

1992

Watkiss and Campbell v. FOA and Son : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Watkiss and Campbell v. FOA and Son*, No. 920151.00 (Utah Supreme Court, 1992).
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BRIEF

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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WATKISS & CAMPBELL, a Utah
professional corporation,

Plaintiff/Appellee,

vs.

FOA & SON, a New York
corporation.

Defendant/Appellant.

:
: **OPENING BRIEF OF**
: **THE APPELLANT**
:

: Trial Court No. 870905684CV

: Appellate No. 92-0151

: Priority No. 16
:
:

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

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UTAH**

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PARTIES

All parties in this matter are reflected in the pleading caption.

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JURISDICTION

Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78-2-2(j) (1953, as amended) in that this appeal concerns review of a final Order and Judgment of the Third District Court, and the Utah Court of Appeals does not have original jurisdiction over said Order and Judgment.

ISSUES FOR REVIEW AND STANDARDS OF REVIEW

Did the trial court abuse its discretion when it struck Appellant's pleadings, entered Appellant's default, and entered Judgment upon that default, due to Appellant's Chairman's failure to present himself for deposition and failure to make discovery.

The applicable standard of review is whether or not the trial court's exercise of discretion with relation to the imposition of sanctions pursuant to Utah R. Civ. P. Rule 37(d) is arbitrary, capricious, or a clear abuse of discretion. See Bartholomew v. Bartholomew, 548 P.2d 239 (Utah 1970).

DETERMINATIVE LAW

Rule 37(d) of the Utah Rules of Civil Procedure reads as follows:

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper

service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

Utah R. Civ. P. 37(d).

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the Order Granting Sanctions and Default Judgment of the Third District Court, Salt Lake County, J. Stirba presiding, against Appellant.

The underlying case is a suit for the collection of attorneys fees which Appellee claims are owed, and unpaid, for services rendered. Appellant claims that the fees, as billed and claimed, are excessive, and beyond the scope of the oral agreement between the parties, and indeed, beyond the scope of reasonableness.

B. COURSE OF PROCEEDINGS

This action began as a suit for the collection of attorneys fees billed by Appellee (hereinafter referred to as

"Watkiss"), for services rendered on behalf of Appellant (hereinafter referred to as "Foa").

In 1986, Foa was sued in the United States District Court for the District of Utah, in a case styled Daw, Incorporated v. American Home Assurance Co., et al., Civil No. 86C0330W. Watkiss was retained to represent Foa in that action, and obtained a favorable result.

In 1987. Watkiss billed Foa for the legal services rendered. Foa refused to pay the bill as submitted by Watkiss, because Foa objected to the inclusion of a \$10,000.00 "exceptional result" fee, as well as an hourly charge for one of the attorneys involved of \$110.00 per hour. Foa claimed that the agreed rate was \$105.00 per hour.

Watkiss filed this action for collection of the attorneys fees, as billed, on August 26, 1987. Foa filed a Motion to Dismiss for Lack of Personal Jurisdiction, which was denied on September 12, 1988.

Watkiss filed a Motion for Summary Judgment, based upon Affidavits filed supporting its claim that the attorneys fees, as billed, were reasonable and necessary. Foa defended, using the affidavit of its then attorney of record, Lynn Charles Spafford, to oppose the affidavits regarding the reasonableness and necessity of the attorneys fees as billed by Watkiss. Watkiss' Motion for Summary Judgment was granted on November 1, 1988.

On March 22, 1991, the November 1988 Summary Judgment was reversed by the Utah Supreme Court, and remanded for trial on the issues of fact raised by the Affidavit of Lynn Charles Spafford.

After noticing the deposition of Foa's chairman, Conrad Foa, and after Mr. Foa failed to appear for the scheduled deposition, Watkiss moved the trial court for an order striking Foa's pleadings and an entry of default judgment.

On December 2, 1991, the trial court ordered Conrad Foa to appear for deposition on or before December 20, 1991 at 12:00 noon, and to pay \$500.00 in attorneys fees.

