

1993

Zions First National Bank, a National Banking Association, and 4447 Associates, a Utah general partnership, Plaintiff and Appellant, v. First Security Financial, a National corporation, Defendant and Appellee : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

ZIONS FIRST NATIONAL BANK, a)
National Banking Association,)
and 4447 ASSOCIATES, a Utah)
general partnership,)

Plaintiff-Appellant,)

v.)

FIRST SECURITY FINANCIAL,)
a National corporation,)

Defendant-Appellee.)

No. 930293-CA

Argument Priority 15

REPLY BRIEF OF APPELLANT

Appeal from a Judgment of the Third Judicial District Court
for Salt Lake County, Honorable Frank G. Noel, District Judge

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UTAH COURT OF APPEALS

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930293

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Utah Court of Appeals

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Mary T. Noonan
Clerk of the Court

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DETERMINATIVE PROVISIONS OF LAW

This case was decided by the trial court sitting without a jury. The principal issues in this case are: (a) whether First Security Financial ("First Security") had notice of a collateral assignment (the "Assignment") from Capitol Thrift & Loan Company ("Capitol") of money owed by First Security under the Purchase Agreements prior to entering into the Settlement Agreement, and (b) whether the balance due Capitol from First Security under the Purchase Agreements was properly adjusted downward by the trial

court in the amount of \$1,000,000.00 on First Security's motion for partial summary judgment.

On review of a factual finding, Rule 52(a), Utah Rules of Civil Procedure, is determinative. On summary judgment, Rule 56, Utah Rules of Civil Procedure, is determinative.¹ As to questions of notice, Utah Code Annotated Sections 70A-1-201² and 70A-9-318³ are determinative in this case.

INTRODUCTION

Pursuant to Rule 24(c) of the Utah Rules of Appellate Procedure,⁴ Appellant 4447 Associates ("4447") replies herein only to those new matters raised by First Security not otherwise covered in 4447's Brief of Appellant.

¹See Addendum O.

²See Addendum P.

³See Addendum Q.

⁴See Addendum R.

ARGUMENT

I.

**APPELLANT 4447 HAS PROPERLY MARSHALLED ALL OF
THE EVIDENCE; AS MARSHALLED, THE EVIDENCE
DEMONSTRATES THAT THE TRIAL COURT'S FINDINGS
OF FACT ARE CLEARLY ERRONEOUS.**

First Security argues in its brief that 4447 has not marshalled the evidence. This is a threshold issue to consideration of this appeal.⁵ First Security states,

4447 Associates has cited this appellate court only the portions of the evidence favorable to its position. Because 4447 Associates did not marshal the evidence, this court should affirm the factual findings of the district court.

Appellee's Brief at 30. First Security's argument asserts but fails to show that 4447 did not meet its burden to marshal the evidence. In fact, First Security has not cited any evidence which 4447 did not include in its brief,⁶ nor has it cited any evidence

⁵If appellant has failed to meet its burden of marshalling the evidence, this court will affirm the finding of the lower court. *Robb v. Anderton*, 863 P.2d 1322, 1328 (Utah Ct. App. 1993).

⁶In its entire brief, First Security has referred to only three pages of the trial transcript in its brief: Page 8, Footnote 4, of Appellee's Brief refers to the "Transcript" at 138 [Record at 937]; Page 16 of Appellee's brief cites to the "Transcript" twice at 106 [Record at 905]; Footnote 9, Page 24 of Appellee's brief cites the "Transcript" at 106 [Record at 905]; Page 31 of Appellee's brief cites the "Transcript" at 65 [Record at 864]. These three citations to the record are contained in 4447's Brief of Appellant as follows: Record at 937 is found at footnotes 34 and 73 and accompanying text; Record at 905 is found at footnotes 41 and 73 and accompanying text; and Record at 864 is found at footnotes 41 and 73 and accompanying text, respectively.

which supports its bald assertion that 4447 has cited "only the portions of the evidence favorable to its position."⁷ Instead, First Security has elected merely to restate the factual findings of the trial court throughout its brief. By doing so, First Security relies only on the trial court's findings and has not shown from the evidence that 4447 did not meet its burden to marshal the evidence.

