust in filing motions, and he has repeatedly taken positions that are frivolous, meritless, and inconsistent with the Settlement Agreement, the Order of Dismissal with Prejudice, the First Ruling, and the Second Ruling.

The court explained that it was entering the sanctions on the "combined bases" of rule 11 and the inherent powers of the court. The Order required Fadel to pay $5,500 toward

Deseret First's attorney fees and $4,500 toward the Trust's. Fadel appeals.

I. The Motions to Intervene and to Strike the Complaint in Intervention

[1] **[2]** ¶ 9 Fadel first asserts that the district court erred in denying his motions to intervene as a matter of right and in granting Deseret First's motion to strike his complaint in intervention.[5] Rule 24(a) of the Utah Rules of Civil Procedure affords a person the right to intervene so long as the person seeking to intervene can demonstrate

> (1) that [the] motion to intervene was timely, (2) that [the person] has "an interest relating to the property or transaction which is the subject of the action," (3) "that the disposition of the action may as a practical matter impair or impede [the person's] ability to protect that interest," and (4) that [the person's] interest is not "adequately represented by existing parties."
>
> *Supernova Media, Inc. v. Pia Anderson Dorius Reynard & Moss, LLC,* 2013 UT 7, ¶ 22, 297 P.3d 599 (quoting Utah R. Civ. P. 24(a)). In this case, the district court denied Fadel's motion to intervene because it was untimely. "We review for abuse of discretion the district court's determination of whether the motion to intervene was timely filed." *Id.* ¶ 15.

[3] ¶ 10 "[T]imeliness ... [is] determined under the facts and circumstances of each particular case, and in the sound discretion of the court." *Id.* ¶ 23 (alterations and omission in original) (citation and internal quotation marks omitted). As a general rule, however, " 'intervention is not to be permitted after entry of judgment.' " *Fisher,* 2003 UT App 91, ¶ 18, 67 P.3d 1055 (quoting *Ostler,* 1999 UT 99, ¶ 9 n. 3, 989 P.2d 1073); *see also Supernova Media,* 2013 UT 7, ¶ 24, 297 P.3d 599 (noting that a motion to intervene is generally considered timely "if it is filed before the final settlement of all issues by all parties" (citation and internal quotation marks omitted)). A judgment includes "any order from which an appeal lies." Utah R. Civ. P. 54(a).

[4] ¶ 11 Fadel contends that a final, appealable judgment had not yet entered when he filed his motions to intervene in August and September 2012 because the district court's final ruling in the case was not entered until December 2012. But Fadel focuses on the wrong order. The underlying case—the litigation between Deseret First and the Trust—had been dismissed in December 2011, months before Fadel sought to intervene. Only the motion for sanctions against Fadel, a non-party, remained pending before the court when Fadel moved to intervene. That the December 2011 dismissal of the case between Deseret First and the Trust was a final judgment seems unassailable, and, in fact, Fadel attempted to appeal that order, *see supra* note 2. A motion to intervene must be filed "before the final settlement of all issues by all *parties." Supernova Media,* 2013 UT 7, ¶ 24, 297 P.3d 599 ***475** (emphasis added) (citation and internal quotation marks omitted). Because the parties (Deseret First and the Trust) had resolved their dispute and the litigation had been dismissed before Fadel filed his motion to intervene, his motion was not timely. *See id.; see also Fisher,* 2003 UT App 91, ¶¶ 18, 20, 67 P.3d 1055 (noting that by the time of the appeal, any petition to intervene would be untimely because the case between the parties had ended).[6] Without a timely motion, Fadel has failed to carry his burden of demonstrating that he was entitled to intervene. *See Supernova Media,* 2013 UT 7, 297 P.3d 599, ¶ 22. Accordingly, we affirm the district court's denial of Fadel's motions to intervene. And because the motions to intervene were properly denied, it was appropriate for the district court to strike the complaint in intervention.

II. Sanctions

[5] ¶ 12 Fadel also challenges the district court's order that he pay sanctions. Fadel argues that the court erred in determining that he had violated rule 11 of the Utah Rules of Civil Procedure because (1) neither Deseret First nor the Trust had complied with the requirements of rule 11 that are prerequisite to an award of sanctions and (2) his conduct did not merit sanctions in the first place.

¶ 13 With regard to his first argument, Fadel misconstrues the nature of the district court's sanction order. The court did not rely only on the parties' sanction motions under rule 11 but determined more broadly that "[u]nder the combined bases and effect of Deseret First's [motions for sanctions,] the Court's First Ruling, the Court's inherent powers, and the remand order from the Utah Court of Appeals" directing the district court to consider attorney fees, "Fadel had violated rule 11." (Citations omitted.) Thus, it appears that the court was relying on both its inherent authority and rule 11 when it ordered sanctions. And Fadel fails to challenge the court's alternative basis for its decision—a court's authority to enter the award based on its inherent powers. *See Allen v. Friel,* 2008 UT 56, ¶ 7, 194 P.3d 903. However, even if rule 11 were the only basis for the court's sanctions order, the award was

within the district court's authority, whether or not the parties' motions complied with the rule.

