

1992

Maverik Country Stores, Inc. v. Industrial Commission of Utah : Petition for Rehearing

Utah Court of Appeals

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**IN THE COURT OF APPEALS
FOR THE STATE OF UTAH**

MAVERIK COUNTRY STORES, INC.,
Petitioner/Appellant,
vs.

THE INDUSTRIAL COMMISSION
OF UTAH,
Respondent,

VICKY ANN MCCORD,
Complainant/Respondent.

CONSOLIDATED
PETITION FOR REHEARING
BY APPELLANT MAVERIK

Docket Number: 920206-CA
Docket Number: 910413-CA
Case Number: UADD 89-0031

Priority No. 7

* * * *

**APPELLANT'S PETITION FOR REHEARING
ON
UTAH COURT OF APPEALS
BRIEF REQUEST FOR REVIEW OF THE RULING OF THE
UTAH INDUSTRIAL COMMISSION**

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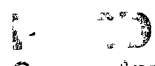
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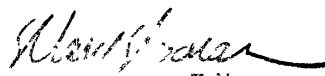
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Utah Court of Appeals

JUN 17 1993


J. T. Noonan
Clerk of the Court

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* * * *

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PROCEDURAL NOTE

This is a Petition for Rehearing is filed by appellant Maverik pursuant to Rule 35 of the Utah Rules of Appellate Procedure. It is a consolidated Petition for Rehearing on two appeal numbers: Docket Number 920206-CA and Docket Number 910413-CA. Those two appeals are from the same Industrial Commission administrative case, and were combined for oral argument. The decision of this Court was rendered as a consolidated decision, a copy of which is attached hereto as Appendix A. The decision was rendered on June 3, 1993.

INTRODUCTION TO PETITION FOR REHEARING

This is a case in which the Court held, in essence, that Maverik has no remedy because, although it filed two appeals, one was too early and the other was too late. In so finding, the Court misapprehended the law, setting a problematic precedent that should not become law. Because the misperceived law was not adequately briefed, the Court was unaware that its ruling was contrary to the opinion of the Utah Supreme Court.

The underlying case is a claim that when Maverik fired claimant/respondent McCord, it was guilty of handicap

discrimination. The Court did not reach any of the appeal issues, since both appeals were dismissed on jurisdictional grounds.

FACTS PERTINENT TO REHEARING

Most of the relevant facts are set forth in pages one through four of the Court's Opinion. Appendix 1. One of the "facts" as stated in the Opinion needs clarification, however. The court observed that McCord was hired (two weeks after termination by Maverik and at a higher wage) as a school custodian. Opinion p. 2. However, the Court stated that she "quit due to an unrelated illness." Id.

That the illness was "unrelated" is not supported by the record. As the Court observes, it should base its decision on facts found by the Commission. See, *King v. Industrial Commission*, 209 Utah Adv. Rep. 33, 34 (Utah App. 1993). The Commission actually found that she quit, and that it was due to illness beyond her control, Findings, p. 5, 8. But the Commission did not find that it was from a problem unrelated to the condition she claims Maverik fired her for. McCord offered no evidence as to the physical condition that made her quit.

The facts most relevant to this Petition are:

1. On June 26, 1991 the ALJ issued its order resolving all matters on their merits, but reserving the amount of attorney fees

to be awarded. Opinion, p. 3.

2. On July 26, 1991 Maverik filed its Writ of Review with this Court ("first appeal"). Id. See Docket No. 910413-CA.

3. On September 10, 1991, despite the pending appeal, the Commission issued its Supplemental Order limited to the issue of attorney fees. Id.

4. Despite its pending appeal, Maverik, McCord and the Commission continued to litigate at the agency level. Id.

5. Maverik filed a Request for Review within the Industrial Commission, which was not received until October 11, 1991 (deemed to be one day late). Id.

6. Maverik's "second appeal" (920206-CA) was a Writ of Review with this Court, claiming that the Commission erred or abused its discretion in finding Maverik's Request for Review untimely. Id.; see also, briefs of Maverik in second appeal.

7. Oral argument was held on May 20, 1993. At argument it became clear that the Court's panel was focusing closely on the jurisdictional issues rather than the merits. Under questioning by Presiding Judge Billings, Maverik's counsel in essence conceded that the first Commission order of June 26th was not final, since the attorney fee issue was reserved.¹ **This, however, is not an**

¹ A few days after oral argument, a prominent local attorney who was in the audience at oral argument directed Maverik's counsel

accurate statement of the law. See argument below.

8. The Court's Opinion was issued June 3, 1993. Appendix 1.

SUMMARY OF ARGUMENT

For years the federal courts have held that where a tribunal reserves only the issue of attorney fees, the resulting order is final and appealable. Utah (like many other states) seems to have adopted the federal rule in 1989. This Court's decision that Maverik's first appeal was nonfinal because the attorney fee issues was reserved is contrary to this authority, and therefore in error.

This Court was also mistaken in holding that the first appeal, filed within thirty days of the Industrial Commission's initial order but a few weeks before its Supplemental Order, was premature. The Court may not have considered Rule 4(c) of the Utah Rules of Appellate Procedure, which makes such a premature appeal effective as if filed on the date the final order was entered.

ARGUMENT

1. **The first order was final.** The law on this point was not

to the decision of *Allen Steel Co. v. Crossroads Plaza Associates*, 119 Utah Adv. Rep. 6 (Utah 1989, later settled and withdrawn during rehearing process). See discussion in Argument section below.

fully discussed in the briefing.² At oral argument, the panel of this Court and the respective counsel proceeded on the incorrect assumption that the agency's reservation of the attorney fee issue made the *Findings of Fact, Conclusions of Law and Order* of the ALJ nonfinal.³ The Court's opinion uses this misunderstanding of the law to hold that the Court had no jurisdiction; that the first appeal was from a nonfinal order.⁴ See, e.g. pp. 2, 5.

The Findings, Conclusions and Order disposed of all issues and constituted a final (albeit incorrect) determination on the merits. The issue of attorney fee entitlement or amount is a wholly separable matter. The agency's reservation of that issue does not make the order nonfinal or prevent it from being appealed.

2. Utah has chosen to allow an appeal on which the attorney

² As the Court alluded to in footnote 4 of the Opinion, the Court is at a disadvantage when an issue is not fully briefed. Such was the case here, where the line of cases and the rule pertinent to this Petition for Rehearing were not fully presented to the Court.

³ Of course jurisdiction either exists or it does not, and cannot be created or destroyed by acquiescence of the parties. See, *Amica Mut. Ins. v. Schettler*, 738 P.2d 641 (Utah 1987).

⁴ The opinion which is about to be published contains incorrect law. Fortunately, the rehearing process permitted by Rule 35, Utah R. App. P., allow this problem to be remedied before this case is used as precedent, and short of petitioning for certiorari.

fee issue remains pending. The holding that the first appeal is not final is erroneous. The question facing this Court was whether reservation of the attorney fee issue in an otherwise final order makes the order nonappealable. This issue is one of first impression in Utah, except for the case of *Allen Steel Co. v. Crossroads Plaza Associates*, 119 Utah Adv. Rep. 6 (Utah S. Ct. 1989, rehearing before Supreme Court requested and briefed and case settled without publication in Pacific Reporter). The *Allen Steel* decision is attached hereto as Appendix 2.

Not one of our previous cases has expressly ruled on the specific issue of whether the deferral of awarding attorney fees makes a judgment nonfinal and therefore noncertifiable under Rule 54(b). See, e.g., *Elder v. Triax Co.*, 740 P.2d 1320 (Utah 1987) [see Justice Howe's dissent at 1324]; *Amica Mutual Ins. v. Schettler*, 738 P.2d 641 (Utah 1987); *Olsen v. Salt Lake City School Dist.*, 724 P.2d 960 (Utah 1986)

Allen Steel, 199 Utah Adv. Rep. at 9.

The Utah Supreme Court's decision in *Allen Steel* is at very least a statement of what Utah's law is or should be.⁵ That case involved the issue of finality, though it related to Rule 54(b),

⁵ The *Allen Steel* decision was pulled and never published. A petition for rehearing was pending in the Utah Supreme Court when the appeal was dismissed by stipulation on April 1, 1991. *Allen Steel* was cited once, in *Gold Standard, Inc. v. American Barrick Resources Corp.*, 805 P.2d 164 (Utah 1990).

Utah Rules of Civil Procedure.⁶ But the rule of law stated by the entire court⁷ in *Allen Steel* is stated in broad terms and applies here as well.⁸ Since finality under these circumstances is a question of first impression, *Allen Steel* used federal law for guidance. In determining procedural matters, the Court may freely refer to authorities which have interpreted similar issues in federal courts. *Gold Standard, Inc. v. American Barrick Resources Corp.*, 805 P.2d 164 (Utah 1990). *Allen Steel* reasoned:

At federal law, a pending claim for attorney fees does not make a judgment on the merits nonappealable. See Beaudry Motor Co. v. Abko Properties, Inc., 780 F.2d 751, 755 (9th Cir.), cert. denied, 479 U.S. 825 (1986) . . . ; Exchange Nat'l Bank v. Daniels, 763 F.2d 286, 292, aff'd on rehearing, 768 F.2d 140 (7th Cir. 1985) ("[A] judgment on the merits is appealable -- independently of

⁶ Rule 54 states in part, "When more than one claim for relief is presented in an action, . . . and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. . . . Rule 54(b), Utah R. Civ. Proc.

⁷ Justices Hall, Howe and Durham joined in the opinion written by justice Stewart. Justice Zimmerman concurred in the pertinent portion of the opinion.

⁸ Rule 54 has no applicability to reservation of the attorney fee issue. *Beaudry Motor Co. v. ABKO Properties, Inc.*, 780 F.2d 751, 755 (9th Cir. 1986), citing to *International Assoc. of Bridge v. Madison Industries, Inc.*, 733 F.2d 656, 658 (9th Cir. 1984) (a judgment on the merits is final and appealable even though a request for attorney fees is pending); *Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555, 571 (7th Cir. 1975) (Rule 54(b) inapplicable to outstanding claim for attorney fees).

Rule 54(b) -- despite the fact that questions of fees remain."). Thus, an actual award of attorney fees need not be reduced to judgment to make the judgement final for appeal purposes since the fees awarded will often include the fees incurred on appeal.

Allen Steel, 199 Utah Adv. Rep. at 9, emphasis supplied.

3. Federal law would clearly allow jurisdiction. It is not surprising that the *Allen Steel* case looked to federal law in the absence of any Utah state law.

In addition to the above mentioned cases from various federal courts of appeals, this issue has been determined by the United States Supreme Court, in *Budinich v. Bectom Dickinson and Co.*, 486 U.S. 196, 100 L.Ed.2d 178, 108 S.Ct. 1717 (1988). A copy of the *Budinich* decision, which affirms the holding of the Tenth Circuit Court of Appeals, is attached as Appendix 3.

Budinich was interestingly similar to the jurisdictional problem here. There the trial court entered an order determining the merits of the case, and (as with the agency order here) said a reasonable attorney fee should be awarded. The trial court requested that the parties brief and document the attorney fees before the amount was determined. The Tenth Circuit correctly found that the first order was final and appealable despite the reservation of the attorney fee issue, and that an appeal was waived if not filed within thirty days of that order.

After a careful review of the various authorities and equities, the need for operational consistency and predictability "requires, we think, a **uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.**" *Id.*, 108 S.Ct. at 1722, emphasis supplied.

Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that **a decision on the merits is a 'final decision'** for purposes of [28 U.S.C. Sec. 1291 providing for appeal of district court 'final decisions'] **whether or not there remains for adjudication a request for attorney's fees** attributable to the case.

Budinich, 108 S.Ct. at 1722, emphasis supplied.

4. Other states hold such an order final and appealable. See, e.g., *Schleft v. Board of Education of Los Alamos*, 752 P.2d 248, 249 (CA New Mexico 1988) ("the pendency of a proceeding solely to determine the amount of costs does not render an otherwise final judgment nonfinal", using federal cases for guidance); *Azer v. Myers*, 8 Haw. App. 86, 793 P.2d 1189, 1216-17, cert. granted, 833 P.2d 901, cert. denied, 833 P.2d 901, affirmed in part, reversed in part (not on finality issue), 795 P.2d 853 (Haw. App. 1990) (An order awarding attorney fees but not setting the amount is appealable).

In *Baldwin v. Bright Mortgage Company*, 757 P.2d 1072 (Colo.

1988) the Colorado Supreme Court granted *certiorari* to review that state's Court of Appeals' decision. The intermediate appellate court had ruled that an appeal of a decision on the merits was nonfinal and nonappealable, because the trial court had expressly reserved the determination of the amount of attorney fees for later decision.

Baldwin relied heavily on *Budinich v. Bectom Dickinson and Co.*, 486 U.S. 196, 100 L.Ed.2d 178, 108 S.Ct. 1717 (1988), discussed above and attached as Appendix 3.

Nevertheless, we believe the that a bright line rule that a decision on the merits is a final judgment for appeal purposes despite any outstanding issue of attorney fees is necessary and appropriate. Such a rule will permit litigants to comply with the relevant appellate rules without a case-by-case analysis of the relationship of attorney fees to the relief sought and will avoid uncertainty. If judgment has been entered and only the issue of attorney fees remains to be determined, certification pursuant to Rule 54(b) is not a prerequisite to appellate review of the merits of the case.

We hold that **a final judgment on the merits is appealable regardless of any unresolved issue of attorney fees**, and we therefore reverse the judgment of the court of appeals and remand with directions to reinstate the petitioner's appeal.

Baldwin, 757 P.2d at 1074, emphasis supplied.

Idaho has likewise followed the rule adopted by the aborted *Allen Steel* decision of Utah's Supreme Court. *Thompson v. Pike*, 122 Idaho 702, 838 P.2d 305 (Idaho App. 1991). "In the present case . . . the district court's decision and dismissal order

resolved all substantive issues raised in the litigation, leaving only the question of an award of costs and attorney fees for further determination. For the purposes of appeal, the dismissal order was a 'final judgment'. . . ." Id., 838 P.2d at 308.

In *Snodgrass v. State Farm Mutual Auto Ins.*, 789 P.2d 211 (Kan. 1990) (following federal court decisions), the Kansas Court of Appeals' ruling that it had no jurisdiction was reversed. "A decision on the merits is final for purposes of appeal even if a request or motion for attorney fees attributable to the case has not yet been determined." Id., 838 P.2d at 213, 215. Accord, *Bradley v. Oregon Trail Sav. & Loan Assoc.*, 47 Or.App. 871, 617 P.2d 263, 268-69 (Ore. App. 1980).

5. Since the initial order was final, the Court has jurisdiction. The appeal should be reviewed on its merits, as exhaustively briefed by the parties and the agency. And this being the case, McCord is probably not a "prevailing party" and the attorney fee award should also fail.

6. Even if the first appeal was premature, it is valid. The other rule the parties and Court Panel failed to properly consider, is Rule 4(c), Utah R. App. P. Essentially, the Court ruled that the first appeal was too early, and the second one too late. Rule

4 makes the appeal valid, effective when it should have been filed.

That rule states,

Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

Id. Should the Court stick by its determination that the first appeal was premature, this is precisely what happened here and the rule applies. The appeal is effective as of the date the Supplemental Order relating to attorney fees was entered (September 10, 1991).

Although timely notice of appeal is jurisdictional, . . . premature filing of the notice of appeal does not deprive this Court of jurisdiction where the final judgment entered is in accord with the ruling appealed from and no post-judgment motions have been made.

CMC Cassity, Inc. v. Aird, 707 P.2d 1304, 1305 (Utah 1985) (citations omitted).

7. There is no need to revisit Heinecke. Heinecke v. Department of Commerce, 810 P.2d 459 (Utah App. 1991). In footnote 4 of the Opinion, the Court suggested it might revisit that case at the request of the Industrial Commission.

The Commission makes out no convincing argument as to why the Court should reverse itself, in derogation of the two year old expectations of Maverik and other litigants similarly situated.

The Commission seeks to ignore the clear wording difference between the various administrative review statutes, and to turn all instances in which parties "may" seek review in the agency into mandatory agency review, despite the lack of mandatory language.

Under Section 63-46b-16(4)(d), Utah Code the Court may grant relief from agency action if the agency has "erroneously interpreted or applied the law", prejudicing the appellant. *Chevron v. Utah State Tax Commission*, 207 Utah Adv. Rep. 23 (Jan. 29, 1993) (citation omitted). "We do not defer to an agency's statutory interpretation unless the legislature has explicitly, or implicitly, granted the agency discretion to interpret the statutory language at issue." *Id.* There is no such grant here.

The Commission's attack on *Heinecke* arises largely from negative logic. "There is no reason for this Court to conclude . . . that U.C.A. Sections 63-46b-12(1)(a) and 14(2A) cannot be read together to require Maverik to exhaust its administrative remedies prior to filing a judicial appeal." Response Br. at 31. In essence, the Commission asks the Court to reword the statute; to make "may" mean "shall", and to narrowly circumscribe jurisdiction because it can think of no reason not to do so. Br. at 31. Statutory language is not so lightly cast aside. The agency should petition the legislature for the change, not this Court.