Under Utah law, "In order to show clear error, the 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,' thus making them 'clearly erroneous.'" Estate of Ashton v. Ashton, 804 P.2d 540, 542 (Utah Ct. App. 1990); see also Grayson Roper Limited v. Finlinson, 782 P.2d 467, 470 (Utah 1989). Thereafter, the appellee may refer to evidence presented to the trial court to which the appellant did not refer and thereby show that appellant has failed to meet its burden to marshal the evidence. As stated above, First Security has failed to show that 4447 did not properly marshal the evidence in the Brief of Appellant. Accordingly, after review of the Brief of Appellant, this Court should find that 4447 has met its burden to marshal the evidence and may now examine the sufficiency of the trial court's findings.

⁷Appellee's Brief at 30.

II. THE NOTICE DEFINITIONS CONTAINED IN SECTION 70A-1-201 ARE APPLICABLE TO SECTION 70A-9-318. UNDER SECTION 70A-1-201, FIRST SECURITY RECEIVED PROPER NOTICE OF THE ASSIGNMENT PURSUANT TO SECTION 70A-9-318.

First Security states that the definitions of notice in Section 70A-1-201 are not applicable to the provisions of Section 70A-9-318.⁸ First Security further states that 4447's position that the definitions contained in Section 70A-1-201 are applicable to the provisions of Section 70A-9-318 is "frivolous and should be rejected by this Court."⁹

However, later in its brief, First Security concedes that the definitions in Chapter One of the UCC are "relevant only if terms that are defined in that section are used elsewhere in the Uniform Commercial Code."¹⁰ First Security further concedes, "Once a court has analyzed the applicable statutory provision (section 70A-9-318), then the court should look to the definitions contained in section 70A-1-201 for additional guidance as to the definition of terms used in section 70A-9-318. In this case, Section 70A-1-

⁸Appellee's Brief at 14. Appellee cites no case law or statute in support of this claim.

⁹Appellee's Brief at 14. Appellee cites no case law or statute in support of this claim.

¹⁰Appellee's Brief at 24-25.

201(26)(b) provides guidance as to the term 'receives notification,' which is used in section 70A-9-318."¹¹

First Security thereby concedes that the definitions contained in 70A-1-201 are applicable in determining whether notice was received, despite its initial statement that 4447's argument on this point is frivolous. 4447 also asserts that the definitions in Section 70A-1-201(25, 27) are similarly relevant and helpful in determining that First Security received notice under Section 70A-9-318. Therefore, 4447 relies on its argument and supporting authorities which are cited in its appellant's brief regarding Section 70A-1-201(25-27).¹²

¹¹Appellee's Brief at 25. See also *Ertel v. Radio Corporation of America*, 307 N.E.2d 471, 473 (Ind. 1974)("Notification is nowhere defined in 9-318(3), but is defined in 1-201(26). . . ."); *Chase Manhattan Bank v. State of New York*, 357 N.E.2d 366, 369 (N.Y. 1976)("Although [the] Uniform Commercial Code does not designate any particular person or place for receipt of notice, least of all to the State, the code does provide, in general terms, conditions under which delivery of notice will be effective. The provisions are relevant and supportive of the analysis (see Uniform Commercial Code, s 1-201, subds. (26), (27))").

¹²See Brief of Appellant at 21-41 and the authorities cited therein. The official comment to Section 9-318 of the UCC also provides that if First Security and Christenson had a question regarding the sufficiency of the notification or the Assignment itself, it had a duty to inquire of Zions:

Subsection (3) requires reasonable identification of the account assigned and recognizes the right of an account debtor to require reasonable proof of the making of the assignment If the notification does not contain such reasonable identification or if such reasonable proof is not furnished on request, the account debtor may disregard the assignment and make payment to the assignor. What is "reasonable" is not left to the arbitrary decision of the account debtor; if there is doubt as to the adequacy either of a notification or of proof submitted after request, the account debtor may not be safe in disregarding it unless he has notified the

III.

UNDER SECTION 70A-9-318(1), 4447 IS NOT
SUBJECT TO THE DEFENSE THAT THE DEBT AT ISSUE
HAS BEEN EXTINGUISHED.

