

1983

## D. Scott McGregor And Eldon L. Richardson, II v. Peter A. Benz And David Cowan : Appellant's Brief

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Merlin O. Baker and John A. Adams; Attorneys for Appellants

---

### Recommended Citation

Brief of Appellant, *McGregor v. Benz*, No. 19173 (1983).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/4097](https://digitalcommons.law.byu.edu/uofu_sc2/4097)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 -) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT  
OF THE STATE OF UTAH

D. SCOTT MCGREGOR and ELDON L. :  
RICHARDSON, II, :

Plaintiffs and :  
Respondents, :

Case No. 19173

v. :

PETER A. BENZ and DAVID COWAN, :

Defendants and :  
Appellants. :

---

APPELLANTS' BRIEF

---

Appeal from the Judgment of the Third Judicial  
District Court for Salt Lake County  
Honorable Timothy R. Hanson, Judge

Merlin O. Baker and  
John A. Adams of  
RAY, QUINNEY & NEBEKER  
400 Deseret Building  
Salt Lake City, Utah 84111-1996

Attorneys for Appellants

LeRoy Axland and  
J. Michael Hansen of  
SUITER, AXLAND, ARMSTRONG & HANSON  
175 South West Temple  
Suite 700  
Salt Lake City, Utah 84101

Attorneys for Respondents

FILED

JUL 15 1983

---

Clerk, Supreme Court, Utah

IN THE SUPREME COURT  
OF THE STATE OF UTAH

D. SCOTT MCGREGOR and ELDON L. :  
RICHARDSON, II, :  
 :  
 Plaintiffs and :  
 Respondents, : Case No. 19173  
 :  
 v. :  
 :  
 PETER A. BENZ and DAVID COWAN, :  
 :  
 Defendants and :  
 Appellants. :

---

APPELLANTS' BRIEF

---

Appeal from the Judgment of the Third Judicial  
District Court for Salt Lake County  
Honorable Timothy R. Hanson, Judge

Merlin O. Baker and  
John A. Adams of  
RAY, QUINNEY & NEBEKER  
400 Deseret Building  
Salt Lake City, Utah 84111-1996

Attorneys for Appellants

LeRoy Axland and  
J. Michael Hansen of  
SUITER, AXLAND, ARMSTRONG & HANSON  
175 South West Temple  
Suite 700  
Salt Lake City, Utah 84101

Attorneys for Respondents

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE .....	1
DISPOSITION IN LOWER COURT .....	1
RELIEF SOUGHT ON APPEAL .....	1
STATEMENT OF FACTS .....	2
ARGUMENT .....	5
I. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ALLOWING THE DEFENDANTS TO FILE COMPULSORY COUNTERCLAIMS AND TO JOIN ADDITIONAL PARTIES .....	5
A. <u>Defendants' Counterclaims are Compulsory            in Nature</u> .....	5
B. <u>The Compulsory Counterclaims of the Defendants            Will Be Barred if not Allowed to be Litigated            in this Action</u> .....	6
C. <u>The Stay of the New Jersey Action was Based on            Plaintiffs' Representation that Defendants'            Claims Could be Litigated in the Utah Action</u> .....	7
D. <u>Based Upon Review Standards Applied at Both            the Federal and State Levels, the Trial Court            Abused its Discretion in Refusing to Allow            Defendants to File Their Compulsory Counterclaims</u> .....	11
1. <u>Federal Case Law</u> .....	11
2. <u>Case Law From Other States</u> .....	12
II. THE JOINDER OF ADDITIONAL PARTIES IS NECESSARY FOR A COMPLETE ADJUDICATION OF THE MATTERS IN CONTROVERSY ..	14
A. <u>Leave to Amend Should be Freely Granted to Allow            Complete Adjudication of Matters in Controversy</u> ..	14

B.	<u>Defendants' Meritorious Counterclaims Include Claims Against Nonresidents</u> .....	16
C.	<u>All of the Additional Parties are Subject to the Jurisdiction of the Utah Courts</u> .....	16
1.	<u>The Nonresidents Sought to be Joined as Parties Have Caused Tortious Injury Within This State</u> .....	17
2.	<u>The Nonresidents Sought to be Joined as Parties Have Transacted Business Within This State</u> .....	18
3.	<u>The Personal Jurisdiction of the Utah Courts Over Nonresident Defendants is as Broad as the Fourteenth Amendment Allows</u> .....	18
CONCLUSION .....		20