Heinecke was discussed without reversal or even criticism just

last year. *Barney v. Division of Occupational and Professional Licensing*, 828 P.2d 542, 544 (Utah 1992) (administrative review prior to judicial appeal is optional).

8. No judgment amount has been entered. Never in all its orders has there been a definite judgment amount entered. For the Court to do anything but allow this appeal leaves this case in limbo, and Maverik and McCord are left without knowing how much Maverik would owe McCord.⁹

In the event the Court disregards all the foregoing arguments and maintains that it is without jurisdiction to hear the first appeal, the second one is well taken. How can Maverik's Request for Review be a day late, if there was never an order setting the judgment amount?

CONCLUSION

If correct legal principals are looked to, the first appeal must be within this Court's jurisdiction, and the second was not late. The appeal should be reinstated and determined on its

⁹ It is doubtful McCord would accept or the Commission would issue a satisfaction based on a check made payable to McCord for "in the range of \$8,000."

merits.¹⁰

The leading case in the area was ignored by McCord and the Agency throughout the agency and appeal levels of this case. This Court should take the opportunity to construe and apply it. *Salt Lake City Corp. v. Confer*, 674 P.2d 632 (Utah 1983). This issue alone is dispositive and requires reversal, because the ALJ applied the wrong legal standard to determine whether there was handicap discrimination.

Handicap discrimination may only occur if the work at issue is found to be a "major life activity". Section 34-35-6, Utah Code. The Commission's position¹¹ is that all jobs, without regard to

¹⁰ Some of the problems with the merits include:

a. The Commission's refusal to consider whether McCord's loss of her part time convenience store clerking job can be a substantial interference with a major life activity;

b. How to reconcile the fact that McCord got a higher paying job just two weeks after leaving Maverik, a job she later quit because of "health reasons", with an award of a couple of years of back-pay and thousands of dollars in attorney fees;

c. why Maverik should suffer when, in delaying the proceeding for over two years, the Commission violated Section 34-35-7.1(3)(b), Utah Code;

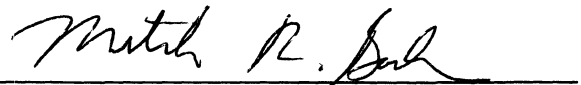
d. how the Court can do anything but reverse the Commission, when it has itself changed its mind about the finality of the first order appealed from;

e. how McCord can win a handicap discrimination action with no medical evidence (except a definition of the condition she claims to have).

¹¹ The issue of the meaning of "major life activity" is a question of statutory construction. In such an issue, no particular deference is given to the agency's interpretation of the

their nature or whether they are full or part time, are major life activities.¹²

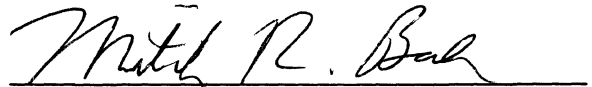
Respectfully submitted this 17th day of June, 1993.



Ronald C. Barker
Mitchell R. Barker
David C. Cundick

CERTIFICATION OF COUNSEL

We hereby certify that this Petition is in good faith, and is not filed for the purpose of delay.



Mitchell R. Barker

statute. *Chevron v. Utah State Tax Commission*, 207 Utah Adv. Rep. 23 (Jan. 29, 1993); *Belnorth Petroleum Corp. v. State Tax Commission*, 204 Utah Adv. Rep. 29, 30 (Utah App. 1993). This a true a *fortiori* here, since the *Confer* case already interpreted the statute in a way contrary to the agency's application.

¹² Importantly, this is not a factual issue, but an example of the ALJ refusing to apply the standard imposed by the Utah courts. The Commission refused to even acknowledge the existence of *Confer*, much less to follow its requirement that it determine whether McCord's part time convenience store clerking job was a "major life activity". *Id.* at 636.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 1993, I caused an original and six copies of the foregoing with the Utah Court of Appeals. I also certify that I caused two true and correct copies of the foregoing to be hand delivered or mailed, postage prepaid to:

James W. Stewart, Esq.
JONES, WALDO, HOLBROOK & McDONOUGH
1500 First Interstate Plaza
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INDUSTRIAL COMMISSION OF UTAH
160 East 300 South #300
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Mitchell R. Barker

APPENDIX 1

Opinion of this Court on which rehearing is sought

JUN - 7 1993
cc: Maverik
FILED

This opinion is subject to revision before
publication in the Pacific Reporter.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

JUN 03 1993

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Maverik Country Stores, Inc.,)
)
Petitioner,)
)
v.)
)
The Industrial Commission of)
Utah and Vicky Ann McCord,)
)
Respondents.)
)

OPINION
(For Publication) Mary T. Noonan
Clerk of the Court

Case No. 920206-CA
and Case No. 910413-CA

F I L E D
(June 3, 1993)

Original Proceeding in this Court

Attorneys: Ronald C. Barker, Mitchell R. Barker, and David G.
Cundick, Salt Lake City, for Petitioner
Benjamin A. Sims and Sharon J. Eblen, Salt Lake City,
for Respondent Industrial Commission of Utah
James W. Stewart and Lisa Jones, Salt Lake City,
for Respondent Vicky Ann McCord

Before Judges Billings, Jackson, and Russon.

BILLINGS, Presiding Judge:

Maverik Country Stores brings separate appeals from two decisions of the Industrial Commission of Utah. The first appeal is from the Industrial Commission's determination that Maverik violated Utah Code Ann. §§ 34-35-1 to -8 (1988 & Supp. 1993), the Utah Anti-Discrimination Act, in its treatment of Vicky Ann McCord. The second appeal is from the Industrial Commission's ruling that Maverik's request for agency review was untimely. We dismiss the first appeal and affirm the ruling in the second.

FACTS

Ms. Jones, a Maverik store manager, hired Ms. McCord as a convenience store clerk on September 30, 1988.¹ McCord worked

1. Because Appellant does not challenge the factual findings of the Industrial Commission, we recite the facts in accord with (...continued)

1991 decision included a specific reservation of the issue of appropriate attorney fees. On September 10, 1991, the ALJ issued a Supplemental Order disposing of the issue of attorney fees.

On July 26, 1991, Maverik filed a Writ of Review with this court (first appeal). The first appeal is from the ALJ's Order of June 26, 1991. On August 26, 1991, McCord and the Industrial Commission filed motions to dismiss the first appeal based on Maverik's failure to exhaust administrative remedies and lack of a final order. On September 16, 1991, this court ordered those motions deferred, and requested the parties include arguments on those issues in their briefs on the merits.

Despite its pending appeal, Maverik then filed a Request for Review by the Industrial Commission of the ALJ's June 26, 1991 and September 10, 1991 Orders. The date the request was filed is unclear. Counsel for Maverik signed and dated the request October 10, 1991. The request has two received dates stamped on it, October 11, 1991 and October 15, 1991. In later orders referring to the request, the Industrial Commission refers to both dates as the day it received the request. For the purposes of our review, we assume the request was received October 11, 1991.

On February 28, 1992, the Industrial Commission denied Maverik's Request for Review based on its untimeliness.² On March 19, 1992, Maverik filed a request with the Industrial Commission to reconsider its denial of the Request for Review. On March 30, 1992, the Industrial Commission denied Maverik's Request for Reconsideration. In this denial, the Industrial Commission recognized it could have allowed the late Request for Review if Maverik had shown good cause for extension of the time period. The Industrial Commission ruled, however, that Maverik had failed to show good cause for the extension.

On April 3, 1992, Maverik filed a "Limited Request for Reconsideration" in which it finally attempted to show good cause for its late filing of the original Request for Review. The Industrial Commission did not respond to this unique motion. On April 7, 1992, Maverik filed a Writ of Review with this court (second appeal). The second appeal is from the Industrial Commission's Order Denying Review and Order Denying Request For Reconsideration.

2. In the Order denying the Request for Review, the Industrial Commission also addressed and rejected Maverik's claims on the merits. Because of our ultimate conclusion, we need not and do not comment on the propriety of the Industrial Commission's disposition on the merits.

We, therefore, have no jurisdiction over the first appeal and must dismiss it.⁴

THE SECOND APPEAL

A. Industrial Commission's Jurisdiction

Maverik contends the filing of the first appeal, regardless of its timeliness, divested the Industrial Commission of jurisdiction to continue to act in the case. Thus, according to Maverik, every action taken by the Industrial Commission after the ALJ's June 26 Order is a nullity. Maverik would have us remand to the Industrial Commission for entry of the Supplemental Order on attorney fees and the agency appeals process. Maverik does not provide any relevant authority supporting this contention.

Other courts have consistently recognized an appeal from a non-final order does not divest the administrative tribunal of

4. Because we find there was no final order prior to the first appeal, we do not reach the issue of whether we also lack jurisdiction because Maverik failed to exhaust its administrative remedies. The Industrial Commission asks us to revisit our decision in Heinecke v. Department of Commerce, 810 P.2d 459 (Utah App. 1991), where we focused on the language of Utah Code Ann. § 63-46b-12(1)(a) (1989) and held a petitioner need not avail himself of a review permitted by agency rule prior to filing an appeal to this court. We distinguished such permissive review from review which is statutorily mandated. Id. at 462. See also Hi-Country Homeowners Assoc. v. Public Service Comm'n, 779 P.2d 682, 684 (Utah 1989) (holding all mandatory reviews must be exhausted prior to judicial appeal).

In Heinecke, however, we did not address the impact of another section of UAPA which provides: "A party may seek judicial review only after exhausting all administrative remedies available" Utah Code Ann. § 63-46b-14(2) (1989) (emphasis added). See also Tax Comm'n v. Iverson, 782 P.2d 519, 524 n.3 (Utah 1989) (citing section 63-46b-14 for proposition petitioner must exhaust administrative remedies prior to judicial review). According to the Industrial Commission section 63-46b-14(2) requires a party to utilize all permissive review prior to filing an administrative appeal. While we express no opinion today on that issue, we do note Heinecke was rendered without the benefit of briefing by counsel. Heinecke, 810 P.2d at 462. Further, we specifically recognized we might revisit the issue at an appropriate point in the future. Id. at 464 n.6. That day still awaits.

B. Timeliness

McCord and the Industrial Commission argue we should dismiss the second appeal because Maverik's Request for Review of the Final Order of the ALJ was untimely. Maverik responds its Request for Review was timely because either (1) Utah Rule of Civil Procedure 6(e) gives it three extra days to file the appeal, (2) the filing date is the date of mailing or, (3) the Industrial Commission abused its discretion in failing to extend the filing deadline by one day. The Final Order was issued September 10, 1991 and Maverik filed its Request for Review October 11, 1991. Whether URCP 6(e) is applicable or whether the crucial date is the mailing date are questions that involve the agency's application or interpretation of general law which we review under section 63-46b-16(4)(d) for correction of error. Morton Int'l, Inc. v. Auditing Div., 814 P.2d 581, 587-89 (Utah 1991); King v. Industrial Comm'n, 209 Utah Adv. Rep. 33, 34 (Utah App. 1993). See also SEMECO v. Auditing Div., 209 Utah Adv. Rep. 73, 76 (Utah 1993) (Durham, J., dissenting).

1. Date of Filing

UAPA provides a request for review must be filed "within 30 days after the issuance of the order" Utah Code Ann. § 63-46b-12(1)(a) (1988). The request must also "be sent by mail to the presiding officer and to each party." Id. § 63-46b-12(1)(b)(iv). The parties agree the ALJ's final Order was dated and issued September 10, 1991. See Dusty's Inc. v. Auditing Div., 842 P.2d 868, 870 (Utah 1992) (holding administrative order is issued on date on face of order).

Maverik first argues that Utah Rule of Civil Procedure 6(e) gives it a three day extension on the thirty day filing deadline. That rule provides: "Whenever a party . . . is required to do some act . . . within a prescribed period after the service of a notice . . . upon him and the notice . . . is served by mail, 3 days shall be added to the prescribed period." Utah R. Civ. P. 6(e) (emphasis added). That rule must be read in light of section 63-46b-12(1)(a) of UAPA which requires a party to appeal thirty days after the issuance of the administrative ruling. Thus, Rule 6(e) does not apply because under section 63-46b-12(1)(a) of UAPA the time for appeal runs from the issuance of an order not from the service of an order on a party.

in section 63-46b-12 requires, as a prerequisite to the agency taking jurisdiction over a review, actual delivery of the necessary documents to the agency within the thirty day time limit.

3. Extension of Filing Deadline

Maverik next argues the Industrial Commission abused its discretion by failing to grant a one day extension of the filing deadline. Maverik does not identify the portion of 63-46b-16(4) under which it asks us to review this claim. See King v. Industrial Comm'n, 209 Utah Adv. Rep. 33, 35 n.6 (Utah App. March 18, 1993) (encouraging counsel to clearly identify the portion of 63-46b-16(4) under which review is sought). Because the authority to grant an extension in a filing deadline is not in an agency-specific statute, but rather a general provision of UAPA, and because Maverik is arguing an abuse of discretion standard, it appears Maverik is necessarily seeking review under Utah Code Ann. § 63-46b-16(4)(h)(iv) (1988). That catch-all portion of section 63-46b-16(4) provides we can grant relief if the agency action is "arbitrary or capricious." Id. We review agency action under this section for reasonableness. Anderson v. Public Serv. Comm'n, 839 P.2d 822, 824 (Utah 1992). See also SEMECO v. Auditing Div., 209 Utah Adv. Rep. 73, 78 (Utah 1993) (Durham, J., dissenting).

a. The Original Request for Reconsideration

For an agency to extend any deadline established under UAPA the petitioner must show good cause. See Utah Code Ann. § 63-46b-1(9) (1988). In its Request for Reconsideration, Maverik made no attempt to show good cause. The Industrial Commission, in its Order denying the Request for Reconsideration, specifically notes Maverik's failure to show good cause. Thus, the Industrial Commission's decision denying Maverik a one day extension is not unreasonable in light of Maverik's complete failure to articulate any facts on which to base a good cause determination.

b. The Second Request for Reconsideration

In a document captioned "Limited Request for Reconsideration" filed April 3, 1992, six days after the original Request for Reconsideration was denied and four days before the second appeal was filed, Maverik finally attempts to show good cause. There is no authorization for a "Limited Request for Reconsideration" in UAPA. Counsel's failure to comply with the rules which set forth the requirements for getting an extension of the filing deadline does not give him the right to create

CONCLUSION

Maverik's first appeal was brought from a non-final Order of the Industrial Commission. Maverik's second appeal was brought from a reasonable ruling of the Industrial Commission that Maverik's Request for Review was untimely. Thus, we dismiss case

9. (...continued)

Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency

Utah Code Ann. § 63-46b-13(1)(a) (1989) (emphasis added). This section provides a petitioner with the option of applying to the agency for reconsideration or appealing to the courts. It does not provide a petitioner the opportunity to pursue both routes concurrently. The emphasized language indicates a petitioner who decides to file a request for reconsideration no longer has a "final agency action" from which to appeal. The petitioner must wait until the request is either responded to in writing or denied by operation of law. Section 63-46b-13(1)(a) provides a request for reconsideration is not a mandatory step in exhausting administrative remedies or reaching "finality" to give the courts jurisdiction over an appeal. It is a permissive step. Petitioners who choose to take advantage of this step must thereafter accept the consequences, one of which is that an appeal to the judicial system cannot be made until the agency acts on the request.

Thus, the second request for reconsideration would have given the Industrial Commission another opportunity to address the merits. Therefore, as of April 7, 1992, Maverik would have no final order from which to appeal. Under this analysis, the second appeal would be brought from a non-final order over which we have no jurisdiction and we would dismiss it.

Further, the window for Maverik to file an appeal from the Industrial Commission's denial of the second request would have been from April 23, 1992 to May 23, 1992. Thus, under either analysis, Maverik is left without judicial review of the merits.

COVER SHEET

CASE TITLE:

Maverik Country Stores, Inc.,
Petitioner,

v.

The Industrial Commission of
Utah and Vicky Ann McCord,
Respondents.

Case No. 920206-CA
& Case No. 910413-CA

June 3, 1993. OPINION (For Publication).

Opinion of the Court by JUDITH M. BILLINGS, Presiding
Judge; NORMAN H. JACKSON and LEONARD H. RUSSON, Judges,
concur.


CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of June, 1993, a true
and correct copy of the foregoing OPINION was deposited in the
United States mail to the parties listed below:

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Judicial Secretary

Original Proceeding in this Court

APPENDIX 2

Allen Steel Utah Supreme Court decision

WE CONCUR:

Gordon R. Hall, Chief Justice
I. Daniel Stewart, Justice
Christine M. Durham, Justice

1. See, however, Utah Rule of Civil Procedure 58A(d), which requires the prevailing party to promptly give notice of the signing or entry of judgment to all other parties and to file proof of service of such notice with the clerk of the court.