First Security has argued that pursuant to Utah Code Annotated 70A-9-318(1), it was entitled to satisfy its obligation to its original creditor, Capitol.¹³ In support of this argument, First Security further cites Bank of Salt Lake v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints,¹⁴ where the court held that "absent notice, it is to be noted that the claims of the Bank, as assignee, were subject to any defense the Church, as account debtor had against Cook, as assignor, 70A-9-318(1)(a)."¹⁵ First Security further argues, "Absent receipt of

assignee with commercial promptness as to the respects in which identification or proof is considered defective.
Uniform Commercial Code (1978 Ed.), West Publishing Co., at 729.

There is no evidence in the record, and none was presented at trial by First Security, which shows that First Security inquired of Zions regarding any defect or uncertainty in the notification of the Assignment was defective. Yet Christenson knew enough about the Assignment that he felt compelled to disclose it to First Security in three separate financial statements at a time immediately previous to the execution of the Settlement Agreement. See discussion *infra* and Record at 779-80 regarding Christenson's disclosures to First Security.

¹³Appellee's brief at 14 and Record at 678.

¹⁴534 P.2d 887 (Utah 1975).

¹⁵Appellee's Brief at 15 (emphasis added). It should be noted that appellee misquoted the section number in its brief as Section 70A-9-~~313~~(1)(a). However, after review of the text of the case, the section number quoted by the Court was Section 70A-9-318(1)(a).

notification¹⁶ by First Security prior to the time the settlement agreement was entered into, 4447 Associates as the successor in interest to Zions First National Bank, N.A. ("Zions"), is subject to the defense that the debt has been completely satisfied"¹⁷ and that Zions was subject to the defense of settlement of the debt under 70A-9-318(1)(b).

4447 agrees with First Security's assertion and its supporting citation to Bank of Salt Lake, but notes that First Security's argument is correct only true if First Security did not receive notice of the Assignment. Indeed, the reverse is also true: If First Security received notice of the Assignment prior to the time the Settlement Agreement was entered into, Zions' rights in the Purchase Agreements were not extinguished or modified even though First Security and Capitol executed the Settlement Agreement. In point of fact, First Security did receive notice of the Assignment prior to execution of the Settlement Agreement through Christenson and its receipt of three copies of his financial statement as shown infra at A. Thus, under Section 70A-9-318(1), 4447 Associates is not subject to First Security's defense that the debt evidenced by the Purchase Agreements via the Settlement Agreement was satisfied because First Security received notice of the Assignment before it executed the Settlement Agreement.

¹⁶Presumably First Security means "receipt of notification" as defined in Section 70A-1-201.

¹⁷Appellee's brief at 16. It is also interesting to note that First Security finally agrees and argues that Zions was only required to notify First Security of the Assignment.

Subsection 1 of Section 70A-9-318 provides:

(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in Section 70A-9-206 the rights of an assignee are subject to:

(a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

The comment to that section provides,

Subsection (1) makes no substantial change in prior law. An assignee has traditionally been subject to defenses or setoffs existing before an account debtor is notified of the assignment. . . . The account debtor may also have claims against the assignor which arise independently of that contract: an assignee is subject to all such claims which accrue before, and free of all those which accrue after, the account debtor is notified (paragraph (1)(b)).¹⁸

The comment to Subsection 1 is devoid of any requirement that the assignee give both notice and demand for payment under 9-318(1). Instead, the comment merely refers to notice and notification.¹⁹ Therefore, it is 4447 who enjoys the protection of Subsection 1 of Section 70A-9-318 and not First Security.

Professors White & Summers also recognize this rule. "Under the Restatement rule, defenses which cannot be asserted against an

¹⁸**Uniform Commercial Code** (1978), West Publishing Co., at 727 (parenthetical reference by the authors of the UCC).

¹⁹*Id.*

assignee are limited to those based on facts arising after the obligor has notice of the assignment."²⁰

A. The undisputed evidence in this case clearly shows that First Security received notice of the Assignment prior to its execution of the Settlement Agreement.

First Security argues that prior to the execution of the Settlement Agreement, it never received notice of the Assignment and that Christenson's knowledge of Capitol's intent to make an assignment in favor of Zions was insufficient to put First Security on notice of the Assignment. 4447 believes that the trial court's findings are clearly erroneous that notice was not received by First Security, and that First Security was under no duty to inquire regarding the Assignment.²¹

²⁰White & Summers, **Uniform Commercial Code**, §14-11, (1972) at 490. The Restatement section referred to is **Restatement of Contracts**, §167(1)(1932).

