2004

Eleanor Ulibarri and Victor Horrocks v. A-Quick Title Loans, Inc. : Brief of Appellees

Utah Court of Appeals

Randall Gaither; Attorney for Appellee.
Robert D. Rose; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

ELEANOR ULIBARRI and VICTOR HORROCKS, Appellees,	)	**BRIEF of APPELLEE**
vs.	)	
A-QUICK TITLE LOANS, INC., Appellant.	)	Case No. 20040367 CA

BRIEF OF THE APPELLEES ELEANOR ULIBARRI AND VICTOR HORROCKS

APPEAL FROM THE THIRD DISTRICT COURT, JUDGE TIMOTHY R. HANSEN

Randall Gaither
Attorney at Law
Attorney for Appellee
159 West Broadway, Suite 105
Salt Lake City, Utah 84101

Robert D. Rose
Attorney at Law
Attorney for Appellant
6364 South Highland, Suite 203
Salt Lake City, Utah 84121

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Attorney for Appellant
6364 South Highland, Suite 203
Salt Lake City, Utah 84121

LIST OF PARTIES:

Appellees: Eleanor Ulibarri and Victor Horrocks
Represented by: Randall Gaither

Appellant: A-Quick Title Loans, Inc.
Represented by: Robert D. Rose

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Appellant,	)	

SUBJECT MATTER AND APPELLATE JURISDICTION

The Court ***does not*** have jurisdiction for this appeal based upon the fact that a Notice of Appeal was not entered from the final Judgment imposing sanctions. The Appellant failed to file a timely appeal based upon Rule 3 of the ***Utah Rules of Appellate Procedure*** and Rule 4 of the ***Utah Rules of Appellate Procedure***. The Appellant filed a Motion to set aside the Judgement, which is the only basis for appeal, after the time for appeal expired.

STATEMENT OF ISSUES PRESENTED FOR REVIEW THE STANDARD OF APPELLATE REVIEW WITH SUPPORTING AUTHORITY AND CITATIONS

1. THE APPELLANT HAS FAILED TO MARSHAL EVIDENCE ON APPEAL TO CLEARLY SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING HIS CASE AFTER FAILING TO ARRANGE A MEETING OR ARRANGE A MEETING AS DIRECTED BY COURT ORDER.

Standard of review: On appeal the Appellate Court will give the Trial Court broad discretion and will not disturb the lower Court's decision absent an abuse of discretion and a likelihood that an injustice occurred." ***Hartford Leasing Corp. v. State***, 888 P.2d 694, 697 (Utah Ct. App. 1994) and ***Winward v. Carlos,*** 2003 UT App 418 (Utah App. 12/04/2003).

2. THE APPELLANT AS A PARTY TO THE ACTION WHEN THE FINAL ORDER STRIKING THE ANSWER AND AWARDING RELIEF TO THE APPELLEE FAILED TO FILE A TIMELY NOTICE OF APPEAL AND INSTEAD ALLOWED THE TIME FOR APPEAL TO EXPIRE BEFORE FILING A RULE 60B MOTION WHICH WAS UNTIMELY AND THEREFORE THE COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE APPEAL.

Standard of review: A party must file the notice of appeal "within 30 days after the date of entry of the Judgment or Order appealed from." Utah R. App. P. 4(a). "If an appeal is not timely filed, this court lacks jurisdiction to hear the appeal." *Serrato v. Utah Transit Auth.*, 2000 UT App 299,¶7, 13 P.3d 616. Once this Court concludes that it lacks jurisdiction, it "retains only the jurisdiction to dismiss the action." *Varian-Eimac, Inc. v.*

Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1989).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE OF THE APPEAL

Rule 37(b)(2)(C) of the Utah Rules of Civil Procedure states, in relevant part:
(2) If a party . . . fails to obey an order to provide or permit discovery . . . the Court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:. . .;

(C) an Order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

RULE 3 OF UTAH RULES OF APPELLATE PROCEDURE. Appeal as of right: how taken.

1. (a) Filing appeal from final orders and judgments. An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule
2. (4) Failure of an Appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

RULE 4 OF UTAH RULES OF APPELLATE PROCEDURE. Appeal as of right: when taken.

3. (a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the Appellate Court, the Notice of Appeal required by Rule 3 shall be filed with the clerk of the Trial Court ***within 30 days*** after the date of ***entry of the judgment or order appealed from.***

RULE 24 OF UTAH RULES OF APPELLATE PROCEDURE. (a)(9) An argument.

