

1994

## Zoll and Branch, P.C. v. Alan Asay : Brief of Appellee

Utah Court of Appeals

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Michael N. Zundel; Kent W. Hansen; Jardine, Linebaugh, Brown and Dunn; Attorney for Respondent.

B. Ray Zoll; Zoll and Branch; Attorney for Appellant.

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UTAH COURT OF APPEALS

IN THE UTAH STATE COURT OF APPEALS

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A10  
DOCKET NO. 940012 CA

ZOLL & BRANCH, P.C.,

Plaintiff/Counterdefendant  
and Appellant,

vs.

ALAN ASAY,

Defendant/Counterclaimant  
and Appellee.

Appeal Number 940012-CA

Priority 15

BRIEF OF APPELLEE

On appeal from the Summary Decision and Order, entered by the court on July 21, 1993, and the Order Augmenting Judgment and Releasing Cash Bond to Alan Asay, entered by the court on August 2, 1993. Both Orders were entered by the Third Judicial District Court for the State of Utah, Judge Michael R. Murphy.

B. Ray Zoll  
Zoll & Branch, P.C.  
Attorneys for Appellant  
5300 South 360 West, Suite 360  
Salt Lake City, Utah 84123

Michael N. Zundel  
Kent W. Hansen  
Jardine, Linebaugh, Brown & Dunn  
Attorneys for Appellee  
370 East South Temple, Suite 400  
Salt Lake City, Utah 84111

FEB 25 1994

*Alan Asay*

# IN THE UTAH STATE COURT OF APPEALS

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## BRIEF OF APPELLEE

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B. Ray Zoll  
Zoll & Branch, P.C.  
Attorneys for Appellant  
5300 South 360 West, Suite 360  
Salt Lake City, Utah 84123

Michael N. Zundel  
Kent W. Hansen  
Jardine, Linebaugh, Brown & Dunn  
Attorneys for Appellee  
370 East South Temple, Suite 400  
Salt Lake City, Utah 84111

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## STATEMENT OF JURISDICTION

This appeal is taken from Orders entered by the Third Judicial District Court for the State of Utah. This court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) (1992).

## DETERMINATIVE AUTHORITY

Utah Code Ann. § 34-28-5 (1969) (subsequently amended 1989). Separation from payroll - Resignation - Suspension because of industrial dispute. (Attached hereto as Addendum Item No. 1.)

## STATEMENT OF THE CASE

This case arose from a dispute between Appellant Zoll & Branch, P.C. ("Zoll & Branch"), and Appellee Alan Asay over wages due to Mr. Asay, and payment due to Mr. Asay under a contract in which he sold certain computer equipment to Zoll & Branch.

The case began after Mr. Asay provided Zoll & Branch with the statutorily required demand for wages due to him. R. 954-55. During the mandatory waiting period, Zoll & Branch filed this suit alleging numerous groundless causes of action including slander, conversion and fraud. R. 8-12, 1062. Mr. Asay counterclaimed against Zoll & Branch in order to collect the money that was owed to him as wages and the purchase price of the computer. R. 23-33.

Subsequently, Mr. Asay filed for relief under Chapter 7 of the United States Bankruptcy Code. R. 1030-32. The trustee for Mr. Asay's estate abandoned to Mr. Asay his counterclaims against Zoll & Branch, because the wage claim might be subject to an exemption, and both of the claims were relatively small and subject to litigation. R. 1032. Any claims of Zoll & Branch against Mr. Asay

were discharged in the bankruptcy case pursuant to order of the Bankruptcy Court. R. 450-51. However, the parties hereto proceeded to trial on the basis that the discharge did not effect any offsets to which Zoll & Branch might be entitled against Mr. Asay's counterclaims. Id.

After trial, the Third District Court for the State of Utah, Judge Michael R. Murphy, entered Judgment in favor of Mr. Asay. R. 464-67 based upon the findings of fact and conclusions of law included here as Addendum Item No. 5. Among other things, Judge Murphy found that Zoll & Branch's motive in "commencing this action [was] as a tactic to pressure Mr. Asay into abandoning his legitimate claims against Zoll & Branch" (R. 459, ¶ 32) and that "there [was] no justification for Zoll & Branch's stop payment order to its bank with respect to the checks . . ." issued to Mr. Asay. R. 456, ¶ 28.

During the trial, Mr. B. Ray Zoll was the primary witness for Zoll & Branch. Two witnesses, both of them attorneys licensed to practice in this State and former employees of Zoll & Branch, testified that Mr. B. Ray Zoll's character and reputation for truthfulness was bad (R. 1046, 1068) and generally contradicted Mr. Zoll's testimony. R. 1039-55, 1055-73. Mr. Asay also testified that Mr. Zoll's testimony was not true. R. 1123-24. The Court found that "Zoll & Branch stopped payments on the checks it issued to Mr. Asay for the sole reason that Mr. Zoll was angered by the password after he found out what it was. Mr. Zoll's testimony

regarding the basis for the offsets claimed by Zoll & Branch is not credible." R. 455, ¶ 22.

Following the Judgment, Zoll & Branch filed a Motion for a New Trial or in the Alternative Motion to Alter or Amend Judgment (the "Motion for a New Trial"). R. 470-76. Pending disposition of the Motion for New Trial, the court successively stayed execution on the judgment for limited periods of time through multiple orders. R. 525-30, 596-97, and 617-18. Correct copies of each of the orders staying execution on the Judgment are attached hereto as Addendum Item No. 6. The last order stayed execution until the court ruled upon the Motion for New Trial. R. 617-18. On 20 July 1993, the court denied the Motion for a New Trial in a document entitled Summary Decision and Order. R. 632-34. In rendering its decision, the court wrote:

Plaintiff [Zoll & Branch] and counter-claim defendant [Zoll & Branch] has moved for a new trial or to alter or amend judgment. The motion seeks to change specific findings. Plaintiff fails to acknowledge, however, that evidence is not the equivalent of fact. The court heard all the evidence and, after viewing the demeanor of witnesses and making judgments of credibility, made its findings. If, as in this case, there is conflicting evidence, there will necessarily be a conflict between the findings and some evidence, the evidence which the court rejected in its role as a factfinder.

R. 632.

On June 16, 1993, Mr. Asay moved to augment the judgment to include additional attorneys' fees accrued in order to preserve, and collect, the Judgment ("Motion to Augment"). R. 601-03. A hearing was held on August 2, 1993. R. 643. At the commencement



of the hearing, Mr. Zoll offered to make a "proffer." R. 1151.  
Following Zoll & Branch's "proffer" the following occurred:

The Court: Well, I think I need to take some evidence on the fees.

Mr. Zoll: You can take it. I really don't care.

(Whereupon Mr. Zoll exits the courtroom)

The Court: The record should indicate Mr. Zoll is walking out, and you may put on your evidence, Mr. Zundel.

\* \* \*

The Court: The record should indicate that I believe under the circumstances that I have the power, although I'm not going to use it, of contempt over Mr. Zoll for his conduct just now.

However, I'm going to restrain myself and not exercise that power and jurisdiction, and we'll proceed with the attorney's fees. And whatever happens, Mr. Zoll is going to have to just live with because he's freely chosen to walk out of this courtroom in a very abrupt manner.

R. 1153-54.

The court thereafter heard the evidence regarding the reasonableness of the attorneys' fees incurred by Mr. Asay and took notice that the stay of execution had expired on July 20, 1993 (12 days prior). The court thereupon executed its Order Augmenting Judgment and Releasing Cash Bond to Alan Asay (the "Order Augmenting Judgment") which Asay's counsel had brought with him to the hearing. R. 643.

Zoll & Branch now appeals the Summary Decision and Order and the Order Augmenting Judgment, but no appeal of the judgment entered at trial has been filed. See Notice of Appeal, ¶ 2. A

correct copy of the Notice of Appeal is included here as Addendum Item No. 9.

In its opening brief, Zoll & Branch challenges Findings Nos. 5, 6, 8, 11, 15, 16, 17, 19, 22, 25-28, and 32-39 as being clearly erroneous, and argues that the Court misapplied Utah's wage payment statute found at Utah Code Ann. § 34-28-5 (1969) and that the court committed procedural error.

### SUMMARY OF ARGUMENTS

Generally an appellate court only reviews a trial court's factual findings for clear error. The trial court's conclusions of law are reviewed for correctness. However, where, as here, the appellant only appeals the denial of a motion for a new trial, the appellate court only reviews the denial for an abuse of discretion.

The trial court properly exercised its authority under Utah Rule of Evidence 611 to control the interrogation of witnesses in order to avoid needless consumption of time in this case. The court scheduled one day for the hearing and allocated one-half day to each party. Zoll & Branch waived any objection to the court's invocation of Rule 611 at trial.

The court properly excluded evidence regarding Mr. Asay's "mental condition." Zoll & Branch failed to offer expert testimony.

The testimony of Garry Willmore was properly admitted since it was not subject to the attorney-client privilege. Zoll & Branch waived any privilege that might have existed by failing to object to Mr. Willmore's testimony at Mr. Willmore's deposition.

Zoll & Branch failed to properly object to the admissibility of Mr. Willmore's testimony at trial. Thus, Zoll & Branch failed to preserve the issue for appeal.

Zoll & Branch has not properly marshalled the evidence concerning its contentions that the trial court's factual findings are clearly erroneous. Zoll & Branch's contentions are based on the mere fact that evidence contrary to some of the findings exists. As such, Zoll & Branch's arguments fail to acknowledge the burden it carries when challenging the trial court's findings of fact. The court's findings of fact are supported by substantial evidence and are not clearly erroneous.

Zoll & Branch's contention that the trial court misapplied Utah's wage statutes regarding penalties and attorneys' fees is based upon Zoll & Branch's misinterpretation of the statute, and upon Zoll & Branch's bold assertions that the court's findings of fact are erroneous. The trial court properly assessed penalties against Zoll & Branch and awarded to Mr. Asay the attorneys' fees he incurred as costs of the suit.

Zoll & Branch did not tender payment of the wages due to Mr. Asay as it argues. Zoll & Branch's deposit with the court was not an unconditional offer of payment. The money was not available to Mr. Asay until Mr. Asay successfully litigated this matter against Zoll & Branch. Zoll & Branch's deposit could not have been a "form of interpleader" as it argues, since there were never more than two parties to this action.

The reasonableness of attorneys' fees in this case must be determined in light of all relevant factors, and not solely based on the amount in controversy as Zoll & Branch suggests. The court considered the reasonableness of the attorneys' fees charged in this case and properly determined that the fees were reasonable in light of all the surrounding circumstances. Contrary to Zoll & Branch's contentions, it was given an opportunity to cross-examine Mr. Asay's counsel regarding the fees but chose to use its time elsewhere.

To the extent that Zoll & Branch complains of the attorneys' fees awarded in the Order Augmenting Judgment, Zoll & Branch waived its right to object to this order when its counsel, Mr. Zoll, walked out of the courtroom at the commencement of the hearing. The award of attorneys' fees was well supported by the record before the trial court and is not clearly erroneous.

Zoll & Branch's allegations of impropriety stem from its insistence that the court improperly released a supersedeas bond to Mr. Asay. The bond in this case was filed pursuant to Utah Rule of Civil Procedure 62(b) and was not a supersedeas bond. The stay of execution on the judgment, as amended, had expired at the time the bond was released to Mr. Asay. Therefore the court properly released the bond to Mr. Asay.

Mr. Asay is entitled to recover his attorneys' fees incurred as a result of this appeal. Under the general rule, a prevailing party who received attorney fees below is also entitled to fees reasonably incurred on appeal. Furthermore, Zoll &

Branch's appeal is frivolous, and Mr. Asay is entitled to fees on appeal pursuant to Utah Rule of Appellate Procedure 33(a).

Because the trial court's findings of fact are well supported by the record and its rulings of law are correct, the trial court's denial of Zoll & Branch's Motion for a new trial was not an abuse of discretion.

## ARGUMENTS

### I. STANDARDS OF REVIEW.

Generally, an appellate court will only review the trial court's factual findings for clear error. E.g., Cummings v. Cummings, 821 P.2d 472, 476 (Utah App. 1991). The trial court's conclusions of law are reviewed for correctness. Id. In the present case, Zoll & Branch has not appealed the underlying judgment in this matter. Rather, Zoll & Branch appeals the Summary Decision and Order, whereby the trial court denied Zoll & Branch's Motion for a New Trial, and the Order Augmenting Judgment. Since the underlying judgment under Rule 59 is not on appeal, nothing in this case is reviewed without recognizing broad discretion in the trial court.

With regard to the denial of Zoll & Branch's Motion for a New Trial, it is well settled that the trial court has broad discretionary power to grant or deny a motion brought under Utah Rule of Civil Procedure 59. E.g., Hancock v. Planned Development Corp., 791 P.2d 183, 184 (Utah 1990); Anderson v. Toone, 671 P.2d 170, 173 (Utah 1983). An appellant bears the heavy burden of showing that the trial court's denial of such a motion was a clear

abuse of discretion. Hancock v. Planned Development Corp., supra; Pusey v. Pusey, 728 P.2d 117 (Utah 1986); Crookston v. Fire Ins. Exchange, 817 P.2d 789, 799 (Utah 1991). Under Anderson v. Toone, supra, when the motion for a new trial is based upon an allegation that the verdict is not supported by the evidence, an appellate court will not reverse the denial of the motion unless the "evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." 671 P.2d at 173. In this case, the trial court's rulings were proper and its findings of fact are well supported by the record. Zoll & Branch has not shown otherwise.

With respect to the Order Augmenting Judgment, Zoll & Branch fails to carry its burden on appeal to show that the findings of the trial court were clearly erroneous, or that its conclusions of law were incorrect. Therefore, the Order Augmenting Judgment must be affirmed.

II. THE TRIAL COURT'S PROCEDURAL RULINGS WERE PROPER AND DO NOT CONSTITUTE PROCEDURAL ERROR.

A. The court properly exercised its authority under Utah Rule of Evidence 611 to control the interrogation of witnesses and avoid needless consumption of time in this case.

