

2003

# George Bryce Rappleye v. Marilyn Rappleye : Brief of Appellee

Utah Court of Appeals

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THE UTAH COURT OF APPEALS

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GEORGE BRYCE RAPPLEYE,

Appellant/Defendant,

v.

MARILYN RAPPLEYE, nka

MARILYN JOHNSON,

Appellee/Plaintiff.

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**BRIEF OF APPELLEE**

Trial Court Case No. 894406626

Appellate Case No. 20030074- CA

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Appeal From the Fourth Judicial District Court, Wasatch County, State of Utah

The Honorable Donald J. Eyre

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ARGUMENT PRIORITY CLASSIFICATION 15

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Clerk of the Court

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ARGUMENT PRIORITY CLASSIFICATION 15

**LIST OF THE PARTIES**

1. Appellant/Defendant is George Bryce Rappleye.
2. Appellee/Plaintiff is Marilyn Rappleye, now known as Marilyn Johnson.



## TABLE OF CONTENTS

Table of Contents .....	iii
Table of Authorities .....	v
Statement of Jurisdiction .....	1
Statement of Issues .....	1
Determinative Statutory or Other Provisions .....	4
Statement of Relevant Facts .....	4
Summary of the Arguments .....	20
Argument	
I. The Trial Court Correctly Ruled That The Discovery Rule Tolled The Applicable Statutes Of Limitations. ....	22
a. The Concealment Prong Of The Discovery Rule Applies to Plaintiff's Claim Of Fraudulent Transfer .....	22
b. The Trial Court Correctly Ruled That The Concealment Prong Of The Discovery Rule Applies To Plaintiff's Claim For Fraudulent Transfer In Addition To The Statutory Discovery Rule Contained In The Utah Uniform Fraudulent Transfer Act .....	28
c. Plaintiff's Constructive Trust Claim Is Also Subject To The Discovery Rule ..	31
II. Erroneous Application Of The Common Law Discovery Rule By The Trial Court Would Constitute Harmless Error In This Case .....	34
III. The Court Of Appeals Must Consider The Trial Court's Finding Of Fact To Be Proper As Rappleye Failed To Request The Entire Transcript Of The Proceeding or To Properly Marshal The Evidence .....	34
a. Rappleye Failed To Request The Transcript For The Entire Proceeding .....	36
b. Rappleye Also Failed To Marshal The Evidence .....	37

IV.	The Court Has Jurisdiction To Adjudicate Rappleye’s Property Placed Under Hodges Name .....	41
a.	The Trial Court Made A Determination That The Transfer Was Fraudulent And Hodges’ Interests Were Represented Throughout The Proceeding .....	42
b.	Full Faith And Credit Has No Application In This Case .....	44
c.	Full Faith And Credit Has No Application In This Case .....	45
V.	The Trial Court Was Not Clearly Erroneous In Determining Rappleye And Hodges’ Interests In The Branson Property .....	47
	Conclusion .....	48
	Appendix	

## TABLE OF AUTHORITIES

### A. Cases

<i>Anderson v. Dean Witter Reynolds, Inc.</i> , 920 P.2d 575 (Utah App. 1996) .....	29, 30
<i>Aragon v. Clover Club Foods, Co.</i> , 857 P.2d 250 (Utah App. 1993) .....	29
<i>Ashton v. Ashton</i> , 733 P.2d 147 (Utah 1987) .....	35
<i>Aurora Credit Serv. v. Liberty West</i> , 970 P.2d 1273 (Utah 1988) .....	1, 2, 3, 23, 24
<i>Baldwin v. Burton</i> , 850 P.2d 1188 (Utah 1993) .....	25
<i>Berenda v. Langford</i> , 914 P.2d 45 (Utah 1996) .....	1, 3, 22, 23, 24, 27, 31
<i>Buehner Block Co. v. UWC Assocs.</i> , 752 P.2d 892 (Utah 1998) .....	31
<i>Burns v. Summerhays</i> , 927 P.2d 197 (Utah Ct. App.) .....	42
<i>Child v. Gonda</i> , 972 P.2d 425 (Utah 1998) .....	38
<i>Hill v. Allred</i> , 28 P.3d 1271 (Utah 2001) .....	24, 26
<i>Jensen v. Eames</i> , 519 P.2d 236 (Utah 1974) .....	44
<i>Jensen v. IHC Hospitals, Inc.</i> , 944 P.2d 327 (Utah 1997) .....	2, 4, 23
<i>Johnson v. Higley</i> , 977 P.2d 1209 (Utah Ct. App. 1999) .....	38
<i>Klinger v. Kightly</i> , 791 P.2d 868 (Utah 1990) .....	30
<i>Mel Trimble Real Estate v. Monte Vista Ranch, Inc.</i> , 758 P.2d 451 (Utah Ct. App. 1998) .....	31
<i>Nielsen v. Nielsen</i> , 2000 WL 33249399 (Utah Ct. App. 2000) (unpublished edition) ..	32
<i>Rappleye v. Rappleye</i> , 855 P.2d 260 (Utah Ct. App. 1993) .....	6
<i>Russell/Packard Dev., Inc.</i> 78 P.3d 616 (Utah Ct. App. 2003) .....	26, 27

<i>Robb v. Anderton</i> , 863 P.2d 1322 (Utah Ct. App. 1993)	38
<i>Sampson v. Richins</i> , 770 P.2d 998 (Utah Ct. App. 1989)	37
<i>Selvage v. JJ. Johnson &amp; Assocs.</i> , 910 P.2d 1252 (Utah Ct. App. 1996)	29, 30
<i>Smith v. Edwards</i> , 17 P.2d 264 (Utah 1932)	25
<i>Smith v. Vuicich</i> , 699 P.2d 763 (Utah 1985)	37
<i>Spears v. Warr</i> , 44 P.3d 742 (Utah 2002)	1, 2, 3, 22
<i>State ex. rel. W.A.</i> , 63 P.3d 607 (Utah 2002)	2
<i>State v. Bishop</i> , 753 P.2d 439 (Utah 1998)	42
<i>State v. Jacques</i> , 924 P.2d 898 (Utah Ct. App. 1996)	35
<i>State v. Perez</i> , 924 P.2d 1 (Utah Ct. App. 1996)	34
<i>State v. Montoya</i> , 937 P.2d 145 (Utah Ct. App. 1997)	41
<i>Stine v. Girola</i> , 337 P.2d 62 (Utah 1959)	44
<i>Tingey v. Christensen</i> , 987 P.2d 588 (Utah 1999)	35
<i>Valcarce v Fitzgerald</i> , 961 P.2d 305 (Utah 1998)	38
<i>Vincent v. Salt Lake County</i> , 583 P.2d 105 (Utah 1978)	23
<i>Warren v. Provo City Corp.</i> , 838 P.2d 1125 (Utah 1992)	23
<i>White v. Gary L. Desselhorst, NP Ski Corp.</i> , 879 P.2d 1371 (Utah 1994)	2, 3
<i>Witear v. Labor Comm’n</i> , 973 P.2d 982 (Utah Ct. App. 1998)	38
<i>Woodward v. Fazzio</i> , 823 P.2d 474 (Utah Ct. App. 1991)	38

**B. Statutes**

Utah’s Uniform Fraudulent Transfer Act, Utah Code Ann. § 25-6-10(1) . . . . .	29, 35
Utah’s Uniform Fraudulent Transfer Act, Utah Code Ann, § 25-6-8(2) . . . . .	45
Utah Code Ann. § 78-2(a)-3(2)(j) . . . . .	
Utah Code Ann. §§ 78-7-5(4) and (9) . . . . .	45
76 Am. Jur. 2d <i>Trusts</i> § 200 (1992) . . . . .	
Utah R. Civ. P. 61 . . . . .	34
Utah R. Civ. P. 69(s) . . . . .	44
Utah R. App. P. 11(e)(2) . . . . .	37

## **STATEMENT OF JURISDICTION**

Pursuant to Utah Code Ann. § 78-2a-3(2)(j), and the Utah Const. Art. VIII, § 3, this Court has jurisdiction over the present appeal.

## **STATEMENT OF THE ISSUES AND STANDARD OF REVIEW**

Issue 1: Did the Trial Court properly rule that the concealment prong of the common law discovery rule applied in this case in addition to the statutory discovery rule contained in the Utah Fraudulent Transfer Act (Utah Code Ann. § 25-6-10(1))?

Standard of appellate review: Correction of error/clearly erroneous. The applicability of statutes of limitations and the applicability of the discovery rule are questions of law to be reviewed for correctness. *Spears v. Warr*, 44 P.3d 742, 753 (Utah 2002) (citations omitted). “However, the applicability of the statute of limitations and the discovery rule also involves a subsidiary factual determination - - the point at which a person reasonably should know that he or she has suffered a legal injury. This is a question of fact. Accordingly, appellate courts review for correctness, incorporating a clearly erroneous standard of review for the subsidiary factual determination of when plaintiffs should have known of their alleged legal injuries.” *Id.* (citations omitted).

Whether the fraudulent concealment doctrine applies to a specific set of facts is a question of fact reviewed under the clearly erroneous standard. *Aurora Credit Serv. v. Liberty West*, 970 P.2d 1273, 1279 (Utah 1998)(citing *Berenda v. Langford*, 914 P.2d 45, 53 (Utah 1996) (“The application of this rule to any particular set of facts is necessarily a

matter left to trial courts and finders of fact.”)); *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327, 334 (Utah 1997).

Issue 2: Did the Trial Court properly find that Plaintiff could not have discovered the fraudulent transfer at issue herein until April, 2001?

Standard of Appellate Review: Clearly erroneous. *Spears v. Warr*, 44 P.3d 742, 753 (Utah 2002) (“The point at which a person reasonably should know that he or she has suffered a legal injury is a question of fact.”); *Aurora Credit Services v. Liberty West*, 970 P.2d 1273, 1279 (Utah 1998) (What a reasonably person would have known or done in specific circumstances is a question of fact).

Issue 3: Did the Trial Court have jurisdiction to attach the proceeds of the Fidelity Investment account under the name of Hodges?

Standard of Appellate Review: Correction of error. *White v. Gary L. Desselhorst, NP Ski Corp.*, 879 P.2d 1371, 1374 (Utah 1994).

Issue 4: Did the Trial Court properly determine Rappleye’s and Hodges’ interests in the proceeds from the sale of the Branson Property?

Standard of Appellate Review: Clearly erroneous. *State ex. rel. W.A.*, 63 P.3d 607, 611 (Utah 2002).

Issue 5: Did the Trial Court give full faith and credit to the Missouri court's Decree of Dissolution of Marriage which awarded Hodges \$410,000.00 (which amount included the proceeds from the sale of the Branson Property) and Rappleye \$506.00?

Standard of Appellate Review: Correction of error. *White v. Gary L. Desselhorst, NP Ski Corp.*, 879 P.2d 1371, 1374 (Utah 1994).

Issue 6: Is Plaintiff's constructive trust claim barred by the applicable statute of limitations?

Standard of Appellate Review: Correction of error/clearly erroneous. The applicability of statutes of limitations and the applicability of the discovery rule are questions of law to be reviewed for correctness. *Spears v. Warr*, 44 P.3d 742, 753 (Utah 2002) (citations omitted). "However, the applicability of the statute of limitations and the discovery rule also involves a subsidiary factual determination - - the point at which a person reasonably should know that he or she has suffered a legal injury. This is a question of fact. Accordingly, appellate courts review for correctness, incorporating a clearly erroneous standard of review for the subsidiary factual determination of when plaintiffs should have known of their alleged legal injuries." *Id.* (citations omitted).

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53 (Utah 1996) (“The application of this rule to any particular set of facts is necessarily a matter left to trial courts and finders of fact.”)); *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327, 334 (Utah 1997).

#### **DETERMINATIVE STATUTORY OR OTHER PROVISIONS**

The dispositive statutes and rules are attached hereto as Exhibit “A” to the Appendix.

#### **STATEMENT OF THE FACTS**

1. On or around April 25, 1991, a Decree of Divorce (‘Original Decree of Divorce’) was entered in the Fourth District Court, Wasatch County, between Defendant/Appellant George Bryce Rappleye (“Rappleye”). (R at 156 - 158; 425, ¶ 1.) In May of 1991, Rappleye filed a Notice of Appeal and Plaintiff in response cross-appealed. (R at 223; 230; 1425, ¶ 2.)

2. On May 20, 1991, Rappleye married Linda Jean Hodges (“Hodges”). (R at 1425, ¶ 3; 1532.)

3. On October 19, 1992, Rappleye and Hodges, entered into a Real Estate Purchase Contract with Edwin Michel and Duvall Investments, Inc. dba Michel’s Motor Lodge to Purchase 33 acres of real property located in Branson, Missouri for \$330,000.00 cash. (R at 1425, ¶ 6; 1451, pg. 47:2-3; 1530-1531) (*see* Appendix, Exhibit “B”).

4. On January 4, 1993, Rappleye and Hodges closed the Earnest Money Sales Agreement to purchase real property and assets generally know as the Branson Lake Resort (the “Branson Property”) in Branson, Missouri, for the purchase price of \$330,000.00, which was paid in cash. At closing, Rappleye executed the HUD settlement statement. Rappleye and Hodges (under the name Linda Jean Rappleye) jointly took title to the Branson Property by Warranty Deed as “husband and wife.” (R at 1425, ¶ 7; 1451, pg. 47:5-9; 1530-1531.) (*see* Appendix, Exhibit “C”).

5. Rappleye paid approximately one-half of the purchase price of \$330,000.00 for the Branson Property using proceeds from the sale of certain Fidelity Investment accounts in his name. (R at 1451, pg. 44:20 - 45:19.) In written wiring instructions to Fidelity Investments, Rappleye and Hodges noted that they desired to redeem the entire balances in their individual, separate accounts and specifically stated “we are buying a resort and want the money transferred to close this week.” The wiring instructions, executed by Rappleye and Hodges, indicated that Rappleye’s account #417-570-736 should have a balance of “\$144,000 plus” and that Hodges’ account #417-601-481 should have a balance of “\$153,579.00 plus.” (R at 1451, pg. 44:20 - 45:19) (*see* Appendix, Exhibit “D”).

6. In February, 1993, Rappleye and Hodges formed a general partnership under the laws of the State of Missouri that did business as Branson Lake Resort (“Branson Lake Resort”). Rappleye and Hodges each owned a one-half interest in

Branson Lake Resort. (R at 1451, pg. 44:20 - 45:19, 62:21 - 64:2; R at 1531.) (*see* Appendix, Exhibit “E”).

7. On June 15, 1993, the Utah Court of Appeals ruled on the parties’ respective appeals and found that remand necessary for further findings on i) the date of valuation of certain investment accounts; and ii) on the propriety of awarding Plaintiff her accounting costs. This Court further found that the evidence did not support award of the entire proceeds from the sale of a certain hardware store to Rappleye. These issues were remanded to the Fourth District Court to be retried. (R at 270.); *See Rappleye v. Rappleye*, 855 P.2d 260 (Utah App. 1993).

8. On July 29, 1993, the Fourth District Court, Wasatch County, State of Utah (“Trial Court”) scheduled a Pre-Trial Conference to be held on August 23, 1993. (R at 278.) At the Pre-Trial Conference, trial date for the issues on remand was set for November 22, 1993. (R at 1529;)

9. Rappleye transferred his ownership in the Branson Property to Hodges by executing a quit-claim deed on September 17, 1993, and filed such deed in the State of Missouri, Taney County Recorder’s Office on September 29, 1993. (R at 1528.) (*see* Appendix, Exhibit “F”).

10. On October 7, 1993, Rappleye purportedly transferred real property known Lot 8, Timpanogos Estates, Wasatch County, located in Midway, Utah (“Timpanogos Property”), to his son, Robert Shane Rappleye, by quit claim deed. The quit claim deed,

however, was not signed in the presence of a notary public until October 27, 1993 and not filed in the Wasatch County Recorder's Office until October 28, 1993. (R at 356-357; 1528.)

11. On October 18, 1993, just nine (9) days before Rappleye executed the quit claim deed for the Timpanogos Property in the presence of a notary public transferring the Timpanogas Property to his son, Plaintiff, by and through her counsel of record, filed a Motion for Pre-Judgment Writ of Attachment for any non-exempt real property and personal property. (R at 284.)

12. On October 28, 1993, twenty-one (21) days after Rappleye purportedly transferred the Timpanogos Property to his son, and one (1) day after the quit claim deed for the Timpanogos Property was signed in the presence of a Notary Public, Rappleye, by and through his counsel of record, submitted an Objection to Plaintiff's Motion for Prejudgment Attachment ("Objection") and Affidavit of Rappleye. (R at 306.)

13. Rappleye's Objection contained the following allegations:

During the appeal herein, Mr. Rappleye remarried and had to move to Missouri to seek employment to maintain himself and his new family. In Missouri, Mr. Rappleye is currently employed on an hourly basis which grosses less than \$1,000.00 per month and which provides significantly reduced hours during the winter months. In order to adequately support himself and his family, Mr. Rappleye has planned on and anticipated the necessity of the \$18,000.00 property payment to cover his living expenses and debts throughout the winter. Any court order delaying or depriving Mr. Rappleye of this payment, even for a short period, will work a grave hardship upon him in his present financial and employment circumstances.

(R at 304.)

14. On October 28, 1993, Rappleye submitted an Affidavit in support of the Objection, subscribed and sworn to one (1) day before he executed the Quit Claim Deed in the presence of a notary public, in which he testified:

1. I am the defendant in this action and have personal knowledge of the facts herein.
2. I am owed a balloon payment of \$18,000.00 on November 1, 1993, for the sale of *my* property located in Heber City, Utah.
3. I need this money to pay off my debts and support myself.
4. I have a \$4,000 stock loss debt.
5. I have a \$6,000 legal fee debt (and rising).
6. I pay \$350.00 per month to support my son on his LDS Church mission, of which I have no income or savings, or convertible assets to meet this obligation.
7. I currently reside in a resort community in Missouri where I do maintenance type work in lieu of my housing expense.
8. I have no other employment at the present time.
9. We are presently in the off-season, which results in non-existent job opportunities.
10. Without the \$18,000.00 lump payment owed to me, I will be unable to provide for myself and unable to meet my financial obligations for the immediate and foreseeable future.

(Emphasis added). (R at 288 - 289.)

15. Rappleye concealed from the Trial Court and Plaintiff that he had moved to Branson, Missouri, with the express purpose of purchasing the Branson Property with his wife, Hodges, in February, 1993, with \$330,000.00 *cash*, and that he had transferred his interest therein to Hodges, a mere thirty-nine (39) days prior to submission of the Objection and Affidavit, without receiving any consideration. (R at 288 - 289; 304.)

16. After submitting the Objection and Affidavit in the Trial Court on October

28, 1993, Rappleye continued to conceal from the Trial Court and Plaintiff his ownership interest in the Branson Property and Branson Lake Resort. For example, Stephen Henroid, his counsel of record, represented to the Trial Court on October 29, 1993, in the Pre-Judgment Writ of Attachment proceeding, that Rappleye had \$250,000.00 in securities accounts at the time of the original trial in 1991 and that he had subsequently lost all of that \$250,000.00 on the stock market, and was working for \$5.00 per hour to survive. (R at 258, pg. 8 - 9.)

