

1993

Mabey v. Wade : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

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

M. Shane Smith; Douglas R. Short; Smith & Hanna.

James I. Watt; Diana J. Huntsman; Mangum & Holt.

Recommended Citation

Legal Brief, *Mabey v. Wade*, No. 930339 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5237

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

IN THE UTAH COURT OF APPEALS

930339-CA

ROBERT MABEY d/b/a PACIFIC
MANAGEMENT

Appellee/Petitioner,

vs.

STANLEY L. WADE and JANET B.
WADE,

Appellants/Respondent.

Appeal No. 940339-CA
Trial Court No. 920012860CV

Priority 15

REPLY TO PETITION FOR REHEARING

Attorneys for Respondent:

JAMES I. WATTS
Attorney-at-Law
124 South 600 East, Suite 100
Salt Lake City, Utah 84102

DIANA J. HUNTSMAN
MANGUM & HOLT
431 South 300 East, Suite 250
Salt Lake City, Utah 84111

Attorneys for Petitioner:

M. SHANE SMITH
DOUGLAS R. SHORT
SMITH & HANNA
Salt Lake City, Utah 84111

FILED
Utah Court of Appeals

SEP 28 1994

Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

ROBERT MABEY d/b/a PACIFIC
MANAGEMENT

Appellee/Petitioner,

vs.

STANLEY L. WADE and JANET B.
WADE,

Appellants/Respondent.

)
)
)
)
)
)
)
)
)
)

Appeal No. 940339-CA
Trial Court No. 920012860CV

REPLY TO PETITION FOR REHEARING

Attorneys for Respondent:

JAMES I. WATTS
Attorney-at-Law
124 South 600 East, Suite 100
Salt Lake City, Utah 84102

DIANA J. HUNTSMAN
MANGUM & HOLT
431 South 300 East, Suite 250
Salt Lake City, Utah 84111

Attorneys for Petitioner:

M. SHANE SMITH
DOUGLAS R. SHORT
SMITH & HANNA
Salt Lake City, Utah 84111

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	
I. APPELLANT/RESPONDENT’S APPEAL IS NOT FRIVOLOUS, BROUGHT FOR THE PURPOSE OF DELAY, OR IN VIOLATION OF RULE 33 OR 34 OF THE RULES OF APPELLATE PROCEDURE	3
II. THE APPELLEE/PETITIONER HAS FAILED TO COMPLY WITH RULE 24A(9) OF THE UTAH RULES OF APPELLATE PROCEDURE.	6
III. APPELLEE ASSERTS THAT A WRITTEN CONTRACT EXISTS BETWEEN THE PARTIES, AND THAT THE CONTRACT SUPPORTS AN AWARD OF FEES.	8
CONCLUSION	9
ATTACHMENTS	
A. CERTIFICATE OF READINESS FOR TRIAL DATED AUGUST 13, 1993	
B. CERTIFICATE OF READINESS FOR TRIAL DATED AUGUST 24, 1993	
C. NOTICE OF APPEAL	
D. PLAINTIFF’S SUBSTITUTE MEMORANDUM	
E. STATEMENT OF FACTS (AS CONTAINED IN PLAINTIFF’S SUBSTITUTE MEMORANDUM)	
F. PLAINTIFF’S COMPLAINT	
G. CONTRACT	

TABLE OF AUTHORITIES

CASES

<u>Porco v. Porco</u> , 752 P.2d 365, 369 (Utah App. 1988)	4
<u>Hinckley v. Hinckley</u> , 815 P.2d 1352; 167 Utah Adv. Rept. 16,	4
<u>Riche v. Riche</u> , 784 P.2d 465; 123 Utah Adv. Rept. 31	4
<u>Wasatch Bank vs. Leany</u> , 727 P.2d 633; 44 Utah Adv. Rept. 22, at 23 . . .	4
<u>Roberts v. Roberts</u> , 835 P.2d 193; 188 Utah Adv. Rept. 26 at 29	5
<u>Darrington v. Wade</u> , 812 P.2d 452 (Utah App. 1992)	5
<u>English v. Standard Optical</u> , 164 Utah Adv. Rept. 41 at 44, (Utah App. 1991)	7

STATUTES

RULES

Rule 24A(9) of the Utah Rules of Appellate Procedure	6
Rule 33 of the Utah Rules of Appellate Procedure	6
Rule 34 of the Utah Rules of Appellate Procedure	6

INTRODUCTION

This matter arises from the Court of Appeals' Memorandum of Decision affirming the Trial Court's denial of Appellant's Motion to Set Aside Default Judgment, which Appellant brought pursuant to Rule 60b of the Utah Rules of Civil Procedure. The Memorandum Decision was rendered on the 7th day of September, 1994. The Memorandum Decision affirming the Trial Court's denial of the Appellate's 60b Motion did not award to the Appellee costs or fees incurred in the appeal. Appellee has requested a Petition for a Rehearing on the specific issue of awarding those fees. Appellee apparently filed with the Court on September 12th, 1994 a Motion for Extension of Time to respond to the summary disposition, which Motion the Court granted on September 15th, 1994, granting the parties until September 26th, 1994 to respond to the Notice of Consideration of Summary Disposition. Appellants have never received the Appellee's September 12th Motion requesting additional time, however Appellant did receive on September 22nd, 1994 the Appellee's Motion to Extend Filing of Petition for Rehearing and a Petition for Reconsideration, which was received in an unbound form on the 18th day of September, 1994, then followed in bound form on the 23rd day of September, 1994.

SUMMARY OF THE ARGUMENT

Appellant objects to the request of Appellee that he be awarded attorneys fees incurred in defending the appeal filed by Appellant of the Trial Court's denial of Appellant's 60b Motion for the reason that Appellee has failed to establish a legal basis for awarding of fees, which Appellee alleges should be awarded on one of the following theories:

1. That the appeal, as filed, was frivolous, or
2. That the appeal was brought for the purposes of delay, or
3. That a contract between the parties provided for attorneys fees, and
4. That Petitioner was awarded attorneys fees at the trial level.

Appellant contends that the appeal is and was justified, raised valid issues of fact and law for review by the Court. Appellant's assertion that this action is founded upon a contract directly contradicts the facts asserted at the trial level. Appellee, throughout the discovery process and beyond alleged the contract between the parties was oral.

Appellant further asserts that Appellee has not complied with Rule 24A(9) of the Utah Rules of Appellate Procedure, which requires the Appellant to set forth the contentions and reasons of the appeal with respect to the issues presented, with citations to the authorities, statutes and the parts of the record relied upon. the Appellee has not done this, but merely made a one paragraph plea as part of its petition.

Further, contrary to the assertion of the Appellee/Petitioner herein the Trial Court denied the request for award of attorneys fees on the specific issue which is the subject of this appeal, the denial of the Motion to Set Aside Default.

Wherefore, based upon the foregoing, Appellant/Respondent requests that the Court deny the Appellee/Petitioner's request for a modification of the Memorandum Decision to include an award of attorneys fees. That the Appellant/Respondent herein be awarded costs and fees for that portion of the appeal pertaining to the Petition for Rehearing, inasmuch as the assertions made by Petitioner/Appellee herein are fallacious, not supported by the record, and in all respects violates of Rule 33 of the Utah Rules of Appellate Procedure.

ARGUMENT

I. APPELLANT/RESPONDENT'S APPEAL IS NOT FRIVOLOUS, BROUGHT FOR THE PURPOSE OF DELAY, OR IN VIOLATION OF RULE 33 OR 34 OF THE RULES OF APPELLATE PROCEDURE.

Appellant objects to the request of Appellee that he be awarded attorneys fees in defending this Appeal for the reason that the appeal was not frivolous or brought for the purpose of delay.