¶ 14 Rule 11 of the Utah Rules of Civil Procedure provides for the entry of sanctions against an attorney when the attorney "present[s] a pleading ... or other paper to the court" for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" or that asserts "claims, defenses and other legal contentions ... [that are not] warranted by existing law" or are frivolous. Utah R. Civ. P. 11(b)-(c). Sanctions may be sought by one of the parties to the litigation or ordered by the court sua sponte. *Id.* R. 11(c). Fadel correctly points out that when a party moves for sanctions, rule 11(c)(1)(A) lays out specific prerequisites for submitting such a motion to the court. *See id.* R. 11(c)(1)(A). However, Fadel overlooks rule 11(c)(1)(B), which governs the proceedings when a court orders sanctions "[o]n its own initiative," *id.* R. 11(c)(1)(B). In that case, the court must "enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney ... to show cause why [he or she] has not violated subdivision (b)." *Id.* That is just what the court did in the First Ruling. The court informed Fadel that it was concerned about Fadel's ongoing attempts to represent the Trust and file documents when the Deseret First—Trust litigation had settled and Fadel was no longer recognized as the Trust's attorney. The court then directed Fadel to file a response to the motion for rule 11 sanctions, or in other words, to demonstrate that he had not violated rule 11. Accordingly, whether the *476 parties' motions for sanctions complied with rule 11 does not determine the outcome; the district court was authorized to proceed under rule 11 on its own initiative and did so once Fadel drew its attention to the deficiency in the parties' own rule 11 motions.

[6] [7] ¶ 15 We now consider whether the court properly ordered sanctions. When reviewing an order for rule 11 sanctions, we review the ultimate conclusion that the rule has been violated as well as any subsidiary legal conclusions for correctness. *Griffith v. Griffith,* 1999 UT 78, ¶ 10, 985 P.2d 255. We review the court's factual findings for clear error. *Id.* We conclude that the district court correctly determined that Fadel violated rule 11 because his actions indicated an improper purpose and were, in the words of the district court, "frivolous, meritless, and inconsistent with the Settlement Agreement, the Order of Dismissal with Prejudice, the First Ruling, and the Second Ruling."

¶ 16 Fadel's contingent fee agreement with the Trust provides that he is to receive "one-half of the amounts recovered by settlement or judgment ... in excess of $10,000. The amounts recovered [are] to be measured by the value received in cash or property or both free from claim from Deseret [First,] which could result in [Fadel] obtaining a joint interest in the land...." Thus, under the fee agreement, the Trust's decision to settle the litigation by selling the property to Deseret First for $30,000 meant that Fadel was entitled to a fee of $10,000. Fadel, however, believed that the Trust's position in the litigation was strong and that it would receive much more if the case were actually tried, perhaps as much as $300,000. Such an outcome, of course, would have significantly increased the amount of his fee.

[8] ¶ 17 An attorney, however, may not put his or her own interests ahead of the client's. *Fisher v. Fisher,* 2003 UT App 91, ¶ 20 n. 8, 67 P.3d 1055 (citing Utah Rules of Professional Conduct 1.7(a), which prohibits an attorney from representing a client when the lawyer's own personal interests may materially limit his or her ability to provide adequate representation). Fadel's prioritization of his interest in his fee over the wishes of the Trust amounted to a conflict of interest. *See* Utah R. Prof'l Conduct 1.7 cmt. 1 (noting that a concurrent conflict of interest between an attorney and a client can arise "from the lawyer's own interests"). The Utah Rules of Professional Conduct prohibit an attorney from providing representation to a client "if the representation involves a concurrent conflict of interest." *Id.* R. 1.7(a). In *Fisher v. Fisher,* 2003 UT App 91, 67 P.3d 1055, we observed that an attorney's interest in collecting his fee became such a conflict once that interest interfered with the client's right to collect the child support awarded to her. *Id.* ¶ 20 n. 8. There, the attorney sought to enforce an attorney lien he placed on his client's right to receive child support payments from the child's father. *Id.* We explained that "at the time [the attorney] sought to enforce his attorney lien, [his] interests were in conflict with [his client's,]" and the prioritization of his own interests over his client's warranted termination of his representation as counsel. *Id.*

[9] ¶ 18 The district court correctly determined that the circumstances in this case precluded Fadel from continuing to represent the Trust once their views of how to proceed diverged so significantly. A lawyer is bound to "abide by a client's decision whether to settle a matter." Utah R. Prof'l Conduct 1.2(a); *see also id.* R. 1.2 cmt. 1 ("The decisions specified in paragraph [1.2](a), such as whether to settle a civil matter, must also be made by the client."). Thus, even

if the attorney believes it is in the client's best interest to continue to trial, once the attorney's advice to do so is refused, he or she must defer to the client's desire to resolve the litigation. There is no dispute that the Trust desired to settle the litigation with Deseret First for the sum of $30,000. As a result, once Fadel had given his contrary advice, he was required to either proceed in support of the Trust's wishes or withdraw from the case. *See id.* R. 1.2(a).

¶ 19 Yet after the mediation, Fadel did not withdraw; rather, he put his own interest in collecting a larger fee above the Trust's decision to resolve the case short of trial. Indeed, Fadel did not seek merely to protect his attorney lien, but he instead sought to ***477** have the Trust's decision to replace him as counsel vacated and to take over the litigation by setting aside the Settlement Agreement so that the case could proceed to trial against the Trust's wishes. He filed pleadings in which he purported to be the Trust's attorney when he was not, including an objection to the Trust's stipulation to dismiss the case and an appeal, and he continued to assert that he represented the Trust even after the court warned him that he had been removed as counsel.[7] Because Fadel acted in disregard of the Trust's decision to settle the case and instead decided to pursue his own desire to take the case to trial in order to increase his potential fee, Fadel had a conflict of interest that precluded him from representing the Trust any further.

¶ 20 Fadel nevertheless maintains that under the totality of the circumstances, his actions were meritorious. He asserts that had he been billing the Trust at his normal hourly rate rather than representing it on a contingent fee basis, he would have billed $47,000 for legal services provided up to the time of mediation. He contends that he has not yet received any payment for his services. However, whatever right Fadel may have had to be paid for his work did not permit him to continue to represent the Trust where his focus on the amount of his fee came into direct conflict with his client's right to resolve the litigation in a way that met its own goals.