17. On October 29, 1993, the Trial Court entered a Prejudgment Writ of Attachment after a hearing was held on the matter. During the hearing, Rappleye's counsel, Stephen Henroid, informed the Court that he had just learned earlier in the day that Rappleye had apparently transferred the Timpanogas Property to another person. Due to the transfer, both parties' counsel requested a continuance of the trial date of November 22, 1993, so the facts surrounding the transfer of the Timpanogas Property could be discovered. A new trial date, March 23, 1994, was set. (R at 258, pg. 10, 16 - 17; R at 310; R at 410.)

18. Also, on October 29, 1993, the same day the Prejudgment Writ of Attachment was entered, Rappleye and Hodges filed for divorce in the Taney County Court, State of Missouri. (R at 1451, pg. 58:24 - 59:15; R at 1525).

19. On November 30, 1993, approximately one (1) month after they filed for divorce in Taney County, State of Missouri, Rappleye and Hodges were sealed for time and all eternity in ceremony held in a temple of the Church of Jesus Christ of Latter-Day Saints, located in Dallas, Texas (“LDS Dallas Temple”). (R at 1451, pg. 58:24 - 59:15; R at 1525.)

20. On or around December 3, 1993, just three (3) days after being sealed in the LDS Dallas Temple, Rappleye and Hodges, representing themselves pro se, entered into and filed in the Circuit Court of Taney County, State of Missouri, a Marital Settlement and Separation Agreement. (R at 1451, pg. 58:24 - 59:15; R at 1525).

21. In the Marital Settlement and Separation Agreement executed and filed on December 3, 1993, Rappleye and Hodges claimed that they had not acquired any property during the course of their marriage despite the fact that they had purchased the Branson Property as a married couple on January 4, 1993, and had formed the general partnership known as Branson Lake Resort. (R at 1524; R at 1536 at Exhibit “5”).

22. Rappleye and Hodges also claimed in the Marital Settlement and Separation Agreement that Rappleye had a premarital worth of only \$506.00. (R at 1536 at Exhibit “5”).

23. On December 23, 1993, Hodges, under the name “Linda Jean Rappleye”, transferred the Branson Property to herself, as “Linda Hodges” by a Warranty Deed. (R at 1536, at Exhibit “7”) (*see* Appendix, Exhibit “G”).

24. On or around January 6, 1994, Hodges' and Rappleye's Decree of Dissolution of Marriage was entered in Taney County, Missouri. (R at 1536, at Exhibit "6".)

25. After the trial on remand held on March 23, 1994, the Trial Court awarded Plaintiff a judgment against Rappleye, as part of the Decree and Judgment ("Decree and Judgment"), in the amount of \$216,011.47. As part of the Judgment of \$216,011.47, entered on October 19, 1994, Plaintiff was awarded one-half of the value of a certain Timberline Hardware Store owned by the parties during their marriage. The Trial Court found the value of the Timberline Hardware Store to be \$364,877.95 and that Plaintiff's resulting interest would be \$182,438.97. The Timberline Hardware Store was sold in 1988 and Rappleye had exclusive control over *all* the proceeds of the sale at all times. (R at 706 - 710.)

26. At the trial on remand on March 23, 1994, Rappleye testified that he spent part of the proceeds from the sale of the Timberline Hardware store on debts and obligations from his marriage to Plaintiff and that he lost the remainder of the proceeds on the stock market. Rappleye testified under oath that he had lost in excess of \$200,000.00 in the stock market in 1992 and 1993 and that he had no assets other than the Timpanogos Property. (R at 1536, at Exhibit "C" at pages 51 - 55.)

27. As part of the Decree and Judgment, the Trial Court also set aside and



voided Rappleye's concealed transfer of the Timpanogos Property to his son and specifically found that the transfer had been undertaken with the express intent to defraud Plaintiff. (R at 706 - 710.)

28. On May 4, 1994, Rappleye signed and submitted to the Fourth District Court his Objections to the Plaintiff's [Proposed] Findings of Fact and Conclusions of Law ("Objections to Proposed Findings of Fact and Conclusions of Law"). Rappleye claimed in the Objections to Proposed Findings of Fact and Conclusions of Law that he had lost \$242,000.00 in stock market losses. (R at 1451, p. 66 - 67; R at 1536, at Exhibit "37".)

29. On October 11, 1994, Rappleye signed and submitted to the Fourth District Court a Letter of Objection to Plaintiff's Findings of Fact and Conclusion of Law and Decree and Judgment ("Letter of Objection"). Rappleye stated in the Letter of Objection that he had been "devastated by \$237,000.000 in investment losses in 1992 and 1993 . . . There are NO remaining assets for collectable judgment". (Emphasis in original). (R at 601 - 614; 1451, pg. 68:4 - 69:9.)

30. On February 10, 1995, four (4) months after entry of the Decree and Judgment, Rappleye filed a Voluntary Petition for Chapter 7 Bankruptcy in United States Bankruptcy Court, Western District of Missouri, Southern Division ("Bankruptcy Court"). (R at 1451, pg. 85:8-19; R at 1536, at Exhibit "40".)

31. In the Schedules and Statement of Financial Affairs also submitted to the Bankruptcy Court on February 10, 1995, and signed by Rappleye under penalty of perjury, Rappleye claimed assets in the amount of \$356.17 consisting entirely of exempt personal property. (R at 1451, pg. 84: 12-17; R at 1536, at Exhibit “40”).

32. In the Statement of Financial Affairs, Rappleye claimed under penalty of perjury that he had incurred stock losses for 1992 in the amount of \$78,752.00 and 1993 in the amount of \$150,131.00, for a total of \$228,884. (R at 1451, pg. 91-92; R at 1536, at Exhibit “40”).

33. After transferring his interest in the Branson Property to Hodges on September 17, 1993, Rappleye continued to reside on the property and his living expenses were covered by Hodges. (R at 287 - 289; R at 1451, pg. 137 - 138.)

34. On May 10, 1995, Hodges sold the Branson Property under the name of “Linda Hodges” to Emery Smith for approximately \$440,000.00. (R at 1521; R 1536, at Exhibit “F”, pg. 20 - 21.)

35. In or around May, 1995, Plaintiff filed a Complaint in the Bankruptcy Court to determine the Dischargeability of the Debt. (R at 1521.)

36. On February 1, 1996, at the trial held on Plaintiff’s Complaint to Determine Dischargeability, Rappleye again testified under oath that he had lost all his assets on the stock market. (R at 1451, pg. 97 - 102:12.)

37. The Bankruptcy Court, after conducting a two-day trial, issued its Findings of Fact, Conclusions of Law and Memorandum Opinion (“Opinion”) on May 28, 1997. The Bankruptcy Court determined that Plaintiff’s claim was non-dischargeable. (R at 1521, at Exhibit “41”; *See* Appendix, Exhibit “H”).

38. In the Opinion, the Bankruptcy Court, while ruling that the debt could not be discharged, seriously called into question Rappleye’s credibility by reciting past incidents of commercial fraud, forgery, and the fraudulent transfer of real estate. In the Opinion, the Bankruptcy court further noted regarding Rappleye’s testimony at trial that “he simply refused to believe judges have the right to distribute any of his assets to Johnson [Plaintiff] because he knew that they were his own pre-marital property. Rappleye claimed to be right and the judges were wrong. In effect, Rappleye claims to be above the law and again it is consistent with some of his other actions such as conveying assets.” (R at 1521, at Exhibit “41”; *See* Appendix, Exhibit “H”).

39. The Bankruptcy Court specifically found that Rappleye kept trying to take away Plaintiff’s judgment, “whether by court proceeding or by simply dissipating the assets” and noted his position as being that “he is not going to be bound by any judge’s determination.” (R at 1521, at Exhibit “41”; *See* Appendix, Exhibit “H”).

40. Finally, the Bankruptcy Court found as follows:

Rappleye had a state of mind that was not good. He has some credibility problems. But to try and go back and give him the benefit of the doubt, the court notes that often defendants may very sincerely and subjectively believe that they are correct, and it is extremely difficult to accept an adverse judgment. Rappleye

certainly has a strong subjective belief that so far all of the four, five or six judges who have looked at the case must be wrong because they do not agree with him. All of the trial judges in Utah, the appellate judges or even an appellate panel, all agree in finding against Rappleye. At some point, Rappleye must realize that, especially where he has sought the services and protection of the court, that he is bound by the judgment.

(R at 1521, at Exhibit “41”; *See* Appendix, Exhibit “H”.)

41. Throughout the trial on remand and the bankruptcy proceedings, Hodges and Rappleye resided together, concealed their divorce from their family, friends, church, employers and represented themselves to the IRS as a married couple despite the fact that they were divorced on January 6, 1994. (R at 1451, pg. 104:11 - 106:19.)

42. On May 21, 1997, Hodges purchased real property and a residence located at 1015 South River Road #31, St. George, Utah (“St. George Property”) Utah, for \$94,000.00.

43. In or around June, 1998, Hodges and Rappleye met with attorney Kurt A. Johnson (“Johnson”) to discuss a separate property trust, will, durable power of attorney and medical power of attorney in order to, among other things, protect the proceeds from the sale of the Branson Property from execution by Plaintiff. (R at 1451, pg. 136: 7 - 15.)

44. On June 15, 1998, Hodges executed the following documents prepared by Johnson: The Linda Jean Hodges Separate Property Trust (“Trust”); Last Will and Testament (“Will”); Springing Durable Power of Attorney (“SDPOA”); and a Durable

Power of Attorney for Health Care Decisions ("DPOAHCD"). (R at 1451, pg. 104:11 - 106:19; R at 1536, at Exhibit "14" - "18".)

45. Rappleye is listed as the primary beneficiary and the successor trustee of the Trust, which has the effect of giving him unfettered access to the trust estate since he is the primary beneficiary of the Trust upon the death of Hodges and no accounting is required to be made to the secondary beneficiaries, Rappleye's and Hodges' children. (R at 1451, pg. 104:11 - 106:19; R at 1536, at Exhibit "14" - "18".)

In her Will, Hodges appointed Rappleye as her executor. Likewise, in her SDPOA, Hodges appointed Rappleye as the attorney/agent in fact to manage all her assets in the event of her incapacity. (R at 1451, pg. 104:11 - 106:19; R at 1536, at Exhibit "14" - "18".)

46. Rappleye is currently living with Hodges in St. George, Utah in a residence purchased with the proceeds from the sale of the Branson Property, but titled under Hodges' name, and has lived there since May, 1997, the date the property was purchased, without payment of rent or other consideration. (R at 1451, pg. 104:11 - 106:19.)

47. After purchasing the St. George Property in 1997, Rappleye and Hodges continued to hold themselves out as a married couple to, or concealed their divorce from, their families, friends, employers, IRS and their church. (R at 1451, pg. 104:11 - 106:19.)

48. Rappleye and Hodges, however, were not legally and lawfully married from the date of their divorce on January 6, 1994, until September 12, 2001, just days after they returned to the State of Utah from selling the motor vehicles in Las Vegas, Nevada, when they were questioned about their marital status by the Bishop of their ward of the Church of Jesus Christ of Latter-Day Saints. (R at 1451, pg. 104:11 - 106:19.) Rappleye and Hodges were remarried in Mesquite, Nevada, on September 12, 2001 at the counsel of their Bishop. (R at 1451, pg. 104:11 - 106:19.)

49. Due to Rappleye's consistent and continual concealment and non-disclosure to Plaintiff and the courts of his assets and business activities, Plaintiff did not know about the existence of Rappleye and Hodges' general partnership's named Branson Lake Resort, or that Rappleye had purchased the Branson Property until April, 2001. (R at 1451, pg. 141.)

50. Plaintiff also did not know of the existence of significant assets under the name of Linda Jean Hodges, individually, or the Linda Jean Hodges Separate Property Trust, as Trustee, until April, 2001, when she learned in April that the residence in which Rappleye and Hodges were residing was titled under Hodges' name, as Trustee for the Separate Property Trust, and on September 26, 2001, when her counsel of record learned during a supplemental proceeding that Hodges had a Fidelity Investment account with a balance of more than \$300,000.00. (R at 1451, pg. 141: R at 1511.)

51. After unsuccessful attempts to serve Rappleye and Hodges at their residence in St. George, Utah in June and July, 2001, with the Motion and Order in Supplemental Proceedings, Rappleye and Hodges were located at the Star Valley Resort, in Star Valley, Wyoming (“Resort”).

52. Also on or around July 3, 2001, after learning that someone was trying to serve them with papers, Rappleye called the Fourth District Court to inquire about what legal action was being taken by Plaintiff and at that time learned about the Motion and Order for Supplemental Proceedings. (R at 1451, pg. 23:8-18, 122:7 - 20.)

53. On July 3, 2001, Rappleye and Hodges left Star Valley, Wyoming, and eventually ended up in Las Vegas, Nevada. Rappleye and Hodges had in their possession on July 5, 2001, a 1985 Fleetwood Pac Motor Home (“Motor Home”), and a 1994 Suzuki Sidekick (“Sidekick”). At the time, Rappleye was listed as the owner of the Motor Home and the Sidekick on their Utah Certificates of Title. (R at 1451, pg. 28:8-18, 122:7 - 20.)

54. On July 9, 2001, a Writ of Execution covering all of the non-exempt property of Rappleye was issued by the Fourth District Court, in connection with the Decree and Judgment. (R. at 813 - 816.)

55. On July 11, 2001, Rappleye transferred the titles to Motor Home and Sidekick from Utah Certificates of Title showing him as the owner to Idaho Certificates of Title showing him as the owner, but listed his residential address as 510 East 17<sup>th</sup>

Street, #308, Idaho Falls, Idaho 83404, the address of a Mail Boxes, Etc. Rappleye and Hodges have never resided in the State of Idaho. (R at 1451, pg. 28:1-14, 121:7-25.)

56. On August 24, 2001, the Trial Court issued an Order to Show Cause ordering Rappleye to appear on September 26, 2001, to show cause why a Bench Warrant should not be entered against Rappleye for his earlier failure to appear at a Motion and Supplemental Order Proceeding hearing, and an Order Granting Ex-Parte Motion for Service of Order to Show Cause by Mailing and the Court mailed the Order to Show cause to Rappleye at his last known addresses. (R 757 - 762.)

57. On August 30, 2001, just days after receipt of the Order to Show Cause, Rappleye sold the Motor Home and the Sidekick to Cars 4 U, a motor vehicle dealership located in Las Vegas, Nevada. The proceeds of the sale were placed under the name of Hodges. (R. at 1451, p. 28-31.)

58. On October 26, 2001, a second Writ of Execution covering all of the non-exempt property of Rappleye, including Fidelity Investment Accounts #X29-106640, #X33-089737, #Y01-058866, and #X29-179590 ("Fidelity Investment Accounts"), was issued by the Trial Court. (R. at 897 - 903.)

59. Hodges admits that the money in Fidelity Investment Accounts upon which execution was levied in this case, as well as the money used to purchase the St. George Property, is from the proceeds of the sale of the Branson Property. (R. at 1451, p. 12-13).



60. On April 29, 2002, the Trial Court entered a Memorandum Decision and, on January 8, 2003, entered Findings of Fact and Conclusions of Law and an Order of Execution. (R at 1393 - 1430.)

61. The Order of Execution confirmed that Plaintiff was entitled to execute upon the Fidelity Investment Accounts and the proceeds of the sale of Motor Home and the Suzuki Sidekick. (R at 1429).

62. On January 27, 2003, the Trial Court entered an Order, based on the Stipulation of the parties, supersedeas bond in connection with this appeal in the amount of \$230,000.00. The parties had stipulated, and the Trial Court ordered, that the \$212,916.00 be considered as Rappleye's 48.49 percent interest in the proceeds of the Branson Property. The stipulation was reached, in part, to avoid the necessity of commencing another execution proceeding in Wasatch County on subject of the St. George Property. (R at 1435 - 1444) (*see* Appendix "I".)

### **SUMMARY OF ARGUMENT**

The Trial Court did not commit reversible error in ruling that the concealment prong of the common law discovery rule applies in this case. The application of the legal rule of fraudulent concealment to the circumstances in this case is left to the Trial Court under Utah law. Rappleye's claim that Plaintiff had actual, constructive or implied notice of the transfer of his interest in the Branson Property to Hodges in September, 1993, is without merit. Rappleye consistently denied under oath having any assets, and during his

bankruptcy trial, expressly denied ever having any financial or record interest in the Branson Property. Also, Utah courts have ruled that the recordation of a deed does not apprise a party of the fraudulent nature of a transfer.

The Trial Court found that Plaintiff established an overwhelming *prima facie* case of fraudulent transfer, that Plaintiff could not have known about her claim for fraudulent concealment until April, 2001, and that Plaintiff acted reasonably and with due diligence at all times. Rappleye has not marshaled any evidence to show that these findings were against the clear weight of the evidence.

Even if this Court were to conclude that the Trial Court erroneously applied the concealment prong of the discovery rule, it constitutes harmless error as the Trial Courts entered findings of fact which meet the elements of statutory discovery rule contained in the UFTA. The Trial Court specifically found that Plaintiff could not have known about the fraudulent transfer until April, 2001.

Rappleye failed to properly brief the issues of whether the Trial Court had jurisdiction to adjudicate the fraudulent transfer and full faith and credit issues raised in his Brief. Rappleye failed to cite to any legal authority. More importantly, the authority cited herein shows that Rappleye's jurisdictional claims are without merit.

Hodges attended and materially participated in the execution proceedings. In fact, Hodges filed a Request of Hearing claiming that the Fidelity Investment Accounts did not contain any of Rappleye's property. Mr. Quesenberry represented the interests of Hodges

in the Trial Court, as well as another case between the parties filed in the Provo Department of the Fourth District Court.

## **ARGUMENT**

### **I. THE TRIAL COURT CORRECTLY RULED THAT THE DISCOVERY RULE TOLLED THE APPLICABLE STATUTES OF LIMITATIONS.**

The Trial Court correctly ruled that the discovery rule tolled the applicable statutes of limitations on Plaintiff's claims.

Generally, a cause of action accrues upon the happening of the last event necessary to complete the cause of action. However, in certain instances, the discovery rule may operate to toll the period of limitations until discovery of the facts forming the basis for the cause of action.

*Berenda v. Langford*, 914 P.2d 45, 50-51 (Utah 1996) (citations omitted) (internal punctuation altered).

Under the “discovery rule,” statutes of limitations may be tolled until discovery of facts forming the basis for a cause of action (1) in situations where the discovery rule is mandated by statute; (2) in situations where a plaintiff does not become aware of the cause of action due to the defendant's concealment or misleading conduct; and (3) in situations where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action. *Spears v. Warr*, 44 P.3d 742, 753 (Utah 2002) (citations omitted); *see also Berenda*, 914 P.2d at 51.