The Appellee, in its Petition for Rehearing asserts that the appeal, as filed, was both frivolous and done for the purpose of delay. Rule 33A of the Utah Rules of Appellate Procedure allows for an award of costs and fees and may include an order of double costs if the appeal is deemed to be frivolous. A frivolous appeal is defined by the Rule as,

"An appeal, motion, brief or other paper which is one that is not grounded in fact, not warranted by existing law, or not based upon a good faith argument to extend to or modify a reverse existing law."

"Delay" is likewise defined by Rule 33 as,

"A motion or brief filed for an improper purpose, such as to harass, cause needless increase in costs, litigation or gain time that will benefit only the party filing the appeal, motion, brief or other paper."

It is a well settled principle of Utah Law that sanctions for the bringing of an appeal,

"... should only be applied in egregious cases, less there be an improper chilling of the right to appeal erroneous lower court decisions."

Porco v. Porco, 752 P.2d 365, 369 (Utah App. 1988)

The Porco reasoning and holding has been affirmed by a long line of cases and authorities, to include Hinckley v. Hinckley, 815 P.2d 1352; 167 Utah Adv. Rept. 16, and Riche v. Riche, 784 P.2d 465; 123 Utah Adv. Rept. 31.

The Appellee apparently wishes this Court to adopt a position that because the Court of Appeals intends to affirm the trial court's decision that it follow inter alia, that the appeal was "frivolous" or "brought for delay." The Utah Supreme Court, in the case of Wasatch Bank vs. Leany, 727 P.2d 633; 44 Utah Adv. Rept. 22, at 23, in which it offered a trial court's award of a deficiency judgment that,

"Even when an appeal is without merit, it does not follow that it was 'frivolous' or brought 'for delay'".

(At page 23)

In the case of Roberts v. Roberts, 835 P.2d 193; 188 Utah Adv. Rept. 26 at 29, quoting from Hinckley, stated,

"However, an unsuccessful appeal which has some merit is not frivolous."

The Appellant/Respondent herein, in its Appellate Memorandum, set forth a littney of cases and rulings which appellant contends reasonably supported its assertion that the trial Court erred in denying the Motion to Set Aside Default. The appeal to this Court is properly taken based upon the existing law of the State of Utah and a good faith argument to extend that law. In so filing its appeal, the Appellant specifically has complied with Rule 33.

Appellant/Respondent cites the case of Darrington v. Wade, 812 P.2d 452 (Utah App. 1992) apparently for the purpose of asserting that because the Appellant was involved in another case involving a Motion to set Aside a Judgment, which motion was filed not by Wade but by Plaintiff establishes a pattern and practice with the Appellant. That case is differentiated from the case at bar for the reason that the issues were different the attorney representing Mr. Wade in that proceeding was different and the facts were different. Appellee's assertion that Mr. Wade has delayed these proceedings throughout the trial process belies the facts. It was Mr. Wade who filed not just one, but two Certifications of Readiness of Trial, and had pushed this case to the setting of a trial date. Mr. Wade had at all times after the setting aside

of the initial Default Judgment moved for an early and expeditious trial on the merits, believing that not only the facts but the existing case law supported his position. (Certificates of Readiness of Trial, Exhibits A and B.)

II. THE APPELLEE/PETITIONER HAS FAILED TO COMPLY WITH RULE 24A(9) OF THE UTAH RULES OF APPELLATE PROCEDURE.

Rule 24A(9) requires that,

"An argument shall contain contentions and reasons of Appellant with respect to issues presented with citations to authority, statutes and parts of record relied upon."

The Appellee, in its Motion for Summary Disposition, merely asserts his opinion that the Appellant was not entitled to appeal the trial Court's denial of Appellant's Motion to Set Aside Default, but fails to cite either case law or facts in the record to support such an assertion. Instead, Appellee choose to factually misstate the Trial Court record, alleging that the Trial Court awarded fees on this issue. The appeal by Appellant is not of the Court's Default Order, but of the Trial Court's denial of the Motion to Set Aside that default. The Trial Court specifically found that the filing of the 60b Motion was proper, both in time and in substance, and that the arguments raised by counsel had merit, and on that basis refused to award the Appellee his requested costs and fees from which the Appellee has appealed. (Notice of Appeal, Exhibit C) This Court, when dealing with a similar request in the case of Hinckley v. Hinckley, 815 P.2d 1352, denied the request of Appellee that she be awarded her costs and fees, she alleged she was entitled to under Rules 33 and 34 of the Rules of Appellate Procedure, when it found,

"However, her brief contains only one sentence regarding attorneys fees and costs, without citations to the record, no legal authorities, and no analysis whatsoever... A mere request in the brief, or assertion by counsel at hearing does not satisfy this requirement."

This Court concluded that,

"Due to the non-compliance with our briefing rule, we decline to address this issue[.]"

Hinckley v. Hinckley, 815 P.2d 1352; 167 Utah Adv. Rept. 16
English v. Standard Optical, 164 Utah Adv. Rept. 41 at 44, (Utah App. 1991)

In the case at hand, the Appellee/Petitioner, in a single paragraph makes a bare demand that he is entitled to an award of costs and fees without citation or authority, or facts supported by the record. The unsupported, unfounded and factually wrong assertions include:

"A. The Appellant failed to file an Answer to a properly served Complaint and Summons."

The Court's record will reflect that an Answer has been filed in this case.

"B. That there was a meritless attempt to set aside the Judgment."

The Trial Court found that the filing of the Motion to Set Aside Default Judgment was properly filed by the Appellant and there was merit to the arguments raised by the Appellant. It was upon this foundation that the Trial Court denied Appellee's request for costs and fees and that the Appellant had delayed the trial proceedings. The fact is, Appellant/Respondent herein was the party who certified the matter ready for trial and aggressively sought a trial on the merits. Appellant did fail to appear at trial for

the reason that both the Appellant and his counsel mistakenly believed the trial had been continued.

III. APPELLEE ASSERTS THAT A WRITTEN CONTRACT EXISTS BETWEEN THE PARTIES, AND THAT THE CONTRACT SUPPORTS AN AWARD OF FEES.

The Appellee, throughout the period of discovery in all pleadings, at the time of trial, and in post-trial motions has consistently asserted that the contract between the parties was an oral contract. The Appellee, in its Substitute Memorandum in opposition to Defendant's Motion to Set Aside Default (Exhibit D), which Appellee was required to file in order to correct false and misleading statements of material fact which had been asserted in the original Memorandum continued to claim the Agreement was oral. In fact, the Appellee, in the Substitute Memorandum's Statement of Facts which was filed in January of 1994 (Exhibit E), specifically states:

"That in or about July of 1989, Defendants engaged Plaintiff as their agent to attempt to obtain a reduction in real property tax liability assessed against a large apartment complex consisting of 108 units owned by the Defendants and located at approximately 2351 East 6895 South, Salt Lake City, Utah.

Paragraph 7

That the engagement was an oral agreement whereby Defendants agreed to only pay Plaintiff in the event that Plaintiff was successful in reducing the tax liability for the property in question..."

Paragraph 8

Appellee now asserts the existence of a written contract which Appellee asserts entitles him to an award of costs and fees. The record will reflect that this dispute and involved an alleged contract for the reduction of property taxes on the property

is located at 2351 East 6895 South in Salt Lake City. (Plaintiff's Complaint, paragraphs 5 and 6, and Statement of Facts, Exhibit F, Paragraph 7.)