¶ 21 Accordingly, we conclude that there was no error in the district court's determination that Fadel's actions in purporting to represent the Trust, contrary to its express wishes and its own judgment of where its interests lie, warranted an award of sanctions. We therefore affirm that award.[8]

¶ 22 In summary, we affirm the district court's decisions to deny Fadel's motions to intervene and to strike the complaint in intervention because the intervention motions were untimely. We also affirm the award of sanctions because there was a basis for the district court's findings that Fadel acted for an improper purpose and asserted claims that were without merit and frivolous.

All Citations

339 P.3d 471, 2014 UT App 267

Footnotes

1 The Honorable Judith M. Billings, Senior Judge, sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11–201(6).

2 Although the district court found that Fadel left the mediation prior to its conclusion, the parties dispute the circumstances leading to Fadel not being present for the entire mediation. We conclude that the precise circumstances are not pertinent to the issues presented on appeal.

3 The thrust of this motion was to ask the court to preclude Deseret First from pursuing the claim for contractual attorney fees that it had included in its complaint, an issue apparently mooted by the Settlement Agreement. But the merits of the motion are not at issue here; rather, its significance lies in the fact that Fadel filed it after having been replaced as counsel for the Trust.

4 Sometime after the First Ruling, Fadel had filed an appeal from the district court's dismissal of the Deseret First–Trust litigation. We dismissed Fadel's appeal in mid-May 2012 on two grounds: (1) because he had been replaced as counsel, Fadel had "no right to file a notice of appeal on behalf of [the Trust]," and thus, the court had no jurisdiction to consider the propriety of the dismissal; and (2) no final, appealable order relating to Fadel himself had yet been entered because "[a] motion for sanctions against Fadel is currently pending in the district court." *Deseret First Fed. Credit Union v. Parkin*, 2012 UT App 140, ¶¶ 12–4, 278 P.3d 630 (per curiam).

5 Fadel asserts that the district court's ruling regarding the complaint in intervention did not address "the legality or propriety of the second motion and the complaint." However, the district court specifically denied both Fadel's first and second motions to intervene and explicitly struck the complaint in intervention as a result.

6 Fadel asserts that *Fisher v. Fisher,* 2003 UT App 91, 67 P.3d 1055, "is not relevant in that it is a domestic relations case" and the attorney lien statute has since been amended in relation to domestic relations cases. However, our conclusion in *Fisher* that the attorney could not move to intervene because a final judgment had already been rendered, making any intervention motion untimely, was based on general intervention principles rather than the attorney lien statute. *See id.* ¶¶ 18, 20. As a consequence, *Fisher* cannot be distinguished in the way that Fadel claims; rather, the case supports the district court's decision here.

7 Fadel argues that he could not be replaced as counsel because he did not give his consent to the substitution as required by rule 74 of the Utah Rules of Civil Procedure. *See* Utah R. Civ. P. 74(d) ("An attorney may replace the counsel of record by filing and serving a notice of substitution of counsel signed by former counsel, new counsel, and the client.").

The primary purpose of rule 74, however, is to keep the judicial process moving forward when a party desires a change in representation. *See id.* R. 74 (explaining the process for attorney withdrawal and appointment of new counsel). It cannot be interpreted to preclude the district court from recognizing new counsel in the face of an attorney's refusal to withdraw, where the client desires it and new counsel has been engaged and is ready to proceed.

8 Fadel does not challenge the amount of the sanction award or the type of sanctions awarded.

End of Document

ADDENDUM 3

Superseded 5/12/2015

38-2-7 Compensation -- Attorney's lien.

(1) The compensation of an attorney is governed by agreement between the attorney and a client, express or implied, which is not restrained by law.

(2) An attorney shall have a lien for the balance of compensation due from a client on any money or property owned by the client that is the subject of or connected with work performed for the client, including, but not limited to:

(a) any real or personal property that is the subject of or connected with the work performed for the client;

(b) any funds held by the attorney for the client, including any amounts paid as a retainer to the attorney by the client; and

(c) any settlement, verdict, report, decision, or judgment in the client's favor in any matter or action in which the attorney assisted, including any proceeds derived from the matter or action, whether or not the attorney is employed by the client at the time the settlement, verdict, report, decision, or judgment is obtained.

(3) An attorney's lien commences at the time of employment of the attorney by the client.

(4) An attorney may enforce a lien under this section by moving to intervene in a pending legal action in which the attorney has assisted or performed work, or by filing a separate legal action. An attorney may not move to intervene in an action or file a separate legal action to enforce a lien before 30 days has expired after a demand for payment has been made and not been complied with.

(5) An attorney may file a notice of lien in a pending legal action in which the attorney has assisted or performed work for which the attorney has a lien under this section. In addition, an attorney may file a notice of lien with the county recorder of the county in which real property that is subject to a lien under this section is located. A notice of lien shall include the following:

(a) the name, address, and telephone number of the attorney claiming the lien;

(b) the name of the client who is the owner of the property subject to the lien;

(c) a verification that the property is the subject of or connected with work performed by the attorney for the client and that a demand for payment of amounts owed to the attorney for the work has been made and not been paid within 30 days of the demand;

(d) the date the attorney first provided services to the client;

(e) a description of the property, sufficient for identification; and

(f) the signature of the lien claimant and an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents.

(6) Within 30 days after filing the notice of lien, the attorney shall deliver or mail by certified mail to the client a copy of the notice of lien.