Conrad Foa's deposition was rescheduled for December 17, 1991. Mr. Foa failed to appear for this deposition. This caused Appellant Foa to file a motion to change Conrad Foa's deposition to New York City.

Because of Conrad Foa's failure to appear for the December 17, 1991 deposition, and citing Conrad Foa's failure to abide by the trial court's December 2, 1991 order, on January 14, 1992, the trial court granted Watkiss' second motion for sanctions, and directed plaintiff's counsel to prepare an order and default judgment.

After Foa's counsel withdrew from this matter, and after being persuaded to reappear, Foa, through its counsel, moved the trial court to vacate its order granting sanctions. At the time of said motion, no default judgment had been submitted, nor entered.

On February 18, 1992, the trial court, via minute entry, denied Foa's Rule 59(e) Motion.

On February 21, 1992, the trial court signed and entered its Order of Sanctions and Default Judgment. Foa filed its Notice of Appeal on March 19, 1992.

C. DISPOSITION AT TRIAL

There was no trial of this case, as it was disposed of via Default Judgment in favor of Appellee.

STATEMENT OF FACTS

All page citations are to the Utah R. App. P. 11(b) pagination of the original record in this matter.

1. Foa retained the services of Watkiss to represent it in the case of Daw, Inc., Plaintiff v. American Home Assurance Co.; National Union Fire Insurance Company of Pittsburgh, PA.; Plastro Tech Industries, Inc.; Foa & Son Corporation; and Does 1 through 50; Defendants. (Civil No. 86 C 0330 W), pending before the United States District Court for the District of Utah, Central Division. (Complaint, p. 3).

2. Watkiss represented Foa's interest in the action, and obtained a favorable result. (Amended Complaint, p. 14).

3. Watkiss' claim for damages against Foa includes a \$10,000.00 exceptional result fee, and an hourly charge of \$110.00 per hour. (Supreme Court Op. [March 22, 1991], p. 201) (See also Watkiss & Campbell v. Foa & Son, 808 P.2d 1061 [1991]).

4. Watkiss filed this action on August 26, 1987. (Complaint, p. 2).

5. Watkiss obtained denial of Foa's Motion to Dismiss for Lack of Personal Jurisdiction on September 12, 1988. (Order, [dated 9-12-88], p. 58).

6. Watkiss obtained summary judgment against Foa on November 1, 1988. (Judgment [dtd. 11-1-88], pp. 111-112).

7. On March 22, 1991, the November 1, 1988 Summary Judgment of the trial Court was reversed by this Court, and remanded for trial on the issues of fact raised by an affidavit filed by Lynn Charles Spafford. (Remittitur, p. 200).

8. Watkiss attempted, in October, 1991, to obtain the deposition of Conrad Foa, Foa's Chairman. Appellant Foa did not know that Mr. Foa would not appear for his deposition, and accordingly, failed to notify its counsel or Watkiss of the non-appearance of Mr. Foa. Mr. Foa, however, failed to appear for his deposition on the scheduled date. Watkiss was then notified by Foa's counsel that Mr. Foa would not be appearing for his deposition. (Notice of Deposition, p. 254, Mot. for Sanctions, p. 262).

9. Watkiss then moved for an order striking Appellant Foa's pleadings and entering default judgment. (Mot. for Sanctions, pp. 259-78).

10. By Order dated December 2, 1991, the trial court ordered Conrad Foa to present himself in Salt Lake City for deposition on or before December 20, 1991 at 12:00 noon, and to pay \$500.00 in attorney's fees by reason of his failure to appear

for deposition as scheduled. (Minute Entry [dtd. 12-2-91], p. 291).

11. Watkiss rescheduled Mr. Foa's deposition for December 17, 1991. (Notice of Deposition, p. 292).

12. Mr. Foa refused to appear for deposition, which refusal caused Appellant Foa to file a motion to change the deposition to New York. (Second Mot. for Sanctions, p. 306; Mot. to Change Place of Deposition, p. 296).

