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Kaziah May Hancock and Cindy Stewart v. The True and Living Church of Jesus Christ of Saints of the Last Days, James D. Harmston, William B. Lithgow, Keith Larson, Daniel (Dan) Simmons, Kay Crabtree, Jeff Hanks, Bart Mulstrom, John Harper, and John Does Nos. 1-5 : Brief of Appellee

Utah Court of Appeals

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

KAZIAH MAY HANCOCK, and CINDY
STEWART,

Plaintiffs/Appellees and Cross-Appellants,

v.

THE TRUE AND LIVING CHURCH OF
JESUS CHRIST OF SAINTS OF THE
LAST DAYS, JAMES D. HARMSTON,
WILLIAM B. LITHGOW, KEITH
LARSON, DANIEL (DAN) SIMMONS,
KAY CRABTREE, JEFF HANKS,
BART MULSTROM, JOHN HARPER
and JOHN DOES NOS. 1-5

Defendants/Appellants and Cross-Appellees

**BRIEF OF APPELLEES/
CROSS-APPELLANTS**

Appellate Docket No. 20030984-CA
District Court No. 980600126
**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 20030984-CA**

Appeal from Orders of the Sixth District Court for Sanpete County, State of Utah
The Honorable David L. Mower

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UTAH APPELLATE COURTS
SEP 08 2004

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STEWART, :

Plaintiffs/Appellees and Cross-Appellants, :

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LAST DAYS, JAMES D. HARMSTON, :
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LARSON, DANIEL (DAN) SIMMONS, :
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- A. U.S. Constitution, Amendment I
- B. Utah Code Ann. §§ 78-27-37 and -38 (1999) (Liability Reform Act)
- C. Utah Rule of Civil Procedure 9(b); Utah Rule of Civil Procedure 12(b)(6); Utah Rule of Civil Procedure 17(d); and Utah Rule of Civil Procedure 19
- D. Utah Code Ann. §§ 76-10-601 through -03 and 1605 (1997) (Pattern of Unlawful Activity Act)
- E. Second Amended Complaint
- F. Decision in Regards to Motion to Dismiss
- G. Order on Motion to File Amended Complaint
- H. Verdict
- I. Fourth Proposed Judgment
- J. Order on Motions Regarding Judgment and New Trial
- K. Order Continuing Trial

JURISDICTION

The Utah Supreme Court has appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j). This appeal was transferred to the Utah Court of Appeals, pursuant to Utah Code Ann. § 78-2-2(4).

ISSUES PRESENTED ON CROSS-APPEAL

Appellees and Cross-Appellants do not dispute or restate the issues presented by the Defendants and Appellants.

In addition to Appellants, Appellees state the following as the issues for Appellees' Cross-Appeal.

Issue 1. Whether the trial court abused its discretion by setting aside the jury's verdict on March 26, 2003, and by ordering a new trial because the jury did not "apportion" the damages among the several Defendants, when the Defendants had never pleaded for nor requested apportionment until after trial and the verdict.

Applicable Standard of Appellate Review: Reviewed for abuse of discretion and error of law. A trial court has no discretion to grant a new trial absent a showing of at least one of the circumstances specified in Utah R. Civil P. 59(a). *Schindler v. Schindler*, 776 P.2d 84 (Utah Ct. App. 1989).

Issue 2. Whether the trial court erred by dismissing Plaintiffs' claim for fraud/constructive fraud/ negligent misrepresentation and Plaintiffs' claim under Utah's

Pattern of Unlawful Activity Act, Utah Code Ann. § 76-10-1601, *et seq.* because Plaintiffs' Second Amended Complaint sufficiently alleges those causes of action.

Applicable Standard of Appellate Review: Rule 12(b)(6) dismissal is a question of law, and the court gives the trial court's ruling no deference and reviews it under a correctness standard. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 211 P.2d 194, 196 (Utah 1991).

Issue 3. Whether the trial court abused its discretion by denying Plaintiffs leave to file a Third Amended Complaint, stating the motion and complaint were not "timely," would require the court to adjudicate church doctrine, and lacked an indispensable party.

Applicable Standard of Appellate Review: This Court reviews refusal to grant motion to amend for abuse of discretion. *Timm v. Dewsnup*, 921 P.2d 138, 1389 (Utah 1996) ("Timm,II"), quoting *Timm v. Dewsnup*, 851 P.2d 1178, 1182 (Utah 1993) ("Timm,I").

PRESERVATION OF ISSUES FOR APPEAL

Appellees' issues were argued by Plaintiffs in their memoranda opposing the Rule 12(b)(6) motions to dismiss (R. 192, 420, 1093 and 1122), the memorandum opposing the motion for new trial (R. 1001), and the reply memorandum in support of their motion for leave to amend (R. 1475).

DETERMINATIVE AUTHORITY

1. U.S. Constitution, Amendment I. (Add. A)
2. Utah Code Ann. § 78-27-37, *et seq.* (Add. B) (Utah Liability Reform Act)
3. Utah Rule of Civil Procedure 9(b). (Add. C)
4. Utah Rule of Civil Procedure 19. (Add. C)
5. Utah Rule of Civil Procedure 17(d). (Add. C)
6. Utah Code Ann. § 76-10-1601, *et seq.* (Add. D) (Utah Pattern of Unlawful Activity Act)

STATEMENT OF THE CASE

Nature of the Case:

This is a fraud, conspiracy and breach of promise action by Plaintiffs against Defendant leaders of the True and Living Church ("TLC"), who obtained Plaintiffs' homes, property and assets by mis representations, fraud, breaches of promise, and unlawful activity.

Plaintiffs/Appellees cross-appeal from the Orders of the Sixth Judicial District Court, Sanpete County, which are: "Order on Motions Regarding Judgment and New Trial" entered February 7, 2003, wherein a new trial was granted Defendants (Add. J); "Order Regarding

Defendants' Motion to Dismiss" entered September 24, 2003 (Add. F); "Order on Motion to File Third Amended Complaint" entered November 12, 2003 (Add. G); and, "Order Continuing Trial" entered November 12, 2003, wherein the Court directed that the above Orders be certified as a final judgment on all of Plaintiffs' claims, except for Plaintiffs' breach of contract claim. (R. 1555, Add. K).

Plaintiffs' cross-appeal seeks reversal of the trial court's Order setting aside the jury verdict and granting a new trial. (R. 1052, Add. J). The 2002 jury's verdict (Add. H) should be reinstated and judgment entered thereon. In the alternative, Plaintiffs appeal the trial court's subsequent dismissal of Plaintiffs' three causes of action, and refused leave to amend.

Course of Proceedings and Disposition Below:

In April 1998, Plaintiffs filed their Complaint alleging claims against all Defendants for (1) breach of contract; (2) fraud, constructive fraud or negligent misrepresentation; (3) unjust enrichment or implied contract, or fraudulent conversion; (4) violation of the "Pattern of Unlawful Activity Act," Utah Code Ann. § 76-10-1601, *et. seq.*; and, (5) intentional infliction of emotional harm. (R. 1-8). Defendants filed a Motion to Dismiss (Memorandum, R. 59). On January 4, 1999, the trial court granted the Motion to Dismiss the second cause of action for fraud and constructive fraud, allowing Plaintiffs to amend their fraud allegations in the Complaint. Plaintiffs' Amended Complaint was filed March 10, 1999. (R. 318). Thereafter, Defendants again moved to dismiss the claims by Plaintiff Hancock (Memo., R.

326). That motion was denied by the court on August 19, 1999. (R. 466). The Defendants then filed various Answers. (R. 292, 302, 310.)

On December 31, 2001, Defendants filed a Motion for Summary Judgment asserting, *inter alia*, the same issues now raised on appeal. (Memo., R. 666). That motion was denied January 17, 2002 (R. 771), and the matter proceeded to a jury trial for four days in January 2002. All five of Plaintiffs' causes of action were tried to the jury, and the jury reached a verdict awarding \$290,325.00 in damages to Plaintiffs for Defendants' breach of contract, fraud, and for infliction of emotional distress. (Minutes, R. 832-4; Verdict, Add. H). No issue of "apportionment" of damages was raised by Appellants in jury instructions or to the court.

The Plaintiffs proposed the entry of a Final Judgment that implemented the jury's verdict. Defendants objected to the proposed judgments in which Defendants were held jointly and severally liable, consistent with the jury's verdict. (R. 894). For the first time, Defendants claimed that the judgment should be apportioned because there should not be joint and several liability. (R. 898.)

On August 5, 2002, the trial court signed and entered a final Judgment -- the Fourth Proposed Judgment. (R. 969; Add. I).

Defendants filed objections to the entry of the Judgment, a Motion for a New Trial, and a Motion to Stay Execution of Judgment. (R. 987, 1007, 1024.) In September 2002, the trial court reversed itself, and set aside the entered Judgment (Add. I), stating that there

wasn't enough information for the court to apportion the damages among the Defendants. (R. 1052.) Six months later, the trial court finally entered its order to set aside the jury verdict and grant a new trial. (R. 1052, Add. J.)

Faced with a new trial, Plaintiffs proposed a Second Amended Complaint in February 2003. (R. 1058.) Defendants filed a third Motion to Dismiss the amended complaint, claiming that the Plaintiffs' amended complaint failed to state a claim upon which relief could be granted and all five of Plaintiffs' claims should be dismissed. (R.1069.) Defendants also filed, for the first time, a motion to oppose joint and several liability, and a request to have fault apportioned under the Utah Liability Reform Act. (R. 1086.) In a July 25, 2003 Order, the trial court accepted the Second Amended Complaint as filed. (R. 1238, 1248.)

Almost immediately after accepting the Second Amended Complaint, the trial court then ruled in Defendants' favor on their third Motion to Dismiss on August 8, 2003. The court dismissed Plaintiffs' second cause of action for fraud/constructive fraud and negligent misrepresentation, Plaintiffs' fourth cause of action for violation of Utah's Pattern of Unlawful Activity Act, and Plaintiffs' fifth cause of action for intentional infliction of emotional harm. (Add. F.) The court ruled that the fraud, misrepresentation, racketeering and intentional infliction claims were not alleged with sufficient specificity (Add. F, R. 1257-8), even though the Plaintiffs had testified at length about these specific facts in the 2002 trial.

The court did not dismiss Plaintiffs' first cause of action for breach of contract or the third cause of action for unjust enrichment, and those claims still remain below for determination. (R. 1254-60.) After this dismissal, Plaintiffs moved for leave to file a Third Amended Complaint to be more specific in the allegations of fraud, misrepresentation and infliction.¹ (Memo., R. 1322). The trial court denied Plaintiffs' motion for leave to amend in an Order entered October 17, 2003. (R. 1511, Add. G.) The court stated that the proposed amended complaint was not timely, that complete relief could not be afforded because not all persons were joined as Defendants, and that the court was impermissibly required to adjudicate "church doctrine." (R. 1558-62.) Effectively, the three causes of action were dismissed and leave to amend to correct any deficiency was refused.

The parties stipulated that the October 28, 2003 trial date should be continued and that the court's Order and the prior order of partial dismissal could be certified final under Rule 54(b), Utah R. Civil P. The trial court entered its dismissal and denial of leave to amend as a final judgment (R. 1555, Add. K) to allow this appeal. Defendants' appeal and Plaintiffs' cross-appeal from these various orders then resulted. (R. 1564, 1567.)

Just because the trial court purported to certify as final its non-final declination to dismiss all claims does not justify Defendants' appeal. Following the court's dismissal of three of Plaintiffs' causes of action (Add. F) and denial of leave to amend their complaint

¹The proposed Third Amended Complaint is in the trial court's file but was excluded and omitted by the clerk from the record index and record on appeal.

(Add. G), the trial court “certified” its Order Regarding Defendants’ Motion to Dismiss as being final for purposes of appeal. (*See* R. 1555, Order Continuing Trial, November 12, 2003, Add. K.) The effect of the Rule 54(b) Orders was to certify as final the dismissal of Plaintiffs’ fraud, misrepresentation, infliction and unlawful activity claims, as well as the refusal to dismiss the breach of contract and unjust enrichment allegations.

Statement of Facts:

The following facts are alleged in Plaintiffs’ Second Amended Complaint (“Complaint”- Add. E) and were testified at trial (Transcript, R. 1575) and in the published depositions of I. Douglas Jordan and William Lythgow.

Plaintiffs Kaziah May Hancock and Cindy Stewart are women residing in Sanpete County, Utah. Defendant The True and Living Church of Jesus Christ of Saints of the Last Days (the “TLC”) is an unincorporated association headquartered in Sanpete County. Each of the individual Defendants resided in Sanpete County during the events alleged in the Complaint and were agents of the TLC. Defendant James D. Harmston is the founder and leader of the TLC and the association. (R. 1060-61.)

In November 1993, Plaintiff Hancock became affiliated with the TLC. At that time, Ms. Hancock owned and lived on her ranch in Indianola, Utah. In March 1996, Ms. Hancock met with leaders of the TLC, who denominated themselves as the “Bishopric.” These Bishopric members were Defendants Keith Larson, Kay Crabtree and Kent Braddy. The purpose of the meeting was to discuss an agreement to exchange goods and services. Ms.

Hancock was asked to turn over the sale proceeds that she received from the sale of her Indianola ranch to the TLC. In exchange, the Defendants promised Ms. Hancock that she would receive from them in return property and financial support, which were referred to as a “stewardship.” The Complaint alleges that the “stewardship” was to be land with water, a place where Ms. Hancock could continue to raise animals as she had on the ranch in Indianola. More specifically, the parties discussed 20 acres of land and sufficient water for five animals per acre. (R. 537-40.) The promise of this property and support in exchange for the funds Ms. Hancock would turn over, or “consecrate,” to the TLC was made by the individual Defendants as professed representations of the TLC. (R. 1061-63).

Plaintiff Stewart became affiliated with the TLC on April 11, 1995. In March 1996, Ms. Stewart was asked by the Defendant leaders of the TLC to liquidate her retirement savings account and turn over the funds to Defendant Harmston for the TLC. Harmston, and other Defendants, promised Ms. Stewart that they would repay her the full amount of her retirement fund, together with payment to her of any costs and penalties for her early withdrawal of the retirement funds. Harmston, acting individually and as the head of the TLC, promised Ms. Stewart that he, individually, and/or the TLC would “always support her,” and thus she should not be concerned about liquidating her IRA account. (R. 1062-63).

In order to gain the confidence of the Plaintiffs and further induce Plaintiffs’ agreement, Harmston and the other Defendants represented to Plaintiffs that Harmston was the “sole spokesman on earth for God” and made other similar religious claims. (R. 1063.)

Plaintiffs Hancock and Stewart were persuaded by the importunings and representations of Defendants Harmston, Larson, Crabtree, Braddy, and other Defendants, and believed Defendants' promises were made both personally and on behalf of the TLC. Hancock and Stewart relied on those representations and promises that each would receive property and support in exchange for the money, goods and services they gave to Harmston for the TLC. Hancock completed the sale of her ranch property in Indianola, Utah, and turned over the proceeds to the TLC – over \$131,000.00. Stewart withdrew her entire IRA account of over \$15,700.00 and gave the money to the TLC. (R. 1064-65.)

Not too long thereafter, in May 1997, Ms. Stewart was expelled from membership in the TLC. Ms. Hancock was asked to leave the TLC association in August 1997. Ms. Hancock never received the support or property she had been promised in consideration for turning over her ranch sale proceeds. Ms. Stewart never received the repayment of her IRA monies and tax liabilities as promised. As a result of Defendants' false and misleading representations and promises, Defendants have been unjustly enriched, and Ms. Hancock alleged damages of \$250,000.00 and Ms. Stewart alleged damages of at least \$15,766.00. (R. 1067-68.)

SUMMARY OF ARGUMENT

Plaintiffs Kaziah Hancock and Cindy Stewart appeal the trial court decisions setting aside their jury verdict of January, 2002, and the Judgment thereon which had awarded them damages on their claims of breach of contract, fraud, misrepresentation and intentional

infliction of emotional harm. After setting aside the verdict and ordering a new trial, the court then improperly dismissed Plaintiff's fraud, misrepresentation and Unlawful Activity counts of their amended complaint, denying leave to amend. The Judgment on the verdict should be reinstated. The trial court abused its discretion in setting aside the verdict and judgment because (1) prior to trial and the verdict, Defendants did not plead or request apportionment of liability, thereby waiving that defense, and (2) the Liability Reform Act did not abolish Defendant's joint and several liability for their fraud, misrepresentation, and/or breach of contract. The Act does not apply in this case.