Zoll & Branch complains that the court scheduled only one full day for the trial of this case, and limited each party to one-half of the day for the presentation of its case. Appellant's Brief, p. 31. In its Summary Decision and Order, from which Zoll & Branch appeals, the trial court explained that

The court was very concerned about this case,  
invoked Rule 611, Utah Rules of Evidence,

allocated 50% of the trial day to each party and was timekeeper for the time consumed. Plaintiff actually used more time than defendant and had adequate time to present its claims and defenses. It was the plaintiff's decision how it was to use its time. It is the court's view that plaintiff misallocated its time, spending too much time on unimportant matters and too little on important matters.

R. 633.

Under Utah Rule of Evidence 611, the trial court has considerable discretion to manage the introduction of evidence and to see that it is presented efficiently. In re Estate of Russell, 852 P.2d 997, 998-99 (Utah 1993). The appellate court will review the lower court's rulings based on Rule 611 only for abuse of discretion. Id.

Zoll & Branch's contention is based on its assertion that the time constraints did not allow it to present its entire case. Appellant's Brief, p. 31. However, shortly after 2:00, when the court reconvened from the lunch break, the court stated "[a]s we proceed with this case I'm seeing the wisdom of my invocation of Rule 611," to which Mr. Zoll replied "I am, too." R. 1002, 1008. Furthermore, long after Zoll & Branch's allotted time had expired, the court asked counsel for Zoll & Branch "[w]hat other witnesses, if you were allowed to call them, would you call?" R. 1117. Tom D. Branch, co-counsel for Zoll & Branch, responded

Myself, and Mr. Steven Branch your honor. My testify [sic] would be corroborating Mr. Zoll's, except for I guess it would be the fact that he testified about the billing logs.

Steve Branch's testimony would be that he looked for the billing logs. That would be

cumulative, as well, so I think that in the interest of time I think we have put in the substantive evidence we need.

R. 1117-18 (emphasis added). Clearly, Zoll & Branch waived any objection it had regarding the court's invocation of Rule 611. Only after the court rendered its decision against Zoll & Branch did it protest the court's invocation of Rule 611.

**B. Evidence regarding Mr. Asay's "mental condition" was properly excluded.**

Zoll & Branch asserts that the trial court erred in sustaining Mr. Asay's objection to Zoll & Branch's question regarding Mr. Asay's medical history. Zoll & Branch argues that Mr. Asay's medical history is admissible under Utah Rule of Evidence 608. Appellant's Brief, 31. Rule 608 allows evidence regarding the credibility of a witness, in the form of opinion or reputation, *only* if it refers to character for truthfulness or untruthfulness.

After the court sustained Mr. Asay's objection, Zoll & Branch explained that the question was intended to elicit evidence that Mr. Asay had a "mental condition" which Zoll & Branch claimed affected his credibility. R. 971-71. Zoll & Branch conceded, however, that it was not prepared to offer expert testimony on the issues. Id. The trial court properly ruled that a lay witness was not qualified to establish that a "mental condition" affected an individual's credibility and thus excluded the evidence. Id.



C. The court properly admitted the deposition testimony of Mr. Willmore.

Zoll & Branch asserts error because of the admission of the testimony of Mr. Willmore and argues that the testimony invaded the attorney-client privilege. Zoll & Branch's argument fails for three reasons: first, the testimony was not protected by the attorney-client privilege; second, even assuming that a privilege existed, Zoll & Branch waived the privilege by failing to properly object to the taking of Mr. Willmore's testimony at deposition; and third, Zoll & Branch failed to properly object to the testimony at trial.

1. The testimony of Mr. Willmore was not protected by attorney-client privilege.

Under Utah Rule of Evidence 504(b), only confidential communications between a client and his attorney that pertain to the subject matter for which the attorney was retained are protected under the attorney-client privilege. Utah R. Evid. 504. Non-confidential communications, or those which are unrelated to the attorney-client relationship are not protected under the privilege. Id.

At trial, Mr. Asay's counsel read into the record portions of Mr. Willmore's deposition regarding Mr. Willmore's communications with Mr. Asay, his experience using the computer system that Mr. Asay sold to Zoll & Branch, the non-existence of facts concerning Mr. Asay's employment supportive of Zoll & Branch's claims, and the poor reputation of Mr. Zoll among members of the legal community for truth and veracity. R. 1039-48. None

of the excerpts read into the record addressed confidential communications between Zoll & Branch and its counsel in any way. Thus, the excerpts do not fall within the attorney-client privilege.

2. Even assuming that a privilege existed, it was waived by failing to object to the taking of Mr. Willmore's deposition.

The attorney-client privilege may be waived if the holder thereof voluntarily discloses or consents to the disclosure of any significant part of the communication. Utah R. of Evid. 507. "[I]f the holder of the privilege fails to claim his privilege by objecting to disclosure by himself or another witness when he has an opportunity to do so, he waives his privilege as to the communications so disclosed." E. Cleary, MCCORMICK ON EVIDENCE § 93, at pp. 223-24 (3d. ed. 1984). The privilege is waived as to communications between a client and its attorney that are made in the presence of third persons whose presence is not reasonably necessary under the circumstances. Hofmann v. Conder, 712 P.2d 216, 216-17 (Utah 1985).

When Mr. Asay's counsel deposed Mr. Willmore, Zoll & Branch did not object to the deposition or to any of the questions based on the attorney-client privilege. R. 1038. By failing to object, Zoll & Branch allowed disclosure of all matter contained in Mr. Willmore's deposition.

3. Zoll & Branch failed to Properly Object at Trial to the Admissibility of Mr. Willmore's Testimony with Regard to Attorney-Client Privilege.

Under Utah Rule of Evidence 103(a)(1), error may not be predicated upon a ruling that admits evidence unless a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When asserting the attorney-client privilege, a bald assertion of privilege is insufficient. 4 J. Moore, W. Taggart & J. Wicker, MOORE'S FEDERAL PRACTICE ¶ 26.60[01], p. 26-162 (2d. ed. 1985). Rather, the privilege must be invoked as to specific questions or documents. Id.

When the deposition testimony of Mr. Willmore was offered at trial, Zoll & Branch initially objected to the reading of less than the entire transcript of the testimony of Mr. Willmore and then subsequently on the basis that the testimony violated the attorney-client privilege. R. 1035-1037. The court properly reserved its ruling on the latter issue, but invited Zoll & Branch to object again if the proffered question was subject to an unwaived privilege. R. 1038. The court stated "[w]ell, let's hear the question and make your objection, then I'll determine whether it's been waived. And if not waived, whether it is subject to the attorney-client privilege." Id.

Thereafter, both parties offered relevant excerpts from the deposition testimony without objection by Zoll & Branch based on attorney-client privilege. R. 1039-55. After the testimony was received, Zoll & Branch did not move to strike it.

III. THE COURT'S FACTUAL FINDINGS IN THIS CASE ARE SUPPORTED BY THE EVIDENCE, AND ZOLL & BRANCH HAS NOT PROPERLY MARSHALLED ALL OF THE EVIDENCE CONCERNING ITS CONTENTIONS TO THE CONTRARY.

In order to successfully challenge the correctness of a trial court's findings of fact, an appellant must ordinarily first marshal all the evidence supporting the findings, and then demonstrate that, viewed in the light most favorable to the lower court's findings, the evidence is legally insufficient to support the findings. Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989). In this regard, this court has recently stated:

This court will not lightly disturb a trial court's findings of fact. In challenging a court's findings of fact on appeal, an appellant must marshal all '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 evidence, thus making them clearly erroneous.' If appellant fails to marshal the evidence, we will assume that the record supports the trial court's findings of fact and proceed to review the accuracy of the trial court's conclusions of law.

Commercial Union Assoc. v. Clayton, 863 P.2d 29, 36 (Utah App. 1993) (emphasis added and citation omitted).<sup>1</sup> In Clayton, the court noted that the appellant had merely selected those facts and excerpts that supported its position and re-argued those facts as if its appeal were a trial de novo. Id. This court stated that such an approach "ignores the heavy burden that [the appellant]

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<sup>1</sup>The court's statements in Clayton are of particular significance to the present case since Mr. Zoll, counsel for Zoll & Branch, also represented the appellants in Clayton.

must carry to properly challenge the trial court's findings of fact." Id.

Once the evidence is properly marshalled, the standard by which the sufficiency of the evidence is judged is set out in Utah Rule of Civil Procedure 52(a). Rule 52(a) states:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Utah R. Civ. P. 52(a).

In the present case, Zoll & Branch fails to marshal the evidence in support of the trial court's findings. Rather, similar to what the appellant did in Clayton, Zoll & Branch selects only a portion of the relevant evidence and then reargues its factual position.

Zoll & Branch fails to carry the additional burden of showing that the trial court's denial of Zoll & Branch's Motion for a New Trial was an abuse of discretion.

**A. If all of the evidence were marshalled, there is sufficient evidence to support each of the court's factual findings.**

**1. Factual Finding No. 5.**

Zoll & Branch contests Finding No. 5 which states,

During his employment with Zoll & Branch, Mr. Asay learned to distrust Mr. B. Ray Zoll. Consequently, near the end of his employment, Mr. Asay placed the password "fuckoff" on the computer system to ensure that he controlled the system until a final agreement for its purchase was reached.

Zoll & Branch argues that the finding is clearly erroneous because testimony existed that Mr. Asay was "attempting to block access to certain files." Appellant's Brief, p. 13.

The unstated context of the snippet of testimony presented by Zoll & Branch concerns negotiations over the price of the computer system purchased by Mr. Asay and sold to Zoll & Branch. The record states:

[Counsel] Did the delay in negotiations in reaching a final figure concern you?

[Asay] Yes, it did.

[Counsel] Why?

[Asay] I was afraid that there would be some effort to take control of the computer system on their part. In other words, change the locks or somehow make the computer system unavailable to me, or simply take it. Find some way of exercising leverage in these negotiations. So I protected the computer system.

R. 941. In its brief, Zoll & Branch concedes that this passage "could support a finding of the motive as characterized in Finding No. 5." Appellant's Brief, p. 13.<sup>2</sup>

The record supports the court's finding that Mr. Asay used the password to block access to certain files because he

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<sup>2</sup> Zoll & Branch also argues that because Mr. Asay testified that he felt no obligation to assist Zoll & Branch after he left, that the password placed on the computer before he left was somehow an act of anger and revenge. Appellant's Brief, p. 13. Zoll & Branch's argument is not only irrelevant, it distorts Mr. Asay's testimony by presenting it out of context. When read in context, in the passage to which Zoll & Branch refers, Mr. Asay testified

So I felt no obligation to do so. I would have done so, and did do so as a favor. I felt sympathetic toward Garry, who was in a difficult position, having to do something that he had had no experience or training in. But I didn't feel like I had any obligation to Zoll & Branch to do it.

(R. 990 (Emphasis added.))

distrusted Zoll & Branch. Therefore, Factual Finding No. 5 cannot be said to be clearly erroneous.

2. Factual Finding No. 6.

Finding No. 6 states:

Mr. Asay placed the password on the word processing files using the standard WordPerfect command, "Password"/"Add". Once the password was revealed, it could be removed by using the standard WordPerfect command, "Password"/"Remove".

Once again Zoll & Branch refers vaguely to evidence that supports the court's finding, but does not marshal that evidence and present it to the appellate court. Appellant's Brief, p. 14.

In the referenced passage, counsel for Zoll & Branch asks Mr. Asay whether certain files were locked and Mr. Asay responded "No. It was accessible by giving the password." R. 1021. In addition to this testimony, Zoll & Branch fails to acknowledge the following testimony of Mr. Willmore, which also supports the finding:

[Counsel] Did he show you what files were in the computer?

[Willmore] He did.

[Counsel] Did he reveal to you all passwords regarding --

[Willmore] He did.

\* \* \*

[Counsel] But he gave you the password?

[Willmore] He did give me the password.

[Counsel] So was the access in fact blocked?

[Willmore] No.

[Counsel] Okay. Did you eventually learn how to remove the password?

[Willmore] Yes, I did.

[Counsel] What did it take to remove the password?

[Willmore] It was a very simple application of -- it was part of the Word Perfect [sic] program, I had understood based on --

[Counsel] It was part of Word Perfect --

[Willmore] It was part of the Word Perfect program, yes.

[Counsel] It was a standard Word Perfect Command?

[Willmore] Yes.

[Counsel] How long did it take you to remove a password when the password would come up?

[Willmore] Perhaps 15 seconds.

R. 1041-43. In addition, Zoll & Branch's witness, Mr. Van Valkenberg, testified that the password was a WordPerfect function and could easily be removed once the password was known. R. 1098. Contrary to Zoll & Branch's contentions, Mr. Van Valkenberg's testimony does not rebut this finding, but rather confirms it.

### 3. Factual Finding No. 15.

Factual Finding No. 15 states "[t]he password provided full access to every file in the computer system. At no time did Mr. Asay sabotage the computer in any way." R. 454, ¶ 15. In addition to the testimony that Zoll & Branch vaguely refers to (R. 987, 1043, 1123), unmarshalled testimony by Mr. Willmore states that Mr. Asay had been "extremely helpful," had shown him the files on the computer and had revealed the password, and that access to the computer's files was not blocked. R. 1041-42.



Zoll & Branch ignores Mr. Willmore's testimony and selectively presents other testimony that it interprets as supporting its position that additional passwords existed. Appellant's Brief,

15. Once again, Zoll & Branch:

fails to acknowledge . . . that evidence is not the equivalent of fact. The court heard all the evidence and, after viewing the demeanor of witnesses and making judgments of credibility, made its findings. If, as in this case, there is conflicting evidence, there will necessarily be a conflict between the findings and some evidence, the evidence which the court rejected in its role as fact-finder.

Summary Decision and Order, R. 632.

**4. Factual Finding No. 16.**

Factual Finding No. 16 states:

Any problems which Zoll & Branch had in accessing the computer system either pre-existed the exchange of the password for the check for the computer system or were the result of Zoll & Branch or its representatives being untrained or uneducated in the use of the computer system.

R. 454, ¶ 16.

Zoll & Branch challenges Factual Finding No. 16. Appellant's Brief, pp. 15-16. However, it presents absolutely no evidence to support or contradict the court's finding. Id.

