

2003

# Gary Porter Construction d/b/a Porter and Sons v. Fox Construction, Inc., and National Surety Corporation : Brief of Appellee and Cross Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Brian W. Steffensen; Steffensen Law Office; Attorneys for Appellee.

Jeffery R. Price, Michael E. Bostwick; Bostwick and Price, P.C.; Attorneys for Appellant.

---

## Recommended Citation

Brief of Appellee, *Gary Porter Construction v. Fox Construction, Inc.*, No. 20030071 (Utah Court of Appeals, 2003).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/4163](https://digitalcommons.law.byu.edu/byu_ca2/4163)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

JAN 12 2004

Paulette Stagg  
Clerk of the Court

---

IN THE UTAH COURT OF APPEALS

---

*Lodged*

GARY PORTER CONSTRUCTION  
dba PORTER & SONS

Plaintiff, Appellee and Cross-  
Appellant

vs.

FOX CONSTRUCTION, INC. and  
NATIONAL SURETY  
CORPORATION,

Case No. 20030071-Ca

Priority No. 15

Defendants, Appellants and  
Cross-Appellees

---

**BRIEF OF APPELLEE AND CROSS APPELLANT**

---

Appeal from Judgments entered in the Third Judicial District Court,  
Salt Lake County, State of Utah, Honorable William B. Bohling

---

Mr. Jeffery R. Price  
Mr. Michael E. Bostwick  
BOSTWICK & PRICE, P.C.  
139 East South Temple St., #320  
Salt Lake City, Utah 84111  
Attorneys for Appellant  
Fox Construction, Inc.

Mr. Brian W. Steffensen  
**Steffensen ❖ Law ❖ Office**  
2159 South 700 East, Suite 100  
Salt Lake City, Utah 84106  
Attorneys for Appellee and Cross-  
Appellant Gary Porter Construction  
dba Porter & Sons

### **Parties to this Appeal**

1. **Gary Porter Construction dba Porter & Sons** (“Porter”) was at all relevant times a sole proprietorship owned by Gary A. Porter.
2. **Fox Construction, Inc.** (“Fox”) was at all relevant times a corporation licensed as a general contractor in the State of Utah.
3. **National Surety Corporation** (“National”) was at all times relevant hereto an Illinois corporation which conducted business in the State of Utah.

## CHECKLIST FOR BRIEFS

☒ **RECORD HAS BEEN RETURNED.**

☒ **TIMELY FILING OF BRIEF**

An untimely brief may be rejected under **Rule 27(e)**. If a brief is untimely, a motion under **Rule 26** will be mandatory for permission to file a late brief

☒ **CORRECT NUMBER OF COPIES**

4. 1 Supreme Court: 10 copies, one containing original signature  
2 Court of Appeals: 8 copies, one containing original signature

☒ **LENGTH** (Excluding Addendum)

1. Appellant, Appellee/Cross-appellant 50 pages  
2. Appellant/Cross-appellee Reply: 25 pages  
3. Appellee/Cross-appellant Reply: 25 pages  
4. Guardian ad Litem or Intervenor: 50 pages  
5. Amicus Curiae No Limit

☒ **SIZE AND BINDING**

☒ **PRINTING REQUIREMENTS**

1. Proportionally spaced typeface must be 13-point or larger for both text and Footnotes; mono-spaced typeface may not contain more than 10 characters per inch.  
2. Print on both sides of the page.  
3. Double-spaced; 1 ½ spacing is unacceptable.  
4. 1" margin on all sides

☒ **COVER REQUIREMENTS**

1. Color: Appellant: Blue Appellant/Cross-appellee Reply: Gray  
Appellee/Cross-appellant: Red Appellee/Cross-appellant Reply: Gray  
Amicus, Intervenor, Guardian: Green  
2. Name of counsel and parties represented  
a. Counsel filing brief on lower right  
b. Opposing counsel on lower left

☒ **CONTENT REQUIREMENTS - IN ORDER STATED**

☒ List of all parties

☒ Table of Contents with page references

☒ Table of Authorities

☒ Jurisdictional Statement (Mandatory for Appellant)

☒ Statement of Issues & Standard of Review (Mandatory for Appellant)

1. Citation to record showing issue preserved in Trial court; or  
2. Statement of grounds for seeking review of issue not preserved in Trial Court

☒ Constitutional or Statutory Provisions

☒ Statement of Case (Mandatory for Appellant)

☒ Statement of Facts

☒ Summary of Argument

☒ Argument

☒ Conclusion

☒ Signature of counsel of record OR party if Pro Se

☒ Proof of Service

☒ Addendum: Findings of fact; memorandum decision; final order; Court of Appeals opinion when Petition for Certiorari is granted (Mandatory for Appellant)

**FILED**  
Utah Court of Appeals

**JAN 15 2004**

Paulette Staggs  
Clerk of the Court

---

IN THE UTAH COURT OF APPEALS

---

GARY PORTER CONSTRUCTION  
dba PORTER & SONS

Plaintiff, Appellee and Cross-  
Appellant

vs.

FOX CONSTRUCTION, INC. and  
NATIONAL SURETY  
CORPORATION,

Case No. 20030071-Ca

Priority No. 15

Defendants, Appellants and  
Cross-Appellees

---

**BRIEF OF APPELLEE AND CROSS APPELLANT**

---

Appeal from Judgments entered in the Third Judicial District Court,  
Salt Lake County, State of Utah, Honorable William B. Bohling

---

Mr. Jeffery R. Price  
Mr. Michael E. Bostwick  
BOSTWICK & PRICE, P.C.  
139 East South Temple St., #320  
Salt Lake City, Utah 84111  
Attorneys for Appellant  
Fox Construction, Inc.

Mr. Brian W. Steffensen  
**Steffensen ❖ Law ❖ Office**  
2159 South 700 East, Suite 100  
Salt Lake City, Utah 84106  
Attorneys for Appellee and Cross-  
Appellant Gary Porter Construction  
dba Porter & Sons

### **Parties to this Appeal**

1. **Gary Porter Construction dba Porter & Sons** (“Porter”) was at all relevant times a sole proprietorship owned by Gary A. Porter.
2. **Fox Construction, Inc.** (“Fox”) was at all relevant times a corporation licensed as a general contractor in the State of Utah.
3. **National Surety Corporation** (“National”) was at all times relevant hereto an Illinois corporation which conducted business in the State of Utah.

## TABLE OF CONTENTS

STATEMENT SHOWING JURISDICTION .....	1
STATEMENT OF ISSUES ON APPEAL .....	1
Fox’s Statement of Issues on Appeal Fails to Comply with U.R.App.P. Rule 24(a)(5) .....	1
Porter’s Statement of Issues Which are On Appeal .....	2
DETERMINATIVE STATUTES AND RULES .....	8
Fox’s Brief Again Failed to Comply with U.R. App. P. Rule 24. ....	8
Determinative Rules .....	8
U.R.Civ.P, Rule 15(c) .....	8
U.R.Civ.P, Rule 56(c) .....	8
U.R.Civ.P, Rule 56(e) .....	9
CJA 4-501(2)(B) .....	9
STATEMENT OF THE CASE .....	9
STATEMENT OF FACTS .....	15
SUMMARY OF ARGUMENTS .....	24
ARGUMENT .....	26
THE SUMMARY JUDGMENT AGAINST FOX WAS FAIR AND JUST IN ALL RESPECTS AND SHOULD BE AFFIRMED .....	26
Fox Did Not Comply with CJA 4-501(2)(B) .....	26
Due to Non Compliance with CJA 4-501, Porter’s Statement of Undisputed Facts Became “Deemed Admitted” .....	28

Judge Bohling Reviewed Fox’s Objection and Determined that it Substantively Did Not Dispute Porter’s Statement of Undisputed Facts . . . . .	29
Consequently, Judge Bohling’s Decision to Grant Summary Judgment Against Fox and in Favor of Porter is Supported by Two Separate and Legally Sufficient Bases . . . . .	30
THE SUMMARY JUDGMENT IN FAVOR OF NATIONAL SHOULD BE REVERSED AND JUDGMENT SHOULD BE ENTERED AGAINST NATIONAL AND IN FAVOR OF PORTER ON THE BOND . . . . .	31
URCivP Rule 15(c) Allows Amendments to Relate Back in Time to the Filing of the Original Complaint. . . . .	31
The Discovery Rule Tolloed the Payment Bond Statute of Limitations.. . . .	41
a. Fox/National Concealed the Payment Bond Information from Porter.. .	42
b. Special Circumstances Exist Rendering the Statute of Limitations Unjust and Irrational. . . . .	46
National’s Attorney Should Have Been Required to Allocate Their Fees Between Fox and National. . . . .	47
STATEMENT OF RELIEF SOUGHT BY PORTER . . . . .	49
ADDENDUM . . . . .	51
A July 18, 2002 Memorandum Decision and Order	
B Order Denying Motion for Relief From National’s Summary Judgment	



## TABLE OF AUTHORITIES

### CASES

<i>Attorney General v. Pomeroy</i> , 93 Utah 426, 73 P.2d 1277, 1294 (1937) . . . . .	40
<i>Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.</i> , 970 P.2d 1273, 1277 (Utah 1998) . . . . .	4,5,6
<i>Berenda v. Langford</i> , 914 P.2d 45, 53 (Utah 1996) . . . . .	42
<i>Certified Sur. Group, Ltd. v. UT Inc.</i> , 960 P.2d 904, 905-06 (Utah 1998). . . . .	4,5,6
<i>Doxey-Layton Co. v. Clark</i> , 548 P.2d 902, 906 (Utah 1976) . . . . .	32, 34, 39, 40
<i>Fennell v. Green</i> , 77 P.3d 339 (Ut App 2003) . . . . .	2, 27
<i>Golding v. Ashley Cent. Irrigation Co.</i> , 902 P.2d 142, 148 (Utah 1995) . . . . .	28
<i>Hartford Leasing Corp. v. State</i> , 888 P.2d 694, 701-02 (Utah Ct.App. 1994) . . . . .	2, 28
<i>Harper v. Summit County</i> , 963 P.2d 768, 776 (Utah App. 1998) . . . . .	46
<i>Hodges v. Gibson Prods. Co.</i> , 811 P.2d 151, 156 (Utah 1991) . . . . .	43
<i>Hom v. Utah Dept. of Public Safety</i> , 962 P.2d 95, 102 (Utah App. 1998).. . . .	42
<i>Lewis v. Moultree</i> , 627 P.2d 94, 98 (Utah 1981) . . . . .	31
<i>Loporto v. Hoegemann</i> , 1999 UT App 175, ¶¶ 14, 982 P.2d 586 . . . . .	28
<i>Lovendahl v. Jordan School District</i> , 63 P.3d 705 (Utah 2002) . . . . .	27, 28
<i>McKay v. Hardy</i> , 973 P.2d 941 (Utah 1998) . . . . .	3,4,7,8
<i>Meyers v. Interwest Corp.</i> , 632 P.2d 879 (Utah 1981) . . . . .	31
<i>Nunez v. Albo</i> , 53 P. 3d 2 (Ut App 2002) . . . . .	14, 23, 34, 35, 36, 39, 40, 41
<i>Parker v. Dodgion</i> , 971 P.2d 496, 497 n. 3 (Utah 1998) . . . . .	28