There is no dispute that the parties had in the past contracted between themselves for services relating to a reduction in property taxes on other parcels of property. The Appellant contends, however, that there is not, and was not, a contract or agreement on the property located at 2351 East 6895 South, which is the subject of this suit. The contract which Appellee attaches to its Petition for Rehearing is on its face for properties other than the property which is the subject of this suit. Although the copy of the contract attached to the copy of the Appellee's petition delivered to Appellant is not the clearest of copies, appears to identify subject properties at 2335 East 7000 South and 261 South 800 East in Salt Lake City, Utah (Exhibit G). Neither property corresponds to the address of the property which is set forth in Plaintiff's Complaint. The assertion by the Appellee that this contract is for the property which is the subject of this suit is fallacious and operates as a fraud upon the Court.

CONCLUSION

The Appellee has failed to establish a legal or factual basis for the awarding of costs and fees which would support his request for a modification of the Memorandum Decision to include an award of fees. Specifically,

- A. That Appellee is entitled to an award of fees for the reason that there was an award of fees at the trial level. The Trial Court specifically

denied Appellee's request for costs or fees related to the Motion to Set Aside the Default Judgment which is the basis for this appeal.

- B. That the contract which Appellee attaches to its Petition is for two specific and distinct pieces of property, none of which are the subject of this suit.
- C. That the Appellee has failed to properly brief the issue as required by Rule 24A(9) of the Rules of Appellate Procedure.

Appellant is entitled to an award of costs and fees. The Appellee's Request for Rehearing on the matter of attorneys fees was done pure and simply to increase the costs of this litigation in the hopes of extracting further remuneration from the Appellant and is not properly founded upon existing case law, statutes or supported by the facts, and in and of itself constitutes a violation of Rule 33 of the Utah Rules of Appellate Procedure, entitling the Appellant to an award of attorneys fees and double costs which he has been required to incur in responding and replying to the Petition for Rehearing.

WHEREFORE, Appellant/Respondent requests that this Court deny the Petition of Appellee to award fees and double costs, and for an Order sanctioning Appellee for the filing of the Petition, and awarding the Appellant reasonable fees and costs which he has been required to return in responding to the frivolous petition.


DATED this 26th day of September, 1994.



JAMES I. WATTS

IN THE UTAH COURT OF APPEALS

Appeal No. 940339-CA
Trial Court No. 920012860CV
Priority No. 15


For, James I. Watts
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on this 20th day of September, 1994, a true and correct copy of the foregoing Certificate of Service was mailed via first class mail, postage pre-paid to:

M. Shane Smith
Douglas R. Short
Smith & Hanna
311 South State, Suite 450
Salt Lake City, Utah 84111

Marilyn M. Patrick
Secretary

Exhibit A

JAMES I. WATTS (#4768)
Attorney for Defendants
124 South 600 East, Suite 100
Salt Lake City, Utah 84102
Telephone (801) 533-8505

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

ROBERT MABEY d/b/a PACIFIC)	
MANAGEMENT)	
	)	CERTIFICATION OF READINESS
Plaintiff,	)	FOR TRIAL
)	
vs.)	
	)	Civil No. 920012860CV
STANLEY L. WADE and JANET B.)	
WADE,	)	Judge Fuchs
)	
Defendants.)	

TO THE DISTRICT COURT:

James I. Watts, attorney for Defendants, by his signature below hereby certifies that in his judgment this case is ready for trial and in support of such certification counsel represents to the Court as follows:

1. That all required pleadings have been filed and the case is at issue as to all parties.
2. That counsel has completed all discovery; that opposing counsel have had reasonable time to pursue discovery; and that all discovery of record has been completed.

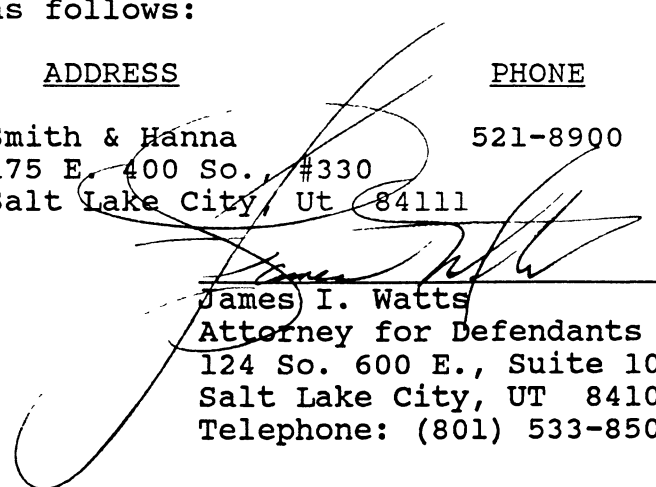
3. That if medical testimony is contemplated or required, copies of all existing medical reports have been available to all counsel or parties of record.

4. That there are no Motions that have been filed which remain pending and upon which no disposition has been made.

5. That reasonable discussions to effect settlement have been pursued by counsel and their clients but no settlement has been affected. (Such discussions are to be realistic in nature and not limited to an unresponded to offer. The duty to affectively negotiate lies with all parties.)

6. Request is hereby made that this matter be set for the earliest possible trial date.

Counsel further certifies that the following counsel or pro se parties of record were furnished with a copy of this Certificate on the 13 day of August, 1993 whose last known addresses and telephone numbers are as follows:

<u>NAME</u>	<u>ADDRESS</u>	<u>PHONE</u>
Charles Hanna	Smith & Hanna 175 E. 400 So., #330 Salt Lake City, Ut 84111	521-8900
	 James I. Watts Attorney for Defendants 124 So. 600 E., Suite 100 Salt Lake City, UT 84102 Telephone: (801) 533-8505	

NOTICE TO ALL PARTIES

Any objections to the above certification or any disagreement to any of the matters to certified are to filed in writing with the Court within ten (10) days of the date hereof, served upon all parties, and will be heard at the scheduling conference.

Exhibit B

1 - 01 / (P)

JAMES I. WATTS (#4768)
Attorney for Defendants
124 South 600 East, Suite 100
Salt Lake City, Utah 84102
Telephone (801) 533-8505

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

ROBERT MABEY d/b/a PACIFIC MANAGEMENT)	
)	
Plaintiff,	)	AMENDED CERTIFICATION OF READINESS FOR TRIAL
)	
vs.)	
)	
STANLEY L. WADE and JANET B. WADE,	)	Civil No. 920012860CV
	)	Judge Fuchs
Defendants.)	

TO THE DISTRICT COURT:

James I. Watts, attorney for Defendants, by his signature below hereby certifies that in his judgment this case is ready for trial and in support of such certification counsel represents to the Court as follows:

1. That all required pleadings have been filed and the case is at issue as to all parties.

2. That counsel has completed all discovery; that opposing counsel have had reasonable time to pursue discovery; and that all discovery of record has been completed.

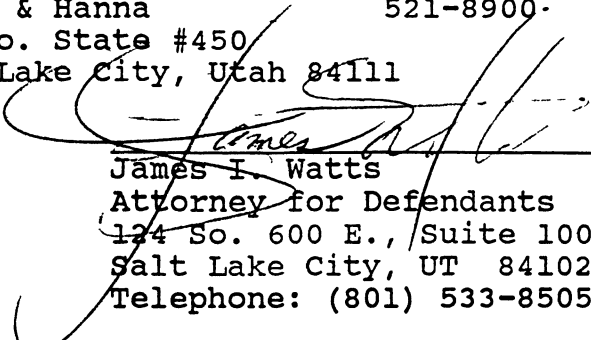
3. That if medical testimony is contemplated or required, copies of all existing medical reports have been available to all counsel or parties of record.

4. That there are no Motions that have been filed which remain pending and upon which no disposition has been made.

5. That reasonable discussions to effect settlement have been pursued by counsel and their clients but no settlement has been affected. (Such discussions are to be realistic in nature and not limited to an unresponded to offer. The duty to affectively negotiate lies with all parties.)