After the verdict on all claims was set aside, the trial court erred in dismissing the fraud, misrepresentation and unlawful activity claims in Plaintiffs' Second Amended Complaint in August, 2003, particularly when these allegations had already been tried to the jury, as well as surviving prior rule 12(b)(6) motions to dismiss. After a four-day trial of the matter in January, 2002, sufficient evidence had been presented to establish the claims and Defendants were well aware of the nature and facts of the allegations against them. In the event the Judgment is not reinstated, these claims should be restored and proceed to new trial.

Following the dismissal of three of Plaintiffs' claims in August, 2003, and with new trial scheduled, the trial court abused its discretion by denying Plaintiffs leave to further amend their complaint. The court's rationale – that the amendment was untimely, required the court to adjudicate church doctrine, and lacked a party, Douglas Jordan, without whom complete relief could not be afforded – are not supported by any legal analysis or authority

properly applied to the facts. Plaintiffs's proposed Third Amended Complaint was filed close in time to the trial court's surprising reversal of its earlier rulings that Plaintiff's claims were sufficient pleaded, and after the parties had already tried the claims.

Plaintiff's claims do not require the Court to adjudicate any church doctrine of the TLC. The First Amendment to the U.S. Constitution has no bearing on this case and is not a defense. Neither the Establishment Clause nor the Free Exercise Clause bar the Plaintiffs' access to the courts for redress of the Defendants' misrepresentations, fraud and breaches of their agreements.

The third reason argued by Defendants for dismissal is the lack of an "indispensable party." Defendants never proposed a theory by which Douglas Jordan was indispensable to the proceedings and failed to meet any requirement of Utah Rule Civil Procedure 19 regarding necessary or indispensable parties. The trial court's conclusion was erroneous. In all, the trial court abused its discretion when it denied Plaintiffs leave to amend to respond to the motions of Defendants. If necessary, the Plaintiffs should be allowed to amend to cure any sufficiency or allegations of their complaint.

Defendants have appealed the trial court's denial of their motion to dismiss the remaining claims for breach of contract and unjust enrichment. Defendants' arguments are not supported by authorities nor persuasively reasoned. Plaintiffs' persuasive analysis and arguments regarding the above issues apply equally to refute the Defendants' contentions that the entire case should be dismissed as a matter of law.

FILED
UTAH APPELLATE COURTS
JAN 14 2005

IN THE UTAH COURT OF APPEALS

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Kaziah May Hancock and Cindy Stewart,)	
)	
)	ORDER
Plaintiffs, Appellees, and)	
Cross-Appellants,)	
)	
v.)	Case No. 20030984-CA
)	
The True and Living Church)	
of Jesus Christ of Saints of)	
the Last Days, James D.)	
Harmston, William B.)	
Lithgow, Keith Larson,)	
Daniel (Dan) Simmons, Kay)	
Crabtree, Jett Hanks, Bart)	
Mulstrom, John Harper, and)	
John Does Nos. 1-5,)	
)	
Defendants, Appellants,)	
and Cross-Appellees.)	

Before Judges Billings, Orme, and Thorne.

This case is before the court on a "Motion to Dismiss Issue 1 Contained in the Brief of Appellees/Cross-Appellants."

After a jury trial, Plaintiffs/Appellees/Cross-Appellants Kazia May Hancock and Cindy Stewart obtained a judgment against Defendants/Appellants/Cross-Appellees The True and Living Church of Jesus Christ of Saints of the Last Days and the named individual defendants (the Church Defendants). In an order entered on February 7, 2003, the district court set aside the judgment and granted a motion for new trial. Hancock and Stewart did not seek permission to appeal that interlocutory order under rule 5 of the Utah Rules of Appellate Procedure and, instead, filed a Second Amended Complaint. The district court subsequently granted, in part, and denied, in part, a motion to dismiss the complaint. The district court certified the August 7, 2003 order, which dismissed causes of action alleging fraud, constructive fraud or negligent misrepresentation, intentional infliction of emotional distress, and claims under the Utah Pattern of Unlawful Activities Act, as final for purposes of

appeal. The same order denied a motion to dismiss the causes of action for breach of contract and unjust enrichment, which remain pending in the district court.

Rule 54(b) of the Utah Rules of Civil Procedure permits the trial court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment." Utah R. Civ. P. 54(b). In order to be eligible for certification, an order must be one that could be characterized as a final judgment as to one or more separate claims. See Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1101 (Utah 1991). "[T]he judgment appealed from must have been entered on an order that would be appealable but for the fact that other claims . . . remain in the action." Id.

The August 7, 2003 order may have been eligible for certification under rule 54(b) insofar as it wholly disposed of one or more separate claims; however, it was not eligible for certification insofar as it denied a motion to dismiss the breach of contract and unjust enrichment causes of action. Nevertheless, the Church Defendants appealed the partial denial of their motion to dismiss. Hancock and Stewart appealed the partial grant of the motion. "A timely appeal from an order certified under Rule 54(b), Utah Rules of Civil Procedure, that the appellate court determined is not final may, in the discretion of the appellate court, be considered by the appellate court as a petition for permission to appeal an interlocutory order." Utah R. App. P. 5(a). In the interest of judicial economy, we invoke this limited exception to allow review of the August 7, 2003 order in its entirety, along with the related October 16, 2003 order denying a motion to amend the complaint.

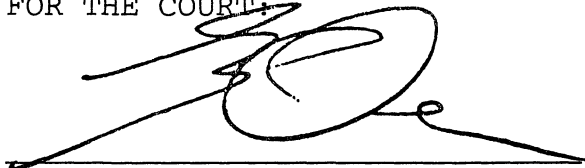
The Church Defendants move to partially dismiss Hancock and Stewart's appeal to the extent that they also seek reversal of the February 7, 2003 order granting the motion for new trial on grounds that this order is not within the scope of this appeal. We agree. Hancock and Stewart did not file a timely petition for permission to appeal from the interlocutory order and the order granting a new trial was not eligible for certification as final under rule 54(b). They now claim that the certification of the August 7, 2003 order rendered all prior interlocutory orders final and appealable. However, the cases they rely upon each arose in the context of an appeal from a final judgment that fully concluded the case in the trial court. None of these cases support the assertion that in an appeal from a partial dismissal

certified as final for appeal, this court may exercise appellate jurisdiction to reverse a previous order setting aside a judgment after an earlier trial and granting of a new trial. Hancock and Stewart alternatively request that we apply the exception contained in rule 5(a) of the Utah Rules of Appellate Procedure. We are generally precluded from suspending or modifying the provisions of rule 5(a), which governs procedures for seeking permission to appeal from interlocutory orders. The limited exception contained in rule 5(a) applies only under circumstances where the trial court certifies a judgment as final for purposes of appeal, which the appellate court later determines was not eligible for certification. The district court was not requested to, and did not attempt to, certify the February 7, 2003 order setting aside the judgment and granting a new trial. Therefore, the prerequisite to allow this court to apply the limited exception does not exist. In addition, we note that after the district court set aside the judgment from the first trial, Hancock and Stewart failed to timely seek permission to appeal, but instead, amended their complaint, and assented to proceeding to trial on the Second Amended Complaint.

IT IS HEREBY ORDERED that the motion is granted, and the Cross-Appeal of Hancock and Stewart is dismissed for lack of jurisdiction insofar as it seeks reversal of the February 7, 2003 order setting aside the judgment following the jury trial and granting a new trial, and the argument contained in Issue 1 of the brief of Appellees/Cross-Appellants Hancock and Stewart is stricken. The appeal and cross-appeal shall otherwise proceed to briefing and plenary consideration on the merits.

DATED this 14th day of January, 2005.

FOR THE COURT:

A handwritten signature in black ink, appearing to be 'G. Orme', written over a horizontal line.

Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on January 18, 2005, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

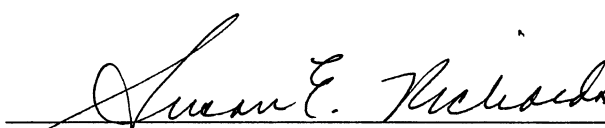
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Dated this January 18, 2005.

By 
Deputy Clerk

Case No. 20030984
District Court No. 980600126

ARGUMENT

POINT I

The Trial Court Abused its Discretion by Setting Aside the Jury Verdict and Ordering a New Trial Because the Defendants Never Pleaded for nor Requested Apportionment.

The trial court should not have set aside the jury's verdict. A trial court has no discretion to grant a new trial absent a showing of at least one of the specific circumstances in Utah R. Civil P. 59(a). *Schindler v. Schindler*, 776 P.2d 84 (Utah App. 1989). After the verdict and judgment, Defendants' motion for a new trial (R. 1007) claimed that insufficient evidence supported the jury's verdict in Plaintiffs' favor, and, for the first time, requested apportionment of damages among the Defendants. The trial court belatedly granted the new trial, not specifying which, if any, circumstance(s) under Rule 59(a) supported a new trial. The court stated that his judgment would not stand due to the verdict's "lack of detailed information about Plaintiffs' claims and Defendants' actions." (R. 1052, Add. J.) Only months after trial, Defendants filed untimely their motion to apportion damages under the Liability Reform Act, which, they claimed, abolished the joint and several liability for damages awarded by the jury. (R. 1086.)

Defendants contend that joint and several liability has been abolished in Utah and, therefore, Plaintiffs must allege the actions of each individual Defendant in order to allow apportionment of fault. (R. 1076). Defendants have misunderstood the Liability Reform Act (the "LRA"), Utah Code Ann. § 78-27-38, (1999), effective March 3, 1998.

The trial court abused its discretion in setting aside the verdict and judgment because (1) prior to trial and the verdict, Defendants did not plead for or request apportionment of liability, waiving that defense; (2) Rules 17(d) and 54(c)(1), Utah Rules of Civil Procedure, provide for entry of final judgment determining the rights of the Defendants among themselves; and, (3) the Liability Reform Act does not abolish joint and several liability for fraud, misrepresentation, or breach of contract claims². The Order Granting a New Trial should be reversed and the jury verdict and Judgment entered on August 5, 2002 should be reinstated.

A. Defendants Waived Any Right for Apportionment of Damages By Not Raising the Claim Prior to Trial.

Prior to the jury's verdict and the Judgment, the Defendants never requested any apportionment of liability among themselves and never raised such a defense or claim. Plaintiffs' Amended Complaint, which was the basis for the 2002 trial of the matter, alleged that the individual defendants acted both in their individual capacities and as agents of the TLC in their fraudulent conduct against Plaintiffs. Their agency binds the individual defendants under any judgment against the TLC. In addition, under Rule 17(d), a judgment against the admitted unincorporated association TLC is enforceable against the joint property of the individual defendants and against the separate property of those defendants at trial.

²Plaintiffs do not appeal the dismissal of their claim for intentional infliction of emotional distress.

At no time prior to the verdict did Defendants seek a ruling of the court with regard to apportionment or ask the jury to apportion.

Both the Plaintiffs' Amended Complaint (R. 318) (upon which the matter was tried) and the Plaintiffs' Second Amended Complaint (Add. E) (which was the subject of Defendants' Rule 12(b)(6) Motion to Dismiss) alleged that the TLC was an unincorporated entity, that Defendant Harmston was an individual and the founder and leader of the TLC, that the individual defendants made promises to Plaintiffs as officers and agents of the TLC and as individuals, and that the Defendants acquired money and property from the Plaintiffs for which they are obligated. Plaintiffs prayed for an award of damages against each individual Defendant. The matter was tried to a jury and a verdict rendered against all Defendants. (Add. H.)

A review of the Requested Jury Instructions of both parties and those presented to the jury as it began its deliberations (R. 724-735, 754-762, 845-882) evidences that the Defendants did not propose any instruction to define fault, or joint and several liability, or that there be any apportionment of the damages awarded. There was no objection to the form of the verdict submitted. Not until after entry of the jury verdict did Defendants file any objection to the jury verdict (R. 894), and first argue that joint and several liability could not be entered under Utah Code Ann. § 78-27-38 (1999). Defendants' failure to raise these defenses prior to trial and the verdict constituted a waiver of that issue.

B. Defendants are Jointly and Severally Liable as Co-Conspirators.

Plaintiffs alleged, argued (R. 929), and presented evidence at trial that the Defendants acted in concert to make false representations and claims in order to obtain Plaintiffs' money, damage Plaintiffs and enrich themselves. Only a portion of the trial transcript is in the record. (R. 1575.) Therefore, the entire evidence at trial should be presumed to support the jury's verdict that the Defendants were jointly liable. *Pratt v. Prodata, Inc.*, 885 P.2d 786, 787 (Utah 1994) ("On appeal from a jury verdict, we view the evidence and all inferences therefrom in the light most favorable to that verdict.").

Co-conspirators may generally be held jointly and severally liable for the damages to a plaintiff. In *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 803 (D. Utah 1988), Judge Winder stated: "Civil conspiracy is essentially a tool allowing a plaintiff injured by the tort of one party to join and recover from a third party who conspired with the tortfeasor to bring about the tortious act or in other words, a method of imposing vicarious liability."

Vicarious liability is distinct from joint and several liability, because it does not arise from actual fault, and the Liability Reform Act "does not logically extend to co-defendants to whom *no* fault can be apportioned, but who are instead subject to vicarious liability." *Peterson v. Coca-Cola USA*, 2002 UT 42, ¶ 19-20, 48 P.3d 941, 948. Vicarious liability can also apply to the law of partnerships and joint ventures, where all partners are vicariously liable for the tortious acts of any other partner. Such liability should also extend to other unincorporated associations. In support of extending vicarious liability to coconspirators:

Membership in a civil conspiracy has been directly compared, for purposes of vicarious liability, to membership in a partnership. Professor Dobbs of the University of Arizona, describing the liability between members of a civil conspiracy in his recent tort treatise, states: “Vicarious liability explains these cases—the parties are engaged in a kind of partnership or joint venture for illegal or tortious purposes.”

Carl D. Adams, *The “Tort” of Civil Conspiracy in Texas*, 54 Baylor L. Rev. 305, 317 (2002), quoting Dan B. Dobbs, *The Law of Torts*, § 340, at 936 (2000).

In a wrongful death action, *Woods v. Cole*, 693 N. E. 2d 333 (Ill. 1998), the plaintiff claimed the two defendants acted in concert when one induced the other to point a gun at the decedent, and the second, not knowing the gun was loaded, fired the weapon. *Id.* at 334. The court first noted the Illinois statute neither exempted nor modified joint and several liability for concerted conduct. The court then discussed the differences between independent concurring tortfeasors and tortfeasors who act in concert. *Id.* at 336-37. The difference was that the “independent, concurring tortfeasor is held jointly and severally liable because the plaintiff’s injury cannot be divided into separate portions, and because the tortfeasor fulfills the standard elements of tort liability, *i.e.*, his or her tortious conduct was an actual and proximate cause of the plaintiff’s injury.” However, the tortfeasor acting in concert “is held jointly and severally liable for that injury because the tortfeasor is legally responsible for the actions of the other individuals.” *Id.* at 336-37.

The Illinois court rejected the argument that apportionment was required even for tortious activity in concert as a fundamental misunderstanding of the nature of the statute.³

The TLC Defendants argue that joint and several liability was abolished as to their actions against Plaintiffs but do not cite legal authority to support their contention. The liability of Defendants, whom the jury presumably found to have acted in concert to cause Plaintiffs' injury, should be joint and several. *Diversified Holdings v. Turner*, 2002 UT 129, 63 P.3d 686 ("action in concert" resulted in a verdict of joint and several liability for fraud, not subject to the Liability Reform Act.)

C. Defendants are Also Jointly and Severally Liable for Breach of Contract and Fraud.

"On appeal from a jury verdict, we view the evidence and all reasonable inferences drawn therefrom in the light most favorable to that verdict." *Pratt v. Prodata, Inc.*, 885 P.2d 786, 787 (Utah 1994). The trial court abused its discretion by not viewing the trial evidence in the light most favorable to the jury's verdict. In the present case, Defendants have not furnished a full trial transcript, and it must be presumed that the evidence presented was sufficient to sustain the verdict and judgment entered. See *Walker Bank & Trust Co. v. Neilson*, 490 P.2d 328, 329 (Utah 1971).

