

1993

Yvonne Gillham dba Concepts West Interiors v. Donald E. Armstrong : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 930236
IN THE UTAH COURT OF APPEALS

YVONNE GILLHAM, d/b/a)	
CONCEPTS WEST INTERIORS,)	
)	
Plaintiff,)	Appellee's Brief
)	
vs.)	Case No.930236-CA
)	
DONALD E. ARMSTRONG,)	Priority 15
)	
Defendant.)	

APPEAL FROM JUDGMENT GRANTED BY THE THIRD CIRCUIT COURT OF SUMMIT
COUNTY, STATE OF UTAH
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Utah Court of Appeals

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Mary T. Noonan
Clerk of the Court

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III.

STATEMENT OF JURISDICTION

The Utah Court of Appeals has original jurisdiction of this matter pursuant to the provisions of Utah Code 78-2a-3(2)(d) and rule 3(a) of the Utah Rules of Appellate Procedure.

IV.

STATEMENT OF THE ISSUES

I. Did the trial court abuse its discretion in denying appellant's Motion for Continuance? The trial court's denial of homeowner's Motion for Continuance will not be upset absent a showing of an abuse of discretion. Hunt v. Hurst, 785 P.2d 414 (Utah 1990).

II. Did the trial court's statements to the defendant regarding Rule 11 and Rule 26(g) sanctions prevent a fair trial? The conduct and remarks of the trial judge will be grounds for a new trial only where it can be shown that such remarks and conduct prevented a fair trial. Bunnell v. Industrial Com'n of Utah, 740 P.2d 1331 (Utah 1987).

III. Did the trial court refuse to admit evidence offered by the defendant? This court will presume a judgment or ruling is valid and supported by the evidence where issues raised on appeal are not part of the trial record. Horton v. Gem State Mutual of Utah, 794 P.2d 847 (Utah App. 1990).

IV. Were the trial court's Findings of Fact and Conclusions of Law regarding the termination of the contract proper? Findings of fact will be reversed only if clearly erroneous; conclusion of law will be reviewed for correctness. Kasco Services Corporation v. Benson, 831 P.2d 86 (Utah 1992).

V. Do the Findings of Fact and Conclusions of Law accurately reflect the trial court's findings?

VI. Should U.R.A.P. 33 sanctions be imposed on the appellant for

the bringing of his non-meritorious appeal issues? Party will be subject to sanction under Rule 33 (U.R.A.P.) where the court finds the appeal was filed in bad faith, was frivolous, or has no reasonable likelihood of success. Hunt v. Hurst, 785 P.2d 414 (Utah 1990).

VII. Should U.R.A.P. 40(a) sanctions be imposed on the appellant and his attorney for his failure to adhere to the rules of this Court? If a motion, brief, or other paper is signed in violation of court rules, or is filed without reasonable inquiry into the law and the facts, sanctions are appropriate. U.R.A.P. 40(a).

V.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND
RULES

The following rules are applicable to the issues on appeal:

Rule 11, Utah Rules of Civil Procedure:

Signing of pleadings, motions, and other papers; sanctions.
...The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ...If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney fee.

Rule 26(g), Utah Rules of Civil Procedure:

Signing of discovery requests, responses, and objections.

... The signature of the attorney or party constitutes a certification that he has read the request, response, or objection and that to the best of his knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation. ...If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

Rule 40(b), Utah Rules of Civil Procedure:

Postponement of the trial. Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

Rule 4-502(5), Utah Code of Judicial Administration:

All parties shall be entitled to conduct discovery proceedings in accordance with this rule. All discovery proceedings shall be completed, including all responses thereto, and all depositions and other documents filed with the court no later than thirty (30) days before the date set for trial of the case. The right to conduct discovery with thirty (30) days before trial shall be within the discretion of the court. Motions to conduct discovery within thirty (30) days before trial shall be presented to the judge assigned to the case upon notice to the other parties in the

action. In exercising its discretion, the court shall take into consideration the necessity and reasons for such discovery, the diligence or lack of diligence of the parties seeking such discovery, whether permitting such discovery will prevent the case from going to trial on the scheduled date, or result in prejudice to any party. Nothing herein shall preclude or limit the voluntary exchange of information or discovery by stipulation of the parties at any time prior to the date set for trial, but in no even shall such exchanges or stipulations require a court to grant a continuance of the trial date.

Rule 11(e)(2), Utah Rules of Appellate Procedure:

Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

Rule 11(g), Utah Rules of Appellate Procedure:

Statement of evidence or proceedings when no report was made or when transcript is unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments within 10 days after service. The statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included by the clerk of the trial court in the record on appeal.

Rule 11(h), Utah Rules of Appellate Procedure:

Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, the trial court, or the appellate court, either before or after the record is transmitted, may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted. The moving party, or the court if it is acting on its own initiative, shall serve on the parties a statement of the proposed changes. Within 10 days after service, any party may serve objections to the

proposed changes. All other question as to the form and content of the record shall be presented to the appellate court.