13. Watkiss filed a second motion for sanctions, citing Conrad Foa's refusals to present himself for deposition as ordered by the court. (Second Mot. for Sanctions, p. 304).

14. By minute entry dated January 14, 1992, the Court granted Watkiss' second motion for sanctions, and directed Watkiss' counsel to prepare an order and default judgment. (Minute Entry [dtd. 1-14-92], p. 352).

15. Three days after the Court's ruling, counsel for Foa withdrew from the case, thereby staying further proceedings for 20 days under Rule 4-506(c), Code of Judicial Administration. (Withdrawal of Counsel, p. 354).

16. On February 4, 1992, Foa's former counsel reappeared in the case, and moved the Court to vacate its order granting sanctions. (Re-appearance of Counsel, p. 363; Mot. to Alter or Amend Order . . . , p. 358).

17. Watkiss prepared a form of order striking defendant's pleadings and entering default judgment, which was

served on Foa's counsel on February 7, 1991. (Mem. in Opp. Mot. to Alter or Amend Order . . . , at Exhibit 2, pp. 377-378).

18. On February 18, 1992, the trial court, via minute entry, denied Foa's Rule 59(e) Motion. (Minute Entry [dtd. 2-18-92], p. 385).

19. On February 21, 1992, the trial court signed and entered its Order of Sanctions and Default Judgment. (Order Granting Sanctions, p. 393). (Order Granting Sanctions, p. 393).

20. The Judgment entered against Foa in this matter included damages awarded to Watkiss as follows:

a. \$40,583.07, representing the principal amount of Watkiss' claim;

b. \$19,106.30, representing interest accrued through February 10, 1992;

c. \$304.20, representing Watkiss' costs;

d. \$16,000.00, representing Watkiss' attorney's fees. (Order Granting Sanctions, pp. 393-394).

21. No evidentiary hearing was held by the trial court before entering judgment for damages prayed in the Amended Complaint.

22. Foa filed its Notice of Appeal on March 19, 1992. (Notice of Appeal, p. 398).

SUMMARY OF ARGUMENT

A party's pleadings should not be stricken and default judgment should not be granted against that party, solely for disobeying an order to cooperate in discovery procedures, unless

this stringent measure is employed with caution and restraint. A party's repeated failure to appear for deposition is sufficient grounds for a trial court to enter default judgment as a sanction. However, in this case, Appellant Foa is being penalized for the failure of a fact witness, albeit the chairman of the board of Appellant, to appear and be deposed after proper notice. Entering Appellant's default, and judgment thereon, based upon a fact witness' failure to be deposed, was an abuse of discretion.

The trial court should have held an evidentiary hearing to determine whether or not Watkiss was entitled to the damages claimed, and whether or not the damages claimed were reasonable. Furthermore, the trial court's entry of default judgment on Watkiss' claim for attorneys fees was an abuse of discretion, in that no hearing was held, nor were specific facts found to support the attorneys fees judgment.

Finally, the trial court's entry of judgment on Watkiss' claim for the \$10,000.00 exceptional result fee is an abuse of discretion, and is an unwarranted condonation of excessive and unreasonable attorneys fees.

Regardless of the type of judgment imposed, a judgment should only be entered for amount to which a party is legally entitled. The trial court failed to find either entitlement, basis or reasonableness for the \$10,000.00 exceptional result fee and the collection litigation attorneys fees.. This failure is

an abuse of discretion, and warrants a reversal or remitter of the judgment amount.

ARGUMENT

POINT I: THE COURT ABUSED ITS DISCRETION IN STRIKING APPELLANT'S PLEADINGS

This Court has held that the striking of a party's pleadings and granting of judgment to the opposing party solely for disobeying an order to cooperate in discovery procedures is a stringent measure, which should only be employed with caution and restraint. Tucker Realty, Inc. v. Nunley, 16 Utah 2d 97, 396 P.2d 410 (1964).

