

2003

# Larry Briggs v. Valley Spas, Inc.; Salt Lake Valley Spas, Inc.; Lowell Brown; Valley Spa I, Inc., : Brief of Appellant

Utah Court of Appeals

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



Part of the [Law Commons](#)

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

Steven E. McCowin; Attorney for Appellees.

Affordable Legal Advocates; Gregory B. Smith; Attorney for Appellant.

---

## Recommended Citation

Brief of Appellant, *Briggs v. Valley Spas*, No. 20030829 (Utah Court of Appeals, 2003).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/4576](https://digitalcommons.law.byu.edu/byu_ca2/4576)

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

---

IN THE UTAH COURT OF APPEALS

---

APPEAL

Larry Briggs,

Plaintiff & Appellant,

v.

Valley Spas, Inc ; Salt Lake Valley Spas,  
Inc Lowell Brown, Valley Spa I Inc

Defendants & Appellees

---

Case no 20030829-CA

---

FILE OF APPELLANTS

---

Larry Briggs appeals the decision of  
Stephen Henriod  
Third District Court

---

Allen E. McCowin  
Attorney for Defendants  
435 S. 1200 East  
Salt Lake City, UT 84102

Aaffordable Legal Advocates  
Gregory B. Smith #6657  
Attorney for Mr. Briggs  
180 S 300 W Suite 170  
Salt Lake City, UT 84101  
Phone (801) 532-5100  
Fax: (801) 532 5178

**FILED**  
Utah Court of Appeals

JAN 26 2004

P  
Clerk of the Court

---

IN THE UTAH COURT OF APPEALS

---

Larry Briggs,

Plaintiff & Appellant,

v.

Valley Spas, Inc.; Salt Lake Valley Spas,  
Inc.; Lowell Brown; Valley Spa I, Inc.,

Defendants & Appellees

APPEAL

Case no. 20030829-CA

---

BRIEF OF APPELLANTS

---

Larry Briggs appeals the decision of  
Stephen Henriod  
Third District Court

---

Steven E. McCowin  
Attorney for Defendants  
435 S. 1200 East  
Salt Lake City, UT 84102

Aaffordable Legal Advocates  
Gregory B. Smith #6657  
Attorney for Mr. Briggs  
180 S 300 W Suite 170  
Salt Lake City, UT 84101  
Phone: (801) 532-5100  
Fax: (801) 532-5178

TABLE OF AUTHORITIES .....	4
STATEMENT OF JURISDICTION.....	6
STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	6
AND STANDARDS OF REVIEW .....	6
DETERMINATIVE LAW.....	10
STATEMENT OF THE CASE.....	10
Nature of case: .....	10
Course of proceedings:.....	10
Disposition at trial court:.....	12
Relevant facts:.....	12
Summary of argument:.....	14
<b>Defendant's first motion for summary judgment:</b> .....	15
<b>Defendants' second motion for summary judgment:</b> .....	16
ARGUMENT .....	16
<b>I. Contrary to the District Court's Finding, The Ostensible Settlement Agreement Did Not Constitute an Accord and Satisfaction.</b> .....	17
<b>II. The District Court Improperly Made Findings of Facts When Deciding the First Summary Judgment.</b> .....	21
<b>III. Contrary to the District Court's Finding, the Ostensible Settlement Agreement, if Valid, Would Not Extinguish Mr. Briggs' Right To Relief.</b> .....	24
<b>IV. The District Court Improperly Granted Defendants' First Motion for Summary Judgment on Other Claims</b> .....	26
<b>Plaintiff Mr. Briggs Properly Pleaded A Consumer Sales Practices Act Violation Claim.</b> .....	27
<b>The District Court's Ruling Leaves Mr. Briggs unable to fully address the merits because of its lack of grounds.</b> .....	29
<b>V. The Briggs Offer was void or voidable because it was made under duress</b>	30
<b>VI. The District Court could not properly enforce the ostensible settlement agreement because the Defendants were not in compliance and had not performed.</b> .....	32
<b>VII. The District Court erred in granting Defendants' Second MSJ, granting attorney's fees.</b> .....	33
<b>VIII. The District Court erred in awarding attorney's fees pursuant to statute</b>	36
<b>IX. The District Court erred by awarding attorney's fee "in the interests of justice"</b> .....	42
CONCLUSION .....	44

ADDENDUM CONTENTS	TAB No.
Sales Agreement	1
Letter from Plaintiff to Defendants 11/09/1999	2
Letter from Defendants to Plaintiff 11/11/1999	3
Affidavit of Larry Briggs 3/17/2001	4
Affidavit of Lowell Brown 4/ /2001	5
District Court Signed Minute Entry 6/11/2001	6
District Court Signed Minute Entry July 23, 2003	7
Objection to Proposed Final Judgment 8/13/2003	8
Letter from Steven E. McCowin to Court 8/19/2003	9
Final Judgment 8/29/2003	10
Utah Code § 78-27-56	11
Utah Rules of Civil Procedure, Rule 56	12
Utah Code § 13-11-1 et seq (Utah Consumer Sales Practices Act)	13
16 CFR § 429	14

## TABLE OF AUTHORITIES

### STATUTES

16 CFR 429 .....	29
Utah Code § 78-2-2(3)(j).....	7
Utah Code § 78-2-2(4) .....	7
Utah Code § 78-27-56 .....	11, 17, 37, 38

### RULES

Rule 56 .....	37
Utah Rules of Civil Procedure, Rule 52(a) .....	31

### CASES

<i>Adamson v. Brockbank</i> , 185 P.2d 264.....	38
<i>Alder v. Bayer Corp.</i> , 2002 UT 115 .....	6, 7, 8, 9, 10
<i>Allen v. Bissinger &amp; Co.</i> , 219 P. 539.....	20
<i>Andreini v. Hultgren</i> , 860 P.2d 916 .....	31, 32
<i>Baldwin v. Burton</i> , 850 P.2d 1188 .....	40
<i>Briggs v. Valley Spas, Inc.</i> , 2001 UT App 410. ....	11
<i>Cady v. Johnson</i> , 671 P.2d 149 .....	40, 41
<i>Campbell v. State Farm Mut. Auto. Ins. Co.</i> , 840 P.2d 130 .....	22, 23
<i>Chipman v. Miller</i> , 934 P.2d 1158 .....	37
<i>Coalville City v. Lundgren</i> , 930 P.2d 1206 .....	40
<i>Colman v. Utah State Land Bd.</i> , 795 P.2d 622.....	27
<i>Colonial Leasing Co. of New England, Inc. v. Larsen Bros. Const. Co.</i> , 731 P.2d 483 ...	23
<i>Controlled Receivables, Inc. v. Harman</i> , 413 P.2d 807 .....	27
<i>Cove View Excavating and Const. Co. v. Flynn</i> , 758 P.2d 474 .....	18
<i>Draper City v. Estate of Bernardo</i> , 888 P.2d 1097 .....	34
<i>Faust v. KAI Technologies, Inc.</i> , 2000 UT 82.....	43
<i>Holbrook Co. v. Adams</i> , 542 P.2d 191 .....	34
<i>In re Discipline of Sonnenreich</i> , 2004 UT 3 .....	37, 40, 41
<i>Kelley v. Leucadia Financial Corp.</i> , 846 P.2d 1238 .....	33
<i>L &amp; A Drywall, Inc. v. Whitmore Const. Co., Inc.</i> , 608 P.2d 626 .....	25
<i>New York Gaslight Club, Inc. v. Carey</i> , 447 U.S. 54.....	43

<i>Petersen v. Petersen</i> , 709 P.2d 372 .....	18
<i>R.J. Daum Const. Co. v. Child</i> , 247 P.2d 817 .....	19
<i>Stewart v. Utah Public Service Com'n</i> , 885 P.2d 759 .....	43
<i>Taylor v. Estate of Taylor</i> , 770 P.2d 163 .....	41, 42
<i>United American Life Ins. Co. v. Zions First Nat. Bank</i> , 641 P.2d 158 .....	23
<i>Utah State University</i> , 646 P.2d 715 .....	27
<i>Watkiss &amp; Campbell v. Foa &amp; Son</i> , 808 P.2d 1061 .....	37

## STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction in this matter pursuant to Utah Code § 78-2-2(3)(j). This matter was assigned to the Utah Court of Appeals pursuant to Utah Code § 78-2-2(4)

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

### AND STANDARDS OF REVIEW

Issue: Whether the court erred when granting Defendants' motion for summary judgment dismissing Mr. Briggs' breach of contract action, by concluding a binding contract to settle Mr. Briggs' claims existed, when there are disputed issues of fact and law about whether there was an unconditional acceptance to Mr. Briggs' offer or whether Defendants response was a counter-offer.

Standard of Review: For reviewing the granting of summary judgment: review for correctness, giving no deference to the trial court, viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Alder v. Bayer Corp.*, 2002 UT 115.

Preserved for appeal: Plaintiff's memorandum opposing Defendants' motion for summary judgment, ¶ 2 (Record, at 188-189).



Issue: Whether the District Court improperly weighed evidence and made findings of fact on disputed issues regarding Plaintiff's offer and Defendants' response to that offer.

Standard of Review: For reviewing the granting of summary judgment: review for correctness, giving no deference to the trial court, viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Alder v. Bayer Corp.*, 2002 UT 115.

Preserved for appeal: Plaintiff's memorandum opposing Defendants' motion for summary judgment; showing disputed facts (Record, at 188-196).

Issue: Whether the Court's conclusion of law finding Mr. Briggs' other causes of action to be without merit, was erroneous.

Standard of Review: For reviewing the granting of summary judgment: review for correctness, giving no deference to the trial court, viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Alder v. Bayer Corp.*, 2002 UT 115.

Preserved for appeal: Plaintiff's Amended Complaint and Jury Demand (Record, at 34-50).

Issue: Whether the District Court erred in finding that Mr. Briggs offer was not made

under duress.

Standard of Review: For reviewing the granting of summary judgment: review for correctness, giving no deference to the trial court, viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Alder v. Bayer Corp.*, 2002 UT 115.

Preserved for appeal: Plaintiff's memorandum opposing Defendants' motion for summary judgment; showing disputed facts (Record, at 188-196).

Issue: Whether the District Court erred in dismissing Plaintiff's complaint because of a settlement agreement when Defendants were in breach of the ostensible settlement agreement, and therefore not in a position to seek enforcement against Mr. Briggs.

Standard of Review: For reviewing the granting of summary judgment: review for correctness, giving no deference to the trial court, viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Alder v. Bayer Corp.*, 2002 UT 115.

Preserved for appeal: Plaintiff's memorandum opposing Defendants' motion for summary judgment; (Record, at 188-196; see ¶ 17; Record, at 171 specifically).

Issue: Whether the District Court erred in granting summary judgment, awarding attorney's fees when disputed material facts precluded summary judgment and where

Defendants admitted that Plaintiff had raised material disputed facts.

Standard of Review: For reviewing the granting of summary judgment: review for correctness, giving no deference to the trial court, viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Alder v. Bayer Corp.*, 2002 UT 115.

Preserved for appeal: Plaintiff's memorandum opposing Defendants' motion for summary judgment; showing disputed facts (Record, at 533 et seq.), Plaintiff's motion to summarily deny Defendants motion for summary judgment; showing Defendants' admission that Plaintiff had raised material disputes (Record, at 798-801).

Issue: Whether the District Court erred in awarding attorney's fees pursuant to statute (Utah Code § 78-27-56) when the undisputed facts do not fit that statute.

Standard of Review: For reviewing the granting of summary judgment: review for correctness, giving no deference to the trial court, viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Alder v. Bayer Corp.*, 2002 UT 115.

Preserved for appeal: Plaintiff's memorandum opposing Defendants' motion for summary judgment; showing disputed facts (Record, at 533 et seq.).

Issue: Whether the District Court erred in awarding attorney's fees "in the interest of

justice” without explaining how any exception to the American Rule fit this case and where the undisputed facts do not support such an award.

Standard of Review: For reviewing the granting of summary judgment: review for correctness, giving no deference to the trial court, viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Alder v. Bayer Corp.*, 2002 UT 115.

Preserved for appeal: Plaintiff’s memorandum opposing Defendants’ motion for summary judgment; showing disputed facts (Record, at 533 et seq.).

#### DETERMINITIVE LAW

Utah Rules of Civil Procedure, Rule 56  
Utah Code § 13-11-1 et seq (Utah Consumer Sales Practices Act)  
Utah Code § 78-27-56 (Attorney’s Fees)

#### STATEMENT OF THE CASE

Nature of case:

This case is for damages for breach of contract, consumer protection violations, and fraud. Defendants counterclaimed for attorney’s fees.

Course of proceedings:

1. Mr. Briggs filed this case on November 29, 1999.
2. Defendants answered on March 20, 2000.

3. Mr. Briggs filed an Amended Complaint on September 26, 2000.
4. Defendants answered and counterclaimed on November 29, 2000.
5. Both sides filed motions for summary judgment. (Defendants: March 15, 2001; Plaintiff: March 26, 2001).
6. The Court heard Mr. Briggs' and Defendants' motions for summary judgment on May 22, 2001.
7. On June 11, 2001 the Court dismissed Mr. Briggs' complaint in a signed minute entry, but did not rule on Defendants' counterclaim.
8. Defendant filed, and the Court signed, a "Final Judgment Dismissing Mr. Briggs' Complaint." July 3, 2001.
9. Mr. Briggs appealed to the Court of Appeals, which found the order was not final and dismissed the appeal without prejudice. *Briggs v. Valley Spas, Inc.*, 2001 UT App 410.
10. Defendants filed a second motion for summary judgment on January 30, 2003.
11. The District Court heard argument on Defendants' second motion for summary judgment ("Second MSJ"), the District Court also heard argument on Defendants' motion for rule 11 sanctions, which it denied. That motion is not part of this appeal.
12. The District Court granted Defendants' Second MSJ in a signed minute entry on July 23, 2003.
13. Mr. Briggs timely appealed on September 22, 2003.