³*Id*; see also Kristopher S. Kaufman, *The Liability Reform Act Subsequent to Field v. Boyer Co.: Sounding the Death Knell of Civil Conspiracy in Utah?* 3 Utah L. Rev. 1077, 1102-06 (2003).

As the basis of its grant of a motion for new trial, the trial court also apparently (without saying) interpreted the Liability Reform Act to permit apportionment of liability among defendants sued for breach of contract. That legal conclusion was erroneous. Under Utah Code Ann. § 78-27-37 (1999), “Fault” is defined as “any actionable breach of legal duty. . . including negligence in all its degrees. . . .” In *Guardian Title Co. of Utah v. Mitchell*, 2002 UT 63, ¶ 2, 54 P.3d 130, the Utah Supreme Court concluded that the statute does not apply to breach of contract: “[T]he tort principles of comparative negligence and agency liability relied on by the district court do not apply to contract actions.”

The Utah Supreme Court discussed the effect of the Liability Reform Act on joint and several liability in *Diversified Holdings v. Turner*, 2002 UT 129, 63 P.3d 686. In *Diversified Holdings*, one of the issues was the jury’s finding that all four defendants were jointly and severally liable for fraud damages and the award of all damages against each defendant individually. *Id.*, 2002 UT 129, ¶ 3, 63 P.3d 686. Regarding joint and several liability, the Court said:

When multiple defendants are jointly and severally liable for fraud damages, as they are here, the full amount of that joint and several liability may form the basis of the actual damages against which punitive damages are assessed for each defendant. When multiple defendants are not jointly and severally liable, as they are not for negligence damages, one defendant’s liability should not be a predicate for increasing punitive damages assessed against another.

Id., 2002 UT 129, ¶ 31, 63 P.3d 686. The TLC Defendants’ argument that joint and several liability for fraud was abolished by the Liability Reform Act is contrary to *Diversified*.

As to the actions of Defendants that resulted in damage to Plaintiffs, Utah Rule of Civil Procedure 17(d) permits Plaintiffs to sue the TLC under its common name, and:

Any judgment obtained against the association shall bind the joint property of all the associates in the same manner as if all had been named parties and had been sued upon their joint liability. The separate property of an individual member of the association may not be bound by the judgment unless the member is named as a party and the court acquires jurisdiction over the member.

Any judgment against the TLC is enforceable against the individual Defendants as the officers and agents of the TLC, and the separate property of those who are named and subject to the jurisdiction of the trial court is subject to the judgment. Plaintiffs need only allege and prove their claims against the TLC, its officers and agents, to bind the joint and separate property of these agents – the named Defendants. This was successfully done, and a jury verdict reached in Plaintiffs’ favor against all Defendants. That verdict should be reinstated.

The jury verdict in the present case found all Defendants jointly and severally liable to Plaintiffs for breach of contract damages and for fraud damages. The trial court’s setting aside of the verdict and granting a new trial to apportion fault among the Defendants was an erroneous application of the statute and an abuse of discretion.

POINT II
Plaintiffs’ Claims Do Not Require the Trial Court to Evaluate or
Decide the Religious Doctrines of Defendant TLC.

Defendants raise First Amendment issues in their appeal of the partial denial of their motion to dismiss Plaintiffs’ causes of action, arguing that their promises to Ms. Hancock and Ms. Stewart were in the nature of “religious doctrines” of the TLC and that such

doctrines are not subject to adjudication by the courts. However, Defendants’ analysis and arguments do not make any distinction between the Establish Clause or the Free Exercise Clause, and neither is discussed by Defendants. (Appellants’ Brief, pp.12-13). Plaintiffs Hancock and Stewart have cross-appealed the trial court’s abuse of discretion when it dismissed the fraud and misrepresentation claims and denied Plaintiffs leave to amend on the ground that such claims required “adjudication of church doctrine.” (Order, Add. G). Again, the court did not discuss whether its adjudication might violate either of the religious amendment clauses.

A. The Trial Court Properly Refused to Dismiss Plaintiffs’ Claims for Breach of Contract and for Unjust Enrichment.

Relying upon *Franco v. Church of Jesus Christ of Latter Day Saints*, 2001 UT 25, 21 P.3d 198, Defendants contend that any “judicial review and interpretation of church law, policies, or practices” is prohibited by the Establishment Clause of the First Amendment. (Appellants’ Brief, pp.12-13). *Franco* does not apply to Plaintiffs’ allegations in this case.

Plaintiff Franco sued the LDS Church and its leaders for injuries she allegedly suffered as a result of advice she received during ecclesiastical counseling. Franco argued that her claims did not require an inquiry into the LDS Church’s religious doctrines, practices, or beliefs and that the First Amendment was inapplicable. *Franco*, 2001 UT 25, ¶ 8, 21 P.3d 198. The Utah Supreme Court relied upon the “excessive entanglement” test in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971):

The excessive entanglement test is, by necessity, one of degree. Indeed, separation of church and state cannot mean the absence of all governmental contact with religion, “since the complexities of modern life inevitably produce some contact.” 16A Am. Jur.2d *Constitutional Law* § 422, at 405 (1998). In light of this reality, the entanglement doctrine does not bar tort claims against clergy for misconduct not within the purview of the First Amendment, because the claims are unrelated to the religious efforts of a cleric.

Franco, 2001 UT 25, ¶ 14, 21 P.3d 198.

This conclusion that *Franco* prescribes embroilment in “standards applicable for . . . clergy” applies to claims against clergy arising from ecclesiastical counseling. *Franco*, 2001 UT 25, ¶ 23, 21 P.2d 198. The *Franco* decision, therefore, does not bar Plaintiffs’ claims. Here, Plaintiffs Hancock and Stewart have brought their tort claims based on the false and fraudulent promises by the TLC Defendants that if the Plaintiffs paid their money they would receive money and property in return. These promises were unrelated to religious efforts, doctrine or practices.

Defendants’ reliance on *State v. Lafferty*, 749 P.2d 1239 (Utah 1988) is also misplaced. The cited language (Appellants’ Brief, p.13) as to whether men “may believe what they cannot prove....” is not relevant when a defendant’s behavior in conformance to his beliefs violates state law. See *Employment Div. Dept. of Human Res. v. Smith*, 494 U.S. 872, 879, 110 S. Ct.1595 (1990) (The right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or

proscribes)"). *See also State v. Green*, 2004 UT 76, ¶ 28 (Holding Utah's bigamy statutes are neutral on their face and as applied).

Defendants have not discussed the most pertinent authority. The Utah Supreme Court considered a dispute over the occupancy of land between individuals and the religious movement called the Priesthood Work ("The Work") in *Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998). Adherents to The Work commonly bought land in the area of Hildale, Utah, and Colorado City, Arizona, and deeded it ("consecrated" it) to The Work. *Id.* at 1252. The land was held by a trust known as the United Effort Plan, or "UEP."

From its inception, the UEP invited members to build their homes on assigned lots on UEP land. Through this system, the UEP intended to localize control over all local real property and to have the religious leaders manage it. Members who built on the trust land were aware that they could not sell or mortgage the land and that they would forfeit their improvements if they left the land. However, the UEP did encourage its members to improve the lots assigned to them and represented to its members that they could live on the land permanently, by using such phrases as 'forever' or 'as long as you wanted.'

Jeffs, at 1239-40.

When dissension over a doctrinal issue arose among adherents of The Work, the group split into two groups: specifically, Jeffs (who acquired control of the UEP) and the claimants (Stubbs). Jeffs declared that all those living on UEP land were tenants at will and filed an unlawful detainer and several quiet title actions against some of the claimants. The claimants sued to declare their entitlement to their lots and claiming that the UEP had been unjustly

enriched by their improvements to the land. The trial court granted claimants relief on their unjust enrichment claim, and both parties appealed. *Id.*

The UEP argued that the religious context of the dispute prohibited the court from applying unjust enrichment principles, because balancing the equities between the UEP and claimants would be tantamount to judging the fairness of the UEP's religious practices and is therefore prohibited. *Id.* at 1243. The Supreme Court stated:

. . . [C]ourts have broad authority to grant equitable relief as needed. And nothing in the general rules of equity applicable in both states prohibits a court from deciding an equity case because the parties are religious entities. The UEP has cited no Arizona or Utah law suggesting that a court should limit the application of the doctrine of unjust enrichment solely because of the religious nature of the relationship and motivation of the UEP and claimants. And federal constitutional law imposes no such limitation.

Jeffs, at 1243.

According to the U.S. Supreme Court, in *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S.440, 449 (1969), the First Amendment “commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.” Applying this mandate, the Utah Court further concluded that “nothing prevents a civil court from hearing an ordinary equity case between religious entities or factions, or between a religious entity and a private litigant.” *Jeffs*, 970 P.2d at 1244.

Accordingly, this Court should deny Defendants' appeal. The trial court has the jurisdiction and duty to determine Plaintiffs' claims against the TLC Defendants, not just for

contract breach and unjust enrichment, but also for fraud and misrepresentation and unlawful activity. There is not any question of any church doctrine central to Plaintiffs' claims. Essentially, what must be determined is (i) whether the TLC Defendants made promises to Plaintiffs; (ii) whether those promises were knowingly false when made and were intended to cause Plaintiffs to act; (iii) whether Plaintiffs acted in reliance thereon by providing the consideration requested; and (iv) whether the TLC Defendants performed their promised obligation, or (v) whether Plaintiffs conferred upon the Defendants a benefit that it would be unjust for them to retain.

B. Adjudication of All of Plaintiffs' Claims for Fraud, Misrepresentation, Unlawful Activity and Breach of Contract Does Not Violate the Establishment Clause of the First Amendment.

In *Jeffs*, the trial court found that the Jeffs claimants improved the disputed land in reliance upon the UEP's representations that they could live on the land for the rest of their lives, conferring a benefit on the UEP which would be inequitable for UEP to retain. *Id.* at 1248. The UEP argued on appeal that the equitable remedy of unjust enrichment violated both the Utah Constitution and the First Amendment to the United States Constitution "because the ruling burdens the free exercise of its members' religious beliefs. Specifically, the UEP asserted that the ruling was unconstitutional because it measured "religious expression against secular standards of fairness." *Id.*

Under the Free Exercise Clause of the First Amendment, a court's determination that incidentally burdens the exercise of religion is not unconstitutional so long as the law is not

intended to burden free exercise, is of general applicability, and is otherwise valid. *Id.* at

1249. The relevant interest was articulated by the appellate court:

We conclude that the state's interest here revolves around the judicial system, not the specific results of the judicial action. This is because the UEP contends that *no* remedy could be returned by the trial court on these claims without violating the state constitution. The state has a compelling interest in ensuring that all parties are able to resolve legal disputes before a neutral tribunal.

Jeffs, at 1250.

This fundamental right of access to the courts and the remedies of Utah's Pattern of Unlawful Activity Act was denied Plaintiffs when their claims for fraud and misrepresentation were dismissed and leave to amend was denied. Even if making access to the court available to Plaintiffs incidentally burdens the Defendants' exercise of their religion, it is not unconstitutional because the state has a compelling interest in judicial resolutions of the claims of both parties. Ecclesiastical status does not place the TLC association or its agents beyond the law; thus, the court's dismissal of Plaintiffs' fraud and misrepresentation and unlawful activity claims, and refusal to allow Plaintiffs leave to amend their complaint against Defendants were an abuse of the court's discretion. The First Amendment simply does not apply to this case – neither the Establishment Clause nor the Free Exercise Clause. All of Plaintiffs' claims should be reinstated for trial, in the event the prior verdict is not restored.

POINT III
The Trial Court Properly Denied Defendants' Rule
12(b)(6) Motion to Dismiss Plaintiffs' Claims for
Breach of Contract and Unjust Enrichment.

When a motion under 12(b)(6) is filed, the issue before the court is whether the petitioner has alleged enough in the complaint to state a cause of action. This preliminary question is asked and answered before the court conducts any hearings on the case. *Alvarez v. Galatka*, 933 P.2d 987, 989 (Utah 1997). Rule 12(b)(6) concerns the sufficiency of the pleadings, not the underlying merits of a particular case.

In determining whether the trial court properly granted a motion to dismiss, the appellate court accepts the factual allegations in the complaint as true and considers all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff. *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218 (Utah 1996). The trial court and Defendants have failed to apply this basic principle to the Plaintiffs' allegations.

A. Plaintiffs' Allegations of Defendants' Promises Are Sufficiently Definite.

To properly state a cause of action for breach of contract, a plaintiff must plead (1) the existence of a valid and enforceable contract, (2) performance by the plaintiff, (3) breach of the express promise by the defendant, and (4) damages to the plaintiff resulting from the breach. *Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, 70 P.3d 17. Plaintiffs' Second Amended Complaint (Add. E) alleges, in paragraph 9, that in exchange for money, goods, and services to be given by Hancock to the Defendants and the TLC, they promised to give her property and support. Paragraph 10 (Add. E) alleges that Stewart

liquidated her entire retirement savings and turned all the funds over to Defendant Harmston for the use of the TLC in exchange for TLC's promise, in paragraph 20, that the TLC would always take care of her and, in paragraph 19, would repay her and pay any tax liability she would incur for early withdrawal of her retirement funds. Neither Plaintiff received any money, land, or support from any Defendant, as they promised. Both Plaintiffs suffered financial loss as a result of these false promises.

The trial court reviewed the contract and unjust enrichment allegations of the Second Amended Complaint and found that they stated a claim for relief. (R. 1254, Add. F). The trial court's ruling should be affirmed as to that issue raised by Appellant.

B. Defendants' Promises are Not Illusory.

Defendants do not argue that they made no promises to Plaintiffs. However, they say, the promises they made were so conditional and indefinite as to be illusory. In *Silvers v. Silvers*, 999 P.2d 786 (Alaska 2000), Michael Silvers borrowed money from his mother over a period of eight years and repaid only a portion. When judgment was entered against him in favor of his mother, Michael appealed, arguing that the loan contract failed for indefiniteness because a specific time of repayment was absent. The appellate court concluded: "A pledge to repay money when the borrower becomes financially able merely represents a conditional promise and is legally enforceable upon satisfaction of the condition. Such contracts do not fail for indefiniteness." *Id.* at 790-91.

Defendants claim their promises to provide Plaintiffs with money, land, and support were conditioned upon “cleansing of the valley.” (R. ^{1575, pp. 60-66}~~674-5~~.) This allegation is disputed by Plaintiffs and, as such, is subject to determination by a fact-trier. Those issues were addressed in the earlier trial herein, and resolved against Defendants. Defendants are entitled to raise the defense as a factual issue, but they are not entitled to adjudication of the issue as a matter of law.

C. The Statute of Frauds Does Not Bar Enforcement of Either Promise.

Whether an agreement is void because it is within the statute of frauds is a question of fact. *M & S Constr. & Eng’g. Co. v. Clearfield State Bank*, 426 P.2d 227 (Utah 1967).

Plaintiff Hancock does not allege that any interest in a particular parcel of real property was created, granted or assigned to her by the Defendants. The Second Amended Complaint, paragraph 18, alleges that she was promised that if she sold her ranch in Indianola, Utah, and gave the proceeds to TLC, she would, in return, receive from the TLC a place where she could continue to raise her animals. (Add. F, p. 4.) No claim is made that Hancock would have “an estate or interest in real property” that would be subject to Utah Code Ann. § 25-5-1. Instead, TLC promised that farm land and water would be made available to her to raise her animals. (R. 200, 210, 418). Such a promise is outside the statute of frauds. *See Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365 (CA9 1987).

Defendants’ Appeal Brief, p.14, admits: “Furthermore, there is no specific property described or piece of real property identified to be enforceable. . . .” Thus, the statute of

frauds does not apply to bar enforcement of this promise. Moreover, the statute would not apply to a constructive trust imposed to prevent Defendants' unjust enrichment at Ms. Hancock's expense. Utah Code Ann. § 25-5-2; *Carnesecca v. Carnesecca*, 572 P.2d 708 (Utah 1977).

The Statute of Frauds does not bar the claims of Co-Plaintiff Stewart, either. Stewart alleges that she was promised money and support; specifically, that the "TLC would always take care of her." (Add. A, ¶ 20). Her claim for relief, however, is not for a lifetime of support, but for the exact amount of money she realized from her retirement account and gave to the TLC, \$15,766.00, including interest and income tax penalties. Even had she made a claim of support for life, such a claim would not be barred by the statute of frauds, where it has long been held that such a promise could be performed within one year, should Stewart's death occur in that time period. *Johnson v. Johnson*, 88 Pac. 230 (Utah 1906); *Pasquin v. Pasquin*, 1999 UT App. 245, 988 P.2d 1.