<i>Penrose v. Ross</i> , 71 P.3d 631 (Ut App. 2003) . . . . .	39, 40, 41
<i>Perry v. Pioneer Wholesale Supply Co.</i> , 681 P. 2d 214 (Utah 1984) . . . . .	32, 33, 34
<i>Price v. Armour</i> , 949 P.2d 1251, 1255 (Utah 1997) . . . . .	28
<i>Russell v. Standard Corp.</i> , 898 P.2d 263, 265 (Utah 1995) . . . . .	32, 39
<i>Sevy v. Security Title Co.</i> , 902 P.2d 629, 636 (Utah 1995) . . . . .	47
<i>Sulzen v. Williams</i> , 977 P.2d 497, 501 (Utah App. 1999) . . . . .	32, 29
<i>Vina v. Jefferson Ins. Co.</i> , 761 P.2d 581, 587 (Utah Ct.App.1988) . . . . .	31, 39, 40
<i>Warren v. Provo City Corp.</i> 838 P.2d 1125, 1129 (Utah 1992) . . . . .	47
<i>Wells v. Wells</i> , 871 P.2d 1036, 1038 (Utah App. 1994) . . . . .	2
<i>Wilcox v. Geneva Rock Corp.</i> , 911 P. 2d 367 (Utah 1996) . . . . .	32
<i>Williams v. Howard</i> , 970 P.2d 1282, 1284 (Utah 1998) . . . . .	41, 42

## **STATUTES**

Utah Code 63-56-38(1) . . . . .	45
Utah Code 78-2-2(3)(a) . . . . .	1
Utah Code 78-2-2(4) . . . . .	1

## **RULES**

CJA 4-501 . . . . .	2, 26, 28
CJA 4-501(2)(B) . . . . .	9, 12, 13, 14, 25, 26, 27, 30
U.R.Civ.P., Rule 15(c) . . . . .	1, 8, 31, 33, 39, 40, 41
U.R.Civ.P, Rule 56(c) . . . . .	8, 25

U.R.Civ.P., Rule 56(e) .....	9
U.R.App.P. Rule 24(a)(5) .....	1
U.R.App.P. Rule 24(a)(6) .....	8

## **TREATISES**

Black's Law Dictionary 748 (7th ed. 1999) .....	40
Webster's Ninth New Collegiate Dictionary 597 (1986) .....	40

## **STATEMENT SHOWING JURISDICTION**

Pursuant to Utah Code 78-2-2(3)(a) this civil appeal is within the jurisdiction of the Utah Supreme Court and was transferred to the Utah Court of Appeals pursuant to Utah Code 78-2-2(4).

## **STATEMENT OF ISSUES ON APPEAL**

This is the consolidation of two separate appeals: (a) one filed by Fox challenging the granting of the summary judgment in favor of Porter, and (b) another filed by Porter challenging the summary judgment dismissing Porter's claims against National based upon a Statute of Limitation and not holding that Rule 15(c) allowed relation back of an amended complaint to the date of the filing of the original complaint, and then the awarding of attorney's fees to National without apportioning between work done for Fox as opposed to work done for National. Fox is designated the Appellant. Porter is the Appellee and Cross-Appellant. National is the Cross-Appellee on Porter's "Cross" Appeal.

**Fox's Statement of Issues on Appeal Fails to Comply with U.R.App.P. Rule 24(a)(5).** Rule 24(a)(5) requires the statement of issues on appeal to cite to the record where the issue was preserved for appeal, and also requires an identification of the applicable standard of review for each issue. Fox has failed to satisfy either of these requirements. Its brief is procedurally deficient in this regard and should be stricken.

**Porter's Statement of Issues Which are On Appeal.**

1. Was Judge Bohling Correct in Ruling that Fox's Memorandum in Support of the Objection to Plaintiff's Motion for Summary Judgment Failed to Comply with the Requirements of Code of Judicial Administration, Rule 4-501? *Preserved for Appeal in Porter's Reply Memorandum in Support of Motion for Summary Judgment* R. 614- 654; *and in oral argument at the hearing on the motion for summary judgment on April 11, 2002* R. 1261; *and in oral argument at the second hearing on the motion for summary judgment on April 29, 2002* R. 1262:27-59.

Standard of Review: A trial court's interpretation of a rule in the Utah Code of Judicial Administration presents a question of law reviewed for correctness. *Wells v. Wells*, 871 P.2d 1036, 1038 (Utah App. 1994). A trial court's ruling enforcing the requirements of CJA 4-501 shall be reviewed under an abuse of discretion standard. ("In addition, the trial court has discretion in requiring compliance with Rule 4-501. *See Hartford Leasing Corp. v. State*, 888 P.2d 694, 701-02 (Utah Ct.App. 1994) (upholding trial court's exercise of discretion in refusing to accept supplemental memoranda outside bounds of rule 4-501) *Fennell v. Green*, 77 P.3d 339 (Ut App 2003)

2. Was Judge Bohling Correct in Ruling that Fox's Memorandum in Support of the Objection to Plaintiff's Motion for Summary Judgment Failed to Properly Dispute Porter's Statement of Undisputed Facts? *Preserved for Appeal in Porter's Reply Memorandum in Support of Motion for Summary Judgment* R. 614- 654; *and in oral*

*argument at the hearing on the motion for summary judgment on April 11, 2002 R. 1261; and in oral argument at the second hearing on the motion for summary judgment on April 29, 2002 R. 1262:27-59.*

Standard of Review: “...this court will review the lower court's findings of fact under the clearly erroneous standard and its conclusions of law under a correctness standard. With respect to mixed questions of law and fact, we will review the underlying facts under the deferential clear error standard; however, the legal effect of those facts is within the province of the appellate court, and no deference need be given a [lower] court's resolution of such questions of law.” *McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

3. Was it reversible error for Judge Bohling to conclude that Porter’s Amended Complaint raising claims against National did not relate back to the date of the filing of the original Complaint under Rule 15 of the Utah Rules of Civil Procedure? *Preserved for Appeal in Porter’s Memorandum in Opposition to Defendant National Surety Corp’s Motion for Summary Judgment R. 238-338, and in oral argument at the second hearing on the motion for summary judgment on April 29, 2002 R. 1262:27-59.*

Standard of Review: “...this court will review the lower court's findings of fact under the clearly erroneous standard and its conclusions of law under a correctness standard. With respect to mixed questions of law and fact, we will review the underlying facts under the deferential clear error standard; however, the legal effect of those facts is within the province of the appellate court, and no deference need be given a [lower] court's resolution of such questions of law.” *McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

4. Was it reversible error for Judge Bohling to fail to find that the actions of Fox and the State of Utah to conceal the identity of the bond company tolled the statute of limitations?

*Preserved for Appeal in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for Summary Judgment* R. 238-338, and in oral argument at the second hearing on the motion for summary judgment on April 29, 2002 R. 1262:27-59.

Standard of Review: "...this court will review the lower court's findings of fact under the clearly erroneous standard and its conclusions of law under a correctness standard. With respect to mixed questions of law and fact, we will review the underlying facts under the deferential clear error standard; however, the legal effect of those facts is within the province of the appellate court, and no deference need be given a [lower] court's resolution of such questions of law." *McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

5. Were their issues of fact as to whether Porter's actions in attempting to learn the identity of the bond company were reasonable which should have precluded the granting of summary judgment in favor of National? *Preserved for Appeal in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for Summary Judgment* R. 238-338, and in oral argument at the second hearing on the motion for summary judgment on April 29, 2002 R. 1262:27-59.

Standard of Review: "...[W]e review the trial court's summary judgment rulings for correctness. *Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1277 (Utah 1998); *Certified Sur. Group, Ltd. v. UT Inc.*, 960 P.2d 904, 905-06 (Utah 1998).

"We consider only whether the trial court correctly applied the law and correctly

concluded that no disputed issues of material fact existed." *Aurora Credit Servs.*, 970 P.2d at 1277.

6. Were their factual issues as to whether there were “exceptional circumstances that rendered the application of the statute of limitations unjust” which should have precluded granting summary judgment in favor of National? *Preserved for Appeal in Porter’s Memorandum in Opposition to Defendant National Surety Corp’s Motion for Summary Judgment* R. 238-338, and in oral argument at the second hearing on the motion for summary judgment on April 29, 2002 R. 1262:27-59.

Standard of Review: “[W]e review the trial court's summary judgment rulings for correctness. *Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1277 (Utah 1998); *Certified Sur. Group, Ltd. v. UT Inc.*, 960 P.2d 904, 905-06 (Utah 1998). "We consider only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact existed." *Aurora Credit Servs.*, 970 P.2d at 1277.

7. Were their issues of fact as to the closeness of the relationship between Fox and National, and whether and how much National knew about Porter’s claims and lawsuit, which should have precluded granting summary judgment in favor of National? *Preserved for Appeal in Porter’s Memorandum in Opposition to Defendant National Surety Corp’s Motion for Summary Judgment* R. 238-338, and in oral argument at the second hearing on the motion for summary judgment on April 29, 2002 R. 1262:27-59.

Standard of Review: “[W]e review the trial court's summary judgment rulings for correctness. *Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1277 (Utah



1998); *Certified Sur. Group, Ltd. v. UT Inc.*, 960 P.2d 904, 905-06 (Utah 1998). "We consider only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact existed." *Aurora Credit Servs.*, 970 P.2d at 1277.

8. Was it error for Judge Bohling to conclude that simply because the relationship between Fox and National was one of privity of contract, there could not be a sufficient closeness of relationship or identity of interest to warrant relation back under Rule 15(c)? *Preserved for Appeal in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for Summary Judgment* R. 238-338, and in oral argument at the second hearing on the motion for summary judgment on April 29, 2002 R. 1262:27-59; and in Porter's Motion for Relief from Summary Judgment, Memorandum in Support thereof and Reply Memorandum R. 926-945, 946-47, 1070-1076; and in the oral argument on said Motion for Relief from Summary Judgment on October 22, 2002 R. 1263.

Standard of Review: "...[W]e review the trial court's summary judgment rulings for correctness. *Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1277 (Utah 1998); *Certified Sur. Group, Ltd. v. UT Inc.*, 960 P.2d 904, 905-06 (Utah 1998). "We consider only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact existed." *Aurora Credit Servs.*, 970 P.2d at 1277.

9. Was it reversible error for the Court, pursuant to the Motion for Relief from Summary Judgment, to fail to hold (a) that there is always a close-enough relationship between a contractor and its surety to allow relation back, (b) that based upon the admissions of Floyd Cox presented to the Court, there was a sufficiently close relationship between Fox and its Surety to allow relation back, and/or (c) the issue of closeness of Fox and its Surety was at least disputed and

should have been determined by the trier of fact before the Court concluded that there should be no relationship back? *Preserved for Appeal in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for Summary Judgment* R. 238-338, and in oral argument at the second hearing on the motion for summary judgment on April 29, 2002 R. 1262:27-59; and in *Porter's Motion for Relief from Summary Judgment, Memorandum in Support thereof and Reply Memorandum* R. 926-945, 946-47, 1070-1076; and in the oral argument on said *Motion for Relief from Summary Judgment* on October 22, 2002 R. 1263.

Standard of Review: "...this court will review the lower court's findings of fact under the clearly erroneous standard and its conclusions of law under a correctness standard. With respect to mixed questions of law and fact, we will review the underlying facts under the deferential clear error standard; however, the legal effect of those facts is within the province of the appellate court, and no deference need be given a [lower] court's resolution of such questions of law." *McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

10. Was it reversible error for the Court to grant all of the fees requested by National's attorney's – even those incurred in defending Fox and not necessarily National? *Preserved for Appeal in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for Award of Attorney's Fees* R. 895-901; and in the oral argument thereon at the hearing on October 22, 2002 R. 1263.

Standard of Review: "...this court will review the lower court's findings of fact under the clearly erroneous standard and its conclusions of law under a correctness standard. With respect

to mixed questions of law and fact, we will review the underlying facts under the deferential clear error standard: however, the legal effect of those facts is within the province of the appellate court, and no deference need be given a [lower] court's resolution of such questions of law.” *McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

### **DETERMINATIVE STATUTES AND RULES**

**Fox’s Brief Again Failed to Comply with U.R. App. P. Rule 24.** Rule 24(a)(6) requires an appellant to set forth in his brief verbatim any and all determinative constitutional provisions, statutes, ordinances, rules and/or regulations. Fox’s Appellant’s Brief fails to do so, and should be stricken for non-compliance with the Rules of Appellate Procedure.