Other appellate courts, when faced with similar issues, have held that granting default judgment should only be utilized as a last resort when other lesser sanctions are clearly insufficient to accomplish the desired end. See Burkhart by Meeks v. Philsco Products Co., Inc., 241 Kan. 562, 738 P.2d 433 (1987). The Washington Court of Appeals held that the entry of default judgment and striking of pleadings must only be used as a sanction for discovery non-compliance when it is apparent from the record that the court explicitly considered whether a lesser sanction would probably have cured the improper behavior, and whether a refusal to obey a discovery order substantially prejudiced the opponent's ability to prepare for trial. See Snedigar v. Hodderson, 53 Wash. App. 476, 968 P.2d 1 (1989). [emphasis added].

In Bartholomew v. Bartholomew, 548 P.2d 238 (Utah 1976), this Court held that a party's repeated failure to appear

for deposition was sufficient grounds for the trial court to enter sanctions, including default judgment, against the non-complying party. Conrad Foa, the recalcitrant deponent herein, is not the defendant in this matter, but is only the defendant's chairman. While he was given notice of deposition, and was eventually ordered by the Court to appear and be deposed, he is still not the party in interest.

Mr. Foa was a fact witness in Foa's defense against Watkiss' excessive claims for attorney's fees. The sanctions imposed upon Foa by the trial court were imposed because of a fact witness' failure to appear for deposition. Foa asserts that rather than strike its pleadings and enter default judgment due to one of Foa's fact witness' failure to obey discovery orders, the trial court should have ruled that Conrad Foa's failure to appear a second time would result in Foa being prohibited from using Conrad Foa as a witness in this action.

Such a result would have been more in line with the rulings of appellate courts regarding the severity of sanctions and use of default judgment, and would have been a lesser sanction which would have still prevented Foa from profiting from its witness' failure to obey discovery orders. Such a result would have not prejudiced Watkiss, in that Watkiss would have then be freed from preparing to combat testimony of the non-complying witness, and would have allowed Watkiss to disregard any proposed testimony of the non-complying witness. Finally, such a result would be substantially just and equitable, and

would have allowed Foa to proceed with its defense of this action, rather than suffer the severe sanction of being unable to proceed with its defense, and suffer default judgment, due to a fact witness' failure to appear for deposition.

Foa is a New York corporation, and as such is entitled to the respect and protections of having been duly incorporated. Conrad Foa, notwithstanding sharing the name of Appellant Foa, is not the appellant, and was not the defendant in this action. Appellant Foa is entitled to be treated as a separate entity from Conrad Foa, and should not suffer the sanction of default judgment due to the failure of an employee and fact witness to obey the discovery orders of the trial court. A lesser sanction could have been remedied, and was not. The entry of default judgment for failure of Foa's fact witness to obey the trial court's discovery order was too severe a remedy, visits extreme prejudice upon Foa, was an abuse of discretion, and should be reversed by this Court.

POINT II: THE TRIAL COURT ABUSED ITS DISCRETION
IN ITS ENTRY OF SANCTIONS

A. Entry of damages without an evidentiary
hearing was an abuse of discretion.

Assuming, arguendo, that the trial court was within its discretion to strike Foa's pleadings, the trial court nevertheless abused its discretion when it entered default judgment against Foa without the benefit of an evidentiary hearing.

The Court of Appeals has ruled that:

As a general rule, a 'default judgment establish[es] as a matter of law, that defendants [are] liable to plaintiff as to each cause of action alleged in the complaint' . . .

Nevertheless, it is still incumbent upon the non-defaulting party to establish by competent evidence the amount of recoverable damages and costs he claims.

Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 965 (Utah App. 1989), quoting Dundee Cement Co. v. Howard Pipe & Concrete Prods., 722 F.2d 1319, 1323 (7th Cir. 1983) [emphasis added]. See also Kwik Way Stores Inc. v. Caldwell, 709 P.2d 30, 38 (Colo. Ct. App. 1985); Armijo v. Armijo, 98 N.M. 518, 650 P.2d 40, 42 (Ct. App. 1982).