ZIMMERMAN, Justice: (Concurring in the Result)

I concur in the disposition of the case made by the majority. However, I depart from the majority in my appraisal of the level of scrutiny the trial court gave the findings of fact and conclusions of law prepared by counsel for Tel-Tech.

It is certainly true that a trial judge need not make any emendations in proposed findings of fact and conclusions of law to demonstrate that he or she has not abdicated the decision-making function to the lawyer who prepared the document. However, here the court signed proposed findings that included a statement that "[n]o evidence was introduced at trial ... of a surety bond" when this was not the case, and a ruling that exhibits previously admitted should be rejected, a ruling which was manifestly incorrect. Moreover, at the time the trial court asked the parties to submit their proposed findings, the court had not decided how the case was to come out; therefore, the parties had no guidance from the trial court as to how to craft their findings. It can be assumed that as a result, each party prepared findings that were favorable to it on all points. The foregoing facts give me pause and suggest that the trial court may have been less than assiduous in reviewing the proposed findings, perhaps simply signing those proposed by the party that prevailed on the basic issues.

Trial judges are certainly entitled to ask the assistance of counsel in preparing findings of fact and conclusions of law. There is some danger that in the press of business, they may come to rely too heavily on these proposals and inadvertently permit counsel to inject findings that may not be entirely in conformity with the judge's views or that may deal with issues the judge has not even thought about.

The finding of facts "is an important part of the judicial function," one that is designed to flesh out the rationale for the decision and one that "the judge cannot surrender ... to counsel." 9 Wright & Miller, *Federal Practice and Procedure* §2578, at 705 (1971) [hereinafter Wright and Miller]. As the United States Supreme Court has noted, findings of fact prepared by the court are "drawn with the insight of a disinterested mind" and are "more helpful to the appellate court" than those prepared by counsel. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964). It is for this reason that the federal courts appear to have almost uniformly adopted the rule that while findings prepared by counsel are sufficient under the federal analogue to Utah Rule of Civil Procedure 52, appellate courts "will feel freer in close cases to

disregard a finding or remand for further findings if the trial court did not prepare them him [or her] self." 9 Wright & Miller, at 707; see Utah R. Civ. P. 52(a); see, e.g., *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 616 F.2d 464 (10th Cir. 1980); *Kelson v. United States*, 503 F.2d 1291 (10th Cir. 1974).

I know that I apply a similar standard in reviewing findings prepared by counsel, and I suspect that other members of this Court do the same, although to my knowledge, we have never said so. In light of this fact and the rule stated above, trial courts would be well advised to be vigilant in guarding against the tendency to view findings as a detail to be dealt with as expeditiously as possible, rather than as a fundamental part of the decisional process, one that goes to the heart of its integrity. In the same vein, counsel preparing proposed findings and conclusions should be cautious lest in their zeal, they include proposals that may undermine the integrity of the judgment they hope to obtain.

Cite as
119 Utah Adv. Rep. 6

**IN THE SUPREME COURT
OF THE STATE OF UTAH**

**ALLEN STEEL COMPANY, a Utah
corporation,**

Plaintiff and Appellee,

v.

**CROSSROADS PLAZA ASSOCIATES, a
Utah joint venture, The Equitable Life
Assurance Society of the United States, a New
York corporation, and Okland-Foulger
Company, a general partnership, Deseret Title
Holding Corporation, a Utah corporation, et
al.,**

Defendants and Appellants.

No. 20532

FILED: October 6, 1989

Third District, Salt Lake County
Honorable Scott Daniels

ATTORNEYS:

Joseph J. Palmer, H. Dennis Piercey, Salt
Lake City, for Allen Steel

Bruce A. Maak, Thomas B. Green, Clark
Waddoups, Salt Lake City, for Crossroads
Plaza and Equitable Life Assurance,

Wilford A. Beesley, Jack Fairclough, Salt
Lake City, for Okland-Foulger

**This opinion is subject to revision before
publication in the Pacific Reporter.**

STEWART, Justice:

Plaintiff Allen Steel Company ("Allen Steel")

brought this action against defendants Crossroads Plaza Associates ("Crossroads"), Equitable Life Assurance Society of the United States ("Equitable"), Okland-Foulger Company ("Okland-Foulger") and various other landowner defendants. The complaint sought a judgment against Okland-Foulger for the unpaid amount on a construction contract between Allen Steel and Okland-Foulger, a judgment against the remaining defendants for their failure as leaseholders of the land where the building was erected to obtain a contractor's bond, and a judgment of foreclosure of a mechanic's lien. Crossroads, Equitable, and Okland-Foulger counterclaimed, seeking both an offset against Allen Steel's contractual claims and tort damages for an alleged defective design of the project by Allen Steel. In addition, Equitable cross-claimed against Okland-Foulger.

The trial court entered a judgment for \$579,294, plus interest, in favor of Allen Steel and against Okland-Foulger, Crossroads, and Equitable and granted Allen Steel's request for foreclosure of its mechanic's lien. The court also awarded Allen Steel a deficiency judgment against Okland-Foulger for the judgment, costs, and attorney fees. The court denied Allen Steel's request for consequential damages, including delay damages, against Okland-Foulger, Crossroads, and Equitable. The trial judge also ruled that the mechanic's lien was not effective against the fee interests of the remaining defendant landowners and ordered Allen Steel to pay the landowners' attorney fees and costs in an amount to be determined at a further proceeding. Finally, the trial court awarded Equitable a judgment for damages on its cross-claim against Okland-Foulger under their joint venture agreement, but held that the amount of such damages should be determined in a subsequent proceeding. The court certified the case for appeal pursuant to the provisions of Utah Rules of Civil Procedure 54(b).

Crossroads, Equitable, and Okland-Foulger appeal the judgment against them and the trial court's dismissal of their counterclaims. Allen Steel cross-appeals the trial court's refusal to enforce its mechanic's lien against the landowners, the denial of delay damages against the developers, and the refusal of the trial court to hold Equitable and Crossroads personally liable for attorney fees. Allen Steel does not appeal the trial court's award of attorney fees to the landowners and against Allen Steel. Nor does Okland-Foulger appeal the award of attorney fees to Allen Steel.

I. FACTS

Equitable and Okland-Foulger created Crossroads Plaza Associates, a joint venture that is the owner of a leasehold interest on which the Crossroads Plaza shopping mall, office building, and parking garage in Salt Lake City, Utah, are built. The real property upon which the project is located consists of separate contiguous parcels of realty separately owned at the time this action arose by Deseret Title Holding Corporation, Salt Lake City corporation, and various other entities ("landowners"), each of whom leased its interest to Crossroads.

The joint venture planned to build a 660,000-

square-foot, four-story shopping mall, a sixteen-story office building, and an eight-story, 2,500-car parking garage complex. The joint venture agreement placed responsibility for construction and "architectural and design" functions on Okland-Foulger "to prepare and finalize complete plans and specifications ... subject to being approved by the venturers." For these responsibilities, Okland-Foulger received a design fee of approximately \$1.4 million. It hired Timmerman/Stephan Associates to provide architectural services for \$227,000.

In the fall of 1977, Okland-Foulger advertised for "design-build" bids on the structural steel work for the Crossroads project, excluding footings and foundations. Allen Steel bid on the project. It was told that the structural steel work was to comply with the Uniform Building Code (1976 ed.). Allen Steel retained Joseph Patrick, a structural engineer, to prepare a preliminary design of the tower for bidding purposes and promised to pay him \$25,000 for the work if Allen Steel secured the bid. Patrick prepared a preliminary structural design using a hambro joist system, which was sufficiently detailed to allow Allen Steel to make a bid. Allen Steel submitted the bid to Okland-Foulger in the form of a proposal dated November 1, 1977, and Okland-Foulger rejected it.

Subsequently, Patrick prepared a second proposal which included three structural alternatives, a bar joist system, a hambro joist system, and a composite metal deck system. Allen Steel submitted the second proposal to Okland-Foulger on January 11, 1978. The bid proposal made clear that the "Owner's engineer" was to accept overall "responsibility for the design." It provided, in part:

This proposal is offered for the design, fabrication, and erection of the Structural Elements only for the Tower and Mall. The following design parameters have been used for the structural design suggested by our engineers to compute the price. Owner's engineer is to check this design and make changes if necessary to enable him to accept overall responsibility for design. Changes that effect [sic] quantity, weight, or complexity of structural members will require an adjustment in price.

(Emphasis added.)

In March, 1978, Allen Steel met with Okland-Foulger, and Okland-Foulger indicated that the composite metal deck alternative had been chosen. Allen Steel reduced its unit price. On March 3, 1978, Okland-Foulger sent a letter to Allen Steel, stating:

This letter is to inform you of our intent, upon the closing of the construction loan for Crossroads Plaza, to enter into an agreement with Allen Steel Company, to provide the structural steel and metal deck for said project, in accordance with your pro-

posal

We understand, in turn, that Allen Steel will make tentative agreements with their suppliers at this time, to insure that the above mentioned proposal will be maintained

It is of some significance that on March 4, 1978, Joseph Patrick wrote to Okland-Foulger, offering to provide engineering services in connection with the footing foundation of the project, and Okland-Foulger accepted his offer

In June, 1978, Okland-Foulger authorized Allen Steel to begin detailing, i.e., preparing detailed template-like plans for the fabrication of steel. Throughout this time, Joseph Patrick worked on the design and consulted from time to time with both Allen Steel and Okland-Foulger. The design prepared by Patrick included a reinforced concrete mat that served as the foundation for the tower. The design also included a structural steel design and a concrete shear wall. The shear wall consisted of a concrete shaft formed by two bracket-shaped structures facing each other and joined together with structural steel to make a rectangular reinforcing framework thirty feet square and extending the entire height of the building. The shear wall was to house the elevator shaft and resist lateral forces imposed on the building by either wind or earthquake.

On August 1, 1978, Allen Steel submitted the completed detail drawings to Okland-Foulger for approval, and Okland-Foulger submitted the design drawings to Equitable for review. Equitable's engineer questioned some areas of the design, and as a result, the concrete mat was increased in thickness by one foot. Although Equitable did not formally approve or disapprove the plans, Okland-Foulger authorized Allen Steel to proceed with fabrication based on the plans.

During the course of construction, Okland-Foulger dealt directly with Patrick regarding concrete tests, weld tests, elevator area design, tenant improvements, and other details. In its findings of fact, the trial court found that Patrick performed some of his functions at the request of Allen Steel, others at the request of Okland-Foulger, and others at the request of both. Generally, however, Patrick's manner of performing the work and his hours and places of work were not controlled by either Allen Steel or Okland-Foulger. Okland-Foulger delivered a proposed subcontract form to Allen Steel on September 5, 1978. Robert Allen of Allen Steel stated that he would have his attorney review the document and then he would sign it, but the agreement was never signed.

Some two weeks later, on September 20, 1978, Allen Steel received a letter from Utah American Steel Company, which was fabricating the steel members, questioning the design of the structure, and on October 9, 1978, Allen Steel spoke to Patrick regarding the structural design and showed him the letter from Utah American Steel. At that time, Patrick showed Allen Steel a letter from the Salt Lake City Engineer's office questioning the design. The same day, a meeting was held between Salt Lake City Corporation and Okland-Foulger in which the City questioned the design but agreed to allow Okland-Foulger to continue construction

upon the posting of a bond.

Salt Lake City halted construction of the Crossroads Plaza Tower on October 16, 1978, because of inadequacies it believed existed in the design of the structure. The basic defect according to an engineer hired by the City was that the shear wall did not comply with the Uniform Building Code. At that time, eight stories had been erected.

Okland-Foulger hired Glen Enke to provide a remedial engineering design to correct the defect. Allen Steel and Okland-Foulger agreed that Allen Steel would finish the contract and perform the remedial work. Pursuant to Glen Enke's revised design, work commenced in March, 1979, and the tower was finished in January, 1980. The revision required strengthening and enlarging the base plates and the steel column and beam connections so that seismic forces would be absorbed through the steel structure itself. In the process, three previously erected stories of reinforced steel had to be torn down.

Okland-Foulger continued regular progress payments to Allen Steel until Allen Steel completed performance of the project and then withheld the final \$579,294 payment owed Allen Steel. Okland-Foulger also asserted a backcharge of over \$2,000,000 for losses due to the expense and delay of redesigning and reconstructing the structural elements of the project. Allen Steel filed a lien in May, 1980, within eighty days of Okland-Foulger's refusal to pay the amount due on the contract and thereafter initiated this action to collect the balance due on its contract with Okland-Foulger or, in the alternative, to collect from Equitable, Crossroads, and the landowners based upon their failure to provide payment bonds. Crossroads, Equitable, and Okland-Foulger filed counterclaims against Allen Steel, asserting both an offset against Allen Steel's claims and an independent ground for recovery of damages based on the defective design of the tower structure. Equitable filed a cross-claim against Okland-Foulger, seeking damages for the defective design from Okland-Foulger pursuant to the joint venture agreement between them.

For purposes of this lawsuit only, the parties stipulated that the design of the structural elements of the tower section of the Crossroads project did not comply with the Uniform Building Code (1976 Ed.) and fell below the ordinary standard of care for structural engineers in the Salt Lake County, Utah area during 1977 and 1978 in the following specific respects:

- (a) The design was not adequate to accommodate and withstand lateral (including torsional) forces induced by seismic and wind forces.
- (b) The design of the manner by which the two halves of the shear wall were connected together was not adequate to enable the two halves of the shear wall, as a connected unit, to withstand shear forces induced by seismic or wind forces.
- (c) The mat footing for the tower structure was not sufficiently stiff to resist overturning forces induced in the

mat footing by the shear wall (which was connected to the mat footing) when the shear wall itself is subjected to horizontal forces

A non-jury trial commenced in June, 1984. During trial, the court ordered the issue of damages to be severed and tried separately after the determination of the liability issues. Following a month-long trial, the trial court entered findings of fact and conclusions of law. The court held that the contract between Allen Steel and Okland-Foulger was embodied in Allen Steel's January 11, 1978 proposal to Okland-Foulger. The trial court also concluded that the language in the contract "effectively excluded any warranty for the design. Therefore, Allen Steel is not liable to Okland-Foulger or Crossroads Plaza Associates for breach of contract." The trial court further held that "Joseph Patrick was an independent contractor and Allen Steel is not liable in tort to Okland-Foulger for his negligence." Based on these conclusions, the trial court ruled that "Allen Steel satisfactorily completed its contract and is entitled to be paid for its work." The court entered a judgment in favor of Allen Steel in the amount of \$579,294 plus interest and against Crossroads Plaza Associates, Equitable, and Okland-Foulger and dismissed defendants' counterclaims against Allen Steel for an offset and damages for negligent design.

The court held Crossroads Plaza Associates and Equitable liable for their failure to furnish a payment bond for the project. The court also ruled that Allen Steel's mechanic's lien was valid as against defendants Okland-Foulger, Equitable, and Crossroads and authorized Allen Steel to foreclose its lien securing the contract balance. The court also held that Allen Steel could not enforce its lien against the landowners' property because they were not parties to a contract with Allen Steel and there was no evidence that they would benefit from the construction of the project at the end of the leases. The trial court also entered a judgment for attorney fees in favor of Allen Steel and against the developers and in favor of the landowners and against Allen Steel.

On appeal, Okland Foulger, Equitable, and Crossroads assert that the trial court erred in holding that (1) Allen Steel was not liable for breach of warranty, and (2) Allen Steel was not liable for negligence in providing a defective design. Allen Steel asserts on cross-appeal that (1) it was entitled to a mechanic's lien against the fee interests of the landowners, (2) the trial court erred in denying delay damages to Allen Steel, and (3) the judgment should state unambiguously that Equitable and Crossroads are personally liable for attorney fees.

II. FINALITY

After oral argument, the Court requested the parties to submit supplemental briefs on the validity of the trial court's certification of the judgment pursuant to Rule 54(b), Utah Rules of Civil Procedure. That rule provides in pertinent part:

When more than one claim for relief and/or when multiple parties are

involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment.

Even though a judgment is certified pursuant to Rule 54 and all parties pursue the appeal, that is not sufficient to confer jurisdiction. *Olson v. Salt Lake City School District*, 724 P.2d 960, 964 (Utah 1986), held that "acquiescence of the parties is insufficient to confer jurisdiction." It is essential that the ruling "wholly dispose of the claim or the party" to be certified as final and appealable under Rule 54(b). 724 P.2d at 964, see also *Pate v. Marathon Steel Co.*, 692 P.2d 765 (Utah 1984).

All the claims between Allen Steel and defendants were fully and finally litigated. Allen Steel won on its claim against defendants Crossroads, Okland-Foulger, and Equitable and on the counterclaims against it. Allen Steel lost on its lien claim against the landowner defendants. There still remain, however, (1) Equitable's damages on its cross-claim against Okland-Foulger, and (2) the amount of attorney fees due Allen Steel and the landowners. Equitable's claim against Okland-Foulger is a separate, independent claim filed as a cross-claim, to which Allen Steel is not a party. The question here is whether the unresolved attorney fee issues with respect to Allen Steel's judgment and the landowner's judgment against Allen Steel make those judgments nonfinal under Rule 54(b).