**Determinative Rules.** The following Rules are determinative:

#### **U.R.Civ.P. Rule 15(c)**

“(c) *Relation back of amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”

#### **U.R.Civ.P. Rule 56(c)**

“(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. **The judgment sought shall be rendered if** the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that **there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.** A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.” (Emphasis added)

### U.R.Civ.P, Rule 56(e)

“(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. ... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, **must set forth specific facts showing that there is a genuine issue for trial.** If he does not so respond, summary judgment, if appropriate, shall be entered against him.” (Emphasis added)

### CJA 4-501(2)(B)

“(B) *Memorandum in opposition to the motion.* The points and authorities in opposition to a motion for summary judgment **shall begin with a section that contains a verbatim restatement of each of the movant’s statement of facts** as to which the party contends a genuine issue exists followed by a concise statement of material facts which support the party’s contention. **Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies.** All material facts set forth in the movant’s statement and properly supported by an accurate reference to the record **shall be deemed admitted for the purpose of summary judgment unless specifically controverted** by the opposing party’s statement.” (Emphasis added)

### STATEMENT OF THE CASE

In the Fall of 1997, Porter and Defendant Fox Construction, Inc. (“Fox”) entered into a written subcontract agreement for the construction of the University of Utah’s Women’s Gymnastic Training Center, wherein Porter was to provide **specific work identified in the Subcontract** – only those specific sections cited therein – for a total lump sum of \$146,740.00, excluding any change orders. In October, 1997 Porter began performing the work required of it under the terms and scope of the parties’ written agreement.

Soon after Porter began its work, Fox, through its supervisors and project manager Jeff Wood, began requesting that Porter perform **additional work that was clearly outside the scope of the parties' written subcontract**. Porter continued to perform the work required of it under the parties' written agreement and **also performed the additional work requested by Fox**.

In connection with all the work Porter was providing to the Project, it invoiced Fox approximately once a month, identifying by line item the work it had performed subsequent to the last invoice and the cost associated with each line item of work. **Initially, Fox paid Porter for all the work it was providing, both inside and outside the scope of the parties' original written agreement**. But within a few months, Fox stopped paying Porter according to the invoices submitted, and instead began falsely claiming that all the work being performed was under the parties' written agreement.

Over the duration of the Project, Porter continued to perform all work required under the parties' written agreement plus the additional work outside the scope of the written contract as requested by Fox, all the while attempting to negotiate with Fox and collect the amounts billed in Porter's invoices. Occasionally, Fox would admit that it owed Porter for the additional work and pay Porter accordingly. But, by the end of Porter's involvement on the Project, Fox ultimately refused to pay Porter for all the work that Porter had performed. Fox refused to pay the amounts still due under the parties' written agreement and refused to pay the amounts still due for the additional work outside

the scope of the written agreement that Porter performed at the request of Fox. The difference in the value of the work performed by Porter and the amount paid by Fox was in excess of \$160,000.00. As a result Porter was forced to initiate this lawsuit.

Porter performed its last work on or about May 16, 1999. Gary Porter and his son, Mark Porter, contacted Fox and the State of Utah numerous times to try to learn the identity of Fox's bonding company. Porter's attorney also made numerous attempts to get this information. It is undisputed that Porter made all of these attempts to get the bond information. It is also undisputed that neither Fox nor the State of Utah ever gave any bonding information to Porter. From Porter's affidavits, it appears that Fox and the State deliberately withheld this information from Porter.

Porter filed his original complaint herein on or about May 16, 2000 without naming the bond company National because Porter had been wholly thwarted in its attempts to learn the identity of National. Fox's initial Rule 26(a) disclosures also did not disclose the bonding information. It was not until after the one year statute of limitations for suing bonding companies was believed by Fox to have expired that Fox finally gave Porter the name of its bonding company.

Porter filed a motion to amend to add National as a party, and to assert a claim on the bond. Fox's and National's attorneys did not oppose this motion to amend. Judge Bohling granted the motion to amend on February 28, 2001. Porter filed his amended complaint naming National on March 14, 2001. There is an issue of whether this waived

the statute of limitations claim/defense.

National filed its motion for summary judgment, raising a statute of limitations defense. Porter opposed the motion, alleging that under Rule 15(c) the amended complaint should relate back and was therefore timely, that the discovery rule tolled the statute, that Fox and National had deliberately withheld the bonding information from Porter, and that extraordinary factors otherwise favored a refusal to enforce the statute of limitations.

Porter filed its own motion for summary judgment for the monies due. In Porter's memorandum, Porter set forth in sixty-five (65) separate paragraphs a very detailed statement of undisputed facts supporting Porter's claims. The record submitted with the motion was over an inch thick. Fox filed an "Objection" to the motion for summary judgment, and a Memorandum in Support of this Objection (collectively "Objection"). This opposing memorandum did not comply with CJA 4-501(2)(B) in that (a) it did not set forth verbatim all of Porter's statements of undisputed fact which Fox alleged were in dispute, and (b) it did not set forth next to each of said undisputed facts any facts supported by citations to the record which Fox believed disputed each of Porter's facts. Rather, Fox merely said that it "admitted" or "denied" Porter's facts number by number, with no evidentiary back up for the denials whatsoever. Fox then set forth certain "additional" disputed facts which did have citations to the record, but none of which were cross-referenced to Porter's statements of undisputed fact.

Porter filed a motion to strike this Objection because it was too late. Porter also filed a motion to strike the “additional” disputed facts on the grounds that these supposed “facts” were without proper foundation or other evidentiary support. For instance, Floyd Cox tried to testify about matters which were only discussed, if at all, between Gary Porter and Fox’s foreman, Jeff Wood.

A hearing was held on these motions on April 29, 2002. After hearing argument on National’s motion for summary judgment, Judge Bohling ruled that Porter’s efforts to learn the identity of Fox’s bonding company had not been diligent enough, that Porter knew that it likely had a bond claim and should have some how tried harder to learn the identify of the bonding company. Judge Bohling also ruled that since the relationship between Fox and National was only one of “privity of contract,” Rule 15(c) would not allow relation back. Consequently, Judge Bohling granted National’s Motion for Summary Judgment and dismissed Porter’s claims against National.

With respect to Porter’s claims against Fox, Judge Bohling heard long and detailed argument as to (a) why Fox’s Objection was deficient under CJA 4-501(2)(B) and that Porter’s statement of undisputed fact should be deemed admitted, and (b) why Fox’s Objection nevertheless did not in reality dispute Porter’s statement of undisputed fact. Judge Bohling took a fairly lengthy recess from the bench to consider these arguments. When Judge Bohling returned to the bench, he announced that:

“I’ve had a chance to give considerable consideration to this motion brought here



by Porter. There is the issue that was raised fairly by Porter that the defendant's memorandum was untimely. It was untimely by a considerable period of time, yet the Court felt in the interest of justice that it should properly consider that memorandum.

But having done so, the Court also believes that it should give a very high level of scrutiny to that memo and the requirements of Rule 4-501 subparagraph ... (2)(b). I've done so, and it's my view that the issues of fact that are being raised by the defendant, Fox, simply don't raise genuine issues of disputed fact, given the standards I have [to] apply under 4-501(2)(c), and I believe that summary judgment should appropriately be granted.

I don't even — I don't find in those undisputed facts an issue of fact on [section] 2300. There was an articulate argument made as to why there should be an issue of fact, but I don't find it in the memorandum, and it seems to me that the issues of — the assertions that have been made here by the plaintiff I asked to these various matters are appropriately submitted to the Court without dispute and [the motion for summary judgment] should be granted.” R. 1262, pp 58 - 59.

Both parties later filed motions to set aside these rulings. Porter filed his motion based upon the then just announced *Nunez v. Albo*, 53 P. 3d 2 (UT App 2002) decision (which allowed relation back for parties with only a privity of contract relationship) and certain factual admissions/testimony obtained from Fox in a supplemental proceeding to the effect that Fox and National had an extremely close financial relationship and identity

of interest. Fox filed its motion to set aside based upon certain new affidavits of Floyd and Nellyn Cox (principals of Fox). Porter moved to strike these affidavits because they were still without foundation. Neither of the Coxes were involved in the negotiation of the Porter Subcontract, or the supervision of Porter's work. Neither of the Coxes are competent to testify about the matters that they attempted to raise in their new affidavits.

Both parties requested an award of attorney's fees.

A hearing was held on October 22, 2002. After argument, Judge Bohling denied both motions to set aside the summary judgments. In denying Porter's motion to set aside, Judge Bohling continued to rule that a privity of contract relationship simply cannot as a matter of law be close enough to allow relation back, despite the holding in *Nunez*.

Judge Bohling also granted National almost all of the fees that it requested, without making any allocations for work performed on behalf of Fox and not National.

Fox appealed the summary judgment in favor of Porter and against it.

Porter appealed the summary judgment in favor of National, and the award of attorney's fees to National.

The appeals were consolidated, and Fox has filed its Appellant's Brief.

### **STATEMENT OF FACTS**

1. Defendant Fox Construction, Inc. ("Fox") entered into a general contract with the University of Utah ("University") for the construction of the Women's Gymnastics Training Facility on the University's campus in Salt Lake City, Utah. (the

“Project”) Fox’s contract with the owner provides that Fox will “furnish labor, materials and equipment to complete the work as required in the Contract Documents . . .” Contract documents include the specifications found in the Project Manual. *Statement of Undisputed Fact No. 1 in Porter’s Memorandum in Support of Motion for Summary Judgment* R. 396 - 552, 397

2. In connection with the Project, Fox and Defendant National Surety Corporation (“National”) issued a Payment Bond for the benefit of persons supplying labor, equipment and material in connection with the Project. *Statement of Undisputed Fact No. 2 in Porter’s Memorandum in Support of Motion for Summary Judgment* R. 396 - 552, 398
3. Fox entered into a written subcontract with Plaintiff Porter & Sons (“Porter”), under which Porter was to “furnish and install all materials, equipment and labor **per plans, specification sections 02000, 02070, 02230, 02601, 02680, 02700 and 02721 and addendums 1 and 2**” for the sum of \$146,740.00. *Statement of Undisputed Fact No. 3 in Porter’s Memorandum in Support of Motion for Summary Judgment* R. 396 - 552, 398 ( *See Copy of Written Subcontract attached to said Memorandum as Exhibit C., at R. 423*)
4. This written subcontract excluded any change orders, and has an integration clause. *Statement of Undisputed Fact No. 4 in Porter’s Memorandum in Support of Motion for Summary Judgment* R. 396 - 552, 398

5. Fox's Project Manager, Jeff Wood prepared the written subcontract between Fox and Porter. *Statement of Undisputed Fact No. 5 in Porter's Memorandum in Support of Motion for Summary Judgment* R. 396 - 552, 398.
6. Porter performed all required work under the written Subcontract. *Statement of Undisputed Fact No. 6 in Porter's Memorandum in Support of Motion for Summary Judgment* R. 396 - 552, 398
7. Fox has admitted that Porter performed all the work identified in specification sections 02230, 02700, and 02721 of the written Subcontract. *Statement of Undisputed Fact No. 7 in Porter's Memorandum in Support of Motion for Summary Judgment* R. 396 - 552, 398-99
8. Specification section 02680 was mistakenly included in Porter's scope of work under the written Subcontract and pursuant to an oral agreement between Porter and Fox, Porter was instructed not provide any labor, equipment or materials covered under that specification section. *Statement of Undisputed Fact No. 8 in Porter's Memorandum in Support of Motion for Summary Judgment* R. 396 - 552, 399
9. In addition to the work performed under the written Subcontract, Porter was requested by Fox to perform additional work outside the scope of the written Subcontract. This included work under specification sections 02300 (Earthwork), 02665 (Water Lines, Valves and Appurtenances) and 02711 (Foundation Drainage

Systems). The work performed by Porter under these sections was clearly outside the scope of the written subcontract and required the payment of additional compensation to Porter. *Statement of Undisputed Fact No. 9 in Porter's*

*Memorandum in Support of Motion for Summary Judgment* R. 396 - 552, 399

10. As Porter performed all the work required under the written Subcontract and the additional work requested by Fox, it invoiced Fox for such work, identifying line item by line item, the work performed and the associated cost for the work.