TABLE OF CASES AND AUTHORITIES

Cases

Page

<u>Abbott G.M. Diesel, Inc. v. Piper Aircraft Corp.,</u> 578 P.2d 850 (Utah 1978) . . . . .	19
<u>Bennett v. Fun &amp; Fitness of Silver Hill, Inc.,</u> 434 A.2d 476 (D.C. App. 1981) . . . . .	13
<u>Bronson v. Borst,</u> 404 A.2d 960 (D.C. App. 1979) . . . . .	13
<u>Cate Rental Co. v. Whalen &amp; Co.,</u> 549 P.2d 707 (Utah 1976) . . . . .	19
<u>Cyclops Corporation v. Fischbach &amp; Moore, Inc.,</u> 71 F.R.D. 616 (W.D. Pa. 1976) . . . . .	6-7
<u>Eckles v. Sharman,</u> 548 F.2d 905 (10th Cir. 1977) . . . . .	16
<u>Foman v. Davis,</u> 371 U.S. 178, 9 L.Ed.2d 222 (1962) . . . . .	11-12
<u>Food Basket, Inc. v. Albertson's, Inc.,</u> 383 F.2d 785 (10th Cir. 1967) . . . . .	11
<u>Globe Leasing Corp. v. Bank of Salt Lake,</u> 586 P.2d 420 (Utah 1978) . . . . .	16
<u>Hartford Accident and Indemnity Company v. District of Columbia,</u> 441 A.2d 969 (D.C. App. 1982) . . . . .	13
<u>Hill v. Zale Corporation,</u> 482 P.2d 332 (Utah 1971) . . . . .	19
<u>Johnson v. Brinkerhoff,</u> 57 P.2d 1132 (Utah 1936) . . . . .	15
<u>Leigh Furniture and Carpet Co. v. Isom, No. 17264</u> (Utah 1982) . . . . .	16
<u>Mallory Engineering, Inc. v. Ted R. Brown &amp; Assoc., Inc.,</u> 618 P.2d 1004 (Utah 1980) . . . . .	17, 19
<u>Mountain States Sports, Inc. v. Sharman,</u> 353 F.Supp. 613 (D. Utah 1972) . . . . .	16
<u>Polin v. Dun &amp; Bradstreet, Inc.,</u> 511 F.2d 875 (10th Cir. 1975) . . . . .	11
<u>Randolph v. Franklin Investment Co.,</u> 398 A.2d 340 (D.C. App. 1979) ( <u>en banc</u> ) . . . . .	12-13

<u>Refrigeradora Del Noroeste S.A. v. Appelbaum</u> , 248 F.2d 858 (7th Cir. 1957) . . . . .	12
<u>Romish v. Albo</u> , 291 So.2d 24 (Fla. App. 1974) . . . . .	13-14
<u>Slim Olson, Inc. v. Winegar</u> , 246 P.2d 608 (Utah 1952) . . . . .	6
<u>Thomas J. Peck &amp; Sons, Inc. v. Lee Rock Products, Inc.</u> , 515 P.2d 446 (Utah 1973) . . . . .	15
<u>Todaro v. Gardner</u> , 285 P.2d 839 (Utah 1955) . . . . .	6
<u>Travelers Indemnity Co. v. United States</u> , 382 F.2d 103 (10th Cir. 1967) . . . . .	11
<u>Turtle Management, Inc. v. Haggis Management, Inc.</u> , 645 P.2d 667 (Utah 1982) . . . . .	16
<u>Ziegler v. Akin</u> , 261 F.2d 88 (10th Cir. 1958) . . . . .	13

#### STATUTES

Federal Rules of Civil Procedure, Rule 15(a) . . . . .	11, 12
Utah Code Annotated, § 78-27-24 . . . . .	17
Utah Rules of Civil Procedure, Rule 13(a) . . . . .	5, 6
Utah Rules of Civil Procedure, Rule 15(a) . . . . .	11, 14

#### MISCELLANEOUS

22 A.L.R.2d 621 . . . . .	6
6 Wright & Miller, <u>Federal Practice and Procedure</u> , § 1417 . . . . .	6

STATEMENT OF THE CASE

The plaintiffs brought this action seeking a declaratory judgment action to determine the validity of a written Compensation Agreement that provided for the payment to defendants of \$250,000.00 and fifteen percent (15%) of the stock in a corporation to be formed for the marketing of a principal adjusted mortgage. Plaintiffs also sought damages based on alleged fraudulent representations of the defendants.

DISPOSITION IN LOWER COURT

The Honorable Timothy R. Hanson of the Law and Motion Division of the Third Judicial District Court denied defendants' Motion for Leave to File an Amended Answer and Counterclaim and to Join Additional Parties. Subsequently plaintiffs and defendants stipulated to the entry of judgment on one of the claims of the plaintiffs and the dismissal of plaintiffs' remaining claims. The defendants have appealed from the denial of their Motion for Leave to File an Amended Answer and Counterclaim and to Join Additional Parties.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the District Court's Order denying their Motion for Leave to File an Amended Answer and Counterclaim and to Join Additional Parties.