Mr. Van Valkenberg testified that his first visit was in late November or early December and at that time Zoll & Branch did not have the password. R. 1093. Mr. Asay's testimony confirmed that Mr. Van Valkenberg's first visit occurred before he left the firm, and consequently before the sale of the computer to Zoll & Branch or the exchange of the password. R. 1123. Mr. Van

Valkenberg also testified that upon his second visit the password had been revealed. R. 1096. Furthermore, Mr. Asay testified that prior to his departure he had hidden files on the computer, but that when he left the firm all files were exposed and he gave the password to all files upon his departure. R. 1123. It is irrelevant whether or not Mr. Asay chose to protect the files with a password or by hiding them while he owned the computer. The evidence supports the court's finding that Mr. Asay revealed the password to Zoll & Branch at the time of sale.

Zoll & Branch argues that even if Finding No. 16 is correct, the denial of access to files should be considered sabotage because Mr. Asay said that Mr. Willmore had called him numerous times for help in accessing files. Appellant's Brief, p. 16. Not only does Zoll & Branch's version of Mr. Asay's testimony not support its conclusion, Zoll & Branch distorts Mr. Asay's testimony once again. Mr. Asay's testimony was that Mr. Willmore's problems were not related to the password, but to his own inexperience with the computer. R. 988-90.

**5. Factual Finding No. 8.**

The amount of time which Mr. Asay billed during his employment with Zoll & Branch was fair and consistent with his obligation to Zoll & Branch and its clients and was fairly and accurately reported on Mr. Asay's time sheets.

R. 453.

Zoll & Branch challenges this finding on the basis that Mr. Zoll expected more hours than were billed, and that Mr. Zoll

testified that this was a condition of employment. Appellant's brief, p. 16.

However, Zoll & Branch again misrepresents the witness' testimony. In stating that Mr. Zoll *expected* 7-8 billable hours per day, Mr. Asay and his former fellow associate of Zoll & Branch, Mr. Drake, were expressly distinguishing Mr. Zoll's expectations from the conditions of their employment. R. 963-64, 975-76, 1057. Furthermore, Zoll & Branch ignores other testimony that because of the administrative tasks Mr. Asay was required to perform, such as secretarial work and delivering documents to the court, Mr. Asay was not able to bill the *expected* number of hours per day. R. 977; 453, ¶ 9. Zoll & Branch also fails to acknowledge that Mr. Zoll's testimony, as quoted in Appellant's Brief at page 17, was controverted by Mr. Asay's testimony, who testified that Mr. Zoll's testimony was untrue. R. 1123-24.

When all of the evidence is viewed in its proper light, giving due regard to the trial court's opportunity to evaluate the witnesses' demeanor and credibility, there is ample evidence to support the court's finding.

#### **6. Factual Finding No. 11.**

Following negotiations, Zoll & Branch agreed to buy only the computer system for \$1,030.00, which was the fair market value of the computer system. Mr. Asay accurately represented all material facts to Zoll & Branch during the negotiations.

Zoll & Branch contests the trial court's finding that the price it paid for the computer was fair market value, and that Mr. Asay had accurately represented all material facts to Zoll & Branch

during negotiations. Appellant's Brief, pp. 18-19. In support of its argument it cites Mr. Van Valkenberg's testimony that the total price paid was in excess of the computer's value at the time of the sale, and that replacing a 1987 disk with a 1984 disk would lessen the value of the computer. Id.

Zoll & Branch's argument about value does not inform the court of what the valuation issue was between Zoll & Branch and Mr. Asay. Mr. Asay testified that he had negotiated with Zoll & Branch over the point in time at which the computer should be valued, whether at the time purchased by Asay or at the time of the proposed sale to Zoll & Branch. R. 942. The computer originally purchased by Mr. Asay was used almost exclusively in his employment with Zoll & Branch. Id. The price finally agreed upon represented a compromise. Id.

Zoll & Branch also fails to acknowledge Mr. Asay's testimony that the 1987 hard drive was replaced because it had completely stopped working. R. 995. Under the circumstances, replacing the failed hard disk with a drive manufactured earlier did not necessarily affect the value of the computer. R. 995.

**7. Factual Finding No. 17.**

The trial court found that:

None of Defendant's actions and conduct regarding the computer system were improper or inappropriate.

R. 454, ¶ 17. Zoll & Branch's arguments focus on Mr. Asay's replacement of a broken 1987 hard drive with a working 1984 hard

drive.<sup>3</sup> As noted above, the hard drive that was removed from the system had completely stopped working. R. 995.

After evaluating all of the evidence, the court determined that none of Mr. Asay's conduct was improper. In its brief, Zoll & Branch offers only a portion of the evidence presented to the court and distorts that evidence by presenting it to this court out of context. Therefore, Zoll & Branch has not properly marshalled the evidence.

#### **8. Factual Finding No. 19.**

Zoll & Branch challenges the trial court's finding that:

When Mr. Asay left Zoll & Branch, he left behind all of his work product pertaining to any case on which he had worked. Mr. Asay also properly left behind his time sheets at Zoll & Branch, which should have been found by Zoll & Branch on the premises with no difficulty whatsoever.

Zoll & Branch misrepresents the testimony that it cites in its brief. Mr. Asay testified as to the ordinary course of business with regard to the manner in which he submitted his billings, stating "I didn't actually turn them in. They were just always kept in a place on my desk, and the secretary would come and get them." R. 967. Mr. Asay testified that it was his custom to

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<sup>3</sup> In an attempt to show that Mr. Asay had acted inappropriately, Zoll & Branch also quotes Mr. Van Valkenberg's testimony regarding Mr. Asay's possible motives for hiding files. Appellant's Brief, p. 20. However, Zoll & Branch does not point out that immediately following the testimony which it quotes in its brief, the court sustained an objection to that very testimony. (R. 1104)

Furthermore, the testimony is irrelevant to the issue, since, as already stated, the evidence indicates that Mr. Van Valkenberg's first visit, wherein he found the hidden files to which he referred, was before the computer was sold to Zoll & Branch, and while it was still owned by Mr. Asay, and that Mr. Asay had exposed all files before selling the computer. (Supra at 20; R. 1123.)

leave his billing sheets on his desk for Mr. Zoll's secretary to collect, but since he had already moved his desk from the office, he left them on the floor because that was "as close as possible to the same location." R. 969; see also, R. 1012, 1059-61.

Zoll & Branch also ignores the testimony of Mr. Drake that supports the court's findings. Mr. Drake testified that as he remembered, Mr. Asay's practice was to place the time-sheets in a box on his desk for the secretary to collect. R. 1060-61.

When read in proper context, the passage cited by Zoll & Branch does not show that the ordinary course of business was for Mr. Asay to hand-deliver his time sheets to a secretary. In addition, Mr. Asay testified that all computer disks that he took with him upon leaving were disks that he had purchased himself that Zoll & Branch had not purchased from him, and that all work product was left on the computer's hard drive. R. 1016, 1021.

Once again, Zoll & Branch has failed to marshal all of the evidence.

#### **9. Factual Finding No. 22.**

In Finding No. 22, the trial court found that:

In defense of Zoll and Branch's actions, Mr. Zoll testified that he stopped payment on the checks because Zoll & Branch had offsetting claims against Mr. Asay. The Court disagrees. Zoll & Branch stopped payment on the checks it issued to Mr. Asay for the sole reason that Mr. Zoll was angered by the password after he found out what it was. Mr. Zoll's testimony regarding the basis for the offsets claimed by Zoll & Branch is not credible.

R. 455, ¶ 22. Zoll & Branch challenges this finding as unsupported by the record, and then simply cites Mr. Zoll's testimony, which the court found not to be credible, to show that the claimed offsets were legitimate. Appellant's Brief, pp. 21-22. Zoll & Branch also quotes Mr. Van Valkenberg's testimony wherein Mr. Van Valkenberg testifies as to what Mr. Zoll had told him. Id. at 23.

In the quoted portion of the record Mr. Zoll attempts to justify the claimed offsets based upon three factors: (1) the password; (2) the valuation of the computer; and (3) Mr. Asay's billing statements. Appellant's Brief, p. 22. Each of the three factors asserted to justify Zoll & Branch's claimed offsets are addressed above. As noted above, Zoll & Branch has not marshalled the evidence regarding the issues that it argues to support its claimed offsets.

Zoll & Branch merely ignores its burden on appeal and the trial court's role as a judge of the witness's credibility.

#### 10. Factual Findings Nos. 25-28.

Zoll & Branch's challenge to Findings Nos. 25-28 relies upon its premise that the other findings challenged by Zoll & Branch are clearly erroneous. Appellant's Brief, p. 23. In Factual Findings 25 through 28, the court found that:

25. Mr. Asay did not convert any documents or other property of Zoll & Branch to his own use.

26. Mr. Asay did not make any misrepresentation to Zoll & Branch regarding any aspect of the computer he sold to Zoll & Branch.

27. Mr. Asay did not slander Zoll & Branch as alleged in the complaint filed by that firm.

28. There is no justification for Zoll & Branch's stop payment order to its bank with respect to the checks at issue in this case.

R. 456.

Zoll & Branch summarily challenges these findings as "contrary to facts found in the transcript, especially in regard to Wilmore's [sic] own deposition testimony, to Asay's misrepresentations pertaining to the computer, to the justification for Zoll & Branch's stop payment order, and to respondent's failure to fulfill his part of the employment agreement, as has been argued above." Appellant's Brief, p. 23. Each of Zoll & Branch's contentions regarding these findings is addressed above, and need not be reargued here.

These findings are well supported by the record and by the other findings of the court upon which findings 25 through 28 rest. Even if the evidence had been properly marshalled, the findings are not clearly erroneous. Therefore, Factual Findings Nos. 25-28 must also be affirmed.

**11. Factual Finding No. 32.**

In its Factual Finding No. 32, the trial court expressly found that "[d]uring the trial of the above-entitled actions, the testimony of Mr. Asay was more credible than the testimony of Mr. Zoll." R. 457, ¶ 32. Zoll & Branch challenges this finding on the grounds that there is no support for it in the record, and (without



citing the record) that it is "controverted by facts in the transcript." Appellant's Brief, p. 24.

It is expressly within the province of the trial judge's authority to evaluate the credibility of witnesses. Utah R. Civ. P. 52(a). Furthermore, once again Zoll & Branch fails to marshal the evidence which supports the trial court's finding. In addition to the intangible evidence, such as the demeanor of the witnesses, the court received unrebutted testimony from two separate witnesses regarding Mr. Zoll's lack of credibility. Both of these witnesses are members in good standing of the Utah State Bar, and both had worked as employees of Zoll & Branch. Mr. Willmore testified that Mr. Zoll's reputation in the legal community for truth and veracity was "extremely poor." R. 1046. Similarly, Mr. Drake testified that other attorneys "don't have a high opinion of Mr. Zoll" for truthfulness. R. 1068.

Based upon the trial court's observation of the witnesses, and the testimony regarding Mr. Zoll's credibility, the trial court's finding that Mr. Asay's testimony was more credible than Mr. Zoll's is not clearly erroneous.

## **12. Factual Findings Nos. 33-38.**

In its Findings Nos. 33-38, the trial court states:

33. Mr. Asay is entitled to receive the following monetary damages from Zoll & Branch as a result of Zoll & Branch's failure to pay Mr. Asay his wages due and its failure to pay for the computer system:

	<u>Principal</u>	<u>Interest</u>
<b><u>Wages and Penalties:</u></b>		
Wage check 12/01/88 -	\$ 1,500.00	
Statutory Continuation of Salary -	<u>\$ 6,000.00</u>	
		\$ 7,500.00
Plus interest from 02/01/89 through 01/08/93 @ 10% or \$ 2.05479 per diem for 1,438 days		\$ 2,951.79
<b><u>Breach of Contract:</u></b>		
Computer payment	\$ 1,030.00	
Plus interest from 12/01/88 through 01/08/93 @ 10% or \$ .2821 per diem for 1,498 days		\$ 327.10
<b><u>Attorneys' Fees:</u></b>		
Through preparation of Findings of Fact and Conclusions of Law and Judgment	\$ 12,000.00	
Out-of-pocket expenses and costs	<u>\$ 1,602.79</u>	
<b>TOTAL DAMAGES: \$ 25,411.68</b>		

34. Mr. Asay is also entitled to additional interest from and after January 8, 1993, at the rates provided under Utah Code Ann. §§ 15-1-1 and 15-1-4.

35. The Court has considered all of the relevant factors in determining the reasonableness of the fees and costs requested by Mr. Asay and his attorneys. In this regard the testimony of Mr. Asay, who is a licensed attorney in this state, was helpful as well as the affidavit of Mr. Asay's counsel, Mr. Michael N. Zundel. The Court also observed the organized and efficient manner in which Mr. Asay's counsel conducted the presentation of Mr. Asay's case at trial. All of the services provided by Mr. Asay's counsel were reasonable and necessary.

36. The hourly rates charged to Mr. Asay by his attorneys, for their time and the time of their paralegals, are reasonable in light of the training, experience and expertise of the service providers and as measured by the hourly rates customarily charged for similar services in the Salt Lake City community.

37. Through November 30, 1992, a total of 129.30 hours of legal services were provided to Mr. Asay by his attorneys in connection with Mr. Asay's attempts to recover the wages due him from Zoll & Branch. The hours of service were necessitated by the actions of Zoll & Branch both before and after this action was begun, including the following actions: 1) failing to pay Mr. Asay the wages justly due him, 2) commencing this action as a tactic to pressure Mr. Asay into abandoning his legitimate claims against Zoll & Branch, 3) refusing to provide discovery as required by the Utah Rules of Civil Procedure, and 4) alleging numerous defenses, including factually contested offsets, to Mr. Asay's claims.

38. Upon consideration of all of the circumstances it is the judgment of this court that Mr. Asay should be awarded \$12,000.00 in attorneys' fees through the preparation of the findings of fact, conclusions of law and judgment in this case and that Mr. Asay's attorneys' out-of-pocket costs of \$1,602.79 should also be awarded.

With regard to Findings Nos. 33-38, Zoll & Branch concedes that the record supports the findings, but then merely states that Zoll & Branch "rebutts these findings." Appellant's Brief, p. 24. Once again Zoll & Branch ignores its burden to marshal all of the evidence, and then to show that the court's findings are clearly erroneous.

IV. **ZOLL & BRANCH'S CONTENTION THAT THE COURT MISAPPLIED THE STATUTE IS BASED UPON A MISINTERPRETATION OF THE STATUTE AND ITS CONTENTION THAT THE COURT'S FINDINGS OF FACT ARE CLEARLY ERRONEOUS.**

Zoll & Branch argues that the trial court's reliance on Utah Code Ann. § 34-28-5 (1969) (subsequently amended 1989) is improper for three reasons: first, it argues that the statute was misconstrued; second, it reargues against the court's factual findings that contradict its position that no wages were due to Mr.