6. Request is hereby made that this matter be set for the earliest possible trial date.

Counsel further certifies that the following counsel or pro se parties of record were furnished with a copy of this Certificate on the 24th day of August, 1993 whose last known addresses and telephone numbers are as follows:

<u>NAME</u>	<u>ADDRESS</u>	<u>PHONE</u>
Charles Hanna	Smith & Hanna 311 So. State #450 Salt Lake City, Utah 84111	521-8900.
	 James I. Watts Attorney for Defendants 124 So. 600 E., Suite 100 Salt Lake City, UT 84102 Telephone: (801) 533-8505	

NOTICE TO ALL PARTIES

Any objections to the above certification or any disagreement to any of the matters to certified are to filed in writing with the Court within ten (10) days of the date hereof, served upon all parties, and will be heard at the scheduling conference.

Exhibit C

M. Shane Smith (3007)
Douglas R. Short (5344)
SMITH & HANNA, P.C.
Attorneys for Plaintiff
311 South State Street, Suite 450
Salt Lake City, Utah 84111
Telephone (801) 521-8900

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT


ROBERT MABEY d/b/a PACIFIC MANAGEMENT,	:	NOTICE OF APPEAL
Plaintiff,	:	
	:	
vs.	:	
STANLEY L. WADE and JANET B. WADE,	:	Civil No.920012860CV
Defendants.	:	Judge Fuchs

Notice is hereby given that plaintiff and appellant, Robert Mabey, by and through his attorneys, M. Shane Smith and Douglas R. Short of Smith & Hanna, P.C., appeals to the Utah Court of Appeals the final judgment of the Honorable Dennis M. Fuchs entered in this matter on June 6, 1994.

The appeal is taken from that portion of the judgment denying plaintiff/appellant an award of attorney's fees.

DATED this 5th day of July, 1994.

SMITH & HANNA

By: 
Douglas R. Short
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify on the 5th day of July, 1994, a true and correct copy of the foregoing NOTICE OF APPEAL was mailed first class, postage pre-paid, to the following:

James I. Watts
124 South 600 East, Suite 100
Salt Lake City, UT 84102

Sharon Ortega

MS3NOTAPPLPAT

Exhibit D

Charles W. Hanna (1326)
M. Shane Smith (3007)
Douglas R. Short (5344)
SMITH & HANNA, P.C.
Attorneys for Plaintiff
311 South State Street, Suite 450
Salt Lake City, Utah 84111
Telephone (801) 521-8900

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

ROBERT MABEY d/b/a PACIFIC MANAGEMENT,	:	PLAINTIFF'S SUBSTITUTE
	:	MEMORANDUM IN OPPOSITION TO
Plaintiff,	:	DEFENDANT'S MOTION
	:	TO SET ASIDE JUDGMENT
	:	
vs.	:	
STANLEY L. WADE and JANET B. WADE,	:	Civil No.920012860CV
Defendants.	:	Judge Fuchs

COMES NOW the plaintiff, Robert Mabey, by and through his attorneys, M. Shane Smith of Smith & Hanna, P.C., and hereby respectfully submits this Memorandum in Opposition to Defendants' Motion to Set Aside Judgment and Motion for Stay of Execution.

STATEMENT OF FACTS

1. This is defendants' second attempt to set aside a judgment in this matter, the first having been a default previously entered by this Court and subsequently set aside.

2. The present judgment was entered by this Court on November 3, 1993, after this matter came before the Court at the time regularly set for trial on the 3rd of November, 1993, at the hour of 9:30 a.m., before the Honorable Dennis Fuchs, Judge, Plaintiff being present and represented by counsel, M. Shane Smith

of Smith & Hanna, Defendants, Stanley L. Wade and Janet B. Wade, failing to appear and no one appearing as counsel, the Court having waited in excess of 15 minutes for Defendants' appearance and noting that notice had been delivered to James I. Watts, attorney of record, of the date, time and place set for trial, the Court having reviewed the file and record in this matter and good cause appearing therefore, ordered that defendants' answer be stricken and judgment was entered against defendants, and each of them, in favor of plaintiff, in the amount of \$2,462.15, together with said plaintiff's costs and disbursements in the amount of \$134.00, plus interest prior to judgment at the rate of ten percent (10%) in the amount of \$1,165.71; further that attorney's fees be awarded to plaintiff in the total amount of \$2405.86, and that the total amount of the judgment is and shall be \$6033.72. It was further ordered that this judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit, and that pursuant to Section 15-1-4, Utah Code Anno., 1953, as amended, interest accrue after judgment in the amount of two points over the federal post judgment interest rate.

3. Defendants now seek to set aside the November 3, 1993 judgment, claiming mistake or excusable neglect arising from counsel's claim that he directed his temporary secretary to enter motions for continuance in two separate cases with similar captions, and the secretary purportedly placed the wrong caption on the motion for the instant case and sent it to the wrong court and

the wrong attorney.

4. Counsel for defendants never contacted plaintiff's counsel in this case to give notice of the motion, or to seek a continuance, or to follow up on the motion for continuance. See affidavit of M. Shane Smith.

5. Counsel for defendants never contacted James Lund, counsel for defendants Doug and Bruce Mabey in the case where the motion was mistakenly filed, to request a continuance or to schedule another trial date.

6. As to the factual background of this case, plaintiff incorporates the facts set forth in plaintiff's original Memorandum in Opposition to Defendants' first Motion to Set Aside Default Judgment.

7. In or about July 1989, defendants engaged plaintiff as their agent to attempt to obtain a reduction in real property tax liability assessed against a large apartment complex consisting of 108 units owned by defendants, and located at approximately 2351 East 6895 South, Salt Lake City, Utah. (Affidavit of Robert Mabey filed with the plaintiff's Memorandum in Opposition to Defendants' Renewed Motion To Set Aside Judgment as Exhibit "A" (hereinafter "Mabey Affidavit"), at paragraph 2.

8. The engagement was an oral agreement whereby defendants agreed to only pay plaintiff in the event that plaintiff was successful in reducing the tax liability for the property in question, and to the extent successful, defendants agreed to pay to plaintiff one-half (1/2) of all reduction in tax liability for the

first year of savings. (Mabey Affidavit, 3.)

9. Plaintiff did obtain a hearing before the Salt Lake County Board of Equalization and was successful in obtaining a reduction in the assessed property tax which resulted in a savings to defendants for tax year 1989 in the amount of Four Thousand Nine Hundred Twenty-Four and 30/100 Dollars (\$4,924.30). (Mabey Affidavit at 5.)

10. Defendants had entered into a separate agreement on a separate piece of property which, although the work was of a similar nature, the appeal was separate and distinct from the present matter. Plaintiff had already been successful in obtaining a reduction in tax liability in that separate appeal involving the other piece of property. (Mabey Affidavit at 8.)

11. As in the present case, defendants accepted the benefit of plaintiff's work but denied any contractual obligation to pay the one-half (1/2) of the tax liability savings to plaintiff as agreed. Plaintiff was forced to bring suit to obtain the funds owed, which suit was successful. After trial to the bench (Judge McCleve), defendants were ordered to pay to plaintiff the sum of one-half (1/2) of the tax liability savings obtain on that separate property. (See Mabey v. Stanley L. Wade and Janet B. Wade, Civil No. 913007821CV, Third Circuit Court, Salt Lake County, Salt Lake City Department.)

12. In the prior case, the Court expressly found that Mabey had entered into an oral contract to attempt to effect a reduction of property taxes on the specific single piece of

property known as the Del Monico apartments. (See Judge McCleve's Findings of Fact, Conclusions of Law and Judgment attached hereto as Exhibit "B" (hereinafter "McCleve Findings") at paragraph 1 of the Findings.)