(7) Any person who takes an interest in any property, other than real property, that is subject to an attorney's lien with actual or constructive knowledge of the attorney's lien, takes his or her interest subject to the attorney's lien. An attorney's lien on real property has as its priority the date and time when a notice of lien is filed with the county recorder of the county in which real property that is subject to a lien under this section is located.

(8) This section does not alter or diminish in any way an attorney's common law retaining lien rights.

(9) This section does not authorize an attorney to have a lien in the representation of a client in a criminal matter or domestic relations matter where a final order of divorce has not been secured unless:

(a) the criminal matter has been concluded or the domestic relations matter has been concluded by the securing of a final order of divorce or the attorney/client relationship has terminated; and
(b) the client has failed to fulfill the client's financial obligation to the attorney.

ADDENDUM 4

Effective 5/12/2015

38-2-7 Compensation -- Attorney's lien.

(1) The compensation of an attorney is governed by agreement between the attorney and a client, express or implied, which is not restrained by law.

(2) An attorney shall have a lien for the balance of compensation due from a client on any money or property owned by the client that is the subject of or connected with work performed for the client, including:

(a) any real, personal, or intangible property that is the subject of or connected with the work performed for the client;

(b) any funds held by the attorney for the client, including any amounts paid as a retainer to the attorney by the client; and

(c) any settlement, verdict, report, decision, or judgment in the client's favor in any matter or action in which the attorney assisted, including any proceeds derived from the matter or action, whether or not the attorney is employed by the client at the time the settlement, verdict, report, decision, or judgment is obtained.

(3) An attorney's lien commences at the time of employment of the attorney by the client.

(4)

(a) An attorney may enforce a lien under this section by:

(i) moving to intervene in a pending legal action:

(A) in which the attorney has assisted or performed work; or

(B) in which the property subject to the attorney's lien may be disposed of or otherwise encumbered; or

(ii) by filing a separate legal action.

(b) An attorney may not move to intervene in an action or file a separate legal action to enforce a lien before 30 days has expired after a demand for payment has been made and not been complied with.

(5) An attorney may file a notice of lien:

(a) in a pending legal action in which the attorney has assisted or performed work for which the attorney has a lien under this section;

(b) with the county recorder of the county in which real property that is subject to a lien under this section is located; or

(c) with the state or federal government office that receives filings that relate to the ownership of the property.

(6) A notice of lien described in Subsection (5) shall include the following:

(a) the name, address, and telephone number of the attorney claiming the lien;

(b) the name of the client who is the owner of the property subject to the lien;

(c) a verification that:

(i) the property is the subject of or connected with work performed by the attorney for the client; and

(ii)

(A) the attorney made a demand for payment of the amounts owed to the attorney for the work and the client did not pay the amounts owed within 30 days after the day on which the attorney made the demand; or

(B) the attorney is filing the notice of lien in accordance with a written agreement between the attorney and the client;

(d) the date on which the attorney first provided services to the client;

(e) a description of the property, sufficient for identification;

(f) the signature of the attorney claiming the lien; and

(g) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents.

(7) Within 30 days after the day on which the notice of lien is filed, the attorney shall deliver or mail by certified mail to the client a copy of the notice of lien.

(8) Any person who takes an interest in any property, other than real property, that is subject to an attorney's lien with actual or constructive knowledge of the attorney's lien, takes the interest subject to the attorney's lien.

(9) An attorney's lien on real property has as its priority the date and time when a notice of lien is filed with the county recorder of the county in which real property that is subject to a lien under this section is located.

(10) This section does not alter or diminish in any way an attorney's common law retaining lien rights.

(11) This section does not authorize an attorney to have a lien in the representation of a client in a criminal matter or domestic relations matter where a final order of divorce has not been secured unless:

(a)

(i) the criminal matter has been concluded or the domestic relations matter has been concluded by the securing of a final order of divorce; or

(ii) the attorney/client relationship has terminated; and

(b) the client has failed to fulfill the client's financial obligation to the attorney.

Amended by Chapter 168, 2015 General Session

ADDENDUM 5

78B-5-825 Attorney fees -- Award where action or defense in bad faith -- Exceptions.

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

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

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

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

Renumbered and Amended by Chapter 3, 2008 General Session

ADDENDUM 6

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (the "Agreement") is made and entered into effective October 20, 2011, by and between Deseret First Federal Credit Union ("Deseret First"), a federally chartered credit union, on one hand; and Jerry W. Parkin ("Jerry Parkin"), in his capacity as Replacement Trustee of the Wilma G. Parkin Family Protection Trust (the "Trust"), a Utah family trust dated July 9, 1999, on the other. (Deseret First and the Trust are each a "Party" and collectively the "Parties.")

I. RECITALS AND BACKGROUND

1. In 1984, Wilma G. Parkin ("Wilma Parkin") owned certain real property in Davis County, State of Utah, Tax Parcel No. 03-032-0056, commonly known by the street address of 362 South Main Street, Bountiful, Utah, 84010, and more specifically identified as follows:

> Beginning at the Northeast Corner of Lot 1, Block 8, Plat "A", Bountiful Townsite Survey, in the City of Bountiful, and running thence South 4 rods; thence West 115.5 feet; thence North 4 rods; thence East 115.5 feet to the point of beginning.
>
> (Commonly known by the street address of 362 South Main Street, Bountiful, Utah, 84010)

(hereinafter the "Property"). At all relevant times and at least since December 1984, the Property has been used for access and as a parking lot for some of the abutting and adjoining buildings.

2. On or about December 28, 1984, South Davis Credit Union ("South Davis") and Wilma Parkin executed a certain Uniform Real Estate Contract (the "Contract") whereby South Davis agreed to purchase the Property from Wilma Parkin for $77,500.00.