Disposition at trial court:

The Court dismissed Mr. Briggs' complaint in Defendants' first motion for summary judgment ("First MSJ") and granted Defendants' counterclaim in Defendants' Second MSJ.

Relevant facts:

1. Between September 17, 1993 and September 16, 1995 Mr. Briggs paid Defendants \$8,939.19, constituting full payment (Record, at 183) at Defendants' Utah State Fair booth for a particular model of spa and gazebo (Defendants' Memorandum in Support of Motion for Summary Judgment, ¶¶ 1-3; Record, at 172-3) having been told by Defendants they could produce his fully-paid-for spa and gazebo whenever Mr. Briggs was ready to take delivery (Affidavit of Larry Briggs, ¶ 4; Record, at 209).
2. At some point, Defendants' business stopped carrying the manufacturer who made Mr. Briggs' spa and gazebo (Affidavit of Defendant Lowell Brown, ¶ 5; Record, at 303).
3. Sometime in 1999, Mr. Briggs became aware that Defendants' were unable to honor his contract because Defendants no longer carried Cal Spas products. (Affidavit of Larry Briggs, ¶ 5; Record, at 209 *cf* Affidavit of Defendant Lowell

Brown, ¶ 2 Record, 336 “...Valley Spas dealer relationship with Cal Spas has been terminated...).

4. Mr. Briggs demanded a refund (Affidavit of Larry Briggs, ¶ 6; Record, at 209).
5. Defendants refused (Affidavit of Lowell Brown, ¶ 4; Record, at 248-9 *cf* Affidavit of Larry Briggs, ¶ 8, 209) claiming Mr. Briggs had bought a “store credit” not a particular hot tub and gazebo (Affidavit of Larry Briggs, ¶ 9, 209 *cf* Letter to Plaintiff from Defendants, dated November 11, 1999 (“Brown Response”); Record, at 185: “Current in store creditof [sic]...” *cf* Affidavit of Defendant Lowell Brown, ¶ 8, Record, at 337 “I never told plaintiff his only right consisted of a ‘store credit’...”).
6. On November 9, 1999, after much negotiation, Mr. Briggs sent Defendants a letter offering to settle his claim (Letter from Plaintiff to Defendants dated November 9, 1999 (“Briggs Offer”); Record, at 184). This letter offered to accept the gazebo as described in his purchase contract, at the then-current higher price, and taking a refund on the difference. The letter further said that this matter had to be “totally resolved” by November 20th 1999 or Mr. Briggs would file suit *Id.*
7. Defendants response, contained in Brown Response, countered by proposing to deliver a gazebo different from the one Mr. Briggs demanded in Briggs Offer, and agreeing to refund the balance to Mr. Briggs by November 18, 1999 (Brown Response; Record, at 185)

8. Brown Response further required that Mr. Briggs agree with and sign their self-styled “proposal” before receiving his refund (Brown Response; Record at 185: “If you are in agreement with letter please acknowledge.... Valley Spa will issue a check at the same time you provide us with agreement with this letter.” and “Thank you for your time and consideration of this proposal.”).
9. Mr. Briggs considered this a counter-offer and never agreed to it (Affidavit of Larry Briggs, ¶ 19; Record, at 109).
10. On November 20, 1999, the date Mr. Briggs' letter had set for performance (Briggs Offer; Record, at 184), and two days after the Brown Response promised to deliver the refund (Brown Response; Record, at 185), Defendants had not delivered the gazebo (Affidavit of Lowell Brown, ¶ 10; Record, at 275-276), nor had they tendered the refund (Affidavit of Larry Briggs, ¶ 15; Record, at 209).
11. Mr. Briggs waited until November 29, 1999 and, having received nothing from Defendants, filed the suit now at issue seeking to enforce his sales contract (Complaint bearing Third District Court file stamp date November 29, 1999, Record, at 1).

Summary of argument:

The District Court erred on several grounds in granting Defendants’ first and second motions for summary judgment.



**Defendant's first motion for summary judgment:**

The District Court dismissed Mr. Briggs' complaint, ruling that a) the November 9, 1999 letter from Plaintiff to Defendant (Briggs Offer) and the November 11, 1999 letter from Defendant to Mr. Briggs (Brown Response) constituted a valid, binding offer and unconditional acceptance to settle Mr. Briggs' claims, and b) "Mr. Briggs' [other] claims do not have merit."

The District Court erred because:

1. The Brown Response is not an unconditional acceptance; it is a counterproposal, which operated to reject the Briggs Offer.
2. The Court improperly weighed evidence and made findings of fact on disputed issues.
3. The ostensible settlement agreement would not totally extinguish Mr. Briggs' rights.
4. The Court's ruling on Mr. Briggs' other causes of action is sparse and lacks conclusions and a recitation of the facts supporting those conclusions, and is itself an incorrect conclusion of law.
5. The Briggs Offer was made under duress after Defendants' unlawful actions, and was therefore void or voidable.
6. Defendants themselves breached the ostensible settlement agreement, and therefore they were not in a position to seek enforcement against

Mr. Briggs.

**Defendants' second motion for summary judgment:**

The District Court granted attorney's fees in the second motion for summary judgment. This decision was erroneous because:

1. Disputed material facts precluded summary judgment.
2. The Court wrongly allowed attorney's fees pursuant to statute (Utah Code § 78-27-56) when the facts do not fit that statute.
3. The Court awarded attorney's fees "in the interest of justice" without explaining how any exception to the American Rule fit this case.

ARGUMENT

Plaintiff Briggs was forced to sue Defendants for breach of contract (and other legal claims) because Defendants refused to deliver the gazebo and spa as contracted for, and for which Mr. Briggs had fully paid some four years earlier, and refused to refund the money to Mr. Briggs. When Mr. Briggs attempted to resolve the matter with the Defendants by proposing the Briggs Offer, the Defendants rejected the offer and pressed their own counter-offer. Mr. Briggs never accepted the counter-offer. The rest of the litigation flows from the Defendants' dogged refusal to make good on the sale of the gazebo and spa or to refund the money paid.

The Defendants filed their first motion for summary judgment (hereafter "First MSJ") against Mr. Briggs' complaint. The District Court granted the First MSJ and thereby cut off Briggs' right to a trial on the merits when the facts and law demanded otherwise. Article I, Section 11 of the Utah Constitution "assures access to the courts for the protection of rights and the redress of wrongs; therefore, summary judgment, which denies the opportunity of trial, should be granted only when it clearly appears that there is no reasonable probability the party moved against could prevail." *Utah State University of Agriculture and Applied Science v. Sutro & Co.*, 646 P.2d 715 n14, (Utah 1982).

In granting Defendants' First MSJ the District Court recited some of the facts of the case, (improperly) weighed some disputed facts, and expressly found that "[the Briggs Offer] constitutes an offer. [The Brown Response] is an unconditional acceptance of Mr. Briggs' offer." (Record, at 375 (also Addendum, at tab 6); see also Record, at 866 (also Addendum, at tab 7), where the District Court implicitly repeated this finding.) The Court then dismissed Mr. Briggs' complaint without further explanation (Record, at 375 (also Addendum, at tab 6)).

**I. Contrary to the District Court's Finding, The Ostensible Settlement Agreement Did Not Constitute an Accord and Satisfaction.**

The District Court erroneously found that the Briggs Offer and Brown Response constituted, as a matter of law, an accord and satisfaction (without actually calling it that).

“An accord and satisfaction arises when the parties to a contract agree that a certain performance offered in substitution of the performance originally agreed upon will discharge the obligation created under the original agreement.” *Petersen v. Petersen*, 709 P.2d 372, 377 (Utah 1985).

It is undisputed that Mr. Briggs and Defendants had a contract obligating Defendants to deliver a particular model spa and gazebo for an agreed price – a price that Mr. Briggs had already paid more than four years before bringing this action. (Sales Agreement, Record, at 55 (also Addendum, at tab 1)). As a defense to Mr. Briggs’ breach of contract cause of action, Defendants alleged that the parties had entered into a new agreement that called for the Defendants to perform in a manner different from the original contract. (Defendants’ Answer to Amended Complaint and Counterclaim, ¶ 1 (under Counterclaim heading), Record, at 65). It was this ostensible agreement that the District Court concluded was valid and binding. (Minute Entry dated June 11, 2001 (“First ME”); Record, at 375 (also addendum, at tab 6)).

The District Court erred in this finding, however, because the ostensible agreement did not fulfill the elements of an accord and satisfaction. “The elements essential to contracts generally must be present in an accord and satisfaction, including an offer and acceptance and a meeting of the minds.” *Cove View Excavating and Const. Co. v. Flynn*, 758 P.2d 474, 476 (Utah App. 1988). Specifically, Defendants did not unconditionally accept the Briggs Offer. Instead, the Brown Response offered different terms and thereby

rejected Mr. Briggs' offer. (Brown Response; Record, at 185 (also addendum, at tab 3))

"An acceptance must unconditionally assent to all material terms presented in the offer, including price and method of performance, **or it is a rejection** of the offer." *Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372, 1376 (Utah 1995) (emphasis added). In this case, the Defendants never assented to "all material terms presented" in the Briggs Offer.

The Briggs Offer offered to accept the "Gazebo as described in my contract." (Briggs Offer; Record, at 184 (also Addendum, at tab 2)). That original contract (the final sales contract) specified a "grey metal" color "Omni Lux[ury]" gazebo with outside dimensions of 16' 7" x 12' 7". (Sales Agreement; Record, at 183 (also Addendum. at tab 1)). The Briggs Offer further demanded that Defendants perform by November 20, 1999 (Briggs Offer; Record, at 184) The Briggs Offer thus called for delivery of the specified gazebo and refund of money by November 20, 1999 (Briggs Offer; Record, at 184 (also Addendum, at tab 2)); the Brown Response did not accept those terms of the Briggs offer.

"An acceptance must be clear, positive and unambiguous.[citation omitted] ... This requirement is often treated as identical with the requirement dealt with in the following sections that an *acceptance must not change, add to, or qualify the terms of the offer*; and such changes or qualifications undoubtedly prevent an acceptance from being positive and unequivocal." *R.J. Daum Const. Co. v. Child*, 247 P.2d 817, 820 (Utah 1952) (internal citation and quotation marks omitted; emphasis added).

By changing the terms of the offer, the Brown Response did not accept the Briggs Offer but instead *counter-offered* by offering to deliver an “Omni Luxury 12x16 green metal roof” gazebo. (Brown Response; Record, at 185 (also Addendum, at tab 3)). The Brown Response also stated: “This is the 1999 version of the product you purchased...” *Id.* Finally, the Brown Response goes on to **require** Mr. Briggs to agree with Defendants’ self-styled “proposal,” i.e. this counter-offer, before he could get his refund. *Id.*

The Brown Response thus offered to deliver a gazebo differing in color, model year, and size from the gazebo specified in the original contract and in the Briggs Offer. Furthermore, the Brown Response required Mr. Briggs to assent to their self-styled proposal.

“An offeree's proposal of *different terms* from those of the offer constitutes a counteroffer, and *no contract arises unless the original offeror accepts it unconditionally.*” *Cal Wadsworth*, at 1378 (emphasis added).

The Brown Response makes clear that Defendants asked Briggs to assent to *their* offer (Brown Response, Record, at 185 (also Addendum, at tab 3)). “The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from the language employed by them, and **the law imputes to a person an intention corresponding to the reasonable meaning of its words** and acts.” *Allen v. Bissinger & Co.*, 219 P. 539, 541 (Utah 1923) (emphasis added)

Defendants’ words required Mr. Briggs to expressly agree with the counter-offer: “*If*

*you are in agreement* with this letter please acknowledge by signing below where provided. Valley Spa will issue a check at the same time *you provide us with agreement* with this letter. ¶ Thank you for your time and consideration of this *proposal*.” (Brown Response; Record, at 185 (also Addendum, at tab 3); emphasis added). The reasonable meaning of Brown Response’s words is that Defendants sought Mr. Briggs’ “agreement” to Defendants’ “proposal,” The plain meaning of the Brown Response’s words is that of an offer; not an “unconditional acceptance.” Furthermore, the reasonable implication of Brown Response’s words is that Defendants knew that their letter was an offer, not an acceptance<sup>1</sup>.

Mr. Briggs never accepted the Brown Response's counter-offer. (Affidavit of Larry Briggs dated March 17, 2001, ¶ 19; Record, at 210 (also Addendum, at tab 4)). Therefore, no contract of any sort arose from the Brown Response. Accordingly, no accord and satisfaction existed as a result of either the Briggs Offer or the Brown Response.