Defendants also argue that the Fraud Statute bars any judgment against the individual defendants because no agreement in writing exists wherein the individuals agreed to answer for the debt of the TLC. This argument is far afield. Plaintiffs have never alleged such an agreement between the individuals; the liability of the TLC and of the individuals is alleged to arise from the concerted and conspiratorial fraudulent conduct of each of the Defendants.

Essentially, the defenses raised by Defendants are affirmative defenses that are fact-dependent. These issues of fact require deference to the determination of the trier of fact as

to the nature and terms of the promises and commitments made by Defendants, severally and in concert.

D. Plaintiffs' Second Amended Complaint States a Claim For Unjust Enrichment.

According to *Jefferies v. Stubbins*, 970 P.2d 1234 (Utah 1998), “[a] party may prevail on an unjust enrichment theory by proving three elements:

‘(1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.’”

Id. at 1247-48, quoting *American Towers Owners Assoc., Inc. v. CCI Mechanical*, 930 P.2d 1192 (Utah 1996) (citations omitted).

The trial court denied Defendants’ motion to dismiss this cause of action, recognizing that the Second Amended Complaint alleges these three elements sufficiently; paragraph 25 states that Defendants have acquired about \$250,000.00 of money, services, or property from Hancock, and \$15,766.00 from Stewart; paragraph 26, that Defendants breached an implied contract with Plaintiffs by refusing to provide the promised return consideration; and, paragraph 27, that Plaintiffs have been damaged and Defendants unjustly enriched thereby. (Add. F, pp. 4-6.) Defendants appeal the trial court’s ruling on the weak assertion that there cannot be both an express and an implied contract with the same terms.

The trial court’s refusal to dismiss the Plaintiffs’ claims of breach of contract and unjust enrichment should be affirmed.

POINT IV
The Trial Court Erred When it Determined
That Douglas Jordan Is An Indispensable Party to this Action.

The trial court denied the Plaintiffs' motion for leave to amend in 2003 on the grounds of untimeliness, requiring adjudication of church doctrine, and lack of a non-party, Douglas Jordan. (R.1511, Add. G). The trial court improperly denied the Plaintiffs leave to amend their Complaint, stating, *inter alia*, that relief could not be afforded Plaintiffs without joining Mr. Douglas Jordan as a party. Douglas Jordan is Plaintiff Hancock's former husband and is now deceased. His deposition was published but is not in the court's record (*see* R. 766). His trial testimony appears in R. 1575.

Defendants did not raise the indispensable party claim in their third motion to dismiss (R. 1069, dated 3-14-03). The issue was raised only in opposition to Plaintiffs' motion for leave to file a third amended complaint (R. 1424, p.8), after the court dismissed counts 2, 4 and 5 of the Second Amended Complaint. (Add. F.)

Defendants have never articulated any reason on which they propose that Jordan is "indispensable" to these proceedings under Rule 19, Utah R. Civil P. In their 9-29-03 Memorandum (R. 1424), Defendants discuss Jordan's alleged role in how the TLC obtained Ms. Hancock's money. Defendants have alleged that Hancock gave the proceeds of the sale of her ranch to her husband, Jordan; that she knew of the monies being donated and the donations were of her own free will and choice; and, that Hancock's claim for return of the

money should be against her husband, Jordan, not Defendants. There are only factual assertions, resolved against Defendants at the trial.

No legal authority is given by Defendants in support of their claim, nor is there even citation to Utah Rules of Civil Procedure 17 or 19 on “real property in interest” or on “indispensable parties.” The trial court erred by ruling as a matter of law that Jordan was a party without whom complete relief could not be afforded, and in denying Plaintiffs leave to amend their complaint (which did not join Jordan). (R. 1511, Add. G).

On appeal, the Defendants have again devoted only twelve (12) lines to their argument that Jordan is an indispensable party to the Plaintiffs’ remaining causes of action before the trial court. The Defendants’ appeal argument, without citation to any authority or rule of procedure, is only a conclusory factual allegation that the proceeds of the sale of Hancock’s ranch were not her premarital funds and were Jordan’s to give away as he desired; that Hancock waived any claim to the proceeds when she stipulated to a decree of divorce that did not award those funds to her; and, that Jordan is the real party in interest, and, as such, Jordan is indispensable. Appellants’ brief is wholly inadequate to support their claim. *State v. Green*, 2004 UT 76, at ¶ 13.

Under *Grand County v. Rogers*, 2002 UT 25, ¶ 29, 44 P. 3d 734, the moving party bears the burden of presenting the specific facts and reasoning to persuade the court that non-parties are necessary. On certiorari, the Supreme Court discussed the two-part analysis required for a determination of indispensability under Rule 19(a):

Under rule 19, the trial court must first determine whether a party is necessary. . . If the party is necessary, the court must next consider whether joinder of the necessary party is feasible. . . If so, the necessary party “shall be joined.” Utah R. Civ. P. 19(a). . . If, on the other hand, the court finds it unfeasible to join the necessary party, the court must address the indispensability of the party under Rule 19(b) and decide whether the action should proceed or be dismissed. . . .Further, in performing a rule 19 analysis, a court must discuss specific facts and reasoning that lead to the conclusion that a party is or is not necessary or indispensable, and failure to do so is error. (Citations omitted).

Grand County, 44 P.3d at 740-41. The trial court did not make any such analysis. The *Grand County* court’s criticisms or that appellant’s lack of authority and showing equally applies in this case. *Id.*

The present appeal requires the same step-by-step analysis of whether Jordan is an indispensable party without whom the matter cannot proceed. Nevertheless, Defendants do not present the specific facts and reasoning under Rule 19, nor do they cite any authority to the trial court or this court. Defendants’ failure below caused the trial court to err when it determined that Jordan was a party without whom complete relief could not be afforded.

The trial court further abused its discretion by refusing to allow an amendment of the Plaintiffs’ complaint. The refusal constituted a dismissal with prejudice. In *Bonneville Tower Condominium Management Committee v. Thompson-Michie Associates, Inc.*, 728 P.2d 1017 (Utah 1986) (*per curiam*), the trial court dismissed the action with prejudice for plaintiff’s failure to comply with Rule 19(a). The Utah Supreme Court found abuse of discretion:

. . . Under Utah Rule of Civil Procedure 41(b), a dismissal for failure to comply with Rule 19(a) is not an adjudication on the merits. Not having considered the merits of plaintiff’s claims, there was no reason for the court to dismiss with prejudice and prevent future consideration of the claims should

the defect be corrected. The trial court abused its discretion by entering its Rule 41(b) dismissal with prejudice.

Bonneville Tower, 728 P.2d at 1020. *Accord Intermountain Physical Medicine Associates v. Micro-Dex Corporation*, 739 P.2d 1131, 1133 (Utah App. 1987) (the trial court abused its discretion in not allowing an amendment just because of increased costs and complexity).

In the present case, Plaintiffs were denied the opportunity to file an amended complaint, essentially a dismissal, with prejudice, of their fraud, misrepresentation and unlawful activity claims. As in *Bonneville Tower* and *Intermountain Physicians*, the court abused its discretion when it did not allow the amendment.

Moreover, if Defendants believed he was “indispensable,” Defendants could have joined Jordan (or his estate) as a party to the action at any time. Having failed to join Jordan or his estate to the action, Defendants should not now complain that the court’s failure to require joinder of Jordan in Plaintiffs’ remaining causes of action mandates dismissal with prejudice. *See Landes v. Capital City Bank*, 795 P.2d 1127, 1132 (Utah 1990) (Having failed to join the SBA, plaintiff cannot complain that the court’s failure to require joinder of the SBA is reversible error).

Defendants’ appeal from the trial court’s refusal to dismiss the existing causes of action should be denied. As to the trial court’s denial of leave to amend as to the dismissed counts on fraud, misrepresentation and unlawful activity, Plaintiffs should have been granted leave to amend their complaint on remand. That ruling should be dismissed.

POINT V
The Trial Court Abused its Discretion When it Denied
Plaintiffs' Motion for Leave to Amend Their Complaint as Untimely.

Plaintiffs' motion to amend its Second Amended Complaint was not untimely when the trial court reversed its prior decisions denying Defendants' prior motions and had already set aside the jury verdict for Plaintiffs. Defendants had twice before moved to dismiss Plaintiffs' claims, and the trial court had denied those motions. All issues were tried to the jury in January 2002. The verdict and Judgment were entered. Plaintiffs were totally surprised by the trial court's reversal in 2003 of all its prior rulings that the Plaintiffs' allegations of fraud, misrepresentation, racketeering and infliction of emotional harm sufficiently stated claims. The trial court's belated dismissal of those claims and then refusing Plaintiffs' motion for leave to amend as "untimely" was a clear abuse of discretion.

The opposing parties were not put to unavoidable prejudice by having an issue adjudicated for which he had not had time to prepare. *Bekins Bar V Ranch v. Huth*, 664 P.2d 455,464 (Utah 1983). In this case, no new factual or legal claims were raised since the filing of the complaint in 1998 and the jury trial in 2002. Under Plaintiffs' proposed amendment, Defendants would be preparing the same defenses as at the prior trial. Any untimely action was that of the trial court in dismissing the claims only weeks before trial after previously denying the same motions on prior occasions.

If the jury verdict is not reinstated, then the trial court should be directed, on remand, to allow Plaintiffs to amend their complaint.

POINT VI

The Second Amended Complaint Sufficiently Alleges the Specific Acts of Defendants' Fraud, Constructive Fraud or Negligent Misrepresentation and Violation of Utah Code Ann. § 76-10-1601, et seq.

The Utah Supreme Court stated, in *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218, (Utah 1996): "In determining whether the trial court properly granted a motion to dismiss, the appellate court must accept the factual allegations in the complaint as true and consider all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff." The propriety of a motion to dismiss is a question of law which is reviewed for correctness, giving no deference to the decision of the trial court. *Krouse v. Bower*, 2001 UT 28 at ¶ 2, 20 P.3d 895.

A. Plaintiff's Second Amended Complaint is Sufficient to State Plaintiff's Claims Under Utah R. of Civil P. 9(b).

The trial court ruled below that Plaintiffs failed to plead Defendants' fraud and theft with sufficient particularity under Rule 9(b), and granted Defendants' motion to dismiss, stating that Plaintiffs alleged only general legal conclusions not supported by facts that identify the "particular dates, times, places, names of people, words that were spoken." The causes of action for fraud/constructive fraud/negligent misrepresentation were dismissed.

This ruling was made in blatant disregard of the specific instances of promises and lies set forth in the Second Amended Complaint, the Affidavits of Plaintiffs Hancock (R. 210, 418) and Stewart (R. 217), and witness Douglas Jordan (R. 200), and the substantial corroborating testimony already presented at trial.

For instance, the Second Amended Complaint, (Add. E) avers that:

(1) promises were made to Hancock by many of the Defendants, including Harmston, acting in his own person and as a agent of the TLC, that if Hancock sold her ranch in Indianola, Utah and gave the funds to the TLC, she would receive in return real property where she could continue to raise her animals (§§ 9, 18); promises were made to Stewart by Harmston, acting in his own person and as an agent of the TLC, that if she liquidated her IRA account and gave the monies from the account to him, he would repay her and pay any tax liability she would incur for early withdrawal (§§ 19, 20);

(2) the promises were false statements because Harmston and the TLC had a pecuniary interest in the transaction, had control over whether or not the promise was fulfilled, and had a confidential or superior relationship with the promisees (§§ 16, 17, and 23);

(3) the Plaintiffs turned over their property and means to Harmston and/or the TLC and suffered the loss of nearly all their assets (§ 21(ix));

(4) the false statements of Harmston, individually, and Harmston as agent of the TLC, and other of the Defendants were intentional and were made regarding future events within Defendants' control (§§ 22, 23);

(5) the Defendants gained a superior position of confidence with the Plaintiffs and took unfair advantage of that position by persuading the Plaintiffs that they must turn over their wealth to the Defendants (§§17);

(6) the Plaintiffs met with the agents of the TLC, listened to their promises, and had no reason to believe that the promises of future performance were false (§§ 8, 9, 16-20);

(7) the Plaintiffs were persuaded that they must turn over their wealth to the Defendants and that they would receive land and support in return (§§9, 19-20);

(8) The Plaintiffs reasonably relied on Defendants' promises of future performance (§§ 21(viii), 23); and,

(9) the Plaintiffs turned over their property and means to Harmston and/or the TLC, never received the land and support they were promised, and consequently suffered the loss of nearly all their assets (§§ 21(ix), 10-12, 14).

In addition to these allegations of the Second Amended Complaint, Defendants, and the court, had the benefit of a full presentation of Plaintiffs' testimony and their supporting evidence at the trial of the matter on January 22-25, 2002, when the jury rendered its verdict for Plaintiffs. At that time, nineteen (19) exhibits were received into evidence and fifteen (15) witnesses testified. (Minutes, R. 832-4.) Based upon on the evidence presented, the jury was able to return a verdict for Plaintiffs on the causes of action for breach and fraud.

For Defendants to argue, and the trial court to conclude, that the allegations of fraud in the Second Amended Complaint ¶¶ 1 through 9 were inadequately pleaded is beyond rationality.

The allegations Plaintiffs have made give sufficient and fair notice to each of the Defendants of Plaintiff's claims against each of them, jointly and severally. *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982); accord, *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218, 1221-22 (Utah 1996).

Plaintiffs' Second Amended Complaint contains a great deal more than just the "broad and general statements" that have been held to give insufficient notice to a defendant. The content, nature and substance of Defendants' false statement are detailed. See *Chapman v. Primary Children's Hospital*, 784 P.2d 1181, 1186 (Utah 1989) (holding that allegations that defendants withheld information regarding the cause and stating how the defendants had "misinformed" the plaintiffs of the injury contained the relevant surrounding facts describing plaintiffs' claim); *Heathman v. Fabian & Clendenin*, 377 P.2d 189, 190 (Utah 1962) (stating that a complaint should allege the content, nature or substance of alleged false statements).

Plaintiffs have pleaded the factual content and the substance of their claims and of the Defendants' conduct, not just "bare legal conclusions." Plaintiffs established then with admitted evidence. The allegations are more than adequate to state Plaintiffs' claims for relief and give fair notice to each Defendant.

B. Plaintiffs' Second Amended Complaint is Sufficient to State Plaintiffs' Claims Under the Utah Pattern of Unlawful Activities Statutes.

The Plaintiffs must plead with particularity their claims under the Utah Pattern of Unlawful Activities Act in order to give sufficient and fair notice to each Defendant. The trial court's error in dismissing Plaintiffs' pattern of unlawful activity claim begins with an analysis of the relevant statutory provisions. *Alta Industries Ltd. v. Hurst*, 846 P.2d 1282, 1287 (Utah 1993).

Section 76-10-1605(1), Utah Code Ann., provides that a person injured by an entity engaged in conduct forbidden by any provision of § 76-10-1603 may sue and recover twice the damages sustained. Section 76-10-1603 defines unlawful acts and provides, in subsection 76-10-1603(3), that it is unlawful for any person employed by or associated with any enterprise to conduct or participate, whether directly or indirectly, in the conduct of that enterprise's affairs through a pattern of unlawful activity. Subsection 76-1-1602(2) defines "enterprise" as "any individual . . . association, or other legal entity, and any group of individuals associated in fact although not a legal entity. . . ." Subsection 76-10-1602(3) defines "pattern of unlawful activity" to mean "at least three episodes of unlawful activity, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission" Finally, "unlawful activity" is defined in section 76-10-1602 as "to directly engage in conduct or . . . intentionally aid another person to engage in conduct which would constitute" one of the enumerated crimes. Subsection 76-10-1605(1)(b) provides that civil liability may attach regardless of whether "the conduct has

been adjudged criminal by any court of the state or of the United States,” and the burden of proof is “clear and convincing evidence.” Subsection 76-10-1605(5).