Not one of our previous cases has expressly ruled on the specific issue of whether the deferral of awarding attorney fees makes a judgment nonfinal and therefore noncertifiable under Rule 54(b). See, e.g., *Elder v. Triax Co.*, 740 P.2d 1320 (Utah 1987), *Amica Mut. Ins. v. Schettler*, 738 P.2d 641 (Utah 1987), *Olson v. Salt Lake City School Dist.*, 724 P.2d 960 (Utah 1986), *General Motors Acceptance Corp. v. Martinez*, 712 P.2d 243 (Utah 1985). See generally, *Williams v. State*, 716 P.2d 806 (Utah 1986), *Pate v. Marathon Steel Co.*, 692 P.2d 765 (Utah 1984).

Rule 54(b) is identical in all material respects to the corresponding federal rule, and in construing our rules, we look to authorities which have interpreted the federal rule. *Olson*, 724 P.2d at 965 n.5, *Pate*, 692 P.2d at 767 n.1. At federal law, a pending claim for attorney fees does not make a judgment on the merits nonappealable. See *Beaudry Motor Co. v. Abko Properties, Inc.*, 780 F.2d 751, 755 (9th Cir.), cert. denied, 479 U.S. 825 (1986) ("Rule 54(b) has no application to motions for attorneys' fees"), *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 292, aff'd on rehearing, 768 F.2d 140 (7th Cir. 1985) ("[A] judgment on the merits is appealable--independently of Rule 54(b)--despite the fact that questions of fees remain.")

The trial court here ruled that the issue of attorney fees could "best be determined after the rights and liabilities of the parties are finally determined either by appeal or expiration of appeal time." A similar observation was made in *Cinemas, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 70

n.2 (2d Cir. 1973):

Delaying a decision on counsel fees until after the merits of a case have been finally determined on appeal may place a claim for attorneys' fees "in much better perspective," *Sprague v. Ticonic National Bank*, [307 U.S. 161, 168 (1939)]; the benefit achieved by an attorney, the skill he has exhibited in obtaining it, and the total hours he has labored are more readily assessable after the appellate process has run its course. Moreover, the fact that the amount of a counsel fee award may turn on such factors provides support for the view that the claim for counsel fees arises out of a separate transaction or occurrence.

Furthermore, the award of attorney fees usually includes attorney fees incurred on appeal as well as at trial. Thus, an actual award of attorney fees need not be reduced to judgment to make the judgment final for appeal purposes since the fees awarded will often include the fees incurred on the appeal. In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 451-52 (1982), the Court stated:

[T]he court's decision of entitlement to fees will ... require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has "prevailed." Nor can attorney's fees fairly be characterized as an element of "relief" indistinguishable from other elements.... Their award is uniquely separable from the cause of action to be proved at trial.

It follows that even though Allen Steel and the landowners may still move for a determination of the amount of attorney fees owed them under judgments now on appeal, this appeal nonetheless arises out of a final judgment properly certified under Rule 54(b).

III. DESIGN-BUILD CONTRACTS

This Court has not previously considered a dispute involving a "design-build" contract. A basic explanation of those contracts is necessary to understand the legal, economic, and business environment in which the parties operate when they enter into such a contract and how and why the parties deal as they do and with what expectations. In its findings, the trial court entered this brief explanation of design-build contracts:

"Design build" or "design construct" is a term used in the construction industry to denote a method of construction whereby a contractor or subcontractor provides both the design and the construction of a particular system in the project. The term is not inflexible, however, and can mean either that the contractor has or has not assumed the ultimate responsibility for the design, and this can vary from project to

project.

(Emphasis added.)

A design-build construction contract consists of an arrangement between an owner and a single entity for the design and construction of a project, as contrasted with the traditional construction process which separates the design and the construction functions. Bynum, *Construction Management and Design-Build/Fast Track Construction From the Perspective of a General Contractor*, 46 Law & Contemp. Probs. 25, 34 (1983) (hereinafter Bynum). The single entity frequently consists of a joint venture between an architect or engineer and a general contractor, a design-build firm which employs both design personnel and contractors, or a general contracting firm which subcontracts design work to an architect or engineer. *Id.* Under design-build contracts, owners need only look to one entity for performance. As a result, such contracts have become increasingly attractive to owners. *Id.* They also appeal to design-build contractors because the contractor is entitled to both design fees and construction profits. Because design-build contracts expedite construction, bids may be made on a "cost-plus" basis, which is generally less risky for the contractor than a fixed price contract. *Id.*

Similarly, although design-build projects may involve building phases similar to traditional contracts, with the design documents first being completely prepared and thereafter approved by the owner, many design-build jobs involve "fast track" construction, where the designing and construction are completed simultaneously in phases. *Id.* "Fast track" construction may save substantial time, thereby reducing financing costs and minimizing the impact of inflation. *Id.* That is especially true where rapid inflation causes the actual costs of building materials to outstrip estimated costs under ordinary bidding practices, thereby producing great risks for subcontractors.

Just as allocation of responsibility under design-build contracts differs from the traditional model, the allocation of liability also diverges from the traditional model. "It is axiomatic that under a design-build contract the contractor assumes, in the absence of limiting or exculpating contractual provisions, liability for design deficiencies." *Id.* at 36; see also *Mobile Housing Environments v. Barton and Barton*, 432 F. Supp. 1343, 1347 (D. Colo. 1977). As a result, "most substantial design-build firms attempt to negotiate contractual limits on their liability." Bynum, at 36. This is frequently accomplished through clauses excluding liability for consequential damages or by carrying, at the owners' expense, broad form builders' risk policies. *Id.*

Since design-build contracts are creatures of general contract law, the allocation and scope of the rights, duties, and responsibilities under the contract must be determined by reference to the terms of the contract and agreement between the parties. As the trial court indicated, the perceptions and understandings of the parties may vary from project to project. The importance of the contractual arrangement is explained by an analogous discussion of architect liability:

Now that architectural relationships take so many forms, it is much more appropriate to allocate risks on the basis of the parties' contracts as modified by their later conduct.

...
.. Even if the suit is brought in tort, the result will be the same since contract interpretation is infected with the tort standard of reasonable care, and the existence of a tort duty is controlled by the contractual undertakings.

... Few duties can reasonably be imposed in all contexts because the architect's construction responsibilities now vary greatly. In general, the frequency of departures from the traditional model makes it appropriate to regard the problem as one of contract interpretation and thus to look to the parties' reasonable expectations.

Note, *Architectural Malpractice: A Contract-Based Approach*, 92 Harv. L. Rev. 1075, 1083-90 (1979) (footnotes omitted)

Since the transition from the traditional allocation of responsibility to the design-build model is likely to result in a wide variety of understandings between parties, the particular agreement between the parties is best defined by the terms of the agreement within the context of the arrangement worked out by the various parties

IV. BREACH OF WARRANTY

A design flaw caused the damages in this case. That is conceded. The principal issue in this lawsuit is whether the subcontractor, Allen Steel, was liable for the basic design of the project under the terms of its design-build contract with Okland-Foulger, notwithstanding a disclaimer of its liability, or whether Okland-Foulger was liable. The trial court held that the joint venture agreement between Okland-Foulger and Allen Steel obligated Okland-Foulger to design the project and placed "responsibility" for the design on Okland-Foulger.

The trial court concluded as a matter of law that "[t]he contract between Allen Steel and Okland-Foulger is the proposal of January 11, 1978 as orally modified. The only modifications included provisions as to time, selection of alternative two [a composite metal deck], and a reduction in price." Okland-Foulger asserts that the trial court erred in that ruling and in not ruling that a proposed subcontract agreement dated September 5, 1978, embodied the contract.

The trial court's findings of fact on that point are based on substantial evidence and are not clearly erroneous under Rule 52(a), Utah Rules of Civil Procedure.

Okland-Foulger first contends that it did not accept Allen Steel's January 11, 1978 proposal. A binding contract exists only when there has been mutual assent by the parties to be bound by the terms of their agreement. *Bunnet v. Bills*, 13 Utah 2d 83, 368 P.2d 597 (1962). The trial court, however, specifically found that Okland-Foulger did assent:

At a meeting held in early March of 1978, the January 11 proposal was accepted by Okland-Foulger Company with certain modifications, although the document was never signed and was not intended by the parties as an integration. The composite metal deck alternative was selected and the unit price was modified. Some provisions regarding time were also modified.

.. On March 3, 1978, Okland-Foulger sent a letter (letter of intent, Exhibit 42) to Allen Steel indicating its intent to enter into an agreement for Allen Steel to provide the structural steel for the project "in accordance with your (Allen Steel's) proposal." This refers to the January 11, 1978 proposal.

The evidence clearly supports the findings. Mr. Hendrik Van Rensburg, executive vice-president of Allen Steel, testified that at the March 1 meeting, Allen Steel regarded the January proposal as valid. Likewise, Okland-Foulger's March 3, 1978 letter clearly suggests that Okland-Foulger considered the proposal a valid agreement. The letter reads as follows.

This letter is to inform you of our intent, upon the closing of the construction loan for Crossroads Plaza, to enter into an agreement with Allen Steel Company, to provide the structural steel and metal deck for said project, in accordance with your proposal.

We understand, in turn, that Allen Steel will make tentative agreements with their suppliers at this time, to insure that the above mentioned proposal will be maintained.

(Emphasis added.)

Okland-Foulger asserts that it did not agree to the language of the January 11 proposal that the owners' engineer was "to check this design and make changes if necessary to enable him to accept overall responsibility for the design." There is, however, substantial evidence which supports the trial court's conclusion that both parties knew of and accepted those terms in the January 11 proposal. Allen Steel clearly intended those terms to be part of the agreement, and did so from the beginning. In an October, 1977 meeting, Robert Allen, president of Allen Steel, William Howe of Allen-Howe Specialties Corporation, and Hendrik Van Rensburg discussed Allen Steel's initial proposal for the Crossroads project. William Howe's notes of the meeting record the decision that Allen Steel should bid Joseph Patrick's design but that the owner, and not Allen Steel, must take responsibility for the design. Mr. Howe's handwritten notes state:

10/31/77 Crossroads Plaza
RBA [Robert Allen]
Van [Hendrik Van Rensburg]
ok to Bid struct price erected -- to a

design suggested by JP [Joe Patrick]
Don't want resp. for design.

Owner must hire engineer & take
resp.

for design & review ours

Money in our bid to pay Joe for
prelim. design.

....

1. Owners Engr to check design & take
resp....

2. [Alternative of hiring engineer
crossed out.] if object -- owner
issues sep contr to Joe

Accordingly, the November 1, 1977 proposal
stated:

The following design parameters have
been used for the structural design
suggested by our engineers to compute
the price. Owner's engineer is to check
this design and make changes if neces-
sary to enable him to accept overall
responsibility for design. Changes that
affect quantity, weight, or complexity
of structural members will require an
adjustment in price.

Okland-Foulger contends that during a meeting
attended by Mr. Van Rensburg and George Mar-
quardt of Allen Steel, Bill Howe, and either or
both Jack and Randy Okland, Sid Foulger told
Allen Steel that this language in the November 1
proposal was unacceptable. The trial court found
otherwise, based on contrary evidence. Mr. Mar-
quardt, Mr. Howe, Mr. Van Rensburg, and Jack
and Randy Okland all testified that Mr. Foulger of
Okland-Foulger did not object to that language.
George Marquardt testified that no one told him
that the January 11 proposal language was unac-
ceptable. Mr. Van Rensburg and Mr. Howe also
testified that no objection was raised to the pro-
posal language in the November 1 proposal or the
January 11 proposal at any time. Jack Okland
testified that he had not seen the November 1
proposal prior to his 1982 deposition and that he
did not attend any meeting with Bill Howe. Randy
Okland testified that he did not hear anyone
object to Allen Steel's proposal language.

Allen Steel's November proposal was not ac-
cepted, and Allen Steel submitted a new proposal,
the January 11 proposal, which provided two
additional structural alternatives and included the
same disclaimer of design responsibility. Okland-
Foulger accepted the latter proposal by its March 3
letter. Although Okland-Foulger asserts that it
rejected the November proposal because of the
disclaimer, the trial court apparently believed the
testimony of Mr. Van Rensburg that Okland-
Foulger rejected the November proposal because it
wanted alternatives to the hambro joint structural
system, not because of any objection to the dis-
claimer.

Okland-Foulger also asserts that the language
of the January 11 agreement is of no effect
because it was superseded by the September 5
subcontract. The trial court found that Allen Steel
received the proposed agreement from Okland-
Foulger and that Robert Allen of Allen Steel
agreed to sign it after his attorney had reviewed it

and concluded it was not objectionable; but no
one signed or accepted the September 5 proposed
subcontract. Okland-Foulger does not deny that
Allen Steel's attorney was to review that subcon-
tract or that no one signed it.

Acceptance of a contract "requires manifestation
of unconditional agreement to all of the terms of
the offer and an intention to be bound thereby....
[It] must be clear, positive and unambiguous." *R.J.
Daum Constr. Co. v. Child*, 122 Utah 194,
200, 247 P.2d 817, 819-20 (1952) (citations
omitted). Allen Steel's promise to review the
document and to sign it was not an acceptance and
did not obligate Allen Steel to sign the document
if the proposed agreement were unsatisfactory.
Even if the parties intended to integrate or form-
alize the January 11 proposal in a subcontract
agreement, "[t]he fact that part of the perform-
ance is that the parties will enter into a contract in
the future does not render the original agreement
any less binding." *Bunnell v. Bills*, 13 Utah 2d 83,
87, 368 P.2d 597, 600 (1962) (footnote omitted).
Allen Steel could, and did, refuse to sign an ag-
reement that it did not believe properly formalized
the agreement already reached. Moreover, Allen
Steel's actions did not indicate an acceptance of
the proposed subcontract. Allen Steel continued to
perform the existing January 11 contract under
which it had been performing for months.

In sum, the facts amply support the court's
findings and legal conclusion that Okland-
Foulger accepted Allen Steel's January 11 pro-
posal and that the later September proposal did not
bind the parties because it was not accepted by
Allen Steel.

The January 11 proposal was offered for the
"design, fabrication, and erection of the Structural
Elements only for the Tower and Mall" (emphasis
added). The proposal also provided that the
"following design parameters have been used for
the structural design suggested by our [i.e., Allen
Steel's] engineers to compute the price. Owner's
engineer is to check this design and make changes
if necessary to enable him to accept overall res-
ponsibility for design" (emphasis added). That
"overall responsibility" included compliance with
the Uniform Building Code.

The trial court also found as a matter of fact
that Okland-Foulger provided Allen Steel with
general design parameters and that Okland-
Foulger relied upon Allen Steel to provide the
design of the structure. In addition, the trial court
found that Allen Steel knew that the structural
aspects of the project were "to be constructed in
conformity with the Uniform Building Code (1976
Edition), and standards appropriate in Seismic
Zone III."

The trial court ruled, however, as a matter of
law, that the contract language negated any liab-
ility on the part of Allen Steel to Okland-Foulger
for a design defect. In effect, Allen Steel promised
to provide a "working" design which it would use
for pricing purposes only, and Okland-Foulger
was obligated to ensure that the design was suffi-
cient and that it would comply with code and
safety requirements.

These conclusions require us to decide whether a
party to a contract may agree to provide a design

for a construction project which is to conform to the Uniform Building Code and in the same contract preclude liability to the other party for breach of warranty for failure to conform by a contract term that the other party to the contract is to accept overall responsibility for the design.

A. Express Warranty

As defined by 17A C.J.S. *Contracts* §342, at 325 (1963), a warranty "is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended to relieve the promisee of any duty to ascertain the fact for himself" (Footnotes omitted.) No specific language is required to create a warranty. For one party to be held to a warranty in a contract, the natural tendency of the statement must be to induce a party to enter into the transaction. *Welchman v. Wood*, 10 Utah 2d 325, 329, 353 P.2d 165, 168 (1960). "Express warranties are construed according to the clear and natural import of the language used" 17A C.J.S. *Contracts* §342, at 327.

Although the January 11 contract contains specific reference to the Uniform Building Code, it does not contain a specific or express covenant that the structural design will conform to the Code. To the contrary, the contract states precisely the reason for the reference to the Building Code; and the reason, in the context of a design-build contract, makes eminent good sense, i.e., that the Code is one of the "design parameters" used by Allen Steel's engineers "to compute the price." Such language does not create an express warranty that the design will conform to the Code.