3. For years, South Davis made its monthly payments to Wilma Parkin.

4. In about 1991, the National Credit Union Administration (the "NCUA") seized all operations and assets of Bonneville (formerly South Davis) through the Department of Financial Institutions of the State of Utah as the credit union was deemed insolvent.

5. On or about March 19, 1991, under a Purchase and Assumption Agreement (the "Assumption Agreement"), NCUA sold and assigned Bonneville's assets and liabilities, including those under the Contract and in the Property, to Deseret First, and Deseret First assumed those assets and liabilities.

6. On or about July 9, 1999, Wilma Parkin signed and recorded a quit claim deed, transferring her interest in the Property from her, personally, to the Trust.

7. Deseret First made the remaining payments to Wilma Parkin and/or to the Trust in December 1999, thus completing all of Deseret First's obligations under the Installment Contract.

8. However, contrary to the Contract and unbeknownst to Deseret First, neither Wilma Parkin nor the Trust properly conveyed title to the Property to Deseret First after Deseret First made the final payment.

9. Later, in the years that followed, Wilma Parkin died.

10. There arose a dispute between Deseret First and the Trust relating to the ownership of the Property. On August 27, 2009, Deseret First filed a Complaint against the Trust in the matter of *Deseret First Federal Credit Union v. Jerry W. Parkin, Successor Trustee of the Wilma G. Parkin Family Protection Trust, et al.*, in the Second Judicial District in and for Davis County, State of Utah, Civil No. 090700605 (the "Lawsuit"). Some factual background, events, circumstances, allegations, claims, defenses, and legal theories are set forth in the pleadings, papers, and other documents on file with the court.

11. The Parties wish to fully resolve and settle all of their allegations, claims and defenses between them, including, but not limited to those raised in the Lawsuit or that could have been raised in the Lawsuit, and, to that end, the Parties have entered into this Agreement.

II. TERMS AND CONDITIONS OF SETTLEMENT

For good and valuable consideration, including the mutual promises and covenants contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

A. Settlement Payment and Fees of Mediator. Deseret First agrees to pay the Trust the total sum of Thirty Thousand Dollars and No Cents ($30,000.00) (the "Settlement Payment") on or before October 21, 2011. Deseret First further agrees to bear and be solely responsible for the fees and costs of Karin Hobbs of Hobbs Mediation, LLC, the agreed upon mediator for the Parties.

B. Warranty Deed. Contemporaneously with this Agreement, the Trust shall execute and deliver to Deseret First a General Warranty Deed in recordable form, in the form and substance of the General Warranty Deed attached hereto as **Exhibit A**, to Deseret First, conveying clear, marketable and insurable title to Deseret First.

C. Release and Settlement. Except for the obligations and other liabilities due under this Agreement, upon the execution of the Agreement, together with their respective beneficiaries, settlors, heirs, assigns, predecessors-in-interest, successors-in-interest, affiliates, parent or subsidiary corporations or entities, entities in which they have an interest, DBAs, principals, agents, officers, directors, employees, members, managers, supervisors, shareholders, representatives, attorneys, accountants, partners, joint venturers, and any and all other persons or entities who have at any time acted, or

purported to act on their respective behalves, absolutely and forever release and discharge each other, together with their respective assigns, predecessors-in-interest, successors-in-interest, affiliates, parent or subsidiary corporations or entities, entities in which they have an interest, DBAs, principals, agents, officers, directors, employees, members, managers, supervisors, shareholders, representatives, attorneys, accountants, partners, joint venturers, and any and all other persons or entities who have at any time acted, or purported to act on their respective behalves, from any and all claims, rights, demands, covenants, duties, obligations, responsibilities, representations, warranties, promises, liabilities, damages, expenses, attorneys' fees, costs, and causes of action, whether known or unknown, contingent or fixed, of whatever kind and howsoever arising, whether at law or in equity, from the beginning of time through the date of this Agreement.

D. Dismissal of Lawsuit. Within a reasonable time after Deseret First's tendering the Settlement Payment, the Parties shall work together to file a stipulation for the dismissal of the Lawsuit with prejudice under Rule 41 of the Utah Rules of Civil Procedure, with each party to bear their own cost and attorneys' fees. The attorneys for Deseret First shall prepare the first draft of the stipulation and proposed order.

E. Fees and Costs. If any legal action arises under this Agreement or by reason of any asserted breach of it, the prevailing party shall be entitled to recover all costs, fees, and litigation expenses, including reasonable attorneys' fees, copying costs, phone calls, and travel expenses, incurred in enforcing or attempting to enforce this Agreement, including costs and fees incurred prior to the commencement of legal action and fees and costs incurred in bankruptcy court or on appeal.

F. Choice of Law. The law of the State of Utah shall govern this Agreement. Any legal proceedings between or among the Parties regarding this Agreement, including any interpretation thereof, shall be conducted in a federal or state court in Davis County, State of Utah, and the Parties hereby submit to and accept such exclusive jurisdiction and venue.

G. Warranty of Authority. Each individual signing this Agreement warrants and represents that he or she is competent and has the full authority to execute this Agreement on behalf of the Party on whose behalf he or she has executed this Agreement and that he or she is acting within the expressed scope of such authority.

H. Entire Agreement. This Agreement constitutes the entire agreement of the Parties. No modification or amendment of this Agreement shall be of any force or effect unless in writing and executed by all of the Parties. There are no other understandings or agreements, verbal or otherwise, between the Parties except as herein expressly set forth. Furthermore, the Parties acknowledge that no promise, inducement or agreement not contained herein has been expressed or made to any of them in connection with this Agreement. The Parties acknowledge that the terms of this Agreement are contractual and may not be changed, waived, released, modified, altered, interlineated or supplemented, nor may any covenant, representation, warranty or other provision herein be waived, except by agreement in writing signed by the Party against whom

enforcement of the change, waiver, release, modification, alteration, interlineation, or supplementation is sought.