In the present case, Plaintiffs’ Second Amended Complaint, paragraph 30, (Add. E) alleges that the Defendant TLC was the “enterprise” and individual “Defendants affiliated with the TLC have committed at least three acts in violation of the ‘Pattern of Unlawful Activity Act.’” Paragraphs 7 through 14 allege the elements of two instances of theft by deception:⁴ Defendants obtained money from Hancock and from Stewart by deception. A third episode is alleged in paragraphs 9 and 11, which allege theft of services:⁵ Hancock was promised property and support in “exchange for . . . services to be given by the Plaintiff, Kaziah May Hancock,” and that “Kaziah May Hancock did deliver . . . services to the Defendants after this time and continued to do so until . . . Ms. Hancock was asked to leave in or about August 1997.”

The Second Amended Complaint sufficiently described the factual basis of the racketeering claim, enabling Defendants to prepare an adequate defense. *See State v. Bell*, 770 P. 2d 100 (Utah 1988). At this point in the proceedings, the trial court should have accepted as true the factual allegations in Plaintiffs’ Second Amended Complaint and,

⁴Utah Code Ann. § 76-6-405. Theft by deception. (1) A person commits theft if he obtains or exercises control over the property of another by deception and with a purpose to deprive him thereof.

⁵Utah Code Ann. § 76-6-409. Theft of Services. (1) A person commits theft if he obtains services which he knows are available only for compensation by deception, threat, force, or any other means designed to avoid the due payment for them.

Plaintiffs argue, denied the motion to dismiss this claim. A cognizable claim for relief has been stated.

CONCLUSION

The trial court's setting aside the jury's verdict was unsupported, an abuse of discretion and error of law. The jury's verdict and the judgment thereon should be reinstated. In the alternative, the trial court's belated decision, barely two months before trial, dismissing the fraud, misrepresentation and racketeering claims, and refusing leave to amend was an abuse of discretion and should be reversed. The dismissed causes of action should be reinstated. If a retrial is necessary, trial should be inclusive of all Plaintiffs' claims for relief. If a further amendment of Plaintiffs' complaint is required, Plaintiffs should be allowed to further amend so that trial can proceed on all counts.

RESPECTFULLY SUBMITTED this 8 day of September, 2004.


A handwritten signature in black ink, appearing to read 'Clark R. Nielsen', written over a horizontal line.

Clark R. Nielsen
Attorney for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of September, 2004, I served two true and correct copies of the foregoing **BRIEF OF APPELLEES/CROSS-APPELLANTS** by causing the same to be mailed, via U.S. first class mail, postage pre-paid, addressed to the following:

F. Kevin Bond
Budge W. Call
BOND & CALL
311 South State, Suite 410
Salt Lake City, UT 84111



ADDENDA

- A. U.S. Constitution, Amendment I
- B. Utah Code Ann. §§ 78-27-37 and -38 (1999) (Liability Reform Act)
- C. Utah Rule of Civil Procedure 9(b); Utah Rule of Civil Procedure 12(b)(6); Utah Rule of Civil Procedure 17(d); and Utah Rule of Civil Procedure 19
- D. Utah Code Ann. §§ 76-10-601 through -03 and 1605 (1997) (Pattern of Unlawful Activity Act)
- E. Second Amended Complaint
- F. Decision in Regards to Motion to Dismiss
- G. Order on Motion to File Amended Complaint
- H. Verdict
- I. Fourth Proposed Judgment
- J. Order on Motions Regarding Judgment and New Trial
- K. Order Continuing Trial

Tab A

UNITED STATES CONSTITUTION

AMENDMENT I

[Religions and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Tab B

78-27-37. Definitions.

As used in Sections 78-27-37 through 78-27-43:

(1) "Defendant" means a person, other than a person immune from suit as defined in Subsection (3), who is claimed to be liable because of fault to any person seeking recovery.

(2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product.

(3) "Person immune from suit" means:

(a) an employer immune from suit under Title 34A, Chapter 3, Workers' Compensation Act, or Chapter 3a, Utah Occupational Disease Act; and

(b) a governmental entity or governmental employee immune from suit pursuant to Title 63, Chapter 30, Governmental Immunity Act.

(4) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative.

History: C. 1953, 78-27-37, enacted by L. 1986, ch. 199, § 1; 1994, ch. 221, § 2; 1996, ch. 240, § 374; 1999, ch. 95, § 1.

Amendment Notes. — The 1999 amendment, effective May 3, 1999, substituted "comparative" for "contributory" in Subsection (2) and corrected a reference.

Retrospective Operation. — Laws 1999, ch. 95, § 6 makes the 1999 amendment retrospective to March 3, 1998, "for any actions for

which: (1) retrospective operation does not enlarge, eliminate, or destroy a vested right; and (2) a final unappealable judgment or order has not been issued as of the effective date [May 3, 1999], by: (a) the United States Supreme Court; (b) the Utah Supreme Court; (c) the Utah Court of Appeals; (d) the United States Circuit Court of Appeals; (e) the United States District Court; or (f) the Utah district court."

NOTES TO DECISIONS

ANALYSIS

Fault.
Cited.

Fault.

The definition of fault encompasses both neg-

ligent and intentional conduct. *Field v. Boyer Co.*, 952 P.2d 1078 (Utah 1998).

Cited in *Cortez v. University Mall Shopping Ctr.*, 941 F. Supp. 1096 (D. Utah 1996).

78-27-38. Comparative negligence.

(1) The fault of a person seeking recovery shall not alone bar recovery by that person.

(2) A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78-27-39(2).

(3) No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39.

(4) (a) In determining the proportionate fault attributable to each defendant, the fact finder may, and when requested by a party shall, consider the conduct of any person who contributed to the alleged injury regardless of whether the person is a person immune from suit or a defendant in the action and may allocate fault to each person seeking recovery, to each defendant, and to any other person whether joined as a party to the action or not and whose identity is known or unknown to the parties to the action, including a person immune from suit who contributed to the alleged injury. In the case of a motor vehicle accident involving an unidentified

motor vehicle, the existence of the vehicle shall be proven by clear and convincing evidence which may consist solely of one person's testimony.

(b) Any fault allocated to a person immune from suit is considered only to accurately determine the fault of the person seeking recovery and a defendant and may not subject the person immune from suit to any liability, based on the allocation of fault, in this or any other action.

History: C. 1953, 78-27-38, enacted by L. 1986, ch. 199, § 2; 1994, ch. 221, § 3; 1999, ch. 95, § 2.

Amendment Notes. — The 1999 amendment, effective May 3, 1999, in Subsection (4)(a) added the language beginning "other person" and ending "to the action, including a" near the end of the first sentence and added the second sentence.

Retrospective Operation. — Laws 1999, ch. 95, § 6 makes the 1999 amendment retro-

spective to March 3, 1998, "for any actions for which: (1) retrospective operation does not enlarge, eliminate, or destroy a vested right; and (2) a final unappealable judgment or order has not been issued as of the effective date [May 3, 1999], by: (a) the United States Supreme Court; (b) the Utah Supreme Court; (c) the Utah Court of Appeals; (d) the United States Circuit Court of Appeals; (e) the United States District Court; or (f) the Utah district court."

Tab C

Rule 9. Pleading special matters.

(a)(1) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. A party may raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity by specific negative averment, which shall include facts within the pleader's knowledge. If raised as an issue, the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(a)(2) Designation of unknown defendant. When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(a)(3) Actions to quiet title; description of interest of unknown parties. In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may describe such unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

(b) Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) Official document or act. In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) Time and place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special damage. When items of special damage are claimed, they shall be specifically stated.

(h) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

(i) Private statutes; ordinances. In pleading a private statute of this state, or an ordinance of any political subdivision thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

(j) Libel and slander.

(j)(1) Pleading defamatory matter. It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(j)(2) Pleading defense. In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(k) Renew judgment. A complaint alleging failure to pay a judgment shall describe the judgment with particularity or attach a copy of the judgment to the complaint.

Rule 12. Defenses and objections.

(a) When presented. Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state and within thirty days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of defenses. A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) Pleading after denial of a motion. The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) Security for costs of a nonresident plaintiff. When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) Effect of failure to file undertaking. If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.

Rule 17. Parties plaintiff and defendant.

(a) Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Utah. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Minors or incompetent persons. A minor or an insane or incompetent person who is a party must appear either by a general guardian or by a guardian ad litem appointed in the particular case by the court in which the action is pending. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted expedient to represent the minor, insane or incompetent person in the action or proceeding, notwithstanding that the person may have a general guardian and may have appeared by the guardian. In an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown party who might be a minor or an incompetent person.

(c) Guardian ad litem; how appointed. A guardian ad litem appointed by a court must be appointed as follows:

(1) When the minor is plaintiff, upon the application of the minor, if the minor is of the age of fourteen years, or if under that age, upon the application of a relative or friend of the minor.

(2) When the minor is defendant, upon the application of the minor if the minor is of the age of fourteen years and applies within 20 days after the service of the summons, or if under that age or if the minor neglects so to apply, then upon the application of a relative or friend of the minor, or of any other party to the action.

(3) When a minor defendant resides out of this state, the plaintiff, upon motion therefor, shall be entitled to an order designating some suitable person to be guardian ad litem for the minor defendant, unless the defendant or someone in behalf of the defendant within 20 days after service of notice of such motion shall cause to be appointed a guardian for such minor. Service of such notice may be made upon the defendant's general or testamentary guardian located in the defendant's state; if there is none, such notice, together with the summons in the action, shall be served in the manner provided for publication of summons upon such minor, if over fourteen years of age, or, if under fourteen years of age, by such service on the person with whom the minor resides. The guardian ad litem for such nonresident minor defendant shall have 20 days after appointment in which to plead to the action.

(4) When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.

(d) Associates may sue or be sued by common name. When two or more persons associated in any business either as a joint-stock company, a partnership or other association, not a corporation, transact such business under a common name, whether it comprises the names of such associates or not, they may sue or be sued by such common name. Any judgment obtained against the association shall bind the joint property of all the associates in the same manner as if all had been named parties and had been sued upon their joint liability. The separate property of an individual member of the association may not be bound by the judgment unless the member is named as a party and the court acquires jurisdiction over the member.

(e) Action against a nonresident doing business in this state. When a nonresident person is associated in and conducts business within the state of Utah in one or more places in that person's own name or a common trade name, and the business is conducted under the supervision of a manager, superintendent or agent the person may be sued in the person's name in any action arising out of the conduct of the business.

(f) As used in these rules, the term plaintiff shall include a petitioner, and the term defendant shall include a respondent.

ADVISORY COMMITTEE NOTE

Paragraph (d) has been changed to conform to the holding in *Cottonwood Mall Co. v. Sine*, 767 P.2d 499 (Utah 1988), which allows an unincorporated association to sue in its own name. The rule continues to allow an unincorporated association to be sued in its own name. The final sentence of paragraph (d) was added to confirm that the separate property of an individual member of an association may not be bound by the judgment unless the member is made a party.

Technical changes in all paragraphs of the rule make the terminology gender neutral. In part (c) the word "minor" has replaced the word "infant," in order to maintain consistency with recent changes made in Rule 4(e)(2). In Rule 4 an infant is defined as a person under the age of 14 years, whereas the intent of Rule 17(c) is to include persons under the age of 18 years.

Rule 19. Joinder of persons needed for just adjudication.

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by court whenever joinder not feasible. If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading reasons for nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of class actions. This rule is subject to the provisions of Rule 23.

Tab D

76-10-1511. Cumulative and supplemental nature of act.

The provisions of this act shall be cumulative and supplemental to the provisions of any other law of the state. 1979

PART 16**RACKETEERING ENTERPRISES****76-10-1601. Short title.**

This act is the "Pattern of Unlawful Activity Act." 1987

76-10-1602. Definitions.

As used in this part:

(1) "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities.

(2) "Pattern of unlawful activity" means engaging in conduct which constitutes the commission of at least three episodes of unlawful activity, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise. At least one of the episodes comprising a pattern of unlawful activity shall have occurred after July 31, 1981. The most recent act constituting part of a pattern of unlawful activity as defined by this part shall have occurred within five years of the commission of the next preceding act alleged as part of the pattern.

(3) "Person" includes any individual or entity capable of holding a legal or beneficial interest in property, including state, county, and local governmental entities.

(4) "Unlawful activity" means to directly engage in conduct or to solicit, request, command, encourage, or intentionally aid another person to engage in conduct which would constitute any offense described by the following crimes or categories of crimes, or to attempt or conspire to engage in an act which would constitute any of those offenses, regardless of whether the act is in fact charged or indicted by any authority or is classified as a misdemeanor or a felony:

- (a) assault or aggravated assault, Sections 76-5-102 and 76-5-103;
- (b) a threat against life or property, Section 76-5-107;
- (c) criminal homicide, Sections 76-5-201, 76-5-202, and 76-5-203;
- (d) kidnapping or aggravated kidnapping, Sections 76-5-301 and 76-5-302;
- (e) arson or aggravated arson, Sections 76-6-102 and 76-6-103;
- (f) causing a catastrophe, Section 76-6-105;
- (g) burglary or aggravated burglary, Sections 76-6-202 and 76-6-203;
- (h) burglary of a vehicle, Section 76-6-204;
- (i) manufacture or possession of an instrument for burglary or theft, Section 76-6-205;
- (j) robbery or aggravated robbery, Sections 76-6-301 and 76-6-302;
- (k) theft, Section 76-6-404;
- (l) theft by deception, Section 76-6-405;
- (m) theft by extortion, Section 76-6-406;
- (n) receiving stolen property, Section 76-6-408;
- (o) theft of services, Section 76-6-409;
- (p) forgery, Section 76-6-501;

(q) fraudulent use of a credit card, Sections 76-6-506.1, 76-6-506.2, and 76-6-506.4;

(r) computer fraud, Title 76, Chapter 6, Part 7;

(s) bribery or receiving bribe by person in the business of selection, appraisal, or criticism of goods, Section 76-6-508;

(t) bribery of a labor official, Section 76-6-509;

(u) defrauding creditors, Section 76-6-511;

(v) acceptance of deposit by insolvent financial institution, Section 76-6-512;

(w) unlawful dealing with property by fiduciary, Section 76-6-513;

(x) bribery or threat to influence contest, Section 76-6-514;

(y) making a false credit report, Section 76-6-517;

(z) criminal simulation, Section 76-6-518;

(aa) criminal usury, Section 76-6-520;

(bb) false or fraudulent insurance claim, Section 76-6-521;

(cc) sale of a child, Section 76-7-203;

(dd) bribery to influence official or political actions, Section 76-8-103;

(ee) threats to influence official or political action, Section 76-8-104;

(ff) receiving bribe or bribery by public servant, Section 76-8-105;

(gg) receiving bribe or bribery for endorsement of person as public servant, Section 76-8-106;

(hh) official misconduct, Sections 76-8-201 and 76-8-202;

(ii) obstructing justice, Section 76-8-306;

(jj) acceptance of bribe or bribery to prevent criminal prosecution, Section 76-8-308;

(kk) false or inconsistent material statements, Section 76-8-502;

(ll) false or inconsistent statements, Section 76-8-503;

(mm) written false statements, Section 76-8-504;

(nn) tampering with a witness, retaliation against a witness or informant, or bribery, Section 76-8-508;

(oo) extortion or bribery to dismiss criminal proceeding, Section 76-8-509;

(pp) tampering with evidence, Section 76-8-510;

(qq) intentionally or knowingly causing one animal to fight with another, Subsection 76-9-301(1)(f);

(rr) delivery to common carrier, mailing, or placement on premises of an incendiary device, Section 76-10-307;

(ss) construction or possession of an incendiary device, Section 76-10-308;

(tt) possession of a deadly weapon with intent to assault, Section 76-10-507;

(uu) unlawful marking of pistol or revolver, Section 76-10-521;

(vv) alteration of number or mark on pistol or revolver, Section 76-10-522;

(ww) forging or counterfeiting trademarks, trade name, or trade device, Section 76-10-1002;

(xx) selling goods under counterfeited trademark, trade name, or trade devices, Section 76-10-1003;

(yy) sales in containers bearing registered trademark of substituted articles, Section 76-10-1004;

(zz) selling or dealing with article bearing registered trademark or service mark with intent to defraud, Section 76-10-1006;

(aaa) gambling, Section 76-10-1102;

(bbb) gambling fraud, Section 76-10-1103;

(ccc) gambling promotion, Section 76-10-1104;