STATEMENT OF FACTS

In the fall of 1981 plaintiffs incorporated The McNeil/Mehew Group ("McNeil/Mehew") and sought investors to capitalize McNeil/Mehew in order to market a principal adjusted mortgage to financial institutions throughout the United States.

At plaintiffs' request, Cowan and Benz interested two investor groups. On December 3, 1981, proposals for investment in McNeil/Mehew were made to these two investor groups -- a "Neppel" group and a "Remlinger" or "Buttonwood Management Associates" group.

Plaintiffs signed a written Compensation Agreement which provided that if the Remlinger Group agreed to capitalize McNeil/Mehew, that Cowan and Benz would be entitled to \$250,000 and 15% of the stock. (Tr. at 11-12, 557-58).

The plaintiffs thereafter made an agreement with the Remlinger Group wherein Buttonwood invested \$350,000 in McNeil/Mehew in exchange for 49% of the corporate stock. Neither payment of any compensation nor issuance of stock was made to Cowan and Benz. Remlinger and Buttonwood had been advised of the written Compensation Agreement, but ignored it.

On January 28, 1982, plaintiffs filed a declaratory judgment action against Cowan and Benz seeking a judgment that the written Compensation Agreement was void and unenforceable.

Defendant Benz, a resident of New Jersey, filed a Motion to Quash Service or, in the Alternative, Motion to Dismiss for Lack of Personal Jurisdiction. This Motion was denied, and a Petition for Intermediate Appeal to the Utah Supreme Court was also denied.

On May 3, 1982, Defendant Benz filed an Answer generally denying the allegations of plaintiffs' Complaint. Defendant Benz asserted no counterclaims against Plaintiffs McGregor and Richardson at that time in order to preserve his objection to the court's in personam jurisdiction.

On May 3, 1982, Defendants Benz and Cowan filed a Complaint in the Superior Court of New Jersey against Richardson; McGregor; Donald Remlinger; McNeil/Mehew Group, Inc., a Utah corporation; and B.M.C. Acquisition Corporation, a New York corporation, d/b/a Buttonwood Management Company, defendants. This action alleged breach of the written Compensation Agreement and claimed damages of \$250,000 and 15% of the stock of McNeil/Mehew. Claims of tortious interference with prospective economic relations, tortious interference with business relations, and inducement to breach a contract were also alleged. (Tr. at 224-30, 548-54).

On June 21, 1982, plaintiffs in the Utah action filed a Motion for an Expedited Trial Setting. This Motion was denied, but the court did set a trial date of April 11, 1983.

In the New Jersey action, McGregor, Richardson, Remlinger and the other defendants moved to dismiss or stay the New Jersey action because of the pending action in Utah. On November 4, 1982 the New Jersey action was stayed on certain conditions, one of which was that Remlinger submit to the jurisdiction of the Utah Court. (Tr. at 235-37, 559-61).

On January 12, 1983, defendants filed their Motion for Leave to File an Amended Answer and Counterclaim and to Join Additional Parties. The proposed Amended Answer and Counterclaim was essentially identical to the action filed in the New Jersey Court. (Tr. at 206-19, 258-72).

On March 7, 1983, the District Court denied the Defendants' Motion for Leave to File an Amended Answer and Counterclaim and to Join Additional Parties. The court also entered a certain Memorandum Decision. (Tr. at 365-67).

On or about March 16, 1983, Defendants Benz and Cowan filed a Motion to Reconsider, or in the Alternative, to Amend Order of the Court. That Motion was denied.

On March 31, 1983, Defendants Benz and Cowan filed with this Court a Petition for an Extraordinary Writ in the Nature of Mandamus. Oral argument was heard on April 4, 1983. The Motion was denied without an explanation as to the basis for the denial.

## ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ALLOWING THE DEFENDANTS TO FILE COMPULSORY COUNTERCLAIMS AND TO JOIN ADDITIONAL PARTIES.

A. Defendants' Counterclaims are Compulsory in Nature.

Defendants' Counterclaims for breach of the written Compensation Agreement and for damages as a result of plaintiffs' tortious conduct are compulsory counterclaims. The refusal of the trial court to allow the defendants to litigate their counterclaims in this action, unless reversed, will result in the claims forever being barred.

Rule 13(a) of the Utah Rules of Civil Procedure, states in part:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

(Emphasis added).