²¹See also Appellant's Brief at 21-41, regarding the discussions of notice issues such as Christenson's conversations with Potts, the mailing and receipt of the Notice of Assignment, etc.

4447 argues that *Time Finance Corporation v. Johnson Trucking Company*, 458 P.2d 1873 (Utah 1969) is inapposite for the reasons cited in the Brief of Appellant at 32-35. However, even under *Time Finance* and contrary to the trial court's holding in this case that knowledge of the existence of the Assignment did not impose a duty of inquiry upon First Security, the Supreme Court expressly stated in *Time Finance*, 458 P.2d 1873 (Utah 1969) that such a duty of inquiry exists:

Even though there is no actual knowledge of an assignment, if there is knowledge of such facts as would put a reasonable man upon inquiry, and as would indicate

However, and perhaps more importantly, the trial court's findings as entered, clearly show that First Security received actual notice of the Assignment prior to First Security's attempt to compromise the receivable by executing the Settlement Agreement with Capitol.²² The trial court expressly found that First Security received the financial statements of Christenson on three separate occasions in connection with the negotiations between First Security and Capitol to compromise the receivable.²³ In its Findings of Fact, the trial court quoted language from Christenson's financial statement disclosing the Assignment²⁴ which financial statement was delivered three separate times to First Security:

This represents my portion of the ownership of Capitol Thrift & Loan based on the contract amount I have with First Security Financial. This receivable has been pledged to Zions First National Bank.²⁵

These disclosures occurred after Christenson was terminated, but before Capitol and First Security executed the Settlement

heedless disregard of others' rights if no attention were paid to them, the effect is the same as if actual notice had been given.

The *Time Finance* court concluded, "As to what inquiry must be made to satisfy the requirement of the law in this respect must be determined from the circumstances in each individual case." *Id.* at 876.

²²Record at 779-80, ¶¶23-24.

²³*Id.*

²⁴See Addenda A and B.

²⁵*Id.*

Agreement.²⁶ These notices of the Assignment were received by First Security at precisely the time when First Security was making its most careful and thorough investigation and analysis of the obligation evidenced by the Purchase Agreements;²⁷ in July 1985, First Security was negotiating with Capitol to extinguish and satisfy the entire debt due under the Purchase Agreements.

Certainly there can be no more important information to an account debtor at the time he is negotiating with the assignor to satisfy the debt than to learn that his obligation has been collaterally assigned. If the account debtor proceeds with his negotiations after notice of the assignment and compromises the debt, the assignee will inevitably challenge the agreement between the account debtor and the assignor. In that case, the account debtor will have to pay the assignee the value of the collateral which was compromised, modified or extinguished by the account debtor/assignor agreement. Thus, only an imprudent or careless account debtor would not communicate with the assignee after learning of the collateral assignment.

²⁶See discussion of these disclosures in Brief of Appellant at 29-35.

²⁷The evidence regarding Christenson's financial statements was unrefuted at trial and is undisputed by First Security on appeal. 4447 argues that because this evidence is undisputed, this Court should review the trial court's legal conclusion that notice was not given for correctness. Record at 780-781, Conclusions of Law ¶¶ 2,3,4,5,6. On appeal from an order regarding questions of law, the appellate court reviews the conclusions of law made by the trial court for correctness, and gives them no special deference. *Reinbold v. Utah Fun Shares*, 850 P.2d 487 (Utah App.1993)(citing *Bountiful v. Riley*, 784 P.2d 1174, 1175 (Utah 1989)).

From the evidence found by the trial court, First Security failed to communicate with Zions after it received notice of the Assignment on three different occasions prior to execution of the Settlement Agreement.²⁸ Thus, pursuant to 70A-9-318(1) and the undisputed evidence that First Security had notice of the Assignment prior to execution of the Settlement Agreement which purportedly extinguished the debt owed Zions, 4447 is not subject to First Security's defense that the debt was settled with Capitol.