#### **a. The Concealment Prong of the Discovery Rule Applies to Plaintiff's Claim of Fraudulent Transfer.**

Under Utah law, whether the fraudulent concealment doctrine applies to a specific set of facts is a question of fact reviewed under the clearly erroneous standard. *Aurora Credit Serv. v. Liberty West*, 970 P.2d 1273, 1279 (Utah 1998)(citing *Berenda v. Langford*, 914 P.2d 45, 53 (Utah 1996) (“The application of this rule to any particular set of facts is necessarily a matter left to trial courts and finders of fact.”)); *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327, 334 (Utah 1997).

In *Berenda*, the court noted that normally all that is required to trigger the statute of limitations is sufficient information to apprise a plaintiff of the underlying cause of action so as to put them on notice to make further inquiry if they harbor doubts or questions about a defendant’s actions; but the court noted an exception:

[U]nder our case law the rule is otherwise when a plaintiff alleges that a defendant took affirmative steps to conceal the plaintiff’s cause of action, as is the case here. In such a situation, the plaintiff can avoid the full operation of the discovery rule by making a prima facie showing of fraudulent concealment and then demonstrating that given the defendant’s actions, a reasonable plaintiff would not have discovered the claim earlier.

*Berenda*, 914 P.2d at 51; *See also Warren v. Provo City Corp.*, 838 P.2d 1125, 1130 (Utah 1992) (balancing reasonableness of plaintiff’s diligence in discovering claim against defendant’s acts of concealment); *Vincent v. Salt Lake County*, 583 P.2d 105, 107 (Utah 1978) (finding that reasonable reliance on defendant’s misrepresentations tolled statute of limitations until discovery of cause of damage.)

The *Berenda* court noted continued:

Thus, the fraudulent concealment version of the discovery rule aims to navigate a balance between two competing policies: (i) that which underlies all statutes of limitations, namely, ‘to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared, and (ii) that of not allowing a defendant who has concealed his wrongdoing to profit from his concealment. *To the extent that the rule requires examination of the reasonableness of a plaintiff’s conduct in light of the defendant’s actions, it differs from the rule as applied when no fraudulent concealment is alleged.*

*Id.* at 52 (citations omitted) (emphasis added).<sup>1</sup>

The following standard has been adopted to determine the applicability of the concealment prong of the discovery rule:

At its most basic level, the fraudulent concealment version of the discovery rule requires a determination of (i) when a plaintiff would reasonably be on notice to inquire into a defendant’s wrongdoing despite the defendant’s efforts to conceal it; and (ii) whether a plaintiff, once on notice, would reasonably have, with due diligence, discovered the facts forming the basis of the cause of action despite the efforts to conceal those facts.

*Id.* at 52.

Recently, in *Hill v. Allred*, 28 P.3d 1271, 1276 (Utah 2001), and *Aurora Credit Service v. Liberty West*, 970 P.2d 1273,1278 (Utah 1998), the Supreme Court of Utah made it clear that weighing the reasonableness of a plaintiff’s conduct in light of the

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<sup>1</sup> *Aurora Credit Serv. v. Liberty West*, 970 P.2d 1273,1278 (Utah 1998) (“The fraudulent concealment doctrine originated as an equitable doctrine to estop one who has prevented discovery of a cause of action by wrongfully concealing a material fact from asserting a statute of limitations defense to the assertion of the claim.” (Citations omitted). “This court has applied this doctrine in the statute of limitations context to estop a wrongdoer from benefitting from concealing his wrong.”)

defendant's steps to conceal the cause of action necessitates factual findings and, therefore, is in the providence of the fact finder.

In this case, the Trial Court ruled that Plaintiff overwhelmingly established a prima facie case of fraudulent concealment, that Plaintiff would not have reasonably been on notice to inquire into Rappleye's wrongdoing until April, 2001, and that Plaintiff acted reasonably and exercised due diligence at all times. (R at 1003, 1005, 1009; 1397, 1399, 1401-1402.)

Rappleye attempts to avoid the overwhelming evidence in support of application of the concealment prong of the discovery rule by arguing that Plaintiff knew or could have known of his ownership of the Branson Property because the conveyancing deeds at issue were recorded in his own name. In support of this argument, Rappleye relies on *Baldwin v. Burton*, 850 P.2d 1188, 1197 (Utah 1993) (Creditors would have discovered the conveyance had they conducted a normal search of property upon which to levy when they received their judgment against debtor).

In *Baldwin*, however, the plaintiff did not allege, let alone show, that the defendant had somehow concealed the cause of action. The Supreme Court of Utah stated that "[r]ecording a deed or entering judgment alone is not enough in some circumstances to apprise a party of the fraudulent nature of a conveyance." *Id.* at 1195 (noting *Smith v. Edwards*, 17 P.2d 264, 271 (Utah 1932)) ("Mere constructive knowledge of the deed by reason of its having been filed for record is not notice of the facts constituting the fraud.")

Moreover, this Court recently held that “the concealment prong of the discovery rule applies to toll the statute of limitations on the plaintiff’s claim, regardless of inquiry or constructive notice.” *Russell/Packard Dev., Inc. v. Carson*, 78 P.3d 616, 621 (Utah Ct. App. 2003) (citation omitted).

Utah courts have consistently held that there is a vast difference between “situations where there [are] no allegations that defendant engaged in acts of concealment [citations omitted], and those in which ‘a plaintiff alleges that a defendant took affirmative steps to conceal a plaintiff’s cause of action.’” *Hill v. Allred*, 28 P.3d 1271, 1276 (Utah 2001). In fact, the *Hill* court called the “alleged concealment *critical* to the statute of limitations question.” *Id.* (Emphasis added).

Rappleye’s position completely ignores his misleading acts, many of which were done while he was under oath and penalty of perjury, and continued concealment of his title and financial interest in the Branson Property. Indeed, notwithstanding the indisputable evidence that he transferred at least \$144,000.00 from his Fidelity Investment Account for the specific and stated purpose of purchasing the Branson Property, Rappleye continues to deny under oath ever having any financial interest therein.

In *Berenda*, the Supreme Court of Utah found “Langford’s [defendant] reliance on *United Park City Mines* and *Baldwin* unhelpful because those cases did not involve a defendant’s affirmative fraudulent concealment of the plaintiff’s cause of action.”

*Berenda*, 914 P.2d at 52. The *Berenda* Court stated that, simply put, *Baldwin* did not require us “to judge the reasonableness of the plaintiff’s conduct in light of the defendant’s acts of concealment.” *Id.* Likewise, in *Russell/Packard*, this Court noted the error in the defendant’s reliance on discovery cases not involving allegations of fraudulent concealment for the same reason. *Russell/Packard*, 78 P.3d at 621. For this reason, *Baldwin* and other non-concealment cases are unhelpful in the instant case.

Rappleye also seeks to avoid application of the discovery rule by noting an exchange between Rappleye and Plaintiff’s counsel at the bankruptcy trial in February of 1996. He speculates that Plaintiff’s counsel knew about the deeds at issue. A review of the exchange, however, reveals *only* that Plaintiff’s attorney knew the name of the person who sold the Branson Property to *Hodges* and the person to whom *Hodges* later sold. The exchange in no way reveals how, or from whom, Plaintiff’s attorney learned that information.

It is illogical to conclude from a review of the entire exchange, and there is no evidence in the exchange, that Plaintiff’s counsel knew that i) Rappleye purchased the Branson Property with *Hodges*; ii) that Rappleye had held title in the Branson Property jointly with *Hodges*; and/or iii) that Rappleye transferred his interest in the Branson Property to *Hodges* on September 17, 1993. If Plaintiff’s counsel had this information, it could have used it to Plaintiff’s great advantage during the bankruptcy trial.



Moreover, Rappleye continued his pattern of fraud and deceit in the same exchange by denying under oath ever having invested in, or ever having any interest in, the Branson Property:

Checkett - Did you have any interest in the resort?  
Bryce - I didn't have any interest in the resort.  
Checkett - Your testimony is that you had no interest in it at all?  
Bryce - None.  
Checkett - No money in it?  
Bryce - No money in it.  
Checkett - Jean wasn't holding anything for you?  
Bryce - Jean?  
Checkett - Yes, sir?  
Bryce - No.<sup>2</sup>

(R at 1451, pg. 36:19 - 38:17.)

The Trial Court noted that Rappleye failed to introduce any evidence that Plaintiff knew of Rappleye's interest in this Branson Property and that it was "disingenuous to argue that Plaintiff should have continued to exercise due diligence in attempting to discover the facts surrounding the transfer in spite of his strong denial under oath."

(R at 1006. )

**b. The Trial Court Correctly Ruled that the Concealment Prong of the Discovery Rule Applies to Plaintiff's Claim for Fraudulent Transfer in Addition to the Statutory Discovery Rule Contained in the Utah Uniform Fraudulent Transfer Act.**

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<sup>2</sup> This is a blatant example of Rappleye's failure to marshal the evidence upon which the Trail Court relied, as discussed more fully in Section III below. Although he attached an informal transcript of the exchange in his Appendix, as Exhibit "D", Rappleye did not include this important part of the exchange in his Brief.

Rappleye argues that the common law discovery rule does not apply in this matter since the Utah Uniform Transfer Act (“UFTA”) includes its own discovery rule. This argument is without merit. The Trial Court correctly ruled that Rappleye’s position is contrary to well-established Utah law that the concealment prong of the discovery rule may be applied *in addition to* a statutory discovery rule.

Under the UTFA, Utah Code Ann. § 25-6-10(1), a claim for relief or cause of action regarding a fraudulent transfer or obligation is extinguished unless action is brought:

- (1) under Subsection 25-6-5(1)(a), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could have been reasonably have been discovered by the claimant.

Rappleye erroneously relies on two cases to advance his assertion that an explicit statutory discovery rule alone governs this matter, namely: *Aragon v. Clover Club Foods Co.*, 857 P.2d 250 (Utah Ct. App. 1993), and *Selvage v. J.J. Johnson & Assocs.*, 910 P.2d 1252 (Utah Ct. App. 1996).

In *Aragon*, this Court noted that “the legislature has statutorily incorporated discovery rules in several statutes of limitation. Other discovery rules have been adopted by judicial action . . . .” *Aragon*, 857 P.2d at 252.<sup>3</sup> Even though the *Aragon* court applied

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<sup>3</sup> Utah courts have long held that “under the concealment prong [of the discovery rule], a defendant who misleads the plaintiff is, in essence, estopped from asserting the statute of limitations as a defense to the claim.” *Anderson v.*

the discovery rule explicitly contained in Utah Code Ann. § 78-15-3, it did not hold that the common law discovery rule cannot be, or should not be, applied in cases where there is an explicit statutory discovery rule. In fact, in *Aragon*, unlike the present case, there was no allegation or showing of misleading conduct or fraudulent concealment of the cause of action. There was also no allegation or showing of technical knowledge necessary for employment of the exceptional circumstances prong of the common law discovery rule. Thus, there was no reason for the court in *Aragon* to apply the common law discovery rule.

In *Selvage*, an opinion issued three (3) years after *Aragon*, this Court rejected an argument identical to Rappleye's in connection with a UFTA claim:

[Cross-Appellant] argues that even if the time limit in 25-6-10(3) is a statute of limitation, the [common law] discovery rule still does not apply. [Cross-Appellant] argues that because section 25-6-10(1) contains an explicit discovery rule, and the other two sections of the time limits section do not, the legislature implicitly meant to preclude the application of the discovery rule to claims brought under subsections (2) or (3). However, as the Utah Supreme Court noted in *Klinger v. Kightly*, 791 P.2d 868 (Utah 1990), *a statutory discovery rule is only one rationale for invoking the discovery rule*. The discovery rules applies in situations where 'there is proof of concealment or misleading by the defendant' or where 'application of the general statute of limitations would be irrational or unjust.'

*Selvage*, 910 P.2d at 1259 (citations omitted)(emphasis added).

In *Berenda*, a case to which Rappleye frequently cites in his Brief, the Supreme Court of Utah applied the fraudulent concealment prong of the discovery rule to

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*Dean Witter Reynolds, Inc.*, 920 P.2d 575, 579 (Utah Ct. App. 1996) (citing *Warren v. Provo City Corp.*, 838 P.2d 1125, 1129-30 (Utah 1992)).

determine whether the statute of limitations was tolled even though Utah Code Ann. § 78-12-27 (the statute of limitations at issue therein) contains an explicit discovery rule.

By its express terms, the statute mandates that we apply the discovery rule. *In addition*, the Amtec plaintiffs presented a prima facie case that Langford [defendant] fraudulently concealed their cause of action. It is the application of the discovery rule in the context of a defendant's fraudulent concealment that is at issue in the instant case.

*Berenda*, 914 P.2d at 51 (emphasis added).

In summary, the Trial Court's ruling on the application of the fraudulent concealment prong of the discovery rule was correct for precisely the reason the cases upon which Rappleye relies are unhelpful: Plaintiff alleged, and proved overwhelmingly, that Rappleye affirmatively concealed her cause of action for fraudulent transfer.

**c. Plaintiff's Constructive Trust Claim is Also Subject to the Discovery Rule.**

The Trial Court did not rule on Plaintiff's claim for constructive trust, presumably because it was not necessary due to its determination that Rappleye's conveyance of the Branson Property was fraudulent. This Court, however, has the authority to affirm the Trial Court's decision on proper grounds other than those which the Trial Court cited in making its decision. *Mel Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451, 456 (Utah Ct. App. 1998); *Buehner Block Co. v. UWC Assocs.*, 752 P.2d 892, 894-95 (Utah 1998).

This Court recently defined a constructive trust as follows:

A constructive trust is an equitable remedy to prevent unjust enrichment in the absence of any express or implied intention to form a trust. . . [A] constructive trust may arise 'where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it . . .'

*Nielson v. Nielson*, 2000 WL 332493999 (Utah Ct. App. 2000) (Citations omitted).

Constructive trusts have also been defined as follows:

A constructive trust-sometimes referred to as a legal fiction or a fiction of equity, and sometimes referred to as a 'trust ex maleficio', based on the view that fraud, either actual or constructive is the very foundation of such trusts - is not a technical trust, but an implied trust. Unlike an express trust, it is not created, but arises by operation and implication of the law, or, more accurately, by construction of the court, when equity so demands. A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest thereto. It is an equitable remedy imposed for the recovery of wrongfully held property, to compel a person who unfairly holds a property interest to hold property in trust for the person to whom in equity and good conscience it should be held or enjoyed, to convey it to the rightful owner, or to set aside a property transfer when property has been acquired under certain inequitable circumstances. It is raised by equity to satisfy the demands of justice to redress a wrong, or to prevent or avoid an unjust enrichment of one party at the expense of another as the result of a transfer of either real or personal property.

76 Am. Jur 2d, *Trusts* § 200 (1992)(citations omitted).

In the present case, Rappleye transferred the Branson Property to Hodges at a time when Plaintiff had a claim against him. Rappleye continued to enjoy and control the benefits of the Branson Property by managing the property and residing there after the transfer. (R at 1414.) Rappleye has also enjoyed, and will continue to enjoy, the benefit of the proceeds of the sale of the Branson Property by Hodges to a third-party by i) residing at the St. George Property, which was purchased with the proceeds of the sale of

the Branson Property, without payment of rent or other consideration; ii) having Hodges pay for his other living expenses; and iii) having a durable power of attorney over, and being the primary beneficiary of, Hodges' estate. (R at 1412-1413, 1411.)

The Trial Court's findings of fact establish the legal fictions created by the transfer of Rapple's interest in the Branson Property to Hodges, and the placement of the proceeds from the sale thereof in the name of Hodges. Accordingly, this Court has the authority to affirm the Trial Court's order of execution of the assets attributed to Hodges' under the constructive trust doctrine.

In *Nielsen v. Nielsen*, 2000 WL 332493999, \*4 (Utah App. 2000), after noting that the discovery rule applies to constructive trusts, this Court held that the four year statute of limitations was tolled under the discovery rule until the plaintiff, Ms. Nielson, discovered the fact that her ex-husband, Mr. Nielson, had placed his interest in their residence under the name of his brother.

Ms. Nielson did not file her lawsuit until March, 1995, almost nine (9) years after the conveyancing deed at issue was recorded. Mr. Nielson had transferred his title in the residence to his brother in 1986. Despite being a tenant in common with Mr. Nielson, Ms. Nielson did not discover the transfer until May 15, 1991, approximately five (5) years after the deed was recorded. She first discovered the transfer when applying for a loan. She then waited more than three (3) years to commence legal action. *Id.*

In *Nielson*, Ms. Nielson resided at the real property at issue. Nevertheless, this Court noted that *Baldwin* held that although a deed is recorded, limitations period does not commence until claimant should have acquired knowledge that transfer was fraudulent. *Id.* (citing *Baldwin*, 850 P.2d at 1195-1197). This Court refused to find that Ms. Nielson knew or should have known of the transfer on the date the deed was recorded.

Although the records shows Laree [plaintiff] may have had constructive notice of the deed when it was recorded, defendants have failed to marshal any evidence that she had actual or constructive notice of the facts which would justify imposing the constructive trust before May 15, 1991.

*Id.*

Rappleye, like Mr. Nielson, failed to introduce any evidence in front of the Trial Court that Plaintiff had actual or constructive knowledge of the facts justifying imposition of a constructive trust prior to April, 2001. As a result, imposition of a constructive trust would have also been appropriate grounds for entry of the Order of Execution.

## **II      ERRONEOUS APPLICATION OF THE COMMON LAW DISCOVERY          RULE BY THE TRIAL COURT WOULD CONSTITUTE HARMLESS          ERROR IN THIS CASE.**

Rappleye implies in his Brief, but never directly alleges, that the Trial Court committed reversible error in applying the concealment prong of the discovery rule to toll the applicable statute of limitations. Under Utah law, an “error” that does not affect substantial rights of the parties is not a reversible error, but a harmless error. *See* Utah R. C. P. 61; *see also State v. Perez*, 924 P.2d 1, 3 (Utah Ct. App. 1996). Rappleye bears “the

burden of showing not only that an error occurred, but that it was substantial and prejudicial.” *See Ashton v. Ashton*, 733 P.2d 147, 154 (Utah 1987).

To demonstrate prejudice, Rappleye must show a reasonable likelihood that without the application of the concealment prong of the discovery rule - the error implied in this case - there would have been a different result. *See Tingey v. Christensen*, 987 P.2d 588, 592 (Utah 1999). This likelihood must be sufficient to undermine confidence in the outcome of the Trial Court’s decision. *See Id.*; *State v. Jacques*, 924 P.2d 898, 902 (Utah Ct. App. 1996).

In the present case, Rappleye has failed to show reversible error. Rappleye asserts that the UFTA’s built-in discovery rule, as follows, should have been applied in this case:

under Subsection 25-6-5(1)(a), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.

Utah Code Ann. § 25-6-10(1).

The Trial Court specifically found that Plaintiff was not on notice of the fraudulent transfer, and that she *could not have discovered* the facts forming the basis for her cause of action, until April, 2001. (R at 1003, 1005, 1397, 1400.) The Trial Court further found that Plaintiff exercised due diligence and acted reasonably at all times. (R at 1397, 1399 - 1400.)



Rappleye could not be prejudiced by any error in the application of the common law discovery rule because the result would have been the same had the Trial Court applied the findings of fact to the statutory discovery rule contained in the UFTA.