The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the Trial Court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a Fact Finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover Attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

STATEMENT OF THE CASE

Nature of the case

This is an appeal from a ruling, finding and Order (see Exhibit A) granting a Judgement striking the answer and awarding relief to the Appellee on a civil complaint for damages based on repossession of a motor vehicle. In the complaint, the Plaintiff, Victor Horrocks, obtained a short term loan in the amount of $650.00 for A1 Title to pay off his college tuition at Salt Lake Community College, Salt Lake City, Utah. The compliant alleged the loan was taken out on May 5, 2001 and the Plaintiff, Victor Horrocks, was making payments as he was instructed by agents of the Defendant. The legal basis was generally the Utah Uniform Commercial Code and the claim that a vehicle was unlawfully repossessed from the Plaintiff Victor Horrock's residence at 874 West 300 South without authority or Notice and in violation of the Security Agreement

Disposition

On November 24, 2003, the Court entered **Findings of Fact and Conclusions of Law, Order** and a **Final Judgement in favor the Appellee**. No Notice of Appeal was filed within thirty days.

STATEMENT OF FACTS

1. This case was opened by the filing of a Complaint on May 10, 2002.

2. On July 10, 2002, a Default Order was entered and a hearing was held on the amount of damages September 10, 2002 at which time the Appellee testified concerning damages in relation to the Judgement which had been previously entered. At that hearing the Court entered the following:

FINDINGS OF FACT

1. The Court finds with the value of additions and improvements and other items such as repairs to the transmission and new tires that the Jeep vehicle subject to this legal action was reasonable and fairly valued at $10,000.00.

2. The Court finds based upon the testimony of Victor Horrocks concerning the fact that he has damages for inconvenience of loss of his vehicle, and to arrange alternative transportation for four(4) months after the vehicle was repossessed and sold at the commercially and unreasonably sale that $350.00 payment is a reasonable amount to be awarded as damages per months.

3. In light of the nature and aspect of the Appellees in repossession and sale of the vehicle in violation of Utah law, the other facts testified by the Appellees at the hearing, it is reasonable to allow loss of use to the Appellees until the Appellees could purchase a new vehicle.

4. The sum of $350.00 per month which is equivalent to the cost per month of renting a similar vehicle and is a reasonable amount for the monthly loss of use caused by the loss of the vehicle for four (4) months.

5. The Court finds that the five (5) hours at the hourly rate of $150.00 per hour are reasonable Attorney's fees.

CONCLUSIONS OF LAW

6. The Court finds that the damages, Attorney fees and costs proven at the hearing case as follows:

a. For lost of the use of the Jeep vehicle	$10,000.00
b. For lost of the payment made on the Promissory Note	$81.25
c. For the four months lost of the use of the vehicle	$1,400.00
d. For inconvenience caused to the parties for four months until they could acquire a new vehicle.	$1,400.00
e. Total Attorney's fees and costs	$915.00

f. Total damages subject to Judgement $13,796.25

3. On November 25, 2002, a Motion to Set Aside the Default Judgement was filed by the Appellant setting forth the grounds to set aside the default based upon service.

4. On February 14, 2002, the Court entered an Order setting aside the Default Judgement.

5. Thereafter, on June 11, 2002, a Motion was filed for an Order compelling discovery and an attorney's fees and that Motion was submitted by Memorandum in support of the Motion.

6. On June 23, 2003, the matter was submitted to the Court and at that time there had been no response filed by the Appellee.

7. On July 9, 2003, the Court in a Minute Entry granted the Motion for an Order Compelling Discovery and Attorney's fees.

8. The Appellant was ordered to respond to Discovery within twenty (20) days.

9. The Appellee's attorney was awarded $300.00 in Attorney's fees.

10. The Court specifically indicated in the Memorandum Decision that the Memorandum Decision served as a Court Order. In this situation the decision was imposed after a Motion was made to impose the sanction and the Appellant had an opportunity to respond, but failed to do so as required by the Court Order.

11. On August 28, 2003, a Notice to Submit was submitted requesting an Order dismissing the Answer as a sanction for failing to respond to the Court Order of July 9,

2003.

12. On September 15, 2003, the Court entered an Order dismissing the Answer and indicating the counsel for the Appellee was to prepare the Order, Findings of Fact and Conclusions of Law.

13. On October 14, 2003, the Appellant filed an Objection to Findings of Fact and Conclusions of Law and a request for hearing and oral argument.

14. On October 20, 2003, the Appellee filed a "Motion for Reconsideration" and a Memorandum in Opposition.

15. On November 4, 2003, the Appellee filed a Memorandum in Opposition to the Appellant's Motion to Reconsider.

16. On November 24, 2003, the Court entered an Order denying any objection to the Findings of Fact and Conclusions of Law.

17. On November 24, 2003, the Court entered an Order denying the objections to the Findings of Fact and Conclusions of Law and overruling and denying the Motion for Reconsideration.

18. On November 24, 2003, the Court entered **Findings of Fact and Conclusions of Law, Order and a Final Judgement in favor the Plaintiff**. The Court made findings that stated:

> 1. In a July 9, 2003 Minute Entry decision, the Court ordered that outstanding Discovery be answered by the Appellant based upon the fact that there was no opposition to the Motion to Compel. Further, the Court ordered that Appellant's counsel was to contact Counsel for the Appellee to arrange a

mutually convenient time to meet regarding a discovery plan.