13. The oral contract between defendants and plaintiff in the prior case was expressly found to be limited to the Del Monico property. (McCleve Findings at paragraph 1.)

14. In the prior case, Judge McCleve expressly found that defendant's, Stanley Wade, claim concerning the reduction in tax liability had been accomplished by himself to not be credible in that defendant, Stanley Wade, was ignorant not only of the procedure necessary to pursue a reduction in real property tax, but he did not even know which agency heard such claims. (McCleve Findings at paragraph 5.)

ARGUMENT

I. Defendants neglect was not excusable.

There was no mistake in this case. Defense counsel had clear notice as to when the trial was scheduled. The only question is whether counsel's clear negligence in failing to properly file the motion for continuance was excusable.

The burden is on defendants to show why their neglect was excusable, and yet, they present absolutely no argument for why the negligence should be excused. They only explain how the negligent filing occurred.

A motion for continuance, standing alone, does not

continue a trial date. At best, it merely serves notice that counsel would not be at trial. For counsel to merely assume that a trial date will be continued without even attempting to contact the court to confirm the continuance, or attempting to contact opposing counsel to obtain an agreement to continue, is not excusable.

Defense counsel had notice of the trial date, and his personal conflict therewith, for almost a month before he left the country, and yet he made absolutely no attempt to contact opposing counsel to arrange a continuance. Such a contact would have required a minimal amount of effort. It could have even been delegated to a staff person. Had such an effort been made, the error in the filing would have been detected and the nonappearance could have been avoided.

The unavailability of defendants' counsel was not an emergency or a surprise. Defendants' counsel knew for over a year that he would not be available from October 17th to November 7th. The whole conflict could have therefore been avoided had defense counsel simply noted in the certificate of readiness for trial that he would be unavailable during the period he would be out of the country. Counsel made no such effort. Since defense counsel did not take even the most minimal amount of effort to ensure that the trial would be continued, his subsequent negligence in filing his motion with the wrong court and the wrong opposing counsel should not be excused.

This is the second judgment that plaintiff has obtained

against the defendants due to defendants lack of diligence in defending this matter. Plaintiff should no longer be required to suffer for defendants misconduct.

II. Defendants have not established a credible meritorious defense.

- A. Defendants have waived any claim that the doctrine of res judicata precludes this action.

Res Judicata is an affirmative defense which must be raised in a defendant's answer or be waived. Utah Rules of Civil Procedure 8(c), and 12(h). Defendants in this case did not raise the defense of res judicata in their Answer and are therefore barred from raising it at this time. Res judicata therefore is not a meritorious defense.

- B. Defendants' claim that the doctrine of res judicata acts to preclude this action is not well founded.

Even if res judicata is not considered to be waived, it does not apply in this case. In the prior case upon which defendants rely, Judge McCleve expressly entered a finding that the contract in question, in the case before her, specifically related to the Del Monico apartment properties. The case at bar involves a completely separate contract for a separate piece of property, the Hillside Apartments. The acts necessary to discharge plaintiffs' obligations to fulfill the terms of the contract presently before the court are completely separate, and indeed required a separate filing before the Board of Equalization, and

resulted in a separate benefit to defendants. Judge McCleve entered specific findings that the property involved was the Del Monico apartment property. The work done by plaintiff, relative to the Del Monico apartment property, was separate and apart from the work done on the Hillside apartment complex property, and indeed required filing, pursuing and prosecuting a totally separate appeal before the Board of Equalization. From the McCleve Findings, it is clear that the prior case was a separate cause of action. Consequently, res judicata does not apply as to the separate contractual claim being raised for the first time in this suit.

Defendants' nevertheless assert that plaintiff is barred from bringing the present cause of action because it should have been brought in the first lawsuit. Since the contracts are separate, any claim plaintiff had in relation to the subject property of this case would have been a permissive claim in the first suit. Defendants have not presented any law requiring plaintiff to file both claims in a single suit.

C. Defendants' claim that no services were performed with regard to the subject property of this suit is without merit.

Defendants assert that plaintiff and defendants did not enter into a contract whereby plaintiff would appeal defendants' property valuation. Defendants assert further that plaintiff performed no services with regard to the subject property of this suit. The appeal filed with the Salt Lake County Board of Equalization on the valuation of the subject property, a copy of which is attached hereto as exhibit "C," clearly identifies Robert Mabey as the party

who filed the appeal as the agent of defendants. It is undisputed that defendants received the benefit of the appeal filed by plaintiff in that their taxes were in fact reduced. It is therefore clear that defendants have no meritorious defense on the merits of plaintiff's claim.

CONCLUSION

In conclusion, plaintiff reiterates his position that Defendants' Motion to Set Aside the Default Judgment should be denied because the neglect was inexcusable, and because defendants do not have any meritorious defense.

Defendants' motion is meritless and brought in bad faith. Plaintiff therefore respectfully requests legal fees for defending against it.

DATED this _____ day of January, 1994.

SMITH & HANNA

By: _____
Douglas R. Short
Attorney for Plaintiff

CERTIFICATE OF HAND DELIVERY

I hereby certify on the _____ day of May, 1993, a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO DEFENDANT'S RENEWED MOTION TO SET ASIDE JUDGMENT was mailed first class, postage pre-paid, to the following:

James I. Watts
124 South 600 East, Suite 100
Salt Lake City, UT 84102

MSSIMEMOPP1.PA1

Charles W. Hanna (1326)
M. Shane Smith (3007)
SMITH & HANNA, P.C.
Attorneys for Defendant
311 South State, Suite 450
Salt Lake City, Utah 84111
Telephone (801) 521-8900

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

ROBERT MABEY d/b/a PACIFIC MANAGEMENT,	:	
Plaintiff,	:	AFFIDAVIT OF ROBERT MABEY
	:	
vs.	:	
	:	
STANLEY L. WADE and JANET B. WADE,	:	Civil No. 920012860CV
Defendants.	:	Judge Fuchs

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

COMES NOW the Affiant, Robert Mabey, who first being duly sworn upon his oath, does depose and state as follows:

1. Affiant is the Robert Mabey named as the Plaintiff in the above-entitled matter.

2. In or about July 1989, Defendants engaged Affiants' services to attempt to effect a reduction in property tax liability for a large apartment complex located at approximately 2351 East 6895 South, Salt Lake City, Utah.

3. The terms of the agreement were very simple; Affiant agreed to use his best efforts to effect a reduction in property taxes on the property and Defendants agreed to pay Affiant one-half (1/) of the reduction in tax liability for the year. Because of the simple nature of the agreement, it was not reduced to writing.

Affiant did pursue the appropriate steps required to effect such a reduction.

4. As agent for the Defendants, Affiant filed the appropriate documents, obtained the hearing before the Salt Lake County Board of Equalization, and prepared the documents showing the value of the property on a capitalization method based on rental income and property values by use of comparable properties.

5. Affiant was successful in obtaining a reduction in tax liability for the year 1989 in the amount of \$4,924.30. Pursuant to the agreement, Affiant is entitled to one-half (1/2) of that savings, which amount is \$2,462.15.

6. At all times, Defendants were aware of the efforts of Affiant and at no time did Defendants request Affiant to discontinue his efforts in pursuing the said reduction in property taxes on this property.

7. Defendants did receive the full benefit of the tax reduction on the property located at 2351 East 6895 South, Salt Lake City, Utah, in the amount of \$4,924.30.

8. At approximately the same time, Defendants engaged Plaintiff to pursue a reduction in tax liability on a separate piece of property known as the Del Monico Apartments. Plaintiff was successful there also in effecting a reduction in property tax and liability for which Plaintiff received the full benefit of said reduction. Defendants were fully aware of Affiant's activities and efforts to effect said reduction in tax on the Del Monico

Apartments and made no effort to stop Affiant's efforts in pursuing such reduction in property taxes on said other piece of property.