**B. Case law in Utah and other jurisdictions
dictates that under Section 70A-9-318(1), 4447
is not subject to First Security's attempt to
extinguish the debt via First Security's
purported settlement with Capitol.**

The law in several jurisdictions supports the proposition that once notification of an assignment has been received, the account debtor compromises the debt at his peril. In Pioneer Commercial Funding Corp. v. United Airlines, Inc., 122 B.R. 871, 882-83 (S.D.N.Y. 1991), the Court stated,

Turning to section 9-318(1)(b), therefore, the provision specifically states that the assignee takes subject to the debtor's claims against the assignor that accrue prior to the debtor's receipt of notification of the assignment. United suggests that notification of the assignment in this context requires both notification of the assignment and a demand for payment, which is precisely the interpretation it gives to section 9-318(3). Unfortunately, this proposition ignores the fact that the language used in sub-divisions 1 and 3 of section 9-318 is not identical. While a two-pronged notice requirement is mandated by sub-division 3, only notification of the assignment is required under sub-

²⁸Record at 682-83.

division 1. If notification of the assignment in sub-division 1 means both notification of the assignment and a demand for payment as United contends, it would be redundant to specifically include both requirements in sub-division 3. Looking at the specific language of the statute, it appears clear that the responsibilities incumbent upon an assignee under section 9-318(1) are less stringent than those required by section 9-318(3). This may be a function of the differing purposes of the two provisions. United's attempt to merge the sections ignores the statutory language and clouds the true issues before us.

Having decided that notification under section 9-318(1) does not require a demand for payment, the next issue for the court was whether United's purported right to a setoff accrued before or after the account debtor received notification of the assignment.²⁹ However, the court stated that issue was not before it at that time.³⁰ The Court also noted, "Even if section 9-318(1)(b)'s notification requirement was meant to include both provisions of section 9-318(3), it is not settled that a specific demand for payment, as opposed to simple actual notice of the assignment and the assignee's right to payment, is required by section 318(3)."³¹

The Pioneer Commercial court concluded, "For all the foregoing reasons, we find United's contention that a demand for payment was

²⁹*Id.* at 883.

³⁰*Id.*

³¹122 B.R. at 883, fn.13 (emphasis added).

required as a condition precedent to Pioneer's claims to be without merit."³²

Finally, as acknowledged and argued by First Security, Utah law recognizes that after receipt of notification of an assignment, an assignee is not subject to the account debtor's defense that the debt was compromised after the account debtor had notice of the assignment. In Bank of Salt Lake v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints,³³ the Utah Supreme Court held that "absent notice, it is to be noted that the

³²*Id.* at 883 (emphasis added). See also *Rosenthal & Rosenthal, Inc. v. John Kunststadt, Inc.*, 482 N.Y.S. 2d 287, 288 (N.Y.App.Div. 1984) ("It is plain, therefore, that defendant may not assert as against plaintiff any unrelated claim which defendant may have had against Ramsay unless it arose prior to the notice from Ramsay of the assignment of the account to plaintiff. The record indicates that defendant's claim against Ramsay arises out of a contract to deliver goods to defendant in installments and the alleged breach did not occur until at least two and possibly three months after defendant had received notice of the assignment. Hence, the allegations of breach by Ramsay cannot serve to defeat plaintiff's claims."); *Barclays American/Business Credit, Inc. v. Paul Safran Metal Company*, 566 F.Supp. 254, 257-58 (N.D.Ill. 1983) ("The question remaining under the terms of 9-318(1)(b), then, is whether Safran's claim accrued prior to its receipt of notification that its account receivable had been assigned to Barclays. . . . Safran's final sale to Interstate occurred on July 1, 1982, in the amount of \$10,662.14. Because this sale occurred after Safran's receipt of notification under s 9-318(1)(b), it may not be used to reduce Barclays' claim."); *In re Lewis Carpet Mills*, 24 B.R. 62 (Bkrtcy.N.D.Ga.1982) ("Moreover, Rosenthal is precluded from asserting this claim against Maguire, which is an assignee of Lewis. The claims and defenses which can be raised against an assignee of an account arising out of a sale are limited by the Uniform Commercial Code, Ga.Code Ann. §109A-9-318(1). . . . The claim for loss of value is one which, if recognized at all, is subject to Ga.Code Ann. §109A-9-318(1)(b). It is a claim which clearly accrued after Rosenthal received notification of the assignment of the accounts sued upon in this case.")

³³534 P.2d 887 (Utah 1975).

claims of the Bank, as assignee, were subject to any defense the Church, as account debtor had against Cook, as assignor, 70A-9-318(1)(a)."³⁴ Conversely, after notice, an assignee is not subject to the claims and defenses of the account debtor.