Asay because of a claimed set-off; and third, it argues that it properly tendered payment by depositing money with the court as a "form of interpleader." Appellant's Brief, pp. 32-36. Zoll & Branch's construction of the statute is contrary to the plain meaning of the statute. As already noted, the court's factual findings have not been shown to be clearly erroneous. While Zoll & Branch may have deposited funds with the court, there was no tender of payment of the wages due to Mr. Asay. Therefore, Zoll & Branch's arguments are each without merit.

**A. The trial court properly applied Utah Code Ann. § 34-28-5 (1969) to award Mr. Asay damages for wages wrongfully withheld by Zoll & Branch.**

Zoll & Branch argues that because Mr. Asay voluntarily quit or resigned his employment. The court should have relied only on Utah Code Ann. § 34-28-5(2) and that it was improper to rely on the penalty provision of section 34-28-5(1). Appellant's Brief, pp. 32-34. Zoll & Branch argues that the trial court's construction of the statute is against public policy and that "[t]his court must take the blinders off the Third District Court judge who believes that statutes should be broadly applied in all cases against employers." Appellant's Brief, p. 38.

It is a well recognized rule of statutory construction that where the language of a statute is clear and unambiguous, the court need not look beyond the language of the statute to determine its meaning. E.g., OSI Industries v. Utah State Tax Comm'n, 860 P.2d 381, 384 (Utah App. 1993); Larsen v. Allstate Ins. Co., 857 P.2d 263, 265 (Utah App. 1993). While the court will not ignore

the statute's plain meaning, under Utah law the courts are to liberally construe statutes with a view to effect the objects of the statutes and to promote justice. Utah Code Ann. § 68-3-2 (1993). See also, Currier v. Holden, 862 P.2d 1357, 1373 (Utah App. 1993) (Garff, J., concurring).

Section 34-28-5 states:

(1) Whenever an employer separates an employee from his payroll, the unpaid wages shall become due immediately, and the employer shall pay such wages to the employee within 24 hours of the time of separation at the specified place of employment.

In case of failure to pay wages due an employee within 24 hours of demand therefor, the wages of such employee shall continue from the date of separation until paid, but in no event to exceed sixty days, at the same rate which the employee received at the time of separation. The employee may recover the penalty thus accruing to him in a civil action. This action must be commenced within sixty days from the date of separation. Any employee who has not made a demand for payment shall not be entitled to any such penalty under this subsection.

(2) Whenever an employee (not having a written contract for a definite period) quits or resigns his employment, the wages earned shall become due and payable not later than 72 hours thereafter, unless such employee shall have given 72 hours' previous notice of his intention to quit, in which latter case such employee shall receive his wages at the specified place of payment at the time of quitting.

Utah Code Ann. § 34-28-5 (1988) (emphasis added).

Under the plain meaning of section 34-28-5, subsection (1) provides for a penalty where an employer fails to pay wages due an employee within 24 hours of a demand therefor, and subsection (2) defines the point in time wages become due when an employee

quits or resigns his employment. This statute must be read as a whole and not in piecemeal fashion in order to effect the objects of this statute and to promote justice. Silver v. State Tax Comm'n, 820 P.2d 912 (Utah 1991).

Zoll & Branch failed to pay the wages due to Mr. Asay within 24 hours of the time they became due, and continued to refuse to pay Mr. Asay's wages. Mr. Asay ultimately received his wages only after executing upon the Judgment entered by the trial court in this case. Therefore, it was proper for the court to rely on the plain meaning of section 34-28-5 and apply the penalties provided therein to this case.

Zoll & Branch also argues that a bona fide dispute existed as to the wages. Appellant's Brief, p. 35, citing Chatterly v. Omnico, 485 P.2d 667, 670 (Utah App. 1971). Zoll & Branch cites cases from other jurisdictions for the proposition that where an employer acts reasonably and in good faith, and where the failure to pay was not willful, the penalty provision should not apply. Appellant's Brief, p. 35.

The cases cited by Zoll & Branch are inapposite to the present case. The trial court expressly rejected Zoll & Branch's claim that it had acted reasonably and in good faith, by finding that "Zoll & Branch stopped payment on the checks it issued to Mr. Asay for the sole reason that Mr. Zoll was angered by the password after he found out what it was" and that Zoll & Branch had commenced suit against Mr. Asay "as a tactic to pressure Mr. Asay into abandoning his legitimate claims against Zoll & Branch." R. 455,

¶ 22; 459, ¶ 37. Zoll & Branch's argument that its failure to pay was not wilful and was due to the claimed set-off amount is not consistent with the facts of this case.

B. Because the trial court's factual findings are not clearly erroneous, Zoll & Branch's contention that the penalties under Utah Code Ann. § 34-28-5 (1988) should not have been applied in this case is without merit.

Zoll & Branch argues in the alternative that the wages were not "justly due" to Mr. Asay because Zoll & Branch claimed a set-off.<sup>4</sup> Appellant's Brief, p. 34. However, the trial court expressly found that the evidence regarding Zoll & Branch's claimed right of set-off was not credible. R. 455, ¶ 22.

The facts on which Zoll & Branch relies for its argument are contradicted by the trial court's findings. Zoll & Branch has not properly marshalled the evidence supporting these findings, and consequently has not shown that the court's findings are clearly erroneous. Therefore, Zoll & Branch's argument that Mr. Asay's wages were not justly due has no basis beyond Mr. Zoll's bald assertions.

C. Zoll & Branch did not properly tender payment of the wages due to Mr. Asay.

Zoll & Branch deposited \$1,176.75 with the court clerk which it characterizes as a "Tender of Payment" or a "form of

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<sup>4</sup>In support of its claimed right of set-off Zoll & Branch cites UCA § 34-28-3(5). Prior to 1989 no section numbered 34-28-3(5) existed in Utah Statutes. The statutes were amended in 1989 to add UCA § 34-28-3(5). Since all material events in this case occurred prior to 1989, UCA § 34-28-3(5) (1989) is inapplicable to this case. OSI Industries v. Utah State Tax Comm'n, *supra*, at 383 (Party is entitled to have its rights determined on the basis of the law as it existed at the time of the occurrence, and a later statute or amendment should not be applied retroactively so as to deprive a party of its rights.)

interpleader". Appellant's Brief, p. 34. However, "[a] tender requires that there be a bona fide, unconditional, offer of payment of the amount of money due, coupled with an actual production of the money or its equivalent." Zions Properties, Inc. v. Holt, 538 P.2d 1319, 1322 (Utah 1975) (emphasis added). Zoll & Branch has never unconditionally offered payment to Mr. Asay of the entire amount due him. A deposit of money into court pursuant to Utah Code Ann. § 78-27-4 with instructions to the clerk to hold the money until Mr. Asay proves his entitlement thereto is not the same as a tender. Wash. Nat. Ins. v. Sherwood Assoc., 795 P.2d 665, 670 (Utah App. 1990); Fitzgerald v. Corbett, 793 P.2d 356, 359 (Utah 1990); Carr v. Enoch Smith Co., 781 P.2d 1292, 1294 (Utah App. 1989).

Under Utah Rule of Civil Procedure 68(a) a defendant may avoid paying costs *where he has tendered payment to the plaintiff* prior to the commencement of the action, and then deposits the money with the court. Rule 68(a) states:

When in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which the plaintiff was entitled, and thereupon deposits in court for the plaintiff the amount so tendered, and the allegation is found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

Zoll & Branch's mischaracterization of its deposit as a "form of interpleader" is absurd. Interpleader is a form of action whereby the plaintiff may join multiple parties as defendants, each of whom may have a claim against the plaintiff, in order to protect



the plaintiff from double or multiple liability. Utah R. Civ. P. 22. In the present case there are only two parties to the action, Zoll & Branch and Mr. Asay. There was no risk that Zoll & Branch could be subject to multiple liability.

**V. THE ATTORNEYS' FEES AWARDED IN THIS CASE ARE REASONABLE.**

The trial court has broad discretion in determining what constitutes a reasonable attorneys' fee. Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988). On appeal the court will review the trial court's determinations only for a clear abuse of discretion. Id.; see also Sears v. Riemersma, 655 P.2d 1105, 1110 (Utah 1982); Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279, 1287 (Utah 1982). The trial court properly exercised its discretion and determined a reasonable attorneys' fee to be awarded in the present case pursuant to Utah Code Ann. § 34-27-1 (1969).

**A. The reasonableness of the fees in this case must be determined in light of the all factors described in Dixie State Bank v. Bracken and its progeny.**

In Appellant's Brief, Zoll & Branch correctly describes the process by which the reasonableness of an attorneys' fee should be measured, but then ignores this process. Appellant's Brief, pp. 28-30. Zoll & Branch argues that the fee in this case is excessive merely because it is "clearly disproportionate to the small amount initially involved."<sup>5</sup> Appellant's Brief, p. 30. Zoll & Branch's

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<sup>5</sup>In its brief Zoll & Branch states that the amounts of the checks were for \$1,176.75 and \$1,030.00 respectively, and that the attorneys' fees are over \$20,000.00. Appellant's Brief, p. 30. Zoll & Branch's juxtaposition of the figures is misleading and inaccurate, and exaggerates the claimed disparity between fees and damages in this case.

(continued...)

argument ignores the manner by which a court is to judge the reasonableness of a fee.

In Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988), the Utah Supreme Court explained the process by which a trial court should examine the reasonableness of a fee award. The court explained that the trial court should find answers to the following four questions:

1. What legal work was actually performed?
2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?
4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?

Id. at 990.

In Dixie State Bank, the court further explained that

[i]n addition, although the amount in controversy can be a factor in determining a reasonable fee, care should be used in putting much reliance on this factor. It is a simple fact in a lawyer's life that it takes about the same amount of time to collect a note in the amount of \$1,000 as it takes to collect a note for \$100,000.

Id. See also Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985)

("The amount of damages awarded in a case does not place a

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<sup>5</sup>(...continued)

Zoll & Branch's calculations do not accurately represent the damages in this case nor the attorneys' fees awarded. The damages awarded to Mr. Asay, with interest and penalties, totalled \$11,808.89. R. 547-58, ¶ 33. The attorneys' fees awarded totalled \$12,000.00, plus an additional \$1,602.79 in out-of-pocket expenses. Id. The initial award of attorneys' fees was later augmented to include an additional \$4,471.86 in fees incurred by Mr. Asay to preserve and collect the judgment. R. 649.

necessary limit on the amount of attorneys fees that can be awarded.") As noted by the Justice Stewart of the Utah Supreme Court

"[a]s a general rule, the amounts recoverable under the FLSA and the [Utah Payment of Wages Act] are so small that attorney fees will exceed any potential recovery. Hence, unless an award of attorney fees is available, workers would be unable to enforce their rights under these statutes.

Smith v. Batchelor, 832 P.2d 467, 474 (Utah 1992) (Stewart, J., concurring and dissenting).

In the present case, the trial court considered the four factors outlined in Dixie State Bank, and determined that the attorneys' fees in this case are reasonable. The trial court found the following:

35. The Court has considered all of the relevant factors in determining the reasonableness of the fees and costs requested by Mr. Asay and his attorneys. In this regard the testimony of Mr. Asay, who is a licensed attorney in this state, was helpful as well as the affidavit of Mr. Asay's counsel, Mr. Michael N. Zundel. The Court also observed the organized and efficient manner in which Mr. Asay's counsel conducted the presentation of Mr. Asay's case at trial. *All of the services provided by Mr. Asay's counsel were reasonable and necessary. [Step #2]*

36. *The hourly rates charged to Mr. Asay by his attorneys, for their time and the time of their paralegals are reasonable [Step #3] in light of the training, experience and expertise of the service providers and as measured by the hourly rates customarily charged for similar services in the Salt Lake City community.*

37. Through November 30, 1992, a total of 129.30 hours of legal services were provided to Mr. Asay by his attorneys in connec-

tion with Mr. Asay's attempts to recover the wages do him from Zoll & Branch. [Step #1] The hours of service were necessitated by the actions of Zoll & Branch both before and after this action was begun, [Step #4] including the following actions: 1) failing to pay Mr. Asay the wages justly due him, 2) commencing this action as a tactic to pressure Mr. Asay into abandoning his legitimate claims against Zoll & Branch, 3) refusing to provide discovery as required by the Utah Rules of Civil Procedure, and 4) alleging numerous defenses, including factually contested offsets, to Mr. Asay's claims.

R. 458-59 (emphasis added).

The amount of the fees was reasonable in light of the circumstances of this case. Zoll & Branch does not present any reason to support its contention that the fees are excessive except that, based upon its exaggerated and misleading calculations, the fees awarded are disproportionate to the amount in controversy. As such, Zoll & Branch fails to meet its burden to show that the trial court abused its discretion in awarding fees as it did, and the trial court's award of attorneys' fees must be upheld.

B. Zoll & Branch was given opportunity to cross-examine Mr. Asay's counsel regarding the attorneys' fees in this case.

During the trial of this matter, the court was presented with the testimony of Mr. Asay, a licensed attorney in this state, regarding the reasonableness of the work performed by Mr. Asay's counsel. Mr. Asay testified that ". . . I haven't ever found that there's been any overkill or that things have been overdone" and that ". . . my opinion is that the charges are reasonable and that the services were necessarily provided." R. 956-57. Mr. Asay's testimony was unrebutted.

The court received the Affidavit of Michael N. Zundel, counsel for Mr. Asay, regarding the reasonableness of the fee. R. 953-54. The court asked Mr. Zoll whether he would stipulate that Mr. Asay's Counsel would testify consistent with its affidavit concerning the fees charged. R. 954. Mr. Zoll so stipulated, subject to the right of cross-examination. Id. The court then granted Zoll & Branch the right to cross-examine Mr. Asay's counsel regarding the fees and accepted Mr. Asay's counsel's affidavit into evidence. R. 954-55. Thereafter, during the presentation of Zoll & Branch's evidence, the court periodically notified Zoll & Branch as to the amount of time remaining, and after Zoll & Branch exhausted its allotted time, the court allowed Zoll & Branch to use substantially more than its allotted time. R. 1014, 1026. After having used more time than it was entitled to, Zoll & Branch objected that it was not given additional time in which to cross-examine Mr. Asay's counsel. R. 1125.