**III THE COURT OF APPEALS MUST CONSIDER THE TRIAL COURT'S FINDINGS OF FACT TO BE PROPER AS RAPPLEYE FAILED TO REQUEST THE ENTIRE TRANSCRIPT OF THE PROCEEDING OR TO PROPERLY MARSHAL THE EVIDENCE.**

Rappleye failed to request the transcript of the entire proceeding in the Trial Court and failed to properly marshal evidence necessary for this Court to conduct a meaningful review.

**a. Rappleye Failed to Request the Transcript for the Entire Proceeding.**

Rappleye only requested the transcript for the hearing held in this matter on March 6, 2002. (R at 1446.) An initial evidentiary hearing took place on December 12, 2001. (R at 891-892.) In the December 12, 2001 hearing, Plaintiff's counsel, upon stipulation of the parties, proffered the entire fact section and time-line contained in Plaintiff's Hearing Brief for Motion for Contempt, Application, and Writ of Execution and discussed in detail the Exhibits attached thereto. (R at 891-892; R 1503-1536 and Exhibits A-L & 1-44 attached thereto.)

Under Rule 11 of the Utah Rules of Appellate Procedure ("URAP"), Rappleye did not need to request the entire transcript of the proceeding, but only the parts he deemed necessary. However, if only part of the transcript was requested, Rappleye had the responsibility to file a statement of the issues to be presented on appeal together with the

request for transcript, and serve upon Plaintiff a copy thereof. URAP Rule 11(e)(3). Plaintiff then would have had ten (10) days from service of the statement of issues to file and serve on Rappleye a designation of any of the portions of the proceedings which he wished to be included. *Id.* Rappleye did not file a statement of issues in this case. (*See* Record Index.)

If Rappleye intended to challenge a finding or conclusion as unsupported by or contrary to the evidence, he had the responsibility of requesting the transcript of all evidence relevant to the finding or conclusion to be challenged. URAP Rule 11(e)(2). “Neither the court nor the appellee is obligated to correct appellant’s deficiencies in providing the relevant portions of the transcript.” *Id.*

As a result of Rappleye’s failure to provide a complete transcript of the relevant evidence as mandated by URAP Rule 11(e)(2), this Court is “unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible evidence.” *Sampson v. Richins*, 770 P.2d 998, 1002 (Utah Ct. App. 1989), *cert. denied*, 776 P.2d 916 (Utah 1989) (quoting *Smith v. Vuicich*, 699 P.2d 763, 765 (Utah 1985)).

**b. Rappleye Also Failed to Properly Marshal the Evidence.**

Rappleye has failed to inform this Court of a significant portion of the evidence supporting the Trial Court’s decision. When challenging a finding of fact, appellate courts refuse to address the challenge unless the appellant has properly marshaled the

evidence. See *Child v. Gonda*, 972 P.2d 425, 433-34 (Utah 1998); *Witear v. Labor Comm'n*, 973 P.2d 982, 985 (Utah Ct. App. 1998).<sup>4</sup>

Appellate courts must assume the findings of fact are correct unless appellants properly marshaled all the evidence in support of the challenged findings. See *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998); *Johnson v. Higley*, 977 P.2d 1209, 1218 (Utah Ct. App. 1999). If the evidence is properly marshaled, appellants then must show that the marshaled evidence is legally insufficient to support the challenged findings when viewing the evidence and inferences in a light most favorable to the decision. *Child*, 972 P.2d at 433; *Johnson*, 977 P.2d at 1217.

In the present case, the Findings of Fact were twenty-six (26) pages in length. (R at 1394-1426.) The Trial Court's Memorandum Decision was eighteen (18) pages in length. (R a 1394-1426.) In its Memorandum Decision, the Trial Court noted that "[i]n Plaintiff's Hearing Brief she begins with a Statement of Relevant Procedural Facts. None of these facts are controverted by Rappleye in subsequent pleadings. The court will rely on those facts as admitted except as contrary evidence was produced at the hearing." (R at 1018.) Each fact contained in Plaintiff's Statement of Facts was supported by

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<sup>4</sup> The marshaling requirement "provides the appellate court the basis from which to conduct a meaningful and expedient review of the facts challenged on appeal" and "serves an important function in reminding litigants and appellate courts of the broad deference owed to the fact finder at trial." *Robb v. Anderton*, 863 P.2d 1322, 1328 (Utah Ct. App. 1993) and *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah Ct. App. 1991).

evidence, through affidavit, exhibit or otherwise. (R 1503-1536 and Exhibits A-L & 1-44 attached thereto.)

Despite the detailed format of the Findings of Fact and Memorandum Decision showing the undisputed facts upon which the Trial Court relied, Rappleye failed marshal numerous significant facts that support the Trial Court's findings and conclusions:

i      Facts related to the purchase of the Branson Property.

Rappleye failed to marshal related to the closing of the Branson Property, including the fact that he executed the Real Estate Purchase Contract and the HUD Settlement Statement. Rappleye also failed to marshal the fact that he transferred approximately \$144,000.00 in funds from his Fidelity Investment Account on January 4, 1993, the date of closing, with the specifically stated purpose of purchasing the Branson property. *See* Statement of the Facts ¶¶ 7-10; 16-17.

ii      Facts a out the time line from June 15, 1993 to January 6, 1994.

Rappleye failed to marshal the time line from June 15, 1993, the date *Rappleye v. Rappleye* was remanded, to January 6, 1994, the date Rappleye's and Hodges' divorce became final, including but not limited to hearings dates, the original remand trial date, and the proximately of these dates to the date Rappleye transferred the Branson Property to Hodges. Rappleye also failed to marshal the evidence that he fraudulently transferred the Timpanogos Property to his son at this same time and that such transfer was set aside and void in the Decree and Judgment. *See* Statement of the Facts ¶¶ 17-23; 46-48.

iii Facts related to Rappleye's and Hodges' divorce.

Rappleye failed to marshal the evidence on his and Hodges' divorce, including the timing of the commencement of the divorce case, the date of their sealing ordinance in the LDS Dallas Temple, and the fact that they continued to live together and hold themselves out as married to their neighbors, family, and church despite not remarrying until September 12, 2001. *See* Statement of the Facts ¶¶ 11-15; 25-31.

iv Facts related to Rappleye's sworn testimony and representations to the Trial Court and the Bankruptcy Court.

Rappleye failed to marshal the evidence of his sworn testimony and representations, made to the Trial Court and Bankruptcy Court, on the subject of his alleged losses on the stock market and inability to pay the Judgment amount including his affidavit, his testimony at the remand trial, his objections after the remand trial, his testimony at the bankruptcy trial. *See* Statement of the Facts ¶¶

v Facts related Rappleye's avoidance of service of Motion and Order in Supplemental Proceedings and Writ of Execution and sale of Motor Home and Suzuki Sidekick.

Rappleye also failed to marshal the evidence of his attempts to avoid service of the Motion and Order in Supplemental Proceedings ("Motion") and the effect of Writ of Execution by departing Wyoming for Idaho, re-registering the Motor Home and Suzuki Sidekick and subsequently selling them in Las Vegas, Nevada. *See* Statement of the Facts ¶¶51-57. Although Rappleye has not appealed the Trial Court's Order of Execution with respect to the proceeds of the Motor Home and Suzuki Sidekick, these facts may

have been relied on as further evidence of the Rappleye's and Hodges' attempts to avoid payment of the judgment amount to Plaintiff.

As Rappleye has failed to marshal all evidence in support of the Trial Court's findings he seeks to challenge, its findings of fact should be assumed as correct.

#### **IV. THE TRIAL COURT HAD JURISDICTION TO ORDER EXECUTION OF RAPPLEYE'S PROPERTY UNDER HODGE'S NAME.**

Rappleye argues that the Trial Court did not have jurisdiction to adjudicate Rappleye's property placed under Hodges' name because i) Hodges was not a party to the proceeding and the Trial Court failed to make a determination of a fraudulent transfer; and ii) the Trial Court did not give full faith and credit to the Missouri court's Divorce Decree and the Bankruptcy proceeding. Rappleye's full faith and credit argument was raised for the first time in his Motion to Reconsider. (R at 1062-1070). Rappleye, however, fails to cite to any legal authority to support this position.<sup>5</sup>

In Utah, appellants have the burden of thoroughly briefing an issue, not matter how recently it was raised. *State of Utah v. Montoya*, 937 P.2d 145, 150 (Utah Ct. App. 1997).

Under Rule 24(a)(9) of the Utah Rules of Appellate Procedure, which is applicable to an appellee through Rule 24(b), an [appellant] must provide an argument containing the contentions and reasons of the [appellant] with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, and parts of the record relied on.' When an [appellant] fails to comply with this rule, we will decline to address the issue

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<sup>5</sup> Rappleye also failed to support this argument with any legal authority in the Trial Court. (R at 1062-1070).

because the ‘reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.

*Id.* (citing *State v. Bishop*, 753 P.2d 439, 450 (Utah 1998) (citation omitted). *See also Burns v. Summerhays*, 927 P.2d 197, 199 (Utah Ct. App.) (“This Court has routinely declined to consider arguments which are not adequately briefed on appeal.”) This Court, therefore, should not consider Rappleye’s unsupported arguments related to jurisdiction.

**a. The Trial Court Made a Determination that the Transfer Was Fraudulent and Hodges’ Interests Were Represented Throughout the Proceeding.**

Rappleye’s position that the Trial Court did not have jurisdiction to order the execution of the Fidelity Investment Accounts under Hodges’ name because it allegedly did not adjudicate the merits of Plaintiff’s fraudulent conveyance claim and Hodges’ interests were not represented during the proceeding is without merit. Indeed, Rappleye has at no time offered *any* legal authority to support this position.<sup>6</sup>

Hodges took an active part in the proceedings. She attended both hearings held on Plaintiff’s Writ of Execution, as well as the Supplemental Proceeding held on September

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<sup>6</sup> Rappleye also claims that Plaintiff herself has shown concern for this issue based on her simultaneous action in Provo. Plaintiff was *not* aware of the existence of the Fidelity Investment Accounts until several months after the Provo action was commenced and only became aware through formal discovery. Otherwise, Plaintiff would have initially filed a Writ of Execution to execute on monies held in the Fidelity Investment Accounts prior to commencement of the Provo action.

25, 2001. (R at 1451, pg. 139; Exhibit E, pg. 1). Hodges filed a Request for Hearing which resulting the proceeding. (R at 885-886; *see* Appendix, Exhibit “J”).

In fact, Hodges’ counsel, Mr. Quesenberry, even asked the Trial Court if she could sit by counsel’s table because “she’s got Exhibits and stuff.”<sup>7</sup> (R at 1451, pg. 4). She testified, on direct and cross examination, on her behalf. (R at 1451, pg. 120-139). Hodges’ son-in-law), Brad Brown, who has in the past provided her with financial advice, also testified on her behalf at both hearings. (R at 891; 1451, pg. 5-9). Hodges brought several documents which were entered into evidence as exhibits to support her claim that she brought money into her initial marriage with Rappleye. (R at 891).

In its Memorandum Decision, contrary to Rappleye’s assertions, the Trial Court noted that Rappleye “essentially conceded at oral argument that he fraudulently conveyed his interest in the Branson Lake Resort to Hodges. . .” (R at 1013.) Moreover, the Trial Court entered a factual finding therein that “[e]ven if Defendant’s claim that he was reimbursing Hodges [for the alleged stock loss] was accepted by the court, he had no legal obligation to do so and the transfer does not defeat Plaintiff’s judgment against him.” (R at 1005.) Clearly, the Trial Court found the transfer to be fraudulent. This conclusion is explicit throughout the Memorandum Decision and the Findings of Fact and Conclusions of Law.

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<sup>7</sup> Mr. Quesenberry also represents Hodges in the Provo action.



**b. The Trial Court Had The Authority to Adjudicate The Fraudulent Transfer in the Execution Proceeding.**

Rappleye argues that the Trial Court did not have the authority to adjudicate the fraudulent transfer in an execution hearing. Rappleye again fails to cite any legal authority to advance his position.

Utah courts have held that transfers of assets could be set aside in garnishment proceedings and that it is unnecessary to file a separate action to obtain such relief. Rule 69(s), Utah Rules of Civil Procedure, also expressly provides that property of the judgment debtor in the possession of any person, or property due to the judgment debtor, may be applied to the satisfaction of the judgment. Therefore, although the Fidelity Investment Account of Hodges was executed upon, such execution was appropriate since part of the money held in the account belongs to Rappleye.

Utah courts have long held judgment creditors can set aside fraudulent conveyances through execution, garnishment, and attachment proceedings. In *Jensen v. Eames*, 519 P.2d 236, 239 (1974), the Utah Supreme Court held that a transfer of stock could be set aside as a fraudulent conveyance on a motion in garnishment proceeding, and it was not necessary to file a separate action to obtain such relief. Similarly, in *Stine v. Girola*, 337 P.2d 62, 64 (Utah 1959), the Utah Supreme Court held that when a transaction alleged in a garnishment proceeding constituted a sham between individual judgment debtors and a corporation, they could be considered identical for purposes of garnishment proceeding.

Rule 69(s), Utah Rules of Civil Procedure, provides as follows:

- (s) *Order for property to be applied on judgment.* The court or master may order any property of the judgment debtor, not exempt from execution, in the possession of the judgment debtor or any other person, or due to the judgment debtor, to be applied towards satisfaction of the judgment.<sup>8</sup>

Finally, the Utah Fraudulent Transfer Act specifically provides for the levy of execution against the asset transferred or its proceeds, when the creditor has a judgment against the debtor, as follows:

- (2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court orders, may levy execution on the asset transferred or its proceeds.

Utah Code Ann. § 25-6-8(2).

The Trial Court had the authority, in law and equity, to order the levy of execution on Hodges' Fidelity Account.

**c. Full Faith and Credit Has No Application In This Case.**

Rappleye claims without legal authority that the Trial Court failed to give full faith and credit to the Missouri court's Decree of Dissolution of Marriage ("Decree") and the

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<sup>8</sup> Utah law also provides that a every court has the authority to:

- (1) *compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in a pending action or proceeding;*
- (9) *devise and make new process and forms of proceedings, consistent with law, necessary to carry into effect its authority and jurisdiction.*

Utah Code Ann. § 78-7-5(4) & (9) (emphasis added).

decision of the U.S. Bankruptcy Court in Missouri. Rappleye fails to note, however, that this Decree resulted from an agreement entered into by Rappleye and Hodges, just three (3) days after being sealed in the LDS temple located in Dallas, Texas, and that the Trial Court found their divorce to be a “sham”. (R at 1451; pg. 104 - 106; R at 1402, 1414.)

Rappleye and Hodges concealed the divorce from family, friends and their church. (R at 1451; pg. 104 - 106; R at 1402, 1414.) The extent of the sham is further evidenced by the fact that the Marital Settlement and Separation Agreement, which was incorporated into the Decree, provides that Hodges pre-marital worth was \$410,000.00, and Rappleye’s per-marital worth was only \$506.00, while they testified under oath in the execution proceedings that Rappleye’s premarital worth was approximately \$300,000.00. (R at 1451, pg. 127, line 20-23.)

Rappleye also fails to note that he concealed the truth about his legal and financial interest in the Branson Property while under oath during the bankruptcy trial. (R at 1451, pg. 36:19 - 38:17.) Application of the full faith and credit doctrine to the Decree and/or the decision of the Bankruptcy court would have the effect of rewarding Rappleye’s perjurious testimony and validating Rappleye and Hodges “sham” divorce. The full faith and credit doctrine has no operation in this case.

**V. THE TRAIL COURT WAS NOT CLEARLY ERRONEOUS IN DETERMINING RAPPLEYE AND HODGES’ INTERESTS IN THE BRANSON PROPERTY.**

Rappleye asserts that Appellant's percentage of the proceeds from the sale of Branson Property should be calculated by dividing his established contribution of \$144,000.00 by the purchase price of \$330,000.00. The Trial Court found that the total amount transferred from Rappleye's and Hodges' separate Fidelity Investment Accounts on January 4, 1994, was \$297,579.79. (R at 1451, pg. 44-45; Appendix, Exhibit "C".) The Trial Court ruled that the "best evidence" as to Rappleye's interest in the proceeds from the sale of the Branson Property is the wiring instructions which evidences in writing that 48.39 percent of that transfer came from Rappleye's separate property. (R at 1451, pg. 44-45; Appendix, Exhibit "C".)

Rappleye's contention is that another \$32,500.00 was used to purchase the Branson Property and that no evidence was introduced to show whether Rappleye or Hodges contributed that amount.<sup>9</sup> The evidence presented to the Trial Court showed that Rappleye and Hodges made every attempt to equally share the costs associated with the purchase of the Branson Property. It is certainly reasonable to assume that the additional amount of approximately \$32,500.00 was also equally shared by Rappleye and Hodges.

Given the fact that Rappleye and Hodges have failed to offer any evidence showing that Hodges paid the additional \$32,500.00, it was well within the Trial Court's discretion

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<sup>9</sup> Rappleye and Hodges paid \$25,000.00 in earnest money in October, 1993, pursuant to the Real Estate Purchase Contract. Rappleye and Hodges would have then paid an additional \$8,500.00 (approximately) at closing. (R at 1531; Appendix, Exhibit "A" & "C".)

to apply the 48.39 percent to the remainder of the purchase price and that finding was not against the clear weight of the evidence.<sup>10</sup>

### CONCLUSION

The Trial Court did not commit reversible error in ruling that the concealment prong of the discovery rule applies in this case. The application of the legal rule of fraudulent concealment to the circumstances in this case is left to the Trial Court under Utah law. The Trial Court found that Plaintiff established an overwhelming *prima facie* case of fraudulent transfer, that Plaintiff could not have known about her claim for fraudulent concealment until April, 2001, and that Plaintiff acted reasonably and with due diligence at all times. Rappleye has not marshaled any evidence to show that these findings were against the clear weight of the evidence.

Even if this Court were to conclude that the Trial Court erroneously applied the concealment prong of the discovery rule, it constitutes harmless error as the Trial Courts entered findings of fact which meet the elements of statutory discovery rule contained in the UFTA. The Trial Court specifically found that Plaintiff could not have known about the fraudulent transfer until April, 2001. Rappleye failed to properly brief the issues of whether the Trial Court had jurisdiction to adjudicate the fraudulent transfer and full faith

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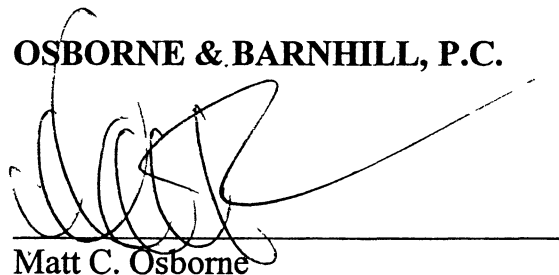
<sup>10</sup> Given the undisputed facts that Rappleye managed the Branson Property and made significant physical improvements thereto, and that Rappleye and Hodges' monetary contributions were roughly equal, Plaintiff requested that the Trial Court find that she was entitled to 50 percent of the proceeds of the sale of the Branson Property.

and credit issues raised in his Brief. Rappleye failed to cite to any legal authority. More importantly, the authority cited herein shows that these issues are without merit.