Accordingly, assuming Watkiss was entitled to an award of sanctions, Foa was entitled to an evidentiary hearing on the sanctions if those sanctions were to be default judgment on Watkiss' complaint. Watkiss' claims included a \$10,000.00 exceptional result fee, and an hourly charge for attorney time of \$110.00 per hour. There is no dispute that there was no contract entered into between the parties. Before judgment could have been entered upon Watkiss' Complaint, the Court was required to hold an evidentiary hearing, to take evidence, and to judicially determine Watkiss' entitlement to its claimed damages, and the proper amounts to be awarded. The trial court's default judgment must be reversed, because Watkiss' claims were not for sums certain, Watkiss' claims included items which were clearly

excessive and not contemplated by the parties at the time of Watkiss' beginning its services for Foa, and there was no hearing in the trial court to ascertain the amount of damages to which Watkiss is due. See Russell v. Martell, 681 P.2d 1193 (Utah 1984).

B. Entry of default judgment damages of attorney's fees was an abuse of discretion

Utah follows the well-established rule that attorney's fees cannot be recovered unless provided for by contract or statute. See Watkiss & Campbell v. Foa & Son, 808 P.2d 1061, 1067, (Utah 1991). See e.g. Canyon Country Store v. Bracey, 781 P.2d 414, 419-20 (Utah 1989); Turtle Management, Inc. v. Haggis Management, 645 P.2d 667, 671 (Utah 1982).

In this case, it is agreed that no written retainer agreement was signed and therefore, no contractual claim for attorney's fees may be sought. See Watkiss & Campbell, supra, at 1067.

This leaves any entitlement to attorney's fees by Watkiss dependant upon statute. A statutory award of attorney's fees is governed by Utah Code Ann. § 78-27-56 (1953, as amended), which provides:

(1) In civil actions, the court shall award reasonable attorney's 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).

Utah Code Ann., supra, § 78-27-56. See also Watkiss & Campbell, supra at 1067-68.

Watkiss cannot base its claim for attorney's fees upon the statute, in that the statute clearly states that "the court shall award attorney fees to the prevailing party only if it determines (1) that the action is without merit and (2) that the action was brought in bad faith." Watkiss & Campbell, supra, at 1068. [emphasis added]. See e.g. Cody v. Johnson, 671 P.2d 149, 151-152 (Utah 1983), Unless the Court finds both elements of the statute, it cannot award attorneys fees.

In the Amica case, supra, the Utah Court of Appeals stated that in awarding attorneys fees under § 78-27-50, supra, "the trial court must make findings that (1) the claim or claims were without merit, and (2) the party's conduct was lacking in good faith." Amica, supra, at 966 [emphasis added]. Without specific findings, this Court has ruled that a "reviewing court cannot determine whether the award of attorney's fees was based upon a meritless claim brought in bad faith or simply because the recovering party prevailed." Watkiss & Campbell, supra at 1068.

In the instant action, the trial court failed to enter any findings regarding meritless defenses or bad faith. This absolute absence of findings, coupled with the lack of any contract whatsoever, renders the trial court's entry of default judgment damages of attorneys fees against Foa an abuse of discretion. This Court should vacate the trial court's award of attorney's fees. See e.g. Amica, supra at 966.

C. Entry of default damages upon Appellee's claim for a \$10,000.00 exceptional result fee and for principal damages arising from \$110.00 per hour charges was an abuse of discretion.

This Court has ruled that a judgment against a defaulting party must be reversed where plaintiff's claims for damages were not for sums certain, and a hearing was not conducted by the trial court to ascertain the amount of damages to which the plaintiffs were entitled. Russell v. Martell, 681 P.2d 1193 (Utah 1984). As noted above, the trial court failed to hold a hearing regarding damages after entry of default in this matter. Additionally, the trial court failed to enter any findings supporting its award of default damages.