2. Appellees' *Motion to enter Order Dismissing the Answer* and entering a Judgement against the Appellant stated in paragraph 4 that Appellees' counsel had not contacted Appellant' counsel as directed by the Court within the intervening period between the Minute Entry of July 9, 2003.

3. The Motion to strike the Appellant's Answer and enter a Default Judgment against the Appellant was supported by a Memorandum of Points and Authorities which were mailed to counsel for the Appellant on August 7, 2003.

4. Thereafter, on August 22, 2003, as above-referenced, Counsel for the Appellees submitted a request for decision seeking a Judgment against the Defendant based upon grounds that the time for responding to the Motion having expired.

5. The Appellant has filed an out-of-time *Objection to Request for Decision* and *Notice of Compliance with Discovery Requests*.

6. The Court finds that the objection of the Appellant is clearly out-of-time and was not filed within the proper time frame after receiving the Appellees' Motion. The document was mailed to Mr. Gaither, Attorney for the Appellees, on September 3, 2003, and filed with the Court on September 2, 2003.

7. The Appellant states that the Discovery requests have been supplied to the Appellees, even though not brought to the Court's attention before the July 9, 2003, Minute Entry decision, and the Appellant claims that there has been compliance with the Appellee's Discovery requests.

8. As to the Appellant's claims, the Court finds that nowhere in the responsive materials submitted by Counsel for the Appellant does the Appellant suggest why Appellant's counsel has chosen not to comply with the Court's directive that he contact Appellees' counsel to arrange for a Discovery and scheduling conference.

9. The failure to contact Appellees' counsel by Appellant's counsel as required by this Court's Minute Entry of July 9, 2003, is the basis for the Appellees' *Motion to Strike the Defendant's Answer and enter Judgment.*

10. The Court finds that the out-of-time Objection filed by Counsel for the Appellant to the Motion to strike the Answer and enter Judgment and the fact that the Appellant has offered no excuse for not contacting Appellees' Counsel to arrange an attorney's meeting and prepare a Discovery Order both require this Court to grant the Motion submitted by the Appellees and to strike the Appellant's Answer.

11. In this case, there have been numerous delays, primarily

occasioned by the Appellant, including the following.

a. Initially, the Appellant's default was entered, but set aside on technical grounds relating to the manner of service. That occurred in February of 2003.

b. Thereafter, nothing occurred in this case until the Appellees sought an Order compelling Discovery, to which the Appellant never filed a written opposition.

c. The Court ruled on that Motion to Compel, as well as the failure of the Appellant to respond to the Appellees' request for Attorney's Scheduling Order, and entered its Minute Entry of July 9, 2003. That ruling not only required a response to the request for Discovery, which has apparently now been provided, but also required Appellant's counsel to contact Appellees' counsel for the purposes of engaging in an attorney's planning conference. That has not occurred, and no excuse has been offered as to why that has not occurred.

19. On December 17, 2003, a Judgement was entered by the Court in favor of the Appellee against the Appellant.

20. The Appellant did not file a Notice of Appeal within (30) days of the date of entry of the Order.

21. On February 10, 2003, the Appellant filed a ***Motion to Set Aside Judgement***.

22. On April 5, 2004, the Court filed an Order and Minute Entry denying the Motion to Set Aside.

23. On May 5, 2004, the Appellant filed a Notice of Appeal.

SUMMARY OF ARGUMENT

1. The Appellant has failed to marshal evidence on appeal to clearly show that the Trial Court abused its discretion in striking the answer after failing to arrange a meeting or

arrange a meeting as directed by Court Order.

2. The Appellant, as a party to the action when the final Order striking the Answer and awarding relief to the Appellee, failed to file a timely Notice of Appeal and instead allowed the time for appeal to expire before filing a Rule 60B Motion. Therefore, the Court does not have jurisdiction to consider the appeal.

ARGUMENT

POINT I

THE APPELLANT HAS FAILED TO MARSHAL EVIDENCE ON APPEAL TO CLEARLY SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING HIS CASE AFTER FAILING TO ARRANGE A MEETING OR ARRANGE A MEETING AS DIRECTED BY COURT ORDER.

Initially, a default judgment was entered in favor of the Appellee after service. The Court allowed the Appellant to set aside the Default Judgments and the Motion was set aside. Thereafter, the Appellant answered and failed to comply with the Order as to the Discovery as specifically ordered by the Court in the Order when setting aside the default.

In order to establish that a particular Finding of Fact is clearly erroneous, "[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the Trial Court's findings are so lacking in support as to be against the clear weight of the evidence." ***In re Estate of Bartell***, 776 P.2d 885, 886 (Utah 1989).