*Statement of Undisputed Fact No. 10 in Porter's Memorandum in Support of Motion for Summary Judgment* R. 396 - 552, 399

11. Fox admitted that it received and reviewed all the invoices submitted by Porter.

*Statement of Undisputed Fact No. 11 in Porter's Memorandum in Support of Motion for Summary Judgment* R. 396 - 552, 399

12. Jeff Wood admitted that on several occasions he and Gary Porter discussed Porter's invoices and went through them line item by line item to make sure that

Fox was properly paying Porter for the work Porter had done. *Statement of Undisputed Fact No. 12 in Porter's Memorandum in Support of Motion for Summary Judgment* R. 396 - 552, 399

13. From November 1, 1997 and thereafter, Porter performed work within the scope of the Subcontract, and additional work outside of the scope of the Subcontract, and billed Fox for this work. Fox paid Porter for a large part of this work, all as set

forth in excruciating detail in Porter's Memorandum in Support of Motion for Summary Judgment, R. 396 - 552, statements of undisputed facts 13-65, R. 400 - 409.

14. Fox ceased paying Porter on Porter's invoices. *Affidavit of Gary Porter, Exhibit Q to Memorandum in Support of Motion for Summary Judgment.* R. 532
15. Porter last provided labor, equipment and/or materials on the Project on or about May 16, 1999. *Statement of Fact No. 2 in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for Summary Judgment* R 238-338, 239
16. Over the course of Porter's involvement on the Project, Porter and Fox had many disagreements over payment for work performed by Porter in connection with the Project. *Statement of Fact No. 3 in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for Summary Judgment* R 238-338, 239
17. Prior to Porter sending a letter to the University of Utah wherein he requested Fox's Payment Bond information, Gary Porter spoke with Jeff Wood, Fox's Project Manager, and requested that Fox provide its Payment Bond information to Porter. Jeff Wood refused to provide the Payment Bond information, including whether a Payment Bond even existed. *Statement of Fact No. 4 in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for*

*Summary Judgment* R 238-338, 239

18. Porter then prepared and sent a letter to the Owner of the Project requesting that it provide Porter with Fox's Payment Bond information. This letter was also mailed to Fox. *Statement of Fact No. 5 in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for Summary Judgment* R 238-338, 239
19. The owner received Porter's letter requesting the Payment Bond. In response the owner requested via e-mail, that the Project's architect speak with Fox's Floyd Cox and Jeff Wood about the matter prior to the owner releasing the Payment Bond information to Porter. *See Statement of Fact No. 6 in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for Summary Judgment* R 238-338, 239
20. Neither Fox nor the owner of the Project provided Porter with any information relating to the Fox's Payment Bond. *Statement of Fact No. 7 in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for Summary Judgment* R 238-338, 239
21. Due to Fox's and the owner's failure to provide the Payment Bond information, Mark Porter spoke with Fox's Project Manager, Jeff Wood and requested the Payment Bond information. Mr. Wood again refused to provide the information to Mark Porter. Mark Porter also made numerous telephone calls to Fox's office

seeking to obtain the Payment Bond information. Fox failed to return any of Mark Porter's messages. *Statement of Fact No. 8 in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for Summary Judgment* R 238-338, 239

22. During the early part of June, 1999, attorney Brian W. Steffensen attempted to contact Tom Christiansen of Campus Construction and Design, the identified Owner of Utah Women's Gymnastic's Training Center Construction Project to try to find out if Fox had posted a bond. Over a period of several weeks, Steffensen left 3 or 4 telephone messages with an individual which Steffensen understood to be a secretary or receptionist, requesting that she ask Mr. Christiansen to contact Steffensen if there was a bond in connection with the Project. R. 606-07
23. As a result of Steffensen's several conversations with this woman, Steffensen understood that she or Mr. Christiansen would get back to Steffensen if there was in fact a bond posted by Fox. When she did not get back to Steffensen, he understood and therefore assumed that it was because there was no bond. R. 607
24. Unaware of the existence of a Payment Bond, Porter filed suit against Fox on March 16, 2000. Thereafter, Fox continued its efforts to conceal the existence of the Payment Bond when it prepared and submitted to Porter its Rule 26 initial disclosures, stating that there was no insurance agreement at issue in the case. Only through discussions between the parties' counsel was Porter finally provided



a copy of the applicable Payment Bond. This information was not provided to Porter until after the applicable statute of limitations had run. *Statement of Fact No. 9 in Porter's Memorandum in Opposition to Defendant National Surety Corp's Motion for Summary Judgment* R 238-338, 240-41

25. Thereafter, Porter filed its Motion to Amend its Complaint to include a claim against National Surety Corporation as surety on the Payment Bond. Fox's and National's attorneys did not object to the amendment adding National. Consequently, Porter's Motion was granted on February 28, 2001. *See Minute Entry Decision and Order*, R. 46-47
26. National filed its motion for summary judgment on statute of limitations grounds on or about December 4, 2001. R. 111-162
27. Porter filed his opposition to National's motion for summary judgment on January 4, 2002. R. 238-338
28. National filed its Reply on January 14, 2003. R. 339-350
29. Porter filed his motion for summary judgment against Fox on March 18, 2002. R. 396-554
30. Fox filed its "Objection" to Porter's motion for summary judgment on April 8, 2002. R. 563-605
31. Porter filed a Motion to Strike Fox's Objection to Porter's Motion for Summary Judgment on April 10, 2002. R. 608 - 613

32. Porter filed his Reply in support of his motion for summary judgment on April 10, 2002, plus a motion to strike Fox's Additional Statement of Disputed Facts. R. 614 - 656
33. Judge Bohling heard oral argument on both motions on April 29, 2002 (continued from April 11, 2002), and granted them both. R. 663
34. On June 6, 2002, Judge Bohling signed the Order Granting Porter Summary Judgment. R. 667-669
35. On July 31, 2002, National moved for an award of attorney's fees. R. 839-876
36. Porter opposed National's request for an award of attorney's fees which included all work done by the attorney's – even that done for Fox and not National, on August 12, 2002. R. 895-901
37. On September 6, 2002, Porter filed his Motion for Relief from Summary Judgment Granted in Favor of Defendant National Surety Corporation. This motion was based upon the new *Nunez v. Albo*, 53 P. 3 (UT App 2002), case, and testimony acquired from Floyd Cox in a supplemental proceeding to the effect that Fox and National were very closely related economically and financially. R. 926-947
38. National opposed Porter's motion for relief from judgment on September 19, 2002. R. 988-997
39. Porter filed his Reply in support of his motion for relief from the National summary judgment on October 2, 2002. R. 1070-1076

40. Fox filed a Rule 60(b) Motion for Relief from the Porter summary judgment on October 11, 2002. R. 1103-1160
41. On October 18, 2002, Porter filed his Memorandum in Opposition to Fox's Rule 60(b) Motion for Relief from the Porter summary judgment. R. 1195-1211
42. Porter also moved to strike the affidavits of Floyd Cox and Nellyn Cox in support of Fox's Rule 60(b) Motion for Relief from the Porter Summary Judgment on October 18, 2002 on the grounds that said affidavits did not have proper foundation. Neither of the Coxes were ever first hand participants in any of the factual occurrences relevant to Porter's work. R. 1212-1216
43. Judge Bohling heard oral argument on the motions for relief from summary judgment on October 22, 2002, and denied them both. R. 1224
44. Judge Bohling also granted National most of the attorney's fees that it requested. Ibid.
45. Porter filed its Notice of Appeal on January 3, 2003. R. 1232-1239

### **SUMMARY OF ARGUMENTS**

Porter filed its motion for summary judgment after the parties' depositions were taken because it knew then that Fox could not factually dispute Porter's claims. Porter's Statement of Undisputed Facts consisted of sixty-five detailed paragraphs – each supported with multiple citations to the record. It painted a painstaking picture of exactly what had occurred and how and why Porter was owed the money that it claimed.

When faced with such a detailed and fully supported motion for summary judgment, U.R.Civ.P. Rule 56 and CJA 4-501(2)(B) placed a heavy burden upon Fox to directly and adequately dispute each and every material fact set forth in Porter's statement of undisputed facts. Fox did not – and in reality could not – dispute Porter's facts. Judge Bohling was correct when he granted the motion for two reasons: (a) the failure to comply with CJA 4-501(2)(B) required Judge Bohling to deem Porter's statement of undisputed fact to be admitted, and (b) substantively Fox's attempt to dispute Porter's facts fell woefully short. The only thing Fox did was try to claim that section 02300 of the Project's plans and specifications was mistakenly left out of the contract. But this assertion was without factual basis in the record. This was one of those unique occasions where the defendant literally could not – and did not – dispute the material facts. Summary Judgment against Fox was entirely appropriate.

With respect to National, Porter's argument is simple: Judge Bohling's ruling as a matter of law that a "privity of contract" relationship is never sufficient to allow an amendment to relate back is simply incorrect. The *Nunez* and *Penrose* cases clearly hold otherwise. Further, the admissions as to the closeness of the financial relationship and identity of interest between Fox and National should have ended the discussion and supported a finding that there was a sufficient identity of interest to allow – nay require – relation back. Further, Fox's (and essentially National's) deliberate hiding of the identity of National should have barred a statute of limitations defense. Finally, the issue of

whether Porter had been diligent enough in its attempts to determine the name of the bonding company was factual in nature and should have been left to the jury.

Under facts suggesting deliberate hiding of the name of the bonding company, and in face of Porter's extensive unsuccessful attempts to learn the identity of National, it was simply inequitable and unfair to allow the statute of limitations to bar Porter's bond claims.

Lastly, the Court should have apportioned Babcock's attorney's fees between Fox and National and not awarded fees for work performed primarily on behalf of Fox and not National.

### ARGUMENT

#### THE SUMMARY JUDGMENT AGAINST FOX WAS FAIR AND JUST IN ALL RESPECTS AND SHOULD BE AFFIRMED

Fox Did Not Comply with CJA 4-501(2)(B). The requirements of CJA 4-501(2)(B) are clear:

*“(B) Memorandum in opposition to the motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a verbatim restatement of each of the movant’s statement of facts as to which the party contends a genuine issue exists followed by a concise statement of material facts which support the party’s contention. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies. All material facts set forth in the movant’s statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party’s statement.”* (Emphasis added)

Fox's "Objection" to Porter's Motion was clearly deficient because:

- a. Fox's Objection did not set forth a verbatim restatement of each of Porter's

statements of fact about which Fox asserted there was dispute;

- b. Fox did not follow each verbatim restatement of Porter's statements of undisputed fact with a concise statement of material facts which support Fox's contention that the "undisputed" facts were disputed.