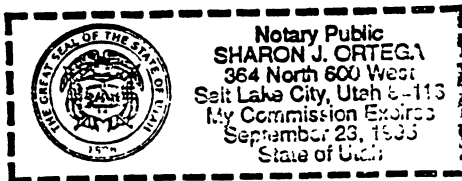
9. Further Affiant sayeth not.

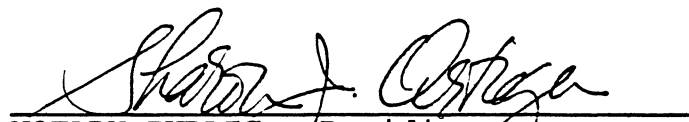
DATED this 12 day of March, 1993.


Robert Mabey

SUBSCRIBED AND SWORN to before me this 12th day of March, 1993.

My Commission Expires:

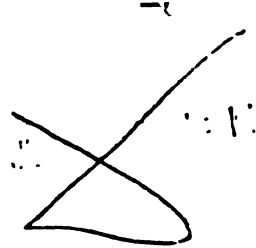



NOTARY PUBLIC - Residing at
Salt Lake County, Utah

MSS\AFFMABEY.PA1

Charles W. Hanna (1326)
SMITH & HANNA, P.C.
Attorneys for Plaintiff
311 South State, Suite 450
Salt Lake City, Utah 84111
Telephone: (801) 521-8900

1000



IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

ROBERT MABEY d/b/a PACIFIC MANAGEMENT,)	
	)	FINDINGS OF FACT AND
Plaintiff,	)	CONCLUSIONS OF LAW
)	
vs.)	
)	
STANLEY L. WADE AND JANET B. WADE,	)	Civil No. 913007821CV
	)	Judge Sheila K. McCleve
Defendants.)	

This matter having come on regularly before the Court for trial on July 17, 1992, the Plaintiff, Robert Mabey, being present and being represented by his counsel, Charles W. Hanna of Smith & Hanna, and Defendant, Stanley L. Wade, being present and representing himself, and the Court having heard the evidence in this matter and the argument presented by both sides, does hereby enter its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about July 1989, Defendants, Stanley L. Wade and Janet B. Wade, entered into a contract with Robert Mabey doing business as Pacific Management pursuant to the terms of which Robert Mabey agreed to attempt to get the Wades' property taxes on the Del Monico Apartments reduced and the Wades agreed to pay to

EXHIBIT B

Robert Mabey the sum of one-half (1/2) of the tax savings for the first year.

2. Robert Mabey was able to obtain a reduction on the taxes assessed on the Del Monico Apartments from \$10,162.85 to \$7,317.26, a total savings of \$2,845.59.

3. Pursuant to the terms of the contract, Robert Mabey was entitled to fifty percent (50%) of the total reduction in the taxes assessed on the Del Monico Apartments. The total reduction was \$2,845.59. Robert Mabey was therefore entitled to payment of the sum of \$1,422.79.

4. Robert Mabey invoiced the Defendants, Stanley L. Wade and Janet B. Wade, for the sum of \$1,422.79 but the Wades failed and refused to pay to Robert Mabey the sum due and owing.

5. The Court finds in Mr. Wade's testimony that he was the individual responsible for the reduction of property taxes on the Del Monico Apartments is not credible. Mr. Wade was not even aware of the procedure necessary to have the property taxes reduced on the Del Monico Apartments, nor was Mr. Wade aware of specifically what entity had ultimately ruled that the taxes on the Del Monico Apartments needed to be reduced.

6. The Court find that in the process initiated by Robert Mabey to have the property taxes on the Del Monico Apartments reduced, that Mr. Wade became aware through a telephone call from an individual associated with the Salt Lake County Board of Equalization of Mr. Mabey's activities to reduce the taxes. Mr. Wade took no action to stop Mr. Mabey from attempting to have the

taxes reduced on the Del Monico Apartments and received the benefit of such reduction.

7. Defendant, Stanley Wade, did not prove that he ever loaned \$2,500.00 to Robert Mabey as provided in his Counterclaim.

8. Stanley Wade did call Robert Mabey and state that he had overpaid Robert Mabey the sum of \$2,500.00 and that he was willing to treat that overpayment as a loan. The Court finds, however, that Mr. Mabey had performed the obligations of his contract on the Hillside Apartments and become entitled to payment of the sum of \$2,500.00. The fact that Mr. Wade decided to pursue an additional appeal to the Utah State Tax Commission to see if his property taxes could be lowered an additional amount, did not affect the fact that Mr. Mabey became entitled to fifty percent (50%) of the savings that he had obtained on the Hillside Apartment property taxes at the level of the Salt Lake County Board of Equalization.

CONCLUSIONS OF LAW

In addition to the Conclusions of Law implied in the Findings of Fact set forth above, the Court finds as follows:

1. Although the Court specifically finds that there was a contract in this case based upon the testimony, the Court further finds as a Conclusion of Law that even if a contract did not exist, that Robert Mabey would be entitled to judgment on his Complaint based upon the doctrine of quantum meruit.

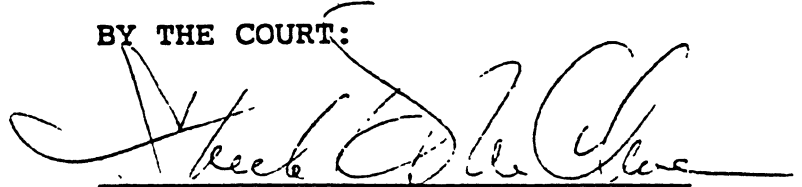
2. The Defendants failed to meet the burden of proof required on the Counterclaim.

3. Plaintiff is entitled to a judgment on its Complaint in the principal amount of \$1,422.79 together with accrued interest and court costs.

4. The Defendants' Counterclaim should be dismissed with prejudice.

DATED this 23rd day of July, 1992.

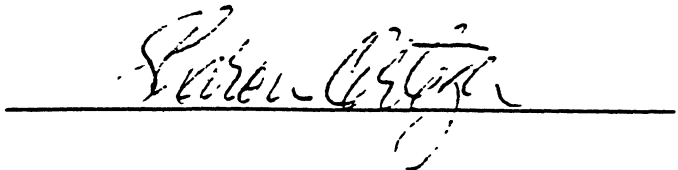
BY THE COURT:


Judge Sheila K. McCleve

MAILING CERTIFICATE

I hereby declare that I caused to be mailed, postage prepaid, first class, a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, this 22 day of July, 1992, to:

Stanley Wade
2159 Parley's Terrace
Salt Lake City, UT 84109



WP51\CWH\FINDFACT.PA1

Charles W. Hanna (1326)
SMITH & HANNA, P.C.
Attorneys for Plaintiff
311 South State, Suite 450
Salt Lake City, Utah 84111
Telephone: (801) 521-8900

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

ROBERT MABEY d/b/a PACIFIC MANAGEMENT,)	
	)	JUDGMENT
Plaintiff,)	
)	
vs.)	
)	
STANLEY L. WADE AND JANET B. WADE,	)	Civil No. 913007821CV
	)	Judge Sheila K. McCleve
Defendants.)	

This matter having come on regularly before the Court for trial on July 17, 1992, the Plaintiff, Robert Mabey, being present and being represented by his counsel, Charles W. Hanna of Smith & Hanna, and Defendant, Stanley L. Wade, being present and representing himself and Defendant, Janet B. Wade, having failed to appear and the Court having heard the evidence submitted by the parties and having heard the argument of counsel for the Plaintiff and having heard the argument of Mr. Wade and for good cause having been shown:

WHEREFORE, by virtue of the law, and by reasons of the premises aforesaid, it is ordered, adjudged and decreed that Plaintiff, Robert Mabey, do recover from Defendants, Stanley L.