A judgment rendered under Rule 56 of the Utah Rules of Civil Procedure must contain only a judgment to which a party is entitled as a matter of law. See e.g. Thornock v. Cook, 604 P.2d 934 (Utah 1979). By analogy, Foa asserts, a judgment rendered under Rules 37 and 55 must also contain only those damages to which a party is entitled as a matter of law. It would be manifestly unjust and unwise to allow trial courts to enter

default judgments for damages to which the non-defaulting party is not entitled as a matter of law. Such a practice would destroy the validity and legitimacy of court proceedings and court orders upon which our judicial system is based.

In this case, no contract or retainer agreement was entered by the parties. Watkiss rendered legal services, and upon the conclusion of those services, presented Foa with a bill for \$40,583.07. Included in the bill was a charge of \$10,000.00 for "exceptional result," and charges for attorney time at \$110.00 per hour. Watkiss' was given to understand that attorney time would be charged at \$105.00 per hour. See Watkiss & Campbell, supra, at 1062.

Rule 1.5 of the Utah Rules of Professional Conduct provides, in pertinent part:

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved and the skill required to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

Utah R. Prof. Cond. 1.5(a), (b). [emphasis added].

No hearing was held to determine the reasonableness or excessiveness of Watkiss' fees upon the entry of Foa's default. There was no contract between the parties. In the absence of a written contract between the parties, Watkiss' claims for services must sound as a claim for quantum meruit, rather than breach of contract. See e.g. Parents Against Drunk Drivers v. Graystone Pines Homeowners' Ass'n., 789 P.2d 52 (Utah 1990). Damages under a quantum meruit theory are not sums certain, and therefore an evidentiary hearing should have been held. The Court of Appeals also held that in order to determine the amount an attorney is entitled to under a theory of quantum meruit, the

Court should look initially to the amount which the parties reasonably intended the attorney to be compensated. See Parents, supra, at 57. "If the amount the parties reasonably intended [the attorney] to recover is not discernable, the Court should award [the attorney] the reasonable value of his services." Id. at 58.

In this case, there was no hearing, and consequently it was impossible for the trial court to determine either the amount the parties intended as compensation, or a reasonable amount. An evidentiary hearing should have been held to determine the reasonable value of Watkiss' services. Foa asserts that whatever these reasonable fees would have been found to include, they most definitely would not have included a \$10,000.00 "exceptional result" fee. Lawyers are engaged to represent their clients, and to zealously advocate those clients' positions. If indeed the result achieved by Watkiss was extraordinary, it was still no less than what was achieved by doing its job. Awarding Watkiss a \$10,000.00 "exceptional result" fee implies that simply paying an attorney his or her hourly rate will not ensure the attorney's most devoted efforts, and that extra compensation must be provided to guarantee the attorney's "extraordinary" efforts. Such a practice cannot be condoned, nor should it be implied. This inference is surely not what Watkiss intended when it claimed its exceptional result fee, however, this inference is certainly what will abide this case

should the \$10,000.00 "exceptional result" fee be allowed to stand as part of the judgment.

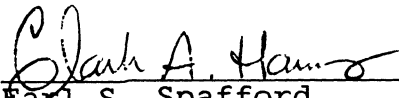
CONCLUSION

The trial court erred when it struck Appellant Foa's pleadings, and entered default judgment upon Watkiss' Amended Complaint, solely because Conrad Foa failed to appear for deposition and disregarded an order of the Court. The trial court erred when it failed to hold an evidentiary hearing as to the entitlement of Watkiss to the amounts claimed in its Amended Complaint. The trial court erred when it upheld and awarded Watkiss' claims for a \$10,000.00 "exceptional result" fee, an unagreed \$110.00 per hour fee and attorneys fees in prosecuting this collection action.

By reason of these errors, Foa prays this Court to reverse the default judgment of the trial court and either remand for an entry of lesser sanctions, or remand for an evidentiary hearing as to Watkiss' entitlement to, and the legality and reasonableness of, the damages claimed by Watkiss in its Amended Complaint.