Defendants' counterclaims arise out of the same transaction or occurrence that formed the basis for plaintiffs' action; plaintiffs do not and cannot contest this fact. Plaintiffs'

Complaint seeks a declaratory judgment that the Compensation Agreement between the plaintiffs and defendants is void and unenforceable as well as damages for fraudulent misrepresentations. The defendants' Counterclaim seeks an award of the \$250,000 and 15% of the stock of McNeil/Mehew as set forth in the Compensation Agreement. Defendants' counterclaims of tortious interference with prospective economic relations, tortious interference with business relations, and inducement to breach a contract all arise out of the same transaction.

B. The Compulsory Counterclaims of the Defendants Will Be Barred if not Allowed to be Litigated in this Action.

Rule 13(a) precludes assertion of a counterclaim which should have been asserted in a prior action. See generally, 22 A.L.R.2d 621 (and subsequent supplements). The Utah Supreme Court in Todaro v. Gardner, 285 P.2d 839, 842 (Utah 1955), stated that "a counterclaim not presented to the court on a matter involving the same transaction is forever barred." See Slim Olson, Inc. v. Winegar, 246 P.2d 608, 610 (Utah 1952); 6 Wright & Miller, Federal Practice and Procedure, § 1417.

In Cyclops Corporation v. Fischbach & Moore, Inc., 71 F.R.D. 616 (W.D. Pa. 1976), the court stated:

The failure to assert a compulsory counterclaim precludes its later assertion in another, subsequent lawsuit. In so holding, the federal

courts have reasoned that (1) the sheer force of Rule 13(a) prevents later suits, or (2) that the principle of res judicata, apart from the policy of Rule 13(a), precludes the litigation of claims that either were actually litigated or could have been litigated between the same parties in a prior lawsuit.

Id. at 620.

The trial court in its Memorandum Decision expressed concern about potential prejudice to plaintiffs because granting defendants' Motion would postpone the trial date. Some inconvenience may have been imposed upon plaintiffs if the time for adjudicating their claims had been delayed. Plaintiffs' inconvenience, however, is minimal compared to the permanent prejudice sustained by the defendants if their compulsory counterclaims are not allowed to be tried in this action. If defendants' compulsory counterclaims are not allowed to be tried in this action, they will never be adjudicated. Justice requires that the plaintiffs' day in court be postponed rather than the defendants' day in court be forever foreclosed.

C. The Stay of the New Jersey Action was Based on Plaintiffs' Representation that Defendants' Claims Could be Litigated in the Utah Action.

The Complaint filed by Cowan and Benz in New Jersey sought damages for breach of the written Compensation Agreement, unjust enrichment, inducement to breach a contract and tortious

interference with a prospective economic advantage. (Tr. at 224-30, 548-54). These same causes of action were alleged in Cowan's and Benz's Counterclaim.

Richardson, McGregor, Remlinger and McNeil/Mehew filed a Joint Memorandum in support of their Motion to Dismiss or Stay the New Jersey action. (Tr. at 562-70A). This Memorandum stated:

Defendants Eldon L. Richardson, II ("Richardson"), D. Scott McGregor ("McGregor"), Donald Remlinger ("Remlinger") and McNeil/Mehew Group, Inc. ("McNeil/Mehew"), submit this Memorandum in support of their motion to stay this proceeding pending resolution of a prior pending action in the State of Utah implicating precisely the same issues. The Utah action will effectively dispose of this controversy. As shall be demonstrated, the single appropriate course is for this Court to stay the New Jersey action pending resolution of the controversy in Utah. The entire relief sought in this action can undoubtedly be obtained in the previously commenced Utah action; the issues and the parties in the two suits are substantially the same; and there are surely no special equities which would compel this Court to allow this action to go forward.

(Tr. at 563).

\* \* \*

This action is therefore the mirror image of the Utah action. No discovery has been taken by either party in the New Jersey action. Nor are there any motions or other proceedings currently pending in the New Jersey action; by contrast, the Utah action is actively being litigated. Consequently, defendants in this action move this Court to stay the New Jersey proceeding pending the outcome of the prior pending action in the

Third Judicial District Court of Utah, which will effectively dispose of all of the issues in this Action.

(Tr. at 564-65).

\* \* \*

The Utah action will certainly afford "adequate relief" and "do complete justice" between these parties. No "special equity" militates to deny these defendants the relief they seek.

The issue presented by this action --- the validity and possible enforcement of the Compensation Agreement --- is identical to that presented in the Utah action, where all of the matters in controversy between the parties can be resolved. In the interest of conservation of judicial resources, avoidance of duplication of litigation and the convenience of the parties, this Court should stay the within proceedings pending the completion of the Utah action.