Rule 33, Utah Rules of Appellate Procedure:

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as define din Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

Rule 40(a), Utah Rules of Appellate Procedure:

Attorney's or party's certificate. Every motion, brief, and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member in good standing of the Bar of this state. The attorney shall sign his or her individual name and give his or her business address, telephone number, and Utah State Bar number. A party who is not represented by and attorney shall sign any motion, brief, or other paper and state the party's address and telephone number. Except when other wise specifically provided by rule or statute, motions, briefs, and other papers need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate that the attorney or party has read the motion, brief or other paper; that to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, it is not frivolous or interposed for the purpose of delay as defined in Rule 33. If a motion, brief, or other papers not signed as required by this rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the attorney or other party. If a motion, brief, or other paper is signed in violation of this rule, the authority and the procedures of the court provided by Rule 33 shall apply.

VI.

STATEMENT OF THE CASE

Plaintiff/appellee (Hereinafter "the designer") entered into a personal services contract with defendant/appellant (Hereinafter "the homeowner") to perform interior design work and consultation homeowners' Deer Valley home. The oral agreement between the parties was reduced to writing by the homeowner, and was prepared in its entirety by the homeowner. Homeowner agreed to pay the designer a total design fee in the amount of \$8,000.00. That fee was to be paid in quarterly payments of \$2,000.00 each over the course of one year. The term of the agreement began July 1, 1991 and ended June 30, 1992. At the end of the term of the agreement homeowner had paid only \$6,000.00 of the total amount due, and had also failed and refused to pay Utah State sales tax, in the amount of \$1,925.00. The homeowner refused to pay the remaining amount and attempted to unilaterally terminate the contract after the designer had completed her work under the contract. On August 18, 1992, designer filed her Complaint with the trial court. Designer complained, among other things, that she had substantially performed her part of the agreement and that the remaining \$2,000.00, plus the additional amounts of Utah State Sales tax was due and owing.

Homeowner filed his Answer and Counterclaim on September 11, 1992. Homeowner was sent designer's Request for Trial Date on January 5, 1993. The trial court sent the Notice of Trial Date

on January 12, 1993. Trial was scheduled for February 10, 1993. Homeowner filed his Motion for Continuance and various Discovery Requests, including his request to depose designer, on January 15, 1993. The trial court heard the homeowner's motions and requests to take depositions on January 27, 1993.

The trial court granted homeowner's request to take the deposition of the designer, and the deposition was scheduled to take place on February 5, 1993. Because of designer's stated concern that the homeowner was attempting to drive up the cost of litigation, the trial court warned the homeowner that if the depositions proved to be a bad faith effort to increase the cost of litigation, and imposed merely for the purposes of harassment and delay, then the costs of those depositions, in accord with the provisions of Rule 11 and 26(g) (U.R.C.P.), could be the responsibility of the homeowner. The trial court reserved consideration and ruling on the issue until the time of trial. The trial court denied the homeowner's Motion for Continuance.

The trial court granted all of homeowner's Discovery requests and ordered that all documents, admissions and other information requested be provided to the homeowner not later than February 3, 1993. All requested matters were produced by the designer on or before February 3, 1993. The deposition scheduled for February 5, 1993 was then cancelled by the homeowner.

The trial was held on February 10, 1993. During the Trial, the homeowner conceded to the trial court that he owed the Utah State sales tax as alleged by the designer, and the homeowner

paid the sales tax to the designer. During the proceedings, a recess was taken. When the court again resumed the proceedings, the tape recorder failed to record the proceedings. When the tape starts again, it begins in progress with a witness who is identified as Susan St.James, wife of the homeowner.

The trial court found that the designer had substantially performed her obligations under the agreement and entered judgment in favor of the designer.

VII.

SUMMARY OF ARGUMENT

I.THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING HOMEOWNER'S MOTION FOR CONTINUANCE.

Homeowner was given more than adequate time to prepare his defense and to take discovery. The homeowner cannot show an abuse of discretion. The denial of the Motion for Continuance was harmless error. This issue is without merit or likelihood of success.

II. THE TRIAL COURT'S STATEMENTS TO THE HOMEOWNER REGARDING RULE 11 SANCTIONS DID NOT PREVENT A FAIR TRIAL.

The trial court was attempting to educate the pro se defendant regarding the Rules of Civil Procedure. A pro se defendant is, nevertheless, held to the same standard of conduct as one who is licensed to practice law. No objection was raised to the remarks and conduct of the trial judge and is therefore barred as being raised for the first time on appeal.

III. THE TRIAL COURT DID NOT REFUSE TO ADMIT EVIDENCE OFFERED BY THE DEFENDANT.

The homeowner attempts to unilaterally supplement the record, and introduce evidence that is not part of the record on appeal. This is in clear violation of the Utah Rules of Appellate Procedure regarding record supplementation. Because the homeowner has not complied with Rule 11 (U.R.A.P.), this Court must presume the trial court's decision was correct, valid and, supported by the evidence.