I. Denial of Liability. It is understood and agreed by the Parties that this Agreement represents a compromise of disputed amounts and claims, and the payments to be made and the execution of the releases are not to be construed as an admission of obligation or liability by any Party, and by whom liability is expressly denied in every particular.

J. Indemnification. The Trust agrees to indemnify, defend, hold harmless, and reimburse Deseret First from and for all liabilities, judgments, settlements, losses, damages, property damage, liens, attorneys' liens, consequential damages, punitive damages, costs, expenses, taxes, interest, fines and penalties, including, without limitation, attorneys' fees, court costs, arbitration costs, mediation costs, costs of investigation, settlement costs, and other litigation expenses, of every kind and nature, relating to any and all claims, actions, disputes, suits, proceedings, demands, inquiries and investigations asserted against Deseret First relating to any lien or encumbrance effecting the marketability or insurability of title to the Property, including any lien claims from George K. Fadel, The Fadel Law Firm, and/or their successors and assigns.

K. Further Documents and Actions. Each of the Parties hereby agrees to execute and deliver to the other Party such other instruments and documents reasonably necessary to effectuate the terms, conditions, and purposes of this Agreement.

L. Attorneys' Fees and Costs of the Parties. Except for the indemnification obligations of the Trust, as set forth in Section J above, each of the Parties agrees to be responsible for the fees and costs of its own attorney or attorneys.

M. Covenant of Non-disparagement. Each Party agrees not to disparage the other Party, including its respective employees, agents, principals, or representatives, with regards to any matter, including, but not limited to the subject matter of the Lawsuit, its business affairs generally, the settlement memorialized by this Agreement, and/or this Agreement.

N. Tax Consequences. The Parties agree to be respectively and solely responsible for any tax consequences arising from any payments to a Party under this Agreement. The Parties acknowledge and agree that no Party has rendered any tax advice whatsoever to any other Party regarding any tax consequences relating to or arising out of this Agreement.

O. No Prior Transfers. The Trust expressly warrant that neither it or any person affiliated therewith have not previously assigned or transferred any of their rights to any claims of any nature related to the matters being released herein and that they are lawfully entitled to make this settlement and receive the satisfaction described herein.

P. Reading of Agreement and Representation of Counsel. The Parties represent and agree that they have carefully read this Agreement, have consulted with legal counsel about the effects hereof, and regarding all prior events, occurrences, and documents, and the Parties know and understand the contents hereof and freely and voluntarily sign, and

it is their unequivocal intention to forever be legally bound hereby. Moreover, the language of this Agreement is a product of the mutual effort of the Parties. This Agreement shall be construed fairly as to all Parties, and it shall not be construed for or against any of the Parties on the basis of the extent to which that Party participated in drafting it as all Parties provided input into the drafting of the Agreement.

Q. Counterparts and Faxed Copies. This Agreement may be executed in any number of counterparts, provided each counterpart is identical in its terms. Each counterpart, when executed and delivered will be deemed to be an original, and all such counterparts shall be deemed to constitute one and the same instrument. Facsimile transmission or scanned and e-mailed version of a signed counterpart shall be deemed to constitute delivery of the signed original.

R. Severability. If any provision of this Agreement is determined to be invalid by a court of competent jurisdiction, such determination shall in no way affect the validity or enforceability of any other provision herein.

S. Signatures.

IN WITNESS WHEREOF, the undersigned have hereunto executed, set their hands, and sealed this Agreement.

By:

DESERET FIRST FEDERAL CREDIT UNION, a federally-chartered credit union:

Signed: _____

Name (printed): SHANE C LONDON

Title: EVP/CFO

Date: 20 OCTOBER 2011

And by:

JERRY W. PARKIN, SUCCESSOR TRUSTEE
OF THE WILMA G. PARKIN FAMILY TRUST, a Utah trust dated July 9, 1999:

Signed: _____

Name (printed): JERRY W. PARKIN

Title: TRUSTEE

Date: OCTOBER 20, 2011

EXHIBIT A

WHEN RECORDED, MAIL TO:

Deseret First Federal Credit Union
c/o Gregory S. Moesinger, Esq.
Kirton & McConkie
60 E. South Temple, Suite 1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120

Tax Parcel No. 03-032-0056

(Space above for Recorder's use only)

GENERAL WARRANTY DEED

JERRY W. PARKIN, AS REPLACEMENT TRUSTEE OF THE WILMA G. PARKIN FAMILY PROTECTION TRUST DATED JULY 9, 1999, whose address is 206 East Wells Fargo Drive, Brookside, Utah 84782 ("Grantor"), hereby conveys and generally warrants to DESERET FIRST FEDERAL CREDIT UNION, whose address is 2480 South 3850 West, Suite C, Salt Lake City, Utah 84120 ("Grantee"), for the sum of Ten Dollars and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the following described tract of land situated in Davis County, State of Utah, more particularly described as follows:

Beginning at the Northeast Corner of Lot 1, Block 8, Plat "A", Bountiful Townsite Survey, in the City of Bountiful, and running thence South 4 rods; thence West 115.5 feet; thence North 4 rods; thence East 115.5 feet to the point of beginning.

(Commonly known by the street address of 362 South Main Street, Bountiful, Utah, 84010)

TO HAVE AND TO HOLD the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise appertaining, and all of the estate, right, title, interest and claim whatsoever, of Grantor, either in law or equity, to the only proper use and benefit of Grantee, and Grantee's successors and assigns, forever.