## **II. The District Court Improperly Made Findings of Facts When Deciding the First Summary Judgment.**

The District Court found that the Briggs Offer and the Brown Response created an

---

<sup>1</sup> Furthermore, the original Answer filed March 20, 2000 does not mention the ostensible settlement agreement (Record, at 23-26) It is only in Defendants’ Answer to Amended Complaint and Counterclaim, after Defendants’ switched counsel, that the issue is raised; one year after Plaintiff filed this suit. (Record, at 51-67).

accord and satisfaction. (First ME; Record, at 375 (also Addendum, at tab 6)). To make this finding, the District Court had to first find that the Defendants accepted the Briggs Offer. The Court's minute entry expressly says it found the Brown Response to be an "unconditional acceptance." (First ME; Record, at 375) "A trial court's finding about whether a party accepted an offer or a counteroffer is a **finding of fact.**" *Cal Wadsworth*, 1378 (emphasis added). The District Court's finding was wholly improper on summary judgment because "summary judgment, by definition, does not resolve factual issues." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 840 P.2d 130, 137 (Utah App. 1992) (cert. denied) (citations omitted).

As explained above, the Brown Response was ineffective as an unconditional acceptance, so there was no accord and satisfaction. Likewise, there is no evidence that Mr. Briggs ever accepted the terms of the Brown Response, i.e. Mr. Briggs never expressly assented to the Brown Response as required by the express terms of that counter-offer. In fact, Mr. Briggs testifies in an affidavit saying: "I never accepted Lowell Brown's offer-proposal...." (March 17, 2001 Affidavit of Larry Briggs, ¶ 19, Record, at 210 (also addendum, at tab 4))

To prevail on their motion for summary judgment, the Defendants had to offer undisputed facts showing every element of their defense. "The party alleging accord and satisfaction has the burden of proving that there has been a definite meeting of the minds on a new and substitute contract." *United American Life Ins. Co. v. Zions First Nat. Bank*,



641 P.2d 158, 160 (Utah 1982). The Brown Response (and Defendant's motion for summary judgment based on the Brown Response) utterly lacked the *undisputed* facts to show that there was a “definite meeting of the minds.” Thus, the District Court erred by granting summary judgment where material facts were in dispute.

The appellate courts review "the trial court's legal conclusions supporting the grant of summary judgment for correctness, according them no particular deference," and look "at the facts and inferences to be drawn therefrom in the light most favorable to the losing party.” *Campbell*, 840 P.2d at 137. Mr. Briggs pleaded a breach of contract claim arising from Defendants' failure to perform on the original gazebo contract. (*See Amended Complaint and Jury Demand, Record*, at 34-50). The undisputed facts show the existence of the original contract (Defendants’ Answer to Amended Complaint and Counterclaim, ¶ 76, *Record*, at 44) that Plaintiff had completed his obligation to perform (i.e. he had paid in full) (Defendants’ Second MSJ, ¶¶ 1-3; *Record*, at 416), and Defendants' failure to perform on it. (*Record*, at 274-275). Defendants have not offered undisputed proof to establish the accord and satisfaction that they alleged. (Defendants’ Answer to Amended Complaint and Counterclaim, ¶ 3 (under heading Affirmative Defenses), *Record*, at 64).

In contract claims, summary judgment is appropriate “[o]nly when contract terms are complete, clear, and unambiguous...” *Colonial Leasing Co. of New England, Inc. v. Larsen Bros. Const. Co.*, 731 P.2d 483, 488 (Utah 1986). Even a cursory reading of the Briggs Offer and the Brown Response show that the terms and conditions differ in the

two documents, and that Brown Response demands Mr. Briggs acceptance, so that they did not form a "clear and unambiguous" contract.

When the facts and inferences are viewed in a light most favorable to Mr. Briggs, the Brown Response itself presents disputed questions of material fact about whether it was an unconditional acceptance of Brigg's Offer. The District Court erred in granting summary judgment and should be reversed.

### **III. Contrary to the District Court's Finding, the Ostensible Settlement Agreement, if Valid, Would Not Extinguish Mr. Briggs' Right To Relief.**

The District Court erroneously ruled that Mr. Briggs had no rights under the original sales contract, and no rights under the ostensible settlement agreement the Court ruled enforceable. (Minute Entry dated July 23, 2003 ("Second ME"); Record, at 867 (also addendum, at tab 7)). Mr. Briggs has maintained that no valid settlement existed, but the District Court erred and imposed an injustice by ruling that Mr. Briggs' rights under *both* the original sales contract *and* the ostensible agreement were extinguished. *Id.*

It is undisputed that Defendants failed to deliver the gazebo and the refund. The only question is: which contract did the Defendants breach? The District Court initially held there was a settlement agreement between the Mr. Briggs and Defendant. (First ME; Record, at 375 (also addendum, at tab 6)). The Defendants failed to deliver the gazebo, even under the ostensible settlement agreement. (Affidavit of Lowell Brown dated April

[no day], 2001, ¶ 13; Record, at 338 (also addendum, at tab 5)). That fact positioned Mr. Briggs to exercise the option of suing for breach of the ostensible settlement agreement, or suing for breach of the underlying claim. “[A] party to the [settlement] agreement aggrieved by an alleged breach thereof by the other party has the option of seeking to enforce the settlement agreement, or regarding the agreement as rescinded and moving against the other party on the underlying claim.” *L & A Drywall, Inc. v. Whitmore Const. Co., Inc.*, 608 P.2d 626, 629 (Utah 1980).

Because Mr. Briggs had the option of suing under either the original contract or the ostensible settlement agreement, the District Court erred by granting summary judgment against Mr. Briggs on both contracts at the same time. “Where a motion for summary judgment is clearly based upon one or the other theory of recovery, (enforcement or rescission), an election may be deemed to have been made, since the two theories must be regarded as separate and distinct claims, and **summary judgment is granted only as to one of the individual claims, *rather than as to the case as a whole.***” *Id.* (emphasis added, footnote omitted).

The District Court first ruled and dismissed Mr. Briggs’ complaint, but the Court’s ruling was silent on Mr. Briggs’ remaining rights. (First ME; Record, at 372-375 (also addendum, at tab 6)). Mr. Briggs, assuming that he could not pursue an action on the original contract, waited for Defendants to perform under the “settlement agreement” Defendants had urged the Court to find. After two more years with no performance, Mr.

Briggs filed a motion to revive the underlying action based on Defendants' nonperformance. (Motion to Revive Underlying Action; Record, at 685). The District Court denied this motion, stating: "Again, the Court confirms its earlier ruling and finds that Mr. Briggs breached the Settlement Agreement. Furthermore, that breach ultimately relieved Defendants of any duty they had to perform under the Agreement." (Second ME; Record, at 867 (also addendum, at tab 7)).

This ruling means that Mr. Briggs has no rights under the original claim and none under the ostensible settlement agreement—he is stripped naked at the bar of justice.

For their part, Defendants expressly elected to pursue the ostensible settlement agreement. "Defendants respectfully submit that in the circumstances of this case, the parties' Settlement Agreement should be summarily enforced..." (First MSJ; Record, at 177-8) Therefore, the District Court's ruling that Mr. Briggs had no claim under either the original contract or the "settlement agreement" is erroneous and an affront to justice. The Court's ruling must be reversed.

#### **IV. The District Court Improperly Granted Defendants' First Motion for Summary Judgment on Other Claims**

The District Court erred in granting Defendants' First MSJ when it tersely ruled "Mr. Briggs' claims of duress, deceptive layaway plans, and violations of the Utah Consumer Sales Practices Act do not have merit." (First ME; Record, at 375 (also

addendum, at tab 6)).

Mr. Briggs had a constitutional and common law right to a trial unless the undisputed facts and law clearly support summary judgment. *See Utah State University*, 646 P.2d 715 n.14. The District Court's grant of summary judgment cut off Briggs' right to a trial on the merits when the facts and law demanded otherwise.

“The courts are a forum for settling controversies, and if there is any doubt about whether a claim should be dismissed for the lack of a factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof.” *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990); *see also Controlled Receivables, Inc. v. Harman*, 413 P.2d 807, 809 (Utah 1966)( “A motion for summary judgment is a harsh measure, and for this reason plaintiffs’ contentions must be considered in a light most to his advantage and all doubts resolved in favor of permitting him to go to trial; and only if when the whole matter is so viewed, he could, nevertheless, establish no right to recovery, should the motion be granted.”)

**Plaintiff Mr. Briggs Properly Pleaded A Consumer Sales Practices Act Violation Claim.**

Defendants committed at least 3 violations of Utah and Federal consumer protection laws:

1. **Mr. Briggs was not properly notified of his 3-day right to rescind** (Sales Agreement; Record, at 182 (also addendum, at tab 1)). Defendants violated 16

CFR § 429 (see addendum, at tab 14), which requires specific notice of the right to rescind on all sales over \$25 made at “the buyer's residence or at facilities rented on a temporary or short-term basis, such as hotel or motel rooms, convention centers, fairgrounds...” 16 CFR § 429.0(a). The rule is stated in 16 CFR § 429.1 (see addendum, at tab 14), the pertinent portions read:

In connection with any door-to-door sale, it constitutes an unfair and deceptive act or practice for any seller to:

(a) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, e.g., Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

"You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right." ...

...

“(f) Misrepresent in any manner the buyer's right to cancel. “

The Utah Legislature has declared that the Utah Consumer Sales Practices Act, “shall be construed liberally to promote the following policies: ... (4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection.” Utah Code § 13-

11-2 (see addendum, at tab 13). Under the Utah Act, Defendants' failure to give a rescission notice constitutes a deceptive act or practice. Utah Code § 13-11-4(m) (see addendum, at tab 13). The sale was over \$25 (Sales Agreement; Record, at 183 (also Addendum, at tab 1)) and it took place at the Utah State Fairgrounds (Amended Complaint and Jury Demand; Record, at 35-36), which is a facility rented "on a temporary or short-term basis." 16 C.F.R. § 429.0(a) (see addendum, at tab 14).

2. **Defendants deceptively insisted that Mr. Briggs had purchased a “store credit,” not a spa and gazebo** (Brown Offer; Record, at 185 (also Addendum, at tab 3) *cf* Sales Agreement; Record, at 183 (also Addendum, at tab 1)). Defendants' statement violated the Utah Consumer Sales Practices Act, Utah Code § 13-11-4(1) (see Addendum, at tab 13) because the statement indicated that Mr. Briggs contract was not for a spa and gazebo, but rather a store credit.
3. **Defendants refused to give Mr. Briggs a refund when they could not deliver the paid for merchandise** (Affidavit of Larry Briggs dated March 17, 2001, ¶ 8; Record, at 209). Defendants' refusal violated the Utah Consumer Sales Practices Act, Utah Code § 13-11-1 et seq. generally and § 13-11-4(1) (see Addendum, at tab 13) requiring a refund where supplier unable to deliver within 30 days).

**The District Court’s Ruling Leaves Mr. Briggs unable to fully address the**

### **merits because of its lack of grounds**

The District Court gave no reasons why it ruled Mr. Briggs' additional claims were without merit. The District Court's failure to explain its ruling violated the Utah Rules of Civil Procedure, Rule 52(a) which requires written conclusions of fact and law: "The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground." The District Court's failure also now prevents Mr. Briggs from addressing its ruling on the merits. This Court should reverse the District Court's ruling and remand for proper consideration of the merits of all of Mr. Briggs' causes of action.

### **V. The Briggs Offer was void or voidable because it was made under duress**

The District Court erred when it found the Briggs Offer a valid offer (First ME, Record, at 375 (also Addendum, at tab 6)). Mr. Briggs was under duress when he made the offer, duress caused by Defendants' wrongful behavior, and leaving Mr. Briggs with no reasonable alternative.

Mr. Briggs had paid the full amount (almost \$9,000) on his contract over four years earlier. Defendants insisted that they would not honor their end of the contract. Defendants insisted that the only thing Mr. Briggs could do with his contract was work some new bargain. The resulting Briggs Offer was very much to Defendants favor. Mr. Briggs had paid for one of Defendants' best spas and gazebos but was forced, by



Defendants' unlawful acts, to consider accepting far less than he had bargained and paid for (Affidavit of Larry Briggs dated March 17, 2001; Record, at 209 (also Addendum, at tab 4)). Defendants' deceptive acts and false claims (see discussion *supra* on the Utah Consumer Sales Practices Act violations) forced Mr. Briggs to bargain against himself when the law, unbeknownst to him, was on his side.

Defendants, under a statutory obligation to obey the law, are seeking to benefit because of their violation of those laws. Had Mr. Briggs known of his rights, i.e. if Defendants had obeyed the law, Mr. Briggs never would have bargained against his best interests (Affidavit of Larry Briggs dated March 17, 2001, ¶ 33; Record, at 210 (also Addendum, at tab 4)).

Mr. Briggs asks this Court to rule that the Briggs Offer was void or voidable by reason of being made under duress, i.e. threatening to convert his contract for a spa and gazebo (as he had bargained for) into a virtually unusable store credit, by failing to give him required notice of his rights to rescission, and by falsely telling him he could not get a refund.

Duress requires two elements: 1) an improper threat that 2) leaves the other party with no reasonable alternative. *see Andreini v. Hultgren*, 860 P.2d 916, 921 (Utah 1993).

“[A]n improper threat may be found when (i) the resulting exchange is not on fair terms, and (ii) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat.” *Andreini v.*

*Hultgren*, 860 P.2d 916, 922 (Utah 1993).

Clearly, Mr. Briggs was getting less than he had originally bargained for, and *paid for*. Defendants had had his money for more than four years without delivering on their obligation, then they threatened to illegally convert his paid-for spa and gazebo into a virtually unusable “store credit.” Because of Defendants’ continuing violations of consumer protection law, Larry Briggs was turned from an arm’s length negotiator to a beggar on his knees, seeking any scrap Defendants would deign to offer.

“[A] contract may be voided [i]f a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative.”

*Andreini v. Hultgren*, 860 P.2d 916, 921 (Utah 1993). Mr. Briggs’ alternatives were to bargain to pay a much higher price for the gazebo he already paid, and had a contract for, forget about the spa, and get a small refund, or *get nothing*.