B. Implied Warranty

As a general rule, courts do not imply a warranty unless there is a representation relied upon which is the basis for the bargain. See, e.g., *Atlas Constr. Co. v. Aqua Drilling Co.*, 559 P.2d 39 (Wyo. 1977). Nevertheless, an implied warranty may exist because of the conduct of the parties. *Moore v. James*, 5 Utah 2d 91, 297 P.2d 221 (1956). Beyond that, this Court has recognized in the context of construing a building contract, that "[i]nsofar as a municipal ordinance is applicable to a contract, it is by operation of law an implied term of that contract." *Quagliana v. Exquisite Home Builders, Inc.*, 538 P.2d 301, 308 (Utah 1975); see also *St. Joseph Hosp. v. Corbetta Constr. Co.*, 21 Ill. App. 3d 925, 316 N.E.2d 51 (1974); *Bott v. Moser*, 175 Va. 11, 7 S.E.2d 217 (1940); *Bebb v. Jordan*, 111 Wash. 73, 189 P. 553 (1920).

Thus, a warranty that the design of a building will conform to the building code is generally implied by operation of law in a contract to design a building. The rationale for the rule is that an architect or other design professional is "bound to know the building restrictions of the designated place, and draw the plans and specifications accordingly." *Bott*, 175 Va. at 15, 7 S.E.2d at 218. Nevertheless, a warranty will not be implied where the contract expressly negates or disclaims such a warranty. *Fredrickson & Watson Constr. Co. v. Department of Public Works*, 28 Cal. App. 3d 514, 104 Cal. Rptr. 421 (1972). Parties should be allowed to make any bargain they wish, including

one excluding any warranty. See *AES Technology Sys., Inc. v. Coheren: Radiation*, 583 F.2d 933 (7th Cir. 1978); cf. *United States v. Bethlehem Steel Co.*, 205 U.S. 105 (1907). It is not the role of the courts to rewrite contracts between parties possessing equal bargaining power. See *Universal Drilling Co. v. Camay Drilling Co.*, 737 F.2d 869, 874 (10th Cir. 1984).

There is no contention that the parties possessed such disparate bargaining power that the agreement was unfairly coerced. Okland-Foulger had the clear-cut duty under the plain language of the January 11 agreement to check the structural design submitted by Allen Steel and to assume overall responsibility for it. The trial court correctly concluded that this language imposed responsibility on Okland-Foulger for the adequacy of the design and negated Allen Steel's liability, at least as between the parties, for that design. To conclude otherwise would nullify the express language of the agreement between the parties. This conclusion is also supported by ample parol evidence adduced at trial. In all events, the trial court did not commit clear error in reaching the conclusion it did.

Contractual disclaimers may, however, be disallowed if they conflict with "some consideration of public policy." *Walker Bank & Trust Co. v. First Security Corp.*, 9 Utah 215, 220, 341 P.2d 944, 947 (1959). Okland-Foulger argues that if we construe the language of the January 11 proposal to preclude Allen Steel's liability for breach of warranty, such a disclaimer violates the public policy of this state against disclaimers of liability for negligence in the performance of construction. Utah Code Ann. §13-8-1 (1986) prohibits agreements in construction contracts to indemnify the indemnitee "against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the [indemnitee]."

Section 13-8-1 does not apply here. In the first place, the January 11 agreement does not provide for indemnification at all. Furthermore, the statute prohibits indemnification for tort liability resulting from consequential damages for bodily injury or damage to property. The provision does not include contract damages for rectifying a failure to meet specifications.

In sum, the contract language that the owner's engineer was to check the design "to enable him to accept overall responsibility for design" negated the existence of a warranty by Allen Steel.

V. CONTRACTOR'S BOND STATUTE

Equitable and Crossroads argue that although the trial court may have correctly ruled that Okland-Foulger was personally liable under the January 11 agreement for the remaining payment due to Allen Steel, Equitable and Crossroads are not personally liable to Allen Steel because they were not parties to the agreement between Allen Steel and Okland-Foulger. We affirm the trial court's conclusion and hold that Crossroads and Equitable, as lessees, are personally liable to Allen Steel based on their failure to furnish a contractor's bond for the project in compliance with Utah Code Ann. §14-2-2 (1973).

The contractor's bond statute in effect at the time of the relevant events required the owner of improved property to obtain a bond to guarantee payment of subcontractors and materialmen if the general contractor fails to pay them:

The owner of any interest in land entering into a contract, involving \$2,000 or more, for the construction, addition to, or alteration or repair of, any building, structure or improvement upon land shall, before any such work is commenced, obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, conditioned for the faithful performance of the contract and prompt payment for material furnished and labor performed under the contract. Such bond shall run to the owner and to all other persons as their interest may appear; and any person who has furnished materials or performed labor for or upon any such building, structure or improvement, payment for which has not been made, shall have a direct right of action against the sureties upon such bond for the reasonable value of the materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon; which right of action shall accrue forty days after the completion, or abandonment, or default in the performance, of the work provided for in the contract.

The bond herein provided for shall be exhibited to any person interested, upon request.

Utah Code Ann. §14-2-1 (Supp. 1977). If a bond is not obtained, the "owner" is personally liable to all materialmen and subcontractors who have not been paid. That liability was established here by Utah Code Ann. §14-2-2 (1973):

Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as herein required, shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon. Actions to recover on such liability shall be commenced within one year from the last date the last materials were furnished or the labor performed.

(Emphasis added.)

The owners of a leasehold, or tenants under a lease, are "owners" of an interest in land under §14-2-1 and §14-2-2. *King Bros. v. Utah Dry Kiln Co.*, 21 Utah 2d 43, 440 P.2d 17 (1968); *Metals Mfg. Co. v. Bank of Commerce*, 16 Utah 2d 74, 395 P.2d 914 (1964); *Buehner Block Co. v. Glezos*, 6 Utah 2d 226, 310 P.2d 517 (1957). The

Crossroads joint venture agreement between Okland-Foulger and Equitable provided that Okland-Foulger, in its individual capacity, would act as the general contractor overseeing the improvements. But the joint venture itself, Crossroads, had the duty to obtain a bond from the general contractor, Okland-Foulger, to ensure payment of materialmen and subcontractors such as Allen Steel. We therefore conclude that Equitable, Okland-Foulger, and Crossroads are personally liable to Allen Steel under the contractor's bond statute because of their failure to procure a contractor's bond.

On the other hand, the landowners/lessors are not liable under the contractor's bond statute because they did not enter "into a contract ... for the construction ... or improvement upon land." Utah Code Ann. §14-2-1 (Supp. 1977). Furthermore, because of the common purpose of the mechanic's lien statutes (§§38-1-1 to 38-1-26) and contractor's bond statutes (§§14-2-1 and 14-2-2) and their practically identical language, adjudications as to what is lienable under the former are helpful in determining the proper application of the latter. *King Bros. v. Utah Dry Kiln Co.*, 21 Utah 2d at 46, 440 P.2d at 19. In light of our discussion *infra* affirming the trial court's finding that the landowners/lessors are not liable under the mechanic's lien statute, that is an additional reason why the landowners/lessors are not liable under the contractor's bond statute.

VI. NEGLIGENCE

The trial court concluded that "Allen Steel is not liable in tort to Okland-Foulger for [Joseph Patrick's] negligence." First, defendants assert that Allen Steel is liable in negligence for the defective design of the tower. They state that the design failed to conform with the Uniform Building Code. It is well established that to base an action in tort, there must be a breach of duty apart from the nonperformance of a contract. *Aspell v. American Contract Bridge League*, 122 Ariz. 399, 595 P.2d 191 (Ct. App. 1979); *Steiner Corp. v. American Dist. Tel.*, 106 Idaho 787, 683 P.2d 435 (1984). Since the January 11 agreement allocated legal responsibility for the design of the structure to Okland-Foulger¹ rather than Allen Steel, Allen Steel had no contractual duty as to the adequacy of the design vis-a-vis Okland-Foulger.

Neither did Allen Steel violate a statutory duty. The existence of a municipal ordinance such as the building code does not alter our conclusion. Even if Allen Steel were liable under such an ordinance to third persons for an unsafe or dangerous design—an issue as to which we express no opinion—defendants are not within the class of people the statute was intended to protect. See *Union Pac. Ry. v. McDonald*, 152 U.S. 262, 283 (1894).

Defendants also contend that Allen Steel is liable under the principle of respondeat superior for the negligence of Joseph Patrick in preparing the design. However, the trial court concluded that Patrick was an independent contractor, and that conclusion is amply supported by substantial evidence.

Patrick testified that the only agreement between

a preliminary design for \$25,000. He also testified that Allen Steel did not hire him to be the engineer of record or to prepare a complete structural design. Nor did Allen Steel request specifically that he design the shear wall. Although Allen Steel referred in one letter to Joseph Patrick as "our structural engineer," the court found that, throughout the summer of 1978, Patrick communicated directly with both Allen Steel and Okland-Foulger. Okland-Foulger dealt directly with Patrick regarding such details as concrete tests, elevator area design, and tenant improvements. Patrick performed many functions at the request of Allen Steel, many at the request of Okland-Foulger, and some at the request of both; nevertheless, his manner of performing the work, the hours, and places of work were determined by him alone. Under these circumstances, the trial court appropriately found Patrick to be an independent contractor.

Under principles of vicarious liability, an employer is not responsible for the negligence of an independent contractor. *Gleason v. Salt Lake City*, 94 Utah 1, 74 P.2d 1225 (1937). Although an exception to this rule exists where an employer contractually undertakes control or responsibility for a task performed by an independent contractor, *id.*, Allen Steel assumed no such obligation. Therefore, the trial court correctly ruled that Allen Steel was not liable in tort to Okland-Foulger.²

VII. LANDOWNERS' LIABILITY

Allen Steel challenges the trial court's conclusion that "Allen Steel's [mechanic's] lien is not valid as against the landowner defendants because they were not parties to any contract with Allen Steel." In particular, Allen Steel challenges the conclusion that there is no evidence that the landowners would benefit from the construction of the Crossroads project at the end of the leases.

Interiors Contracting Inc. v. Navalco, 648 P.2d 1382, 1386 (Utah 1982), held that "the mere existence of a lessor-lessee relationship, without more, does not justify charging the lessor's interest with a mechanic's lien for improvements made on the property at the instance of the lessee." There are, however, occasions when a lessor's interest may be subject to a mechanic's lien. First, a lessor's property interest may be subject to a lien if an agreement, express or implied, exists between the lessor or his agent and the contractor. *Zions First Nat'l Bank v. Carlson*, 23 Utah 2d 395, 464 P.2d 387 (1970). The trial court concluded that there was no agreement between Allen Steel and the landowners regarding the construction of Crossroads Tower. Nor is there any indication or evidence that Crossroads or Equitable were agents of the landowners.

A second basis for imposing a mechanic's lien on the fee interest of a landowner may exist if the contract between the landowner and the lessee requires the lessee to construct improvements that enhance the value of the freehold. See *Interiors Contracting*, 648 P.2d at 1388. Even though the landowners' leases with Crossroads may have required the Crossroads project to be constructed, that is not necessarily determinative of whether the

landowners' interests are subject to the lien. See *Gorman v. Birrell*, 41 Utah 274, 125 P. 685 (1912); *Morrow v. Merritt*, 16 Utah 412, 52 P. 667 (1898). The law is that "a lessor is subject to a lien for improvements by a tenant if the lease 'requires or obligates the tenant to construct improvements which substantially enhance the value of the freehold'" *Interiors Contracting*, 648 P.2d at 1387 (citing *Utley v. Wear*, 333 S.W.2d 787 (Mo. Ct. App. 1960) (emphasis in original)).

Thus, for a lien to exist against the lessor's interest, the value of the lessor's interest must be substantially enhanced. Ordinarily, improvements will enhance the value of an interest in land only if the value of the improvements extend beyond the life of the lease. The landowners' leases with Crossroads have a primary term of 62 years and three 10-year renewal option periods—a total potential lease term of 92 years.

Allen Steel presented no evidence of the useful life of the improvements or their value in either 62 years or 92 years. The trial court concluded, as a matter of fact:

There is no evidence that the useful life of the improvements extends beyond the lease period or that the landowners will benefit from the construction of the Crossroads Project.

It follows, as the trial court held, that there is no lien against the landowners' fee estate.

VIII. DEFICIENCY JUDGMENT AND ATTORNEY FEES

Allen Steel also cross-appeals the portion of the judgment in its favor against Okland-Foulger which limited liability for any deficiency judgment after foreclosure of the mechanic's lien to Okland-Foulger. Allen Steel contends that Crossroads and Equitable should also be held liable for a deficiency judgment.³ The developers, Crossroads and Equitable, claim that if they are subject to the mechanic's lien law, their financial exposure to Allen Steel is limited to their interest in the lien property under Utah Code Ann. §38-1-16 (1988). They argue that they are not personally liable to plaintiff under the mechanic's lien law because they were not parties to the contract between Allen Steel and Okland-Foulger. There is, therefore, no basis for holding them personally liable for attorney fees under the mechanic's lien law.

Utah Code Ann. §38-1-18 (1988) governs the assessment of attorney fees in a mechanic's lien action and remains unchanged since the events underlying this lawsuit:

In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.

Equitable and Crossroads concede that even if Allen Steel is entitled to attorney fees from funds derived from the mechanic's lien foreclosure sale under §38-1-18, they are not personally liable for Allen Steel's attorney fees resulting from the lien foreclosure action. They contend that §38-1-

18 should be read to be consistent with §38-1-16 (1988), which reads:

Every person whose claim is not satisfied as herein provided may have judgment docketed for the balance unpaid, and execution therefor against the party personally liable.

Attorney fees become part of the taxable costs in a lien foreclosure action pursuant to §38-1-18. Section 38-1-16 limits a deficiency judgment, which would include attorney fees, to a "party personally liable." That term means the person or party that entered into the contract which gave rise to the furnishing of labor and supplies to improve the real property and is personally liable therefor.

In sum, we affirm the award of attorney fees. We also affirm the trial court's award of a deficiency judgment for attorney fees against Okland-Foulger.

IX. DELAY COSTS

Allen Steel next argues that it is entitled to a new trial on the issue of delay damages. Since Okland-Foulger agreed to "accept overall responsibility for design" and the trial court found that Allen Steel had breached no contractual obligation, Allen Steel argues, it was improper to deny plaintiff delay damages for defendants' fault in delaying completion of the contract. We disagree.

Simply because Okland-Foulger accepted overall responsibility for design and because Allen Steel did not breach its obligation, do not necessarily mean that Okland-Foulger's conduct was the proximate cause of Allen Steel's damages. Paragraph 3 of the trial court's conclusions indicate an independent source of fault for delay:

Joseph Patrick was an independent contractor and Allen Steel is not liable in tort to Okland-Foulger for his negligence, nor is Okland-Foulger liable in tort to Allen Steel for Patrick's negligence.

Nor does plaintiff convince us with its sparse review on this point that there are "volumes of evidence supporting the decision in favor of Allen Steel." Plaintiff does not cite any significant portion of the record to show that the trial court's findings were clearly erroneous. It does not follow that the trial court's ruling that Allen Steel is not entitled to delay damages was clearly erroneous because the trial court made the finding that the evidence "is insufficient to prove that Okland-Foulger [and] Equitable ... breached a duty of care to adequately review the design."

Affirmed.

WE CONCUR:

Gordon R. Hall, Chief Justice
Richard C. Howe, Associate Chief Justice
Christine M. Durham, Justice

1. We make no ultimate determination of responsibility between Okland-Foulger and the engineer, Joseph Patrick, or anyone else. Our holding, of course, does not extend beyond the facts of this case.

2 The same conclusion applies to the tort counter-claims of defendants Equitable and Crossroads. Allen Steel owed them no contractual or statutory duty beyond what was owed to Okland-Foulger. Furthermore, since the trial court ruled that Joseph Patrick was an independent contractor for whose negligence Allen Steel was not liable to Okland-Foulger, we perceive no basis for holding Allen Steel liable in tort to Equitable or Crossroads. If anything, Equitable and Crossroads may have a cause of action against Patrick.

3 Paragraph seven of the trial court's order of February 13, 1985, gives rise to this appeal. It provides: "In the event a deficiency may remain in satisfaction of Allen Steel's judgment, costs, and any attorney's fees it may then have been awarded after applying all the proceeds of the foreclosure sale, Allen Steel is awarded a deficiency judgment against Okland-Foulger." The names of "Crossroads Plaza Associates" and "Equitable" are lined through, implying that there may be no deficiency judgment against Crossroads or Equitable for the judgment, costs, or attorney fees under the mechanic's lien statute.

ZIMMERMAN, Justice: (Concurring and Dissenting)

I concur in the opinion of Justice Stewart, except for that portion which upholds the trial court's conclusion that the contract between the parties constituted an express disclaimer of any warranty by Allen Steel that the design met the requirements of the Uniform Building Code. In my view, Allen Steel undertook to satisfy the requirements of the Code and breached that provision of the contract.

The trial court found that "the January 11, 1978, proposal required Allen Steel Company to design the 'structural elements' of the tower," that the January 11th proposal was "the contract between Allen Steel" and defendants, that Allen Steel knew that its design was to conform to the requirements of the Uniform Building Code, that the structural design provided by Allen Steel pursuant to the proposal "[did] not comply with the Uniform Building Code," and that Okland-Foulger and Equitable breached no duty of care in their review of the defective design. Yet in the face of this prima facie finding of a breach of contract by Allen Steel, the trial court concluded as a matter of law that the following language from the January 11th proposal "excluded any warranty for the design."