GRANTOR COVENANTS with Grantee that Grantor is lawfully seized of the Property in fee simple; that the Grantors have good right and lawful authority to sell and convey the Property; that the Property is free and clear of any and all encumbrances; and the Grantors hereby fully warrant the title to the Property and will defend the same against the lawful claims of all persons whomsoever.

SUBJECT TO: (i) any state of facts which an accurate survey or physical inspection of the Property might show, (ii) all zoning regulations, restrictions, rules and ordinances, building restrictions and other laws and regulations now in effect or hereafter adopted by any governmental authority having jurisdiction, and (iii) current taxes, reservations, easements, rights-of-way, covenants, conditions, restrictions, encroachments, and all other matters of record or enforceable at law or in equity.

WITNESS the hand of said Grantor, this 20TH day of October, 2011.

GRANTOR:

Jerry W. Parkin, as Replacement Trustee of The Wilma G. Parkin Family Protection Trust, dated July 9, 1999

STATE OF UTAH)
:ss
COUNTY OF DAVIS)

On this 20 day of October, 2011, personally appeared before me Jerry W. Parkin, as Replacement Trustee of The Wilma G. Parkin Family Protection Trust, dated July 9, 1999, who acknowledged that he executed the foregoing on behalf of The Wilma G. Parkin Family Protection Trust, dated July 9, 1999.

Notary Public for Utah

Notary Public
BAUNA DAVIS
Commission #609613
My Commission Expires
May 18, 2015
State of Utah

4817-2765-4412.1

WHEN RECORDED, MAIL TO:

Deseret First Federal Credit Union
c/o Gregory S. Moesinger, Esq.
Kirton & McConkie
60 E. South Temple, Suite 1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120

E 2622585 B 5384 P 2-3
RICHARD T. MAUGHAN
DAVIS COUNTY, UTAH RECORDER
10/21/2011 8:09:00 AM
FEE $12.00 Pgs: 2
DEP eCASH REC'D FOR KIRTON & MCCONKIE

Tax Parcel No. 03-032-0056

(Space above for Recorder's use only)

GENERAL WARRANTY DEED

JERRY W. PARKIN, AS REPLACEMENT TRUSTEE OF THE WILMA G. PARKIN FAMILY PROTECTION TRUST DATED JULY 9, 1999, whose address is 206 East Wells Fargo Drive, Brookside, Utah 84782 ("Grantor"), hereby conveys and generally warrants to DESERET FIRST FEDERAL CREDIT UNION, whose address is 2480 South 3850 West, Suite C, Salt Lake City, Utah 84120 ("Grantee"), for the sum of Ten Dollars and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the following described tract of land situated in Davis County, State of Utah, more particularly described as follows:

Beginning at the Northeast Corner of Lot 1, Block 8, Plat "A", Bountiful Townsite Survey, in the City of Bountiful, and running thence South 4 rods; thence West 115.5 feet; thence North 4 rods; thence East 115.5 feet to the point of beginning.

(Commonly known by the street address of 362 South Main Street, Bountiful, Utah, 84010)

TO HAVE AND TO HOLD the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise appertaining, and all of the estate, right, title, interest and claim whatsoever, of Grantor, either in law or equity, to the only proper use and benefit of Grantee, and Grantee's successors and assigns, forever.

GRANTOR COVENANTS with Grantee that Grantor is lawfully seized of the Property in fee simple; that the Grantors have good right and lawful authority to sell and convey the Property; that the Property is free and clear of any and all encumbrances; and the Grantors hereby fully warrant the title to the Property and will defend the same against the lawful claims of all persons whomsoever.

SUBJECT TO: (i) any state of facts which an accurate survey or physical inspection of the Property might show, (ii) all zoning regulations, restrictions, rules and ordinances, building restrictions and other laws and regulations now in effect or hereafter adopted by any governmental authority having jurisdiction, and (iii) current taxes, reservations, easements, rights-of-way, covenants, conditions, restrictions, encroachments, and all other matters of record or enforceable at law or in equity.

WITNESS the hand of said Grantor, this 20th day of October, 2011.

GRANTOR:

Jerry W. Parkin, as Replacement Trustee of The Wilma G. Parkin Family Protection Trust, dated July 9, 1999

STATE OF UTAH)
:ss
COUNTY OF DAVIS)

On this 20 day of October, 2011, personally appeared before me Jerry W. Parkin, as Replacement Trustee of The Wilma G. Parkin Family Protection Trust, dated July 9, 1999, who acknowledged that he executed the foregoing on behalf of The Wilma G. Parkin Family Protection Trust, dated July 9, 1999.

Notary Public for Utah

Notary Public
BAUNA DAVIS
Commission #608513
My Commission Expires
May 18, 2015
State of Utah

4817-2765-4412.1

100110273

October 20, 2011

Pay Thirty Thousand and 00/100********** DOLLARS

$******30,000.00

TO THE ORDER OF Jerry W. Parkin as trustee of the Wilma G. Parkin Family Protection Trust

Payment in full re: Civil No 090700605

MEMBER COPY

PLEASE DETACH BEFORE DEPOSITING AND RETAIN FOR YOUR RECORDS

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DESERET FIRST CREDIT UNION

P.O. Box 45046
Salt Lake City, Utah 84145
Telephone (801) 456-7000
www.dfcu.com
3240

CREDIT UNION SERVICE CENTERS.