Besides Defendants’ violations of consumer protection laws discussed *supra*, Defendants’ acts also violated their obligation of good faith and fair dealing. The District Court allowed a malefactor to benefit from his malfeasance by obligating Mr. Briggs to an offer made by wrongful coercion. This should not stand and the District Court’s ruling should be reversed.

**VI. The District Court could not properly enforce the ostensible settlement agreement because the Defendants were not in compliance and had not**

**performed.**

Defendants argued that there was a settlement agreement and that Mr. Briggs breached it by filing suit. (Defendants' Answer to Amended Complaint and Counterclaim, ¶ 1 (under Counterclaim heading), Record, at 65). The District Court erred in accepting this argument, not only because there was no acceptance, as argued *supra*, but Defendants were themselves not in compliance with their argued-for agreement.

“Neither party to an agreement can be said to be in default (and thus susceptible to a judgment for damages or a decree for specific performance) until the other party has tendered his own performance.” *Kelley v. Leucadia Financial Corp.*, 846 P.2d 1238, 1243 (Utah 1992) (internal quotation marks omitted).

Although Defendants had told the district Court that they had performed on the ostensible agreement (Record, at 176; First MSJ, heading II, “Defendants have performed their side of the settlement agreement”), Defendants later admitted they have not performed saying “it would be foolhardy for Defendants to perform...” (Record, at 693).

The District Court erred when it enforced the ostensible agreement against one party while the other party was in default. This ruling should be reversed.

**VII. The District Court erred in granting Defendants' Second MSJ, granting attorney's fees.**

Mr. Briggs filed his opposition to Defendants' Second MSJ (which asserted 87 so-

called undisputed material facts) and properly disputed a substantial number of allegations (Record, at 572 et seq) that Defendant certified to the Court (pursuant to Rule 11(b) Utah Rules of Civil Procedure) as “UNDISPUTED MATERIAL FACTS.” (Second MSJ; Record, at 417). Because there were disputes over “facts” that Defendants conceded were “material,” the District Court erred in granting summary judgment.

"[I]t only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact. ... if there is *any* dispute as to *any* issue, material to the settlement of the controversy, the summary judgment should not be granted." *Holbrook Co. v. Adams*, 542 P.2d 191, 193 (Utah 1975) emphasis added); *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995) (same rule, same language).

In his memorandum opposing Defendants' Second MSJ, Mr. Briggs disputed ¶¶ 4-6, 8, 12, 15, 17-19, 22-23, 25-26, 28-31, 33, 35, 38, 40-43, 48-49, 51, 53-54, 62, 65, 69, 78 of Defendants' Second MSJ (Memorandum in Opposition to Second MSJ; Record, at 533 et seq.). For example: ¶ 5 of Defendants' Second MSJ alleges as an undisputed material fact the following: “On November 11, 1999 Defendants unconditionally accepted Mr. Briggs’ settlement offer.” (Second MSJ; Record, at 418). Mr. Briggs disputes this with eight pages of discussion, citing to affidavits 26 times (Memorandum in Opposition to Second MSJ; Record, at 533-540). Whether the Defendants accepted the Briggs Offer is a fact that is absolutely necessary to deciding whether there was any settlement agreement,

which is a necessary element to proving lack of merit. The "fact" of acceptance was controverted; it was error for the District Court to weigh this highly-contested "fact" and grant summary judgment.

Defendants, in response to Mr. Briggs' challenge to their Second MSJ, filed a motion for Rule 11 sanctions (Record, at 699 et seq.). (The District Court rightly denied this motion (Second ME; Record, at 867 (Affidavit of Larry Briggs dated March 17, 2001; Record, at 209 (also Addendum, at tab 7))). In Defendants' reply memorandum in support of their Rule 11 motion *Defendants conceded Mr. Briggs had raised disputes of material facts*: "Defendants challenge only those falsehoods which are relevant to [Defendants'] Counterclaim. Mr. Briggs made these false representations in an attempt to raise *material* disputes of fact precluding summary judgment on the Counterclaim. The materiality of each misrepresentation is discussed below." (Record, at 747; emphasis in original).

Defendants, having conceded that the disputes were material, did not ask the Court to withdraw their Second MSJ even though Utah law does not allow summary judgment where material facts are in dispute. Mr. Briggs, therefore, moved the Court to summarily dismiss Second MSJ (Record, at 798) on grounds that the dispositive issue was settled.

In Defendants' memorandum opposing Mr. Briggs' summary motion (Record, at 825) the argument reaches the absurd: "Any residual disputes of fact are not 'material' within the meaning of Rule 56..." (Record, at 826, emphasis in original). What Defendants now

dismiss as "residual disputes of fact" (having previously called them "*material*" (Record, at 747; emphasis in original)) in this case were not just material, they were critical. The District Court wrongly granted summary judgment where the movant admitted disputes of material facts ("The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56, Utah Rules of Civil Procedure (see Addendum, at tab 12)).

The District Court's granting of summary judgment should, therefore be reversed.

#### **VIII. The District Court erred in awarding attorney's fees pursuant to statute**

The District Court erroneously granted Defendants' Second MSJ granting attorney's fees under Utah Code Section 78-27-56 (see Addendum, at tab 11). The District Court's ruling failed to make appropriate findings of fact and conclusions of law, and its decision was erroneous as a matter of law.

Section 78-27-56 states in pertinent part:

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith...

This statute does not broadly authorize a court to award attorneys fees at the court's discretion or because a party prevails in a lawsuit. “Section 78-27-56 of the Utah Code is narrowly drawn and not meant to be applied to all prevailing parties in all civil suits. To safeguard against an overly broad application, a prevailing party must demonstrate two distinct elements before a court may award attorney fees; namely, that the claim is (1) without merit, and (2) not brought or asserted in good faith.” *In re Discipline of Sonnenreich*, 2004 UT 3, ¶ 46 (internal quotation marks and citations omitted).

Our Supreme Court earlier declared: “Under the plain language of this statute, attorney fees are appropriately awarded only if the trial court determines that three requirements are met: (1) the party seeking fees prevailed; (2) the claim or defense asserted by the opposing party was meritless; and (3) that claim or defense was asserted in bad faith. With regard to each of these elements, **the trial court must make specific findings**. see *Watkiss & Campbell v. Foa & Son*, 808 P.2d 1061, 1068 (Utah 1991) (emphasis added) (“Specific findings further the ends of justice by allowing appeals courts to better review the trial court's award.”). “Absent specific findings, the basis of the award cannot be determined.” *Chipman v. Miller*, 934 P.2d 1158, 1161 (Utah App. 1997).

The District Court’s ruling, set forth in its signed minute entry of July 23, 2003, states: “Accordingly, pursuant to Utah Code Ann. 78-27-56 ... the Court awards attorney’s fees as a result of Mr. Briggs’ breach.” (Second ME; Record, at 866 (also Addendum, at tab 7)). The Court’s ruling does not make any of the findings required by law. *Chipman*, 934

P.2d at 1161. As a matter of law, the ruling is thus insufficient to support an award of attorneys' fees.

What is worse, the District Court's terse and uninformative ruling raised the issue of motive or bias. At oral argument on July 22, 2003, Defendants' counsel stated:

Now Mr. Briggs has made it clear he's going to appeal and Your Honor, I would suggest – and I'm going to be a little more practical and explicit than I'd usually be in a court and if I'm speaking (inaudible) I ask for the Judge's forgiveness, if the Judge splits the baby this litigation will continue because Mr. Briggs will appeal and we'll keep rolling up fees. If the Judge awards a substantial attorney's fee award that will give us room to negotiate and compromise and hopefully put a stake through the heart of this thing.

(Transcript of July 22, 2003 Oral Argument; Record, at 893, page 25, lines 9-17).

This revealing statement shows Defendants' counsel asking the Court to join on his side and thwart Mr. Briggs' right to appeal. "The right to an appeal is a valuable and constitutional right and ought not to be denied except where it is clear the right has been lost or abandoned." *Adamson v. Brockbank*, 185 P.2d 264, 268 (Utah 1947). Because of the District Court's terse ruling, and because the Court did not disdain this line of argument from counsel, Mr. Briggs has no way of knowing if the Court relied on this argument in making its award of *substantial attorney's fees*.

Another instance of undue and unfair influence occurred after that hearing. In its signed minute entry of July 23, 2003, the District Court asked Defendants to "prepare an order consistent with this Minute Entry." (Record, at 867 (also Addendum, at tab 7)). Defendants sneaked an exclamation of bad faith and meritlessness into their order, trying



to salvage the Court's ruling. The proposed order thus recited: "[F]or the reasons set forth in the Court's Minute Entry dated July 23, 2003, *as well as the grounds set forth in defendants' memoranda*, Mr. Briggs' claims are without merit, and were not asserted in good faith." (Record, at 885 (also Addendum, at tab 10); emphasis added). Defendants added language to the District Court's order – "the grounds set forth in defendants' memoranda" – that included by reference all of Defendants' arguments *as though the District Court had accepted and agreed with them all*.

Mr. Briggs filed an objection to Defendants' bootstrapping of grounds into the order. (Record, at 875-876 (also Addendum, at tab 8)). In response to Mr. Briggs' objection, Defendants' counsel, Steven E. McCowin, sent an *ex-parte* letter to Judge Henriod explaining why he felt it necessary to improve upon the Court's ruling. (Letter from Defendants' counsel to Judge Henriod dated August 19, 2003; Record, at 883 (also Addendum, at tab 9)). That *ex-parte* letter sought to cause the court to modify its order without briefing or a hearing on the merits, without even being on the record. The first paragraph of the *ex-parte* letter stated:

An award of attorney fees under Utah Code Ann. § 78-27-56 must include a finding of fact that the party lacked good faith, and a conclusion of law that the action was without merit. Pennington v. Allstate Ins. Co., 973 P.2d 932.939 n.3 (Utah 1998). To satisfy this requirement, Defendants included the following language in the draft Final Judgment: "Mr. Briggs' claims were without merit and were not asserted in good faith."

(Letter from Defendants' counsel to Judge Henriod dated August 19, 2003; Record, at 883 (also Addendum, at tab 9)).

The Court impliedly refused Mr. Briggs' objection and acquiesced to Defendants'

manipulation of the ruling when the Court signed the Order as prepared by Defendants.  
(Final Judgment; Record, at 884 et seq (also Addendum, at tab 10))

Notwithstanding Defendants' liberties with the District Court's ruling, the ruling is still flawed on the merits. The law requires such a ruling to show why Mr. Briggs' case is frivolous. "[T]here [must] be **substantial evidence** that the claim was lacking basis in either law or fact and therefore frivolous..." *Cady v. Johnson*, 671 P.2d 149, 152 (Utah 1983). The Court's minute entry (Second ME; Record, at 865 (also Addendum, at tab 7)) and the Final Judgment (Record, at 884 (also Addendum, at tab 10)) lack any foundation for a conclusion that Mr. Briggs' complaint was frivolous. No recitation of the "substantial evidence" that Mr. Briggs' complaint was frivolous appears in the District Court's decision.

In addition to concluding the Mr. Briggs' case was frivolous, the District Court had to make a finding of fact on the requirement that the action was not brought or asserted in good faith. See *In re Discipline of Sonnenreich*, 2004 UT 3, ¶ 46 (second element).

"[T]he issue of bad faith is a question of fact to be ascertained by the finder of fact." *Coalville City v. Lundgren*, 930 P.2d 1206, 1211 (Utah App. 1997); see also *Baldwin v. Burton*, 850 P.2d 1188, 1199 (Utah 1993) ("For purposes of section 78-27-56, we found the terms 'lack of good faith' and 'bad faith' to be synonymous.")

To determine whether a party acted in "bad faith" requires finding that party's subjective evil intent. "Thus, it does not follow that simply because [a party] had no legal

foundation to bring the action that it was also acting in bad faith. Rather, a finding of bad faith turns on a **factual determination** of a **party's subjective intent**.” *In re Discipline of Sonnenreich*, 2004 UT 3, 49 (emphasis added); *see also Cady v. Johnson*, 671 P.2d 149, 152 (Utah 1983) (even "pursuing a meritless claim ... does not rise to lack of good faith.”)

Finally, “where attorney fees are awarded to a prevailing party on summary judgment, the undisputed, material facts must establish, *as a matter of law*, that (1) the party is entitled to the award and (2) the amount awarded is reasonable.” *Taylor v. Estate of Taylor*, 770 P.2d 163, 169 (Utah App. 1989).

The undisputed facts show:

1. Mr. Briggs paid nearly \$9,000 to Defendant for a spa and gazebo (First MSJ; Record, at 172-3 (¶¶ 1-3)).
2. Defendants refused to perform under that contract (Affidavit of Lowell Brown; Record, at 274-275).
3. Defendant promised substituted performance (Briggs Response; Record, at 185).
4. Mr. Briggs called Cal Spas to see if Defendants had placed an order for the gazebo they said they ordered. (March 17, 1999 Affidavit of Larry Briggs, ¶ 16; Record, at 209).
5. Cal Spas said Defendants had not placed an order and that they would not

do any business with Defendants. (Id, ¶ 17; Record, at 209).

6. Defendant never performed substituted performance (Record, at 693).<sup>2</sup>

7. Mr. Briggs has received nothing for his money (Record, at 693).

Viewing these facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party cannot lead to a finding that Mr. Briggs acted in bad faith. *Taylor*, 770 P.2d at 169 (claims that lack merit do not necessarily prove bad faith). These same facts militate against the conclusion that Mr. Briggs' claim was lacking in either law or fact, or was frivolous in any respect.