(ddd) possessing a gambling device or record, Section 76-10-1105;
 (eee) confidence game, Section 76-10-1109;
 (fff) distributing pornographic material, Section 76-10-1204;
 (ggg) inducing acceptance of pornographic material, Section 76-10-1205;
 (hhh) dealing in harmful material to a minor, Section 76-10-1206;
 (iii) distribution of pornographic films, Section 76-10-1222;
 (jjj) indecent public displays, Section 76-10-1228;
 (kkk) prostitution, Section 76-10-1302;
 (lll) aiding prostitution, Section 76-10-1304;
 (mmm) exploiting prostitution, Section 76-10-1305;
 (nnn) aggravated exploitation of prostitution, Section 76-10-1306;
 (ooo) sexual exploitation of a minor, Section 76-5a-3;
 (ppp) communications fraud, Section 76-10-1801;
 (qqq) any act prohibited by the criminal provisions of Title 58, Chapter 37, Utah Controlled Substances Act, or Title 58, Chapter 37b, Imitation Controlled Substances Act, or Title 58, Chapter 37c, Utah Controlled Substance Precursor Act;
 (rrr) any act prohibited by the criminal provisions of Title 61, Chapter 1, Utah Uniform Securities Act;
 (sss) any act prohibited by the criminal provisions of Title 57, Chapter 11, Utah Uniform Land Sales Practices Act;
 (ttt) false claims for public assistance under Section 35A-1-502, 76-8-1203, 76-8-1204, or 76-8-1205;
 (uuu) any act prohibited by the criminal provisions of Title 63, Chapter 56, Utah Procurement Code;
 (vvv) any act prohibited by the criminal provisions of the laws governing taxation in this state;
 (www) any act prohibited by the criminal provisions of Title 32A, Chapter 12, Criminal Offenses;
 (xxx) any act prohibited by the criminal provisions of Title 13, Chapter 10, Unauthorized Recording Practices Act;
 (yyy) deceptive business practices, Section 76-6-507;
 (zzz) any act prohibited by the criminal provisions of Title 76, Chapter 10, Part 19, Money Laundering and Currency Transaction Reporting Act;
 (aaaa) any act illegal under the laws of the United States and enumerated in Title 18, Section 1961 (1)(B), (C), and (D) of the United States Code;
 (bbbb) any act prohibited by the criminal provisions of Title 19, Environmental Quality Code, Sections 19-1-101 through 19-7-109;
 (cccc) taking, destroying, or possessing wildlife or parts of wildlife for the primary purpose of sale, trade, or other pecuniary gain, in violation of Title 23, Chapter 13, or Section 23-20-4; and
 (dddd) false claims for medical benefits, kickbacks, and any other act prohibited by False Claims Act, Sections 26-20-1 through 26-20-12.

1997

(2) It is unlawful for any person through a pattern of unlawful activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.

(3) It is unlawful for any person employed by or associated with any enterprise to conduct or participate, whether directly or indirectly, in the conduct of that enterprise's affairs through a pattern of unlawful activity.

(4) It is unlawful for any person to conspire to violate any provision of Subsection (1), (2), or (3).

1997

76-10-1603. Unlawful acts.

(1) It is unlawful for any person who has received any proceeds derived, whether directly or indirectly, from a pattern of unlawful activity in which the person has participated as a principal, to use or invest, directly or indirectly, any part of that income, or the proceeds of the income, or the proceeds derived from the investment or use of those proceeds, in the acquisition of any interest in, or the establishment or operation of, any enterprise.

76-10-1605. Remedies of person injured by a pattern of unlawful activity — Double damages — Costs, including attorney's fee — Arbitration — Agency — Burden of proof — Actions by attorney general, county attorney, or district attorney — Dismissal — Statute of limitations — Authorized orders of district court.

(1) A person injured in his person, business, or property by a person engaged in conduct forbidden by any provision of Section 76-10-1603 may sue in an appropriate district court and recover twice the damages he sustains, regardless of whether:

(a) the injury is separate or distinct from the injury suffered as a result of the acts or conduct constituting the pattern of unlawful conduct alleged as part of the cause of action; or

(b) the conduct has been adjudged criminal by any court of the state or of the United States.

(2) A party who prevails on a cause of action brought under this section recovers the cost of the suit, including a reasonable attorney's fee.

(3) All actions arising under this section which are grounded in fraud are subject to arbitration under Title 78, Chapter 31a.

(4) In all actions under this section, a principal is liable for actual damages for harm caused by an agent acting within the scope of either his employment or apparent authority. A principal is liable for double damages only if the pattern of unlawful activity alleged and proven as part of the cause of action was authorized, solicited, requested, commanded, undertaken, performed, or recklessly tolerated by the board of directors or a high managerial agent acting within the scope of his employment.

(5) In all actions arising under this section, the burden of proof is clear and convincing evidence.

(6) The attorney general, county attorney, or, if within a prosecution district, the district attorney may maintain actions under this section on behalf of the state, the county, or any person injured by a person engaged in conduct forbidden by any provision of Section 76-10-1603, to prevent, restrain, or remedy injury as defined in this section and may recover the damages and costs allowed by this section.

(7) In all actions under this section, the elements of each claim or cause of action shall be stated with particularity against each defendant.

(8) If an action, claim, or counterclaim brought or asserted by a private party under this section is dismissed prior to trial or disposed of on summary judgment, or if it is determined at trial that there is no liability, the prevailing party shall recover from the party who brought the action or asserted the claim or counterclaim the amount of its reasonable expenses incurred because of the defense against the action, claim, or counterclaim, including a reasonable attorney's fee.

(9) An action or proceeding brought under this section shall be commenced within three years after the conduct prohibited by Section 76-10-1603 terminates or the cause of action accrues, whichever is later. This provision supersedes any limitation to the contrary.

(10) (a) In any action brought under this section, the district court has jurisdiction to prevent, restrain, or remedy injury as defined by this section by issuing appropriate orders after making provisions for the rights of innocent persons.

(b) Before liability is determined in any action brought under this section, the district court may:

(i) issue restraining orders and injunctions;

(ii) require satisfactory performance bonds or any other bond it considers appropriate and necessary in

connection with any property or any requirement imposed upon a party by the court; and

(iii) enter any other order the court considers necessary and proper.

(c) After a determination of liability, the district court may, in addition to granting the relief allowed in Subsection (1), do any one or all of the following:

(i) order any person to divest himself of any interest in or any control, direct or indirect, of any enterprise;

(ii) impose reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, to the extent the Utah Constitution and the Constitution of the United States permit; or

(iii) order the dissolution or reorganization of any enterprise.

(d) However, if an action is brought to obtain any relief provided by this section, and if the conduct prohibited by Section 76-10-1603 has for its pattern of unlawful activity acts or conduct illegal under Section 76-10-1204, 76-10-1205, 76-10-1206, or 76-10-1222, the court may not enter any order that would amount to a prior restraint on the exercise of an affected party's rights under the First Amendment to the Constitution of the United States, or Article I, Sec. 15 of the Utah Constitution. The court shall, upon the request of any affected party, and upon the notice to all parties, prior to the issuance of any order provided for in this subsection, and at any later time, hold hearings as necessary to determine whether any materials at issue are obscene or pornographic and to determine if there is probable cause to believe that any act or conduct alleged violates Section 76-10-1204, 76-10-1205, 76-10-1206, or 76-10-1222. In making its findings the court shall be guided by the same considerations required of a court making similar findings in criminal cases brought under Section 76-10-1204, 76-10-1205, 76-10-1206, or 76-10-1222, including, but not limited to, the definitions in Sections 76-10-1201, 76-10-1203, and 76-10-1216, and the exemptions in Section 76-10-1226. 1993

76-10-1606. Repealed.

1987

76-10-1607. Evidentiary value of criminal judgment in civil proceeding.

A final judgment or decree rendered in favor of the state or a county in any criminal proceeding brought by this state or a county shall preclude the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding. 1981

76-10-1608. Severability clause.

If any part or application of the Utah Pattern of Unlawful Activity Act is held invalid, the remainder of this part, or its application to other situations or persons, is not affected. 1987

76-10-1609. Prospective application.

The amendments to the Utah Pattern of Unlawful Activity Act are prospective in nature and apply only to civil causes of action accruing after the effective date of this act. However, crimes committed prior to the effective date of this act may comprise part of a pattern of unlawful activity if at least one of the criminal episodes comprising that pattern occurs after the effective date of this act and the pattern otherwise meets the definition of pattern of unlawful activity as defined in Section 76-10-1602. 1987

Tab E

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
SANPETE COUNTY, STATE OF UTAH

KAZIAH MAY HANCOCK and)	
CINDY STEWART,)	
)	
Plaintiffs,)	
)	
vs.)	SECOND
)	AMENDED COMPLAINT
THE TRUE AND LIVING CHURCH)	
OF JESUS CHRIST OF THE SAINTS)	
OF THE LAST DAYS,)	
JAMES D. HARMSTON, WILLIAM)	
B. LITHGOW, KEITH LARSON,)	
DANIEL (DAN) SIMMONS, KAY)	
CRABTREE, JEFF HANKS,)	
BART MULSTROM, JOHN HARPER,)	
and JOHN DOE'S NOS. 1 TO 5,)	Civil No. 980600126
)	
Defendants.)	

COMES NOW Don S. Redd, Attorney for and in behalf of Plaintiffs, Kaziah May Hancock (hereinafter "Ms. Hancock") and Cindy Stewart (hereinafter "Ms. Stewart") and Complains and alleges as follows:

JURISDICTION AND PARTIES

1. (a) That plaintiffs are individuals residing in Sanpete County, State of Utah.
- (b) Defendant "The True and Living Church of Jesus Christ of the Saints of the Last Days is an unincorporated entity headquartered in Sanpete County, State of Utah.
- (c) Defendant James D. Harmston ("Mr. Harmston") is an individual residing in

Sanpete County, State of Utah.

(d) Defendant William B. Lithgow is an individual who was residing in Sanpete County, State of Utah at the time of these causes of action.

(e) Defendant Keith Larson is an individual residing in Sanpete County, State of Utah.

(f) Defendant Daniel Simmons is an individual residing in Sanpete County, State of Utah.

(g) Defendant Kay Crabtree is an individual who was residing in Sanpete County, State of Utah at the time of these causes of action.

(h) Defendant Jeff Hanks is an individual who was residing in Sanpete County, State of Utah at the time of these causes of action.

2. James D. Harmston is the founder and ultimate leader of the True and Living Church of Jesus Christ of The Saints of the Last Days. (hereinafter "the TLC")

3. Mr. Harmston is also the head of an organization referred to as "The Church of the Firstborn."

4. On or about November of 1993 Ms. Hancock became affiliated with the True and Living Church of Jesus Christ of The Saints of the Last Days.

5. On or about April 11, 1995 Ms. Stewart became affiliated with the True and Living Church of Jesus Christ of The Saints of the Last Days.

FIRST CAUSE OF ACTION
(BREACH OF CONTRACT -- all defendants)

6. In support of her First Cause of Action, Plaintiffs re-allege each and every allegation contained in paragraphs #1 through #5 of this Complaint as if fully set forth herein.

7. After becoming affiliated with the TLC the Plaintiff's were induced by Mr. Harmston and his religious subordinates to liquidate their assets and place them into the control of the Defendants.

8. On or about March 25, 1996 the Plaintiff, Kaziah May Hancock, met with the

"Bishopric" of the TLC, Keith Larson, Kay Crabtree, and Kent Braddy, to establish a stewardship for her in exchange for her contribution of money and time to the TLC.

9. In exchange for money, goods, and services to be given by the Plaintiff, Kaziah May Hancock, to the Defendants the Plaintiff was assured and promised by the TLC and/or its representatives that she would receive back a "stewardship" of property and support in exchange for the funds she "consecrated" to the TLC.

10. As a further inducement for the Plaintiff to "consecrate" her wealth over to the Defendants, Plaintiff was promised by Mr. Harmston that they would become members of The Church of the Firstborn and would meet Christ face to face.

Cindy Stewart liquidated her entire retirement savings at the insistence of Mr. Harmston and turned all the funds over to him for the use of the TLC.

Harmston and other acting as TLC officers promised Cindy Stewart full repayment of her money plus payment of all her costs and losses for early withdrawal of her retirement funds.

11. Kaziah May Hancock did deliver money, goods and services to the Defendants after this time and continued to do so until Ms. Stewart was excommunicated in or about May 1997 and Ms. Hancock was asked to leave in or about August 1997.

12. Plaintiff, Kaziah May Hancock, never received a "stewardship" of any kind as promised.

13. Plaintiff, Kaziah May Hancock, never met Christ face to face as promised.

14. Plaintiff, Cindy Stewart was never repaid her retirement or the costs and penalties she incurred for the early withdrawal.

SECOND CAUSE OF ACTION
(FRAUD/CONSTRUCTIVE FRAUD/NEGLIGENT
MISREPRESENTATION - all defendants)

15. In support of their Second Cause of Action, Plaintiffs re-allege each and every allegation contained in paragraphs #1 through #14 of this Complaint as if fully set forth herein.

16. By appealing to the Plaintiffs deepest spiritual needs and commitments, Mr.

Harmston, along with other Defendants, persuaded the Plaintiffs that Mr. Harmston was the sole spokesman on earth for God and thus gained the confidence of the Plaintiffs.

17. After gaining a superior position of confidence with the Plaintiffs, Mr. Harmston and other Defendants took unfair advantage of that position by persuading the Plaintiffs that they must turn over their wealth to the Defendants.

18. Promises were made by many of the Defendants, including Mr. Harmston, acting in his own person and as an agent of the TLC to Ms. Hancock that if she sold her ranch in Indianola and consecrated her assets to the TLC, she would receive back a "stewardship," or a place where she could continue to raise her animals.

19. Promises were made by Mr. Harmston, acting in his own person and as an agent of the TLC, to Ms. Stewart that if she liquidated her IRA account and consecrate the monies from the account to him he would repay her and pay any tax liability she would incur for early withdrawal.

20. Mr. Harmston, acting in his own person and as an agent of the TLC, also promised Ms. Stewart that she shouldn't be concerned about giving up her IRA account because he and/or the TLC would always take care of her.

21. Mr. Harmston, along with other officers of the TLC:

- (i) made representations to the Plaintiffs promising future performance;
- (ii) the statements of future performance was false;
- (iii) the false statements of future performance was material;
- (iv) the Defendants either knew that the statements of future performance made to the Plaintiffs were false or were ignorant of their truth;
- (v) the Defendants intended that the Plaintiffs would act upon the false statements and in the manner reasonably contemplated;
- (vi) the Plaintiffs were ignorant of the falsity of the statements of future performance made to them by the Defendants;
- (vii) the Plaintiffs relied on the false statements of future performance made to them by the Defendants;
- (viii) The Plaintiffs had a right to rely on the statements of future performance to be true;

(ix) The Plaintiffs turned over their property and means to Mr. Harmston and/or the TLC and consequently suffered the loss and conversion of nearly all their assets.

22. Plaintiffs allege that the above actions were intentional on the part of Mr. Harmston acting in his own person and/or as an agent of the TLC, and some of the Defendants, and constitute **actual fraud**; or the above actions were unintentional on the part of the Defendants and constitute **constructive fraud** and/or **negligent misrepresentation**.

23. Failure to perform on a future promise constitutes a **false statement** under the circumstances required by law and/or equity as follows:

- (i) the promisor(s) had a pecuniary interest in the transaction; [*Galloway v. AFCO Development Corp.* 777 P.2d 506 (Utah App 1989)].
- (ii) the promisor(s) had control over whether or not the promise was fulfilled; ["Statements ... relating to future events may be actionable ... where the future event is full within the declarant's control." 37 C.J.S. 14(b) (Fraud); also *Logan Equipment Co. v. Simon Aerials, Inc.*, 736 F.Supp. 1188. "Generally, redress may be had ... for an unfulfilled promise to perform in the future made with the undisclosed intention not to perform, or without the intention to perform, and for the purpose of inducing action." 37 C.J.S. 15 (Fraud)].
- (iii) the promise has a fiduciary, confidential, or superior relationship with the promisee; ["Where a relation of trust and confidence exists between two parties, so that one of them places peculiar reliance in the other's trustworthiness, the latter is liable for representations as to future conduct, and not merely as to past facts." 37 C.J.S. 14(b) (Fraud); also *Southern Mortg. Co. v. O'Dom*, 699 F.Supp 1227; *Stewart v. Phoenix Nat. Bank*, 64 P .2d 101, 49 Ariz. 34; *Edmunds v. Valley Circle Estates*, 2 Dist., 20 Cal.Rptr.2d 701, 16 C.A. 4 1290].