For these reasons, the Utah Court of Appeals should affirm the Trial Court's decision contained in its Findings of Fact and Conclusions of Law and Order on Execution.

DATED this 22<sup>nd</sup> day of November, 2003.

**OSBORNE & BARNHILL, P.C.**

A handwritten signature in black ink, appearing to read 'Matt C. Osborne', is written over a horizontal line.

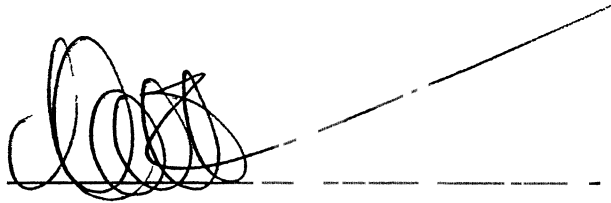
Matt C. Osborne

Attorney for Plaintiff Marilyn Johnson

**CERTIFICATE OF HAND-DELIVERY**

I certify that I caused a true and accurate copy of the foregoing Brief of Appellee  
to be hand-delivered, on this 24<sup>th</sup> day of November, 2003, to the following:

Stephen Quesenberry  
J. Bryan Quesenberry  
Hill, Johnson & Schmutz, L.C.  
3319 North University Ave., Suite 200  
Provo, Utah 84604

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right, positioned above a dashed line.

## APPENDIX

- Exhibit “A”** - Utah Code Ann. § 25-6-10
- Exhibit “B”** - Real Estate Purchase Contract dated October 19, 1992, between Edwin Michel, Duval-Michel Investment, Inc. dba Michel’s Motor Lodge and G. Bryce Rappleye and L. Jean Rappleye (Introduced at the evidentiary hearing on March 6, 2002 as Exhibit “2” and attached to Plaintiff’s Hearing Brief for Motion for Contempt, Application of Property and Writ of Execution as Exhibit “2”, which was filed on December 12, 2001).
- Exhibit “C”** - Warranty Deed by Corporation to G. Bryce Rappleye and L. Jean Rappleye from Duvall-Michel Investment, Inc. (Introduced at the evidentiary hearing on March 6, 2002 as Exhibit “3” and attached to Plaintiff’s Hearing Brief for Motion for Contempt, Application of Property and Writ of Execution as Exhibit “3”, which was filed on December 12 2001).
- Exhibit “D”** Wiring Instructions to Lee Datesman and Kyle Russell signed by L. Jean Roberts and George Bryce Rappleye (Introduced at the evidentiary hearing on March 6, 2002, as Exhibit “M” and attached to Plaintiff’s Hearing Brief for Motion for Contempt, Application of Property and Writ of Execution as Exhibit M, which was filed on December 12, 2001).
- Exhibit “E”** Partnership Records with Charter Number X00250636, registration date February 4, 1993 (Introduced at the evidentiary hearing on March 6, 2002 as Exhibit “E” and attached to Plaintiff’s Hearing Brief for Motion for Contempt, Application of Property and Writ of Execution as Exhibit “E”, which was filed on December 12, 2001).
- Exhibit “F”** - Quick Claim Deed with Statutory Acknowledgment, dated September 1 1993 between George Bryce Rappleye and Linda Jean Rappleye (Introduced at the evidentiary hearing on March 6, 2002 as Exhibit “4” and attached to Plaintiff’s Hearing Brief for Motion for Contempt, Application of Property and Writ of Execution as Exhibit “4”, which was filed on December 12, 2001).
- Exhibit “G”** - Statutory Warranty Deed from dated December 3, 1993 from Linda Jean Rappleye to Linda Hodges (Introduced at the evidentiary hearing on March 6, 2002 as Exhibit “7” and attached to Plaintiff’s Hearing Brief for Motion for Contempt, Application of Property and Writ of Execution as Exhibit “7”, which was filed on December 12, 2001).



- Exhibit “H”** - Bankruptcy Opinion; United States Bankruptcy Court, Western District of Missouri, Southern Division in Case No. 95-60100 filed May 28, 1997; *George Bryce Rappleye, Debtor Marilyn Johnson, Plaintiff v. George Bryce Rappleye, Defendant* (Introduced at the evidentiary hearing on March 6, 2002, as Exhibit “41” and attached to Plaintiff’s Hearing Brief for Motion for Contempt, Application of Property and Writ of Execution as Exhibit “41”, which was filed on December 12, 2001).
- Exhibit “I”** - Stipulation and Order Re: Supersedeas Bond dated January 27, 2003.
- Exhibit “J”** - Request for Hearing signed and submitted by Linda Jean Hodges on December 11, 2001.

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TOC: [Utah Code Annotated](#) > [/.../](#) > [CHAPTER 6. UNIFORM FRAUDULENT TRANSFER ACT](#) > § 25-6-10. Claim for relief -- Time limits

Citation: *uca* 25-6-10

*Utah Code Ann. § 25-6-10*

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\*\*\* STATUTES CURRENT THROUGH THE 2002 6TH SPECIAL SESSION \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH 2003 UT 1, 2003 UT APP 13 \*\*\*

\*\*\* AND JANUARY 17, 2003 (FEDERAL CASES) \*\*\*

TITLE 25. FRAUD  
CHAPTER 6. UNIFORM FRAUDULENT TRANSFER ACT

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Utah Code Ann. § 25-6-10 (2003)

§ 25-6-10. Claim for relief -- Time limits

A claim for relief or cause of action regarding a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(1) under Subsection 25-6-5(1)(a), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) under Subsection 25-6-5(1)(b) or 25-6-6(1), within four years after the transfer was made or the obligation was incurred; or

(3) under Subsection 25-6-6(2), within one year after the transfer was made or the obligation was incurred.

**HISTORY:** C. 1953, 25A-1-10, enacted by L. 1988, ch. 59, § 10; recompiled as C. 1953, 25-6-10.

NOTES TO DECISIONS

ANALYSIS

Construction.

Liquidation.

Cited.

CONSTRUCTION.

The time limit for bringing an insider transfer claim in Subsection (3) is a statute of limitation, not a statute of repose. Selvage v. J.J. Johnson & Assocs., 910 P.2d 1252 (Utah Ct. App. 1996).

LIQUIDATION.

In action to recover payments made by insurer under fraudulent transfer theory, when a

petition for a liquidation order was filed before expiration of limitations period, plaintiff had two years after the liquidation order to institute the action. Wilcox v. Geneva Rock Corp., 911 P.2d 367 (Utah 1996).

CITED in Warner v. DMG Color, Inc., 2000 UT 102, 20 P.3d 868.

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TOC: Utah Code Annotated > /... > CHAPTER 6. UNIFORM FRAUDULENT TRANSFER ACT > **§ 25-6-10. Claim for relief -- Time limits**

Citation: **uca 25-6-10**

View: Full

Date/Time: Tuesday, July 22, 2003 - 2:12 PM EDT

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Missouri Association of REALTORS®

**RE 555D - Contract for the Sale of Real Estate  
With Contingencies**

1756

THIS IS A LEGALLY BINDING CONTRACT, IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE.

THIS CONTRACT, made and entered into this 19th day of October, 1992, by and between  
Edwin Michel, Duval-Michel Investments, Inc. DBA Michel's Motor Lodge, the Seller,  
and G. Bryce Rappleye & L. Jean Rappleye, the Buyer

The terms Seller and Buyer may be either singular or plural according to whichever is evidenced by the signatures below.

WITNESSETH: For and in consideration of the mutual obligations of the parties hereto, the Seller hereby agrees to sell and convey unto the Buyer and the Buyer agrees to purchase from Seller, upon the terms and conditions hereinafter set forth, the following described real estate situated in the County of Taney

State of Missouri, To-WIT: Property commonly known as Michel's Motor Lodge, Rockaway Beach, Mo, consisting of 3.03 acres M/L and all improvements thereon. Recorded legal description to govern seller to provide complete equipment lists 5 days after acceptance of this contract. All equipment & appliances to be in working order at closing. Buyer to inspect all cottages & home 2 days before closing. Any liens on the property, furnishings, & equipment to be paid off on or before closing. Taxes to be prorated. Seller to furnish title insurance & survey of the property with boundaries flagged before closing. Seller will assist buyers for 5 days on an 8 hour basis or at such time no longer needed. Guest lists, mailing lists, promos, printed materials being used are a part of this purchase. Advanced deposits or reservations to be given to Buyer at closing. Advertising for 1993 prepaid will be prorated at closing. Buyer & Seller agree to split closing costs paid to title escrow company.

together with the following described personal property, if any, now located thereon, to-wit: electric, plumbing, heating and air conditioning fixtures and equipment, attached floor coverings, window shades, venetian blinds, curtain rods, storm doors and windows, screens, awnings, attached mirrors, TV antenna, automatic garage door opener, water softener, Per inventory lists, furniture, appliances, equipment, truck, all 23 unit furnishings, towels, linens.

subject, however, to any reservations, easements or restrictions of record and any zoning laws, regulations or ordinances affecting the said property, as will not materially interfere with such use of the property as the Buyer might reasonably expect to make in view of the general character of the area and neighborhood in which the property is located.

The price for said property shall be Three hundred thirty thousand \$330,000.00 CASH DOLLARS; to be paid by Buyer as follows: \$ \$20,000.00 at the time of the execution and delivery of this contract, the receipt of which is hereby acknowledged by the Seller, and which is deposited with Branson Lake Country Realty / Interest bearing acct. interest to Buyer.

as agent for the Seller, as earnest money, and as a part of the purchase price and consideration for this agreement and shall be deposited as soon as practicable, but not later than five (5) banking days after the date of final acceptance of the contract by all parties, and upon delivery of the deed as hereinafter provided, the Buyer shall pay the balance of the purchase price to Seller as follows: if Seller agrees to finance part of the purchase price as hereinafter set forth, by delivering the note and deed of trust as hereinafter provided; or if Buyer is assuming and agreeing to pay the note secured by a deed of trust which is presently outstanding as hereinafter set forth, by the Buyer accepting delivery of a deed containing the assumption agreement; and by delivering to Seller the remaining balance of the purchase price, if any, in cash or by certified check.

All of the General Sales Conditions and Closing Practices and any Financing or Special Agreements, all as set forth below and on the reverse side hereof, are hereby made a part of this contract. Permission is hereby granted by Seller and Buyer for the agent to provide sales data information of this transaction, including selling price and property address, to the local Board of REALTORS®, its members, member's prospects, appraisers and other professional users of real estate sales data.

**FINANCING (Check A or B)**

- A. ☒ This contract is not subject to Buyer obtaining financing.  
B. ☐ This contract is given subject to the Buyer's ability to obtain financing under the terms and conditions set forth in "RE 555D/A - Exhibit A, Financing Agreements" attached hereto and incorporated herein as set forth verbatim.

**CONTRACT CONTINGENCIES (Check A or B)**

- A. ☐ This contract is not subject to any contingencies, except those as to title requirements herein set forth and "RE 555D/A - Exhibit A, Financing Agreements" (if said exhibit is attached hereto)  
B. ☒ This contract is subject to certain contingencies that are set forth in RE555D/B - Exhibit B, Contract Contingencies", attached hereto and incorporated herein as if set forth verbatim.

The sale under this contract shall be closed at the office of Tri-Lakes Escrow in Branson, Missouri, on or before the 1 day of JANUARY, 1993, at 10:00 o'clock A M. or at such other time and place as the parties may mutually agree. If there are defects in the title to the property which require correction, then the time of closing may be extended by the application of said General Closing Conditions and Sales Practices.

Possession shall be delivered to the Buyer at the time of closing or within closing days thereafter, subject to the rights of who occupies the premises.

The Seller agrees to pay the agent the commission agreed upon between them.

**REAL ESTATE DISCLOSURE TO BUYER BY SELLER'S AGENT:** Buyer acknowledges that Buyer has been informed orally, at the time the Agent obtained personal and financial information, or provided other specific assistance, and by this written disclosure, that (1) the listing and cooperating ("selling") brokers working through their salespeople are acting on behalf of the Seller of the real estate; (2) the source(s) of any commission or other payment to be made to the Agent is from the (Seller) (or ); and (3) information given to the Agent by the Buyer may be disclosed to the Seller.

IN WITNESS WHEREOF, the Buyer has executed this agreement on the day and year first above written and acknowledges receipt of one copy of this contract which offer set forth herein shall automatically expire at 4:00P M. on the 19th day of October, 1992, if not accepted by Seller by that time or withdrawn by Buyer prior to that time.

K. Buyer G. Bryce Rappleye Date 10-19-92 Time 3PM M. S.S. # 519-36-9722  
L. Buyer L. Jean Rappleye Date 10-19-92 Time 2 p M. S.S. # 433-80-1960

Seller hereby ☐ accepts the foregoing offer set forth in this contract on the terms and conditions specified herein, effective on the day and year first above written.  
☐ counter offers

Seller's counter offer shall automatically expire at \_\_\_\_\_ M. on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_, if not accepted by Buyer by that time or withdrawn by Seller prior to that time.

Seller Edwin Michel, Duval-Michel Investments, Inc. Date \_\_\_\_\_ Time \_\_\_\_\_ M. S.S. # \_\_\_\_\_

Seller G. Bryce Rappleye, L. Jean Rappleye Date 10/19/92 Time 3pm M. S.S. # 496-52-3241

Buyer accepts the Seller's counter offer made on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_ Time \_\_\_\_\_ M. on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_ Time \_\_\_\_\_ M. Buyer's initials \_\_\_\_\_

This transaction is co-brokered through \_\_\_\_\_. The undersigned agent acknowledges receipt of the earnest money deposit and confirms that the required agency disclosure has been made in accordance with MREC Rule #4 CRS 250-8.095.

Agent \_\_\_\_\_ by \_\_\_\_\_ Date \_\_\_\_\_

**GENERAL CLOSING CONDITIONS and SALES PRACTICES**

*The marginal captions of the various paragraphs hereof are intended solely for convenience of reference and shall not be deemed to modify, place any construction upon, or explain provision of this contract.*

<b>Abstract and examination</b>	The Seller shall within 28 days prior to date of closing deliver to the Buyer an Abstract of Title to said property certified to date by a competent abstracter showing the title marketable in fact in the Seller and taxes, assessments, judgments and mechanics liens of record affecting said property, subject however to any exceptions herein stated.
<b>Defect in title</b>	The Buyer shall have ten (10) days after such delivery to examine said abstract and if the title of said real property is defective, the Buyer shall specify the objections in writing and deliver the same to the Seller at the office of the agent within ten (10) days after such delivery of the abstract. The Seller shall have any such defects corrected within sixty (60) days from the date of delivery of such objections. Any defects appearing in the abstract and not objected to, except liens of record which can be removed as of course by the payment of money, shall be deemed waived but only insofar as correction of the abstract is concerned. If any of said defects so noted are not corrected within sixty (60) days after delivery of such objections then this contract shall be null and void and the earnest money deposited as aforesaid shall be returned to the Buyer and the abstract returned to the Seller.
<b>Title insurance</b>	In lieu of the Seller furnishing to Buyer such Abstract of Title for examination, the Seller shall deliver to Buyer prior to the date of closing a commitment to issue an owner's policy of title insurance. Any commitment made hereunder shall be in the amount of the purchase price of the property, naming the Buyer as the insured and issued by a title insurance company licensed to write title insurance in Missouri which policy shall insure the owner's title to be marketable in fact as called for by this contract and shall provide that a policy shall be issued immediately after the Seller's general warranty deed to the Buyer is placed of record. All costs of owner's title insurance shall be paid by the Seller, and the premium of the mortgagee's title policy, if any, shall be paid by the Buyer.
<b>Title standards</b>	It is understood and agreed that title herein required to be furnished is marketable title as set forth in Title Standard 4 of the Missouri Bar. It is also agreed that any encumbrance or defect in the title which is within the scope of any of the Title Standards of the Missouri Bar shall not constitute a valid objection on the part of the Buyer, provided the Seller furnishes the affidavits, or other title papers, if any described in the applicable standard.
<b>Seller to convey by warranty deed</b>	If the title to said real property be marketable in fact as called for herein, the Seller shall deliver for the Buyer at the office of said Seller's agent a general warranty deed free and clear from all liens and encumbrances whatsoever, except as herein provided, and the buyer shall then and there pay the balance, if any, of said cash payment and deliver to the Seller the note and deed of trust, if any, heretofore provided for.
<b>Taxes, assessments and rents</b>	The Seller shall pay in full all State, County and Municipal taxes and assessments, general and special, which are a lien on said property except taxes for this calendar year which shall be prorated as of the date of the delivery of the deed. If the amount of taxes cannot then be ascertained, proration shall be computed on the amount of general taxes for the preceding calendar year. The rental from said real property, if any, shall go to the Seller prorated to date of delivery of the deed and to the Buyer thereafter. Security deposits and advance rents, if any, shall be paid to Buyer at closing. In the event Seller has paid to any lender a deposit for taxes, such amounts shall be applied toward the payment of Seller's obligation under this paragraph and shall be assigned to Buyer and Buyer shall reimburse Seller for any excess over the amount of Seller's obligation for prorated taxes hereunder, and if such deposit is not sufficient to satisfy Seller's obligation hereunder, Seller shall pay to Buyer the amount of any difference.
<b>Fiduciary to perform promptly</b>	It is understood and agreed that because of the commitments of the parties, that time is of the essence of this agreement, and if the Seller has kept Seller's part of this agreement by furnishing marketable title as herein provided, and the Buyer fails to comply with the requirements of this agreement within ten (10) days thereafter, then the money deposited as aforesaid shall be paid over to the Seller as liquidated damages, actual damages being difficult if not impossible to ascertain, and this agreement may or may not be thereafter operative, at the option of the Seller. Seller's agent shall not be liable for the earnest money to be deposited as herein provided until actually in the hands of the agent. If Buyer shall fail to pay additional earnest money deposit when due (if required by the contract) or if the earnest money deposit is to be paid over to Seller as liquidated damages because of failure of Buyer to perform as herein provided, then the earnest money deposit shall go first toward reimbursing expenses of Seller or Seller's agent incurred in this transaction, and the balance to be paid One-Fourth (1/4) to Seller and One-Fourth (1/4) to Seller's named agent in lieu of commission, provided however, that the said agent shall be entitled to receive any sum of money for his services greater than the amount agreed to as compensation. Seller and Buyer agree that in the event of a dispute over the return or forfeiture of any earnest money held by the broker, the broker shall hold said deposit in his escrow account until the parties obtain written instructions from all parties consenting to disposition or until a civil action is filed to determine disposition at which time the broker may pay the funds into court.
<b>Property to be kept insured</b>	It shall be Seller's obligation to keep the improvements on the said property fully insured until the date of delivery of the deed to the Buyer. If the improvements on the said property are substantially damaged or destroyed by fire or other casualty prior to the closing of this sale, then the Buyer shall have the option of accepting all of the insurance proceeds and proceeding with his performance under this contract, or cancelling this contract whereupon the earnest money deposited as aforesaid shall be returned to the Buyer and the abstract returned to the Seller. In the event Buyer accepts the insurance proceeds and proceeds under this contract and Seller has agreed herein to finance a part of the purchase price, then Buyer must either use the insurance proceeds to restore the improvements, or Seller at Seller's election can cancel this contract.
<b>Assignment of insurance</b>	In the event the parties hereto agree that any insurance policy on the property subject hereto is to be assigned to Buyer, then at the time of closing Buyer agrees to pay Seller pro rata any amount of unearned insurance premium thereunder and the policy shall be assigned to Buyer. In the event the Buyer is assuming responsibility of the property which is secured by a deed of trust and the lender requires a continuation of the insurance policy made by the Seller, then the Seller shall assign said deposit to the Buyer and the Buyer shall reimburse the Seller for the amount thereof.
<b>Facsimile signatures</b>	"Facsimile signatures", as that term is commonly used with reference to facsimile machines used in transmitting documents, signatures, photocopies, etc., shall be and hereby are declared by all parties to this Contract to be the same as an original signature to this Contract; a facsimile of this Contract, including the signature portion thereof, shall be treated and relied upon by all parties hereto as an original contract and an authentic signature with the same legal force and effect as though the facsimile is in fact the original document to which a genuine signature has been affixed.
	It is further understood that the agent makes no guarantee or representation as to the title of said real property, or discrepancies that survey may reveal, or as to the repair or condition of any of the buildings or improvements situated upon said above described real property.