Zoll & Branch now asserts that it had no opportunity to cross-examine Mr. Asay's counsel because the court did not continue to grant additional time for Zoll & Branch to do so. Appellant's Brief, p. 31. By recognizing Zoll & Branch's right to cross-examine Mr. Asay's counsel, the trial court does not grant unlimited time to do so. Zoll & Branch had opportunity to cross-examine Mr. Asay's counsel but chose to use its time elsewhere. Zoll & Branch's argument that it was not given opportunity to cross-examine Mr. Asay's counsel is simply false.

C. Zoll & Branch waived its right to contest attorneys' fees awarded in the Order Augmenting Judgment when its counsel exited the courtroom at the commencement of the hearing regarding these fees.

In addition to the fees awarded to Mr. Asay in the Judgment, Zoll & Branch contests that portion of the fees that were awarded at the August 2, 1993 hearing to augment the Judgment. Appellant's Brief, p. 32. All attorneys' fees charged by Mr. Asay's counsel in this case have been reasonable. Furthermore, any objection Zoll & Branch had to the fees awarded at this hearing was waived when Zoll & Branch's counsel, Mr. Zoll, walked out of the courtroom at the commencement of the hearing and did not return.

In Martindale v. Adams, 777 P.2d 514, 517 (Utah App. 1989), the plaintiff appealed, inter alia, on the basis that the trial court had awarded less than the full amount of attorney's fees sought. In that case the court was presented with the testimony of the plaintiff's attorney and furnished with specific details of the time expended in support of the attorney's fees. Id. There was no objection raised by defendants to the testimony and, in fact, neither the defendants nor their attorneys attended the hearing on the fees. Id. Under these circumstances the court held that the trial court had abused its discretion in not awarding the plaintiff the entire amount of the fee sought without a finding that the fee was unreasonable. Id.

Since the trial court was furnished with specific un rebutted evidence of the time spent, the rates charged, and the necessity of the work, under Martindale it would have been an abuse of discretion for the trial court to award Mr. Asay less than the

full amount of the fees in question in the motion to augment the judgment. Zoll & Branch did not object to the evidence, and has not created any record whatsoever to show that the fees were excessive. The court's findings are supported by the evidence, and do not show an abuse of discretion.

D. Any disparity between fees in this case and the amount in controversy is attributable to Zoll & Branch, who cannot now complain that its own actions increased the cost of litigating this case.

Zoll & Branch accuses the trial court of simply granting Mr. Asay's motion to augment the attorneys' fees awarded in this case without examining the supporting affidavits. Appellant's Brief, p. 32. In support of its argument it quotes the record where the court granted Mr. Asay's Motion to Augment after Zoll & Branch's counsel prematurely exited the courtroom. Id. However, the court's language immediately following the portion quoted by Zoll & Branch is enlightening as to the justification for the amount of attorneys' fees expended in this case. After receiving the affidavit of Mr. Asay's counsel and hearing the evidence regarding the fees, the court stated:

Your request will be granted. The judgment is to be augmented in the amount of \$4,461.86 as additional fees and costs.

Further to what you indicated, I think that Mr. Zoll's conduct towards the court, who quite obviously is not an adversary in this matter, probably reflects upon the additional fees caused by the way he handled this matter.

And if he had handled the matter in a more professional manner, that the amount of fees that have been accrued would not have been accrued, and I believe that was part of your theory in the first place.

R. 1158 (emphasis added).

Zoll & Branch's tactics have added to the expense of this litigation and are exemplified by Mr. Zoll's repeated refusals to attend or submit to scheduled depositions. In an attempt to schedule Mr. Zoll's deposition, Mr. Asay's counsel sent Mr. Zoll a letter listing 8 days that were acceptable and requesting that Mr. Zoll notify Mr. Asay's counsel as to which time would be preferable. R. 77. The letter stated that if Mr. Zoll failed to respond the deposition would be scheduled on a specified date. Id. Because Mr. Zoll did not respond, the deposition was scheduled and Mr. Zoll was notified of the time and place approximately three weeks in advance. Id. Pursuant to requests from Mr. Zoll the deposition was rescheduled twice. Id. Finally Mr. Asay's counsel had a subpoena issued ordering Mr. Zoll to appear at the scheduled time. Id. On the morning of the scheduled deposition, Mr. Zoll called to inform Mr. Asay's counsel that he would attend but was running late. Id. Mr. Zoll appeared at the deposition 40 minutes late, proffered a statement listing the excuses why he could not continue, and began to leave. Id. Mr. Asay's counsel attempted to question Mr. Zoll regarding his statement, but Mr. Zoll interrupted him and stated:

You don't have anything to say.

(To the reporter) Give me a copy of the information that's been given.

And I'll see you another date or your motion to compel. [sic] Whatever you have -- Whatever rights you have you can, of course, exercise those. Thank you gentlemen -- I mean Mister and Ms.



R. 77. Mr. Zoll then abruptly left the proceeding, as he later did at the hearing to augment fees. Id.

In Dixie State Bank, 764 P.2d at 985, the court recognized that a party should not be allowed to use tactics to increase the costs of litigation and then contest an award of attorneys' fees on the basis that they are excessive in light of the amount in controversy. In the present case, the trial court recognized Zoll & Branch's tactics for what they were, i.e., "an attempt to pressure Mr. Asay into abandoning his legitimate claims." R. 459, ¶ 37. Through its own dilatory and frivolous tactics, Zoll & Branch has increased the cost of litigating this matter. Zoll & Branch's unsupported claim that the fees in this case are excessive is not grounds to overturn the trial court's finding that the fees are reasonable.

VI. THERE HAS NEVER BEEN ANY RULE 62(d) SUPERSEDEAS BOND POSTED IN THIS CASE. THE RULE 62(b) BOND THAT WAS POSTED WAS PROPERLY RELEASED TO MR. ASAY.

In its statement of the case, Zoll & Branch alludes to alleged impropriety on the part of the trial court and counsel for Mr. Asay by stating that "the trial court judge improperly violated a stay of execution on the supersedeas bond" and allowed "Respondent Asay to make an ex parte motion". Appellant's Brief, p. 7. Although Zoll & Branch does not address the statement further in its brief, Asay will address the matter here.

Zoll & Branch's contention that the trial court acted inappropriately centers around its assertion that a "supersedeas bond" was improperly released to Asay. Id. In support of its

assertion, Zoll & Branch relies on the trial court's Order Granting Zoll & Branch's Motion for a Stay of Execution and releasing Garnishment (the "Stay"). A copy of the Stay is attached hereto at Addendum Item No. 6. The Stay states:

ORDERED, that upon compliance with all of the provisions of this Order by Zoll & Branch, all proceedings and actions to enforce or collect the judgment entered in this case in favor of Alan Asay shall be stayed until May 25, 1993 (8 weeks and 30 days after February 23, 1993), or until thirty days after Zoll & Branch's motion for a new trial and motion to alter or amend judgment are heard and decided by this Court, whichever first occurs;

R. 526. (emphasis added).

The Stay was granted pursuant to Rule 62(b), Utah Rules of Civil Procedure. Stay, p. 1 R. 525-27. In contrast to subsection (d) (pertaining to supersedeas bond), subsection (b), allows the court to stay the execution of a judgment pending the disposition of the following motions: 1) a motion for a new trial or to alter or amend judgment; 2) a motion for relief from judgment or order; 3) a motion for judgment in accordance with a motion for a directed verdict; or 4) a motion for amendment to the findings or for additional findings. By its express terms, the Stay expired upon the earlier of 25 May 1993 or 30 days after Zoll & Branch's motion for a new trial and motion to alter or amend judgement were heard and decided by the court. Zoll & Branch has persistently maintained that its security was posted as a supersedeas bond because "TENDER AS SUPERSEDIOUS [sic] /SECURITY BOND" was typed on the certificate of deposit receipt submitted to the court, despite the court's rejection of Zoll & Branch's position. R. 515.

On 25 May 1993, pursuant to a stipulation by the parties, the court signed an Order Allowing Extension of Bond Expiration Date (the "First Extension") that postponed expiration of the bond until 25 June 1993. R. 596-97. A copy of the First Extension is attached hereto at Addendum Item No. 6. The First Extension did not in any way alter the nature of the security, and expressly stated that the bond would expire on 25 June 1993. Id.

The stay was further extended by the court's order dated 23 June 1993 (the "Second Extension") because the court's file on this case had been lost. R. 617-18. A copy of the Second Extension is attached hereto at Addendum Item No. 6. By the express terms of the Second Extension, the stay was extended until the court's file could be found and until Zoll & Branch's Motion for a New Trial could be ruled upon. Id. The court's file was located and the Motion for a New Trial was denied on 20 July 1993, thereby terminating the stay and all extensions. R. 632-33.

On 2 August 1993, the court properly recognized that no stay was in effect and released the cash held by the court clerk to Mr. Asay in partial satisfaction of the judgment in Mr. Asay's favor. As noted, at this time the Stay, the First Extension and the Second Extension had by their own express terms expired.

Zoll & Branch's allegations of misconduct on the part of the trial court and Mr. Asay's counsel are entirely without justification, and are absolutely chimerical. Throughout this matter, Mr. Asay's counsel has carefully followed all court procedures and rules despite Zoll & Branch's insistence on ignoring court deter-

minations, rules, and decorum, and persistent attempts to falsify the record by, inter alia, asserting the existence of a supersedeas bond with no good faith basis when in fact no supersedeas bond existed.

VII. MR. ASAY IS ENTITLED TO RECOVER HIS COSTS ON APPEAL, INCLUDING AN AWARD FOR REASONABLE ATTORNEYS' FEES.

A. Mr. Asay is entitled to an award of attorneys' fees under Utah Code Ann. § 34-27-1 (1988).

Under Utah law, attorneys' fees may generally only be recovered where provided for by contract or statute. E.g., Dixie State Bank v. Bracken, 764 P.2d at 988.

"The general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." Utah Dept. of Social Services v. Adams, 806 P.2d 1193, 1197 (Utah App. 1991); Brown v. Richards, 840 P.2d 143, 156 (Utah App. 1992). Where a contract provides a basis for awarding attorneys' fees, the courts have consistently held that such a provision includes attorneys' fees incurred for the appeal of the matter. See, e.g., Management Services v. Development Associates, 617 P.2d 406, 408-09 (Utah 1980); Centurian Corp. v. Cripps, 624 P.2d 706, 713 (Utah 1981); Edward's Pet Supply v. Bentley, 652 P.2d 889, 890 (Utah 1982). In Martindale v. Adams, 777 P.2d 514, 518 (Utah App. 1989) this court applied the general rule to award attorney fees on appeal where the plaintiff had been awarded fees at trial pursuant to the mechanics lien statute. In Burt v. Burt, 799 P.2d 1166, 1171 (Utah App. 1990), the court stated that where fees are awarded in divorce

actions pursuant to statute, fees should also ordinarily be awarded on appeal.

In the present case, Mr. Asay's award of attorneys' fees is based on Utah Code Ann. § 34-27-1. Therefore, Mr. Asay is entitled to recover reasonable attorneys' fees which he has incurred in order to defend the judgment on appeal.

**B. Zoll & Branch's appeal is frivolous.**

Utah Rule of Appellate Procedure 33(a) provides that the court shall award just damages to the prevailing party, which may include single or double costs and attorney fees, where the court determines that an appeal is frivolous. An appeal is frivolous if it is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. Utah R. App. P. 33(b). See also, e.g., O'Brien v. Rush, 744 P.2d 306, 310 (Utah App. 1987) (A frivolous appeal is one without a reasonable legal or factual basis). In Utah Dept of Social Services v. Adams, supra, this court held that "an appeal brought from an action which is properly determined to be in bad faith is necessarily frivolous under Utah R. App. P. 33." 806 P.2d at 1197.

The trial court expressly found that this action was commenced as a tactic to pressure Mr. Asay into abandoning his legitimate claims against Zoll & Branch. R. 459. Zoll & Branch's action was therefore brought in bad faith, and this appeal is frivolous. Zoll & Branch's appeal is not grounded in fact nor warranted by existing law, and contains no good faith argument to extend, modify or reverse existing law. Mr. Asay is therefore

entitled to recover his costs incurred on appeal, including reasonable attorneys' fees from Zoll & Branch and its counsel, B. Ray Zoll, personally.

## CONCLUSION

Throughout its brief Zoll & Branch misrepresents and distort's the record of this case in order to disguise itself as a legitimate employer victimized by a "total miscarriage of justice." Zoll & Branch handed checks to Mr. Asay upon his final departure from the firm to pay his wages and to purchase Mr. Asay's computer system. After Mr. Asay had left the firm, Zoll & Branch stopped payment on the checks. When confronted by Mr. Asay, Zoll & Branch filed this action as a tactic to pressure Mr. Asay into abandoning his legitimate claims against them. Utah's wage statutes, and the penalties provided therein, are designed to protect employees against these types of tactics.

The burden on the appellant in this case is to show that the trial court abused its discretion in refusing a new trial, and it has fallen far short of carrying that burden. Zoll & Branch has not marshaled the evidence and shown that the trial court's findings are clearly erroneous. In fact, the credible evidence in this case supports the trial court's findings.

The trial court also did not abuse its discretion in managing the trial under Utah R. Civ. P. 611, or making evidentiary rulings.

Nor does the plain meaning of Utah Code Ann. § 34-28-5 provide any basis for a new trial; in fact, section 34-28-5 is

intended to address precisely this type of factual situation. See Smith v. Batchelor, 832 P.2d at 471-72.

The trial court awarded unpaid wages, statutory penalties, and attorneys' fees under Utah Code Ann. § 34-27-1, the wage payment statute's "mandatory attorney fee provision, which requires the court to grant a successful plaintiff a reasonable attorney fee . . . ." Smith v. Batchelor, 832 P.2d at 469. Moreover, the trial courts findings on the reasonableness and amount of the fees are not clearly erroneous.

This appeal is the latest episode in a nearly five-year effort by Zoll & Branch to "to pressure Mr. Asay into abandoning his legitimate claims against Zoll & Branch." Such harassment should not be tolerated.

DATED this 20<sup>th</sup> day of February, 1994.