If the evidence is inadequately marshaled, this Court assumes that all findings are adequately supported by the evidence. ***In re Estate of Beesley***, 883 P.2d 1343,(Utah 1994). A party challenging a Fact Finding must first marshal all record evidence that supports the challenged finding." ***Utah R. App. P. 24(a)(9).*** Here the Court made detailed and specific findings.(See attachment one hereto)

After the Order was entered, the Appellant sought on three occasions to have the Court reconsider the striking of the Answer. There was a Judgement entered on Notice and after full briefing not on default. This was not a Default Judgement entered after failure to respond to service of process. The Trial Court heard the Appellant's excuses and denied the relief requested after making careful and detailed facts .

Rule 37(b)(2)(C) of the Utah Rules of Civil Procedure states, in relevant part:
(2) If a party . . . fails to obey an order to provide or permit discovery . . . the Court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:. . .;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

In ***Morton V. Continental Baking Co.,*** 938 P.2d 271 (Utah 04/08/1997) the Supreme Court affirmed the Trial Court's dismissal of Morton's claims under Rule 37(b)(2)(C) of the ***Utah Rules of Civil Procedure***. In ***Morton***, the Court found the Appellant had not clearly shown that the Trial Court abused its discretion in dismissing the case. The Court stated:

We have never expressed any rule which delineates a specific level of behavior

which must be met before rule 37 sanctions are warranted. As stated previously, a party's conduct merits sanctions under rule 37 if any of the following circumstances are found: (1) the party's behavior was willful; (2) the party has acted in bad faith; (3) the Court can attribute some fault to the party; or (4) the party has engaged in persistent dilatory tactics tending to frustrate the judicial process. See *Osguthorpe*, 892 P.2d at 6; *Schamanek*, 684 P.2d at 1266.

To find that a party's behavior has been willful, there need only be " 'any intentional failure as distinguished from involuntary noncompliance.' " *Amica Mut. Ins. Co.*, 768 P.2d at 961 (quoting *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869, 872-73 (10th Cir. 1987)); see also *Osguthorpe*, 892 P.2d at 8. Morton presented to the Trial Court numerous excuses for failing to comply with the Court's Order in numerous Motions following the dismissal of his case. The Trial Court was not persuaded. Morton then presented the same arguments to the Court of Appeals, which found them to be "without merit." Morton presents the same excuses to this Court. However, Morton has not attacked the Court of Appeals' determination that such excuses were "without merit." On the other hand, because Morton knew that a Motion to Compel had been filed, which threatened dismissal of his case, and because all of the Motions and Orders were properly served on Morton, we think that there is ample evidence to support the view that Morton's failure to supply the Discovery requests in a timely manner was at least willful.

The Court noted in ***Morton V. Continental Baking Co.,*** that though dismissal of a noncomplying party's action is one of the most severe of the potential sanctions that can be imposed that it was within the range of the sanctions a Trial Judge can impose. ***Utah Dep't of Transp. v. Osguthorpe***, 892 P.2d 4(Utah 1995). In ***Morton***, the Court indicated that 'it is clear from the language of Rule 37 that it is within a Trial Court's discretion to impose such a sanction." The Court stated:

Because Trial Courts must deal first hand with the parties and the Discovery process, they are given broad discretion regarding the imposition of discovery sanctions.' " *Osguthorpe*, 892 P.2d at 6 (quoting *Darrington v. Wade*, 812 P.2d 452, 457 (Utah.Ct.App. 1991)). Thus we have long held that we will not interfere unless

" 'abuse of that discretion [is] clearly shown.' " Id. at 8 (quoting *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986)); see also *Tucker Realty, Inc. v. Nunley*, 396 P.2d 410, 412, 16 Utah 2d 97, 100 (1964) ("Unless it is shown that [the Trial Court's] action is without support in the record, or is a plain abuse of discretion, it should not be disturbed."). We will find that a Trial Court has abused its discretion in choosing which sanction to impose only if there is either "an erroneous conclusion of law or . . . no evidentiary basis for the Trial Court's ruling." *Askew v. Hardman*, 918 P.2d 469, 472

The ***Morton*** precedent was followed recently in ***Hales v. Oldroyd,*** 2000 UT App 75 (Utah App. 03/16/2000). There the Court indicated that no finding of a "complete failure" to comply with Discovery is required and dismissal as a discovery sanction has been upheld for late or incomplete discovery responses. Citing ***W.W. & W.B. Gardner, Inc. v. Park West Village, Inc.***, 568 P.2d 734 (Utah 1977) (affirming Default Judgment when Defendant failed to respond to Discovery although answers were tendered prior to sanction hearing) and, ***Schoney v. Memorial Estates, Inc.***, 790 P.2d 584 (Utah Ct. App. 1990) (affirming dismissal of Plaintiff's claim when Plaintiff failed to timely respond to Discovery requests but produced information at hearing).