This proposal is offered for the design, fabrication, and erection of the structural elements only for the Tower and Mall. The following design parameters have been used for the structural design suggested by our engineers to compute the price. Owner's engineer is to check this design and make changes if necessary to enable him to accept overall responsibility for design. Changes that effect [sic] quality, weight, or complexity of structural members will require an adjustment in price.

(Emphasis added) In my view this language cannot accomplish the end claimed for it by the trial court.

I agree with Justice Stewart that parties to a construction contract can disclaim liability for a design's failure to comply with applicable building codes. However, I am of the view that to disclaim such a warranty, which Justice Stewart concedes is implied in all contracts to provide designs for buildings and which I conclude the trial judge found was an express part of the agreement between the parties here, the language used must be clear and unambiguous. Vague generalities about "responsibility" for the design in a bidding document will not suffice to disclaim a responsibility so fundamentally linked to the furnishing of a detailed design. See, e.g., *United States v. Spearin*, 248 U.S. 132, 137 (1918), *Kelley v. Bank Bldg. and Equip. Corp. of America*, 453 F.2d 774, 777 (10th Cir. 1972), *Jack B. Parson Constr. Co. v. Utah Dep't of Transp.*, 725 P.2d 614, 616-17 (Utah 1986), *Thorn Constr. Co. v. Utah Dep't of Transp.*, 598 P.2d 365, 367-68 (Utah 1979).

Because I conclude that the trial court erred in concluding that the above language operated as a disclaimer, I would reverse the portion of the judgment that found against defendants on their counterclaim against Allen Steel and remand the case for further proceedings.

Cite as

119 Utah Adv. Rep. 17

IN THE SUPREME COURT OF THE STATE OF UTAH

CO-AX ENTERPRISES CORP., a Utah
corporation,

Plaintiff and Appellant,

v.

The TRIAX CO., a Utah corporation,
Defendant and Appellee.

No. 20033

FILED: October 11, 1989

Fourth District, Utah County
Honorable George E. Ballif

ATTORNEYS:

Claron C. Spencer, Dale E. Anderson, Salt
Lake City, for appellant

William L. Nixon, Alpine, Denver C. Snuffer,
Salt Lake City, for appellee

This opinion is subject to revision before
publication in the Pacific Reporter.

STEWART, Justice:

Co-Ax Enterprises ("Co-Ax") appeals from a judgment of the trial court which held that Co-Ax failed to prove its breach of contract claim brought against The Triax Company ("Triax").

The parties have failed to make clear the exact procedural course of the case in the trial court. Nevertheless, we believe that the case is subject to an appropriate decision and proceed on the basis of the case as presented in the briefs.

The United States Navy contracted in late 1978 with the defendant, Triax, to renovate certain military housing on the island of Midway. The Navy contract included provisions that Triax was to provide all the materials and equipment necessary for the work; that the manner of delivery of materials and equipment to the island was the choice of Triax; and that the term of the contract was 360 days. In January of 1979, Triax submitted to the Navy a progress schedule which was approved February 10, 1979, calling for the work to be completed within a five-month period.

Triax subcontracted the labor for the job. During late 1978 and early 1979, Triax negotiated with the plaintiff, Co-Ax, to provide the labor force for all but the plumbing work for the project. The contract price between Triax and Co-Ax was determined by a calculation of the cost of labor plus an agreed profit per month for a period of five months. On January 11, 1979, Co-Ax and Triax signed a formal contract. The contract, however, was silent as to the supply and delivery of materials and equipment and the length of time for which the labor force was to be supplied by Co-Ax.

The laborers supplied by Co-Ax arrived on the island in the first part of February. At the end of five months, the renovation of the buildings had not been completed and the work had come to a standstill because of shortages of materials due to delays in the delivery of materials and equipment. The material shortages were caused by shipping problems. Triax had selected the Military Sea Transport Service as the shipping agent. During this period, Co-Ax received payments from Triax on the contract, for the labor performed but nothing for the profit which had been agreed upon.

Co-Ax's request for additional funds to remain on the island for a longer term was refused by Triax, and Co-Ax's construction crew abandoned the project. The job was completed by a new work crew employed by Triax. Subsequently, Co-Ax, as the labor subcontractor, sued Triax, contending that the parties had agreed that Co-Ax would provide the labor source for a five-month period and that Triax had promised to supply materials and equipment. Co-Ax contended that the inability to complete its work was the result of shortages of materials and equipment due to delays in delivery which were the responsibility of Triax. Co-Ax sought damages for lost profits and compensation for tools which had been left behind.

Triax denied that it had agreed to provide materials and equipment to meet Co-Ax schedules and denied that the subcontract was to be completed within the five-month period. Triax contended that the January 11, 1979 writing was the entire agreement between the parties. Triax counterclaimed against Co-Ax, seeking damages for the additional employees which it had to hire to complete the project.

APPENDIX 3

Budinich United States Supreme Court decision

conspicuous gap in the workmen's compensation field by furnishing protection against death or disability to laborers and mechanics employed by contractors or other persons on Federal property." S.Rep. No. 2294, at 1.

That Congress intended nothing more than to provide much-needed coverage to these workers is shown by the single revealing item in the scanty legislative history of the statute. The House version of the bill not only would have extended coverage to these workers, but also would have subjected federal property to state safety and insurance regulations and would have authorized state officers to enter upon federal premises in furtherance of these aims. The Senate struck out these latter provisions at the request of the Executive Branch of the Federal Government, noting expressly that they "would not only produce conflicts of authority between State and Federal officers but would also mark a wide departure from the well-established principle that Federal officers should have complete charge of any regulations pertaining to Federal property." S.Rep. No. 2294, at 2. As no such departure from normal practice was intended by Congress, the Senate version of the bill was enacted.

This background to the enactment of § 290 shows that Congress did not intend to expose federal instrumentalities to the kind of detailed and mandatory regulation that is provided by the Ohio law at issue in this case. The Court's response on this point is simply to assert that "[t]he effects of direct regulation on the operation of federal projects are significantly ¹¹⁹⁵more intrusive than the incidental regulatory effects of such an additional award provision." *Ante*, at 1712. In some instances the Court may be correct that the effects of direct regulation could be more intrusive than a provision for penalty awards, but the question here is not whether these two things are exactly the same, but simply whether the "regulatory effects" of the penalty provision, which as set out above are far from "incidental," are the kinds of

effects that Congress did not intend to sanction when it enacted § 290. These effects are clearly impermissible under the rationale that the Senate articulated for removing from the bill the two obnoxious provisions that had been included in the House version. And even if I were to conclude that Congress had acted ambiguously on this score, I would at least be forced to conclude that Congress offered no "clear" or "unambiguous" mandate for the kind of specific regulatory compulsion that this Ohio law exerts upon this federal facility.

I therefore respectfully dissent.



486 U.S. 196, 100 L.Ed.2d 178

¹¹⁹⁶Joseph G. BUDINICH, Petitioner,

v.

BECTON DICKINSON AND COMPANY,
Respondent.

No. 87-283.

Argued March 21, 1988.

Decided May 23, 1988.

Former employee brought action against former employer for breach of contract, quantum meruit, misrepresentation, and outrageous conduct in connection with reduction in commissions. The United States District Court for the District of Colorado, Sherman G. Finesilver, Chief Judge, entered judgment on jury verdict for less than amount sought, denied employee's new trial motions, and later rendered decision with regard to attorney fees. Employee appealed. The Court of Appeals, 807 F.2d 155, dismissed, and employee petitioned for writ of certiorari. The Supreme Court, Justice Scalia, held that district court's decision on merits was "final deci-

sion," from which appeal had to be timely taken, even though employee's request for attorney fees had not yet been decided

Affirmed

1. Federal Courts ⇐372

Although state law generally supplies rules of decision in federal diversity cases, it does not control resolution of issues governed by federal statute USCA Const Art 6, cl 2 28 USCA § 1652

2. Federal Courts ⇐433

In diversity case, any question as to appealability of district court's decision as final decision on merits is question of federal and not state law USCA Const Art 6, cl 2, 28 USCA §§ 1291, 1652

3 Federal Courts ⇐433

Federal procedural statute mandating when appeal might be taken from one federal court to another could properly be applied in diversity case without violating Tenth Amendment USCA Const Amend 10, 28 USCA § 1291

4. Federal Courts ⇐599

Order ending litigation on merits may qualify as "final order" for purpose of appeal, though question still remains to be decided, where resolution of question will not alter order or moot or revise decisions embodied in order 28 USCA § 1291

See publication Words and Phrases for other judicial constructions and definitions

5. Federal Courts ⇐599

Decision on merits is "final decision" for purpose of appeal, whether or not there remains for adjudication a request for attorney fees attributable to case 28 USCA § 1291

See publication Words and Phrases for other judicial constructions and definitions

6. Federal Courts ⇐670

Court of Appeals was without jurisdiction to review case on merits, where notice of appeal was not timely filed FRAP Rules 2, 3(a), 4(a)(1), 26(b), 28 USCA

Syllabus *

In petitioner's employment compensation action, which respondent removed from a Colorado state court to the Federal District Court on the basis of diversity of citizenship, judgment was entered on the jury's verdict for petitioner in an amount considerably less than he had sought. Petitioner timely filed new trial motions and a motion for attorney's fees under Colorado law. On May 14, 1984, the court denied the new trial motions but found that petitioner was entitled to attorney's fees, and, on August 1, 1984, entered a final order determining the amount of the fees. On August 29, petitioner filed notice of appeal to the Court of Appeals, covering all of the District Court's post-trial orders. Although affirming the attorney's fees award, the court granted respondent's motion to dismiss as to all other issues on the grounds that the judgment was final and immediately appealable upon entry of the May 14 order denying the new trial motions, and that the appeal notice was not filed within 30 days of that order as required by Federal Rules of Appellate Procedure 4(a)(1) and (4).

Held

1. The question whether the District Court's decision on the merits was appealable before the attorney's fees determination was made is governed by federal law—specifically 28 USC § 1291, which provides that all district court "final decisions" are appealable to the courts of appeals—and not by Colorado law. Although state law generally supplies the rules of decision in federal diversity cases, it does not control the resolution of issues governed by federal statute. The contention that the

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the

reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

application of § 1291 to diversity cases would violate the Tenth Amendment to the Federal Constitution is without merit, since § 1291 is "rationally capable of classification" as a procedural rule, and is therefore necessary and proper for implementing Congress' Art. III, § 1, power to establish federal courts. *Hanna v. Plumer*, 380 U.S. 460, 472, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8. Pp. 1719-1720.

2. A decision on the merits is a "final decision" for purposes of § 1291, and is therefore immediately appealable, even though the recoverability or amount of attorney's fees for the litigation remains to be determined. The merits order ends the litigation on the merits, and the remaining fees question does not prevent finality, since it is collateral to, and separate¹⁹⁷ from, the order, and resolution of it cannot alter or amend the order or moot any decisions that the order embodies. According to different treatment to attorney's fees when they are deemed part of the merits recovery by statutory or decisional law (as petitioner claims is the case in Colorado) would not serve § 1291's purposes, and would disserve the interests of courts and litigants because, since the merits or nonmerits status of a fee provision is often unclear, the issue of finality and hence the jurisdictional time for appeal would be left in doubt. The argument that the Court of Appeals' decision constitutes a significant change in the law and therefore should be applied only prospectively cannot avail petitioner, since, regardless of whether such a change has occurred, the untimely filed notice of appeal did not give the court jurisdiction to review the merits decision. Pp. 1720-1722.

807 F.2d 155 (CA10 1986), affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

Thomas Frank, Evergreen, Colo., for petitioner.

Terre Lee Rushton, Denver, Colo., for respondent.

Justice SCALIA delivered the opinion of the Court.

Petitioner brought this action in Colorado state court to recover employment compensation allegedly due. Respondent removed the case to the United States District Court for the District of Colorado on the basis of diversity of citizenship. 28 U.S.C. §§ 1332, 1441. A jury awarded petitioner a verdict of \$5,000 (considerably less than had been sought), and judgment was entered on March 26, 1984. Petitioner timely filed new-trial motions, challenging various rulings by the District Court, and a motion for attorney's fees. (Colorado law provides that in a suit to collect compensation due from employment "the judgment . . . shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action." Colo.Rev.Stat. 8-4-114 (1986).) On May 14, 1984, the District Court denied the new-trial motions, found that petitioner was entitled to attorney's fees, and requested further briefing and documentation before determining¹⁹⁸ their amount. The District Court issued its final order concerning the attorney's fees on August 1, 1984. On August 29, petitioner filed notice of appeal to the Court of Appeals for the Tenth Circuit, covering all the District Court's post-trial orders.

Respondent filed a motion to dismiss the appeal, arguing that the judgment was final and immediately appealable when the order denying the new-trial motions was entered May 14, 1984, and that the notice of appeal was not filed within 30 days of that order as required by Federal Rules of Appellate Procedure 4(a)(1) and (4). The Court of Appeals granted the motion to dismiss as to all issues except the award of attorney's fees, which it affirmed. We granted certiorari, 484 U.S. 895, 108 S.Ct. 226, 98 L.Ed.2d 185 (1987), to resolve a conflict in the Courts of Appeals. Compare, e.g., *Holmes v. J. Ray McDermott & Co.*, 682 F.2d 1143, 1146 (CA5 1982), cert. denied, 459 U.S. 1107, 103 S.Ct. 732, 74 L.Ed.2d 956 (1983), with, e.g., *International Assn. of Bridge, Structural, Ornamen-*

tal, and Reinforcing Ironworkers' Local Union 75 v. Madison Industries, Inc., 733 F.2d 656, 658 (CA9 1984).

It is common ground in this case that if the District Court's decision on the merits was appealable before its determination of attorney's fees, then the merits appeal was untimely. See Fed. Rules App.Proc. 4(a)(1), (4), (6); Fed. Rules Civ.Proc. 54(a), 58. Petitioner contends that Colorado law governs this question and that "[u]nder Colorado law a claim is not final and appealable until attorneys fees are fully determined." Brief for Petitioner 13. We do not agree that Colorado law governs.

[1-3] Although state law generally supplies the rules of decision in federal diversity cases, see 28 U.S.C. § 1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938), it does not control the resolution of issues governed by federal statute, see U.S. Const., Art. VI, cl. 2 (Supremacy Clause); 28 U.S.C. § 1652; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-405, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967). Under 28 U.S.C. § 1291, "all final¹¹⁹⁹ decisions of the district courts" are appealable to the courts of appeals. In using the phrase "final decisions" Congress obviously did not mean to borrow or incorporate state law. "Final decisions" is not a term like "property," which naturally suggests a reference to state-law concepts, cf. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); and the context of its use in § 1291 makes such a reference doubly implausible, since that provision applies to all federal litigation and not just diversity cases. Nor is it possible to accept petitioner's contention that § 1291 does not apply to diversity cases because it would violate the Tenth Amendment to the Constitution. We have held that enactments "rationally capable of classification" as procedural rules are necessary and proper for carrying into execution the power to establish federal courts vested in Congress by Article III, § 1. *Hanna v. Plumer*, 380 U.S. 460, 472, 85

S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965); see also *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 5, and n. 3, 107 S.Ct. 967, 969, and n. 3, 94 L.Ed.2d 1 (1987). A statute mandating when an appeal may be taken from one federal court to another certainly meets this test. Cf. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (treating appealability as an issue of federal law in a case brought under diversity jurisdiction).

[4, 5] The question before us, therefore, is whether a decision on the merits is a "final decision" as a matter of federal law under § 1291 when the recoverability or amount of attorney's fees for the litigation remains to be determined. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633-634, 89 L.Ed. 911 (1945). A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 308-309, 82 S.Ct. 1502, 1514-1515, 8 L.Ed.2d 510 (1962); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 513-516, 70 S.Ct. 322, 325-326, 94 L.Ed. 299 (1950). We have all but held that an attorney's fees determination¹²⁰⁰ fits this description. In *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), we held that a request for attorney's fees under 42 U.S.C. § 1988 is not a motion "to alter or amend the judgment" within the meaning of Federal Rule of Civil Procedure 59(e) because it does not seek "reconsideration of matters properly encompassed in a decision on the merits." 455 U.S., at 451, 102 S.Ct., at 1166. This holding was based on our conclusion that "a request for attorney's fees under § 1988 raises legal issues collateral to" and "separate from" the decision on the merits. *Id.*, at 451-452, 102

S.Ct., at 1166. We went so far as to observe in dicta that “[t]he collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as ‘final’ and ‘appealable.’” *Id.*, at 452–453, n. 14, 102 S.Ct., at 1166–1167, n. 14. See also *Sprague v. Ticonic National Bank*, 307 U.S. 161, 170, 59 S.Ct. 777, 781–782, 83 L.Ed. 1184 (1939) (observing that a petition for attorney’s fees in equity is “an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree”).