**SPECIAL AGREEMENTS**

\$1,000.00 will be held in escrow until spring when pool can be opened & filters & pool can be inspected & confirmed to be operating. Purchase includes all 23 rental units consisting of cabins & motel units situated on 3 different locations. 5 rental sitting on South West side of street, (4 unit complex & large cabin) making up five units. House & storage buildings, pool, signage. Seller will share half the costs of laying new frost free water lines & covering & insulating existing lines on the North East side of street to make them rentable for the winter season.

Buyer will forfeit \$20,000.00 earnest money if they do not close per this agreement, excepting death or permanently disabled.

Abstract order \_\_\_\_\_ 19 \_\_\_\_\_ Attorney's opinion received \_\_\_\_\_ 19 \_\_\_\_\_  
Abstract delivered \_\_\_\_\_ 19 \_\_\_\_\_ Closed \_\_\_\_\_ 19 \_\_\_\_\_

No 3358 P 4



**Missouri Association of REALTORS®**

**RE 555D/B - EXHIBIT B**

## Contract Contingencies

(Only those paragraphs which are completed shall be applicable)

Contract # 1756

**A. CONTRACT TO BE CONTINGENT UPON SALE OF OTHER PROPERTY** This sale is at the option of the Buyer, contingent on the sale and the closing of such sale of Buyer's property located at (Address) \_\_\_\_\_ (City) \_\_\_\_\_ (State) \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_. In the event the closing of such sale is not completed, through no fault of the Buyer, this contract shall at the option of the Buyer be void and upon Buyer's request earnest money less any expenses incurred by or on behalf of Buyer, shall be refunded to Buyer.

(1) Seller shall have the right to cancel this contract at any time by giving Buyer \_\_\_\_\_ hours written notice. Said time period will commence at the point in time when the Buyer or Buyer's agent has actual knowledge of Seller's written notice. The cancellation shall be effective automatically unless within said time period after receipt of such notice the Buyer shall notify the Seller in writing that he will complete the purchase of said property even though the contingency in paragraph A. has not been fulfilled.

(2) In the event of the removal of this contingency based upon Seller giving notice as outlined in paragraph (1) herein, Buyer shall close on closing date scheduled in the sale contract.

**B CONTRACT TO BE CONTINGENT UPON BUYER OBTAINING EMPLOYMENT** The parties hereto agree performance under the terms of this contract shall be expressly contingent on the employment of \_\_\_\_\_ with \_\_\_\_\_ under the terms acceptable to said individual on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_. In the event such employment is not obtained this contract shall be null and void and the earnest money deposit shall be returned to Buyer

**C. CONTRACT TO BE CONTINGENT UPON THIRD PARTY INSPECTION:** The parties hereto agree performance under the terms of this contract shall be expressly contingent on an inspection by a third party or parties on Buyer's behalf Within 30 days after the final acceptance of the sales contract. Buyer, at Buyer's option and expense, has the right to obtain written inspection reports from reputable third party or parties as to structural defects, environmental hazards, plumbing, heating, air conditioning and sewage systems, swimming pool, all mechanical equipment and appliances, and systems in home after which time this right shall be waived. Should the result of such inspections not be acceptable to Buyer, Buyer shall have five (5) days in which to furnish Seller a copy of the inspection report or reports and to notify Seller or Listing Agent, in writing of non-acceptability. Seller shall have five (5) days from receipt of the report and notification in which to agree to correct or repair the unacceptable defects prior to closing or to enter into an agreement in writing with Buyer as to a monetary adjustment in lieu of correction of such defects. Buyer shall have three (3) days in which to accept Seller's proposal for repairs and correction of the defects; and if Buyer shall fail to do so, this contract shall become null and void and the earnest money deposit, less any expenses incurred by or on behalf of Buyer, shall be refunded to Buyer.

**D. CONTRACT TO BE CONTINGENT UPON TERMITE INSPECTION:** Prior to closing a licensed exterminator shall inspect the residential dwelling and issue a written certification showing the structure to be free of termites or other wood-boring insect infestation or serious damage caused by termites or other wood-boring insects. If infestation is found, Seller shall pay the cost of treatment of the residential dwelling not over \$1000.00. If damage from infestation is found Seller agrees to pay the cost for repairs. Estimated repair costs are \$1000.00. The Seller shall be responsible for the cost of any repairs.

**E. CONTRACT TO BE CONTINGENT UPON SELLER'S PREVIOUS CONTRACT.** Buyer acknowledges that Seller has entered into a previous contract for the sale of the property described herein with (Buyer) \_\_\_\_\_, dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and this contract is subject to the rights of the previous Buyer and is contingent upon said contract not being closed.

**F. CONTRACT CONTINGENT UPON BUYER'S LOAN APPRAISER'S INSPECTION.** If repairs are required by Buyer's loan appraiser Seller agrees to pay the first \$ \_\_\_\_\_ of repair. If estimated repairs exceed that amount, this contract shall be voidable at Buyer's option, and if declared void, the earnest money deposit, less any expenses incurred by or on behalf of Buyer shall be refunded to Buyer.

**G. CONTRACT CONTINGENT UPON WELL WATER SATISFYING STATE STANDARDS.** This contract shall be contingent upon a test(s) made by a state-certified laboratory of the well(s) supplying water to the dwelling which indicate(s) the water to be satisfactory by State standards. The cost of said test(s) shall be paid by the \_\_\_\_\_. In the event the test(s) reveal(s) the water to be unsatisfactory by State standards, Seller shall correct the problem at Seller's expense not to exceed \$ \_\_\_\_\_, and to furnish Buyer with a reinspection report(s) showing the water to be satisfactory by State standards. If the cost to correct the problem is greater than the sum agreed upon herein, this contract shall be voidable at the Buyer's option, and, if declared void, the earnest money deposit less any expenses incurred by or on behalf of Buyer shall be refunded to Buyer.

Seiler \_\_\_\_\_

Soller \_\_\_\_\_

Buyer

Buyer





Form 104 0319 Page 4172

L. 1940 BLKINS-SWYERS CO., SPRINGFIELD, MO. - R 2400

# 13, 136

Class 80

## Warranty Deed by Corporation

KNOW ALL MEN BY THESE PRESENTS:

That **DUVALL-MICHEL INVESTMENTS, INC.**

of the County of **TANEY**

in the State of **MISSOURI**

, a Corporation

organized and existing under the laws of the State of **MISSOURI**

party of the first part, in consideration of

--TEN AND NO/100 AND OTHER GOOD AND VALUABLE CONSIDERATIONS ----- DOLLARS

to it paid by **G. DRYCE RAPPEYE AND L. JEAN RAPPEYE, HUSBAND AND WIFE**

*101 Lake St. Rockaway Beach, Mo. 65790*

of the County of **TANEY**

and State of **MISSOURI**

parties

of the second part, the receipt whereof is hereby acknowledged, and by virtue and pursuance of a Resolution of the Board of Directors of said party of the first part, does by these presents, Grant, Bargain, Sell, Convey and Confirm unto the said part

of the second part **THEIR**

heirs and assigns, the following described lots, tracts, or parcels of land, lying, being

and situate in the County of **TANEY**

and State of **MISSOURI**

to-wit:

**ALL OF LOTS ONE (1), TWO (2), THREE (3) AND FOUR (4) IN BLOCK FIFTY-ONE (51), AND LOTS THREE (3) AND FOUR (4) IN BLOCK FORTY-SIX, AND LOTS TEN (10) AND ELEVEN (11) IN BLOCK FORTY-ONE (41) ALL IN ROCKAWAY BEACH, AS PER THE RECORDED PLAT THEREOF FILED IN THE OFFICE OF THE RECORDER OF DEEDS, TANEY COUNTY, MISSOURI.**

TO HAVE AND TO HOLD the premises aforesaid, with all and singular the rights, privileges, appurtenances, and immunities thereto belonging or in anywise appertaining unto the said parties of the second part, and unto **THEIR** heirs and assigns, forever. The said party of the first part hereby covenanting that it is lawfully seized of an indefeasible estate in fee in the premises herein conveyed; that it has good right to convey the same; that the said premises are free and clear of any incumbrance done or suffered by it or those under whom it claims; and that it will warrant and defend the title to the said premises unto the said parties of the second part and unto **THEIR** heirs and assigns forever, against the lawful claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, the **DUVALL-MICHEL INVESTMENTS, INC.**

the said party of the first part has caused these presents to be signed by its **PRESIDENT**

and

attested by its secretary, and corporate seal to be hereunto affixed, this the **4TH** day of **NOVEMBER**

A. D. 1987



**DUVALL-MICHEL INVESTMENTS, INC.**

(SEAL)

*Edwin V. Michel*  
**EDWIN V. MICHEL, PRESIDENT**

(SEAL)

Attested *[Signature]*  
**DUVALL-MICHEL INVESTMENTS, INC.**

Secretary

BOOK 0318 PAGE 4173

19, 1936

STATE OF MISSOURI,  
County of TAREY

On this 4TH day of JANUARY A. D. 19 93.

Before me personally appeared EDWIN V. MICHEL

to me personally known, who being duly sworn, did say that he is PRESIDENT  
of

DUVALL-MICHEL INVESTMENTS, INC.

that the seal affixed to this instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed  
in behalf of said corporation by authority of its Board of Directors and the said

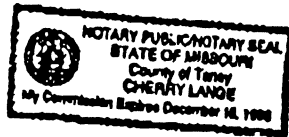
EDWIN V. MICHEL, PRESIDENT

acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, at my office in  
BRANSON, MISSOURI the day and year first above written.

My commission as Notary Public will expire on the 16TH day of DECEMBER, 19 96.

*Cherry Lange*  
CHERRY LANGE Notary Public



Warranty Deed by Corporations  
With Statutory Acknowledgment

FROM

TO

Filed for record this day of  
A. D. 19  
at o'clock minutes M.  
Recorder.

Recorder's Fee

Deputy.

Recorder's Fee

Grantee Address

Notary Address

© 1988 - Glenspring Co., Springfield, Mo. 65803

IN THE RECORDER'S OFFICE

STATE OF MISSOURI

County of Tarey

1. Katherine Clarkson

Recorder of Deeds of said County, do hereby certify  
that the within instrument of writing was, on the  
12 day of January A. D. 19 93,  
at 12 o'clock 42 minutes P.M.  
duly filed for record, and is now recorded in the  
Records of this office in Book 318 at page 4172-4173

IN WITNESS WHEREOF, I have hereunto set my  
hand and affixed my official seal at

Forsyth

12 day of January A. D. 19 93.

Katherine Clarkson

Recorder.

Deputy.

Recorder's Fee

FILED

ESS JUN 12 11:31

RECORDING FEE \$2.00  
STATE USER FEE \$4.00  
TOTAL \$6.00

RECORDING FEE \$2.00  
STATE USER FEE \$4.00  
TOTAL \$6.00

Evans Title Exchange - Branson



January 4, 1993  
7 3 2 0 2 6 9

Mr. Lee Datesman/Kyle Russell:

Please wire the entire balance of these two cash reserve money market accounts to Boatmen's Bank of Rockaway Beach, Missouri.

1) BRYCE RAPPLAWE ACCOUNT # 417-570-736  
Should have \$144,000.00 + plus.

2) L. JEAN ROBERTS ACCOUNT # 417-601-481  
Should have \$153,579.00 + plus.

We are buying a resort and want the money transferred to close title this week.

I thank you for your immediate attention to this matter of redeeming these shares.

L. JEAN ROBERTS

L. Jean Roberts

GEORGE BRYCE RAPPLAWE

George Bryce Rapplawe

MUTUAL FUND INVESTMENT SERVICES

93 JAN 3 PM 1:27



## Business Entity with Charter Number *X00250636*

**Name** BRANSON LAKE RESORT

**Street** 101 Lake Street: P.O. Box 86 **City/State/Zip** Rockaway Beach, MO 65740-0086  
**Business Type** Fictitious Name **Registration Date** 02/04/1993  
**Status Date** 01/14/1994 **Status** IP

---

**Status History**

**Owners**

---

**Business Entity Name Search**

**Agent Name Search**

**Charter Number Search**

## Owners for the Business Entity with Charter Number *X00250636*

Name	Street	City/State/Zip	Ownership
1 George Bryce Rappleye	101 Lake Street	Rockaway Beach, MO	50%
2 Linda Jean Rappleye	101 Lake Street	Rockaway Beach, MO	50%

---

Status History

Charter Record

---

Business Entity Name Search

Agent Name Search

Charter Number Search





0322 1207

26.767

# QUIT CLAIM DEED

With Statutory Acknowledgment

THIS INDENTURE, Made on the 17th day of September .. A D  
 One Thousand Nine Hundred and ninety-three .. by and between George Bryce ..  
Rappleys, a married person ..  
 of the County of Taney .. in the State of Missouri, part x .. of the first part, and ..  
Linda Jean Rappleys, a married person ..  
The Branson Lakes Family Resort, P.O. Box 86, Rockaway Beach, Mo. 64679  
 of the County of Taney .. in the State of Missouri, part x .. of the second part.

WITNESSETH, That the said party .. of the first part in consideration of the sum of  
\*\*One and other valuable considerations\*\*\*\*\* .. DOLLARS  
 to him .. paid by the party .. of the second part, the receipt of which is hereby acknowledged,  
 do ss .. by these presents Remise, Release and forever Quit Claim unto the said party .. of the  
 second part the following described lot, tracts, or parcels of land, lying, being and situate in the County of  
Taney .. and State of Missouri, to-wit:

All of Lots One (1), Two (2), Three (3), and Four (4) in Block Fifty-one (51), and  
 Lots Three (3) and Four (4) in Block Forty-six (46), and Lots Ten (10) and Eleven  
 (11) in Block Forty-one (41) all in Rockaway Beach, as per the recorded Plat thereof  
 filed in the Office of the Recorder of Deeds, Taney County, Missouri.

TO HAVE AND TO HOLD the same with all rights, immunities, privileges and appurtenances there-  
 to belonging unto the said party .. of the second part and her .. heirs and assigns for-  
 ever, so that neither the said party .. of the first part nor his .. heirs, nor any other person  
 or persons for his .. or in his .. name .. or behalf, shall or will hereafter claim or  
 demand any right or title to the aforesaid premises or any part thereof, but they, and every one of them shall  
 by these presents be excluded and forever barred.

IN WITNESS WHEREOF, the said party .. of the first part has .. hereunto set his ..  
 hand .. and seal .. the day and year first above written.

Signed, Sealed and Delivered in the presence of

George Bryce Rappleys (SEAL)  
 .. (SEAL)  
 .. (SEAL)  
 .. (SEAL)

STATE OF MISSOURI,  
 County of .. ss.

## SINGLE PERSON'S ACKNOWLEDGMENT

On this .. day of .., 19 .. before me personally appeared ..  
 to me known to be the person .. described in and who executed the foregoing instrument, and  
 acknowledged that .. executed the same as .. free act and deed.

The said .. further declared .. to be single and unmarried  
 IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal,  
 at my office in .. the day and year first above written  
 My term of office as a Notary Public will expire .., 19 ..

STATE OF MISSOURI

County of Janey

MARRIED PERSONS' ACKNOWLEDGMENT

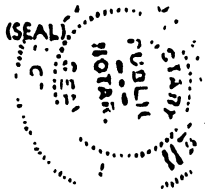
On this 27 day of September, 1933

before me personally appeared George Bryce Rappleye, a married person

known to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal,  
at my office in St. Louis, Mo. the day and year first above written.  
My term of office as a Notary Public will expire September, 1934

Notary Public



FILED

SEP 28 1933

RECORDED FEE \$8.00  
STATE FEE \$4.00  
TOTAL \$12.00 pd

Evans Title Escrow - B

Remember this Deed Must be Recorded

to Be Legal

READ DEED CAREFULLY AS

RECORD CANNOT BE CHANGED

AFTER RECORDING

QUIT CLAIM DEED

FROM

TO

STATE OF MISSOURI

County of Janey

In the Recorder's Office

I Katherine Clarkson

Recorder of said County, do hereby certify

that the within instrument of writing, with

the Certificate thereon, was on the 27th

day of October, A. D., 1933

at 4 o'clock and 21 Minutes P.M.,

filed for Record in this office and is duly

recorded in the Records of this office in

Book 322 at Page 1207-1208

IN WITNESS WHEREOF, I have here-

unto set my hand and affixed my official

seal at St. Louis, Mo.,

the date to above written.

Katherine Clarkson, Recorder

Per Director, Deputy

Recorder's Fee - \$ -

Grantee Address

Mailing Address

Form 2-A



This instrument is prepared by: .

Linda Jean Rappleye .  
P.O. Box 86 .  
Rockaway Beach, Missouri 65740 .  
(417) 561-4135 .

This space reserved for use  
by Clerk of Court:

. . . . .

# STATUTORY WARRANTY DEED

I, Linda Jean Rappleye, whose post office address is P.O. Box 86, Rockaway Beach, Missouri 65740, hereinafter referred to as "the Grantor", for good and valuable consideration, the receipt of which is acknowledged, hereby grant, bargain, sell, and convey to Linda Hodges, whose post office address is P.O. Box 86, Rockaway Beach, Missouri 65740, hereinafter referred to as "the Grantee" and the heirs, assigns and successors of the Grantee forever, all right, title interest, estate, lien, claim, equity, and demand of the Grantor in and to the real property in Taney County, Missouri, described as:

ALL OF LOTS ONE (1), TWO (2), THREE (3), AND FOUR (4) IN BLOCK FIFTY-ONE (51), AND LOTS THREE (3) AND FOUR (4) IN BLOCK FORTY-SIX (46), AND LOTS TEN (10) AND ELEVEN (11) IN BLOCK FORTY-ONE (41), LOT TEN (10) IN BLOCK FORTY (40) IN THE SUB-DIVISION OF ROCKAWAY BEACH, MISSOURI AS PER THE RECORDED PLAT THEREOF, RECORDS OF TANEY COUNTY, MISSOURI.