Because of these failures, Fox's Objection is a perfect example of exactly what CJA 4-501(2)(B) was designed to preclude. Fox's failure to comply forced Judge Bohling to sift through each and every one of Fox's "additional facts" to try to determine if, how and/or why each such "additional facts" might somehow dispute one or more of Porter's statements of undisputed fact. This was exactly the problem that the trial court in *Fennell v. Green*, 77 P.3d 339 (Ut App 2003) faced when a party failed to comply with CJA 4-501.

It is clear that Fennell failed to comply with the rule. He did not refer to Defendants' statements of uncontroverted facts, but instead included only his own statement of undisputed facts. **As a result, it was unclear what facts Fennell contended were disputed.**" *Fennell*, at 342. (Emphasis added)

CJA 4-501(2)(B) was designed to assist the Court in determining exactly what the opposing party considered to be the disputed facts. The *Fennell* court quoted the Utah Supreme Court when it reaffirmed the proposition that parties are required to comply with the Rules of Judicial Administration.

**The Utah Supreme Court ... recently emphasized the importance of compliance with the Rules of Judicial Administration** in Lovendahl v. Jordan School District, 2002 UT 130, 63 P.3d 705.[fn3] In Lovendahl, the plaintiff sued for damages under a claim for inverse condemnation. See id. at ¶¶ 48. The defendant's summary judgment motion and supporting memorandum included

facts and arguments that the plaintiff, in opposing the summary judgment motion, did not address. *See id.* at ¶¶ 50. **The court noted that under rule 4-501(2)(B) "all facts set forth in the movant's statement of facts are `deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.'" *Lovendahl*, 2002 UT 130 at ¶¶ 50 (quoting Utah R. Jud. Admin. 4-501(2)(B)). ...**

In addition, the trial court has discretion in requiring compliance with rule 4-501. *See Hartford Leasing Corp. v. State*, 888 P.2d 694, 701-02 (Utah Ct.App. 1994) (upholding trial court's exercise of discretion in refusing to accept supplemental memoranda outside bounds of rule 4-501). **Utah courts have repeatedly upheld the necessity of compliance with the Utah Rules of Judicial Administration.** *See id.*; *see also* *Golding v. Ashley Cent. Irrigation Co.*, 902 P.2d 142, 148 (Utah 1995) (determining that failure to comply with rule 4-501 made additional filings moot); *cf. Price v. Armour*, 949 P.2d 1251, 1255 (Utah 1997) (finding trial court erred in not complying with rule 4-501 but affirming because error was harmless); *Loporto v. Hoegemann*, 1999 UT App 175, ¶¶ 14, 982 P.2d 586 (reversing trial court where it did not follow notice requirement of rule 4-506 of the Utah Rules of Judicial Administration). *See generally* *Parker v. Dodgion*, 971 P.2d 496, 497 n. 3 (Utah 1998) (affirming trial court on other grounds but noting plaintiff's response to motion for summary judgment failed to conform with rule 4-501 because it failed to set forth disputed facts and did not contain numbered sentences).

#### **Due to Non Compliance with CJA 4-501, Porter's Statement of Undisputed**

**Facts Became "Deemed Admitted."** The last part of CJA 4-501 clearly states that failure to dispute a statement of undisputed facts properly "shall" result in those "undisputed facts" being deemed admitted. The Utah Supreme Court so held in *Lovendahl*, 2002 UT 130. Judge Bohling did not have any discretion to ignore these requirements. Porter's Statement of Undisputed Facts had to be deemed admitted, and the motion for summary judgment based thereon granted.

**Judge Bohling Reviewed Fox's Objection and Determined that it**

**Substantively Did Not Dispute Porter's Statement of Undisputed Facts.** Judge

Bohling was conscientious and did not want to grant summary judgment against Fox unless the material facts really were not disputed. Judge Bohling clearly went the extra mile and exhaustively reviewed the parties' memoranda. After that exhaustive review, Judge Bohling came to the conclusion that Fox had not in fact disputed Porter's Statement of Undisputed Facts with citations to real, hard admissible evidence. Fox had tried to say "denied" to many of the statements, but that clearly is not sufficient without much more.

Judge Bohling's conclusion was entirely accurate. Fox tried to argue that Floyd Cox testified in his deposition that the work required under Section 02300 of the plans and specifications for the project – which Section clearly is not included in the written subcontract – was mistakenly left out of the subcontract. That appears to be the main position that Fox tried to espouse in its Objection. Unfortunately for Fox, the evidence actually adduced in this case was clear and did not support any such assertion. Cox did not have personal knowledge of any of this because he did not negotiate the contract, did not draft it and did not supervise Porter's work. Fox's foreman – Jeff Wood (who is the only person who did have personal knowledge of the relevant facts) – did not so testify in his deposition. The lack of admissible evidence to dispute Porter's Undisputed Facts led Judge Bohling to conclude from the bench that although Fox's attorneys had argued valiantly for the Court to so find, there simply was no evidence set forth in the Objection



to support such a conclusion. R. 1262,k pp. 58-59

**Consequently, Judge Bohling's Decision to Grant Summary Judgment Against Fox and in Favor of Porter is Supported by Two Separate and Legally Sufficient Bases.** The order signed by Judge Bohling states that the summary judgment was granted based upon two separate and legally sufficient reasons. First, the deemed admitted statements of undisputed fact arising from the operation of 4-501(2)(B); and Second, the determination that substantively the Objection did not in actuality dispute Porter's statement of undisputed facts. If this Court of Appeals undertakes the same exhaustive effort that Judge Bohling did, it will quickly reach the same conclusion.

But it is important to note that Judge Bohling had absolute discretion to require Fox to comply with CJA 4-501(2)(B), and based upon Fox's failure to so comply, to deem Porter's statement of undisputed facts to be admitted. These rulings and/or actions by Judge Bohling are well within the bounds of his discretion and are therefore unassailable on this appeal.

The Summary Judgment was proper and fair. Porter's marshaling of the evidence in support of its position as set forth in the statement of undisputed facts was detailed, comprehensive and compelling. There can be no real doubt but that Porter is in every way fully entitled to the judgment which was rendered in its favor. It is consistent with the written subcontract, the admitted changes orders and admitted requests for additional work. Fox's defense thereto was at all times somewhat desperate and contrived. Fox's

appeal in these regards should be entirely dismissed and Judge Bohling's corresponding rulings affirmed.

**THE SUMMARY JUDGMENT IN FAVOR OF NATIONAL SHOULD BE REVERSED AND JUDGMENT SHOULD BE ENTERED AGAINST NATIONAL AND IN FAVOR OF PORTER ON THE BOND**

**URCivP Rule 15(c) Allows Amendments to Relate Back in Time to the Filing of the Original Complaint.** Porter's last work was on May 16, 1999. Porter filed his original complaint in March of 2000. If the amended complaint adding National were allowed to relate back, it would have been timely.

Rule 15(c) of the Utah Rules of Civil Procedure provides in relevant part, that "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." URCivP 15(c). "Relation back is allowed under the rules even if a statute of limitations has run during the intervening time." *Meyers v. Interwest Corp.*, 632 P.2d 879 (Utah 1981). "In considering motions to amend pleadings, primary considerations are whether parties have adequate notice to meet new issues and whether any party receives an unfair advantage or disadvantage." *Lewis v. Moultrie*, 627 P.2d 94, 98 (Utah 1981); *See also, Vina v. Jefferson Ins. Co.*, 761 P.2d 581, 587 (Utah Ct.App.1988).

Generally Rule 15(c) will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings. But, the Utah Supreme Court has made an exception to the general rule. "The exception operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identity of interest; so

it can be assumed or proved the relation back is not prejudicial.” *Sulzen v. Williams*, 977 P.2d 497, 501 (Utah App. 1999) quoting, *Dovey-Layton Co. v. Clark*, 548 P.2d 902, 906 (Utah 1976). It has been further held, that parties have an identity of interest when “the real parties in interest were sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage.” *Dovey-Layton Co.*, 548 P.2d at 906. Cf. *Russell v. Standard Corp.*, 898 P.2d 263, 265 (Utah 1995) (noting that identity of interest exists when existing parties and those sought to be added are so closely related “that notice of the action against one serves to provide notice of the action to the other”) (citation omitted).

In this case, Porter argued initially in opposition to National’s motion for summary judgment that it is clear that Fox and National have the identity of interest necessary to relate Porter’s Amended Complaint back to the date of its original complaint. In connection with Fox becoming the general contractor for the Project, Fox as Principal and National as surety, issued a Payment Bond for the benefit of persons supplying labor and material in connection with the Project. According to the Payment Bond, both Defendants are jointly and severally liable. Their economic fates on this project are entirely identical. They are joined at the economic hip.

However, Judge Bohling granted National’s motion, ruling that:

“Turning first to the relation back doctrine, it is well-established that the filing of an amended complaint generally will relate back to the date of the filing of the original complaint only when the amendment does not add a new party. If, however, a party is added, but the new and old parties are ‘so closely related in their business operations that notice of the action against one serves to provide notice of the action to the other,’ then an exception applies, and relation back is allowed. See, *Wilcox v. Geneva Rock Corp.*, 911 P. 2d 367 (Utah 1996) at 368; and *Perry v. Pioneer Wholesale Supply Co.*, 681 P. 2d 214 (Utah 1984) at 216. To determine whether this exception applies here requires an examination of the relationship between Fox and NSC. **The identity of interest between these**

**parties, as it turns out, is privity of contract. It is clear, as held in *Perry*, that such a relationship is an insufficient identity of interest to allow for relation back.** *Id.* Thus, plaintiff's action in filing the claim adding NSC as a party does not relate back to the filing date of the original Complaint under Rule 15." (Emphasis added) R. 793-94

Judge Bohling's written ruling sets forth all of the case law and principles that Porter was relying on, but then it suddenly concludes that "privity of contract" equals (or requires a finding of) "insufficient identity of interest."

The Court based its ruling on its reading of the Utah Supreme Court decision of *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214 (Utah 1984). In *Perry*, a third party plaintiff had subcontracted to furnish doors and millwork on a construction project. Perry ordered the doors from the supplier, which then ordered the doors from the manufacturer. Following suit by the general contractor against Perry for breach of contract arising from a claim that the doors were defective, Perry filed his third party complaint against the supplier and manufacturer alleging they had breached their warranties. *Id.* at 216. Perry's third party complaint was filed more than five years after the doors were delivered to Perry. *Id.*

The trial court in *Perry* granted the supplier's and manufacturer's motion for summary judgment, ruling that Perry's claims were barred by the applicable four year statute of limitations. On appeal, Perry argued that pursuant to U.R.Civ.P. 15(c) his third party complaint should relate back to the filing of the original complaint. The Utah Supreme Court ruled against Perry, finding that there was no "identity of interest" between the original plaintiff (the general contractor), Perry (the door subcontractor) and the third party defendants (the door supplier and

manufacturer). The Supreme Court stated that “[i]dentity of interest’ as used . . . means that the parties are so *closely related* in their business operations that notice of that action against one serves as notice of the action to the other.” *Id.* At 217. Other than being in “privity of contract,” there was no close relationship between the original parties and those sought to be amended in. Consequently, the Utah Supreme Court upheld the summary judgment which dismissed the complaint against the supplier and manufacturer. *Id.* At 217.

So, under *Perry* it is clear that a mere “privity of contract” relationship is not enough to meet the “identity of interest” standard. But it is Porter’s belief that *Perry* did not stand for the proposition that parties in a “privity of contract” relationship could never meet the “identity of interest” standard as was found by Judge Bohling.