IV. THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE PROPER AND SUPPORTED BY THE EVIDENCE.

Homeowner's statement of the standard of review is incorrect. The purported evidence supporting homeowner's argument is barred from consideration by virtue of the U.R.A.P. 11 violation cited above. The trial court's findings of fact are supported by the clear weight of the evidence and there is no indication from the record that the trial judge failed to adequately deliberate and consider the merits of the case. Automatic Control Products v. Tel-Tech, 780 P.2d 1258 (Utah 1989). Designer substantially performed under the agreement and is entitled to judgment.

V. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ACCURATELY REFLECT THE TRIAL COURT'S FINDINGS.

The trial court's findings and conclusions are accurately reflected in the Findings of Fact and Conclusions of Law.

VI. U.R.A.P. 33 SANCTIONS SHOULD BE IMPOSED ON HOMEOWNER FOR THE BRINGING OF A NON-MERITORIOUS, BAD FAITH APPEAL.

Homeowner has pursued this appeal even though it has no reasonable likelihood of success; has displayed a pattern of dilatory practices, which has unreasonably increased the cost of this appeal; has failed to exercise reasonable inquiry when stating questions of law and standards of review before this Court; and has failed to comply with the clear requirements of the Rules of Appellate Procedure, specifically with respect to the attempt to unilaterally supplement the record. Rule 33 Sanctions are therefore appropriate.

VII. U.R.A.P. 40(a) SANCTIONS SHOULD BE IMPOSED ON THE HOMEOWNER AND HIS ATTORNEY FOR HIS REPEATED FAILURE TO ADHERE TO THE RULES OF THIS COURT.

Homeowner's counsel mischaracterizes the proceedings below, misstates basic questions of law, attaches unrelated authority, and has submitted to this court matters and evidence which are not part of the official record. The designer in each case has been required to respond to homeowner's violation or non-compliance with this Court's Rules of Procedure. Rule 40(a) Sanctions are therefore appropriate.

VIII.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING HOMEOWNER'S MOTION FOR CONTINUANCE.

The Homeowner is required to show an abuse of discretion to sustain any merits of his continuance argument on appeal. Hill v. Dickerson, 839 P.2d 309 (Utah App. 1992), citing Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988) and Hardy v. Hardy, 776 P.2d 917, 925-26 (Utah App. 1989).

Homeowner's stated reason for urging the continuance of the trial date was for the furtherance of discovery. See *Transcript of Hearing*, January 27, 1993, p. 2. Prior to his discovery requests of January 15, 1993, the homeowner had performed no discovery. The trial court ordered that all discovery requests made by the homeowner were to be complied with, no later than February 3rd, 1993. See *Transcript of Hearing*, January 27, 1993, p. 20. All discovery as requested by the homeowner were supplied on or before February 3, 1993. All depositions as requested by the homeowner were actually scheduled and were to be conducted on February 5, 1993. See *Transcript of Hearing*, January 27, 1993, p. 20. The homeowner, after receipt of discovery information from the designer, declined to conduct the depositions.

At the hearing on January 27, 1993, the court also offered to continue the trial date to February 17, 1993, but the homeowner declined that date. See *Transcript of Hearing*, January 27, 1993, p. 18. Homeowner had over five months for depositions and discovery to be undertaken. It is undisputed that homeowner, during that five-month period of time, undertook no formal discovery. Homeowner waited until three weeks before the

scheduled trial to begin this process by filing requests for discovery and depositions on January 15, 1993. The homeowner complains that the trial court's denial of his Motion for Continuance was unreasonable. The homeowner then fails to show even one instance where he was unable to fairly present his case because of the denial of the Motion for Continuance. This case is a basic collection matter, based upon a written agreement prepared in its entirety by the homeowner. The evidence presented at trial by both parties consisted of documents and statements that were entirely known to both parties.

The homeowner makes no attempt to show how the denial of his Motion for Continuance prevented him from obtaining a fair trial. Other than the bald assertion that he did not have time to prepare, the homeowner does not even suggest how the trial court's denial precluded him from fairly presenting his case.

Ample time was allowed after the commencement of the lawsuit to utilize discovery procedures. It is well established law that a trial court is vested with substantial discretion in deciding whether requests for continuance should be granted. It is also firmly established that the trial courts decision will not be reversed unless it is clear that the trial court has abused that discretion by acting unreasonably. U.R.C.P. 40(b); Hunt v. Hurst, 785 P.2d 414 (Utah 1990); Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988); Hill v. Dickerson, 839 P.2d 309 (Utah App. 1992). In Hunt, a pro se party's motion for continuance was denied where the pro se party had five months for discovery,

prior to submission to the trial court on Motion for Summary Judgment, in a dental malpractice action. The facts and circumstances of that action were far more complex than those which exist in this case. The Utah Supreme Court held that the trial court did not abuse its discretion in denying the pro se party's Motion for Continuance. Hunt at 416.