SUBJECT TO EASEMENTS AND RESTRICTIONS OF RECORD, IF ANY.

The Grantor fully warrants the title to the above-described property and will defend the same against the lawful claims of all persons whomsoever.

This Statutory Warranty Deed is signed by the Grantor in the Presence of the witnesses of the 3 day of December, 1993.

WITNESSES:

Charles A. Nichols  
Charles A. Nichols  
Brandy L. Nichols  
Brandy L. Nichols

GRANTOR:

Linda Jean Rappleye  
Linda Jean Rappleye

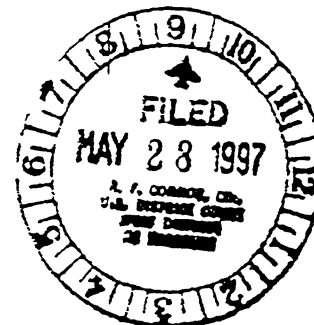
STATE OF MISSOURI  
COUNTY OF TANEY

The foregoing instrument was acknowledged before me on the 3 day of December, 1993, by Linda Jean Rappleye, who personally appeared before me, and acknowledged that she executed the same as her free act and deed.





UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF MISSOURI  
SOUTHERN DIVISION



IN RE:  
GEORGE BRYCE RAPPLEYE,  
Debtor.

MARILYN JOHNSON,  
Plaintiff,

vs.

GEORGE BRYCE RAPPLEYE,  
Defendant.

Case No. 95-60100

Adv. No. 95-6025

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

Defendant-Debtor George Bryce Rappleye filed a Chapter 7 petition seeking to discharge, among other debts, obligations owed to his former wife, plaintiff Marilyn Johnson, as a result of a Decree of Dissolution of Marriage entered by a Utah state court. Plaintiff filed a timely complaint to determine dischargeability of debt pursuant to 11 U.S.C. § 523(a)(5) and (15). Appearances at trial were: Plaintiff, in person and by counsel J. Kevin Checkett; Debtor, in person and by counsel Dan Nelson. After hearing the evidence and arguments, the court finds Debtor's obligations to Plaintiff are nondischargeable. The court has jurisdiction over this core proceeding and may enter final orders pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(b)(2)(A),(I),(J) and (O).

These findings and conclusions are consistent with those made on the record at the end of the hearing and in a supplemental record, which shall be incorporated herein, but due to additional review of the record, they may modify oral findings. Any findings of fact designated in error as conclusions of law shall be deemed findings of fact; any conclusions of law designated in error as findings of fact shall be deemed conclusions of law.

## FACTUAL BACKGROUND

These parties married in their fifties and divorced after approximately five years. Plaintiff had been married previously for more than 20 years to a doctor in the Air Force. She had and her former spouse had six children. In the dissolution of that marriage, Plaintiff received a modest pension of \$1,180 per month.

Prior to Debtor's 1995 bankruptcy filing in Missouri, the Fourth Judicial District Court of Wasatch County, Utah entered a Decree of Dissolution of Marriage between Debtor and Plaintiff in 1991. Pursuant to the Decree, Debtor was to pay a total of approximately \$206,000 to Plaintiff, including \$5,000 for Plaintiff's attorney's fees. Debtor failed to pay any of these obligations.

During the marriage of Plaintiff Marilyn Johnson and Debtor George Rappleye, which lasted only about five years, the parties had both separate and joint property, and separate property which was commingled and converted to joint or marital property. For example, at the time of the marriage Debtor owned a hardware store. When Debtor and Plaintiff married, Plaintiff cashed in her Air Force pension benefit, her primary asset, and contributed the \$50,000 in proceeds to the hardware business which she and Debtor jointly operated during their marriage. In the dissolution of marriage proceedings, the state court judge found the hardware business was marital property. As will be discussed below, the business was lucrative.

During the marriage plaintiff was unemployed except for her work without salary in the hardware store. As found in the dissolution proceeding, she was 55 years old and had limited education, training and job experience. Before the marriage, she had \$1,180.00 per month income from the Air Force pension which she cashed in and contributed to the hardware store. At and after the dissolution, Plaintiff's income was only \$800 per month. In contrast, Debtor was 56, in good health, and had years of business and work experience. He owned at least two lucrative businesses,



including the hardware store (which the state court held had been converted to marital property) and a hosiery business in California. In the dissolution, he received one half of the proceeds of sale of the hardware business, which totaled approximately \$182,000. He had retired and was not gainfully employed, but in order to pay his monthly expenses of \$1,875.00, he could look to the hardware store sale proceeds and income of \$25,000 per year from the hosiery business. When Debtor began the hardware business in 1981, before the marriage, he earned \$15,000 per year from the business, and could earn at least that much and most likely significantly more based on his experience and knowledge, as found by the Utah state court. In 1992, after the dissolution proceeding, Debtor's income was \$78,752.00. After that, his income allegedly dropped to virtually zero when he became a stake missionary.

The state court divided the hardware store proceeds of approximately \$182,000 equally and entered the judgment for it as alimony, divided an account evenly so that Plaintiff received \$58,000, and awarded her attorney fees. It also appears Plaintiff was awarded \$800 per month support for two years. Debtor appealed the decision, which was substantially affirmed, and then retried the matter. During the proceedings, Debtor made a fraudulent transfer of real property to his son, which the court voided. In violation of the court's order, Debtor dissipated a Merrill Lynch account by writing checks to family members and friends. At one time, it appears the account had in excess of \$300,000.

Debtor and Plaintiff are both members of the Mormon church, and Debtor now lives in Branson, Missouri, where he has volunteered to serve as a full-time lay missionary, known as a "stake missionary." This position produces no income, and Debtor claims he now has no income and lives off the charity of friends. Plaintiff works as a church secretary and rents out a room in her home for extra income.

On February 13, 1995, Debtor filed a Chapter 7 bankruptcy seeking discharge of his debts,

including that owed to Plaintiff, which was listed in the schedules at \$216,011.478. Other than the debt to plaintiff, most of the other scheduled debts were for attorney fees to numerous attorneys. In addition, two friends, Brandy and Charles Nichol, were listed with two unspecified claims totaling \$11,200.00. At trial Debtor testified the Nichols' debts were for helping him prepare court documents.

## DISCUSSION

### 1. Dischargeability under § 523(a)(5)

11 U.S.C.A. § 523(a)(5)(1994) provides, in pertinent part, that:

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

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\*

(5) to a . . . former spouse . . . of the debtor, for alimony to, maintenance for, or support of such spouse . . . in connection with a separation agreement, divorce decree or other order of a court of record . . . .

The issues to be decided before this court are judged by the standard of preponderance of evidence.

Grogan v. Garner, 111 S.Ct. 654 (1991).

The evidence indicates the awards made to Plaintiff and ordered to be paid by Debtor were intended as support. While the court does not disregard the Decree Of Dissolution Of Marriage issued by the Utah state court, nothing in the Decree is conclusive on the issues tried by the Bankruptcy Court. See In re Williams, 703 F.2d 1055 (8th Cir. 1983); In re Ianke, 185 B.R. 297 (Bankr. E.D. Mo. 1995). A statement in a decree of dissolution of marriage that neither party is awarded support is not a limiting factor binding on the bankruptcy court. See, Holiday v. Kline, 63 F.3d 749 (8th Cir. 1995); In re Williams, 703 F.2d 1055 (8th Cir. 1983). This court's findings are

consistent with the findings of the Fourth Judicial District Court of Wasatch County, Utah.

The doctrine of collateral estoppel prevents relitigation of an issue in a later lawsuit by the party against whom the issue was decided in the previous adjudication. Swapshire v. Baer, 365 F.2d 948, 950 (8th Cir. 1989). The elements of collateral estoppel are: 1) the issue decided in the prior adjudication is identical to the issue in the present case; 2) the prior adjudication resulted in a judgment on the merits; 3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior lawsuit; and 4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the previous suit. Swapshire, 365 F.2d at 951, citing Oates v. Safeco Ins. Co. of America, 583 S.W.2d 719 (Mo. 1979). The elements of collateral estoppel are satisfied in the present case regarding the support nature of the award.

The issues in this adversary action as to division of marital property and debts, and determination of awards in the nature of support, are the same as those which were comprehensively and thoroughly litigated throughout the Utah court system by these same parties. Plaintiff presented credible testimony and evidence before this court that the exhibits presented and accepted into evidence in this proceeding were used before the courts in Utah to determine the support issue. The decision by the District Court of Wasatch County, Utah on retrial, which was a decision on the merits, makes clear that the obligations of Debtor to Plaintiff were for her support. Debtor had a full and fair opportunity to litigate all the issues in the Utah state courts, and in fact has availed himself of the opportunities to engage in extensive litigation in Utah.

Even without the benefit of the doctrine of collateral estoppel, this court's ruling in favor of Plaintiff and against Debtor would be the same. The court has considered the numerous factors set forth in In re Soval, 171 B.R. 690, 692 (Bankr. E.D. Mo. 1987), in determining the dischargeability under § 523(a)(5) of the debt owed Plaintiff by Debtor. Plaintiff has met the burden of proof under

the Soval analysis to show that the obligations ordered by the Utah court to be paid by Debtor to Plaintiff or for her benefit were intended to have a support function and are, therefore, nondischargeable obligations under §523(a)(5) of the Bankruptcy Code.

Particularly noteworthy is the fact that Plaintiff has poor earning capacity and is not employed at the same job she held at the time of the Utah retrial. The Utah court did not believe Plaintiff had a surplus of funds by which she could support herself. Debtor, on the other hand, has business experience and has had at least two businesses which have generated substantial profits. Debtor's earning capacity is actually much greater than that found by the Utah court. During Debtor's life, he has generated a significant amount of income and assets.

## **2. Dischargeability under § 523(a)(15)**

The obligations are also nondischargeable pursuant to § 523(a)(15) of the Bankruptcy Code. 11 U.S.C.A. § 523(a)(15)(1994) provides, in pertinent part, that:

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

\* \* \*

(15) . . . that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record . . . unless-

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor . . . ; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a . . . former spouse . . . .

Under the provisions of § 523(a)(15), the burden is on Debtor to show either his inability to pay the joint indebtedness or to show that the benefit to Debtor of receiving a discharge of these debts outweighs the detriment to Plaintiff from Debtor's non-payment of the debts. See, In re Becker, 185 B.R. 567 (Bankr. W.D. Mo. 1995). Debtor has made no such showing under either prong.

In re Florio, 187 B.R. 654, 656-658 (Bankr. W.D. Mo. 1995), is adopted by this court for the proposition that the ability to pay under § 523(a)(15) does not necessarily mean at the time of the trial, but requires the court to consider debtor's future earning capacity. Here, Debtor has voluntarily placed himself in a position of earning less income - - virtually no income, in fact - - and then claims he is unable to pay his debts. Debtor's decision to become a stake missionary in his church is his decision alone.<sup>1</sup> He chose to place himself in a position of voluntary retirement several years ago. Debtor receives no compensation from his church. Taking a voluntary retirement and working in a voluntary position for the church or a charitable or civic institution is a luxury many people would like to be able to afford. Debtor is not prohibited from making such life-choice decisions, but he cannot do so in order to render himself a pauper in an effort to avoid the lawful support obligations rendered by the Utah dissolution court, or while seeking the protection of the bankruptcy court as a means to avoid those support obligations. When the obligations to Plaintiff are satisfied, Debtor is free to make such life-choices.

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<sup>1</sup> Debtor testified that if the stake president asked a person to volunteer to be a stake missionary, it was actually a command or request that one did not decline. Debtor testified that he was asked to do this by the stake president, but he could not remember the president's name. Plaintiff's counsel questioned Plaintiff about whether Debtor was called by the stake president to be a stake missionary or whether he volunteered. Debtor's objection to the question was sustained. However, it appears the testimony should have been admitted because Debtor introduced the issue and relied on hearsay testimony to assert that the stake president asked him to be a stake missionary. Therefore, Plaintiff should have been allowed to testify that the stake president informed her he did not ask Debtor, but that Debtor volunteered for mission work.

Debtor raised medical issues as a reason it would be more detrimental to him to enforce the obligations and why he could not pay the obligations. Debtor presented no expert testimony or medical evidence of such conditions and there is no evidence that Debtor is disabled or is in any manner unable to work. The court observed Debtor during a period of two days and he appeared fit and fully able to function, which he apparently does in his full-time volunteer endeavor. Although Debtor claims to have disc problems, many people have such back problems and are able to get along with their daily lives and employment. In fact, Debtor is an avid golfer and continues to play golf in spite of his claimed disability. Additionally, Debtor is able to perform his full-time job as a voluntary stake missionary, his normal daily activities, and odd jobs. Debtor did not establish an inability to pay sufficient to satisfy the first prong of § 523(a)(15).

Analysis of the second prong of § 523(a)(15) indicates that the detriment to Plaintiff outweighs the benefit of discharge to the Defendant. As previously noted, Plaintiff does not have significant earning capacity. By contrast, Debtor has years of business experience and has had at least two lucrative businesses which have made substantial profits. He has previously generated significant income and assets. Debtor has greater income capacity but chooses not to work. Plaintiff also at one time wished to be a volunteer missionary, but instead now works as a church secretary and rents out a room in her home to meet ordinary living expenses. Debtor suggests that Plaintiff should look to her children for support, but Debtor's support obligations are not discharged by any acts of charity from Plaintiff's children.

### **3. Debtor's Credibility**

Debtor's previous lack of honesty and deceptive actions reflect on his credibility. Plaintiff testified that during the marriage Debtor kept significant sums of cash hidden in the home,. Once, she unexpectedly came across \$52,000 in cash hidden inside the bathroom cabinet behind the drawers.

Debtor told her at that time the cash was taken from the register (and apparently was not reported to tax authorities) at the hardware store the couple owned. This testimony was basically undisputed. The couple took their personal problem over Debtor hiding money from his spouse to their bishop. Plaintiff and Debtor apparently split the \$52,000 after their bishop advised them to do so.

The District Court of Wasatch County found Debtor made at least one fraudulent transfer within his family. The court voided that transfer. The state court prohibited Debtor from disbursing funds, yet in violation of that order, Debtor made a transfer of \$6,000 to \$10,000 to his children out of the funds. He made the transfer because Plaintiff made a gift of money to her children before the divorce. Plaintiff testified the transfer to her children was from her half of the hidden \$52,000 that the bishop split between the parties. In contrast, Debtor's transfers to his family members and children after initiation of the dissolution proceedings were made from the marital assets Debtor had been enjoined from disbursing. Whether there was a specific order in effect from the state court judge at that time, one would know generally in a divorce proceeding where assets are being divided that it is improper to take assets and convey them to family members. If Debtor conveyed marital assets in order to keep them out of Plaintiff's reach, the conveyance constituted a fraudulent transfer.

Evidence came in without objection that in 1984, Debtor was indicted in federal court in Wyoming for actions involving commercial fraud. Debtor and a third party attempted to obtain funds from a bank in payment for bogus merchandise orders to the third party. Debtor would apparently receive a check from the bank and then sign a lien waiver, which he then sent back to the bank. No merchandise was delivered, so the lien waiver was essentially false. The court notes that the information came into evidence without objection. The case did not go to trial and there was no conviction because Debtor entered into a pretrial diversion agreement wherein he was put on probation for one year and required to pay restitution of \$25,000. Pursuant to the diversion

agreement, if at the end of that time Debtor had complied with the agreement, the charges would be dismissed. Debtor was not prosecuted because he made restitution and complied with the other requirements of the agreement.

There was also evidence that Debtor forged Plaintiff's name on at least two occasions, once to a check and once to a document that released Plaintiff's money from a Merrill-Lynch bank account. In regard to the check, the court notes that a photocopy of the check was produced at trial and it was not possible to determine from the copy whether it was her signature or a copy of her signature. The questions asked by Debtor's attorney in regard to the checking account, however, did not directly dispute that there had been a transfer out of the bank account. The questions went to whether there had been any ultimate or permanent loss incurred because of the check written out of the account. Plaintiff, on the other hand, was not trying to establish that there had been an ultimate loss, but that there had been a tendency to make false transactions, to forge names and to engage in fraudulent activity. The \$30,000 from the allegedly forged check were later returned to her account, which was a joint account with Debtor. Plaintiff indicated that Debtor was the only other person who had access to the checks and who could have forged her name. The court makes no specific finding that a forgery occurred, based upon the earlier reference about the photocopy of the check, but notes there was not a denial that it occurred, only testimony that no permanent loss resulted. Plaintiff also testified that during the time of the dissolution proceedings, a real estate lot was transferred to Debtor's son. The transfer was accomplished by Debtor forging his son's name while the son was on an obligatory mission outside the State of Utah.

Debtor's credibility is also suspect in regard to allegations that he lives at this point in his life totally without income and dependent on the charity of others. The court notes that Debtor claimed the estimated \$450 a month income that he listed in his schedules was, in fact, the value of charitable



donations from friends who support him and occasionally allow him to stay at their houses while he engages in his stake missionary work. In examining the other facts in this case, such as debtor's previous income and his propensity for hiding cash and transferring assets to family members, it appears that Debtor has had a pattern and practice of accumulating large amounts of money in forms that are difficult to trace, as evidenced by the \$52,000 in cash skimmed from his business. Debtor has had a practice of accounting loosely or not at all for such funds. Debtor's allegations that he lives totally without any income and solely on the charity of others is not consistent with the other facts in the case.

An issue arose during Debtor's cross-examination of Plaintiff that shed additional light on Debtor's credibility and motive. Debtor's counsel, after conferring with Debtor, attempted to ask whether Plaintiff had engaged in extensive litigation in her divorce from her first husband. Her first husband was an Air Force doctor and their long-term marriage resulted in six children. After Plaintiff's counsel objected, Debtor's counsel explained that the reason for the question was to show Plaintiff's custom and practice of being a professional litigator or "black widow" who engaged husbands in divorces and then litigated until she got their money. Debtor's argument that Plaintiff had a scheme to bilk innocent men of their assets is ludicrous. In actually applying the argument to Plaintiff's first marriage, the scenario portrayed would be that Plaintiff entered into her first marriage of 20 years, and gave birth to and reared six children while following her spouse from air base to air base, in order to bilk her former spouse of the small pension she was awarded in the dissolution of marriage.

There was absolutely no evidence to support the assertion of any such practice by Plaintiff. The true significance of such a question is the questioner's own motivation. Debtor's question invites examination of his own thinking, his own state of mind and his own actions. In examining all the

circumstances leading up to the bankruptcy trial, the court concludes the litigation was protracted and multiplied by Debtor and not by Plaintiff. If there is any custom and practice of being a professional litigator, it is on Debtor's part, as he has taken his case to three different courts in Utah and one Missouri court, all with the consistent result that the courts ruled adversely to Debtor's position. During these protracted judicial proceedings, he dissipated and diverted the marital assets and has avoided paying Plaintiff. Debtor appealed the first decision of the Utah state court. The court of appeals rendered an adverse decision to Debtor, who then went back for a second trial. He eventually filed bankruptcy, again in order to upset the Utah court's decision. By filing the bankruptcy, he forced Plaintiff to file the adversary action to protect the judgment she obtained in Utah. It is not fair to suggest that Plaintiff has engaged in bad faith litigation because she has been placed in the position of having to protect her judgment which Debtor has tried to take away and which, by devious means and dissipation of assets, he has avoided paying. Moreover, it is just as likely that one could examine Debtor's behavior and conclude that his practice was to enter into a short-term marriage with someone who appeared lonely and vulnerable and had \$50,000 so that Debtor could get the money and then leave. The question backfired on Debtor and provided a revealing key to his state of mind.