The Court stated in ***Hales v. Oldroyd,*** stated:

The Court made the required preliminary findings of willfulness and dilatory behavior to support sanctions under Rule 37. Once the threshold finding is made, the choice of sanction is within the discretion of the Trial Court. We conclude the Trial Court did not abuse its discretion in dismissing Hales's complaint based on ample evidence in the record of her multiple delays and failures to respond to discovery requests and court orders.

The Court of Appeals has indicated that because Trial Courts must deal first hand

with the parties and the discovery process, the Trial Judge is given broad discretion regarding the imposition of discovery sanctions. See ***Utah Rules of Civil Procedure*** *37(d).* ***Schoney v. Memorial Estates, Inc.*** 790 P.2d 584, 585-86 (Utah Ct. App. 1990). The Rule 37 discovery sanction has been found to be justified as the basis for the entry of default judgment and the circumstances in this matter is clearly not an abuse of discretion. See also, ***Hill v. Dickerson***, 839 P.2d 309, 312 (Utah.Ct.App. 1992).

Although the Courts recognize that a party must be given an opportunity to be heard, the Utah Appellate Courts dismissal with prejudice is appropriate when a party pursues a claim in a manner that abuses that opportunity. The Trial Court here applied appropriate sanctions in light of the Appellees' continued refusal to comply with Orders of the Court after having a Default Judgment set aside.

The Appellee submits that the Appellant did not meet the requirements of Rule 24 (a)(9) of the ***Utah Rules of Appellant Procedure*** in the opening brief. This requires a party challenging Findings of Fact to marshal all evidence that supports the challenged findings. Instead of giving to the Trial Court or this Court specific reasons, the Appellant relied on general policy. In the case of ***Roderick v. Ricks***, 2002 UT 84 indicated that in order to meet the marshaling requirements the Appellant must marshal all favorable evidence at the point in the Brief where there is a challenge of the Findings of Fact. Rule 24 provides that the party challenging a Fact Finding must first marshal all record evidence that supports the challenge finding. In ***West Valley City v. Majestic Inv. Co.*** 818P.2d 1311

(Utah.Ct.App. 1991), the Utah Court indicated that in order to properly discharge the duty of marshaling the evidence the challenger must present comprehensive order all evidence which supports the findings that the Appellant resists.

Therefore, in light of the failure to marshal evidence and to clearly show that there was a abuse of discretion, the Court should affirm the Trial Court's detailed findings and judgment.

POINT II

THE APPELLANT AS A PARTY TO THE ACTION WHEN THE FINAL ORDER STRIKING THE ANSWER AND AWARDING RELIEF TO THE PLAINTIFF FAILED TO FILE A TIMELY NOTICE OF APPEAL AND INSTEAD ALLOWED THE TIME FOR APPEAL TO EXPIRE BEFORE FILING A RULE 60B MOTION WHICH WAS UNTIMELY AND THEREFORE THE COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE APPEAL.

On December 17, 2003, a Judgement was entered by the Court in favor of the Appellee against the Appellant.(see attachment 2) The Appellant did not file a Notice of Appeal within thirty (30) days of the date of entry of the Order. A Notice of Appeal from a final order or judgment is timely only if filed "within 30 days after the date of entry of judgment or order appealed from." ***Utah R. App. P. 4(a)***.

On February 10, 2003, the Appellant filed a "Motion to Set Aside Judgement". On April 5, 2004, the Court filed an Order and Minute Entry denying the Motion to Set Aside. On May 5, 2004, the Appellant filed a Notice of Appeal. "[A]n appeal of a [r]ule 60(b) order addresses only the propriety of the denial or grant of relief. The appeal does not, at

least in most cases, reach the merits of the underlying judgment from which relief was sought'" ***Franklin Covey Client Sales v. Melvin***, 2000 UT App 110, (Utah 2000).

The Appellant during the course of this litigation filed extensive Memorandums before the Judge on all of the issues and all of the points raised in the related Motion to Set Aside. The Appellant even objects to the Findings of Fact prior to judgment being entered. The Trial Court ruled and considered on the Motions and denied these same arguments on prior occasions. The Motion for Reconsideration and Motion to Set Aside were filed after the time for a Notice to Appeal expired.

In ***Schoney v. Memorial Estates, Inc.***, the Court of Appeals stated:

> The judgment by default was a Final Judgment, i.e., one which puts an end to a lawsuit by declaring that the plaintiff is or is not entitled to recover the remedy sought. See *Calder Bros. Co. v.* Anderson, 652 P.2d 922, 926 n.4 (Utah 1982); *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 969 (Utah App. 1989). Thus, Schoney's suit was concluded, unless relief could be **obtained on appeal**

Therefore, the Motion was precluded by "law of the case." "The purpose of the doctrine of 'the law of the case' is that in the interest of economy of time and efficiency of procedure, it is desirable to avoid the delays and the difficulties involved in repetitious contentions and rulings upon the same proposition in the same case." ***Richardson v. Grand Central Corp.***, 572 P.2d 395, 397 (Utah 1977) ***Amica Mutual Ins. Co. v. Schettler***, 768 P.2d 950 (Utah Ct. App. 1989). ***Richardson v. Grand Central Corp.***, 572 P.2d 395, 397 (Utah 1977) ***Amica Mutual Ins. Co. v. Schettler***, 768 P.2d 950 (Utah Ct. App. 1989).