Jardine, Linebaugh, Brown & Dunn  
A Professional Corporation



By: Michael N. Zundel



By: Kent W. Hansen

Attorneys for Appellee Alan Asay

KWHP053.006

Michael N. Zundel (#3755)  
Kent W. Hansen (#6560)  
**JARDINE, LINEBAUGH, BROWN & DUNN**  
A Professional Corporation  
Attorneys for Appellee  
370 East South Temple, Suite 400  
Salt Lake City, Utah 84111-1290  
Telephone: (801) 532-7700

IN THE UTAH STATE COURT OF APPEALS

<p>ZOLL &amp; BRANCH, P.C.,</p> <p>Plaintiff/Counterdefendant and Appellant,</p> <p>vs.</p> <p>ALAN ASAY,</p> <p>Defendant/Counterclaimant and Appellee.</p>	<p>Appeal Number 940012-CA</p> <p>Priority 15</p>
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I hereby certify that on the 25th day of February, 1994,  
I served upon Appellant, Zoll & Branch, a true and correct copy of  
**BRIEF OF APPELLEE**, and a copy of this certificate of service, by  
causing the same to be mailed, via first-class United States mail,  
postage prepaid, to the following:

B. Ray Zoll, Esq.  
**ZOLL & BRANCH**  
5300 South 360 West, #360  
Murray, Utah 84123

DATED this 25th day of February, 1994.

**JARDINE, LINEBAUGH, BROWN & DUNN**  
A Professional Corporation

By: 

Michael N. Zundel  
Attorneys for Appellee



Tab 1

voluntarily leaving the service of any person, company or corporation with intent and for the purpose of preventing such employee from engaging in or securing similar or other employment from any other person, company or corporation. 1969

#### **34-24-2. Violation — Penalty.**

If any person blacklists or publishes, or causes to be blacklisted or published, any employee discharged by any corporation, company or individual, with the intent and for the purpose of preventing such employee from engaging in or securing similar or other employment from any other corporation, company or individual, or shall in any manner conspire or contrive by correspondence or otherwise to prevent such discharged employee from securing employment, such person is guilty of a felony and shall be fined not less than \$55 nor more than \$1000 and imprisoned in the state prison not less than sixty days nor more than one year. 1969

### **CHAPTER 25 FELLOW SERVANTS**

#### **Section**

34-25-1. "Vice-principal" defined.

34-25-2. "Fellow servant" defined.

#### **34-25-1. "Vice-principal" defined.**

All persons engaged in the service of any person and entrusted by such employer with authority of superintendence, control or command of other persons in the employ or service of such employer, or with authority to direct any other employee in the performance of any duties of such employee, are vice-principals of such employer, and are not fellow servants. 1969

#### **34-25-2. "Fellow servant" defined.**

All persons who are engaged in the service of any employer and who while so engaged are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being entrusted by such employer with any superintendence or control over his fellow employees, are fellow servants with each other; but nothing herein contained shall be so construed as to make the employees of such employer fellow servants with other employees engaged in any other department of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants. 1969

### **CHAPTER 26 WAGES A PREFERRED DEBT**

#### **Section**

34-26-1. Extent and condition of preference.

34-26-2. Claim — Notice.

34-26-3. Claim — Exceptions — Contest.

34-26-4. "Wages" defined.

#### **34-26-1. Extent and condition of preference.**

If any property of any person is seized through any process of any court, or when his business is suspended by the act of creditors or is put into the hands of a receiver, assignee, or trustee, either by voluntary or involuntary action, the amount owing to workmen, clerks, traveling or city salesmen, or servants, for work or labor performed within five months next preceding the seizure or transfer of the property shall be considered and treated as preferred debts, and the

workmen, clerks, traveling and city salesmen, and servants shall be preferred creditors, the first to be paid in full. If there are not sufficient proceeds to pay them in full, then the proceeds shall be paid to them pro rata, after paying costs. No officer, director, or general manager of a corporation employer or any member of an association employer or partner of a partnership employer is entitled to this preference. 1987

#### **34-26-2. Claim — Notice.**

Any such employee, laborer or servant desiring to enforce his claim for wages under this chapter shall present a statement under oath to the officer, person or court charged with such property within ten days after the seizure of it on any process, or within thirty days after the same may have been placed in the hands of any receiver, assignee or trustee, showing the amount due after allowing all just credits and setoffs, the kind of work for which such wages are due and when performed. Any person with whom any such claim shall have been filed shall give immediate notice thereof by mail to all persons interested, and, if the claim is not contested as provided in Section 34-26-3, it shall be the duty of the person or the court receiving such statement to pay the amount of such claim or claims to the person or persons entitled thereto, after first paying all costs occasioned by the seizure of such property, out of the proceeds of the sale of the property seized. 1969

#### **34-26-3. Claim — Exceptions — Contest.**

Any person interested may within ten days after the notice of presentment of said statement contest such claims, or any part of them, by filing exceptions to them supported by affidavit with the officer or court having the custody of such property, and thereupon the claimant shall be required to reduce his claim to judgment in some court having jurisdiction before any part thereof shall be paid. The person contesting shall be made a party defendant in any such action and shall have the right to contest such claim, and the prevailing party shall recover proper costs. 1969

#### **34-26-4. "Wages" defined.**

Whenever used in this chapter, "wages" shall mean all amounts due the employee for labor or services, whether the amount is fixed or ascertained on a time, task, piece, commission basis or other method of calculating such amount. 1969

### **CHAPTER 27 ATTORNEYS' FEES IN SUITS FOR WAGES**

#### **Section**

34-27-1. Reasonable amount — Taxed as costs.

#### **34-27-1. Reasonable amount — Taxed as costs.**

Whenever a mechanic, artisan, miner, laborer, servant, or other employee shall have cause to bring suit for wages earned and due according to the terms of his employment and shall establish by the decision of the court that the amount for which he has brought suit is justly due, and that a demand has been made in writing at least fifteen days before suit was brought for a sum not to exceed the amount so found due, then it shall be the duty of the court before which the case shall be tried to allow to the plaintiff a reasonable attorneys' fee in addition to the amount found due for wages, to be taxed as costs of suit. 1969

## CHAPTER 28

### PAYMENT OF WAGES

- Section  
34-28-1. Public and certain other employments excepted.  
34-28-2. Definitions.  
34-28-3. Regular paydays — Currency or negotiable checks required — Deposit in financial institution — Statement of total deductions.  
34-28-4. Notice of paydays — Failure to notify a misdemeanor.  
34-28-5. Separation from payroll — Resignation — Suspension because of industrial dispute.  
34-28-6. Dispute over wages — Notice and payment.  
34-28-7. Payment at more frequent intervals permitted — Agreements to contravene act prohibited.  
34-28-8. Subcontractors — Compliance with act.  
34-28-9. Enforcement of chapter.  
34-28-10. Employers' records — Inspection by commission.  
34-28-11. Commission may employ assistants.  
34-28-12. Violations — Misdemeanor.  
34-28-13. Assignment of wage claims — Powers of commission — Award of attorneys' fees.  
34-28-14. Actions by commission as assignee — Costs need not be advanced.  
34-28-15 to 34-28-18. Repealed.

#### **34-28-1. Public and certain other employments excepted.**

None of the provisions of this chapter shall apply to the state, or to any county, incorporated city or town, or other political subdivision, or to employers and employees engaged in farm, dairy, agricultural, viticultural or horticultural pursuits or to stock or poultry raising, or to household domestic service, or to any other employment where an agreement exists between employer and employee providing for different terms of payment, except the provisions of Section 34-28-5 shall apply to employers or employees engaged in farm, dairy, agricultural, viticultural, horticultural or stock or poultry raising. 1973

#### **34-28-2. Definitions.**

As used in this chapter:

(1) The word "employer" includes every person, firm, partnership, association, corporation, receiver or other officer of a court of this state, and any agent or officer of any of the above-mentioned classes, employing any person in this state.

(2) The word "wages" means all amounts due the employee for labor or services, whether the amount is fixed or ascertained on a time, task, piece, commission basis or other method of calculating such amount. 1969

#### **34-28-3. Regular paydays — Currency or negotiable checks required — Deposit in financial institution — Statement of total deductions.**

Every employer shall pay to his employees the wages earned semimonthly or twice during each calendar month on days to be designated in advance by the employer as the regular payday; provided, that the employer shall pay for services rendered during each semimonthly period within ten days after the

close of such period; provided, that when the semimonthly payday shall fall on Saturday or Sunday, or legal holiday, payment of wages earned during the semimonthly period shall be made on the day preceding such Saturday or Sunday, or legal holiday. Whenever the employer hires his employees on a yearly salary basis, then the employer may pay the employee on a monthly scale, the wages shall be paid by the seventh of the month following the month for which services were rendered. He shall pay such wages in full, in lawful money of the United States, or checks on banks convertible into cash on demand at full face value thereof.

No person, firm or corporation or agent, or officer shall issue in payment of wages due or to become due or as an advance on wages to be earned for services performed or to be performed within this state any order, check or draft, unless it is negotiable and payable in cash, on demand, without discount, at a bank, the name and address of which must appear on the instrument.

If an employee voluntarily authorizes an employer to deposit wages due or to become due, or an advance on wages to be earned, in a bank, savings and loan association, credit union or other financial institution in the State of Utah, the employer may so deposit until the authorization is terminated.

If any deduction is made from the wages paid, the employer shall, either semimonthly or monthly at the employer's option, furnish the employee with a statement showing the total amount of each deduction, provided that only one total need be shown to include all standing deductions of fixed amounts, unless otherwise agreed by employer and employee. 1977

#### **34-28-4. Notice of paydays — Failure to notify a misdemeanor.**

(1) It shall be the duty of every employer to notify his employees at the time of hiring of the day and place of payment, of the rate of pay, and of any change with respect to any of these items prior to the time of the change. Alternatively, however, every employer shall have the option of giving such notification by posting these facts and keeping them posted conspicuously at or near the place of work where such posted notice can be seen by each employee as he comes or goes to his place of work.

(2) Failure to post and to keep posted any notice or failure to give notice as prescribed in this section shall be deemed a misdemeanor and punishable as such. 1969

#### **34-28-5. Separation from payroll — Resignation — Suspension because of industrial dispute.**

(1) Whenever an employer separates an employee from his payroll, the unpaid wages of such employee shall become due immediately, and the employer shall pay such wages to the employee within 24 hours of the time of separation at the specified place of payment.

In case of failure to pay wages due an employee within 24 hours of a demand therefor, the wages of such employee shall continue from the date of separation until paid, but in no event to exceed sixty days, at the same rate which the employee received at the time of separation. The employee may recover the penalty thus accruing to him in a civil action. This action must be commenced within sixty days from the date of separation. Any employee who has not made a demand for payment shall not be entitled to any such penalty under this subsection.

(2) Whenever an employee (not having a written contract for a definite period) quits or resigns his employment, the wages earned shall become due and payable not later than 72 hours thereafter, unless such employee shall have given 72 hours' previous notice of his intention to quit, in which latter case such employee shall receive his wages at the specified place of payment at the time of quitting.

(3) In the event of the suspension of work as the result of an industrial dispute, the wages earned and unpaid at the time of this suspension shall become due and payable at the next regular payday, as provided in Section 34-28-3, including without abatement or reduction all amounts due all persons whose work has been suspended as a result of such industrial dispute, together with any deposit or other guaranty held by the employer for the faithful performance of the duties of the employment. 1969

#### **34-28-6. Dispute over wages — Notice and payment.**

In case of a dispute over wages, the employer shall give written notice to the employee of the amount of wages which he concedes to be due and shall pay such amount without condition within the time set by this chapter; but acceptance by the employee of any such payment made shall not constitute a release as to the balance of his claim. 1969

#### **34-28-7. Payment at more frequent intervals permitted — Agreements to contravene act prohibited.**

Nothing contained in this chapter shall in any way limit or prohibit the payment of wages or compensation at more frequent intervals, or in greater amounts or in full when or before due, but no provisions of this act can in any way be contravened or set aside by a mutual agreement. 1969

#### **34-28-8. Subcontractors — Compliance with act.**

Whenever any person shall contract with another for the performance of work, then it shall be the duty of such person to provide in the contract that all wages earned pursuant to the contract shall be paid in accordance with the provisions of this chapter, and in the event that any wages earned under the contract shall not be paid as required in this act, such person shall be civilly liable for all wages for work performed under such contract in the same manner as if the employees entitled to such wages were directly employed by such person. 1969

#### **34-28-9. Enforcement of chapter.**

(1) (a) The Industrial Commission shall ensure compliance with this chapter, investigate any alleged violations of this chapter, and determine the validity of any claim for any violation of this chapter filed with it by an employee.

(b) The amount of \$50 constitutes the minimum wage claim that the commission may accept.

(2) (a) An abstract of any final award may be filed in the office of the clerk of the district court of any county in the state. If so filed, it shall be docketed in the judgment docket of that district court.

(b) The time of the receipt of the abstract shall be noted by the clerk and entered in the judgment docket.

(c) If filed and docketed, the award constitutes a lien from the time of the docketing upon the real property of the employer situated in the

county, for a period of eight years from the date of the award unless previously satisfied

(d) Execution may be issued on the award within the same time and in the same manner and with the same effect as if the award were a judgment of the district court.

(3) (a) The county attorney for the county in which the plaintiff or the defendant resides, depending on the district in which the final award is docketed, shall represent the commission on all appeals and shall enforce judgments.

(b) The county shall be awarded reasonable attorney's fees, as specified by the Industrial Commission, and costs for:

(i) appeals where the plaintiff prevails; and

(ii) for judgment enforcement proceedings.

(4) (a) The Industrial Commission may enter into reciprocal agreements with the labor department or corresponding agency of any other state or with the person, board, officer, or commission authorized to act on behalf of that department or agency, for the collection in any other state of claims or judgments for wages and other demands based upon claims previously assigned to the Industrial Commission.

(b) The Industrial Commission may, to the extent provided for by any reciprocal agreement entered into under Section 34-38-9, or by the laws of any other state, maintain actions in the courts of the other states for the collection of any claims for wages, judgments, and other demands and may assign the claims, judgments, and demands to the labor department or agency of any other state for collection to the extent that may be permitted or provided for by the laws of that state or by reciprocal agreement.