Plaintiff alleges that some or all three of the above exceptions existed in their relationships and dealings with the Defendants.

THIRD CAUSE OF ACTION
(FRAUDULENT CONVERSION or in the alternative UNJUST
ENRICHMENT/IMPLIED CONTRACT -- all defendants)

24. In support of their Third Cause of Action, Plaintiffs re-allege each and every allegation contained in paragraphs #1 through #23 of this Complaint as if fully set forth herein.

25. Defendants have acquired about two hundred fifty thousand dollars (\$250,000.00) of money, services, or property from Ms. Hancock, and fifteen thousand seven hundred sixty-six dollars (\$15,766.00) from Ms. Stewart by fraudulent conversion and/or unjust enrichment. The bulk of Ms. Stewart's money represented a retirement account awarded her in a divorce settlement and constituted nearly all of her assets.

26. Defendants have breached an implied contract with Plaintiffs by refusing to provide valuable consideration, as promised, in the full amount of money, services, or property taken by the Defendants.

27. By receiving or taking money, services, or property from Plaintiffs without providing equal value in return, Defendant's have been unjustly enriched to Plaintiffs detriment.

28. As a result of Defendants unjust enrichment, Ms. Hancock have been damaged in the amount of two hundred fifty thousand dollars (\$250,000.00); and Ms. Stewart has been damaged in the amount of fifteen thousand seven hundred sixty-six dollars (\$15,766.00), plus pre-judgment interest accruing since the time of the conversion of their money as permitted by Utah Code Annotated 1953 (hereinafter "U.C.A.")15-1-1(2).

FOURTH CAUSE OF ACTION
(RACKETEERING -- all defendants)

29. In support of their Fourth Cause of Action, Plaintiffs re-alleges each and every allegation contained in paragraphs #1 through #28 of this Complaint as if fully set forth herein.

30. Plaintiffs allege that the TLC qualifies as a racketeering enterprise under the Utah Criminal Code "Pattern of Unlawful Activity Act" U.C.A. 76-10-1601 et. seq. Defendants

affiliated with the TLC have committed at least three acts in violation of the "Pattern of Unlawful Activity Act." Defendants violations are stated in particularity as follows:

(a) James D. Harmston and each other Defendant in conjunction with their leadership positions in the TLC and "The Church of the Firstborn", has violated the Utah Criminal Code "Pattern of Unlawful Activity Act" U.C.A. 76-10-1601 et. seq. They have engaged in unlawful activity. Some of these unlawful activities are including, but not limited to: Theft by Deception, U.C.A. 76-6-405; Theft of Services, U.C.A. 76-6-409; Unlawful Dealing with Property by Fiduciary, U.C.A. 76-6-513; Communications Fraud, U.C.A. 76-10-1801, either directly or did aid and abet other Defendant's by some or all of the above actions.

**FIFTH CAUSE OF ACTION
(INTENTIONAL INFLICTION OF EMOTIONAL
HARM -- all defendants)**

31. In support of their Fifth Cause of Action, Plaintiffs re-allege each and every allegation contained in paragraphs #1 through #30 of this Complaint as if fully set forth herein.

32. Plaintiffs have suffered great mental anguish and pain as a result of the loss from their life savings effected by the conversion their money by the Defendants.

33. The actions of the Defendants named in this Complaint have significantly harmed and damaged the Plaintiffs.

WHEREFORE Plaintiffs pray for judgment against the Defendants individually and severally and in their favor as follows:

1. An award of two hundred fifty thousand dollars (\$250,000.00) representing the actual value of money, goods, and services fraudulently converted from Ms. Hancock to the Defendant's use; and an award of fifteen thousand seven hundred sixty-six dollars (\$15,766.00) representing the actual value of money received from Ms. Stewart by fraudulent conversion.

2. An award of interest accruing at ten percent per annum on the amount of money converted from the Plaintiffs to the Defendant's use as allowed by Utah Code Annotated 15-1-1

since the date of the conversion.

3. An award of damages as allowed as a civil penalty by Utah's "Pattern of Unlawful Activity Act," Utah Code Annotated 76-10-1605 et. seq. equal to double the total amount of Plaintiffs actual damages in the loss of their principle plus accrued interest, and costs of litigation including reasonable attorney fees.

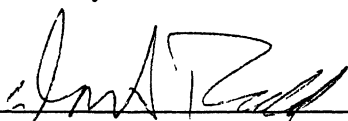
4. An award of punitive damages as allowed by, and in keeping with, Utah Code Annotated 78-18-1 et. seq. in the amount of treble the total amount of Plaintiffs actual damages in the loss of their principle plus accrued interest.

5. An award of two hundred fifty thousand (\$250,000.00) for the mental anguish suffered by Cindy Stewart and Ms. Hancock which represents the amount of the funds taken from her; and as award of fifteen thousand seven hundred sixty-six dollars (\$15,766.00) for the mental anguish suffered by Ms. Stewart which represents the amount of the funds taken from her.

6. An award of attorney's fees and costs.

7. And such other relief as the court deems appropriate.

RESPECTFULLY SUBMITTED this 19 day of February 2003.



DON S. REDD, Attorney for Plaintiffs,
44 North Main
Layton, Utah 84041

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Amended Complaint was mailed on the 19 day of February 2003 by depositing same in the U.S. Mail to the following:

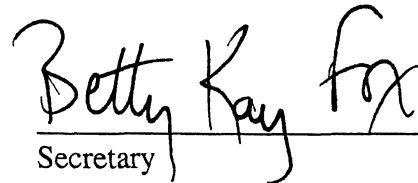
John H. Jacobs
Attorney for Crabtree
75 N. Center St.
American Fork, UT 84003

F. Kevin Bond
Budge W. Call
Mark S. Middlemas
Attorneys for Defendants
311 S. State Suite 410
Salt Lake City, UT 84111

Keith Larson
111 West Center
Snowflake, AZ 85937

Clark R. Nielsen
Attorney at Law
68 S. Main St., Suite 600
Salt Lake City, UT 84101

William Lithgow
37550 Pine Knoll Ave
Palm Desert, CA 92211


Secretary

Tab F

DISTRICT COURT, SANPETE COUNTY, UTAH
160 North Main
Manti, Utah 84642
Telephone: 435-835-2131 Fax: 435-835-2135

KAZIAH MAY HANCOCK, and CINDY
STEWART,

Plaintiffs,

vs.

THE TRUE AND LIVING CHURCH OF
JESUS CHRIST OF SAINTS OF THE LAST
DAYS, JAMES D. HARMSTON, WILLIAM
B. LITHGOW, KEITH LARSON, DANIEL
(DAN) SIMMONS, KAY CRABTREE,
KENT BRADDY, JEFF HANKS, BART
MUSTROM, JOHN HARPER and JOHN
DOES NOS. 1-5,

Defendants.

**DECISION IN REGARDS TO
MOTION TO DISMISS**

Case No. 980600126

Assigned Judge: DAVID L. MOWER

A portion of this case is presently at issue and ready for a decision. The issue is raised by the combination of the Amended Complaint and a Motion to Dismiss.

The Amended Complaint was filed on March 10, 1999. The Motion to Dismiss was filed on March 14, 2003 by Attorney Kevin Bond on behalf of the defendants represented by him.

INTRODUCTION

The analytical method to be used is this: Assume that the complaint is true and then analyze its claims to see if any are deficient.

ANALYSIS

The Amended Complaint contains five separate claims or causes of action. I intend to analyze each one separately.

Part One - First Cause of Action

"BREACH OF CONTRACT-ALL DEFENDANTS." The analytical method I prefer to use is to search for the verbs in the language of the document. This helps me focus in on the most relevant language of the claim. This method has led me to the following language which is quoted directly from paragraphs 9, 11, and 12 of the Amended Complaint. I believe that this language is the essence of the claim in the first cause of action.

Plaintiffs **were ... promised** by the [defendants] that they would receive ... a "stewardship" of property or support

Plaintiffs **did deliver** money, goods, and services

Plaintiffs **never received** a "stewardship"

There are two types of defendants in this case, individuals and organizations. Two organizations are referred to by name in the Amended Complaint. One of those is "The True and Living Church of Jesus Christ of The Saints of the Last Days." The other is "The Church of the Firstborn."

The Amended Complaint contains several instances of words in quotation marks. I will list them here.

"the TLC"

"Bishopric"
"stewardship"
"consecrate"
"consecrated"

Sometimes an author uses quotation marks to signify words with special or unique meaning based on circumstances or relationships. That could certainly be true in this case. However, the drafter of the Amended Complaint has not explained the reason for placing certain words in quotation marks. I will use the common dictionary definitions for these words.

Here are two of those definitions:

Stewardship

Pronunciation: 'stüü-&rd-"ship, 'styüü-; 'st(y)u(-&)rd-

Function: **noun**

Date: 15th century

1 : the office, duties, and obligations of a steward

2 : the conducting, supervising, or managing of something;
especially : the careful and responsible management of something
entrusted to one's care <stewardship of our natural resources>

Steward

Pronunciation: 'stüü-&rd, 'styüü-; 'st(y)u(-&)rd

Function: **noun**

Etymology: Middle English, from Old English stIweard, from stI,
stig hall, sty + weard ward -- more at STY, WARD

Date: before 12th century

1 : one employed in a large household or estate to manage
domestic concerns (as the supervision of servants, collection of
rents, and keeping of accounts)

2 : SHOP STEWARD

3 : a fiscal agent

4 a : an employee on a ship, airplane, bus, or train who manages
the provisioning of food and attends passengers b : one appointed

to supervise the provision and distribution of food and drink in an institution

5 : one who actively directs affairs : MANAGER
Merriam-Webster On-Line Dictionary (www.m-w.com)

Since a stewardship is a noun then it is a thing. One may wonder if the right to manage someone else's property is a thing of value. However, the analysis here is not concerned with value, only with whether or not a claim is stated. Here we have this claim: I was promised one thing in exchange for another. I gave but didn't receive. I am entitled.

My conclusion is that a claim is stated.

Part Two - Second Cause of Action

"FRAUD/CONSTRUCTIVE FRAUD/NEGLIGENT MISREPRESENTATION - all defendants."

Part 2.a. - Second Cause of Action - Fraud

The words "fraud" and "particularity" have become linked by the jurisprudence of our state. For example, see P36 of *Franco v. The Church of Jesus Christ of Latter-Day Saints and Others*, 21 P.3d 200, Utah Supreme Court, 2001. I refer specifically to this sentence: "We have stressed, and continue to hold, that mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude ... summary judgment."

As I read the text of this cause of action I looked for information about particular dates, times, places, names of people, words ~~that were spoken~~. I found none. Hence the cause of action is deficient and should be dismissed.

Part 2.b. Second Cause of Action - Constructive Fraud

Constructive Fraud must also be plead with particularity. The complaint is lacking in particulars about times, places, names of people, words that were spoken. This cause of action is deficient and should be dismissed.

Part 2.c. - Second Cause of Action - Negligent Misrepresentation

This cause of action is plead as an alternative to Constructive Fraud. ~~It should~~ contain the same specific information as the fraud claims. Since it does not it is deficient and should be dismissed.

Part Three - Third Cause of Action

"FRAUDULENT CONVERSION or in the alternative UNJUST ENRICHMENT/IMPLIED CONTRACT-all Defendants."

The special words from this cause or action are:

Defendants have acquired ... money ... by fraudulent conversion and/or [sic] unjust enrichment.

Defendants have breached an implied contract ... by refusing to provide ... valuable consideration, as promised in the full amount... .

... Defendants have been unjustly enriched.

This cause of action is essentially the same as the first cause since its resolution depends on the value of a stewardship. The Third Cause of Action does state a claim and will not be dismissed.

Part Four - Fourth Cause of Action

“RACKETEERING – all Defendants.”

Private, civil lawsuits are authorized for violation of Utah’s Racketeering Enterprises Act. The authorization is found in Section 76-10-1605(1), Utah Code.

The same statute requires that the elements of each claim be stated with particularity. See Section 76-10-1605(7).

There is nothing in the fourth cause of action that refers to particular dates, times, places, people, words or actions. Hence, this cause of action is deficient and should be dismissed.

Part Five - Fifth Cause of Action

“INTENTIONAL INFLICTION OF EMOTIONAL HARM – All Defendants.”


A required element of this tort relates to intent. More specifically, the element relates to the defendants’ intent. The element is that the defendant “ ... intended to cause, or acted in reckless disregard of the likelihood of causing, emotional distress” *Retherford v. AT&T Communications of the Mountain States, Inc.*, 844 P.2d 949, 970-971 (Utah Supreme Court 1992).

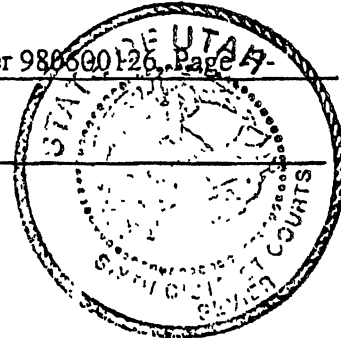
The Complaint is silent as to this element. Hence it is deficient, and the cause of action should be dismissed.

Mr. Bond is appointed to draft an appropriate order and to submit it for execution by following the procedure set forth in Rule 4-504.

DECISION IN REGARDS TO MOTION TO DISMISS, Case number 980600126, Page 4-

Date 7 Aug, 2003


David L. Mower
District Court Judge



CERTIFICATE OF SERVICE

On August 7, 2003 a copy of this DECISION IN REGARDS TO MOTION TO DISMISS was sent by M=first- class mail, P=Clerk's office pickup box, F=Fax to:

Addressee

F. Kevin Bond
Budge W. Call
311 S. State, Suite 450
Salt Lake City, UT 84111

Method

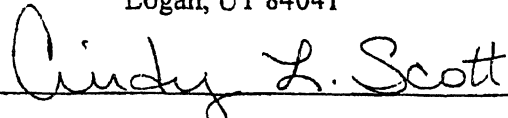
M

Addressee

Don S. Redd
Clark R. Nielsen
44 North Main
Logan, UT 84041

Method

M


Cindy L. Scott

Tab G

DISTRICT COURT, SANPETE COUNTY, UTAH

160 North Main
Manti, Utah 84642

Telephone: 435-835-2131 Fax: 435-835-2135

KAZIAH MAY HANCOCK, and CINDY
STEWART,

Plaintiff,

vs.

THE TRUE AND LIVING CHURCH OF
JESUS CHRIST OF SAINTS OF THE LAST
DAYS, et al.,

Defendant.

**ORDER ON MOTION TO FILE
AMENDED COMPLAINT**

Case No. 980600126

Assigned Judge: DAVID L. MOWER

The Plaintiff's have made a motion to file an amended complaint. It was accompanied by a proposed pleading entitled Third Amended Complaint. There have been memoranda filed in opposition to the motion, and it is now ripe and ready for decision.

DECISION

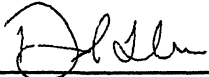
The motion should be denied.

ANALYSIS

The motion is not timely. Were it to be granted, it would require the fact finder to judge church doctrine which is not allowed. Were it to be allowed, it alleges actions by Ivan Douglas Jordan, who is not a party to this action, and complete relief could not be afforded. Mr. Call is

appointed to draft an appropriate order and submit it for execution by following the procedures set forth in Rule 4-504 CJA.

Date 16 OCT, 2003

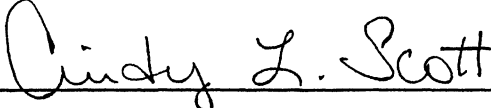


David L. Mower
District Court Judge

Certificate of Notification

On Oct. 16th, 2003, a copy of the above was sent to:

Name	Address
Don S. Redd Attorney at Law	44 N. Main Layton, Utah 84041
John H. Jacobs Attorney for Crabtree	75 N. Center St. American Fork, Utah 84003
F. Kevin Bond Budge W. Call Mark S. Middlemas	311 S. State, Suite 410 Salt Lake City, Utah 84111
Clark R. Nielsen	68 S. Main St., Suite 600 Salt Lake City, Utah 84101
William Lithgow	37550 Pine Knoll Ave. Palm Desert, CA 92211
Keith Larson	524 W. Juniper Snowflake, AZ 85937

x 

Tab H

FILED
SANPETE COUNTY
2002 JAN 28 PM 2 49

BY Slattery DEPUTY

DISTRICT COURT, SANPETE COUNTY, UTAH

160 North Main Street
Manti, UTAH 84642
Telephone: 435-835-2131 Fax: 435-835-2135

KAZIAH MAY HANCOCK and CINDY
STEWART,

Plaintiff's,

vs.