In ***Utah State Employees Credit Union v. Riding***_24 Utah 2d 211, 469 P.2d

1 (1970) a party filed a motion to reconsider a Trial Court's order of judgment. The Court stated: "We are unaware of any such motion under our rules.... We think the motion to reconsider the motion to vacate the judgment is abortive under the rules...." See, ***Tracy v. University of Utah Hosp.***, 619 P.2d 340, 342 (Utah 1980) (rules of civil procedure make no provision for a motion to reconsider); see also ***Peay v. Peay***, 607 P.2d 841, 842-43 (Utah 1980) (a party cannot extend the time for filing an appeal simply by filing a "motion for reconsideration of order striking petition and motion for relief from Final Judgment")

The Appellee submits that the ***Utah Rules of Civil Procedure*** do not provide for a Court to re-open or reconsider a judgment which was fully submitted and ruled upon the Court when appeal was waived. The Appellant waived the filing of an appeal to the appropriate Court because there was no factual or legal basis to set aside a matter which the Judge denied the request to "reconsider".

In ***Peay v. Peay***, 607 P.2d 841, 842-43 (Utah 1980) the Appellate Court indicated that the time for taking an appeal simply by filing a "motion for reconsideration of order striking petition and motion for relief from final judgment"). In ***Utah State Employees Credit Union v. Riding*** 24 Utah 2d 211, 469 P.2d 1 (1970), a party filed a motion to reconsider a trial court's order of judgment. The Court stated: "We are unaware of any such motion under our rules.... We think the motion to reconsider the motion to vacate the judgment is abortive under the rules...." See, ***Tracy v. University of Utah Hosp.***, 619 P.2d 340, 342 (Utah 1980) (Rules of Civil Procedure make no provision for a Motion to

Reconsider).

The Appellant has not filed any Notice of Appeal and therefore the Judgement is final. The Court should dismiss the appeal and award an Order for Attorney's fees pursuant to Rule 33 of the Appellate Rules of Procedure for pursing an Appeal without jurisdiction. In determining to enter such award, the Court should take into account the fact that the lower Court awarded a Judgement which included post judgment continuing attorney fees in this matter.

CONCLUSION AND REQUEST FOR RELIEF

The Appellee requests that the Court find that there is no jurisdiction for this appeal. In the alternative, the Appellee requests this Court sustain the ruling of the District Court in these proceedings and dismiss the appeal.

DATED this 9th day of November 2004.

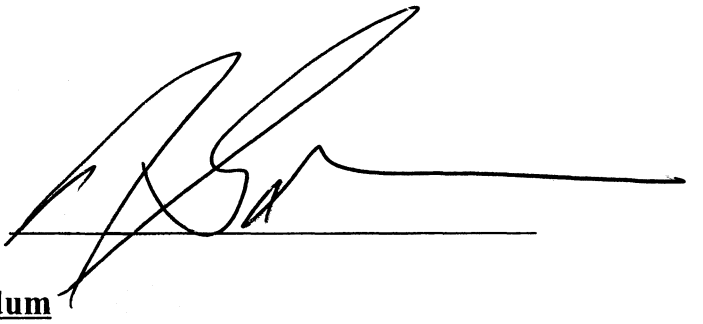
RANDALL GAITHER
Attorney for the Appellee

MAILING CERTIFICATE

I hereby certify that on the 9 day of November, 2004 a true and correct copy of the foregoing BRIEF was mailed First Class, postage prepaid to:

ROBERT D. ROSE
ATTORNEY FOR APPELLANT
6364 SOUTH HIGHLAND, SUITE 203
SALT LAKE CITY, UTAH 84121

DATED this 9 day of November, 2004.



Addendum

I. FINDINGS OF FACT AND CONCLUSION

II. JUDGMENT

III. MOTION TO SET ASIDE

I. FINDINGS OF FACT AND CONCLUSION

RANDALL GAITHER #1141
Attorney for the Plaintiffs
159 West 300 South Broadway #105
Salt Lake City, Utah 84101
Telephone: (801) 531-1990

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY SALT LAKE DEPARTMENT, STATE OF UTAH

ELEANOR ULIBARRI and VICTOR HORROCKS, Plaintiffs, vs. A-QUICK TITLE LOANS, INC., Defendant.	**FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER** Judge: HANSEN Civil No. 020904009

Based upon the Minute Entry entered by the Court and signed on September 15, 2003, the pleadings on file, the Court hereby enters the following:

FINDINGS OF FACT

1. In a July 9, 2003 Minute Entry decision, the Court ordered that outstanding discovery be answered by the Defendant based upon the fact that there was no opposition to the Motion to Compel. Further the Court ordered that defendant's counsel was to contact counsel for the plaintiffs to arrange a mutually convenient time to meet regarding a discovery plan.