(c) The Industrial Commission may, upon the written request of the labor department or other corresponding agency of any other state or of any person, board, officer, or commission of that state authorized to act on behalf of the labor department or corresponding agency, maintain actions in the courts of this state upon assigned claims for wages, judgments, and demands arising in any other state in the same manner and to the same extent that the actions by the Industrial Commission are authorized when arising in this state. However, these actions may be commenced and maintained only where the other state by legislation or reciprocal agreement has extended the same comity to this state. 1987

#### **34-28-10. Employers' records — Inspection by commission.**

(1) (a) Every employer shall keep a true and accurate record of time worked and wages paid each pay period to each employee who is employed on an hourly or a daily basis in the form required by the Industrial Commission's rules.

(b) The employer shall keep the records on file for at least one year after the entry of the record.

(2) The Industrial Commission and its authorized representatives may enter any place of employment during business hours to inspect the records and to ensure compliance with this section.

(3) Any effort of any employer to obstruct the Industrial Commission and its authorized representatives in the performance of their duties is considered to be a violation of this chapter and may be punished as any other violation of this chapter. 1987

#### **34-28-11. Commission may employ assistants.**

The Industrial Commission, pursuant to the law of

## COLLATERAL REFERENCES

**Utah Law Review.** — Desuetude, Due Process, and the Scarlet Letter Revisited, 1992 Utah L. Rev. 449.

**Brigham Young Law Review.** — Interpreting Statutes Faithfully — Not Dynamically, 1991 B.Y.U. L. Rev. 1353.

**Am. Jur. 2d.** — 15A Am. Jur. 2d Common Law §§ 13 to 18.

**C.J.S.** — 15A C.J.S. Common Law §§ 11, 13 to 15.

**Key Numbers.** — Common Law ⇌ 12.

## 68-3-2. Statutes in derogation of common law liberally construed — Rules of equity prevail.

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.

**History:** R.S. 1898 & C.L. 1907, § 2489; C.L. 1917, § 5839; R.S. 1933 & C. 1943, 88-2-2.

**Cross-References.** — One form of civil action; law and equity administered in same action, Rule 2, U.R.C.P.

## NOTES TO DECISIONS

## ANALYSIS

In general.  
Amendment of pleadings.  
Decisions of foreign courts.  
Garnishment proceedings.  
Inheritance laws.  
Liability of city.  
Life insurance.  
Penal statutes.  
Questions of novel impression.  
Remedial statutes.  
Rules of equity prevail.  
— Forfeitures.  
Statutes of foreign states.  
Worker's compensation.  
Cited.

**In general.**

This section is mandatory. *Hammond v. Wall*, 51 Utah 464, 171 P. 148 (1918).

This section abrogates the common-law rule. *In re Garr's Estate*, 31 Utah 57, 86 P. 757 (1906); *State v. Barboglio*, 63 Utah 432, 226 P. 904 (1924).

When a statute charges one with a duty or imposes a burden or a penalty, it must do so with sufficient clarity that one of ordinary intelligence will understand what he is required to do, and, in case of alternative choices, he can comply by selecting the one least burdensome to him. *Ringwood v. State*, 8 Utah 2d 287, 333 P.2d 943 (1959).

Statutes are to be liberally construed to give effect to their purpose and promote justice but they are not to be distorted beyond the intent of the legislature. *Stanton Transp. Co. v. Davis*, 9 Utah 2d 184, 341 P.2d 207 (1959).

**Amendment of pleadings.**

Requirement in this section that provisions of statutes and proceedings under them be liberally construed with view to effect statutes' objects and to promote justice applies, at least in matter of amendment of pleading, as well when it is statutes of another state, as when it is statutes of Utah, that are involved. *Pugmire v. Diamond Coal & Coke Co.*, 26 Utah 115, 72 P. 385 (1903) (decided under prior law).

In action for wrongful death erroneously commenced by intestate's widow and children, who were only parties in interest, instead of properly by personal representative, it was error for trial court not to allow complaint to be amended so as to substitute, as plaintiff, widow in her capacity as administratrix. *Pugmire v. Diamond Coal & Coke Co.*, 26 Utah 115, 72 P. 385 (1903) (decided under prior law).

**Decisions of foreign courts.**

Decisions of courts of other states under statutes differing from those of Utah are not controlling, it being duty of Utah courts to construe statutes of own state and give them such effect as the Legislature intended, reasoning from the language used and the purpose in

#### **78-1-2.4. Number of circuit judges — Replacement authority.**

(1) Subject to changes due to the reallocation or elimination of circuit court positions under Section 20-1-7.6, the number of circuit court judges shall be:

- (a) two circuit judges in the First District;
- (b) seven circuit judges in the Second District;
- (c) ten circuit judges in the Third District; and
- (d) three circuit judges in the Fourth District.

(2) On January 1, 1992, the district court and circuit court in the Fifth, Sixth, Seventh, and Eighth Districts are merged into one court. The successor court shall be the district court and shall be located in those municipalities where the district courts currently are located. Judges of the successor court in these judicial districts shall be district court judges as of that date. Judges of these districts shall stand for unopposed retention election as required by law.

**History:** C. 1953, 78-1-2.4, enacted by L. 1988, ch. 115, § 6; 1991, ch. 268, § 21; 1991 (2nd S.S.), ch. 7, § 4; 1993, ch. 59, § 5.

**Amendment Notes.** — The 1993 amendment, effective March 12, 1993, in Subsection (1), added the language beginning “Subject” and continuing to “Section 20-1-7.6” at the beginning of the introductory language and substituted specific numbers for ranges of numbers throughout the subsection; in Subsection

(2), substituted “district court and circuit court” for “circuit courts” and “merged into one court” for “established as” in the first sentence and rewrote the last three sentences by providing for successor courts; deleted former Subsection (3), ending the authority to replace a vacant circuit court judicial position with a court commissioner position in 1996; and made stylistic changes.

## **CHAPTER 2**

### **SUPREME COURT**

Section

78-2-2. Supreme Court jurisdiction.

#### **78-2-2. Supreme Court jurisdiction.**

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) a judgment of the Court of Appeals;
- (b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
- (c) discipline of lawyers;
- (d) final orders of the Judicial Conduct Commission;
- (e) final orders and decrees in formal adjudicative proceedings originating with:
  - (i) the Public Service Commission;

- (ii) the State Tax Commission;
- (iii) the Board of State Lands and Forestry;
- (iv) the Board of Oil, Gas, and Mining; or
- (v) the state engineer;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony; and

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers; and

(e) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings.

**History:** C. 1953, 78-2-2, enacted by L. 1986, ch. 47, § 41; 1987, ch. 161, § 303; 1988, ch. 248, § 5; 1989, ch. 67, § 1; 1992, ch. 127, § 11.

**Amendment Notes.** — The 1992 amendment, effective April 27, 1992, in Subsection

(4), deleted former Subsections (e) and (f), which read: "general water adjudication" and "taxation and revenue; and," respectively, making related changes; redesignated former Subsection (g) as Subsection (e); and made stylistic changes in Subsection (e).

## NOTES TO DECISIONS

### ANALYSIS

Appellate jurisdiction.

— Formal adjudicative proceedings.

Certiorari.

Cited.

**Appellate jurisdiction.**

— Formal adjudicative proceedings.

Subdivision (3)(e)(iii) confers jurisdiction in the Supreme Court only over final orders and decrees that originate in formal adjudicative proceedings in agency actions. *Southern Utah*

*Wilderness Alliance v. Board of State Lands & Forestry*, 181 Utah Adv. Rep. 7 (1992).

### Certiorari.

When exercising certiorari jurisdiction granted by this section, the Supreme Court reviews the decision of the Court of Appeals, not of the trial court; therefore, the briefs of the parties should address the decision of the Court of Appeals, not the decision of the trial court. *Butterfield v. Okubo*, 184 Utah Adv. Rep. 27 (1992).

Cited in *State v. Humphrey*, 176 Utah Adv. Rep. 8 (1991).

Tab 2



### Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

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

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

(c) **Procedures.**

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

**Advisory Committee Note.** — Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.

If an appeal is found to be frivolous, the court must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages — single or double costs or attorney fees or both — is left to the discretion of the court. Rule 33 is amended to make express the authority of the court to

impose sanctions upon the party or upon counsel for the party. This rule does not apply to a first appeal of right in a criminal case to avoid the conflict created for appointed counsel by *Anders v. California*, 386 US 738 (1967) and *State v. Clayton*, 639 P.2d 168 (Utah 1981). Under the law of these cases, appointed counsel must file an appeal and brief if requested by the defendant, and the court must find the appeal to be frivolous in order to dismiss the appeal.

#### NOTES TO DECISIONS

##### ANALYSIS

Frivolous appeal.

—Defined.

—Sanctions.

Cited.

##### Frivolous appeal.

A husband's appeal from a judgment relating to alimony and distribution of marital property was frivolous, where there was no basis for the argument presented and the evidence and law was mischaracterized and misstated. *Eames v. Eames*, 735 P.2d 395 (Utah 1987).

Plaintiff's counsel violated rule and was therefore subject to sanction when, after he investigated plaintiff's malpractice action against defendant orthodontist and found that he could not prove breach of duty or causation,

the record was devoid of any relevant, admissible evidence showing negligence, and after losing on summary judgment, he persisted in filing an appeal. *Hunt v. Hurst*, 785 P.2d 414 (Utah 1990).

An appeal brought from an action that was properly determined to be in bad faith is necessarily frivolous under this rule. *Utah Dep't of Social Servs. v. Adams*, 806 P.2d 1193 (Utah Ct. App. 1991).

##### —Defined.

For purposes of this rule, a "frivolous" appeal is one having no reasonable legal or factual basis. Lack of good faith is not required. *O'Brien v. Rush*, 744 P.2d 306 (Utah Ct. App. 1987).

A frivolous appeal is one without reasonable legal or factual basis. *Backstrom Family Ltd.*

Tab 3

him, and may order separate trials or make other orders to prevent delay or prejudice.

**Compiler's Notes.** — This rule is substantially identical to Rule 20, F.R.C.P.

**Cross-References.** — Separate trial authorized, U.R.C.P. 42(b).

#### NOTES TO DECISIONS

##### ANALYSIS

Insurer.

—Declaratory action as to effect of policy.

—Personal injury action.

Cited.

**Insurer.**

—**Declaratory action as to effect of policy.**

One who claims to be damaged by the negligent act of another is not a proper party to an action by the insurer of the latter under a public liability policy, whereby a declaratory judgment is sought declaring the legal effect of the terms of such policy. *Utah Farm Bureau Ins.*

*Co. v. Chugg*, 6 Utah 2d 399, 315 P.2d 277 (1957).

—**Personal injury action.**

Plaintiff's attempt to join defendant's insurance company as a party defendant in a personal injury action, based on insurance policy providing that the insurance company "has agreed to pay a claim only after another claim has been prosecuted to a conclusion," did not come within the joinder provision of either Rule 18(b) or this rule. *Young v. Barney*, 20 Utah 2d 108, 433 P.2d 846 (1967).

Cited in *Stank v. Jones*, 17 Utah 2d 96, 404 P.2d 964 (1965); *Dairyland Ins. Corp. v. Smith*, 646 P.2d 737 (Utah 1982).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 59 Am. Jur. 2d Parties § 92 et seq.; 75 Am. Jur. 2d Trial § 12.

**C.J.S.** — 67 C.J.S. Parties §§ 33 to 55; 88 C.J.S. Trial § 7 to 10.

**Key Numbers.** — Parties ⇌ 13 to 16, 24 to 27; Trial ⇌ 3, 4.

### Rule 21. Misjoinder and non-joinder of parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

**Compiler's Notes.** — This rule is identical to Rule 21, F.R.C.P.

#### NOTES TO DECISIONS

##### ANALYSIS

Added parties.

—Service of process.

—Sole owner of dissolved corporation.

Severance.

**Added parties.**

—**Service of process.**

Even though sons were necessary parties and in court during the trial, the court could not make the sons parties defendant without service of summons or other process. *Monroe City v. Arnold*, 22 Utah 2d 291, 452 P.2d 321 (1969).

—**Sole owner of dissolved corporation.**

Trial court had discretion to allow individual who was sole owner of corporate stock and grantee of land in question to join as plaintiff in action brought by corporation to quiet tax title to land where corporation had been dissolved prior to suit. *Falconaero Enter., Inc. v. Bowers*, 16 Utah 2d 202, 398 P.2d 206 (1965).

**Severance.**

Severance is within the sound discretion of the trial court and, absent abuse of such discretion, will not be upset on appeal. *King v. Barron*, 770 P.2d 975 (Utah 1988).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 59 Am. Jur. 2d Parties §§ 259 to 278.

**C.J.S.** — 67 C.J.S. Parties § 139 et seq.

**Key Numbers.** — Parties ⇌ 77 to 92.

### Rule 22. Interpleader.

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objecting to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant

exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

**Compiler's Notes.** — This rule is identical to Rule 22(1), F.R.C.P.

#### NOTES TO DECISIONS

##### ANALYSIS

Attorney fees.

—Denial.

Escrow.

Failure to interplead.

—Insurer.

Function of interpleader.

Taxation.

Termination.

—Decision on all issues.

**Attorney fees.**

—Denial.

If a party bringing an action has, through his own fault, caused the conflicting claims necessitating interpleader, it is proper to deny his attorney's fees. *Capson v. Brisbois*, 592 P.2d 583 (Utah 1979).

**Escrow.**

Interpleader statute could be invoked by a person holding stock in escrow. *Walker v. Bamberger*, 17 Utah 239, 54 P.2d 108 (1898).

**Failure to interplead.**

—Insurer.

Failure of an insurer to bring an action in interpleader did not constitute an unreasonable delay on its part in making payment under a policy, so as to justify a judgment against such company for interest. *Maycock v. Continental Life Ins. Co.*, 79 Utah 248, 9 P.2d 179 (1932).

##### Function of interpleader.

The function of an interpleader is to compel conflicting complainants to litigate their claims among themselves. *Maycock v. Continental Life Ins. Co.*, 79 Utah 248, 9 P.2d 179 (1932).

An action in interpleader is a proceeding in equity in which a person who has possession of money or property which may be owned or claimed by others seeks to rid himself of risk of liability, or possible multiple liability, by disclaiming his interest and submitting the matter of ownership for adjudication by the court. *Terry's Sales, Inc. v. Vander Veur*, 618 P.2d 29 (Utah 1980).