THE TRUE AND LIVING CHURCH OF JESUS
CHRIST OF THE SAINTS OF THE LAST
DAYS, JAMES D. HARMSTON, WILLIAM B.
LITHGOW, KEITH LARSON, DANIEL (DAN)
SIMMONS, KAY CRABTREE, KENT
BRADDY, PHILLIP P. SAVAGE, JEFF HANKS,
AND JOHN DOES 1-5

Defendant's.

VERDICT

Case No. 980600126

Assigned Judge: DAVID L. MOWER

The jury has made a decision.

1. There was a breach of contract by at least one of the defendants. ☒ Yes ☐ No (If
you answered "No," skip to question 3.)
2. The Court should order the defendants to pay because of the breach of contract.

A. To Cindy Stewart \$ 1748.34

B. To Kaziah May Hancock \$ 131,750.00

3. There was fraud or misrepresentation by at least one defendant. ☒ Yes ☐ No (If you answered "No," skip to question 5.)

4. The Court should order the defendants to pay because of the fraud or misrepresentation.

A. To Cindy Stewart \$ 12,077.02

B. To Kaziah May Hancock \$ 131,750.00

5. At least one defendant was unjustly enriched. ☐ Yes ☒ No (If you answered "No," skip to question 7.)

6. How much money should the Court order the defendants to pay because of unjust enrichment?

A. To Cindy Stewart \$ _____

B. To Kaziah May Hancock \$ _____

7. At least one defendant engaged in racketeering. _____ Yes ☒ No (If you answered "No," skip to question 9.)

8. How much money should the Court order the defendants to pay because of the racketeering?

A. To Cindy Stewart \$ _____

B. To Kaziah May Hancock \$ _____

9. There was intentional infliction of emotional distress by at least one defendant.
☒ Yes _____ No (If you answered "No," then your work is finished. Have the Jury Chair sign this Verdict and then notify the bailiff that you are ready to return to Court.)

10. How much money should the Court order the defendants to pay because of the intentional infliction of emotional distress?

A. To Cindy Stewart \$ 6,500.00

B. To Kaziah May Hancock \$ 6,500.00

Signed on Jan 28, 2002

X

Dent Kendall
Jury Chair

Tab I

DON S. REDD #2705
Attorney at Law
44 North Main
Layton, Utah 84041
Telephone: (801) 546-1264

2002 JAN 5 PM 9 17

BY _____ DEPUTY

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
SANPETE COUNTY, STATE OF UTAH

KAZIAH MAY HANCOCK, and)	
CINDY STEWART,)	
Plaintiffs,)	FOURTH PROPOSED JUDGMENT
vs.)	
)	
THE TRUE AND LIVING CHURCH)	Civil No. 980600126
OF JESUS CHRIST OF SAINTS OF)	
THE LAST DAYS, JAMES D.)	
HARMSTON, WILLIAM B. LITHGOW,)	Judge David L. Mower
KEITH LARSON, DANIEL (DAN))	
SIMMONS, KAY CRABTREE, AND)	
KENT BRADDY,)	
)	
Defendants.)	

This matter was tried before a jury in Manti, Utah on January 22, 23, 24 and 25. The jury returned their verdict on the 28th day of January, 2002.

Plaintiffs KAZIAH MAY HANCOCK, and CINDY STEWART were present with their attorney, Don S. Redd, Defendants THE TRUE AND LIVING CHURCH OF JESUS CHRIST OF SAINTS OF THE LAST DAYS, JAMES D. HARMSTON, DANIEL (DAN) SIMMONS, AND KENT BRADDY were present with their Attorney, Mark Middlemas. Defendants WILLIAM B. LITHGOW, KEITH LARSON AND KAY CRABTREE were not present, but were represented by Mark Middlemas.

The jury having reached their verdict and were unanimous on all portions there of, it is hereby ordered and adjudged as follows:

1. The defendants The True and Living Church of Jesus Christ of Saints of the Last Days, James D. Harmston, William B. Lithgow, Keith Larson, Daniel (Dan) Simmons, Kay Crabtree and Kent Braddy did breach a contract with each Plaintiff.

2. Judgment is entered against each defendant The True and Living Church of Jesus Christ of Saints of the Last Days, James D. Harmston, William B. Lithgow, Keith Larson, Daniel (Dan) Simmons, Kay Crabtree and Kent Braddy jointly and severally in the amount of \$1,748.34 plus interest of \$1,137.76 from October 14, 1996 to January 14, 2002 for a total of \$2,886.10 in favor of Cindy Stewart for breach of contract.

3. Judgment is entered against each defendant The True and Living Church of Jesus Christ of Saints of the Last Days, James D. Harmston, William B. Lithgow, Keith Larson, Daniel (Dan) Simmons, Kay Crabtree and Kent Braddy jointly and severally in the amount of \$131,750.00 plus interest of \$101,165.00 from June 1, 1996 to January 28, 2002 for a total of \$226,332.00 for breach of contract in favor of Kaziah May Hancock.

4. There was fraud and misrepresentation by defendants The True and Living Church of Jesus Christ of Saints of the Last Days, James D. Harmston, William B. Lithgow, Keith Larson, Daniel (Dan) Simmons, Kay Crabtree and Kent Braddy against Plaintiff Kaziah May Hancock and Plaintiff Cindy Stewart

5. Judgment is entered against defendant The True and Living Church of Jesus Christ of Saints of the Last Days, James D. Harmston, William B. Lithgow, Keith Larson, Daniel (Dan) Simmons, Kay Crabtree and Kent Braddy jointly and severally in the amount of \$12,077.02 plus

\$7,859.39 interest from October 14, 1996 to January 14, 2002 for a total of \$19,936.41 for fraud and misrepresentation in favor of Cindy Stewart.

6. Judgment is entered against defendants The True and Living Church of Jesus Christ of Saints of the Last Days, James D. Harmston, William B. Lithgow, Keith Larson, Daniel (Dan) Simmons, Kay Crabtree and Kent Braddy jointly and severally in the amount of \$131,750.00 plus interest of \$101,165.00 from June 1, 1996 to January 28, 2002 for a total of \$226,332.00 for fraud and misrepresentation in favor of Kaziah May Hancock.

7. Defendants The True and Living Church of Jesus Christ of Saints of the Last Days, James D. Harmston, William B. Lithgow, Keith Larson, Daniel (Dan) Simmons, Kay Crabtree and Kent Braddy intentionally inflicted emotional distress on plaintiff Cindy Stewart. Defendants The True and Living Church of Jesus Christ of Saints of the Last Days, James D. Harmston, William B. Lithgow, Keith Larson, Daniel (Dan) Simmons, Kay Crabtree and Kent Braddy intentionally inflicted emotional distress on plaintiff Kaziah May Hancock.

8. For their intentional infliction of emotional distress, Judgment is entered against defendants jointly and severally in the amount of \$6,500.00 in favor of Cindy Stewart.

9. Judgment is entered against defendants The True and Living Church of Jesus Christ of Saints of the Last Days, James D. Harmston, William B. Lithgow, Keith Larson, Daniel (Dan) Simmons, Kay Crabtree and Kent Braddy jointly and severally in the amount of \$6,500.00 in favor of Kaziah May Hancock.

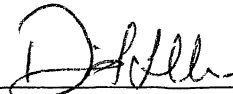
10. All judgments accrue interest at the statutory rate for Judgments.

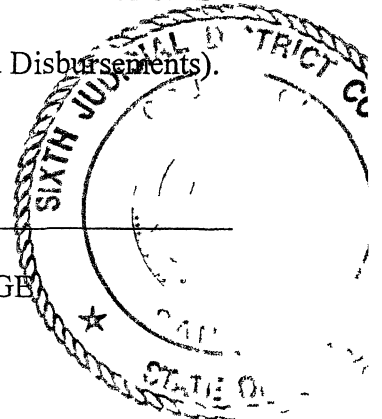
11. Petitioners are awarded their attorney fees on the grounds and in the amount found by the court.

12. Plaintiffs are also awarded any costs including attorney fees necessary to collect these judgments

13. Plaintiffs are also awarded their costs incurred under Rule 54 Utah Rules of Civil Procedure in the amount of \$1,000.67 (see attached Memorandum of Costs and Disbursements).

DATED this 31 day of ^{July}~~June~~, 2002.


DAVID L. MOWER
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing FOURTH PROPOSED JUDGMENT was mailed on this 30 day of June 2002 by depositing same in the U.S. Mail, postage prepaid to the following:

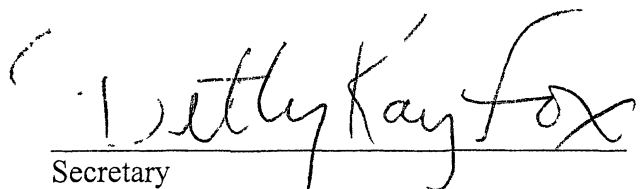
John H. Jacobs
Attorney for Crabtree
75 N. Center St.
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William Lithgow
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Palm Desert, CA 92211

Keith Larson
111 West Center
Snowflake, AZ 85937

Clark R. Nielsen
Attorney at Law
576 East South Temple Street
Salt Lake City, UT 84102


Secretary

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 980600126 by the method and on the date specified.

METHOD	NAME
Mail	KEITH LARSON DEFENDANT 111 West Center Snowflake, AZ 85937
Mail	WILLIAM B. LITHGOW DEFENDANT 37550 Pine Knoll Ave Palm Desert CA 92211
Mail	F KEVIN BOND ATTORNEY DEF 311 SOUTH STATE, SUITE 410 SUITE 410 SALT LAKE CITY UT 84111
Mail	BUDGE W CALL ATTORNEY DEF 311 SOUTH STATE SUITE 410 SALT LAKE CITY UT 84111
Mail	JOHN H. JACOBS ATTORNEY DEF 75 NORTH CENTER STREET AMERICAN FORK UT 84003
Mail	CLARK R NIELSEN ATTORNEY PLA 576 EAST SOUTH TEMPLE STREET SALT LAKE CITY UT 84102
Mail	DON S REDD ATTORNEY PLA 44 NORTH MAIN LAYTON UT 84041

Dated this 5 day of August, 2002.

Sharon Vetterli
Deputy Court Clerk

Tab J

2003 FEB 7 PM 4 22

DISTRICT COURT, SANPETE COUNTY, UTAH

160 North Main Street

Manti, UT 84642

Telephone: 435-835-2131 Fax: 435-835-2135

BY *ABennett* - CLERK

KAZIAH MAY HANCOCK and CINDY
STEWART,

Plaintiffs,

vs.

THE TRUE AND LIVING CHURCH OF
JESUS CHRIST OF SAINTS OF THE LAST
DAYS, et al.,

Defendants.

**ORDER ON MOTIONS REGARDING
JUDGMENT AND NEW TRIAL**

Case No. 980600126

Assigned Judge: David. L. Mower

Several motions are pending in this case. The subject matter of the motions concerns what to do with the jury verdict and how to convert it into an enforceable judgment. I have reviewed the file several times over the past several weeks with a view to entering a judgment.

I am convinced that the task is impossible. The verdict did not require the jury to provide enough detailed information about the plaintiffs' claims, the defendants' actions and how they relate to each other.

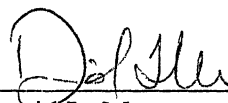
Hence, no judgment will be entered. The motion for a new trial is granted. Mr. Call is appointed to draft an appropriate order and to submit it for execution by following the procedure set forth in rule 4-504, Code of Judicial Administration.

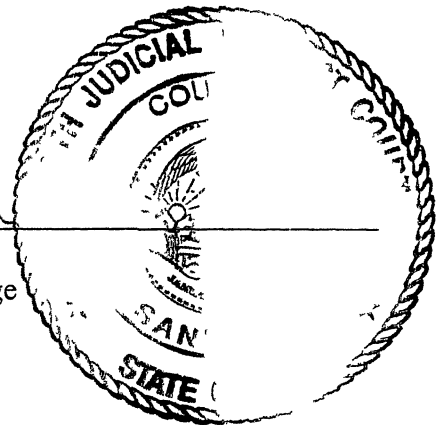
1052

ORDER ON MOTIONS REGARDING JUDGMENT AND NEW TRIAL, Case number
980600126, Page -2-

The Court Clerk is directed to arrange for a scheduling conference to be held on the
record in Manti. At that conference the Court will establish a case management plan with
deadlines and a trial date.

Dated this 7 day of ^{Feb}January, 2003.


David L. Mower
District Court Judge



CERTIFICATE OF SERVICE

On ~~January~~ ^{7 Feb.}_____, 2003 a copy of the above ORDER ON MOTIONS REGARDING
JUDGMENT AND NEW TRIAL was sent to each of the following by the method indicated:

<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)	<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)
Clark R. Nielsen 68 South Main St. Suite 600 Salt Lake City, UT 84101	Mail	John H. Jacobs 75 N. Center St. American Fork, UT 84003	Mail
F. Kevin Bond Budge W. Call Mark S. Middlemas BOND & CALL 311 South State, Suite 410 Salt Lake City, UT 84111	Mail	William Lithgow 37550 Pine Knoll Ave. Palm Desert, CA 92211	Mail

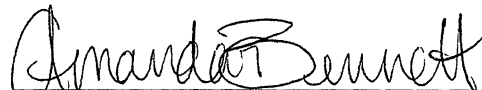
ORDER ON MOTIONS REGARDING JUDGMENT AND NEW TRIAL, Case number
980600126, Page -3-

Keith Larson
111 West Center
Snowflake, AZ 85937

Mail

Don S. Redd
44 North Main Street
Layton, UT 84041

Mail


Deputy Clerk

Tab K

FILED
SANPETE COUNTY, UTAH
2003 NOV 12 PM 4 26
KIRK J. HILL
SANPETE COUNTY CLERK
BY D. Hulson DEPUTY

DON S. REDD #2705
Attorney at Law
44 North Main
Layton, Utah 84041
Telephone: (801) 546-1264

**IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
SANPETE COUNTY, STATE OF UTAH**

KAZIAH MAY HANCOCK AND)	ORDER CONTINUING TRIAL
CINDY STEWART)	
)	
)	
Plaintiff,)	
)	
vs.)	
)	
THE TRUE AND LIVING CHURCH)	Civil No. 980600126
OF JESUS CHRIST OF SAINTS OF)	
THE LAST DAYS, JAMES D.)	
HARMSTON, WILLIAM B. LITHGOW,)	Judge David L. Mower
KEITH LARSON, DANIEL (DAN))	
SIMMONS, KAY CRABTREE,)	
JEFF HANKS, BART MULSTROM,)	
JOHN HARPER, JOHN DOE'S NOS. 1-5)	
)	
Defendants.)	

BASED upon the parties Stipulation and Agreement, it is hereby ORDERED as follows:

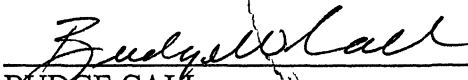
1. The Court hereby directs its Orders of August 7, 2003 dismissing three of Petitioners' claims for relief and upholding the other two Claims for relief and its Order of October 16, 2003, denying Plaintiffs' Motion to Amend, is entered as a final Judgment.

2. That the Trial presently scheduled for October 28, 2003 is continued pending the appeal of these Judgments.

DATED this 5 day of ^{NOV} October, 2003.


DISTRICT COURT JUDGE

APPROVED AS TO FORM AND CONTENT


BUDGE CALL
Attorney for Defendants The True
and Living Church of Jesus Christ
of Saints of the Last Days, James D.
Harmston, Daniel Simmons, Kent
Braddy, Bart Mulstrom and
John Harper

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing ORDER CONTINUING TRIAL was mailed on this 21 day of October, 2003 by depositing same in the U.S. Mail, postage prepaid to the following:

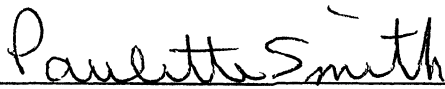
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Secretary