Wade and Janet B. Wade, the sum of \$1,422.79 together with \$230.04 accrued interest and \$54.00 court costs.

It is further ordered, adjudged and decreed that the Defendants' Counterclaim is hereby dismissed with prejudice.

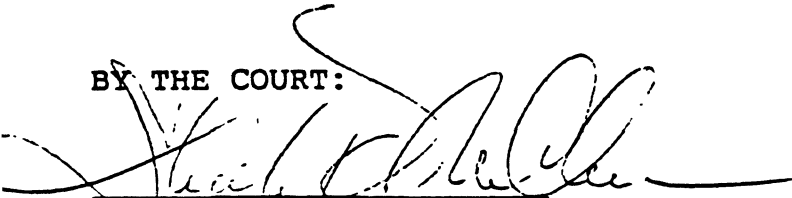
Judgment rendered this 23rd day of July, 1992.

Attest my hand as Clerk and the Seal
of the said Court this _____ day of
July, 1992.

_____, Clerk

By _____, Deputy Clerk

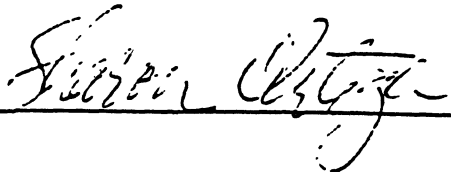
BY THE COURT:


Judge Sheila K. McCleve

MAILING CERTIFICATE

I hereby declare that I caused to be mailed, postage prepaid, first class, a true and correct copy of the foregoing JUDGMENT, this 22 day of July, 1992, to:

Stanley Wade
2159 Parley's Terrace
Salt Lake City, UT 84109



WP51\CWH\JUDGMENT.PA1

**SALT LAKE COUNTY BOARD OF EQUALIZATION
REQUEST FOR REVIEW OF MARKET VALUE**

OWNER(S) RECORD	LAT-LOCAL REALTY & CONSTRUCTION C/O STANLEY L. WADE		
PROPERTY LOCATION	2438 E. 6900 S. # APPROX		
PHONE # (8:00-5:00) EC) 552-2662	PHONE # (AGENT/OTHER) () -	ASSESSOR'S MARKET VALUE \$	

current (January 1) market value for your property was determined pursuant to Article 59 of the Utah Code. Your request for review must be based upon facts which warrant an adjustment in the market value. The information shown and/or attached hereto must be complete and accurate, subject to verification by the Board of Equalization. Any adjustment granted will be based upon the facts presented to the Board of Equalization.

Board only considers matters related to the value of property for tax purposes. It cannot consider complaints concerning matters not related to the set value of the property. The Board has the discretion to raise, lower or adjust the market value of the property, based upon the facts presented.

Whereby request the market value of this property be adjusted by the Board of Equalization based upon the following: (check the appropriate box)

- Recent sale of the subject property. (Attach copy of closing documents).
- Recent appraisal of the subject property. (Attach full copy)
- Recent sales of comparable properties. (Attach comparable sales data)
- Capitalized income derived from commercial property. (See instructions)
- Replacement cost analysis. (See instructions)
- Other or error in physical characteristics. (Attach full description)

I certify that all statements herein or attachments hereto are true and correct to the best of my knowledge and that based upon the facts presented it is my opinion that the current (January 1) market value of this property is:

2,564,000.00

DATE: Aug 21 1980

0-74A

Signature: [Signature]

☐ Owner ☒ Other: (specify) agent

(Office Use Only)								
OWNER				ACTION TAKEN			PROP TYPE	10/5
DATED	2222 452 002			REVIEW DATE	6-11		REAPP YEAR	75
P. TAX CODE	PMIC	ITEM NO	3 of 3	REVIEW REASON	5-12	APPEAL NUMBER	14541	

Exhibit E

Charles W. Hanna (1326)
M. Shane Smith (3007)
Douglas R. Short (5344)
SMITH & HANNA, P.C.
Attorneys for Plaintiff
311 South State Street, Suite 450
Salt Lake City, Utah 84111
Telephone (801) 521-8900

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

ROBERT MABEY d/b/a PACIFIC MANAGEMENT,	:	PLAINTIFF'S SUBSTITUTE
	:	MEMORANDUM IN OPPOSITION TO
Plaintiff,	:	DEFENDANT'S MOTION
	:	TO SET ASIDE JUDGMENT
	:	
vs.	:	
STANLEY L. WADE and JANET B. WADE,	:	Civil No.920012860CV
Defendants.	:	Judge Fuchs

COMES NOW the plaintiff, Robert Mabey, by and through his attorneys, M. Shane Smith of Smith & Hanna, P.C., and hereby respectfully submits this Memorandum in Opposition to Defendants' Motion to Set Aside Judgment and Motion for Stay of Execution.

STATEMENT OF FACTS

1. This is defendants' second attempt to set aside a judgment in this matter, the first having been a default previously entered by this Court and subsequently set aside.

2. The present judgment was entered by this Court on November 3, 1993, after this matter came before the Court at the time regularly set for trial on the 3rd of November, 1993, at the hour of 9:30 a.m., before the Honorable Dennis Fuchs, Judge, Plaintiff being present and represented by counsel, M. Shane Smith

of Smith & Hanna, Defendants, Stanley L. Wade and Janet B. Wade, failing to appear and no one appearing as counsel, the Court having waited in excess of 15 minutes for Defendants' appearance and noting that notice had been delivered to James I. Watts, attorney of record, of the date, time and place set for trial, the Court having reviewed the file and record in this matter and good cause appearing therefore, ordered that defendants' answer be stricken and judgment was entered against defendants, and each of them, in favor of plaintiff, in the amount of \$2,462.15, together with said plaintiff's costs and disbursements in the amount of \$134.00, plus interest prior to judgment at the rate of ten percent (10%) in the amount of \$1,165.71; further that attorney's fees be awarded to plaintiff in the total amount of \$2405.86, and that the total amount of the judgment is and shall be \$6033.72. It was further ordered that this judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit, and that pursuant to Section 15-1-4, Utah Code Anno., 1953, as amended, interest accrue after judgment in the amount of two points over the federal post judgment interest rate.

3. Defendants now seek to set aside the November 3, 1993 judgment, claiming mistake or excusable neglect arising from counsel's claim that he directed his temporary secretary to enter motions for continuance in two separate cases with similar captions, and the secretary purportedly placed the wrong caption on the motion for the instant case and sent it to the wrong court and

the wrong attorney.

4. Counsel for defendants never contacted plaintiff's counsel in this case to give notice of the motion, or to seek a continuance, or to follow up on the motion for continuance. See affidavit of M. Shane Smith.

5. Counsel for defendants never contacted James Lund, counsel for defendants Doug and Bruce Mabey in the case where the motion was mistakenly filed, to request a continuance or to schedule another trial date.

6. As to the factual background of this case, plaintiff incorporates the facts set forth in plaintiff's original Memorandum in Opposition to Defendants' first Motion to Set Aside Default Judgment.

7. In or about July 1989, defendants engaged plaintiff as their agent to attempt to obtain a reduction in real property tax liability assessed against a large apartment complex consisting of 108 units owned by defendants, and located at approximately 2351 East 6895 South, Salt Lake City, Utah. (Affidavit of Robert Mabey filed with the plaintiff's Memorandum in Opposition to Defendants' Renewed Motion To Set Aside Judgment as Exhibit "A" (hereinafter "Mabey Affidavit"), at paragraph 2.