The District Court erred in awarding attorney's fees and should be reversed.

#### **IX. The District Court erred by awarding attorney's fee "in the interests of justice"**

The District Court also justified its award of fees on the broad claim that it was "in the interests of justice." (Second ME; Record, at 866 (also Addendum, at tab 7)). No legal precedent in Utah authorizes attorney's fee awards solely "in the interests of justice."

Utah courts have, from time immemorial, held to the American Rule: "The traditional

American rule, and the rule in Utah, is that attorney fees are not recoverable by a

prevailing party unless authorized by statute or contract." *Faust v. KAI Technologies, Inc.*,

---

<sup>2</sup> After an interview between Defendant Lowell Brown and Plaintiff's counsel Greg Smith, Mr. Brown boasted that he was going to build the gazebo he had procured for Plaintiff and drop it off at Mr. Smith's office in the next couple of days. (Affidavit of Gregory B. Smith ¶ 36; Record, at 580) Mr. Brown never did this either. (Affidavit of Gregory B.

2000 UT 82, ¶ 17.

*Faust* raised a claim for attorney's fees that was not authorized by statute or contract. The *Faust* appellants argued that *Stewart v. Utah Public Service Com'n*, 885 P.2d 759 (Utah 1994) (awarding attorney's fees on a private attorney general doctrine), created a new and broad right to attorney's fees. The *Faust* court wrote:

[I]n *Stewart* we recognized an exception to the traditional rule and held that an equitable award of attorney fees was proper under the private attorney general doctrine, which allows for an award of fees where a plaintiff **successfully vindicates an important public policy benefiting a larger population**. In doing so, we stated that we note the exceptional nature of this case. **We further note that any future award of attorney fees under this doctrine will take an equally extraordinary case.**

*Faust*, ¶ 18 (emphasis added).

Defendants inexplicably rely on *Faust* (Second MSJ; Record, 441), and its progenitor *Stewart* (Memorandum in Opposition to Plaintiff's Motion to Dismiss; Record, at 635), in making their claim for attorney's fees. However, Defendants failed to inform the District Court that *Faust* punctures the claim they built up from *Stewart*.

Defendants have offered no grounds on which to hold that their defense against this breach of contract action constituted the work of a "private attorney general" vindicating an important public policy benefiting a larger population as, for example, a prevailing federal civil rights plaintiff does. See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (civil rights plaintiffs serve as private attorneys general and thus serve the

---

Smith ¶ 40; Record, at 580).

national interest). These Defendants, being sued for a breach of contract and violation of consumer protection laws, have no colorable claim to that preferred status.

The District Court erred in awarding attorney's fees "in the interest of justice" and should be reversed.

### CONCLUSION

The District Court erred by weighing and deciding disputed material facts and making improper, and erroneous conclusions of law in granting Defendants' first and second motions for summary judgment.

Wherefore, Mr. Briggs asks the Court of Appeals to reverse both summary judgment rulings and remand to the District Court for trial on the merits.

DATED this 25 day of JAN, 2004.

151  
Gregory B. Smith  
Attorney for Mr. Briggs

CERTIFICATE OF MAILING

I certify that on the 26 day of JAN, 2004, I did deliver two true and correct copy of the foregoing Opening Brief of Appellant to the following persons, postage prepaid:

Steven E. McCowin  
Attorney for Defendants  
435 S. 1200 East  
Salt Lake City, UT 84102

151

Tab 1



**VALLEY SPAS**3985 S. Redwood Rd.  
Salt Lake City, UT.  
972-1191**ALL AMERICAN**3214 Washington Blvd  
Ogden, UT.  
621-1953**FORREST SPAS**539 N. Main  
Logan, UT.  
752-5816**SPA OUTLET**170 S. State St.  
Orem, UT.  
224-1395

Contract Date: 9/16/94 Customer Name: LARRY BRIGGS  
Address: 4450 S. 40TH ST. WILSON UT. 84110  
Phone (Home): 968-3788 (work): 408-1420

MODEL RELAX V13 COLOR TRILITE QUARITE (GOLD)  
SIZE 8'0" x 58" **ALTAIR PLUS X ACRYLIC** HEAT-1-E

Deluxe Pillows and Stainless Steel Handrails..... Inc. ☒ Not Inc. ☐ ..... \$  
Complete U.L. Approval..... Inc. ☒ Not Inc. ☐ ..... \$  
Plumbing Includes Installation of skimmer & Drain..... \$  
☒ Cal Spa Jets..... Inc. ☒ Not Inc. ☐ ..... \$  
☒ Hydro Swirl Jets..... Inc. ☒ Not Inc. ☐ ..... \$  
☒ Jumbo Jet..... Inc. ☒ Not Inc. ☐ ..... \$  
☒ Cascading Neck Jet..... Inc. ☒ Not Inc. ☐ ..... \$  
☒ 2Jet Neck Blaster..... Inc. ☒ Not Inc. ☐ ..... \$  
☒ Foot Jets..... Inc. ☒ Not Inc. ☐ ..... \$  
☒ 18 Jets..... Inc. ☒ Not Inc. ☐ ..... \$  
☒ Ozonator..... Inc. ☒ Not Inc. ☐ ..... \$  
220 Volt Cal Spas Skid Pack..... \$  
3.0 H.P. Pump/s 30' H.P. Air Blower (SUN-1-2000-11.0S) ..... \$  
50 Sq. Ft. Filter 55 KW Heater..... \$

Time Clock for Controlled Operation..... Inc. ☒ Not Inc. ☐ ..... \$  
Freeze Protection..... Inc. ☒ Not Inc. ☐ ..... \$  
ABS Equipment Enclosure..... Inc. ☒ Not Inc. ☐ ..... \$  
Heavy Duty 5/8" Thick Redwood Cabinet..... Inc. ☒ Not Inc. ☐ ..... \$  
Heavy Duty 5/8" Thick Cedar Siding Cabinet..... Inc. ☐ Not Inc. ☒ ..... \$  
Full Foam Insulation..... Inc. ☒ Not Inc. ☐ ..... \$  
Tapered Insulated Vinyl Cover STD. FDLX ☒ Inc. ☐ Not Inc. ☐ Color GOLD ..... \$  
Cover Hinge..... Inc. ☒ Not Inc. ☐ ..... \$  
Cal Spas Light with Colored Lens..... Inc. ☒ Not Inc. ☐ ..... \$  
Gazebo..... Inc. ☒ Not Inc. ☐ Model MM LUX Roof Style G-27 METAL ..... \$  
1 ' Bar 1 Stools 5 ' Step 2 Planters 1 Bay Wnd..... \$  
Spa Delivery..... Inc. ☒ Not Inc. ☐ ..... \$  
Gazebo Assembly..... Inc. ☒ Not Inc. ☐ ..... \$  
Gazebo Shade Canopy Cover..... Inc. ☐ Not Inc. ☐ ..... \$

Crane Charges are NOT Included- Cal Spas Does Not Arrange or Pay for Cranes..... \$

CHEMICAL KIT ..... \$  
ADD SUPERCHARGER ..... \$

PORTABLE SPA TWO PUMP SYSTEM NEEDS 220 Volt 50 AMP breaker and 4-#6 gauge wires

PORTABLE SPA ONE PUMP SYSTEM NEEDS 220 Volt 40 AMP breaker and 4-#8 gauge wires.

CAL SPAS DOES NOT DO ANY ELECTRICAL WORK!

CUSTOMER RESPONSIBLE FOR ANY BUILDING PERMITS

Check with local building departments for all codes regarding proper hookups

A clean 110 Volt-20 amp plug-in GFCI is required by owner on all 110 Volt portable spas

Wood Skirted Spas need a Flat Solid Level Decking underneath.

Notice to Consumer. Should either party find it necessary to collect or bring suit in court to enforce the terms hereof, any judgement awarded shall include court cost and a reasonable attorney fee and interest of 1.5 % per mo. on balance owed.

**CASHIER CHECKS ONLY**  
**APPROVED AND ACCEPTED**

BUYER Larry Briggs DATE 9/16/94

BUYER \_\_\_\_\_ DATE \_\_\_\_\_

SELLER SCOT CALL DATE \_\_\_\_\_

DATE DESIRED WILL PAY IN 12 MONTHS LEAD SOURCE \_\_\_\_\_

ALL SALES FINAL

SUB TOTAL \$ 8395.00

SALES TAX \$ 514.19

DOC FEE \$ 30.00

TOTAL \$ 8939.19

DOWN PAYMENT \$ 1439.00

FREIGHT & DELIVERY \$ 1000.00

TOTAL BALANCE DUE \$ 7500.19

METHOD OF PAYMENT

Cover Hinge installed w/c DM

Tab 2

NOVEMBER 9, 1999

MR. LOWELL BROWN  
ATTN: Larry Briggs

This letter is in response to you not getting back with me stating your position on whether you were willing to except my last offer made to you to settle my dispute with Valley Spa. Again I will reiterate my offer. On Thursday (11-4-99) over the phone I told you that I was willing to pay the current high price of \$5,995.00 + applicable tax for the Gazebo as described in my contract. I also told you that my original contract states that delivery and setup was included. However, I said that as long as you could provide me with the setup instructions that I would be willing to set it up myself.

I also stated that after paying Valley Spa for the Gazebo that there was a remaining balance on my contract of around \$2,570.00. Because this amount isn't enough to purchase a spa to my satisfaction I told you that you would have to refund this amount back to me.

You, responded by saying something to the affect of "well, with the high cost of shipping and the price of redwood going through the roof these days, I don't know if I would be willing to do this either, don't get me wrong, I'm not saying that I won't except this offer and on the other hand I'm not saying that I will, however if you'll let me think about it over night I'll call you tomorrow morning with my answer". Since we had this conversation on Thursday and you hadn't got back in contact with me as late as Monday I made an appointment to see a Contract Attorney on Tuesday.

After speaking with him, he told me the first thing that I should do is write you this letter before we pursue legal action against Valley Spa. I have now sent you this letter by certified mail. If you do not except my offer as described above we will settle this in court. My attorney told me that usually in this type of case the court awards the original contract price + a set fee of 10% accumulative yearly interest.

If you do not except this offer and it goes to court, I'm suing for the return of the contract price + interest (not any of Valley Spa products) I'll take my money else where to make my purchase.

Mr. Brown you now have until November 20, 1999 to get back with me and totally resolve this issue. If it is not resolved by this date, we will settle it in court.

You can contact me by phone at 968-3788. If I am not at home you can leave a message, the answering machine is always on.

Sincerely,

Larry Briggs

Tab 3



---

3985 So. REDWOOD ROAD	♦	SALT LAKE CITY	♦	UTAH	♦	84123 (801) 972-1215
6835 So. STATE STREET	♦	SALT LAKE CITY	♦	UTAH	♦	84047 (801) 568-7050

---

November 11, 1999

Larry Briggs  
4950 So. 4095 W.  
Kearns, UT 84118  
801-968-3788

Re: Previous spa and gazebo purchase. Current in store credit of \$8,939.19.

Dear Larry,

As per your request I have ordered an Omni Luxury 12X16 green metal roof gazebo by Cal Spa. This is the 1999 version of the product purchased on September 16, 1995. The agreed upon price is stated in my October 21, 1999 letter to you, the Better Business Bureau, and the Utah Division of Consumer Protection.

In addition, Valley Spa has agreed to pay the balance of the contract by November 18, 1999. Our agreement is as follows: \$5995.00 plus tax of \$380.60 totaling \$6,375.68 will be subtracted from the current in store credit of \$8,939.19. The balance of \$2,563.51 will be paid to you. If you are in agreement with this letter please acknowledge by signing below where provided. Valley Spa will issue a check at the same time you provide us with agreement of this letter.

Thank you for your time and consideration of this proposal.

Sincerely,

Well Brown

A handwritten signature in dark ink, appearing to read 'Well Brown', is written over the printed name. To the right of the signature, the date 'Nov 11-99' is handwritten.

nature \_\_\_\_\_ Date \_\_\_\_\_

Tab 4

---

THIRD DISTRICT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

---

Larry Briggs	} Affidavit of Larry Briggs
	}
Plaintiff,	} Case no 990911916
	}
vs.	}
	}
Valley Spas, Inc; Salt Lake Valley Spas,	} Judge Henriod
Inc.; Lowell Brown; Valley Spa I, Inc	}
	}
Respondent	}

---

I Larry Briggs having been sworn under oath do testify according to my personal knowledge and belief the following:

1: If called to testify I would truthfully state the following;

2: I bought a spa and gazebo from defendants because I thought they were manufacturers of these things.

3: Had I known that defendants were not manufactures of these products I never would have intrusted them with my money.

4: I was told by employees of the defendant that I could retrieve my Cal Spas products anytime in the future.

5: In 1999 I discovered thru a service man that works for defendants, that defendants no longer carried Cal Spa products.

6: I was alarmed that defendants had not bothered to notify me of this

7: On or about September 1999 on two seperate occasions, I demanded that I be given a refund

8: However, I was refused a refund, once by a salesman, the next time by Lowell Brown

9. Lowell Brown told me that I had to spend my (store credit) on current merchandise on current prices, he also told me that there would be no way that I could receive similar products that I had purchased in my contract because prices had gone up and styles had changed. He also told me that I had to either accept a lesser gazebo or a lesser hot tub but he wasn't willing to give me the similar sizes and styles according to my contract. At this point I felt coerced to settle with Lowell Brown on terms that would be acceptable to him, or I would get nothing. I never bargained for a (store credit), I bargained for specific goods.