(Tr. at 567).

\* \* \*

In view of all the circumstances before this Court, and in light of the foregoing principles of law, it is needless and undesirable to proceed here and in Utah simultaneously. Indeed, to allow this action to go forward at this time would cause unnecessary duplication of discovery, litigation and annoyance and harassment of the defendants in this action. Consequently, this action should be stayed pending conclusion of the Utah action.

(Tr. at 570).

The New Jersey Court entered a stay order:



ORDERED that this action be and the same hereby is stayed as to all proceedings pending the disposition of an action in the courts of the State of Utah entitled D. Scott McGregor and Eldon L. Richardson, II v. Peter A. Benz and David Cowan, Civil No. C-82-727, on condition that Donald Remlinger not contest the exercise of jurisdiction over him by the courts of Utah in any claim asserted by the defendants here and arising out of the same transactions and occurrences in issue in this or that action; and

\* \* \*

IT IS FURTHER ORDERED that in the event the defendants in the Utah action assert a claim naming as a defendant there any of the defendants named here over whom the Utah court determines it has no jurisdiction, leave is given to any party on notice in accordance with the Rules Governing the Courts of the State of New Jersey to move to dissolve the stay granted herein for good cause shown, provided, however, that nothing in this Order shall be deemed to permit any party automatically to dissolve this stay.

(Tr. at 236-37, 560-61).

Richardson and McGregor represented to the New Jersey Court that it should stay the New Jersey action because all issues between the parties could be litigated in the Utah action. They then vigorously argued that the Utah trial court should not allow the defendants to assert its counterclaims. It would be a gross injustice for defendants Benz and Cowan to be denied the right to litigate their claims in this action; plaintiffs should be estopped to argue that such denial is just and proper.

D. Based Upon Review Standards Applied at Both the Federal and State Levels, the Trial Court Abused its Discretion in Refusing to Allow Defendants to File Their Compulsory Counterclaims.

Defendants have found no Utah case law setting forth the specific criteria to determine whether a trial court has committed an abuse of discretion in refusing to allow a party to amend its pleadings to assert compulsory counterclaims. However, under the clearly articulated standards of the federal courts and other jurisdictions, the trial court committed error in this case.

1. Federal Case Law.

The Supreme Court of the United States has made it clear that courts must heed the mandate of Rule 15(a)<sup>1</sup> that leave to amend "shall be freely given when justice so requires." Foman v. Davis, 371 U.S. 178, 182, 9 L.Ed.2d 222, 226 (1962). Polin v. Dun & Bradstreet, Inc., 511 F.2d 875 (10th Cir. 1975); Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967); Travelers Indemnity Co. v. United States, 382 F.2d 103 (10th Cir. 1967); Ziegler v. Akın, 261 F.2d 88 (10th Cir. 1958).

In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by

---

<sup>1</sup>Rule 15(a) of the Federal Rules of Civil Procedure is identical to the Rule 15(a) of the Utah Rules of Civil Procedure.

amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be 'freely given'.

Foman, supra at 226.

The rationale of this liberal amendment policy is to insure that litigants have an opportunity to test on the merits the validity of their claims.

In Refrigeradora Del Noroeste S.A. v. Appelbaum, 248 F.2d, 858 (7th Cir. 1957), the Seventh Circuit referred to the mandate of Rule 15(a). The court held that it was error to deny the motion for leave to file an answer and counterclaim because the plaintiff corporation was not available for service of process anywhere within the United States. The court of appeals concluded that the trial court, by refusing to permit the amendment to be filed, had, in fact, denied the defendant his day in court. Id. at 862.

## 2. Case Law From Other States.

A carefully considered line of authority on the question of leave to amend or add a compulsory counterclaim comes from the District of Columbia Court of Appeals. In Randolph v. Franklin Investment Co., 398 A.2d 340 (D.C. App. 1979) (argued en banc 1978), the District of Columbia Court of Appeals stated:

In the present record we find none of the reasons which the courts have used to justify denial of leave to file a counterclaim. This was

the Randolphs' first such request. The case had been pending little more than ten months. No party previously had requested a continuance. There was no indication of bad faith or dilatory motive on the Randolphs' part. The counterclaim was not obviously without merit. Finally, we do not perceive prejudice.

Id. at 351 (footnotes omitted). The court reversed and ordered the trial court to allow the plaintiffs to file their counterclaim.