The homeowner complains that the trial court did not provide him with a discovery "cut-off" date. There is no record of any such request having ever been made, and this matter is now raised for the first time on appeal. Rule 16 of the Utah Rules of Civil Procedure (U.R.C.P.) and Rule 4-502(5) of the Utah Code of Judicial Administration (U.C.J.A.) are dispositive on the matters related to pre-trial scheduling and management, and discovery procedures in civil cases. Under Rule 16 U.R.C.P., the trial court in its discretion, or upon motion of a party, may order such conferences as may be appropriate for a particular case. No motions were ever filed by either party pursuant to Rule 16 U.R.C.P. No mention or objection as to the lack of a scheduling conference has been raised by the homeowner prior to bringing this appeal. The issue is barred as being raised for the first time on appeal.

The court also complied with the provisions of Rule 4-502(5) U.C.J.A., and allowed homeowner discovery requests that were made within 30 days before the trial date. All discovery requested by the homeowner was allowed by the trial court, and all requests were responded to by the designer. See *Transcript of Hearing*,

January 27, 1993, p.17-20. The homeowners claims are obviously frivolous and without merit.

The trial court offered homeowner its best choices in trial dates available to the court, within the time and resource constraints then affecting the trial court. *Transcript of Hearing*, January 27, 1993, p. 21. To assign error to the trial court for homeowner's choice is illogical. The travel schedule of the homeowner was his choice. The homeowner now contends that his choices about that travel schedule should be error assigned to the trial court. The trial court scheduled the trial date approximately six months from the date after the Complaint was filed. The homeowner, by his own statement, was available for that trial date, and could not attend a later date because of his travel schedule. The homeowner must accept responsibility for his scheduling choice. See *Transcript of Hearing*, January 27, 1993, pp18-21.

Finally, the homeowner claims that a substantial right was affected when the trial court denied his Motion for Continuance. Homeowner offers no reason why the five months prior to trial was not an ample length of time to prepare his defense. The only claim that homeowner forwards on this matter is, that this Court should upset the trial court's ruling because the trial court would not accommodate homeowner's travel schedule. See *Transcript of Hearing*, January 27, 1993, pp18-21. This does not amount to a showing of an abuse of discretion.

This claim of error is without merit, it has no reasonable

likelihood of success and is entirely frivolous in its character.

II. THE TRIAL COURT'S STATEMENTS TO THE HOMEOWNER REGARDING RULE 11 AND RULE 26(g) SANCTIONS WERE REASONABLE AND PROPER AND DID NOT PREVENT A FAIR TRIAL.

It is well established that the permissiveness used for discovery procedures has limitations, and that these limitations should serve the primary purpose of the rules of Civil Procedure which are to ". . . secure the just, speedy, and inexpensive determination of every action." State Road Commission v. Petty, 412 P.2d 914 (Utah 1966). The trial court has the power and discretion to impose sanctions on parties who frustrate this objective. Under Rule 11 and 26(g) U.R.A.P. a party signing motions, documents, and other discovery requests certify by that signature that those requests are interposed in good faith. The trial judge in the present case was merely trying to encourage such an outcome by his explanations of these rules of Civil Procedure to the pro se defendant.

The appropriate characterization of the trial court's statements regarding homeowner's decision to depose the designer are clear from the *Transcript of Hearing* on January 27, 1993. See *Transcript of Hearing*, January 27, 1993, pp. 10-13, 15-17. Simply stated, the trial court was attempting to explain to a pro se party the requirements of good faith and the possible imposition of Rule 11 and Rule 26(g) (U.R.C.P.) sanctions on all participants in the litigation in the event that the court was

convinced of the bad faith of any of the parties. The court explained that either party is subject to sanctions, including costs and attorney's fees, if they act in bad faith toward each other and needlessly increase the cost of litigation to the opposing party. The following language of the Court illustrates the Court's indulgence of the homeowner, and the court's attempt to explain the basic legal precept of good faith requirements to the homeowner:

THE COURT: Well, I'm not going to award you attorney's fees if you didn't incur any, number one. You've chosen to be pro se. If in the course of a trial you were to convince me that this action was brought in bad faith, without any legitimate basis, that if your costs were--if Mr. Gold required you to take depositions and do things that were simply a waste of time and running up costs, then absolutely, I would consider a motion to award fees back.

But that's not what I have before me. I have a plaintiff that brought an action. There was no ostensible reason why a deposition should be taken in the case. And if that proves to be correct, that there was no needful, appropriate reason for the deposition, I'm just telling you you're on the hook for the costs of those.

If Mr. Gold required something for you to do that incurred a cost that was not needful, it was merely for harass, delay, then absolutely you're going to be looking--you'd be entitled to some sanctions back to him. The rules apply both ways.