Accordingly, under Utah law and the UCC as interpreted in this and other jurisdictions, 4447 is not subject to First Security's alleged settlement of the debt in favor of Capitol, because execution of the Settlement Agreement occurred after First Security received notice of the Assignment.

IV.

**THE PURCHASE PRICE FOR THE RECEIVABLE SHOULD
NOT HAVE BEEN ADJUSTED DOWNWARD BY ONE MILLION
DOLLARS.**

First Security has failed to present new law or argue evidence which is different from its memoranda submitted in conjunction with its Motion for Partial Summary Judgment. Therefore, 4447 reasserts that the granting of defendant's Motion for Partial Summary Judgment and the downward adjustment described in its Brief of Appellant was clear error. Furthermore, if there is a dispute about when the closing date occurred or ought to have occurred, which question is necessarily a question of fact precluding summary judgment, then this factual issue should have been resolved in

³⁴Appellee's Brief at 15 (emphasis added). Appellee misquoted the section number in its brief as 70A-9-313(1)(a). However, after review of the text of the case, the section number quoted by the Court was 70A-9-318(1)(a).

favor of 4447.³⁵ 4447 hereby relies upon this and its arguments which are before the court on this issue.³⁶

CONCLUSION

When marshalled together, all of the evidence adduced at trial by the defendant do not support the findings of fact and conclusions of law of Judge Noel. Appellant respectfully requests this Court to reverse the trial court's judgment and hold that

1) notice of the Assignment was received by First Security before it executed the Settlement Agreement,

2) pursuant to Utah Code Annotated Section 70A-9-318(1)(b) the Settlement Agreement did not extinguish the rights of Zions in the receivable owed by First Security to Capitol, and,

3) the purchase price payable under the Purchase Agreements

³⁵When reviewing the trial court's decision granting summary judgment, the appellate court reviews the facts in the light most favorable to the party opposing summary judgment and affirms a grant of summary judgment only if the moving party is entitled to judgment as a matter of law. *First American Commerce Company v. Washington Mutual Savings Bank*, 743 P.2d 1193, 1194 (Utah 1987).

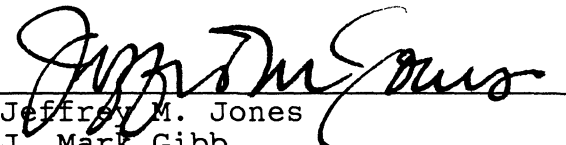
³⁶See Brief of Appellant at 41-45; Record at 385-390.

should not have been adjusted downward in the amount of \$1,000,000.00.

DATED this 24th day of January, 1994.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that I caused two true and correct copies of the foregoing Reply Brief of Appellant to be mailed, first class postage prepaid, to the following this 2nd day of January, 1994:

Craig Carlile
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RAY, QUINNEY & NEBEKER
92 North University Avenue
Suite 210
Provo, Utah 84145
Attorneys for Appellee



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ADDENDUM R

the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court shall immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court shall transmit the record of the supplemental proceedings upon the preparation of the entire record.

(g) **Appellate court determination.** Upon receipt of the record from the trial court, the clerk of the court shall notify the parties of the new schedule for briefing or oral argument under these rules. Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in other appeals. The findings of fact entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals.

(Added effective October 1, 1992.)

Rule 24. Briefs.

(a) **Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review and the standard of appellate review with supporting authority for each issue.

(6) Constitutional provisions, statutes, ordinances, rules and regulations whose interpretation is determinative shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and in that event, the provision shall be set forth as provided in paragraph (f) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on.

(10) A short conclusion stating the precise relief sought.

(b) **Brief of the appellee.** The brief of the appellee shall conform to the requirements of paragraph (a) of this rule except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) **Reply brief.** The appellant may file a brief in reply to the brief of the appellee and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraph (a)(2), (3), (6), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) **References in briefs to parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

(f) **Reproduction of statutes, rules, regulations, documents, etc.** If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, to the extent not set forth under subparagraph (a)(6) of this rule, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form. Copies of those parts of the record on appeal that are of central importance to the determination of the appeal (e.g., the challenged instructions, findings of fact and conclusions of law, memorandum decision, the contract or document subject to construction, etc.) shall also be included in the addendum.

(g) **Length of briefs.** Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (f) of this rule.

(h) **Briefs in cases involving cross-appeals.** If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant.