10: I did not agree to this, so against my will I finally began to dicker with him.

11: I was coerced into making an offer of settlement with Valley Spa.

12: I wrote Lowell Brown a letter on or about November 1999, in it I demanded several things.

13: I had demanded setup instructions for the gazebo, which he did not except.

14: I did not agree to his new offer because I needed the setup instructions

15: I specifically told Lowell Brown that I had to have my refund by November 20, 1999, I still have not received any refund from Lowell Brown, he also never ordered the gazebo I demanded.

16. On or about November 13th or 14th, I called Cal Spas to see if Lowell Brown had ordered a gazebo in my name.

17. They told me that they no longer or at any time in the future would do business with Lowell Brown or Valley Spas

18: On or about November 18th I called Lowell Brown, and he said to me that if he found out that I had contaced Cal Spas that he would kill the deal and that I would have to take him to court and that it would cost me a whole lotta money.

19: I never accepted Lowell Browns offer-proposal and signed it like he requested.

20: Lowell Brown told me that he thought the setup instructions were included in the crate, but this was not acceptable to me.

21: I would only accept an offer by Valley Spa if 1: either the setup instructions were included, or 2: Vally Spa agreed to build the gazebo for me as my original contract stated, this was very important because building a deluxe 12' x 16' gazebo is like adding an addition to ones home.

22: I could not get Lowell Brown to specifically agree to one or the other.

23: I understood from Lowell Browns tone of voice that he was sick of dealing with me and if the set up instructions were not included that that would be my problem and not his.

24: I waited until November 29th to see what Lowell Brown was going to do if anything.

25: The last conversation that I had had with Lowell Brown led me to believe that all dealings with him had been killed because I had called Cal Spas.

26: Lowell Brown did not order the Cal Spa Omni Luxury gazebo as described in my contract.

27: Valley Spa was not ready to deliver any gazebo to me because they never called or contacted me to tell me they had it.

28: Valley Spa was not willing to deliver any gazebo to me because Lowell Brown told me that he would kill the deal if I had contacted Cal Spas in any way, shape or form.

29: After that statement, I told him I had contacted Cal Spas.

30: We hung up and I understood that all negotiations or dealings were killed.

31: I would never agree to buy anything new from an unauthorized dealer.

32: Had Lowell Brown told me that he was going to try to sell me a gazebo or hot tub that he had to secretly get thru another dealer I would have never agreed to it.

33: Had I known that I had a right to a refund, I would not have negotiated with Lowell Brown, because what he was willing to do for me was not acceptable to me, but he had me over a barrel and acting against my will under duress.

Dated this 17th day of March 2001.

  
Larry D. Briggs

STATE OF TENNESSEE  
COUNTY OF MONROE

Personally appeared before me, Joe Hawkins, a Notary Public, in and for said County and State, the within named LARRY D. BRIGGS, with whose identity was proven to me on the basis of satisfactory evidence, and who acknowledged that he executed the within instrument for the purposes therein contained. Witness my hand and seal this 17th day of MARCH, 2001.





Tab 5

Attorney for defendants and counterclaimants  
Lowell Brown and Valley Spa I, Inc.

LARRY BRIGGS,	)	
	)	
	)	AFFIDAVIT OF
Plaintiff and	)	LOWELL BROWN
Counterclaim Defendant,	)	
vs.	)	
	)	
VALLEY SPAS, INC.; SALT LAKE	)	
VALLEY SPAS, INC.; LOWELL	)	Civil No. 990911916
BROWN; VALLEY SPA I, INC.	)	
	)	Judge Henriod
Defendants, and	)	
Counterclaimants	)	

I, Lowell Brown, being duly sworn and on my oath, state as follows:

2. Although Valley Spa's dealership relationship with Cal Spas has been terminated, Valley Spa continues to have a very limited business relationship with Cal Spas. For example, on occasion Cal Spas will authorize Valley Spa to perform warranty work on Cal Spas' products. In addition, on occasion Valley Spa is able to purchase parts from Cal Spas.

**3. No reasonable, objective person who visited Valley Spas' Utah State Fair exhibit**

in 1993, 1994, or 1995 could have come to the conclusion that Valley Spas was a manufacturer of spas or gazebos.

4. I maintain a close supervision over the salesmen employed by Valley Spa, and am aware of the types of representations that they make on behalf of Valley Spa. No salesman of Valley Spa would ever have told a customer that he or she could take delivery of purchased goods at any point in the future.

5. Prominently displayed at Valley Spa's Utah State Fair exhibit in 1993, 1994, and 1995 were signs stating that Valley Spa's prices were guaranteed for one year.

6. Although Valley Spa is no longer a Cal Spas dealer, it has every right to sell Cal Spas products which it has acquired.

7. Pursuant to the parties' Settlement Agreement, defendants have already procured for plaintiff the gazebo called for in his original contract with defendants. The particular model of spa called for in the original contract between plaintiff and Valley Spa is no longer manufactured by Cal Spas.

8. I have never told plaintiff that his only right consisted of a "store credit" of \$8,939.19 that he could apply to Valley Spa's current products.

9. Defendants have never exercised any duress over plaintiff or forced him to do anything against his will.

10. At the time Valley Spa entered into the original contract with plaintiff, and for a substantial period of time thereafter, Valley Spa had the spa and gazebo models specified in that contract either in stock or available for prompt shipment. By waiting for four years before he requested delivery the spa and gazebo, plaintiff substantially frustrated Valley Spa's performance of that contract. During the four-years delay, Valley Spas had changed manufacturers; Valley Spa

can still obtain Cal Spa gazebos and spas, but Cal Spa no longer manufactures the particular model of spa called for in the contract.

11. Defendants have never attempted to persuade plaintiff to “repudiate” anything.

12. Defendants never “killed” or in any other way repudiated the parties’ Settlement Agreement.

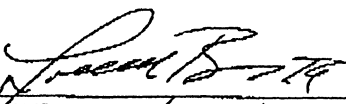
13. Defendants are ready, willing, and able to perform all of their obligations under the Settlement Agreement, subject to their rights of off-set in accordance with any damages awarded to them on their counterclaim against plaintiff.

14. Plaintiff’s suggestion that the modest amount of money here at issue should be maintained in any sort of separate trust account, escrow account, or interest-bearing account for the benefit of plaintiff, or that the money here at issue amounts to any significant “working capital,” are silly and false. Such assertions bespeak a total unfamiliarity with commercial reality.

15. Although the supplier through whom Valley Spa procured the gazebo called for in the parties’ Settlement Agreement has asked that his name not be publicly disclosed, there is nothing commercially unreasonable about this procurement process.

16. After plaintiff paid off the purchase price under his contract with Valley Spa, a number of things remained to be done under the contract. First, plaintiff was required to notify Valley Spa to request delivery; the implied duty of good faith and fair dealing required that this notice be given within a reasonable time frame, and not delayed so long that Valley Spa's performance would be frustrated.

DATED this \_\_ day of April, 2001.

  
\_\_\_\_\_  
Lowell Brown *LOWELL BROWN*

Subscribed and sworn to before me this \_\_ day of \_\_\_\_\_, 2001.

My Commission Expires: \_\_\_\_\_

\_\_\_\_\_  
Notary Public  
Residing at \_\_\_\_\_

Tab 6

**FILED DISTRICT COURT**  
Third Judicial District

JUN 11 2001

By [Signature] SALT LAKE COUNTY  
Deputy Clerk

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

-----

<b>LARRY BRIGGS,</b>	:	<b>MEMORANDUM DECISION</b>
<b>Plaintiff,</b>	:	<b>CASE NO. 990911916</b>
<b>vs.</b>	:	
<b>VALLEY SPAS, INC.; SALT LAKE</b>	:	
<b>VALLEY SPAS, INC.; LOWELL BROWN,</b>	:	
<b>VALLEY SPA I, INC.,</b>	:	
<b>Defendants.</b>	:	

-----

Plaintiff and defendants argued Motions for Summary Judgment to the Court on May 22, 2001. The Court took both Motions under advisement at the conclusion of argument, and now issues this Memorandum Decision.

On September 17, 1993, Larry Briggs signed a contract with Valley Spas, Inc., to purchase a jetted hot tub and a Cal Spas Omni Luxury Gazebo for \$8,494.68. Plaintiff put \$500 down. Plaintiff claims he informed defendants he could not accept delivery on the tub and gazebo for several years, and that defendants replied it would not be a problem for them to warehouse the goods. On September 16, 1994, plaintiff agreed to buy additional merchandise, raising the total purchase to \$8,939.19, and paid an additional \$939.19. On September 16, 1995, plaintiff paid off the contract amount. Four years later, plaintiff attempted to take possession

of the merchandise that he had purchased, however, in the interim period the defendants had stopped doing business with Cal Spas and did not have the same gazebo or hot tub that plaintiff had specified and this dispute ensued.

On September 26, 2000, plaintiff filed an Amended Complaint against defendants, claiming causes of action that include, but are not limited to breach of contract, violations of state consumer sales practices law, fraud, conversion, and breach of fiduciary obligations. Plaintiff demands damages in the amount of \$70,000.

In response, the defendants filed an Answer and Counterclaim, arguing that because plaintiff is engaged in anticipatory repudiation of a settlement agreement and acted unreasonably in violation of public policy, the Court should compensate defendants for their attorney's fees.

Plaintiff's Motion is confusing, to say the least. It is difficult, if not impossible to determine which theories of liability plaintiff relies upon. For example, plaintiff alleges duress, but does not clearly set forth any of the elements to prove that cause of action. Plaintiff's Motion is denied.

Defendants claim that plaintiff's November 9 letter was an offer to settle this dispute on specific terms. Defendants contend they accepted plaintiff's offer in their November 11 letter,



accordingly asserting that a settlement agreement was created and plaintiff is bound under the terms of that agreement.

The November 9 letter offered to settle the dispute and totally resolve the issue, stating, (1) plaintiff is willing to pay the current price of \$5,995, plus applicable tax for the gazebo described in the contract; (2) even though the original contract included delivery and set-up, provided defendant includes instructions, plaintiff will do assembly himself; (3) if you do not accept this offer and it goes to court, I am suing for the return of the contract price, plus interest.

On November 11, 1999, defendant responded to plaintiff's offer, stating:

As per your request, I have ordered an Omni Luxury 12 x 16 green metal roof gazebo by Cal Spa. This is the 1999 version of the product purchased on September 16, 1995. Our agreement is as follows: \$5,995, plus tax of \$380.60, totaling \$6,375.68, subtracted from the current in store credit of \$8,939.19. The balance of \$2,563.51 will be paid to you. If you are in agreement with this letter, please acknowledge by signing below where provided.

Plaintiff did not sign the agreement, and 13 days after the offer to settle in the November 9 letter, he filed a Complaint.


In response to defendants' Motion, plaintiff argues there was no offer to settle the dispute, because plaintiff wrote the November 11 letter under duress (although he fails to allege the

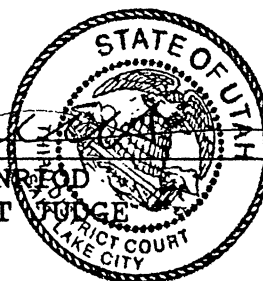
elements of duress); and two, that there was no offer, because defendant informed him he was going to kill the deal because plaintiff had contacted Cal Spa. Plaintiff also raises the sentence in the November 11 letter that says, "If you are in agreement with this letter, please acknowledge by signing below where provided," to argue that it wasn't a complete agreement until he signed.

Plaintiff's November 9 letter constitutes an offer. Defendants' November 11 letter is an unconditional acceptance of plaintiff's offer. Plaintiff's claims of duress, deceptive layaway plans and violations of the Utah Consumer Sales Practices Act do not have merit.

Defendants' Motion for Summary Judgment is granted. Counsel for defendants is to prepare a Judgment consistent with this opinion.

Dated this 11 day of June, 2001.

  
STEPHEN L. HENRICH  
DISTRICT COURT JUDGE



Tab 7

FILED DISTRICT COURT  
Third District

THIRD DISTRICT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

JUL 25 2003

SALT LAKE COUNTY Lyn

By \_\_\_\_\_  
Deputy Clerk

LARRY BRIGGS,

Plaintiff,

v.

VALLEY SPAS INC.; SALT LAKE  
VALLEY SPAS INC.' LOWELL  
BROWN; VALLEY SPA I, INC.

Defendants.

MINUTE ENTRY

CASE NO. 990911916

JUDGE STEPHEN L. HENRIOD

This matter is currently before the above entitled Court on several pending motions, including: 1) Defendants' Motion For Leave To Amend Counterclaim; 2) Plaintiff's Motion For Summary Judgment; 3) Defendants' Motion To Dismiss Respondent's Counterclaim; 4) Plaintiff's Motion To Revive Underlying Action; and 5) Defendants' Motion For Rule 11 Sanctions. Oral arguments were heard on July 22, 2003 after which the Court took the matter under advisement. Now, having considered the submissions of the parties along with the relevant legal authorities the Court rules as stated herein.

I. DEFENDANTS' MOTION TO AMEND

Pursuant to the liberal amendment policies set forth in Utah Rules of Civil Procedure 15(a), the Court grants defendants' motion for Leave To Amend their Counterclaim to include the phrase: "and by the wrongful manner in which plaintiff litigated."