Judge Roger Livingston, Trial Court Judge, Transcript of Hearing, January 27, 1993, pp. 16-17.

Rule 26(g) (U.R.C.P.) specifically provides that a court, upon motion or upon its own initiative, may impose appropriate sanction, including reasonable expenses incurred, upon a party whose discovery certification is made in violation of the rule.

Rule 26(g) specifies the areas which a party's good faith and reasonable inquiry certification apply: That the party's request, response, or objection is "(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and; (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." Rule 26(g) U.R.C.P.

The statements of the trial court judge relate precisely to the specific good faith and reasonable inquiry requirement of Rule 26(g) and Rule 11 (U.R.C.P.). The homeowner does not complain or allege that the statements of the judge are in any way incorrect or improper in light of Rule 26(g). That allegation cannot be made by the homeowner because Judge Livingston's statements are a correct and precise statement of a party's responsibility to conduct discovery in good faith.

The homeowner characterizes the issue of remarks and conduct of the trial judge as that of an exclusive question of law. To this end, he cites Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884 (Utah 1988). See *Appellant's Brief*, p1. The linkage and attribution of authority in this argument defies logic. The question presented is one of the appropriateness of the remarks and conduct of the trial judge. That issue is in no

way related to the decision reached in Mountain Fuel. Mountain Fuel establishes a standard of review where questions of law regarding equal protection are exclusively raised on appeal. The homeowner's citation of authority and characterization of the questions of law presented are clearly inappropriate.

A pro se defendant is held to the same standard of conduct as one who is licensed to practice law. Nelson v. Jacobsen, 669 p.2d 1207, 1213 (Utah 1983), reaffirmed by Worst v. Department of Employment Security, 818 p.2d 1036, note 3 (Utah App. 1991). However, under the doctrine that a lay person acting as his or her own attorney should be accorded every consideration that may reasonably be indulged, the trial court, in the present case, undertook to explain the implications of unnecessarily increasing the cost of litigation to the designer. After indulging the pro se defendant in a lengthy explanation of the rules of the court, the trial court waived the U.R.C.P. requirement for discovery at least 30 days before trial and granted the homeowner's Motion for Discovery. It is impossible for the designer to guess at how this indulgence by the court "precluded" the homeowner from taking the requested depositions.

Alternatively, even if the trial court erred in its explanations of the rules to the homeowner, there was no objection raised by homeowner to the remarks and conduct of the trial judge. This Court will not address an issue raised for the first time on appeal. Progressive Acquisition, Inc. v. Lytle, 806 P.2d 239, 242 (Utah App. 1991). See also: Gaston v. Hunter,

588 P.2d 326 (Ariz. App. 1978) (party waives his right to appeal in instance of judicial misconduct if he fails to object at a time when alleged misconduct could be cured); First Realty & Inv. Co., Inc. v. Rubert, 600 P.2d 1149 (Idaho 1979) (whether trial court improperly commented from bench was not preserved for appeal where appellants had not objected to trial court's remark); Phil-Co Feeds, Inc. v. First Nat. Bank in Havre, 777 P.2d 1306 (Mont. 1989) (party did not preserve for appeal issue of judicial misconduct in connection with judge's alleged "volcanic anger" at off-record bench conference, where party did not object at time of action).

Homeowner next argues that because pro se defendant disagreed with the trial court's ruling, that he thereby served his notice of objection to the conduct of the trial judge. A disagreement does not rise to the level of an objection if it is not calculated to obtain a ruling thereon. Barson v. Squibb, 682 P.2d 832, 837 (Utah 1984). The Utah Supreme Court announced the standard as follows:

In order to preserve a contention of error on appeal, the party claiming the error in admission of evidence must raise the objection to the trial court in clear and concise terms and in a timely fashion calculated to obtain a ruling thereon.

Id. at 837.

The pro se defendant's disagreements do not rise to this level of contention so as to allow the trial court to rule. *Transcript of Hearing*, January 27, 1993, pp. 20-12. Simply engaging in argument with the trial judge does not calculate an

opportunity for a ruling. The issue is therefore barred, as being raised for the first time on appeal.

This issue of appeal has no reasonable likelihood of success, is trivial to the disposition of the case, is entirely frivolous in its nature, and is not based on the facts surrounding the indulgence of the pro se party by the trial court.