(i) **Briefs in cases involving multiple appellants or appellees.** In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) **Citation of supplemental authorities.** When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) **Requirements and sanctions.** All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(l) **Brief covers.** The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27. (Amended effective October 1, 1992.)

Rule 25. Brief of an amicus curiae or guardian ad litem.

A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae or the guardian ad litem is desirable. Except as all parties otherwise consent, an amicus curiae or guardian ad litem shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus curiae or guardian ad litem will support, unless the court for cause shown otherwise orders. A motion of an amicus curiae or guardian ad litem to participate in the oral argument will be granted when circumstances warrant in the court's discretion.

Rule 26. Filing and service of briefs.

(a) **Time for serving and filing briefs.** The appellant shall serve and file a brief within 40 days after date of notice from the clerk of the appellate court pursuant to Rule 13, unless a motion for summary disposition of the appeal or a motion to remand for determination of ineffective assistance of counsel has been previously interposed, in which event service and filing shall be within 30 days from the denial of such motion. The appellee shall serve and file a brief within 30 days after service of the appellant's brief. A reply brief may be served and filed by the appellant. If a reply brief is filed, it shall be served and filed within 30 days after the filing and service of the appellee's brief. If oral argument is scheduled fewer than 35 days after the filing of appellee's brief, the reply brief must be filed at least 5 days prior to oral argument. By stipulation filed with the court, the parties may extend each of such periods for no more than 30 days in civil cases or 15 days in criminal cases. A motion for enlargement of time need not accompany the stipulation. No such stipulation shall be effective unless it is filed prior to the expiration of the period sought to be extended.

b) **Number of copies to be filed and served.** Ten copies of each brief, one of which shall contain an original signature, shall be filed with the Clerk of the Supreme Court. Eight copies of each brief, one of which shall contain an original signature, shall be filed with the Clerk of the Court of Appeals. Two copies shall be served on counsel for each party separately represented.

c) **Consequence of failure to file briefs.** If an appellant fails to file a brief within the time provided in this rule, or within the time as may be extended by order of the appellate court, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief within the time provided by this rule, or within the time as may be extended by order of the appellate court, an appellant may move that the appellee not be heard at oral argument.

(d) **Return of record to the clerk.** Each party, upon the filing of its brief, shall return the record to the clerk of the court having custody pursuant to these rules.

(Amended effective October 1, 1992.)

Rule 27. Form of briefs.

(a) **Paper size; printing and spacing.** Briefs shall be typewritten, printed or prepared by photocopying or other duplicating or copying process that will produce clear, black and permanent copies equally legible to printing, in type not smaller than ten characters per inch, on opaque, unglazed white paper 8½ inches wide and 11 inches long, and shall be securely bound along the left margin. The impression must be double spaced, except for matter customarily single spaced and indented, with adequate margins on the top and sides of each page.

(b) **Binding.** Briefs shall be printed on both sides of the page, and bound with a compact-type binding so as not unduly to increase the thickness of the brief along the bound side. Coiled plastic and spiral-type bindings are not acceptable.

(c) **Color of cover; contents of cover.** The cover of the brief of appellant shall be blue, that of appellee, red, that of intervenor, guardian ad litem, or amicus curiae, green, that of any reply brief, gray, that of any petition for rehearing, tan, that of any response to a petition for rehearing, white, that of a petition for certiorari, white, that of a response to a petition for certiorari, orange, and that of a reply to the response to a petition for certiorari, yellow. All brief covers shall be of heavy cover stock. There shall be adequate contrast between the printing and the color of the cover. The cover of all briefs shall set forth in the caption the full title given to the case in the court or agency from which the appeal was taken, as modified pursuant to Rule 3(g), as well as the designation of the parties both as they appeared in the lower court or agency and as they appear in the appeal. In addition, the covers shall contain: the name of the appellate court; the number of the case in the appellate court opposite the case title; the priority number of the case, as set forth in Rule 29; the title of the document (e.g., Brief of Appellant); the nature of the proceeding in the appellate court (e.g., Appeal, Petition for Review) and the name of the court and judge, agency or board below; the names and addresses of counsel for the respective parties designated as attorney for appellant, petitioner, appellee, or respondent, as the case may be. The names of counsel for the party filing the document shall appear in the lower right and opposing counsel in the lower left of the cover.