31-7890/3240

100110273

October 20, 2011

Pay Thirty Thousand and 00/100********** DOLLARS

$******30,000.00

TO THE ORDER OF Jerry W. Parkin as trustee of the Wilma G. Parkin Family Protection Trust

Payment in full re: Civil No 090700605

VOID AFTER 60 DAYS

⑈100110273⑈ ⑆324078909⑆ 750000003⑈

ADDENDUM 7

George K. Fadel #1027
Attorney For Successor Trustee, Defendant
170 West 400 South
Bountiful, Utah 84010
Telephone: 801-295-2421

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

DESERET FIRST FEDERAL CREDIT UNION, a federally-chartered credit union, Plaintiffs,	)	NOTICE OF ATTORNEY'S LIEN
JERRY W. PARKIN, SUCCESSOR TRUSTEE OF THE WILMA G. PARKIN FAMILY PROTECTION TRUST, a Utah family trust, ESCROW SPECIALISTS, INC. a Utah Corporation,	)	Civil No. 090700605
Defendant.	)	Judge David R. Hamilton

1. Notice is hereby given to all concerned that George K. Fadel (Attorney), 170 West 400 South, Bountiful, Utah, 84010, 801-295-2421, claims and files an Attorney's Lien pursuant to Section 38-2-7 Utah Code Annotated.

2. The property is owned by the Trustee of Wilma G. Parkin Family Protection Trust and the Successor Trustee during the time services were rendered by the Attorney. The beneficiaries named in the Trust, following the death of Wilma G. Parkin are: Jerry W. Parkin, Brent R. Parkin, Dennis J. Parkin and Joy L. Parkin under THE WILMA G. PARKIN FAMILY PROTECTION TRUST, dated July 9, 1999. The real property which is the subject of the above-entitled action is situated at 362 South Main, Bountiful, Utah and was conveyed by Wilma G. Parkin to the Trust by deed dated July 9, 1999, recorded August 10, 1999, and which property is

more particularly described as follows:

> Beginning at a point 165 feet south from the NE Corner Lot 4 Block 8, Plat A, Bountiful Townsite Survey, thence South 4 rods; thence West 7 rods; thence North 4 rods; thence East 7 rods to beginning containing 0.17 acres Serial Number 03:032:0056.

3. The above described tract is noted in the above action as the property subject to the Quiet Title action and the service of the attorney are all related to preserving the title to said tract in the name of the trust for the benefit of all named beneficiaries as specified by the Grantor-Settlor of the Trust.

4. The Attorney first provided services for the Trust on May 7, 2009. An Attorney-Client Agreement was formalized February 18, 2010, between the attorney and Jerry W. Parkin, the successor trustee and made a part hereof. Services rendered up to and including October 20, 2011, total 188 hours which apart from the agreement are of the reasonable value of $250.00 per hour or $47,000.00. Attorney has advanced court costs, deposition costs, and other expenditures for which he is entitled to be reimbursed.

5. Without the consent of the Attorney, and against his advice, Jerry W. Parkin executed and delivered to Deseret First Federal Credit Union a General Warranty Deed, dated October 20, 2011, recorded October 23, 2011 in the office of the Davis County Recorder in Book 5384 Pages 2 and 3, purporting to convey property not owned by the Trust. The grantee had full knowledge of the objection of the Attorney to any conveyance, and the grantee proceeded to deal directly with Jerry W. Parkin. The deed was executed and delivered by Jerry W. Parkin without proper advice or right, and contrary to the best interest of the beneficiaries, who had not authorized any conveyance,

especially no warranty deed to property never owned by the Trust.

Dated this 24th day of October, 2011.

George K. Fadel, Attorney at Law

State of Utah

ss:

County of Davis

On this 24 day of October, 2011, personally appeared before me George K. Fadel, an attorney, who acknowledged signing the same.

Notary Public
JEFFREY R MATHIS
Commission Number 576120
My Commission Expires
September 24, 2012
State of Utah

Notary Public

GEORGE K. FADEL
ATTORNEY AT LAW
ROCK-MANOR
170 WEST 400 SOUTH BOUNTIFUL, UTAH 84010

ATTORNEY - CLIENT AGREEMENT

THIS AGREEMENT made this 18th day of February 2010, between GEORGE K. FADEL (Attorney) and Jerry W. Parkin, Successor Trustee of THE WILMA G. PARKIN FAMILY PROTECTION TRUST, (Trustee).

1. Attorney has represented the Trustee and the Trust since May 2009, in matters relating to the title to property at 362 South Main Street , Bountiful, Utah, against Deseret Federal Credit Union.

2. Attorney has now prepared an Answer & Counterclaim against Deseret in Civil Case #090700605 in the District Court for Davis County.

3. Attorney and Trustee hereby agree that the compensation due to the Attorney for past service and continued service in the District Court , unless sooner resolved, will be one-half of the amounts recovered by settlement or judgment and/or judgment in excess of $10,000. The amounts recovered are to be measured by the value received by cash or property or both free from claim from Deseret which could result in the Attorney obtaining a joint interest in the land with the Trustee after deducting $10,000.

Witness the hands of the parties the day and year first above written.

George K. Fadel
GEORGE K. FADEL
ATTORNEY

Jerry W. Parkin
JERRY W. PARKIN ,TRUSTEE
CLIENT

EXHIBIT TO NOTICE OF ATTORNEY'S LIEN

Certificate of Mailing

I hereby certify I mailed copies of the Notice of Lien to Mr. Jerry W. Parkin, 206 East Wells Fargo Drive, Brookside, Utah, 84782, and to Mr. Gregory S. Moesinger, attorney for Deseret First Federal Credit Union, P.O. Box 45120, Salt Lake City, Utah 84145-0120, this 24th day of October, 2011.

George K. Fadel