III. THE TRIAL COURT DID NOT REFUSE TO ADMIT EVIDENCE OFFERED BY THE HOMEOWNER.

Homeowner admits in his Brief (p13), and elsewhere (Memo. in Opposition to Appellees Motion to Strike and for Sanctions, January 21, 1994), that there is no record of the trial court excluding any evidence where homeowner purportedly attempted to introduce documentary evidence. The homeowner then attempts to supplement the record by attaching a purported exhibit and the Affidavit of Susan St. James. *Appendix F & G, Appellant's Brief.*

Homeowner's attempt to unilaterally supplement the record in this manner is patently improper and must be disregarded because homeowner has failed to comply with Rule 11(g)&(h)U.R.A.P.. His claim is therefore fatally deficient under Rule 11(e)(2) U.R.A.P. The proper method for supplementing the record is for homeowner to seek a supplementation hearing before the trial court. Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356 (Utah App. 1991) (when record appropriately needs supplementation, Rule 11(h) is method to be implemented). This Court has further announced its view on claims of error submitted outside the scope

of U.R.A.P. 11(e)(2) in Horton v. Gem State Mutual of Utah:

Absent the trial transcript, appellant's claim of error is "merely an unsupported, unilateral allegation which we cannot resolve." *Mark VII Fin. Consultants Co.*, 792 P.2d at 134. Without all the relevant evidence bearing on the issues raised on appeal, as required by Utah R.App.P. 11(E)(2), "we can only presume that the judgment was supported by sufficient evidence. *State v. Nine Thousand One Hundred Ninety-Nine Dollars*, 791 P.2d 213, 217 (Utah App. 1990).

794 P.2d 847, at 849 (Utah App. 1990).

The affidavit and evidence attached as appendix to homeowner's Brief cannot be considered by this Court. Olson at 1359-60.

Because the homeowner has not complied with Rule 11 U.R.A.P., this Court must presume that the trial court's decision was correct and valid and that it was supported by the evidence. State v. Rawlings, 829 P.2d 150 (Utah App. 1992) (absent adequate record, court could not address issues raised and would presume correctness of disposition made by trial court); Sampson v. Richins, 770 P.2d 998 (Utah App. 1989) (the Court of Appeals will presume that the trial court's findings were supported by competent and sufficient evidence, where entire record was not before Court); Smith v. Vuicich, 699 P.2d 763 (Utah 1985) (where record before Supreme Court is incomplete, it is unable to review evidence as a whole and must therefore presume that verdict was supported by admissible and competent evidence); First Federal Sav. & Loan Ass'n v. Schamanek, 684 P.2d 1257 (Utah 1984) (in the absence of a record, Supreme Court must presume that the trial court's rulings were correct); Bevan v. J.H. Construction Co.,

Inc., 669 P.2d 441 (Utah 1983) (in the absence of a transcript Court assumes that the proceedings at trial were regular and proper and that the judgment was supported by competent and sufficient evidence).

Any reasonable inquiry into the rules of this Court and, the fundamental rules of law governing record supplementation, would have obviated homeowner's argument and designer's cost in responding. It is clear that this argument of homeowner is without merit and has been improperly interposed upon this Court.

Assuming, *arguendo*, that this issue is properly before this court, there can be no showing of error. The standard of review related to a trial court's determination of admissibility of evidence is that the trial court's ruling will not be upset absent an abuse of discretion. State v. Horton, 848 P.2d 708 (Utah App. 1993). The record clearly shows that the trial court openly invited the homeowner on numerous occasions to submit further evidence and testimony. None was forthcoming from the homeowner. The Court generously allowed the homeowner free and full range in submission of evidence and argument. A finding of abuse of discretion cannot be supported in this matter.

IV. THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE PROPER AND SUPPORTED BY THE EVIDENCE.

The standard of review applicable to the issue raised by homeowner is again different than the standard posited by the homeowner. The issue of the contract involves both a question of fact and a question of law for the purposes of review. Findings

of fact will only be reversed if found clearly erroneous; findings of law will be reviewed for correctness. Kasco Services Corporation v. Benson, 831 P.2d 86,89 (Utah 1992), citing Utah Rule of Civ. Procedure 52(a); State v. Petersen, 810 P.2d 421, 425 (Utah 1991); State v. Ramirez, 817 P.2d 774, 781-82 n.3 (Utah 1991).

Homeowner first argues that because the trial court did not allow his "documentary evidence" on substantial performance discussed in Section III of this Brief, that the trial court erred in its Findings of Fact.

This reliance upon homeowner's objection to the trial court's "refusal to admit relevant documentary evidence" is self defeating. Homeowner cannot avail himself of the trial court's alleged refusal to admit evidence where those proceedings are not part of the record he presents on appeal. The homeowner then fails to attempt any proper record supplementation in accord with the Rules of Appellate Procedure. Homeowner's only contention with the Findings of Fact is summarily whisked away when he no longer has the purported "non-admission of documentary evidence" to complain of. He cannot pursue his objection in this Court, because it is simply not part of the record as required in Rule 11(e)(2) U.R.A.P..

All relevant aspects of the contract (acceptance, consideration, performance, etc.) were explored by the trial court through testimony, additional exhibits and extensive colloquy between the court and the witnesses. See *Transcript of*

Trial, pp. 1-91.