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT & PLAINTIFF'S MOTION TO DISMISS

On June 11, 2001 this Court issued a memorandum decision granting defendants' original Motion for Summary Judgment and dismissing all of plaintiffs' claims on the ground that the claims had been previously extinguished by the parties' Settlement Agreement. Now, defendants come before the Court requesting summary judgment on their counterclaim for the legal expenses incurred as a result of plaintiff's breach of the Settlement Agreement. In response, plaintiff asserts that his complaint was meritorious and not brought in bad faith.

Consistent with its previous ruling, the Court concludes the undisputed facts show that plaintiff knowingly and improperly asserted claims which he had previously agreed to settle. Accordingly, pursuant to Utah Code Ann. § 78-27-56 and in the interests of justice, the Court rules that defendants may recover the attorney fees incurred as a result of plaintiff's breach.

Accordingly, defendants' Motion for Summary Judgment is granted and plaintiff's Motion To Dismiss is denied.

III. PLAINTIFF'S MOTION TO REVIVE UNDERLYING ACTION

Plaintiff moves the Court to revive the underlying action claiming that even if there was a settlement agreement, which plaintiff still maintains there was not, the settlement should be

considered void due to defendants alleged non-performance.

Essentially the same argument was made by plaintiff two years ago with respect to defendants' prior Motion for Summary Judgment. Again, the Court confirms its earlier ruling and finds that plaintiff breached the Settlement Agreement. Furthermore, that breach ultimately relieved defendants of any duty they had to perform under the Agreement. Consequently, plaintiff's Motion To Revive The Underlying Claim is denied.

#### IV. DEFENDANTS' MOTION FOR RULE 11 SANCTIONS


Finally, defendants move the Court for an award of sanctions against plaintiff's counsel, Greg Smith, in accordance with Rule 11 of the Utah Rules of Civil Procedure. Specifically, defendants allege that Mr. Smith violated Rule 11 by filing pleadings containing knowingly and/or recklessly false allegations of material fact. Mr. Smith denies defendants claims and argues that Rule 11 is inapplicable.

Upon consideration of the parties' arguments and Rule 11 itself, the Court declines defendants' invitation to invoke Rule 11 sanctions against Mr. Smith. Defendants' motion for Rule 11 sanction is denied

Defendants' counsel is hereby requested to prepare an Order consistent with this Minute Entry.

Dated this 23 day of July, 2003.

BY THE COURT:



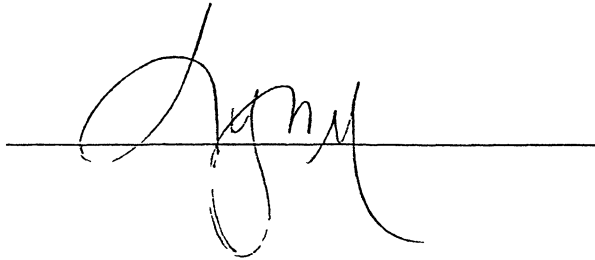
STEPHEN L. HENRIOD  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 25 Day of July, 2003:

Steven E. McCowin  
435 South 1200 East  
Salt Lake City, Utah 84102

Affordable Legal Advocates  
G. Brent Smith  
180 South 300 West, Suite 170  
Salt Lake City, Utah 84101





Tab 8

Gregory B. Smith. #6657  
Attorney for Plaintiff  
180 South 300 West #170  
Salt Lake City, UT 84101  
Phone: (801) 532-5100

---

THIRD DISTRICT COURT, STATE OF UTAH  
SALT LAKE COUNTY. SALT LAKE DEPARTMENT

---

Larry Briggs.  
Plaintiff.

vs.

Valley Spas, Inc., et al  
Defendants

OBJECTION TO PROPOSED FINAL  
JUDGMENT

Case no. 990911916

Judge Henriod

---

On July 25<sup>th</sup> 2003 the Court ruled by signed Minute Entry and instructed Defendants to prepare an order “consistent with this Minute Entry.” (Minute Entry of July 23<sup>rd</sup> 2003. at pg 3). On August 5<sup>th</sup> 2003<sup>1</sup>, Defendants served Plaintiff, by fax, their proposed Final Judgment. After discussion between counsels, a second proposed Final Judgment (“Proposed Judgment”) was served on Plaintiff’s counsel on August 11<sup>th</sup> 2003.

Plaintiff objects to the following language: “, as well as the grounds set forth in the defendants’ memoranda, plaintiff’s claims are without merit, and were not asserted in good faith.” (Proposed Judgment, at 2). Plaintiff suggests to the Court that the language “grounds set forth in defendants’ memoranda” seeks to incorporate *all* of *Defendants’* claims and arguments (not only those in their motion for summary judgment) into the Court’s conclusions. Plaintiff notes that this is not consistent with the Court’s Minute Entry where the Court has made *its* conclusion clear: “[T]he Court concludes the undisputed facts show that plaintiff knowingly and improperly asserted claims which he had

---

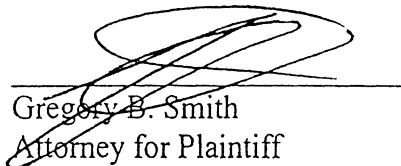
<sup>1</sup> The cover letter attached to the first proposal was dated July 28<sup>th</sup> 2003. Plaintiff assumes this is a typo.

previously agreed to settle.” (Minute Entry of July 23<sup>rd</sup> 2003. at 2). Plaintiff objects to this attempt to circumvent the Court’s ruling to suit Defendants’ desires

Likewise, the language: “plaintiff’s claims are without merit. and were not asserted in good faith.” The Court certainly knows of these terms and Plaintiff assumes that the Court chose its language carefully and with full knowledge of what it was concluding. Plaintiff suggests that Defendants’ insertion of this verbiage is an inappropriate attempt to bend the Court’s ruling to their own purposes and Plaintiff objects

Wherefore Plaintiff prays that the Court reject the proposed Final Judgment and instruct Defendants to comply with its previous ruling and prepare an order “consistent with this Minute Entry.” (Minute Entry of July 23<sup>rd</sup> 2003. at pg 3).

Dated this 13 day of August 2003

  
Gregory B. Smith  
Attorney for Plaintiff

Tab 9

Steven Edward McCowin, Esq.  
435 South 1200 East  
Salt Lake City, Utah 84102  
(801) 582-6529

August 19, 2003

Via Fax (801) 238-7076  
The Honorable Judge Stephen L. Henriod  
Third District Court for the State of Utah

Re: Plaintiff's Objection to Proposed Final Judgment

Dear Judge Henriod:

An award of attorney fees under Utah Code Ann. § 78-27-56 must include a finding of fact that the party lacked good faith, and a conclusion of law that the action was without merit. Pennington v. Allstate Ins. Co., 973 P.2d 932, 939 n.3 (Utah 1998). To satisfy this requirement, Defendants included the following language in the draft Final Judgment: "plaintiff's claims were without merit, and were not asserted in good faith."

Plaintiff objects to this language. Plaintiff insists that the Final Judgment be limited to the more abbreviated language of the Court's Minute Entry: "plaintiff knowingly and improperly asserted claims which he had previously agreed to settle." Defendants believe that the findings required by Pennington are implicit in the Court's Minute Entry. Nevertheless, by objecting to the specific language required by Pennington, Plaintiff seems to be trying to create a technical legal defect in the Final Judgment.

Defendants also understand that there are multiple bases supporting the conclusion that Plaintiff lacked good faith and asserted meritless claims – e.g., Plaintiff's baseless assertions of a \$70,000 damages claim, and a personal claim against Defendant Lowell Brown. Defendants therefore included the following language in the draft Final Judgment: "as well as the grounds set forth in the defendants' memoranda."

Plaintiff also objects to this language. Again, Plaintiff attempts to limit the Final Judgment to the specific language of the Minute Entry, insisting that there is but a single factual predicate for the Court's judgment – that "plaintiff knowingly and improperly asserted claims which he had previously agreed to settle." Defendants respectfully submit that the Court should reject Plaintiff's attempt to limit the Court's judgment to this single predicate.

Very truly yours,

  
-Steven E. McCowin

cc: Gregory B. Smith, Esq.  
Via Fax (801) 532-5178

Tab 10

AUG 28 2003

By Lyn  
Deputy Clerk

Steven E. McCowin (#4621)  
435 South 1200 East  
Salt Lake City, Utah 84102  
(801) 582-6529  
Attorney for defendants and counterclaimants  
Lowell Brown and Valley Spa I, Inc.

IN THE THIRD DISTRICT COURT FOR THE STATE OF UTAH  
SALT LAKE COUNTY, DIVISION II

---

LARRY BRIGGS,	)	
	)	
	)	FINAL JUDGMENT
Plaintiff and	)	
Counterclaim Defendant,	)	
vs.	)	
	)	
VALLEY SPAS, INC.; SALT LAKE	)	
VALLEY SPAS, INC.; LOWELL	)	Civil No. 990911916
BROWN; VALLEY SPA I, INC.	)	
	)	Judge Henriod
Defendants, and	)	
Counterclaimants	)	

---

The first motion of defendants Valley Spa I, Inc., and Lowell Brown for summary judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure came on for hearing on May 22, 2001, the Honorable Stephen L. Henriod, Judge, presiding. In this first motion for summary judgment, defendants asked the Court to dismiss the claims of plaintiff Larry Briggs on the basis of the parties' prior Settlement Agreement. Plaintiff appeared through his attorney, Gregory B. Smith; defendants appeared through their attorney, Steven E. McCowin. Having considered all the evidence in support of and in opposition to the motion, and having heard and considered the arguments of counsel, and being fully advised in the matter;

The court finds that there are no genuine issues of material fact, and that for the reasons set forth in the Court's Memorandum Decision dated June 11, 2001, the plaintiff's claims were

extinguished by the parties' settlement agreement.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the first motion of defendants Valley Spa I, Inc., and Lowell Brown for summary judgment be, and it is granted.

IT IS FURTHER ORDERED ADJUDGED, AND DECREED that the complaint of plaintiff Larry Briggs, be, and it is, dismissed with prejudice.

The second motion of defendants for summary judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure came on for hearing on July 22, 2003, the Honorable Stephen L. Henriod, Judge, presiding. In this second motion for summary judgment, defendants asked the Court for judgment on their counterclaim against plaintiff for the legal expenses they have incurred as a result of plaintiff's breach of the parties' settlement agreement, and as a result of the wrongful manner in which plaintiff litigated this matter. Plaintiff appeared through his attorney, Gregory B. Smith; defendants appeared through their attorney, Steven E. McCowin. Having considered all the evidence in support of and in opposition to the motion, and having heard and considered the arguments of counsel, and being fully advised in the matter;

The court finds that there are no genuine issues of material fact, and that for the reasons set forth in the Court's Minute Entry dated July 23, 2003, as well as the grounds set forth in the defendants' memoranda, plaintiff's claims were without merit, and were not asserted in good faith. Defendants are therefore entitled to an award of their attorneys' fees pursuant to Utah Code Ann. § 78-27-56. The court further finds that on the undisputed facts of this case, an award of attorneys' fees is appropriate in the interests of justice. The court therefore exercises its equity powers to award defendants the attorneys' fees they have incurred in this case. The court further finds that defendants' have incurred attorneys' fees in the amount of \$ 26,062.50, and that

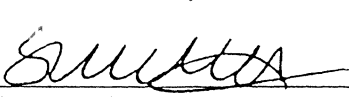


those fees were reasonable given the manner in which plaintiff litigated. The court further find that offset against these attorneys' fees is the \$8,939.19 in cash and value that plaintiff was to receive under the parties' settlement agreement.

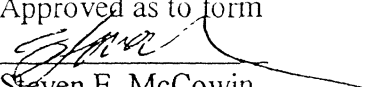
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that defendants have judgment against plaintiff Larry Briggs, for attorneys' fees in the sum of \$ 17,123.<sup>51</sup> together with interest from the date of entry of this judgment at the ~~rate of~~ <sup>judgment rate of 3.41%</sup> % until paid together with the costs and disbursements of this action amounting to \$ 0, making a total of \$ 17,123.<sup>51</sup> in all, and that defendants have execution therefore.

Larry Briggs resides at \_\_\_\_\_. Mr. Briggs' social security number is \_\_\_\_\_.

SO ORDERED this 26 day of August, 2005.

  
Judge Henriod

Approved as to form

  
Steven E. McCowin  
Attorney for Defendants

Approved as to form

\_\_\_\_\_  
G. Brent Smith  
Attorney for Plaintiff

## Tab 11

**C**

UTAH CODE, 1953

TITLE 78. JUDICIAL CODE

PART III. Procedure

CHAPTER 27. MISCELLANEOUS PROVISIONS

78-27-56 Attorney's fees --Award where action or defense in bad faith --  
Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

**History:** L. 1981, ch. 13, § 1; 1988, ch. 92, § 1.

U.C.A. 1953 § 78-27-56, UT ST § 78-27-56

Current through 2003 First Special Session

Copyright © 2003 by Matthew Bender & Company, Inc., a member of the

of the LexisNexis Group.

END OF DOCUMENT

## Tab 12

**WEST'S UTAH RULES OF COURT**  
**UTAH RULES OF CIVIL PROCEDURE**  
**PART VII. JUDGMENT**

Copr © West Group 2003. All rights reserved

Current with amendments received through 10/01/03

**RULE 56. SUMMARY JUDGMENT**

**(a) For Claimant.** A party seeking to recover upon a claim, counterclaim or cross claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof

**(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof

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

**(d) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

**(f) When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just

**(g) Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall

[Amended effective November 1 1997]

UT R RCP Rule 56

END OF DOCUMENT

Tab 13

**C**

UTAH CODE, 1953

TITLE 13. COMMERCE AND TRADE

CHAPTER 11. CONSUMER SALES PRACTICES

13-11-1 Citation of act.