*Nunez v. Albo*, 53 P. 3d 2 (Ut App 2002) appeared to resolve this issue, making it absolutely clear that parties in “privity of contract” most definitely can have the “identity of interest” necessary to allow relation back for amendment purposes. Even if the relationship is one of “privity of contract,” it can nevertheless be sufficiently close that notice of the proceedings to one party would be tantamount to notice of the proceedings to the other party. The issue is whether it can be assumed (from the closeness of the relationship) or proven (from the specific facts in the case), that the party sought to be amended in was “sufficiently alerted to the proceedings or [was] involved in them unofficially from an early stage.” *Nunez* at ¶ 29 (*See Doxey-Layton Co. v. Clark*, 548 P.2d 902, 906 (Utah 1976).

In *Nunez*, a patient brought a medical malpractice action against her physician in

connection with treatment that she received for spider veins. Following the expiration of the statute of limitations, the patient sought to amend her complaint to add the physician's employer, the state university where the physician served as a faculty member. *Id.* at ¶¶ 1-6. The trial court denied the plaintiff's motion to amend on the grounds that the relationship between the physician and his employer was one of "privity of contract."

On appeal, the plaintiff argued that her amended complaint adding the university as a defendant related back to her original complaint because the employer–employee relationship was close enough, and the university employer had in fact known of the lawsuit, such that it could be presumed and in fact proven that the university had notice of the proceedings and would not therefore be prejudiced. The Utah Court of Appeals agreed, and overruled the trial court's decision. The Court of Appeals held that plaintiff's amended complaint related back to the date of her original complaint due to the "identity of interest" between the physician and university. This "identity of interest" between the physician and the university was based upon the *contract* of employment between the physician and the university and the university's involvement in the proceedings unofficially from an early stage, including providing counsel for the physician and communications made by the university to plaintiff.

Thus, *Nunez* makes it clear that the **closeness of relationship** between the new and old parties is the point of examination for the court; if that relationship is close enough such that the new party was sufficiently alerted to the proceedings, whether officially or

unofficially, from an early stage then there will be found a sufficient “**identity of interest**” between the new and old parties such that relation back of the amended complaint is not prejudicial. *Nunez* further clarifies that parties in **privity of contract** can be so closely related that they have a sufficient “**identity of interest**” so as to allow relation back.

Porter was thrilled, therefore, when the Court of Appeals decided *Nunez* and ruled in a “privity of contract” case there could be a sufficient identify of interest between parties who were only in “privity of contract” to allow an amended complaint to relate back to the date of the filing of the original complaint therein.

Porter was also thrilled when Floyd Cox, appearing as president of Fox Construction at an examination at Porter’s counsel’s office on September 5, 2002, testified about the closeness of the relationship between bond companies – surety companies -- and contractors in general, and the specific relationship between Fox and National. After testifying that Fox would submit formal, audited financials to National at least once each year, Cox testified as follows:

“Q.(By Mr. Steffensen) And that was as your counsel indicated, you supplied that [(financials)] yearly as a condition?

A. (Cox) Yes.

Q. Did you have any obligations in connection with your agreements with the bond company to notify them if there was any change in condition during the course of a year, such as that the financials submitted previously would not be accurate?

A. I would meet with the bonding agents and representatives of the [Fireman’s bond]

companies at least two or three times a year, and *they were very well aware of the financial situation during the year, what was happening with Fox Construction.*

Mr. Steffensen: And I assume that's because counsel probably would agree that my observation of **the relationship between a contractor and a bonding company is one of almost economic carnal knowledge of one another.** Would you agree with that, counsel?

Mr. Price [counsel for Fox]: I've never heard it quite described that way.

The Witness [Floyd Cox]: **I think that describes it well.**

Q. (Mr. Steffensen) Does that describe it well?

A. Yes.

Q. **I mean, they expect to "know" you in the Biblical sense as to your financial condition?**

A. Let's put it this way: **They pretty much knew when I cut my fingernails, yes.**

Q. Okay. And then *did you have obligations to keep them informed as to what was happening on the jobs, claims and things?*

A. Absolutely, yes. And *it was their obligation to check, and check with the owners.* It was typical procedure for them.

Q. And that's what you did on all of the projects you had during your relationship with National Surety?

A. That's correct." (Transcript of Supp. Order Examination of Floyd Cox, Sept. 5, 2002; 10:1 - 11:17). (*Porter's Memorandum in Support of Motion for Relief From Summary Judgment Granted in Favor of National Surety Corporation*, **R. 965**

Fox admitted, with National's attorney present, that the relationship between Fox and



National was one of “economic carnal knowledge,” that National “knew” Fox in the Biblical sense as to Fox’ financial condition, that National knew when Cox/Fox “cut [his] fingernails,” that Fox had an obligation to keep National informed of “claims and things” on the jobs, and that National had an “obligation to check [for claims/problems on the jobs], and check with the owners. It was typical procedure for [National].” The relationship between Fox and National was an economic/financial “marriage.” National had as much notice and/or control over Fox as does a parent corporation over a subsidiary, or a subsidiary corporation over a sister subsidiary corporation. One cannot imagine a more close “economic relationship” than this. It is certainly as close, if not closer, than the employee/employer relationship which *Nunez* found sufficient to allow relation back. Based upon these admissions, and the commonly known practices in the construction industry, this Court should rule as a matter of law that the contractor/principal and surety relationship is always sufficiently close to meet the “identity of interest” standard with respect to bond claims. Under the description of the relationship described by Cox above, notice of claims is contractually required to be given by the principal/contractor. Further, National had a pattern and practice of independently monitoring the status of claims on a job, and to check with the owner (in this case, the State of Utah) to learn about claims. From these facts, it can be presumed that notice to Fox and the State of Utah was notice to National. At the very least there are critical factual issues here which should have precluded granting summary judgment.

Porter argued in its motion for relief based upon the *Nunez* case, and this new evidence that the relationship between Fox and National was exactly the type where there should be found an Identity of Interest, that the summary judgment in favor of National should be set aside. Judge Bohling summarily rejected these arguments, ruling again that

since there was a “privity of contract” relationship between Fox and National, there was still an insufficient identity of interest.

Porter believes that these rulings by Judge Bohling were clearly erroneous – especially in light of the recent decision in *Penrose v. Ross*, 71 P.3d 631 (Ut App. 2003). Although an identity of interest was not found in that case, the Court’s discussion of the analysis to be followed in determining if there is an identity of interest is very instructive:

“Utah Rule of Civil Procedure 15(c) governs the relation back of amendments, stating: “Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.” *Id.*

Rule 15(c) further “allows a plaintiff to cure defects in his or her original complaint despite the intervening running of a statute of limitations.” *Russell v. Standard Corp.*, 898 P.2d 263, 265 (Utah 1995). Generally, however, rule 15(c) will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings. . . . **There is an exception to this rule.** The exception operates where there is a relation back, as to both plaintiff and defendant, **when new and old parties have an identity of interest; so it can be assumed or proved the relation back is not prejudicial. The rationale underpinning this exception is one which obstructs a mechanical use of a statute of limitations; to prevent adjudication of a claim.** *Doxey-Layton Co. v. Clark*, 548 P.2d 902, 906 (Utah 1976) (emphasis added); see also *Vina v. Jefferson Ins. Co. of N.Y.*, 761 P.2d 581, 586 (Utah Ct.App. 1988) (applying identity of interest rule laid out in *Doxey-Layton*). **“An identity of interest exists `when “the real parties in interest were sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage.””** *Nunez v. Albo*, 2002 UT App 247>, ¶¶ 29, <53 P.3d 2> (quoting *Sulzen v. Williams*, 1999 UT App 76, ¶¶ 14, 977 P.2d 497 (quoting *Doxey-Layton*, 548 P.2d at 906)), *cert. denied*, 59 P.3d 603 (Utah 2002).

...

Having determined that the present case is not a misnomer case, **we next determine whether a true identity of interest exists, permitting the amended complaint to relate back.** If an identity of interest is established, a party generally cannot be prejudiced. See Doxey-Layton Co. v. Clark, 548 P.2d 902, 906 (Utah 1976) (stating amendment permitted "where there is a relation back, . . . when new and old parties have an identity of interest; so it can be assumed or proved the relation back is not prejudicial"); Vina v. Jefferson Ins. Co. of New York, 761 P.2d 581, 586 (Utah Ct.App. 1988) (same).

Black's Law Dictionary defines "**identity**" as "[t]he identical nature of two or more things." Black's Law Dictionary 748 (7th ed. 1999). Webster's defines identity as Page 636 "**sameness of essential or generic character in different instances**" and "**the condition of being the same with something described or asserted.**" Webster's Ninth New Collegiate Dictionary 597 (1986). **Therefore, an identity of interest requires parties to have the "same" interest.** This definition is supported by the Utah Supreme Court in Attorney General v. Pomeroy, 93 Utah 426, 73 P.2d 1277, 1294 (1937). In Pomeroy, the issue before the court was whether a final judgment as to one issue in a case with multiple parties was effective as to all parties for the purpose of an appeal.[fn4] See id. at 1294. The court applied the "**identity of interest**" test, which it defined as "**whether the determination of the issues as to any defendant depends on or affects the determination of the issues as to the other defendants.**"[fn5] Id.

Similarly, in Nunez v. Albo, 2002 UT App 247, 53 P.3d 2, this court determined that an identity of interest existed between an employer and an employee, permit an amendment to the complaint adding the employer as a party to the complaint. In Nunez, a malpractice action was filed against a physician alleging damages caused by the physician's performance of a medical treatment. See id. at ¶¶ 5. Nunez filed a motion to amend the complaint to name the physician's employer, the University of Utah Hospital (Hospital), as a defendant. See id. at ¶¶¶ 5-6. The trial court denied Nunez's motion and she appealed. See id. at ¶¶ 6. In determining whether the amended complaint related back to the original complaint, this court analyzed rule 15(c) and cases outlining the exception permitting the addition of parties where an identity of interest is established. See id. at ¶¶ 29.

**We held that an identity of interest existed between the Hospital and**

the physician because the cause of action "arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading." Id. (quoting Utah R.Civ.P. 15(c)). This court also noted that the Hospital had potential vicarious liability as the employer of the physician. See id. at ¶¶¶¶ 27-34. Further, the University provided legal counsel for the physician, asserting that the physician was acting within the scope of his employment by the Hospital and was entitled to the protections of the Governmental Immunity Act.[fn6] See id.

**In Nunez, any disposition of the case against the physician would necessarily affect the Hospital's liability. Thus, an identity of interest existed because the legal position and defenses of the two parties were the "same."**

The legal positions and defenses of Fox and National in this case are likewise the "same." They are co-obligors with Fox. If Fox is found liable to Porter, then National is liable to Porter. The interests of a principal and surety on all construction jobs – with respect to bond claims, are always identical. With respect to payment lawsuits, they always have an identity of interest.

#### **The Discovery Rule Tolled the Payment Bond Statute of Limitations.**

In addition to Rule 15 permitting Porter's Amended Complaint to relate back to the date of the original Complaint, Porter asserted that the statute of limitations on Porter's Payment Bond claim was tolled pursuant to the discovery rule. The discovery rule is a judicially created doctrine which functions as an exception to the normal application of a statute of limitations. Under the discovery rule, "the statute of limitation does not begin to run until the plaintiff learns of or in the exercise of reasonable diligence should have learned of the facts which give rise to the cause of action." *Williams v. Howard*, 970 P.2d

1282, 1284 (Utah 1998). The Utah Supreme Court has enumerated three situations in which the application of the discovery rule is appropriate: (1) where the application of the rule is mandated by statute; (2) where the plaintiff is unaware of a cause of action because of the defendant's misleading conduct or concealment; and (3) where application is warranted by the existence of special circumstances that would, based on a balancing test, render application of the statute of limitations unjust or irrational. *Id.* at 1285. In the instant case, the discovery rule should toll the one year statute of limitation on Porter's Payment Bond cause of action due to Fox's concealment of information pertinent to the existence of its Payment Bond, and the existence of special circumstances rendering the statute of limitations unjust and irrational.

a. **Fox/National Concealed the Payment Bond Information from Porter.**

In order to toll the statute of limitations under the concealment prong of the discovery rule, a plaintiff must establish a prima facie case that the defendant actively concealed the existence of a cause of action, and that given defendant's actions, a reasonable plaintiff would not have discovered the claim earlier. *See, Berenda v. Langford*, 914 P.2d 45, 53 (Utah 1996); *Hom v. Utah Dept. of Public Safety*, 962 P.2d 95, 102 (Utah App. 1998). In so holding, the Utah Supreme Court has stated, "weighing the reasonableness of the plaintiff's conduct in light of the defendant's steps to conceal the cause of action necessitates the type of factual findings which preclude summary judgment in all but the clearest of cases." *Berenda*, at 54. Furthermore, it has held that

when an agency or privity relationship exists between the third party concealing the cause of action and another defendant, the concealment can be imputed to the defendant if the agent acts in whole or in part to carry out the purposes of the principal. *Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 156 (Utah 1991).