Debtor's true reasons for contesting his support obligations do not arise from an honest belief that the state court judges were erroneous in their decisions regarding the obligations, or that he is truly unable to pay the obligation and that a discharge would be more beneficial to him than detrimental to Plaintiff. The key to Debtor's true reason for contesting the debt surfaced at the end of examination by his counsel. Debtor was asked a question regarding his purpose in attempting to discharge his obligations to Plaintiff. Debtor's answer was spontaneous and damaging. He said that he simply refused to believe judges have the right to distribute any of his assets to Plaintiff because

he knew they were his own premarital property. Debtor claimed he was right and the judges were wrong. In effect, Debtor claims to be above the law, a state of mind which is consistent with his previous actions, such as making fraudulent transfers, dissipating assets despite the judge's order, and skimming profits from his business without disclosing the hidden funds either to his spouse or the tax authorities.

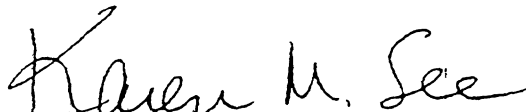
Debtor has a strong subjective belief that so far, all the judges who have looked at the case must be wrong because they do not agree with him. All the trial and appellate judges in Utah and now the bankruptcy court in Missouri have agreed in their findings against Debtor. At some point, Debtor must realize that, especially where he has sought out the protection of the court, he is bound by that judgment.

### CONCLUSION

Accordingly, based on the foregoing, it is ORDERED, ADJUDGED and DECREED:

1. Judgment is granted in favor of Plaintiff Marilyn Johnson and against Defendant-Debtor George Bryce Rappleye in the amount of \$216,011.47, the amount scheduled in this bankruptcy proceeding, with prepetition and post-petition interest at the rate specified in the decree of dissolution of marriage, or in the absence of such rate in the decree, at the rate provided pursuant to Utah law, plus costs.

2. The judgment entered herein is not dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)((5) and § 523 (a)(15).

  
Karen M. See, Bankruptcy Judge



*[Handwritten signature]*

**STEPHEN QUESENBERRY (8073)**  
**J. BRYAN QUESENBERRY (9156)**  
**HILL, JOHNSON & SCHMUTZ, L.C.**  
Jamestown Square  
3319 North University Avenue  
Provo, Utah 84604  
Telephone (801) 375-6600

**Attorneys for Defendant**

IN THE FOURTH JUDICIAL DISTRICT COURT  
WASATCH COUNTY, STATE OF UTAH  
1361 S. Highway 40 P.O. Box 730 Heber City, Utah 84032

MARILYN RAPPLEYE, nka,  
MARILYN JOHNSON,

Plaintiff,

vs.

GEORGE RAPPLEYE,

Defendant.

**STIPULATION AND ORDER RE:  
SUPERSEDEAS BOND**

Case No. 6626

Judge Donald Eyre

Plaintiff, Marilyn Johnson ("Plaintiff"), by and through her counsel of record, Matt C. Osborne, Osborne & Barnhill, P.C., and Defendant George Bryce Rappleye ("Defendant") and Linda Jean Hodges-Rappleye, by and through Defendant's counsel of record and Hodges-Rappleye's counsel, Stephen Quesenberry, Hill, Johnson & Schmutz, hereby enter into the following stipulation, and request immediate entry of the order incorporated herein, regarding the posting of a supersedas bond.

*[Handwritten signature]*

## RECITALS

1. On January 8, 2003, the Court entered Findings of Fact and Conclusions of Law on Defendant's Request for Hearing and Motion to Set Aside and Release the Writ of Execution filed in connection with, among other things, a certain Writ of Execution served on Fidelity Investments on October 28, 2001, entering findings of fact and conclusions of law among other things:

- a. The Branson Lake Property, as that term is defined therein, was sold for \$440,000.00, and Defendant had a 48.39 percent interest in the sales proceeds of the Branson Lake Property, or up to \$212,916.00;
- b. Plaintiff may execute on Defendants' share of the proceeds of the sale of the Branson Lake Property up to the amount of the Judgment;
- c. Plaintiff is entitled to execute up to the amount of her Judgment on Defendant's 48.39 percent interest in Fidelity Investment Accounts #X29-179590, #X01-058866, #X33-089737, #X29-106640 and X29-203807; and
- d. Defendant's 48.39 percent interest in Fidelity Investment Accounts #X29-179590, #X01-058866, #X33-089737, #X29-106640 and X29-203807 shall be computed by taking the outstanding balances of the accounts on October 26, 2002, prior to the withdrawal of \$100,000.00 (which was ordered by the Court in or around January, 2002);

2. The Court entered an Order of Execution on January 8, 2003, ordering, among other things, the following:
  - a. Plaintiff is entitled to execute up to the amount of her Judgment on Defendant's 48.39 percent interest in Fidelity Investment Accounts #X29-179590, #X01-058866, #X33-089737, #X29-106640 and X29-203807; and
  - b. Defendant's 48.39 percent interest in Fidelity Investment Accounts #X29-179590, #X01-058866, #X33-089737, #X29-106640 and X29-203807 shall be computed by taking the outstanding balances of the accounts on October 26, 2001, the date the funds were frozen pursuant to the Writ of Execution.
3. Plaintiff filed an Abstract of Judgment in Fifth Judicial District Court in and for Washington County, State of Utah, on or about May 1, 2002;
4. Plaintiff caused a Writ of Execution to be issued by the Fifth District Court on or around July 31, 2002 ("Washington County Writ of Execution");
5. The Praecipe attached to the Washington County Writ of Execution listed the residence located at 1015 South River Road, St. George, Utah ("St. George Property"), and any non-exempt personal property located thereon;
6. The Washington County Writ of Execution was served upon Defendant on or around August 6, 2002;

7. The Court has ordered that the supersedeas bond (pursuant to Utah Rule of Civil Procedure 62(d)) in this matter) should be in the amount of \$230,000.00. This bond would effect a stay on the execution of the January 8, 2003 order of the Court regarding the Fidelity Accounts referenced in the Order of Execution, but would not act as a stay on Plaintiff's execution on the judgment Plaintiff has against Defendant in this case generally;

8. The reason for the \$230,000.00 bond was to provide sufficient surety to cover the amount of Defendant's 48.39% interest in the proceeds of the sale of the Branson Lake Property, to wit: \$212,916.00, plus anticipated costs and attorney fees on appeal;

9. The other primary asset which was purchased with the proceeds from the sale of the Branson Lake Property is the St. George Property;

10. Defendant and Linda Jean Hodges-Rappleve ("Hodges-Rappleve") have admitted that the St. George Property was purchased solely with the proceeds of the sale of the Branson Lake Property; and

11. Plaintiff, Defendant and Hodges-Rappleve desire to resolve all issues related to the St. George Property in the present action and ensuing appeal so that further fees and costs may be avoided in connection with the Washington County Execution.

WHEREAS, the parties stipulate and agree as follows:

1. Plaintiff and Defendant agree that Defendant will pay \$230,000.00 into the Registry of the Court as security in lieu of a supersedeas bond, pursuant to Rule 62(i)(2), Utah Rules of Civil Procedure. This payment would effect a stay on the execution of the January 8,



2003 order of the Court regarding the Fidelity Investment Accounts referenced in the Order of Execution, but would not act as a stay on Plaintiff's execution on the judgment Plaintiff has against Defendant in this case generally.

2. The \$230,000.00 to be deposited with the Court shall only be released from the Registry upon order of the Court.

3. The \$230,000.00 to be deposited with the Court shall come from the Fidelity Investment Accounts referenced in the Court's Order of Execution, with the specific instructions set forth below.

4. Plaintiff shall have the right to apply to the Court for additional sureties in the event it appears that the \$230,000.00 will be insufficient to cover the attorney fees and costs of the appeal.

5. It is the express and specific intent of Plaintiff, Defendant and Hodges-Rappleye that \$212,916.00 of the \$230,000.00 to be deposited with the Court represents Defendant's 48.39% of the proceeds of the sale of the Branson Lake Property. The remaining proceeds of the sale of the Branson Lake Property are the sole and separate property of Hodges-Rappleye.

6. It is the express and specific intent of Plaintiff, Defendant and Hodges-Rappleye that the \$230,000.00 includes any interest of Defendant in the St. George Property; it is the express and specific intent of the parties that the Court shall have jurisdiction over that money.

7. In exchange for the release of the Washington County Writ of Execution and Plaintiff's agreement not to take further action against the St. George Property, Defendant and

Hodges-Rappleye agree that \$212,916.00 of the \$230,000.00 to be deposited shall be released to Plaintiff if she prevails on appeal, plus any additional amount established as attorney fees, interest, and costs on appeal.

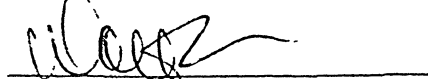
8. Plaintiff agrees that the Fidelity Investment Accounts, the 1991 GMC van and St. George Property shall be free from any further orders of the court once the \$230,000.00 has been deposited into the Court's registry.

9. Plaintiff agrees not to take any action, other than the present case, against the Fidelity Investment Accounts, St. George Property and 1991 GMC Van.

10. Plaintiff, Defendant and Hodges agree that Fidelity Brokerage Services, L.L.C., be ordered and instructed to pay the sum of \$230,000.00 to the Registry of the Court, Fourth Judicial District Court, Wasatch County, Utah, with the above-described case number noted on the check, at Post Office Box 730, Heber City, UT 84660, or to hand-deliver said funds to said court at 1361 South Highway 40, Heber City, UT. This money shall be paid by liquidating the entire amount of Fidelity account X29-106640 (approximately \$200,000.00), with the remainder of the \$230,000.00 bond to come from the Fidelity account X29-20387. The total transferred by Fidelity Brokerage Services, L.L.C. should equal \$230,000.00.

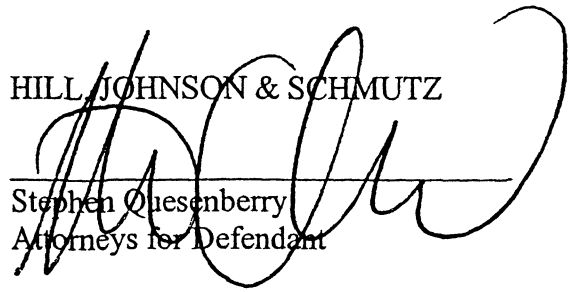
11. The parties further agree that the Court's Order of Execution instructing Fidelity Investments to pay these funds to the Plaintiff is to be disregarded by Fidelity Investments, and only the Order set forth below is to be followed with regard to the funds.

OSBORNE & BARNHILL, P.C.



Matt Osborne  
Attorneys for Plaintiff

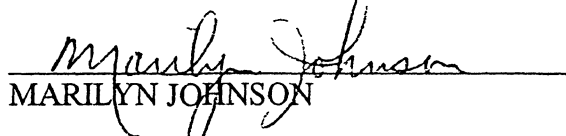
HILL, JOHNSON & SCHMUTZ



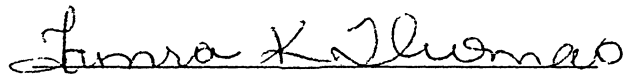
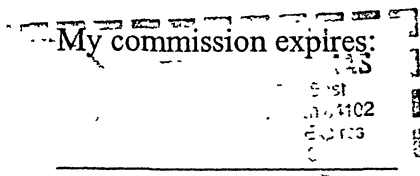
Stephen Quesenberry  
Attorneys for Defendant

STATE OF UTAH                    )  
  : ss.  
COUNTY OF SALT LAKE    )

Marilyn Johnson (Affiant), being first duly sworn under oath, deposes and says that Affiant is the Plaintiff in the above-entitled action, that Affiant has read the foregoing Stipulation and understands the contents thereof, and that the same are true of Affiant's own knowledge, information, and belief. Affiant hereby agrees to the terms of the stipulation.

  
MARILYN JOHNSON

SUBSCRIBED AND SWORN TO before me this 22 day of January, 2003.



Notary Public  
Residing at \_\_\_\_\_ County, Salt Lake

1438

SUBSCRIBED AND SWORN TO before me this \_\_\_\_\_ day of January, 2003.

My commission expires: \_\_\_\_\_

Notary Public

Residing at \_\_\_\_\_ County, Salt Lake

STATE OF UTAH )

: ss.

COUNTY OF \_\_\_\_\_ )

George Bryce Rappleye (Affiant), being first duly sworn under oath, deposes and says that Affiant is the Defendant in the above-entitled action, that Affiant has read the foregoing Stipulation and understands the contents thereof, and that the same are true of Affiant's own knowledge, information, and belief. Affiant hereby agrees to the terms of the stipulation.

George Bryce Rappleye  
GEORGE BRYCE RAPPLEYE

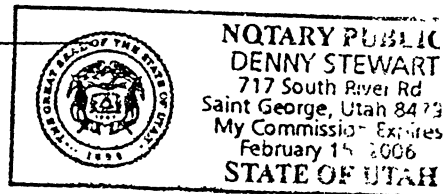
SUBSCRIBED AND SWORN TO before me this 18 day of January, 2003.

My commission expires: \_\_\_\_\_

Denny Stewart

Notary Public

Residing at Washington County



STATE OF UTAH )

: ss.

COUNTY OF Washington )

1437

Linda Jean Hodges-Rapple (Affiant), being first duly sworn under oath, deposes and says that Affiant is a Party to the above-referenced Stipulation in the above-entitled action, that Affiant has read the foregoing Stipulation and understands the contents thereof, and that the same are true of Affiant's own knowledge, information, and belief. Affiant hereby agrees to the terms of the stipulation.

*Linda Jean Hodges-Rapple*  
LINDA JEAN HODGES-RAPPEYE

SUBSCRIBED AND SWORN TO before me this 13 day of January, 2003.

My commission expires:

2/15/06

*Denny Stewart*  
Notary Public  
Residing at Washington County



NOTARY PUBLIC  
DENNY STEWART  
717 South River Rd  
Saint George, Utah 84790  
My Commission Expires  
February 15, 2006  
STATE OF UTAH

~~ORDER~~

~~Based on the above stipulation, the Court hereby ORDERS that:~~

- ~~1. The parties' stipulation is hereby an order of the Court; and~~
- ~~2. Plaintiff, Defendant and Hodges and third parties shall follow said stipulation.~~

ORDERED this \_\_\_\_ day of January, 2003.

Honorable Judge Donald Fyre

Approved as to form:

\_\_\_\_\_  
Matt C. Osborne  
Attorney for Plaintiff

*Stephen Quesenberry*  
\_\_\_\_\_  
Stephen Quesenberry  
Attorney for Defendant

14310

## ORDER

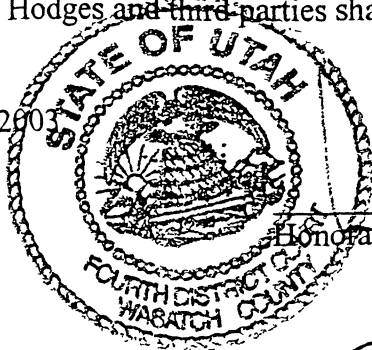
Based on the above stipulation, the Court hereby ORDERS that:

1. Fidelity Brokerage Services, L.L.C., is hereby ordered and instructed to pay the sum of \$230,000.00 to the Registry of the Court, Fourth Judicial District Court, Wasatch County, Utah, with the above-described case number noted on the check, at Post Office Box 730, Heber City, UT 84660, or to hand-deliver said funds to said court at 1361 South Highway 40, Heber City, UT. This money shall be paid by liquidating the entire amount of Fidelity account X29-106640 (approximately \$200,000.00), with the remainder of the \$230,000.00 bond to come from the Fidelity account X29-20387. The total transferred by Fidelity Brokerage Services, L.L.C. should equal \$230,000.00.

2. The remaining terms of the parties' stipulation is hereby incorporated into and made part of this order of the Court; and


3. Plaintiff, Defendant and Hodges and third parties shall follow said stipulation.

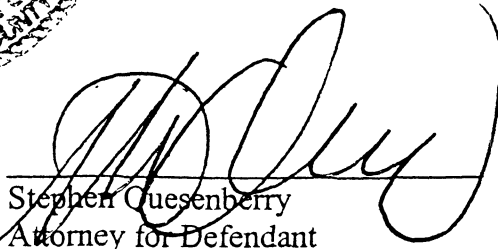
ORDERED this 27<sup>th</sup> day of January, 2003



Honorable Judge Donald Eyre

Approved as to form:

  
Matt C. Osborne  
Attorney for Plaintiff

  
Stephen Quesenberry  
Attorney for Defendant



Matt C. Osborne, USB NO. 7271  
**OSBORNE & BARNHILL, P.C**  
11576 South State, Bldg. 1001  
Draper, Utah 84020-9453  
Telephone: (801) 571-2555

Attorney for Plaintiff

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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR  
WASATCH COUNTY, STATE OF UTAH

---

MARILYN RAPPLEYE kna MARILYN  
JOHNSON,

Plaintiff,

v.

GEORGE BRYCE RAPPLEYE,

Defendant.

**REQUEST FOR HEARING**

Case No. 6626  
Judge Guy R. Burningham

- 
1. ☒ Complete paragraph one if you claim the property executed upon is exempt:  
(☒) (a). The property which has been executed upon is exempt from execution  
because it is (Check applicable boxes:)  
☐ Homestead up to the amount allowed by law  
☐ A motor vehicle used in my trade or business and having a value  
below that allowed by law  
☐ Tools of the trade  
☐ Social Security Benefits  
☐ Supplemental Security Income (SSI)  
☐ Veterans' Benefits  
☐ Unemployment Benefits  
☐ Worker's Compensation Benefits  
☐ Public Assistance (Welfare)  
☐ Alimony or Child Support  
☐ Pensions



- ☐ Wages or other earnings from personal services
- ☐ Owned by another person
- ☐ Only partly owned by me
- ☐ Certain tools of the trade below the value allowed by law
- ☐ Certain furnishings and appliances
- ☐ Certain musical instruments
- ☐ Certain heirlooms
- ☐ Other (describe): \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

2. Complete paragraph two if you believe the Writ of Execution was improperly issued:

☐ a. I believe that the writ of execution was issued improperly. (Explain) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

☒ b. Check if applicable: I claim ownership of all or part of the property taken and I am not one of the persons against whom a judgment has been entered.

☐ c. Check if applicable: I do not own the property taken

I REQUEST THAT THIS MATTER BE SET FOR A HEARING.

THE STATEMENTS MADE IN THIS REQUEST ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Dated this 11 day of December, 2001.

  
Signature