Homeowner now questions the trial court's findings and cites Baker v. Western Sur. Co., 757 P.2d 878 (Utah App. 1988), as authoritative. Of course, the standard of review cited in Baker applies where the court interprets a contract as a matter of law without regard for extrinsic evidence. It cannot be seriously argued that the trial court in the present case did not have a deep and probing regard for extrinsic evidence related to the contract. This much is patently clear from the entire record. The trial court in this matter admitted and allowed evidence which went far beyond the "four corners" of the August 14, 1991 agreement. See *Trial Transcript*, February 5, 1993, pp30-66. That evidence is extrinsic in nature. The standard of review urged by the homeowner does not address the existence of such extrinsic evidence.

Homeowner's only objection to the Findings of Fact deals with Paragraph 9 of the trial court's Findings of Fact and Conclusions of Law. See *Discussion of Findings of Fact and Conclusions of Law*, March 17, 1993, p. 14 (hereinafter "*Discussion*"). Paragraph 9 reads as follows:

9. The contract between plaintiff and defendant provided that plaintiff would be paid a design fee in the amount of \$8,000.00 for her services, and that said design fee would be paid by way of \$2,000.00 quarterly payments with the first payment being due on September 30, 1991.

Findings of Fact and Conclusions of Law, March 17, 1993, p. 3.

The trial court found, by a preponderance of evidence, that the contract provided for said payment. There is nothing

whatever in the record to suggest that the trial court's finding is clearly erroneous. Any claim that the homeowner makes in this regard is simply his continuing difference of opinion with the trial court's finding which is adverse to him. See *Discussion*, pp. 7, 10-11. The disagreement with the trial court on this matter does not constitute a meritorious claim of a "clearly erroneous" finding. There is ample testimony to justify such a finding, and the homeowner never has denied that he exclusively prepared the agreement.

More importantly, the homeowner never objects or questions the trial court's Finding of Fact, paragraph 12, where the trial court finds substantial performance on the part of the designer. The issue of termination on his part is rendered moot by designer's successful assertion of her "substantial performance" claim. Again, the evidence submitted to the court, and the record provides clear justification for such a finding of substantial performance by the designer. The "clearly erroneous" standard cannot be met.

V. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ACCURATELY
REFLECT THE TRIAL COURT'S FINDINGS.

The trial court's Findings of Fact will not be disturbed unless they are clearly erroneous. Kasco Services Corporation v. Benson, op.cit. infra, and where it appears that the trial judge adequately deliberated and considered the merits of the case in entering its findings and judgement, Automatic Control Products v. Tel-Tech, 780 P.2d 1258 (Utah 1989).

Homeowner ignores the extensive statements of the trial court on this matter, at the time of trial, and further ignores the extensive discussion of the Findings of Fact and Conclusions of Law which took place before the trial court on March 17, 1993.

The homeowner objected to a number of the Findings of Fact at the *Discussion on the Findings of Fact and Conclusions of Law* held on March 17, 1993 ("*Discussion*"). The homeowner apparently believes that his differences of opinion with the trial court are grounds for the reversal of the trial court's specific order.

The trial court spent a generous amount of time hearing the objections of the homeowner on the Findings of Fact and Conclusions of Law. The homeowner would have this Court re-hash the issue simply because he does not agree that the court knew what it signed on the 17th of March, 1993. This is patently absurd. If there is any question that the trial court "mechanically" adopted the designer's proposed Findings of Fact and Conclusions of Law, it is dispelled by an examination of the changes made in the final, amended Findings of Fact and Conclusions of Law which contain changes that were urged by the homeowner. See *Discussion*, p2,3,4,5,10,12,13. The trial court also made it's position clear during the Discussion:

THE COURT: . . . Again, I guess this is what trials are for, to sort out contesting perspectives and different points of view. Again, I tried to do the best I can for that and so the--and I do believe that the judgement, the, form and Findings of Fact as I've directed those be changed, accurately reflect those. Again, it's not as either of you would have them but I believe the findings and conclusions and judgement form is consistent with the ruling of the Court. And I have no problem with any of that.

Discussion, p.15.

The trial court signed the amended Findings of Fact and Conclusions of Law only one hour later. It is hard to imagine where the homeowner can find the error he seeks. Assuming, *arguendo*, that homeowner properly defines the question of law, standard of review, and cites the correct authority, he is still a long way from proving the Findings are against the "clear weight of the evidence".

VI. U.R.A.P. 33 SANCTIONS SHOULD BE IMPOSED ON HOMEOWNER FOR THE BRINGING OF A NON-MERITORIOUS, BAD FAITH APPEAL.

Homeowner has pursued this appeal even though it has no reasonable likelihood of success, continued to display a pattern of dilatory practices and has failed to exercise reasonable inquiry when stating questions of law and standards of review before this Court.

Designer maintains that the issues brought before this Court are without merit and are pursued as a dilatory tactic to avoid final judgment. Homeowner brings a case to this Court which cannot be reasonably expected to succeed.