In the instant case, the undisputed facts show that Fox actively concealed the existence of the Payment Bond and identity of its surety such that Porter could not have reasonably discovered the claim earlier. Or, at the very least **a genuine issue of material fact exists regarding Fox's concealment.** The undisputed material facts also demonstrate a relationship between Fox and National such that Fox's conduct in concealing the Payment Bond information should be imputed to National. As such, National's Motion for Summary Judgment should have been denied.

Porter's last work was performed on May 16, 1999. Porter and Fox attempted to negotiate the settlement of their payment disputes. Ultimately, these settlement negotiations broke down in the spring of 1999. Thereafter, Gary Porter spoke with Fox's Project Manager, Jeff Wood and requested that Fox provide Porter with Fox's Payment Bond information. Jeff Wood refused to provide Porter with any information relating to the Payment Bond, including whether such bond even existed. As a result of Fox's refusal, Porter sent a letter to the owner of the Project on April 23, 1999. Pursuant to the letter, Porter sought information relating to Fox's Payment Bond in order to make a claim. This letter was also sent to Fox. That very same day, Tom Christensen (Utah State

Employee) sent an e-mail to Jill Jones of AJC Architects acknowledging that he had received the letter from Porter and requested that she discuss this matter with Fox before the University released the Payment Bond information. Neither the owner nor Fox provided Porter with information relating to the Payment Bond following Porter's written request. Thereafter and due to their failure to provide the information requested, Mark Porter had a discussion with Jeff Wood in May of 1999, wherein another demand was made that Fox provide its Payment Bond information. Again, Jeff Wood refused to provide the information. Porter's attorney also attempted unsuccessfully to get the Payment Bond information.

Due to Fox's concealment of the existence of a Payment Bond, Porter was unaware of the facts forming the basis for a cause of action upon the Payment Bond. Therefore, Porter filed this instant action against Fox on March 16, 2001. On or about May 31, 2000, Fox further attempted to conceal the existence of the Payment Bond by indicating in its Rule 26 Initial Disclosures that there were no insurance agreements at issue in the case. Then, following the expiration of the statute of limitations governing claims upon payment bonds, Fox finally provided Porter with a copy of the Payment Bond. This was the first time Porter discovered the facts necessary to form the basis of his cause of action against Surety upon the Payment Bond. Porter then obtained leave from the Court to amend its Complaint to assert its claim upon the Payment Bond.

These facts are sufficient to establish a prima facie case that Fox took affirmative

steps to conceal the existence of a cause of action upon the Payment Bond. Utah Code Annotated Section 63-56-38(1) provides that when a construction contract is awarded under Utah's Procurement Code, the contractor [Fox] to whom the contract is awarded shall deliver a payment bond to the state that is in an amount equal to 100% of the price specified in the contract and is executed by a surety company authorized to do business in Utah, which is for the protection of each person supplying labor, equipment, or material for the performance of the work provided for in the contract. Additionally, the statute permits the waiver of a Payment Bond by the state. Thus, the first element necessary to maintain a cause of action upon a Payment Bond, is the existence of a Payment Bond. Due to Fox's active concealment, Porter was unable to discover the existence of Fox's Payment Bond until after it filed suit against Fox in March of 2000, still within one year of last time labor, equipment or materials were supplied to the Project. Even after Porter filed suit, Fox continued to conceal the existence of the Payment Bond until after the statute of limitations had expired. Upon receipt of the Payment Bond information, Porter finally had facts forming the basis of its cause of action and obtained leave to amend its complaint to allege a cause of action upon the Payment Bond.

Furthermore, the undisputed facts demonstrate that Fox's conduct of concealing the information should be imputed to National. Fox and National bound themselves to the University of Utah such that they were both jointly and severally liable to all claimants supplying labor or materials provided for under Fox's contract with the



University of Utah. Furthermore, Fox's conduct was at least in part, clearly furthering the purposes of National by reducing the potential number of claims it could be jointly and severally liable upon under the Payment Bond. As a result of this relationship, Fox's concealment of the existence of the Payment Bond and the identity of National should be imputed to National. Thus, the one year statute of limitations should have been tolled and Porter's claim upon the Payment Bond should be permitted or at the very least a genuine issue of material fact is present which should have prevented the Court from determining the date the statute of limitations began to run. In either event, National's motion should have been denied.

**b. Special Circumstances Exist Rendering the Statute of Limitations Unjust and Irrational.**

Similar to the rationale in preventing one party from escaping liability due to a party's conduct of concealing facts necessary to form the basis of a cause of action, the discovery rule will toll the statute of limitations when special circumstances exist rendering the statute unjust and irrational regardless of any showing that the defendant has prevented discovery of the cause of action. Porter asserts that the material facts demonstrate that under the circumstances, application of the statute of limitations is unjust and irrational.

"The ultimate determination of whether a case presents exceptional circumstances that render the application of a statute of limitations irrational or unjust [turns on] a balancing test." *Harper v. Summit County*, 963 P.2d 768, 776 (Utah App. 1998); *quoting*

*Sevy v. Security Title Co.*, 902 P.2d 629, 636 (Utah 1995)(citations omitted). In this balancing test, the Court must weigh the hardship imposed on the claimant by the application of the statute of limitations against any prejudice to the defendant resulting from the passage of time. *Id.* Some factors the court considers in applying this balancing test include: (1) whether the defendant's problems caused by the passage of time are greater than the plaintiff's; (2) whether the defendant performed a technical service that the plaintiff cannot reasonably have been expected to evaluate; and (3) whether the claim has aged to the point that witnesses cannot be located, evidence cannot be found, and the parties cannot remember basic events. *Sevy* at 636. Furthermore, the Utah Supreme Court has held that before reaching this balancing test "the plaintiff must first show that the plaintiff did not know of and could not reasonably have known of the existence of the cause of action in time to file a claim within the limitation period." *Id. citing Warren v. Provo City Corp.* 838 P.2d 1125, 1129 (Utah 1992). This latter issue of plaintiff's discovery is a question of fact. *Sevy* at 634.

As demonstrated above, in order to maintain an action upon a Payment Bond, such a bond must have been issued. In the instant case, the material facts demonstrate that Porter did not know whether Fox had obtained a Payment Bond until after June 29, 2000, approximately one and one half months after the statute of limitations had expired. The material facts further demonstrate that Porter made reasonable attempts to discover the existence of the Payment Bond from both Fox and the owner of the Project prior to the

expiration of the statute of limitations but that Fox willfully concealed the Payment Bond information from Porter. As such, Porter filed the instant action against Fox in March of 2000 and sought to discover the Payment Bond information through the initial disclosure phase of discovery. Even after Porter filed the instant action, Fox continued in its efforts to conceal the payment Bond information by stating that no insurance agreements were applicable to this case. Thereafter, Fox finally disclosed the Payment Bond information after the statute of limitations had run. Upon discovery that Fox had obtained a Payment Bond, Porter amended its Complaint to assert a cause of action thereon.

Based upon these material facts, Porter did not discover the facts forming the basis of its cause of action until Fox came clean on or about June 29, 2000, after the statute of limitations had run. If the applicable statute of limitations continues to be imposed, Porter will be precluded from obtaining redress from the party who insured that Fox would pay for all labor and materials provided to the Project. Porter has a judgment against Fox, but Fox can't pay. This unjust application of the statute of limitations would allow Fox and National to reap the benefits of Fox's willful concealment and open the door to future similar conduct. Such conduct is against public policy and should not be condoned by the Court. The substantial hardship to Porter and public policy clearly outweigh any prejudice, if any, National might claim to have experienced.

**National's Attorney Should Have Been Required to Allocate Their Fees Between Fox and National.** Following service of Porter's Amended Complaint upon

National, the law firm of Babcock, Bostwick, Scott, Crawley & Price (“Babcock”) entered its appearance on behalf of National. Babcock had already been in the case representing Defendant Fox Construction, Inc. (“Fox”) for over an entire year prior. When National filed its motion for attorney’s fees, Babcock failed to separately allocate the time spent on its defense of National and Fox and sought through National’s motion, to recover its attorney’s fees for its unsuccessful defense of Fox. Additionally, an analysis of Babcock’s invoice submitted in support of Mr. Price’s Affidavit of Attorney’s Fees demonstrates that National’s motion sought to recover for attorney’s fees billed by Babcock for work that was never completed and for unreasonable and excessive hours. Simply put, National sought to recover approximately \$28,000 in attorney’s fees for answering a complaint, taking a deposition and drafting a motion for summary judgment on a statute of limitations defense.

Porter objected, but Judge Bohling granted an award of \$25,000 plus costs. Porter still feels like this award was excessive and improper under the circumstances and as outlines in its memorandum in opposition to the request, which is incorporated herein.

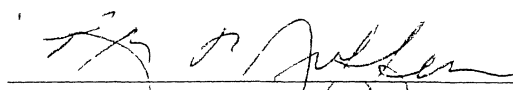
#### **STATEMENT OF RELIEF SOUGHT BY PORTER**

Porter asks this Court to (a) affirm the summary judgment against Fox, (b) authorize an award of additional attorney’s fees and costs in connection with this appeal, (c) reverse the summary judgment in favor of National and against Porter, (d) reverse the award of attorney’s fees to National, (e) in the alternative, require National’s attorneys to

allocate their fees between work for Fox and work for National, and (f) if the summary judgment in favor of National is reversed and the summary judgment against Fox is affirmed, to direct that judgment be entered in favor of Porter and against National for the same amounts previously awarded to Porter, plus costs and fees.

DATED this 12<sup>th</sup> day of January, 2004.

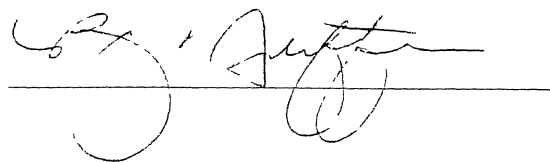
**Steffensen ❖ Law ❖ Office**

  
\_\_\_\_\_  
Attorney for Plaintiff

**Certificate of Mailing**

I hereby certify that on the 12 day of Jan, 2004, that I caused two true and correct copies of the foregoing instrument to be ✓ mailed. postage prepaid; and/or \_\_\_\_\_ hand delivered by \_\_\_\_\_ fax and/or by \_\_\_\_\_ courier; to:

Jeffery R. Price  
Michael E. Bostwick  
Bostwick & Price, P.C.  
139 East South Temple St., #320  
Salt Lake City, Utah 84111

  
\_\_\_\_\_

## Addendum A

July 18, 2002 Memorandum Decision  
and Order

FILED DISTRICT COURT  
Third Judicial District

JUL 18 2002

SALT LAKE COUNTY  
By [Signature]  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

GARY PORTER CONSTRUCTION, dba	:	MEMORANDUM DECISION AND ORDER
PORTER & SONS,	:	
	:	CASE NO. 000902201
Plaintiff,	:	
	:	
vs.	:	
	:	
FOX CONSTRUCTION, INC., &	:	
NATIONAL SURETY CORPORATION,	:	
	:	
Defendants.	:	

-----

Before the Court are plaintiff's objections to defendant National Surety Corporation's ("NSC") proposed Order relating to defendant's Motion for Summary Judgment which the Court granted from the bench on April 29, 2002, following oral argument. Pursuant to the Court's request, counsel for NSC drafted the proposed Order, to which plaintiff objected. The proposed Order and the Objection thereto were submitted to the Court on May 9, 2002. The Court writes independently to clarify the basis for its decision and resolve the Objections.