The foregoing discussion is ultimately question-begging, however, since it assumes that the order to which the fee issue was collateral *was* an order ending litigation on the merits. If one were to regard the demand for attorney’s fees as *itself* part of the merits, the analysis would not apply. The merits would then not have been concluded, and § 1291 finality would not exist. See *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 740–742, 96 S.Ct. 1202, 1204–1205, 47 L.Ed.2d 435 (1976). As a general matter, at least, we think it indisputable that a claim for attorney’s fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action. At common law, attorney’s fees were regarded as an element of “costs” awarded to the prevailing party, see 10 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil* § 2665 (1983), which are not generally treated as part of the merits judgment, cf. Fed.Rule Civ.Proc. 58 (“Entry of the judgment ¹²⁰¹shall not be delayed for the taxing of costs”). Many federal statutes providing for attorney’s fees continue to specify that they are to be taxed and collected as “costs,” see *Marek v. Chesny*, 473 U.S. 1, 43–48, 105 S.Ct. 3012, 3035–3036, 87 L.Ed.2d 1 (1985) (BRENNAN, J., dissenting) (citing 63 such statutes)—as does, in fact, the Colorado statute at issue here.

Petitioner contends, however, that the general status of attorney’s fees for § 1291 purposes must be altered when the statutory or decisional law authorizing them makes plain (as he asserts Colorado law does) that they are to be part of the merits judgment. This proposition is not without some support. Some Courts of Appeals have held that the statutes creating liability for attorney’s fees can cause them to be part of the merits relief for purposes of § 1291. See, e.g., *Holmes v. J. Ray McDermott & Co.*, 682 F.2d, at 1146; *McQuarter v. Atlanta*, 724 F.2d 881, 882 (CA11 1984) (*per curiam*). This Court itself implicitly acknowledged the possibility of such an approach in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980), where, in holding that a judgment on the merits was final and immediately appealable apart from the question of attorney’s fees, we expressly distinguished cases in which the plaintiff had specifically requested attorney’s fees as part of the prayer in his complaint. *Id.*, at 479–480, 100 S.Ct., at 749–750, n. 5. Now that we are squarely confronted with the question, however, we conclude that the § 1291 effect of an unresolved issue of attorney’s fees for the litigation at hand should not turn upon the characterization of those fees by the statute or decisional law that authorizes them.

We have said elsewhere that “[t]he considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system.” *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69, 68 S.Ct. 972, 977, 92 L.Ed. 1212 (1948). Indeed, in the context of the finality provision governing appealability of matters from state courts to this Court, 28 U.S.C. § 1257, ¹²⁰²we have been willing in effect to split the “merits,” regarding a claim for an accounting to be sufficiently “dissociated” from a related claim for delivery of physical property that “[i]n effect, such a contro-

versy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092 (1945). This practical approach to the matter suggests that what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as "merits" or "nonmerits," but rather preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.

For all practical purposes an appeal of merits-without-attorney's-fees when there is a statute deeming the attorney's fees to be part of the merits is no more harmful to the trial process than an appeal of merits-without-attorney's-fees when there is no such statute. That "deeming" does not render the appeal more disruptive of ongoing proceedings, more likely to eliminate a trial judge's opportunity for reconsideration, more susceptible to being mooted by settlement, or in any way (except nominally) a more piecemeal enterprise. In short, no interest pertinent to § 1291 is served by according different treatment to attorney's fees deemed part of the merits recovery; and a significant interest is disserved. The time of appealability, having jurisdictional consequences, should above all be clear. We are not inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known. Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a "final decision" for purposes of § 1291

whether or not ¹²⁰³there remains for adjudication a request for attorney's fees attributable to the case.

[6] Finally, petitioner argues that even if the Court of Appeals properly decided the question of appealability, the decision constitutes a significant change in the law and therefore should only be applied prospectively. Regardless of whether today's decision works a change, our cases hold that "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-380, 101 S.Ct. 669, 676, 66 L.Ed.2d 571 (1981). Since the Court of Appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely, and since the taking of an appeal within the prescribed time is mandatory and jurisdictional, see Fed. Rules App.Proc. 2, 3(a), 4(a)(1), 26(b); *United States v. Robinson*, 361 U.S. 220, 229, 80 S.Ct. 282, 288, 4 L.Ed.2d 259 (1960); *Farley Transportation Co. v. Santa Fe Trail Transportation Co.*, 778 F.2d 1365, 1368-1370 (CA9 1985), the Court of Appeals was without jurisdiction to review the decision on the merits.

. . .

The Tenth Circuit correctly concluded that federal law governed the question of appealability and that petitioner's judgment on the merits was final and appealable when entered. Accordingly, its judgment is

Affirmed.



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APPENDIX 4

DETERMINATIVE STATUTES AND RULES

Statutes

Sec. 34-35-6, Utah Code
Sec. 34-35-7.1(3)(b), Utah Code
Sec. 63-46b-12(1)(a)(iv), Utah Code
Sec. 63-46b-14(2A), Utah Code
Sec. 63-46b-16(4)(d), Utah Code

Rules

Rule 54, Utah Rules of Civil Procedure
Rule 54(b), Utah Rules of Civil Procedure
Rule 4(c), Utah Rules of Appellate Procedure
Rule 35, Utah Rules of Appellate Procedure

sions it has rendered, and the other work performed by it,

(i) recommend policies to the governor, and submit recommendation to employers, employment agencies and labor organizations to implement those policies,

(j) recommend any legislation concerning discrimination because of race, sex, color, national origin, religion, age, or handicap to the governor that it considers necessary,

(k) within the limits of any appropriations made for its operation, cooperate with other agencies or organizations, both public and private, in the planning and conducting of educational programs designed to eliminate discriminatory practices prohibited under this chapter, and

(l) adopt an official seal

(2) The division shall investigate alleged discriminatory practices involving officers or employees of state government if requested to do so by the Career Service Review Board

(3) (a) In any hearing held under the authority of this chapter, the division may

(i) subpoena witnesses and compel their attendance at the hearing,

(ii) administer oaths and take the testimony of any person under oath, and

(iii) compel any person to produce for examination any books, papers, or other information relating to the matters raised by the complaint

(b) Any of the following may conduct hearings

(i) the commission

(ii) any commissioner,

(iii) the coordinator, or

(iv) a hearing examiner or agent appointed by the commission

(c) If a witness fails or refuses to obey a subpoena issued by the commission, the commission may petition the district court to enforce the subpoena

(d) (i) No person may be excused from attending or testifying or from producing records, correspondence, documents, or other evidence in obedience to a subpoena issued by the commission under the authority of this section on the ground that the evidence or the testimony required may tend to incriminate him or subject him to any penalty or forfeiture

(ii) No person may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he shall be compelled to testify or produce evidence after having claimed his privilege against self-incrimination, except that a person testifying is not exempt from prosecution and punishment for perjury

1000

34-35-6. Discriminatory or unfair employment practices — Permitted practices.

(1) It is a discriminatory or prohibited employment practice

(a) (i) for an employer to refuse to hire, or promote, or to discharge, demote, terminate any person, or to retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified, because of race, color, sex, pregnancy, child-

birth, or pregnancy-related conditions, age, if the individual is 40 years of age or older, religion, national origin, or handicap. No applicant nor candidate for any job or position may be considered "otherwise qualified," unless he possesses the education, training, ability, moral character, integrity, disposition to work, adherence to reasonable rules and regulations, and other job related qualifications required by an employer for any particular job, job classification, or position to be filled or created,

(ii) as used in this chapter, "to discriminate in matters of compensation" means the payment of differing wages or salaries to employees having substantially equal experience, responsibilities, and skill for the particular job. However, nothing in this chapter prevents increases in pay as a result of longevity with the employer, if the salary increases are uniformly applied and available to all employees on a substantially proportional basis. Nothing in this section prohibits an employer and employee from agreeing to a rate of pay or work schedule designed to protect the employee from loss of Social Security payment or benefits if the employee is eligible for those payments,

(b) for an employment agency

(i) to refuse to list and properly classify for employment, or to refuse to refer an individual for employment, in a known available job for which the individual is otherwise qualified, because of race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, religion, national origin, age, if the individual is 40 years of age or older, or handicap,

(ii) to comply with a request from an employer for referral of applicants for employment if the request indicates either directly or indirectly that the employer discriminates in employment on account of race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, religion, national origin, age, if the individual is 40 years of age or older, or handicap,

(c) for a labor organization to exclude any individual otherwise qualified from full membership rights in the labor organization, or to expel the individual from membership in the labor organization, or to otherwise discriminate against or harass any of its members in full employment of work opportunity, or representation, because of race, sex, pregnancy, childbirth, or pregnancy-related conditions, religion, national origin, age, if the individual is 40 years of age or older, or handicap,

(d) for any employer, employment agency, or labor organization to print, or circulate, or cause to be printed or circulated, any statement, advertisement, or publication, or to use any form of application for employment or membership, or to make any inquiry in connection with prospective employment or membership, which expresses, either directly or indirectly, any limitation, specification, or discrimination as to race, color, religion, sex, pregnancy, childbirth, or pregnancy-related conditions, national origin, age, if the individual is 40 years of age or older, or handicap or intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification, or required by, and

given to, an agency of government for security reasons;

(e) for any person, whether or not an employer, an employment agency, a labor organization, or the employees or members thereof, to aid, incite, compel, or coerce the doing of an act defined in this section to be a discriminatory or prohibited employment practice, or to obstruct or prevent any person from complying with this chapter, or any order issued under it, or to attempt, either directly or indirectly, to commit any act prohibited in this section,

(f) for any employer, labor organization, joint apprenticeship committee, or vocational school, providing, coordinating, or controlling apprenticeship programs, or providing, coordinating, or controlling on-the-job-training programs, instruction, training, or retraining programs

(i) to deny to, or withhold from, any qualified person, because of race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, religion, national origin, age, if the individual is 40 years of age or older, or handicap the right to be admitted to, or participate in any apprenticeship training program, on-the-job-training program, or other occupational instruction, training or retraining program,

(ii) to discriminate against or harass any qualified person in that person's pursuit of such programs, or to discriminate against such a person in the terms, conditions, or privileges of such programs, because of race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, religion, national origin, age, if the individual is 40 years of age or older, or handicap,

(iii) to print, or publish, or cause to be printed or published, any notice or advertisement relating to employment by the employer, or membership in or any classification or referral for employment by a labor organization, or relating to any classification or referral for employment by an employment agency, indicating any preference, limitation, specification, or discrimination based on race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, religion, national origin, age, if the individual is 40 years of age or older, or handicap except that a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on race, color, religion, sex, pregnancy, childbirth, or pregnancy-related conditions, age, national origin, or handicap when religion, race, color, sex, age, national origin, or handicap is a bona fide occupational qualification for employment

Nothing contained in Subsections (1)(a) through (1)(f) shall be construed to prevent the termination of employment of an individual who is physically, mentally, or emotionally unable to perform the duties required by that individual's employment, or to preclude the variance of insurance premiums, of coverage on account of age, or affect any restriction upon the activities of individuals licensed by the liquor authority with respect to persons under 21 years of age

(2) (a) It is not a discriminatory or prohibited employment practice

(i) for an employer to hire and employ employees, for an employment agency to classify or refer for employment any individual,

for a labor organization to classify its membership or to classify or refer for employment any individual or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of religion, sex, pregnancy, childbirth or pregnancy-related conditions, age, national origin, or handicap in those certain instances where religion, sex, pregnancy, childbirth, or pregnancy-related conditions, age, if the individual is 40 years of age or older, national origin, or handicap is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise,

(ii) for a school, college, university, or other educational institution to hire and employ employees of a particular religion if the school, college, university, or other educational institution is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religious corporation, association, or society, or if the curriculum of the school, college, university, or other educational institution is directed toward the propagation of a particular religion,

(iii) for an employer to give preference in employment to his own spouse, son, son-in-law, daughter, daughter-in-law, or to any person for whom the employer is or would be liable to furnish financial support if those persons were unemployed, or for an employer to give preference in employment to any person to whom the employer during the preceding six months has furnished more than one-half of total financial support regardless of whether or not the employer was or is legally obligated to furnish support, or for an employer to give preference in employment to any person whose education or training was substantially financed by the employer for a period of two years or more

(b) Nothing contained in this chapter applies to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of the business or enterprise under which preferential treatment is given to any individual because he is a native American-Indian living on or near an Indian reservation

(c) Nothing contained in this chapter shall be interpreted to require any employer, employment agency, labor organization, vocational school, joint labor-management committee, or apprenticeship program subject to this chapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, age, national origin, or handicap of the individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, age, national origin, or handicap employed by any employer, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of that race, color, religion,

sex, age, national origin, or handicap in any community or county or in the available work force in any community or county.

(3) It is not a discriminatory or prohibited practice with respect to age to observe the terms of a bona fide seniority system or any bona fide employment benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this chapter except that no such employee benefit plan shall excuse the failure to hire any individual.

(4) Notwithstanding Subsection (3), or any other statutory provision to the contrary, other than Subsection (5) and Section 67-5-8, and except where age is a bona fide occupational qualification, no person shall be subject to involuntary termination or retirement from employment on the basis of age alone, if the individual is 40 years of age or older.

(5) Nothing in this section prohibits compulsory retirement of an employee who has attained at least 65 years of age, and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if that employee is entitled to an immediate nonforfeitable annual retirement benefit from his employer's pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, which benefit equals, in the aggregate, at least \$44,000. 1989

34-35-7. Repealed.

1985

34-35-7.1. Procedure for aggrieved person to file claim — Investigations — Adjudicative proceedings — Settlement — Reconsideration — Determination.

(1) (a) Any person claiming to be aggrieved by a discriminatory or prohibited employment practice may by himself, his attorney, or his agent, make, sign, and file with the commission a request for agency action.

(b) Every request for agency action shall be verified under oath or affirmation.

(c) A request for agency action made under this section shall be filed within 180 days after the alleged discriminatory or prohibited employment practice occurred.

(2) Any employer, labor organization, joint apprenticeship committee, or vocational school who has employees or members who refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a request for agency action asking the commission for assistance to obtain their compliance by conciliation or other remedial action.

(3) (a) Before a hearing is set or held as part of any adjudicative proceeding, the commission shall promptly assign an investigator to attempt a settlement between the parties by conference, conciliation, or persuasion.

(b) If no settlement is reached, the investigator shall make a prompt impartial investigation of all allegations made in the request for agency action.

(c) The commission and its staff, agents, and employees shall conduct every investigation in fairness to all parties and agencies involved, and may not attempt a settlement between the parties if it is clear that no prohibited employment practice has occurred.

(d) If the aggrieved party wishes to withdraw the request for agency action, he must do so prior to the issuance of a final order.

(4) (a) If the initial attempts at settlement are unsuccessful, and the investigator uncovers insuffi-

cient evidence during his investigation to support the allegations of discrimination or prohibited employment practice set out in the request for agency action, the investigator shall formally report these findings to the director.

(b) Upon receipt of the investigator's report, the director may issue a determination and an order for dismissal of the adjudicative proceeding.

(c) A party may make a written request to the director for an evidentiary hearing to review de novo the director's determination and orders within 30 days of the date of the determination and order for dismissal.

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(c) A party may file a written request to the director for an evidentiary hearing to review de novo the director's determination and order within 30 days of the date of the determination and order.

(d) If the director receives no timely request for a hearing, the order requiring the respondent to cease any discriminatory or prohibited employment practices and to provide relief to the aggrieved party becomes the final order of the commission.

(6) In any adjudicative proceeding, the investigator who investigated the matter may not participate in a hearing except as a witness, nor may he participate in the deliberations of the presiding officer.

(7) Prior to commencement of an evidentiary hearing, the party filing the request for agency action may reasonably and fairly amend any allegation, and the respondent may amend its answer. Those amendments may be made during or after a hearing but only with permission of the presiding officer.

(8) (a) If, upon all the evidence at a hearing, the presiding officer finds that a respondent has not engaged in a discriminatory or prohibited employment practice, the presiding officer shall issue an order dismissing the director's determination and ending the adjudicative proceeding.

(b) If a director's determination is dismissed, the presiding officer may order that the respondent be reimbursed by the complaining party for his attorneys' fees and costs.

(9) If upon all the evidence at the hearing, the presiding officer finds that a respondent has engaged in a prohibited discriminatory practice, the presiding officer shall issue an order requiring the respondent to cease any discrimination or prohibited employment practice and to provide relief to the complaining party, including reinstatement, back pay and benefits, and attorneys' fees.

(10) Conciliation between the parties is to be urged and facilitated at all stages of the adjudicative process.

(11) (a) Either party may file a written request for review of the order by the commission in accordance with Section 63-46b-12.

(b) If there is no timely request for review by the commission, the order issued by the presiding officer becomes the final order of the commission.

sex, age, national origin, or handicap in any community or county or in the available work force in any community or county.