Homeowner has established a pattern of improper docketing statements, improper submission of documents, failure to adhere to rules of appellate procedure and a consistent misapplication or lack of authority in his memoranda. Designer has been obligated to respond to four docketing statements, improperly interposed affidavits and exhibits, numerous procedural missteps and more than mild deficiencies in presenting his issues on

appeal. Reasonable inquiry into the status of Homeowner's claim, the rules of this court and the current state of the law governing homeowner's issues raised on appeal would have dispensed with such improprieties.

This is precisely the type and kind of case which has been previously held out by this Court as ripe for Rule 33 Sanctions and Award of Costs. Eames v. Eames, 735 P.2d 395 (Utah 1987); Hunt v. Hurst, 785 P.2d 414 (Utah 1990); Utah Dept. of Social Services v. Adams, 806 P.2d 1193 (Utah App. 1987); Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989).

VII. U.R.A.P. 40(a) SANCTIONS SHOULD BE IMPOSED ON THE HOMEOWNER AND HIS ATTORNEY FOR HIS REPEATED FAILURE TO ADHERE TO THE RULES OF THIS COURT.

Homeowner's counsel mischaracterizes the proceedings below, misstates basic questions of law, attaches unrelated authority, and fumbles basic standards of appellate review. This type of preparation is indicated by the four different docketing statements filed in connection with this case.

A great deal of time must be expended in properly re-stating the questions of law, standards of review and, proceedings in the lower court. Additionally, when there are elementary flaws in the docketing statement, designer is forced to expend inordinate time and resources to bring these matters to this Court's attention.

This appeal has previously been dismissed by the Court because of inadequate Docketing Statements filed by the homeowner

and his attorneys. The designer has previously filed Objections to homeowner's prior Docketing Statements, and a Motion to Dismiss Appeal, all of which have been previously granted by this Court. The homeowner and his current legal counsel have misrepresented the homeowner's prior representation by a licensed and active member of the Utah State Bar in order to obtain the reinstatement of this appeal. Those misrepresentations have been verified by affidavits on file with this Court from both the homeowner's personal secretary and the record keeping personnel from the Utah State Bar.

Rule 40(a) sanctions are, therefore, appropriate in this case. The most recent impropriety in homeowner's conduct is the attempt to accomplish record supplementation in violation of Rule 11(g)&(h) and Rule 11(3)(2) (U.R.A.P.). Even a cursory review of this Court's Rules of Procedure and the recent case law related to record supplementation would have resulted in significant savings of time and expense to designer in responding to this improper, unmeritorious and frivolous attempt to supplement.

IX.

CONCLUSION

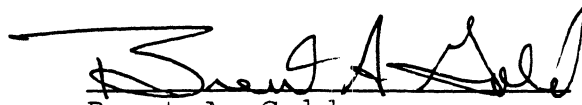
Based upon the foregoing argument, homeowner's appeal should be denied. The trial court acted properly, within its discretion, and conducted a fair and impartial hearing and trial. The designer substantially performed her services under the agreement and is entitled to the agreed compensation.

The homeowner has brought this appeal to delay final

judgment in the order of paying the designer. It was his intent from the outset to rob designer of her fee by so increasing the cost of collection that it grossly exceeded the amount in controversy. Additionally, homeowner and his various attorneys have interposed bad faith arguments, exhibits and other papers on this court and they should be additionally sanctioned for such violations of this court's rules.

The judgement of the trial court should be affirmed and this court should award designer her attorney fees and double costs on appeal.

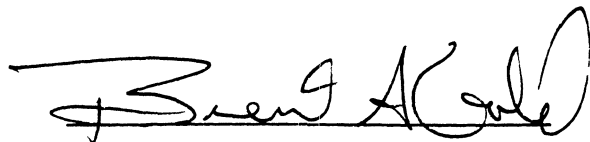
DATED this 7th day of February, 1994.


Brent A. Gold
Attorney for Appellee

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of February, 1994, that I mailed by first-class, postage pre-paid, two (2) true and correct copies of the foregoing Appellee's Brief to the following:

Kenneth Allen
Attorney for Appellant
10 West Broadway, Suite 500
Salt Lake City, Utah 84101



ADDENDUM A

There are no addendums that appellee wishes to add to her brief. However, please note that Appellant's Brief contains relevant materials that are the subject of Appellee's Brief, and a reproduction here is regarded as wasteful.

Appellant's Brief Addendums

Addendum A: The Contract

Addendum B: Notice of Appeal

Addendum C: Judgement

Addendum D: Findings of Fact and Conclusions of Law

Addendum E: Homeowner's Motion for Continuance

Addendum F: Affidavit of Susan St. James

Addendum G: Excluded Evidence

Addendum H: Discussion of Findings of Fact and Conclusions of Law, March 17, 1993

Addendum I: Transcript of Hearing, January 27, 1993

Addendum J: Portion of Trial Transcript, February 10, 1993