This act shall be known and may be cited as the "Utah Consumer Sales Practices Act."

**History:** L. 1973, ch. 188, § 1.

U.C.A. 1953 § 13-11-1, UT ST § 13-11-1

Current through 2003 First Special Session

Copyright © 2003 by Matthew Bender & Company, Inc., a member of the

of the LexisNexis Group.

END OF DOCUMENT



**C**

UTAH CODE, 1953

TITLE 13. COMMERCE AND TRADE

CHAPTER 11. CONSUMER SALES PRACTICES

13-11-2 Construction and purposes of act.

This act shall be construed liberally to promote the following policies:

- (1) to simplify, clarify, and modernize the law governing consumer sales practices;
- (2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;
- (3) to encourage the development of fair consumer sales practices;
- (4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection;
- (5) to make uniform the law, including the administrative rules, with respect to the subject of this act among those states which enact similar laws; and
- (6) to recognize and protect suppliers who in good faith comply with the provisions of this act.

History: L. 1973, ch. 188, § 2.

U.C.A. 1953 § 13-11-2, UT ST § 13-11-2

Current through 2003 First Special Session

Copyright © 2003 by Matthew Bender & Company, Inc., a member of the

of the LexisNexis Group.

END OF DOCUMENT

**C**

UTAH CODE, 1953

TITLE 13. COMMERCE AND TRADE

CHAPTER 11. CONSUMER SALES PRACTICES

13-11-3 Definitions.

As used in this chapter:

(1) "Charitable solicitation" means any request directly or indirectly for money, credit, property, financial assistance, or any other thing of value on the plea or representation that it will be used for a charitable purpose. A charitable solicitation may be made in any manner, including:

(a) any oral or written request, including a telephone request;

(b) the distribution, circulation, or posting of any handbill, written advertisement, or publication;

(c) the sale of, offer or attempt to sell, or request of donations for any book, card, chance, coupon, device, magazine, membership, merchandise, subscription, ticket, flower, flag, button, sticker, ribbon, token, trinket, tag, souvenir, candy, or any other article in connection with which any appeal is made for any charitable purpose, or where the name of any charitable organization or movement is used or referred to as an inducement or reason for making any purchase donation, or where, in connection with any sale or donation, any statement is made that the whole or any part of the proceeds of any sale or donation will go to or be donated to any charitable purpose. A charitable solicitation is considered complete when made, whether or not the organization or person making the solicitation receives any contribution or makes any sale.

(2) "Consumer transaction" means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance), including the use or misuse of personal identifying information of any person in relation to a consumer transaction to, or apparently to, a person for primarily personal, family, or household purposes, or for purposes that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged, or a solicitation or offer by a supplier with respect to any of these transfers or dispositions. It includes any offer or solicitation, any agreement, any performance of an agreement with respect to any of these transfers or dispositions, and any charitable solicitation as defined in this section.

(3) "Enforcing authority" means the Division of Consumer Protection.

(4) "Final judgment" means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired.

(5) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or any other legal entity.

(6) "Supplier" means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.

**History:** L. 1973, ch. 188, § 3; 1983, ch. 58, § 4; 1987, ch. 105, § 2; 2000, ch. 57, § 1.

U.C.A. 1953 § 13-11-3, UT ST § 13-11-3

Current through 2003 First Special Session

Copyright © 2003 by Matthew Bender & Company, Inc., a member of the

of the LexisNexis Group.

END OF DOCUMENT

**C**

UTAH CODE, 1953

TITLE 13. COMMERCE AND TRADE

CHAPTER 11. CONSUMER SALES PRACTICES

13-11-4 Deceptive act or practice by supplier.

(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

(d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

(f) indicates that the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(g) indicates that replacement or repair is needed, if it is not;

(h) indicates that a specific price advantage exists, if it does not;

(i) indicates that the supplier has a sponsorship, approval, or affiliation the supplier does not have;

(j) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false;

(k) indicates that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction;

(l) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or, if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to either cancel the sales agreement and receive a refund of all previous payments to the supplier or to extend the shipping date to a specific date proposed by the supplier, but any refund shall be mailed or delivered to the buyer within ten business days after the seller receives written notification from the buyer of the buyer's right to cancel the sales agreement and receive the refund;

(m) fails to furnish a notice of the purchaser's right to cancel a direct solicitation sale within three business days of the time of purchase if the sale is made other than at the supplier's established place of business pursuant to the supplier's personal contact, whether through mail, electronic mail, facsimile transmission, telephone, or any other form of direct solicitation and if the sale price exceeds \$25, unless the supplier's cancellation policy is communicated to the buyer and the policy offers greater rights to the buyer than this Subsection (2)(m), which notice shall be a conspicuous statement written in dark bold at least 12 point type, on the first page of the purchase documentation, and shall read as follows: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY (or time period reflecting the supplier's cancellation policy but not less than three business days) AFTER THE DATE OF THE TRANSACTION OR RECEIPT OF THE PRODUCT, WHICHEVER IS LATER.";

(n) promotes, offers, or grants participation in a pyramid scheme as defined under Title 76, Chapter 6a, Pyramid Scheme Act;

(o) represents that the funds or property conveyed in response to a charitable solicitation will be donated or used for a particular purpose or will be donated to or used by a particular organization, if the representation is false;

(p) if a consumer indicates his intention of making a claim for a motor vehicle repair against his motor vehicle insurance policy:

(i) commences the repair without first giving the consumer oral and written notice of:

(A) the total estimated cost of the repair; and

(B) the total dollar amount the consumer is responsible to pay for the repair, which dollar amount may not exceed the applicable deductible or other copay arrangement in the consumer's insurance policy; or

(ii) requests or collects from a consumer an amount that exceeds the dollar amount a consumer was initially told he was responsible to pay as an insurance deductible or other copay arrangement for a motor vehicle repair under Subsection (2)(p)(i), even if that amount is less than the full amount the motor vehicle insurance policy requires the insured to pay as a deductible or other copay arrangement, unless:

(A) the consumer's insurance company denies that coverage exists for the repair, in which case, the full amount of the repair may be charged and collected from the consumer; or

(B) the consumer misstates, before the repair is commenced, the amount of money the insurance policy requires the consumer to pay as a deductible or other copay arrangement, in which case, the supplier may charge and collect from the consumer an amount that does not exceed the amount the insurance policy requires the consumer to pay as a deductible or other copay arrangement;

(q) includes in any contract, receipt, or other written documentation of a consumer transaction, or any addendum to any contract, receipt, or other written documentation of a consumer transaction, any confession of judgment or any waiver of any of the rights to which a consumer is entitled under this chapter; or

(r) charges a consumer for a consumer transaction that has not previously been agreed to by the consumer.

**History:** L. 1973, ch. 188, § 4; 1983, ch. 55, § 1; 1983, ch. 58, § 5; 1985, ch. 250, § 1; 1987, ch. 105, § 3; 1995, ch. 237, § 1; 1998, ch. 194, § 1; 1999, ch. 21, § 8; 2001, ch. 196, § 1.

U.C.A. 1953 § 13-11-4, UT ST § 13-11-4

Current through 2003 First Special Session

Copyright © 2003 by Matthew Bender & Company, Inc., a member of the

Tab 14

**16 CFR**  
**Commercial Practices**  
**CHAPTER I**  
**FEDERAL TRADE COMMISSION**

**SUBCHAPTER D -- TRADE REGULATION RULES**

**PART 429 -- RULE CONCERNING COOLING-OFF PERIOD FOR SALES MADE AT HOMES  
OR AT CERTAIN OTHER LOCATIONS**

**Sec.**

429.0 Definitions.

429.1 The Rule.

429.2 Effect on State laws and municipal ordinances.

429.3 Exemptions.

**Authority:** Sections 1-23, FTC Act, 15 U.S.C. 41-58.

**§429.0 Definitions.**

For the purposes of this part the following definitions shall apply:

(a) *Door-to-Door Sale* -- A sale, lease, or rental of consumer goods or services with a purchase price of \$25 or more, whether under single or multiple contracts, in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller (e.g., sales at the buyer's residence or at facilities rented on a temporary or short-term basis, such as hotel or motel rooms, convention centers, fairgrounds and restaurants, or sales at the buyer's workplace or in dormitory lounges). The term *door-to-door sale* does not include a transaction:

(1) Made pursuant to prior negotiations in the course of a visit by the buyer to a retail business establishment having a fixed permanent location where the goods are exhibited or the services are offered for sale on a continuing basis; or

(2) In which the consumer is accorded the right of rescission by the provisions of the Consumer Credit Protection Act (15 U.S.C. 1635) or regulations issued pursuant thereto; or

(3) In which the buyer has initiated the contact and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer, and the buyer furnishes the seller with a separate dated and



signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within 3 business days; or

(4) Conducted and consummated entirely by mail or telephone; and without any other contact between the buyer and the seller or its representative prior to delivery of the goods or performance of the services; or

(5) In which the buyer has initiated the contact and specifically requested the seller to visit the buyer's home for the purpose of repairing or performing maintenance upon the buyer's personal property. If, in the course of such a visit, the seller sells the buyer the right to receive additional services or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of those additional goods or services would not fall within this exclusion; or

(6) Pertaining to the sale or rental of real property, to the sale of insurance, or to the sale of securities or commodities by a broker-dealer registered with the Securities and Exchange Commission.

(b) *Consumer Goods or Services* -- Goods or services purchased, leased, or rented primarily for personal, family, or household purposes, including courses of instruction or training regardless of the purpose for which they are taken.

(c) *Seller* -- Any person, partnership, corporation, or association engaged in the door-to-door sale of consumer goods or services.

(d) *Place of Business* -- The main or permanent branch office or local address of a seller.

(e) *Purchase Price* -- The total price paid or to be paid for the consumer goods or services, including all interest and service charges.

(f) *Business Day* -- Any calendar day except Sunday or any federal holiday (e.g., New Year's Day, Presidents' Day, Martin Luther King's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.)

#### **§429.1 The Rule.**

In connection with any door-to-door sale, it constitutes an unfair and deceptive act or practice for any seller to:

(a) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, e.g., Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

"You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."

The seller may select the method of providing the buyer with the duplicate notice of cancellation form set forth in paragraph (b) of this section, *provided however*, that in the event of cancellation the buyer must be able to retain a complete copy of the contract or receipt. Furthermore, if both forms are not attached to the contract or receipt, the seller is required to alter the last sentence in the statement above to conform to the actual location of the forms.

(b) Fail to furnish each buyer, at the time the buyer signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned either "NOTICE OF RIGHT TO CANCEL" or "NOTICE OF CANCELLATION," which shall (where applicable) contain in ten point bold face type the following information and statements in the same language, e.g., Spanish, as that used in the contract.

### NOTICE OF CANCELLATION

[enter date of transaction] \_\_\_\_\_

(Date)

You may CANCEL this transaction, without any Penalty or Obligation, within THREE BUSINESS DAYS from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within TEN BUSINESS DAYS following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your Notice of Cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this Cancellation Notice or any other written notice, or send a telegram, to [Name of seller], at [address of seller's place of business] NOT LATER THAN MIDNIGHT OF [date].

I HEREBY CANCEL THIS TRANSACTION. (Date)\_\_\_\_\_ (Buyer's signature)\_\_\_\_\_

(c) Fail, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the .

transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

(d) Include in any door-to-door contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this section including specifically the buyer's right to cancel the sale in accordance with the provisions of this section.

(e) Fail to inform each buyer orally, at the time the buyer signs the contract or purchases the goods or services, of the buyer's right to cancel.

(f) Misrepresent in any manner the buyer's right to cancel.

(g) Fail or refuse to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to: (i) Refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

(h) Negotiate, transfer, sell, or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

(i) Fail, within 10 business days of receipt of the buyer's notice of cancellation, to notify the buyer whether the seller intends to repossess or to abandon any shipped or delivered goods.

#### **§429.2 Effect on State laws and municipal ordinances.**

(a) The Commission is cognizant of the significant burden imposed upon door-to-door sellers by the various and often inconsistent State laws that provide the buyer the right to cancel a door-to-door sales transaction. However, it does not believe that this constitutes sufficient justification for preempting all of the provisions of such laws and the ordinances of the political subdivisions of the various States. The rulemaking record in this proceeding supports the view that the joint and coordinated efforts of both the Commission and State and local officials are required to insure that consumers who have purchased from a door-to-door seller something they do not want, do not need, or cannot afford, be accorded a unilateral right to rescind, without penalty, their agreements to purchase those goods or services.

(b) This part will not be construed to annul, or exempt any seller from complying with, the laws of any State or the ordinances of a political subdivision thereof that regulate door-to-door sales, except to the extent that such laws or ordinances, if they permit door-to-door selling, are directly inconsistent with the provisions of this part. Such laws or ordinances which do not accord the buyer, with respect to the particular transaction, a right to cancel a door-to-door sale that is substantially the same or greater than that provided in this part, which permit the imposition of any fee or penalty on the buyer for the exercise of such right, or which do not provide for giving the buyer a notice of the right to cancel the transaction

in substantially the same form and manner provided for in this part, are among those which will be considered directly inconsistent.

### **§429.3 Exemptions.**

(a) The requirements of this part do not apply for sellers of automobiles, vans, trucks or other motor vehicles sold at auctions, tent sales or other temporary places of business, provided that the seller is a seller of vehicles with a permanent place of business.

(b) The requirements of this part do not apply for sellers of arts or crafts sold at fairs or similar places.