2. Plaintiffs' *Motion to enter Order Dismissing the Answer* and entering a judgement against the Defendant stated in paragraph 4 that Defendant's counsel had not contacted plaintiffs' counsel as directed by the Court within the intervening period between the Minute Entry of July 9, 2003.

3. The Motion to strike the Defendant's Answer and enter a Default Judgment against the Defendant was supported by a Memorandum of Points and Authorities which were mailed to counsel for the Defendant on August 7, 2003.

4. Thereafter, on August 22, 2003, as above-referenced, Counsel for the Plaintiffs submitted a request for decision seeking a Judgment against the Defendant based upon grounds that the time for responding to the Motion having expired.

5. The Defendant has filed an out-of-time *Objection to Request for Decision* and *Notice of Compliance with Discovery Requests*.

6. The Court finds that the Objection of the Defendant is clearly out-of-time and was not filed within the proper time frame after receiving the Plaintiff's Motion. The document was mailed to Mr. Gaither, attorney for the Plaintiffs, on September 3, 2003 and filed with the Court on September 2, 2003.

7. The Defendant states that the discovery requests have been supplied to the Plaintiffs, even though not brought to the Court's attention before the July 9, 2003, Minute Entry decision, and the Defendant claims that there has been compliance with the Plaintiff's discovery requests.

8. As to the Defendants claims, the Court finds that nowhere in the responsive materials submitted by Counsel for the Defendant does the Defendant suggest why defendant's counsel has chosen not to comply with the Court's directive that he contact Plaintiffs's Counsel to arrange for a discovery and scheduling conference.

9. The failure to contact Plaintiffs' Counsel by Defendant's Counsel as required by this Court's Minute Entry of July 9, 2003, is the basis for the Plaintiffs' *Motion to Strike*

the Defendant's Answer and enter Judgment.

10. The Court finds that the out-of-time Objection filed by Counsel for the Defendant to the Motion to strike the Answer and enter Judgment and the fact that the Defendant has offered no excuse for not contacting Plaintiffs' Counsel to arrange an attorney's meeting and prepare a discovery Order both require this Court to grant the Motion submitted by the Plaintiffs and to strike the Defendant's Answer.

11. In this case, there have been numerous delays, primarily occasioned by the Defendant, including the following.

a. Initially, the Defendant's default was entered, but set aside on technical grounds relating to the manner of service. That occurred in February of 2003.

b. Thereafter, nothing occurred in this case until the plaintiffs sought an Order compelling discovery, to which the Defendant never filed a written opposition.

c. The Court ruled on that Motion to Compel, as well as the failure of the defendant to respond to the plaintiffs' request for attorney's scheduling Order, and entered its Minute Entry of July 9, 2003. That ruling required not only a response to the request for discovery, which has apparently now been provided, but also required defendant's counsel to contact plaintiff's counsel for the purposes of engaging in an attorney's planning conference. That has not occurred, and no excuse has been offered as to why that has not occurred.

12. Failure to comply fully with discovery is in direct violation of this Court's Minute Entry order of July 9, 2003.

13. A hearing was held before the Court based upon a previously entered Default

Judgement on September 10, 2002 at 8:30 a.m. before the Court where witnesses and documents were introduced as evidence.

14. The Court finds with the value of additions and improvements and other items such as repairs to the transmission and new tires that the Jeep vehicle subject to this legal action was reasonable and fairly valued at $10,000.00.

15. The Court finds based upon the testimony of the Plaintiff Victor Horrocks concerning the fact that he has damages for inconvenience for loss of his vehicle and to arrange alternative transportation for four months after the vehicle was repossessed and sold at the commercially and unreasonably sale that $350.00 payment is a reasonable amount to be awarded as damages per months.

16. In light of the nature and aspect of the Plaintiffs in repossession and sale of the vehicle in violation of Utah law, the other facts testified by the Plaintiff at the hearing, it is reasonable to allow loss of use to the Plaintiffs until the Plaintiffs could purchase a new vehicle.

17. The sum of $350.00 per month which is equivalent to the cost per month of renting a similar vehicle and is a reasonable amount for the monthly loss of use caused by the loss of the vehicle for four months.

18. The Court finds that the hourly rate of $150.00 per hour in this matter as for Attorney's fees is reasonable and a factual basis to award attorney fees to counsel for the Plaintiffs.