(3) It is not a discriminatory or prohibited practice with respect to age to observe the terms of a bona fide seniority system or any bona fide employment benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this chapter except that no such employee benefit plan shall excuse the failure to hire any individual.

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(b) Every request for agency action shall be verified under oath or affirmation.

(c) A request for agency action made under this section shall be filed within 180 days after the alleged discriminatory or prohibited employment practice occurred.

(2) Any employer, labor organization, joint apprenticeship committee, or vocational school who has employees or members who refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a request for agency action asking the commission for assistance to obtain their compliance by conciliation or other remedial action.

(3) (a) Before a hearing is set or held as part of any adjudicative proceeding, the commission shall promptly assign an investigator to attempt a settlement between the parties by conference, conciliation, or persuasion.

(b) If no settlement is reached, the investigator shall make a prompt impartial investigation of all allegations made in the request for agency action.

(c) The commission and its staff, agents, and employees shall conduct every investigation in fairness to all parties and agencies involved, and may not attempt a settlement between the parties if it is clear that no prohibited employment practice has occurred.

(d) If the aggrieved party wishes to withdraw the request for agency action, he must do so prior to the issuance of a final order.

(4) (a) If the initial attempts at settlement are unsuccessful, and the investigator uncovers insuffi-

cient evidence during his investigation to support the allegations of discrimination or prohibited employment practice set out in the request for agency action, the investigator shall formally report these findings to the director.

(b) Upon receipt of the investigator's report, the director may issue a determination and an order for dismissal of the adjudicative proceeding.

(c) A party may make a written request to the director for an evidentiary hearing to review de novo the director's determination and orders within 30 days of the date of the determination and order for dismissal.

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(c) A party may file a written request to the director for an evidentiary hearing to review de novo the director's determination and order within 30 days of the date of the determination and order.

(d) If the director receives no timely request for a hearing, the order requiring the respondent to cease any discriminatory or prohibited employment practices and to provide relief to the aggrieved party becomes the final order of the commission.

(6) In any adjudicative proceeding, the investigator who investigated the matter may not participate in a hearing except as a witness, nor may he participate in the deliberations of the presiding officer.

(7) Prior to commencement of an evidentiary hearing, the party filing the request for agency action may reasonably and fairly amend any allegation, and the respondent may amend its answer. Those amendments may be made during or after a hearing but only with permission of the presiding officer.

(8) (a) If, upon all the evidence at a hearing, the presiding officer finds that a respondent has not engaged in a discriminatory or prohibited employment practice, the presiding officer shall issue an order dismissing the director's determination and ending the adjudicative proceeding.

(b) If a director's determination is dismissed, the presiding officer may order that the respondent be reimbursed by the complaining party for his attorneys' fees and costs.

(9) If upon all the evidence at the hearing, the presiding officer finds that a respondent has engaged in a prohibited discriminatory practice, the presiding officer shall issue an order requiring the respondent to cease any discrimination or prohibited employment practice and to provide relief to the complaining party, including reinstatement, back pay and benefits, and attorneys' fees.

(10) Conciliation between the parties is to be urged and facilitated at all stages of the adjudicative process.

(11) (a) Either party may file a written request for review of the order by the commission in accordance with Section 63-46b-12.

(b) If there is no timely request for review by the commission, the order issued by the presiding officer becomes the final order of the commission.

(c) The presiding officer may impose the conditions at any time after the intervention. 1987

63-46b-10. Procedures for formal adjudicative proceedings — Orders.

In formal adjudicative proceedings:

(1) Within a reasonable time after the hearing, or after the filing of any post-hearing papers permitted by the presiding officer, or within the time required by any applicable statute or rule of the agency, the presiding officer shall sign and issue an order that includes:

(a) a statement of the presiding officer's findings of fact based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted;

(b) a statement of the presiding officer's conclusions of law;

(c) a statement of the reasons for the presiding officer's decision;

(d) a statement of any relief ordered by the agency;

(e) a notice of the right to apply for reconsideration;

(f) a notice of any right to administrative or judicial review of the order available to aggrieved parties; and

(g) the time limits applicable to any reconsideration or review.

(2) The presiding officer may use his experience, technical competence, and specialized knowledge to evaluate the evidence.

(3) No finding of fact that was contested may be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.

(4) This section does not preclude the presiding officer from issuing interim orders to:

(a) notify the parties of further hearings;

(b) notify the parties of provisional rulings on a portion of the issues presented; or

(c) otherwise provide for the fair and efficient conduct of the adjudicative proceeding. 1988

63-46b-11. Default.

(1) The presiding officer may enter an order of default against a party if:

(a) a party in an informal adjudicative proceeding fails to participate in the adjudicative proceeding;

(b) a party to a formal adjudicative proceeding fails to attend or participate in a properly scheduled hearing after receiving proper notice; or

(c) a respondent in a formal adjudicative proceeding fails to file a response under Section 63-46b-6.

(2) An order of default shall include a statement of the grounds for default and shall be mailed to all parties.

(3) (a) A defaulted party may seek to have the agency set aside the default order, and any order in the adjudicative proceeding issued subsequent to the default order, by following the procedures outlined in the Utah Rules of Civil Procedure.

(b) A motion to set aside a default and any subsequent order shall be made to the presiding officer.

(c) A defaulted party may seek agency review under Section 63-46b-12, or reconsideration under Section 63-46b-13, only on the decision of the

presiding officer on the motion to set aside the default.

(4) (a) In an adjudicative proceeding begun by the agency, or in an adjudicative proceeding begun by a party that has other parties besides the party in default, the presiding officer shall, after issuing the order of default, conduct any further proceedings necessary to complete the adjudicative proceeding without the participation of the party in default and shall determine all issues in the adjudicative proceeding, including those affecting the defaulting party.

(b) In an adjudicative proceeding that has no parties other than the agency and the party in default, the presiding officer shall, after issuing the order of default, dismiss the proceeding. 1988

63-46b-12. Agency review — Procedure.

(1) (a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule.

(b) The request shall:

(i) be signed by the party seeking review;

(ii) state the grounds for review and the relief requested;

(iii) state the date upon which it was mailed; and

(iv) be sent by mail to the presiding officer and to each party.

(2) Within 15 days of the mailing date of the request for review, or within the time period provided by agency rule, whichever is longer, any party may file a response with the person designated by statute or rule to receive the response. One copy of the response shall be sent by mail to each of the parties and to the presiding officer.

(3) If a statute or the agency's rules require review of an order by the agency or a superior agency, the agency or superior agency shall review the order within a reasonable time or within the time required by statute or the agency's rules.

(4) To assist in review, the agency or superior agency may by order or rule permit the parties to file briefs or other papers, or to conduct oral argument.

(5) Notice of hearings on review shall be mailed to all parties.

(6) (a) Within a reasonable time after the filing of any response, other filings, or oral argument, or within the time required by statute or applicable rules, the agency or superior agency shall issue a written order on review.

(b) The order on review shall be signed by the agency head or by a person designated by the agency for that purpose and shall be mailed to each party.

(c) The order on review shall contain:

(i) a designation of the statute or rule permitting or requiring review;

(ii) a statement of the issues reviewed;

(iii) findings of fact as to each of the issues reviewed;

(iv) conclusions of law as to each of the issues reviewed;

(v) the reasons for the disposition;

(vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion

of the adjudicative proceeding is to be remanded,

(vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties, and

(viii) the time limits applicable to any appeal or review 1988

63-46b-13. Agency review — Reconsideration.

(1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order

(2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request

(3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied 1988

63-46b-14. Judicial review — Exhaustion of administrative remedies.

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required,

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if

(i) the administrative remedies are inadequate, or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b)

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter 1988

63-46b-15. Judicial review — Informal adjudicative proceedings.

(1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings, except that the juvenile court shall have jurisdiction over all state agency actions relating to removal or placement decisions regarding children in state custody

(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business

(2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include

(i) the name and mailing address of the party seeking judicial review,

(ii) the name and mailing address of the respondent agency,

(iii) the title and date of the final agency action to be reviewed, together with a duplicate copy, summary, or brief description of the agency action,

(iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action,

(v) a copy of the written agency order from the informal proceeding,

(vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review,

(vii) a request for relief, specifying the type and extent of relief requested,

(viii) a statement of the reasons why the petitioner is entitled to relief

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings

(b) The Utah Rules of Evidence apply in judicial proceedings under this section 1990

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record,

(b) the appellate court may tax the cost of preparing transcripts and copies for the record

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record, or

(ii) according to any other provision of law

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

1988

63-46b-17. Judicial review — Type of relief.

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

(i) order agency action required by law;

(ii) order the agency to exercise its discretion as required by law;

(iii) set aside or modify agency action;

(iv) enjoin or stay the effective date of agency action; or

(v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

1987

63-46b-18. Judicial review — Stay and other temporary remedies pending final disposition.

(1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.

(2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention.

(3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted.

(4) If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may not grant a stay or other temporary remedy unless it finds that:

(a) the agency violated its own rules in denying the stay; or

(b) (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter;

(ii) the party seeking judicial review will suffer irreparable injury without immediate relief;

(iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings; and

(iv) the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances.

1987

63-46b-19. Civil enforcement.

(1) (a) In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district courts.

(b) The action seeking civil enforcement of an agency's order must name, as defendants, each alleged violator against whom the agency seeks to obtain civil enforcement.

(c) Venue for an action seeking civil enforcement of an agency's order shall be determined by the requirements of the Utah Rules of Civil Procedure.

(d) The action may request, and the court may grant, any of the following:

(i) declaratory relief;

(ii) temporary or permanent injunctive relief;

(iii) any other civil remedy provided by law; or

(iv) any combination of the foregoing.

(2) (a) Any person whose interests are directly impaired or threatened by the failure of an agency to enforce an agency's order may timely file a complaint seeking civil enforcement of that order, but the action may not be commenced:

(i) until at least 30 days after the plaintiff has given notice of his intent to seek civil enforcement of the alleged violation to the agency head, the attorney general, and to each alleged violator against whom the petitioner seeks civil enforcement;

(ii) if the agency has filed and is diligently prosecuting a complaint seeking civil enforcement of the same order against the same or a similarly situated defendant; or

(iii) if a petition for judicial review of the same order has been filed and is pending in court.

(b) The complaint seeking civil enforcement of an agency's order must name, as defendants, the agency whose order is sought to be enforced, the agency that is vested with the power to enforce the order, and each alleged violator against whom the plaintiff seeks civil enforcement.

(c) Except to the extent expressly authorized by statute, a complaint seeking civil enforcement of an agency's order may not request, and the court may not grant, any monetary payment apart from taxable costs.

(3) In a proceeding for civil enforcement of an agency's order, in addition to any other defenses allowed by law, a defendant may defend on the ground that:

PART VII. JUDGMENT.

Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which 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 the rights and liabilities of all the parties.

(c) **Demand for judgment.**

(1) **Generally.** Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) **Costs.**

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3), (4) [Deleted.]

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision

from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket. (Amended effective January 1, 1985.)

Amendment Notes. — Subdivisions (d)(3) and (d)(4), relating to the award of costs by the appellate court and costs in original proceedings before the Supreme Court, were repealed with the adoption of the Utah Rules of Appellate Procedure, effective January 1, 1985. See, now, Rule 34(d), Utah R.App.P.

Compiler's Notes. — This rule is similar to Rule 54, F.R.C.P.

Cross-References. — Continuances, discre-

tion to require payment of costs, U.R.C.P. 40(b).

Judges' retirement fee, taxing as costs, § 49-6-301.

State, payment of costs awarded against, § 78-27-13.

Stay of judgment upon multiple claims, U.R.C.P. 62(h).

Witness fees, taxing as costs, § 21-5-8.

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Absence of express determination.

In action based on alleged breach of loan agreement, where trial court improperly dismissed plaintiff-corporation's complaint with prejudice and granted defendant-bank judgment on its counterclaim and cross-claim, judgment on cross-claim and counterclaim would be subject, on remand, to revision since all claims presented had not been adjudicated and since trial court made no express determina-

tion as required by this section. *M. & S. Constr. & Eng'g Co. v. Clearfield State Bank*, 24 Utah 2d 139, 467 P.2d 410 (1970).

Amendment of pleadings.

The proper application of Rule 15(b) and Subdivision (c)(1) of this rule, is that amendments should be allowed where a case has actually been tried on a different issue or a different theory than had been pleaded. *First Sec. Bank v. Colonial Ford, Inc.*, 597 P.2d 859 (Utah 1979).

Appeal as of right.

Where the requirements of this rule concerning appeal of orders in multi-party or multi-claim actions are satisfied, the parties are entitled to appeal such orders as a matter of right, and the Supreme Court does not have discretion to refuse to review the orders. *Pate v. Marathon Steel Co.*, 692 P.2d 765 (Utah 1984).

After a party or parties have availed themselves of the provisions of Subdivision (b), allowing an entry of judgment on "fewer than all of the claims or parties," an appeal may be had on the adjudicated claims or by those parties. *All Weather Insulation, Inc., v. Amiron Dev. Corp.*, 702 P.2d 1176 (Utah 1985).

Certification not determinative.

This rule does not necessarily mean there is a final judgment merely because the court's order so recites; there was in fact no final judgment where the trial court denied defendant's motion to dismiss, thus leaving the parties in court, then entered an order that the denial was a final judgment. *Little v. Mitchell*, 604 P.2d 918 (Utah 1979).

Costs.

—In general.

Costs were not recoverable at common law and are therefore generally allowable only in the amounts and in the manner provided by statute. *Frampton v. Wilson*, 605 P.2d 771 (Utah 1980).

"Costs," as used in Subdivision (d)(1), means those fees which are required to be paid to the court and to witnesses, and which the statutes authorize to be included in the judgment. *Frampton v. Wilson*, 605 P.2d 771 (Utah 1980).

Subdivision (d)(2) provides a process of review by a trial court of the amount claimed to

an entry of judgment, nor was it a final judgment for purposes of appeal. *Wilson v. Manning*, 645 P.2d 655 (Utah 1982); *Utah State Tax Comm'n v. Erekson*, 714 P.2d 1151 (Utah 1986); *Sather v. Gross*, 727 P.2d 212 (Utah 1986); *Ahlstrom v. Anderson*, 728 P.2d 979 (Utah 1986).

An unsigned minute entry does not constitute a final order for purposes of appeal. *State v. Crowley*, 737 P.2d 198 (Utah 1987).

Cited in *Huston v. Lewis*, 818 P.2d 531 (Utah 1991); *Boggs v. Boggs*, 824 P.2d 478 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

A.L.R. — Appealability of order suspending imposition or execution of sentence, 51 A.L.R.4th 939.

Rule 4. Appeal as of right: when taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

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(e) **Costs in other proceedings and agency appeals.** In all other matters before the court, including appeals from an agency, costs may be allowed as in cases on appeal from a trial court. Within 15 days after the expiration of the time in which a petition for rehearing may be filed or within 15 days after an order denying such a petition, the party to whom costs have been awarded may file with the clerk of the appellate court and serve upon the adverse party an itemized and verified bill of costs. The adverse party may, within 5 days after the service of the bill of costs file a notice of objection and a motion to have the costs taxed by the clerk. If no objection to the cost bill is filed within the allotted time, the clerk shall thereupon tax the costs and enter judgment against the adverse party. If the adverse party timely objects to the cost bill, the clerk, upon reasonable notice and hearing, shall determine and settle the costs, tax the same, and a judgment shall be entered thereon against the adverse party. The determination by the clerk shall be reviewable by the court upon the request of either party made within 5 days of the entry of judgment; unless otherwise ordered, oral argument shall not be permitted. A judgment under this section may be filed with the clerk of any district court in the state, who shall docket a certified copy of the same in the manner and with the same force and effect as judgments of the district court.

NOTES TO DECISIONS

Cited in Barber v. Barber, 792 P.2d 134
(Utah Ct. App. 1990).

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Appeal and
Error §§ 1009 to 1024.

C.J.S. — 5 C.J.S. Appeal and Error § 1979.
Key Numbers. — Costs ⇌ 221 et seq.

Rule 35. Petition for rehearing.

(a) **Time for filing; contents; answer; oral argument not permitted.** A rehearing will not be granted in the absence of a petition for rehearing. A petition for rehearing may be filed with the clerk within 14 days after the entry of the decision of the court, unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires. Counsel for petitioner must certify that the petition is presented in good faith and not for delay. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court. The answer to the petition for rehearing shall be filed within 14 days after the entry of the order requesting the answer, unless otherwise ordered by the court. A petition for rehearing will not be granted in the absence of a request for an answer.

(b) **Form of petition; length.** The petition shall be in a form prescribed by Rule 27. An original and six copies shall be filed with the court. Two copies shall be served on counsel for each party separately represented. Except by order of the court, a petition for rehearing and any response requested by the court shall not exceed 15 pages.

(c) **Action by court if granted.** If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(d) **Untimely or consecutive petitions.** Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk.

(Amended effective October 1, 1992.)

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