According to the plaintiffs, defendant Fox Construction's ("Fox") refusal to pay began prior to January 1998, and plaintiff's Amended Complaint asserts that the payment for the services for which plaintiff seeks recovery was past due as of February 11, 1998. NSC objects to this date, as it was established by

modifying deposition testimony which occurred after both the deadline allowed for making such modifications, and after the filing of the present Motion for Summary Judgment. However, the date is not material to the decision reached in this case, and thus, the Court adopts this date for purposes of this motion only.

Plaintiff continued work on the project until approximately May 16, 1999. (See, Amended Complaint ¶ 15.) On March 16, 2000, plaintiff filed this Complaint against Fox, seeking damages resulting from Fox's alleged failure to pay plaintiff for work performed on the University of Utah Women's Gymnastics facility on the University Campus. On January 12, 2001, by motion, plaintiff sought leave to amend its Complaint adding NSC as a defendant, and adding a claim against the payment bond. On February 28, 2001, plaintiff's unopposed motion was granted.

Utah Code Ann. § 63-56-38(4) provides that "(4) An action upon a payment bond . . . is barred if not commenced within one year after the last day on which the claimant performed the labor or service or supplied the equipment or material on which the claim is based." Based upon Fox's refusal to pay, Porter's cause of action upon the bond could have accrued under this section as early as February 11, 1998. Nevertheless, in resolving all reasonable inferences arising from the undisputed facts in favor of Porter, the Court construes May 16, 1999, the approximate date of the



completion of all Porter's work on the project, as the date of accrual for its cause of action on the payment bond. Thus, absent some basis in law to relate the filing date of the amended complaint back to the filing date of the original Complaint, or to toll the statute of limitations, the latest date upon which Porter could have filed its Complaint upon the bond is May 16, 2000, nine months prior to the filing of the Motion for Leave to File Amended Complaint,

Plaintiff argues that a basis exists to do both. First, plaintiff argues that the relation back doctrine under Rule 15 of the Utah Rules of Civil Procedure is applicable; and second, that the "discovery rule," tolling the statute of limitations also applies.

Turning first to the relation back doctrine, it is well-established that the filing of an amended complaint generally will relate back to the date of the filing of the original Complaint only when the amendment does not add a new party. If, however, a party is added, but the new and old parties are "so closely related in their business operations that notice of the action against one serves to provide notice of the action to the other," then an exception applies, and relation back is allowed. See, Wilcox v. Geneva Rock Corp., 911 P.2d 367 (Utah 1996) at 369; and Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214 (Utah 1984) at 217. To

determine whether this exception applies here requires an examination of the relationship between Fox and NSC. The identity of interest between these parties, as it turns out, is privity of contract. It is clear, as held in Perry, that such a relationship is an insufficient identity of interest to allow for relation back. Id. Thus, plaintiff's action in filing the claim adding NSC as a party does not relate back to the filing date of the original Complaint under Rule 15.

Turning to the discovery rule, the Utah Supreme Court, in Williams v. Howard, 970 P.2d 1282 (Utah 1998), explained the rule as follows:

Special situations exist in which the so-called discovery rule tolls the running of the statute of limitations. *Myers*, 635 P.2d at 86. The discovery rule is a judicially created doctrine under which the statute of limitation does not begin to run until the plaintiff learns of or in the exercise of reasonable diligence should have learned of the facts which give rise to the cause of action. The discovery rule functions as an exception to the normal application of a statute of limitation.

...[t]he discovery rule does not apply to a plaintiff who becomes aware of his injuries or damages and a possible cause of action before the statute of limitations expires.

Accordingly, the discovery rule tolls the statute of limitations unless plaintiff in the exercise of reasonable diligence should have learned of the facts which give rise to the cause of action,

or, alternatively, plaintiff became aware of his injuries or damages and a "possible" cause of action before the statute expired.

To frame these issues properly, two statutes need to be considered: one requires contractors performing state work to deliver both payment and performance bonds or security to the state, Utah Code Ann., § 63-56-38; the other provides that "any person may obtain from the state a certified copy of a bond upon payment of the cost of reproduction of the bond and postage." Utah Code Ann., § 63-56-39. Read together, these statutes give plaintiff both notice of the likelihood of the existence of a payment bond and the procedure for obtaining a copy of the bond.

Plaintiff concedes that he was aware that there was or should have been a payment bond on the project as early as April 1999. Nevertheless, despite his awareness and the statutory procedure for obtaining a copy of a bond, neither plaintiff, an experienced contractor, nor his counsel, ever availed themselves of this procedure. Instead, plaintiff asked Fox for a copy of the bond in April and May, 1999, without success, prior to commencing the action, and plaintiff's counsel left phone messages in June, 2000 with a receptionist or secretary of the identified owner of the project, but dropped the matter when the phone calls were not returned. In order to obtain a copy of the bond, plaintiff had

only to make a written request and include a check for an amount sufficient to cover copying and postage. The requirement of reasonable diligence, at a minimum, required plaintiff to at least do as much. In failing to do so, plaintiff may not avail itself of the discovery rule.

The alternative exception is equally problematic for plaintiff. As described previously, plaintiff was aware of his injuries or damages as early as February, 1998, and was aware there should have been a bond as early as April 1999. As NSC argues, given plaintiff's admitted suspicions, plaintiff was at least aware of the "possibility" if not the probability or even certainty of a cause of action against the payment bond before the statute had run on May 16, 2000. Accordingly, plaintiff plainly could have pled a cause of action against Fox on its bond or a doe surety company to avoid the running of the statute even without a copy of the bond in hand. Plaintiff did not do so. Even after receiving actual notice of the payment bond, plaintiff waited eight months before filing its Amended Complaint adding NSC as a party.

It is undisputed that by May 16, 1999 plaintiff was aware of his injuries or damages, and equally plain that plaintiff was aware of a possible cause of action upon the payment bond prior to the May 16, 2000 statute of limitation deadline. Accordingly the discovery rule does not apply.

PORTER CONST.  
V. FOX CONST.

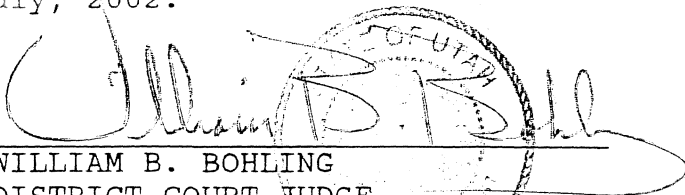
PAGE 7

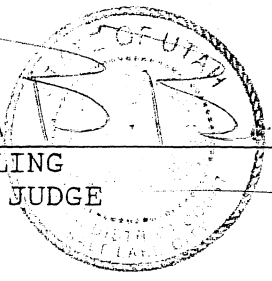
MEMORANDUM DECISION

For the foregoing reasons, plaintiff's claim against NSC is barred under the statute of limitations such that NSC is entitled to Judgment as a matter of law. In view of these determinations,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the Motion of defendant NSC for Summary Judgment under Rule 56(c) of the Utah Rules of Civil Procedure shall be and is hereby granted, and that all claims and causes of action asserted by plaintiff against defendant NSC in the Amended Complaint shall be and are hereby dismissed in their entirety, with prejudice. This constitutes the final Order of the Court on the matters referenced herein. No further Order need be prepared.

Dated this 18 day of July, 2002.

  
WILLIAM B. BOHLING  
DISTRICT COURT JUDGE




MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision and Order, to the following, this 18 day of July, 2002:

Brian C. Steffensen  
Damian E. Davenport  
Attorneys for Plaintiffs  
2159 South 700 East, Suite 100  
Salt Lake City, Utah 84106

Jeffrey R. Price  
Michael E. Bostwick  
Attorneys for Defendant  
57 W. South Temple, 8<sup>th</sup> Floor  
Salt Lake City, Utah 84101



## Addendum B

Order Denying Motion for Relief From  
National's Summary Judgment

IMAGED

\*

Jeffery R. Price (6315)  
Michael E. Bostwick (7037)  
**BOSTWICK & PRICE, P.C.**  
One Thirty Nine East  
South Temple St., Suite 320  
Salt Lake City, Utah 84111  
Telephone: (801) 961-7400  
Facsimile: (801) 961-7406

FILED DISTRICT COURT  
Third Judicial District

FEB 1 2 2003

SALT LAKE COUNTY  
By [Signature]  
Deputy Clerk

*Attorneys for Defendants Fox Construction, Inc. and National Surety Corp.*

**IN THE THIRD JUDICIAL DISTRICT COURT**

**SALT LAKE COUNTY, STATE OF UTAH**

GARY PORTER CONSTRUCTION, dba  
PORTER & SONS,

Plaintiff,

vs.

FOX CONSTRUCTION, INC., and NATIONAL  
SURETY CORP.,

Defendants.

**ORDER**

**Civil No. 000902201**

**Judge William B. Bohling**

ENTERED IN REGISTRY  
OF JUDGMENTS

DATE 02/21/03

Plaintiff's, Gary Porter Construction, dba Porter & Sons ("Porter"), Motion for Relief from Summary Judgment Granted in Favor of Defendant National Surety Corporation ("Motion") came on for hearing on the 22<sup>nd</sup> day of October, 2002, at the hour of 2:00 p.m. before the Honorable Judge William B. Bohling, Judge of the Third District Court. Defendants were represented by their attorneys of record Jeffery R. Price and Michael E. Bostwick of BOSTWICK & PRICE, P.C. Plaintiff Porter was represented by its attorneys of record Brian W. Steffensen and Damian E. Davenport of STEFFENSEN LAW OFFICE. The court

Order (re attorney's fees) @J



000902201 JD12539731

125



having heard argument of counsel on the issues, and having reviewed the file, makes and enters the following findings of fact and conclusions of law.

The case of *Nunez v. Albo*, 2002 UT App. 247, is not controlling in this situation. The relationship between National and Fox Construction lacks the necessary identity of interest in order for the Rule 15 relation-back doctrine to apply. As such, Porter's Motion is denied.

Pursuant to Utah Code Ann. § 63-56-38 and *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988), National is awarded attorneys' fees and costs in the amount of \$25,000.00. As a matter of law, there is nothing in the Affidavit of Attorneys' Fees which is false. Utah law states that no apportionment is necessary when the facts are inextricably intertwined. The facts in this case are inextricably intertwined in this case, therefore, no apportionment is necessary between Fox Construction and National Surety Corporation ("National"). It was the role of the surety, National, was required to defend the action when Fox could not.

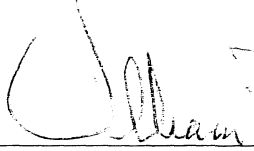
In summary, National is awarded a judgment against Plaintiff Porter in the amount of:

\$25,000.00      Attorneys' fees and costs

together with post-judgment interest at the legal rate as provided from the date of the judgment until paid, plus after-accruing costs, and attorneys' fees expended in collecting said judgment by execution or otherwise.

DATED this 20 day of February, 2002.

BY THE COURT

  
Judge William B. Bohling