In Bronson v. Borst, 404 A.2d 960 (D.C. App. 1979), the District of Columbia Court of Appeals again stated the criteria for determining whether a trial court has abused its discretion in denying a motion for leave to amend the answer to include a compulsory counterclaim:

Those criteria include: the number of such requests, the length of the pendency of the trial, the number of previous continuances, the existence of bad faith or dilatory motive, the merit of the counterclaim, and the existence of prejudice to the other party.

Id. at 963. In Bronson the court concluded that the trial court erred in its decision to deny the request to file a compulsory counterclaim. Those same criteria have been applied in that jurisdiction in subsequent cases. See Bennett v. Fun & Fitness of Silver Hill, Inc., 434 A.2d 476 (D.C. App. 1981); Hartford Accident and Indemnity Company v. District of Columbia, 441 A.2d 969 (D.C. App. 1982).

In Romish v. Albo, 291 So.2d 24 (Fla. App. 1974), the court ruled that the trial court's failure to grant leave to amend

in that case was an abuse of discretion where counsel for one of the parties had discovered information creating a valid compulsory counterclaim six months after filing the answer. Id. at 25.

Defendants' Motion for Leave to File an Amended Answer and Counterclaim was the first and only such request for leave to amend pleadings. No continuances of any trial date had been sought in this case. There is no basis for asserting that defendants' Motion was submitted either in bad faith or because of dilatory motive. The merit of defendants' counterclaims is readily apparent.

The only prejudice that was asserted by plaintiffs was that the trial date would be postponed. An impartial weighing of the interests of justice requires that plaintiffs' day in court be delayed in order that defendants may have their day in court. The trial court abused its discretion in not granting leave to the defendants to file their compulsory counterclaims.

II. THE JOINDER OF ADDITIONAL PARTIES IS NECESSARY FOR A COMPLETE ADJUDICATION OF THE MATTERS IN CONTROVERSY.

A. Leave to Amend Should be Freely Granted to Allow Complete Adjudication of Matters in Controversy.

Rule 15(a), U.R.C.P., provides that leave to amend pleadings should be freely granted. The Utah Supreme Court has indicated that this rule should be liberally construed so that all

elements of a controversy may be decided and determined in one action. In Johnson v. Brinkerhoff, 57 P.2d 1132 (Utah 1936), the court stated:

The amended complaint was filed before trial and defendants' answer thereto was filed before trial of the cause. . . . A more liberal rule will be applied in cases where amendments are offered under such circumstances than when offered during or after trial, where the parties may be taken by surprise or handicapped in the meeting of new allegations. The rule, however, is toward liberality in allowance of amendments to pleadings for the purpose of permitting a complete adjudication of the matters in controversy and in the furtherance of justice.

Id. at 1136.

In Thomas J. Peck & Sons, Inc. v. Lee Rock Products, Inc., 515 P.2d 446 (Utah 1973), the court stated:

Some tempest has been raised about the court allowing the plaintiff to make tardy amendments to the pleadings. In doing so he wisely and properly stated:

The pleadings are never more important than the cause that is before the court . . . . There can be no prejudice in this case because we'll give ample time for any answer . . . .

This is in harmony with what we regard as the correct policy: of recognizing the desirability of the pleadings setting forth definitely framed issues, but also of permitting amendment where the interest of justice so requires, and the adverse party is given fair opportunity to meet it.

Id. at 449-50.

B. Defendants' Meritorious Counterclaims Include Claims Against Nonresidents.

Defendants have alleged breach of the written Compensation Agreement and claims in tort against the additional parties Remlinger, McNeil/Mehew, Buttonwood, and the individual partners of Buttonwood. These tort claims are (1) tortious interference with prospective economic relations, (2) tortious interference with business relations, and (3) inducement to breach a contract.

Each of these torts is recognized by Utah law. The Utah Supreme Court in Leigh Furniture and Carpet Co. v. Isom, No. 17264 (Utah 1982), recently recognized for the first time the tort of tortious interference with prospective economic relations. Tortious interference with business relations is also recognized in Utah, see, e.g., Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667 (Utah 1982); Globe Leasing Corp. v. Bank of Salt Lake, 586 P.2d 420 (Utah 1978). The tort of inducement to breach a contract was recognized in Mountain States Sports, Inc. v. Sharman, 353 F. Supp. 613 (D. Utah 1972), rev'd on other grounds, Eckles v. Sharman, 548 F.2d 905 (10th Cir. 1977).

C. All of the Additional Parties are Subject to the Jurisdiction of the Utah Courts.

The McNeil/Mehew Group, Inc. is a Utah corporation and transacts business in Utah. The stay of the New Jersey state

court action was expressly conditioned on Remlinger's submission to the jurisdiction of the courts of Utah. (Tr. at 235-37, 559-61).