8. The engagement was an oral agreement whereby defendants agreed to only pay plaintiff in the event that plaintiff was successful in reducing the tax liability for the property in question, and to the extent successful, defendants agreed to pay to plaintiff one-half (1/2) of all reduction in tax liability for the

first year of savings. (Mabey Affidavit, 3.)

9. Plaintiff did obtain a hearing before the Salt Lake County Board of Equalization and was successful in obtaining a reduction in the assessed property tax which resulted in a savings to defendants for tax year 1989 in the amount of Four Thousand Nine Hundred Twenty-Four and 30/100 Dollars (\$4,924.30). (Mabey Affidavit at 5.)

10. Defendants had entered into a separate agreement on a separate piece of property which, although the work was of a similar nature, the appeal was separate and distinct from the present matter. Plaintiff had already been successful in obtaining a reduction in tax liability in that separate appeal involving the other piece of property. (Mabey Affidavit at 8.)

11. As in the present case, defendants accepted the benefit of plaintiff's work but denied any contractual obligation to pay the one-half (1/2) of the tax liability savings to plaintiff as agreed. Plaintiff was forced to bring suit to obtain the funds owed, which suit was successful. After trial to the bench (Judge McCleve), defendants were ordered to pay to plaintiff the sum of one-half (1/2) of the tax liability savings obtain on that separate property. (See Mabey v. Stanley L. Wade and Janet B. Wade, Civil No. 913007821CV, Third Circuit Court, Salt Lake County, Salt Lake City Department.)

12. In the prior case, the Court expressly found that Mabey had entered into an oral contract to attempt to effect a reduction of property taxes on the specific single piece of

Exhibit F

Charles W. Hanna (1326)
SMITH & HANNA, P.C.
Attorneys for Plaintiff
311 South State, Suite 450
Salt Lake City, Utah 84111
Telephone: (801) 521-8900

FILED
1992 SEP 10 PM 4:21
CLERK OF THE CIRCUIT COURT
SALT LAKE DEPARTMENT

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

ROBERT MABEY d/b/a PACIFIC
MANAGEMENT,

Plaintiff,

vs.

STANLEY L. WADE and JANET B.
WADE,

Defendants.

)

)

)

)

)

)

COMPLAINT

Civil No.
Judge

920012868CV
Fuch

Plaintiff, Robert Mabey, for cause of action against
defendants, Stanley L. Wade and Janet B. Wade, complains and
alleges as follows:

GENERAL ALLEGATIONS

1. Plaintiff, Robert Mabey, is a resident of Salt Lake
County, State of Utah, and does business in the State of Utah as
Pacific Management.

2. Defendants, Stanley L. Wade and Janet B. Wade, are
residents of Salt Lake County, State of Utah.

3. The contract upon which the within causes of action
are based were entered into and were to have been performed in Salt
Lake County, State of Utah.

FIRST CAUSE OF ACTION

Breach of Contract

4. Plaintiff realleges the allegations contained in paragraphs 1 through 3 as though set forth verbatim herein.

5. In about July of 1989, defendants, Stanley L. Wade and Janet B. Wade, entered into a contract with Robert Mabey doing business as Pacific Management pursuant to the terms of which Robert Mabey agreed to attempt to get the Wades' property taxes on certain property located at 2351 East 6895 South in Salt Lake City, Utah reduced, and the Wades agreed to pay Robert Mabey one-half of the savings for the first year.

6. Pacific Management was able to obtain a reduction on the taxes assessed against the property located at 2351 East 6895 South from \$26,375.04 to \$21,450.74, a total savings of \$4,924.30.

7. Pursuant to the terms of the contract, Pacific Management was entitled to 50% of the total savings of \$4,924.30 as payment for its services. Pacific Management is therefore entitled to \$2,462.15.

8. Pacific Management has fully complied with all of its obligations under the contract and demand has been made upon defendants, Stanley L. Wade and Janet B. Wade, for payment of the sum of \$2,462.15, but said defendants have failed and refused to pay to plaintiff the sum due and owing.

SECOND CAUSE OF ACTION

Quantum Meruit

9. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 8 as though set forth verbatim herein.

10. Plaintiff, Robert Mabey, has provided to defendants services in reducing their real property taxes, which are the subject matter of this litigation, which has conferred a reasonable value upon said defendants.

11. Plaintiff has acted as alleged herein, with the expectation of being compensated therefor in an amount equal to the reasonable value of the services provided by plaintiff to defendants.

12. Defendants, Stanley L. Wade and Janet B. Wade, owe to plaintiff, Robert Mabey, the sum of \$2,462.15 to compensate plaintiff for the fair and reasonable value of the services provided by plaintiff to defendants.

13. Plaintiff has not acted as a volunteer or an intermeddler in conducting himself as alleged herein, and defendants at all times have acknowledged the actions of plaintiff as conferring a substantial benefit upon them with respect to the services rendered in lowering their property taxes.

14. To permit defendants to retain the benefits received from plaintiff without compensating plaintiff therefor would result in the unjust enrichment of defendants at the expense of plaintiff,

which unjust enrichment should not be countenanced by a court of equity.

WHEREFORE, plaintiff prays the above entitled Court for judgment as follows:

FIRST CAUSE OF ACTION

Breach of Contract

1. That plaintiff, Robert Mabey, be awarded a personal money judgment against defendants, Stanley L. Wade and Janet B. Wade, in the amount of \$2,462.15, together with prejudgment interest at the legal rate and court costs.

SECOND CAUSE OF ACTION

Quantum Meruit

2. That plaintiff, Robert Mabey, be awarded a personal money judgment against defendants, Stanley L. Wade and Janet B. Wade, in the amount of \$2,462.15, together with prejudgment interest at the legal rate and court costs.

3. For such other and further relief as the Court deems equitable and just in the premises.

DATED this 10th day of September, 1992.

SMITH & HANNA

By: 

Charles W. Hanna

Plaintiff's Address:
2169 South 700 East
Salt Lake City, Utah 84106

CWH\COMPLAIN.PA1

Exhibit G

PACIFIC MANAGEMENT CORPORATION

This agreement is made between "PACIFIC MANAGEMENT CORPORATION" (hereafter PMC) and the Owner/s (hereafter Client) of the property noted herein. The property to be researched and appealed by PMC. is located:

2335 E. 7000 S.

261 S. 800 E.

S.C.C.

UT.

(property address)

(city)

(state)

(zip)

The following is agreed by both parties:

1. Client authorizes PMC to appeal the assessed valuation of above property before appropriate government entitles. If PMC determined that it may not be beneficial to appeal the Real Property taxes of property, PMC at their sole discretion, may elect not to proceed with the tax appeal.

2. Client agrees to pay PMC 50% of the first year savings in Real Property Taxes realized by appeal process. Client agrees to pay PMC upon written notice of the Tax reduction. Client empowers PMC or it's officers with limited power of attorney to act in behalf of client in all matters relating to the property tax appeal, direction of or disposition of refund, and or collection of any compensation due PMC.

3. Client agrees to hold PMC harmless of any action arising out of association with PMC. Client agrees to provide all requested documents. In the event of non-payment, Client agrees to pay all resulting collection cost, court cost and reasonable attorneys fees.

4. Client agrees to cooperate and provide any and all assistance, information and documentation necessary for PMC to complete the tax appeal process, including copies of 1989 NOTICE OF PROPERTY VALUATION AND TAX CHANGE and CLOSING STATEMENT if property was purchased within the last year, and to complete the following section as it may apply by filling out the following: (please print)

Robert A. Thompson Owner
PACIFIC MANAGEMENT DATE

[Signature]
OWNER SIGNATURE

OWNER

CITY

STATE

ZIP

AREA

TELEPHONE

DATE

APPROX. DATE PURCHASED _____