CONCLUSIONS OF LAW

19. A factual basis exists to enter sanctions for violation of Court Orders in relation to discovery and also pursuant to *Utah Rules of Civil Procedures Rule 37* to grant the relief requested by the Plaintiff against the Defendant including striking of the Answer and entry of the prior Judgement which was entered by the Court after an Evidentiary Hearing.

20. The Court finds that the damages, Attorney fees and costs proven at the earlier hearing case as follows:

a. For lost of the use of the Jeep vehicle	$10,000.00
b. For lost of the payment made on the Promissory Note	$81.25
c. For the four months lost of the use of the vehicle	$1,400.00
d. For inconvenience caused to the parties for four months until they could acquire a new vehicle	$1,400.00.
e. Total attorney fees and costs	$915.00
f. Total damages subject to Judgement	$13,796.25

ORDER

21. The Court hereby grants the Motion of the Plaintiff to strike the Answer previously submitted and Judgement shall be entered in favor of the Plaintiff and against the Defendant in accordance with the prior Judgement which was entered after a hearing and testimony of witnesses and exhibits were considered by the Court.

22. The Judgement will provide for additional attorney fees incurred to enforce the July 9, 2003 Minute Entry.

DATED this 24 day of Nov, 2003.

JUDGE TIMOTHY HANSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that on the 13 day of November, 2003, a true and correct copy of the foregoing AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER was mailed to:

NATHAN DRAGE
ATTORNEY FOR DEFENDANTS
4766 SOUTH HOLLIDAY ROAD
HOLLIDAY, UTAH 84117

DATED this 13 day of November, 2003.

II. JUDGMENT

RANDALL GAITHER #1141
Attorney for the Plaintiffs
159 West 300 South Broadway #105
Salt Lake City, Utah 84101
Telephone: (801) 531-1990

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY SALT LAKE DEPARTMENT, STATE OF UTAH

ELEANOR ULIBARRI and VICTOR HORROCKS,

Plaintiffs,

vs.

A-QUICK TITLE LOANS, INC.,

Defendant.

JUDGEMENT

Judge: HANSEN

Civil No. 020904009

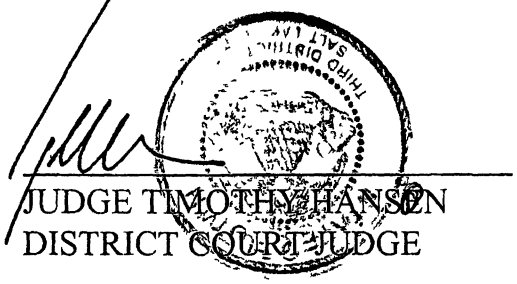
Based upon the Minute Entry of the Court dated August 22, 2003, the Findings of Fact and Conclusions of Law entered by the Court in addition to the Findings of Fact and Conclusions of Law previously on record and good cause appearing:

IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiffs are jointly awarded a Judgement in the amount of $13,796.25 against the Defendant A-Quick Title Loans, Inc.

IT IS HEREBY ORDERED AND ADJUDGED that attorney fees in the amount of three hundred ($300.00) which were incurred after July 9, 2003 to the date of Judgement in this matter as and for attorney fees is awarded in favor of the Plaintiff's against the Defendant, A-Quick Title Loans, Inc.

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff is entitled reasonable attorney fees incurred after the date of the hearing for collection on the judgement and the Plaintiffs may apply to the Court pursuant to the Utah Rules of Civil Procedure and pursuant to the Utah Code of Judicial Administration for supplemental attorney fees.

DATED this 24 day of ~~October~~ Nov, 2003.



JUDGE TIMOTHY HANSEN
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that on the 30 day of ~~October~~ Sept, 2003, a true and correct copy of the foregoing JUDGEMENT was mailed to:

NATHAN DRAGE
ATTORNEY FOR DEFENDANTS
4766 SOUTH HOLLIDAY ROAD
HOLLIDAY, UTAH 84117

DATED this 30 day of ~~October~~ Sept, 2003.

III. MOTION TO SET ASIDE

Nathan W. Drage #5194
Nathan W. Drage, P.C.
4766 Holladay Blvd.
Holladay, Utah 84117
Telephone: 801-273-9300
Facsimile: 801-273-9314

Attorney for Defendant

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

SALT LAKE DEPARTMENT, STATE OF UTAH

ELEANOR ULIBARRI and VICTOR HORROCKS Plaintiffs vs. A-QUICK TITLE LOANS, INC. Defendant.	RULE 60(b) MOTION TO SET ASIDE JUDGMENT Civil NO. 020904009 Judge Hanson

Defendant, through his attorney, respectfully moves this Court to set aside the judgment rendered in this matter on November 24, 2003 pursuant to Rule 60(b)(1) and (6).

This motion is supported by the attached Memorandum of Points and Authorities and the Affidavit of Nathan W. Drage.

Dated this 30th day of January, 2004.

Nathan W. Drage
Attorney for Defendant