The Buttonwood partnership and the individual partners are subject to the personal jurisdiction of this Court under the Utah long-arm statute.<sup>2</sup> See Mallory Engineering, Inc. v. Ted R. Brown & Assoc., Inc., 618 P.2d 1004, 1005-07 (Utah 1980).

1. The Nonresidents Sought to be Joined as Parties Have Caused Tortious Injury Within This State.

The actions of the nonresident counterclaim defendants, through their agent(s), have deprived a Utah citizen (Cowan) of his compensation under the written Compensation Agreement and deprived defendants Cowan and Benz of the economic benefits they would have received by becoming principals in the Utah corporation of McNeil/Mehew. The torts allegedly committed by the nonresident counterclaim defendants against Benz and Cowan are significant. Benz and Cowan have been deprived of participation in a lucrative business opportunity and/or deprived of substantial compensation for valuable services rendered. The actions of the nonresident defendants have had a definite, foreseeable impact in Utah.

---

<sup>2</sup>Utah Code Annotated § 78-27-24. A more extensive discussion of the bases for personal jurisdiction is contained in Defendants' and Counterclaimants' Memorandum in Support of Motion for Leave to Amend Answer and Counterclaim and to Join Additional Parties (Tr. at 578-89).



2. The Nonresidents Sought to be Joined as Parties Have Transacted Business Within This State.

Remlinger as an agent for Buttonwood and its partners, negotiated extensively with McGregor and Richardson - both by telephone over interstate lines and in person, including at least one personal visit to Utah for the specific purpose, in part, of determining how to deal with the claims of Cowan and Benz. Deposition of D. Scott McGregor (Jan. 18 and 19, 1983) at 239-45, 274, 279, 306; (Feb. 24, 1983) at 4-5, 8-11.

Buttonwood was involved directly in interstate commerce by funding McNeil/Mehew which is actively engaged in soliciting interstate business. Buttonwood and its individual partners, acting through their agents, Remlinger and Caruso, have sought the protection of the State of Utah by entering into agreements for the subsequent incorporation of a Utah corporation and its business operation in Utah. See Exhibit 46 to Deposition of D. Scott McGregor. Remlinger and Caruso are directors of McNeil/Mehew. Id.

3. The Personal Jurisdiction of the Utah Courts Over Nonresident Defendants is as Broad as the Fourteenth Amendment Allows.

The Utah Supreme Court now recognizes that the Utah State Legislature intended to make its jurisdictional reach over nonresident defendants as broad as the Fourteenth Amendment would

allow. Such has not always been the case. A restrictive view characterized by Cate Rental Co. v. Whalen & Co., 549 P.2d 707 (Utah 1976); Hill v. Zale Corporation, 482 P.2d 332 (Utah 1971), prevailed earlier. Under the former standard, jurisdiction over nonresident defendants was exerted provided the non-resident defendant was engaged in some substantial activity with some degree of continuity within the state. Mallory Engineering, supra at 1006 n.2.

The more recent decisions of the Utah Supreme Court uphold the expansive grant of jurisdictional power intended by the legislature. See, e.g., Abbott G.M. Diesel, Inc. v. Piper Aircraft Corp., 578 P.2d 850 (Utah 1978). The current standard was summarized by the Utah Supreme Court in Mallory Engineering, supra:

The resultant standard for determining a nonresident's amenability to the jurisdiction of the state courts is not whether the nonresident is "present" in the state, but rather whether the nonresident has such contacts with the "state of the forum as make it reasonable, in the context of our federal system of government, to require the (nonresident) to defend the particular suit which is brought." This reasonableness standard, incorporating the requirements of fair play and substantial justice, looks to the quality and nature of the nonresident's contacts with the forum state. Therefore, the central concern of the inquiry into personal jurisdiction is the relationship of the defendant, the forum, and the litigation, to each other.

Mallory Engineering, supra at 1007 (footnotes omitted) (emphasis added).

The nonresident counterclaim defendants' transaction of business through their agent(s) satisfies the required minimal factual nexus. The nonresident counterclaim defendants have purposely availed themselves of the privilege of contracting under the laws of the State of Utah for the incorporation of a Utah corporation in which they would possess a substantial ownership interest. By doing so, they have invoked the benefits and protection of this state. Personal jurisdiction over these nonresident counterclaim defendants is warranted on the basis of the business they have transacted through their agents in this state.