DATED this 17th day of July, 1992.

SPAFFORD & SPAFFORD
A Professional Corporation



Earl S. Spafford
Clark A. Harms
Attorneys for Appellant

lcs\foa\opening.br1

ADDENDUM

FEB 21 1992

Clerk of Dist. Court
[Signature]

WATKISS & SAPERSTEIN
VINCENT C. RAMPTON (2684)
310 South Main Street, Suite 1200
Salt Lake City, Utah 84101

Attorneys for Plaintiff

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

WATKISS & CAMPBELL, a
professional corporation,

Plaintiff,

vs.

FOA & SON, a New York
corporation,

Defendant.

2172206
2-24-92-8:16am
ORDER GRANTING SANCTIONS
FOR FAILURE TO MAKE
DISCOVERY

Civil No. C87-05684
Judge Anne M. Stirba

Plaintiff's Second Motion for Sanctions for Failure to
Make Discovery having been submitted to the Court in accordance
with Rule 4-501, Utah Code of Judicial Administration; the Court
having reviewed the submittals of the parties and the record in
this matter; and good cause appearing therefor,

IT IS HEREBY ORDERED as follows:

1. That plaintiff's Second Motion for Sanctions for
Failure to Make Discovery be and hereby is granted;
2. That defendant's Answer be and hereby is stricken and

its default entered herein;

3. That judgment be and hereby is entered in favor of plaintiff Watkiss & Campbell, and against defendant Foa & Son in the following amounts:

a. \$40,583.07, representing the principal amount of plaintiff's claim;

b. \$19,106.30, representing interest accrued through February 10, 1992;

c. \$304.2, representing plaintiff's costs herein;


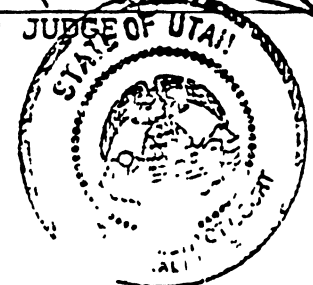
d. \$16,000, representing plaintiff's attorney's fees; and

e. Interest on the foregoing at the legal rate from and after February 10, 1992 until paid in full; and

4. That this judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit.

DATED this 21st day of February, 1992.

BY THE COURT:

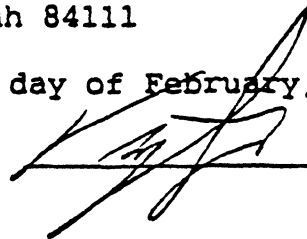

DISTRICT JUDGE OF UTAH


CERTIFICATE OF SERVICE

I herewith certify that I am a member of and/or employ
by the firm of Watkiss & Campbell, 310 South Main Street, Suite
1200, Salt Lake City, Utah and that in said capacity and pursuant
to Rule 5, Utah Rules of Civil Procedure, a copy of the foregoing
form of Order Granting Sanctions for Failure to Make Discovery was
caused to be served upon:

Earl S. Spafford, Esq.
SPAFFORD & SPAFFORD
425 East 100 South
Salt Lake City, Utah 84111

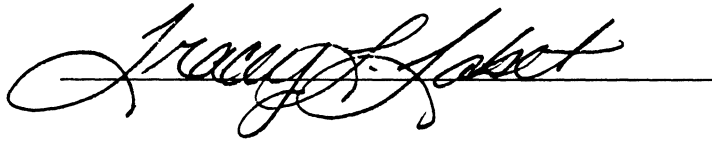
by hand delivery this 7th day of February, 1992.



CERTIFICATE OF MAILING

I certify that on the 20th day of July, 1992, I mailed a true and correct copy of the foregoing **OPENING BRIEF OF THE APPELLANT**, postage prepaid and addressed to the following:

Vincent C. Rampton, Esq.
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Attorney for Appellee

A handwritten signature in cursive script, appearing to read "Tracy S. Baker", is written over a horizontal line.