#### CONCLUSION

One of the two defendants in this action, Peter A. Benz, a nonresident, has been held to be subject to the personal jurisdiction of the Utah courts. There is no dispute that the counterclaims of the defendants are compulsory in nature. If defendants' compulsory counterclaims are not permitted to be tried in the District Court, Rule 13, together with the doctrines of collateral estoppel and res judicata will preclude defendants from raising their claims in the action that is currently stayed in a New Jersey state court. In short, the question presented by this appeal is whether a nonresident defendant may be held

hostage to the personal jurisdiction of this state's courts, and simultaneously denied the opportunity to have adjudicated meritorious compulsory counterclaims.

Sound legal precedent and equitable considerations support defendants' position. The District Court abused its discretion in failing to grant defendants' Motion for leave to file their amended answer and counterclaims and to join additional parties. Neither the District Court nor the plaintiffs articulated specifically how plaintiffs would be prejudiced if the trial were postponed. Plaintiffs have not detailed any financial, commercial or legal interests that would have been impaired had the trial date been continued. Defendants' Motion to Amend was the first request to amend pleadings in this action. There had been no continuances requested in this case.

The District Court in its Memorandum Decision stated two reasons for denying appellants' Motion for Leave to File an Amended Answer and Counterclaim and to Join Additional Parties. The Court stated that "defendants' Motion to Amend and to Join Additional Parties would raise new issues, delay the long-standing trial date, and would seriously prejudice the plaintiffs having the matter heard as scheduled." (Tr. at 366).

Appellants concede that the granting of the Motion for Leave to File an Amended Answer both would have raised new issues

and delayed the trial date. However, neither of those grounds indicates that plaintiffs would have been seriously prejudiced in their rights. It was entirely appropriate and expected that the issues raised in the New Jersey action would be adjudicated in the Utah action because this was what the plaintiffs represented to the New Jersey Court and was the reason why it was stayed. The inclusion of these issues was not the inclusion of spurious or indirectly related issues. The issues presented by appellants' counterclaim were directly related to the occurrences and transactions that formed the basis for plaintiffs' complaint.

The determination whether to delay a trial date must involve a careful and fair weighing of the interests of justice. Although the District Court stated that the interests of justice led it to conclude that the Motion should be denied, it is incomprehensible to suggest that one party should be forever foreclosed from ever having its day in court in order to avoid temporarily delaying another party's day in court.

Plaintiffs argue that defendants filed an Answer in this action and therefore had an opportunity at that time to present any counterclaims. It should be emphasized that the Answer was filed only after Defendant Benz unsuccessfully challenged the jurisdiction of the Utah courts. The facts in this case are clear in demonstrating that Appellant Benz at each juncture attempted to

preserve his right to contest the exercise of personal jurisdiction over him by the Utah courts. He was compelled to answer in this action at the peril of being subject to a default judgment. His filing of the action in New Jersey was a timely and responsible effort to present valid claims against plaintiffs and other parties that properly should be included in this action.

The Joint Memorandum filed by plaintiffs, together with Donald Remlinger and McNeil/Mehew, in support of their motion to dismiss or stay the New Jersey action, represented to the court that if a stay were ordered in the New Jersey action, the Utah courts would be able to "effectively dispose of all the issues in this action." (Tr. at 565). They also argued that "the Utah action will certainly afford 'adequate relief' and 'do complete justice' between these parties. (Tr. at 567).


The New Jersey court stayed that action on the condition that Donald Remlinger submit to the jurisdiction of the Utah courts and that all issues be considered there. The Stay Order of the New Jersey court was entered on November 4, 1982. Five weeks later Appellants Benz and Cowan filed their Motion for Leave to File Amended Answer and Counterclaim and to Join Additional Parties in the Utah action, which asserted, as has been conceded by plaintiffs, essentially the same claims that had been presented in the New Jersey action. Contrary to the letter and spirit of the representations made by plaintiffs and others to the New

Jersey court to induce it to grant a stay of proceedings in this action, plaintiffs have tenaciously resisted every effort of appellants to have their claims included in this action.

For these reasons, defendants submit that the District Court's decision to deny defendants' Motion for Leave to File an Amended Answer and Counterclaim and to Join Additional Parties was an abuse of discretion and requires reversal.

DATED this 15<sup>th</sup> day of July, 1983.

RAY, QUINNEY & NEBEKER

  
Merlin O. Baker

  
John A. Adams

Attorneys for Appellants  
400 Deseret Building  
Salt Lake City, Utah 84111-1996  
Telephone: (801) 523-1500

CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of July, 1983, two true and correct copies of the foregoing Appellants' Brief was mailed, postage prepaid, to LeRoy S. Axland, J. Michael Hansen, Sutter, Axland, Armstrong & Hanson, 175 South West Temple, Suite 700, Salt Lake City, Utah 84101.

Merlin C. Baker