##### Taxation.

Complaint by taxpayer to compel two counties to interplead as to which was entitled to tax as result of apportionment by State Tax Commission was held insufficient. See *Union Pac. R.R. v. Summit County*, 48 Utah 540, 161 P. 463 (1916).

##### Termination.

—Decision on all issues.

If the action in interpleader accomplishes the purpose for which the plaintiff instituted it, it is not necessarily a requisite to its termination that it decide all of the issues between the adverse claimants. *Terry's Sales, Inc. v. Vander Veur*, 618 P.2d 29 (Utah 1980).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 45 Am. Jur. 2d Interpleader § 29 et seq.

**C.J.S.** — 48 C.J.S. Interpleader § 11.

**A.L.R.** — Amount of attorney's compensa-

tion in absence of contract or statute fixing amount, 57 A.L.R.3d 475.

**Key Numbers.** — Interpleader ⇨ 14.

### Rule 23. Class actions.

(a) **Prerequisites to a class action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class actions maintainable.** An action may be maintained as a class action if the prerequisites of Subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

### Written instructions.

#### —Failure to tender.

#### —Waiver.

Where plaintiff had failed to tender a written instruction on burden of proof he could not claim error in the lack of such instruction. *Fulder v. Zinik Sporting Goods Co.*, 538 P.2d 1036 (Utah 1975).

**Cited in** *Wellman v. Noble*, 12 Utah 2d 350, 366 P.2d 701 (1961); *Hill v. Cloward*, 14 Utah 2d 55, 377 P.2d 186 (1962); *Ortega v. Thomas*, 14 Utah 2d 296, 383 P.2d 406 (1963); *Meier v. Christensen*, 15 Utah 2d 182, 389 P.2d 734 (1964); *Memmott v. U.S. Fuel Co.*, 22 Utah 2d 356, 453 P.2d 155 (1969); *Telford v. Newell J. Olsen & Sons Constr. Co.*, 25 Utah 2d 270, 480 P.2d 462 (1971); *Flynn v. W.P. Harlin Constr.*

*Co.*, 29 Utah 2d 327, 509 P.2d 356 (1973); *McGinn v. Utah Power & Light Co.*, 529 P.2d 423 (Utah 1974); *Henderson v. Meyer*, 533 P.2d 290 (Utah 1975); *Lamkin v. Lynch*, 600 P.2d 530 (Utah 1979); *State v. Hall*, 671 P.2d 201 (Utah 1983); *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042 (Utah 1984); *Gill v. Timm*, 720 P.2d 1352 (Utah 1986); *Penrod v. Carter*, 737 P.2d 199 (Utah 1987); *King v. Fereday*, 739 P.2d 618 (Utah 1987); *State v. Cox*, 751 P.2d 1152 (Utah Ct. App. 1988); *Ramon ex rel. Ramon v. Farr*, 770 P.2d 131 (Utah 1989); *Anton v. Thomas*, 806 P.2d 744 (Utah Ct. App. 1991); *Reeves v. Gentile*, 813 P.2d 111 (Utah 1991); *Hodges v. Gibson Prods. Co.*, 811 P.2d 151 (Utah 1991); *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 817 P.2d 341 (Utah Ct. App. 1991).

### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 75A Am. Jur. 2d Trial § 1077 et seq.

**C.J.S.** — 88 C.J.S. Trial §§ 266 to 448.

**A.L.R.** — Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case

stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

**Key Numbers.** — Trial ⇌ 182 to 296.

## Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional find-

ings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

**Compiler's Notes.** — This rule is similar to Rule 52, F.R.C.P.

#### NOTES TO DECISIONS

##### ANALYSIS

###### Adoption.

- Abandonment of contract.
- Advisory verdict.
- Breach of contract.
- Child custody.
- Contempt.
- Credibility of witnesses.
- Denial of motion.
- Divorce decree modifications.
- Easement.
- Evidentiary disputes.
- Juvenile action.
- Material issues.
- Harmless error.
- Submission by prevailing party.
- Court's discretion.
- Water dispute.
- Findings of state engineer.

###### Amendment.

- Motion.
- Caption.
- Conformance with original findings.
- New trial.
- Notice of appeal.
- Time.
- Tolling of appeal period.
- When made.
- Overruling or vacation.
- Another district judge.
- Lack of notice.

###### Child custody awards.

###### Criminal cases.

###### Criminal contempt.

###### Effect.

- Preclusion of summary judgment.
- Relation to pleadings.

###### Failure to object to findings.

###### How findings entered.

###### Judgments upon multiple claims or parties.

###### Judicial review.

- Equity cases.
- Standard of review.
- Conclusions of law.
- Criminal cases.
- Criminal trials.
- Findings of facts by jury.
- Intent.

###### Juvenile proceedings.

###### Purpose of rule.

###### Stipulations.

###### Sufficiency.

###### —Allegations of pleadings.

###### —Burden on appeal.

###### —Found insufficient.

###### —Vacation of judgment.

###### —Found sufficient.

###### —Opinion or memorandum of decision.

###### —Recitals of procedures.

###### —Technical error.

###### —Ultimate facts.

###### Summary judgment.

###### —Statement of grounds.

###### Waiver.

###### —Failure of court.

###### When filed.

###### —Tardy filing.

###### Cited.

###### Adoption.

###### —Abandonment of contract.

In a contract action by a real estate broker for his commission, where the defendant raises the issue of abandonment of the contract by his answer, the court should make findings on the issue of abandonment. Failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial. *Gaddis Inv. Co. v. Morrison*, 3 Utah 2d 43, 278 P.2d 284 (1954).

###### —Advisory verdict.

The trial court has the responsibility to make findings of fact and conclusions of law, notwithstanding the advisory verdict of a jury. *Romrell v. Zions First Nat'l Bank*, 611 P.2d 392 (Utah 1980):

###### —Breach of contract.

Where plaintiffs, in action for breach of contract, requested finding by court on material issue as to whether the foundation of their house had been located in accordance with zoning ordinances and restrictive covenants, it was the duty of the court to make such a finding. *Quagliana v. Exquisite Home Bldrs., Inc.*, 538 P.2d 301 (Utah 1975).

Tab 4

## ARTICLE I. GENERAL PROVISIONS.

### Rule 101. Scope.

These rules govern proceedings in the courts of this State, to the extent and with the exceptions stated in Rule 1101.

**Advisory Committee Note.** — Adapted from Rule 101, Uniform Rules of Evidence (1974). Rule 1101 contains exceptions dealing with preliminary questions of fact, grand jury proceedings, miscellaneous judicial or quasi-judicial proceedings and summary contempt proceedings. Rule 101 and 1101 are comparable to Rule 2 of the Utah Rules of Evidence (1971), except that Rule 2 made applicable other procedural rules (i.e., civil/criminal) or applicable statutes to the extent that they relax the Rules of Evidence. In addition, Rule 2 of the Utah Rules of Evidence (1971) expressly made the rules applicable to both civil and criminal proceedings.

Rule 101 adopts a general policy making the

Rules of Evidence applicable in all instances in courts of the state including situations previously governed by statute, except to the extent that specific statutory provisions are expressly retained. Rule 101 also rejects *Lopes v. Lopes*, 30 Utah 2d 393, 518 P.2d 687 (1974) to the extent that it permits ad hoc development of special rules of court inconsistent with these Rules of Evidence.

The position of the court in *State v. Hansen*, 588 P.2d 164 (Utah 1978) that statutory provisions of evidence law inconsistent with the rules will take precedence is rejected.

**Cross-References.** — Evidence generally, § 78-25-2 et seq.; Rule 43, U.R.C.P.

#### NOTES TO DECISIONS

#### **Bail hearings.**

The former Utah Rules of Evidence were applicable to and controlling at bail hearings.

*Chynoweth v. Larson*, 572 P.2d 1081 (Utah 1977).

#### COLLATERAL REFERENCES

**Utah Law Review.** — Utah Rules of Evidence 1983, 1985 Utah L. Rev. 63, 68.

Utah Rules of Evidence 1983 — Part II, 1987 Utah L. Rev. 467.

Biased Evidence Rules: A Framework for Judicial Analysis and Reform, 1992 Utah L. Rev. 67.

### Rule 102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

**Advisory Committee Note.** — Rule 102 is the federal rule, verbatim, and is an adjuration as to the purpose of the Rules of Evidence.

#### NOTES TO DECISIONS

**Cited in** *State v. Gray*, 717 P.2d 1313 (Utah 1986); *State v. Banner*, 717 P.2d 1325 (Utah 1986).

#### COLLATERAL REFERENCES

**Utah Law Review.** — Recent Developments in Utah Law, 1986 Utah L. Rev. 95, 130.

### Rule 103. Rulings on evidence.

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.



(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Plain error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

**Advisory Committee Note.** — Rule 103 is the federal rule, verbatim, and is in conformity with Rules 4 and 5, Utah Rules of Evidence (1971), Rule 61, Utah Rules of Civil Procedure, and Utah case law not involving constitutional considerations. Subsection (a)(1) is in accord with Rule 4, Utah Rules of Evidence (1971) and *Stagmeyer v. Leatham Bros.*, 20 Utah 2d 421, 439 P.2d 279 (1968). See also *Bradford v. Alvey & Sons*, 621 P.2d 1240 (Utah 1980);

*Szarak v. Sandoval*, 636 P.2d 1082 (Utah 1981). Rule 103(d) is a restatement of the plain error rule. See Rule 4, Utah Rules of Evidence (1971) and *State v. Poe*, 21 Utah 2d 113, 441 P.2d 512 (1968).

**Cross-References.** — Harmless error in admission or exclusion of evidence, Rule 61, U.R.C.P.

## NOTES TO DECISIONS

### ANALYSIS

Applicability.

Bench trial.

Erroneous rulings.

—Cumulative evidence.

—Exclusion.

—Harmless error.

—Objection.

—Offer of proof.

—Substantial right or prejudice.

—Waiver.

Plain error.

Purpose.

Cited.

#### Applicability.

Adequacy under Subdivision (a)(2) of plaintiff's proffer of expert testimony was irrelevant where the trial court's exclusion of the testimony was a case management decision and the substance of the testimony had no bearing on the court's decision, because the exclusion of testimony was not an evidentiary ruling to which Subdivision (a)(2) would apply. *Berrett v. Denver & R.G.W.R.R.*, 830 P.2d 291 (Utah Ct. App.), cert. denied, 836 P.2d 1383 (Utah 1992).

#### Bench trial.

When a trial is to a court, the rulings on evidence are not of such critical moment as when a trial is to a jury, because it is to be assumed that the court has, and will use, its superior knowledge as to competency and the effect which should be given evidence. *Super Tire Mkt., Inc. v. Rollins*, 18 Utah 2d 122, 417 P.2d 132 (1966).

#### Erroneous rulings.

##### —Cumulative evidence.

Even if refusal to admit photographs was error, no prejudice resulted to defendant where the evidence was cumulative and could have added nothing to defendant's case. *Godesky v. Provo City Corp.*, 690 P.2d 541 (Utah 1984).

##### —Exclusion.

When evidence is excluded by the trial court, any error which may have resulted from such exclusion is cured when the substance of the evidence is later admitted through some other means. *State v. Stephens*, 667 P.2d 586 (Utah 1983).

##### —Harmless error.

Where there was no likelihood that the testimony in question had any substantial bearing on the outcome of the trial, it was not a cause for reversal. *Stagmeyer v. Leatham Bros.*, 20 Utah 2d 421, 439 P.2d 279 (1968).

Admission of hearsay testimony connecting defendant with the crime was not prejudicial where there was other testimony connecting the defendant to the crime adduced before the hearsay testimony. *State v. Gardunio*, 652 P.2d 1342 (Utah 1982).

The improper admission of hearsay evidence was harmless error where the exclusion of such evidence was not likely to produce a different result. *In re Estate of Hock*, 655 P.2d 1111 (Utah 1982).

Denial of a defendant's motion to suppress certain identification evidence was not a ruling upon which error can be predicated where there was other ample evidence of the defendant's culpability. *State v. Bullock*, 699 P.2d 753 (Utah 1985).

Trial court's error in restricting defense counsel's cross-examination of the prosecution's key witness concerning bias was harmless, where the jury had sufficient information to fully appraise the witness's biases and motivations. *State v. Hackford*, 737 P.2d 200 (Utah 1987).

Admission of improper impeachment evidence was not prejudicial error, where the testimony did not bear directly on whether defendant did or did not do any of the acts with which he was charged, and there was no indication that the testimony improperly influ-

without the knowledge of the person making the communication, may know the content of the communication. Problems of waiver are dealt with by Rule 507.

The Committee felt that exceptions to the privilege should be specifically enumerated, and further endorsed the concept that in the

area of exceptions, the rule should simply state that no privilege existed, rather than expressing the exception in terms of a "waiver" of the privilege. The Committee wanted to avoid any possible clashes with the common law concepts of "waiver."

## **Rule 504. Lawyer-client.**

(a) **Definitions.** As used in this rule:

(1) A "client" is a person, including a public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the lawyer" is one employed to assist the lawyer in a rendition of professional legal services.

(4) A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or one specifically authorized to communicate with the lawyer concerning a legal matter.

(5) A "communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client and the client's representatives to the lawyer or the lawyer's representative incidental to the professional relationship.

(6) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, and among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, in any combination.

(c) **Who may claim the privilege.** The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication is presumed to have authority to claim the privilege on behalf of the client.

(d) **Exceptions.** No privilege exists under this rule:

(1) **Furtherance of crime or fraud.** If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) **Claimants through same deceased client.** As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) **Breach of duty by lawyer or client.** As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; or

(4) **Document attested by lawyer.** As to a communication relevant to an issue concerning a document to which the lawyer is an attesting witness; or

(5) **Joint clients.** As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

**Advisory Committee Note.** — Rule 504 is based upon proposed Rule 503 of the United States Supreme Court. Rule 504 would replace and supersede Utah Code Ann. § 78-24-8(2) and is intended to be consistent with the ethical obligations of confidentiality set forth in Rule 1.6 of the Utah Rules of Professional Conduct.

The Committee revised the proposed rule of the United States Supreme Court to address the issues raised in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981), as to when communications involving representatives of a corporation are protected by the privilege. The Committee rejected limiting the privilege to members of the "control group" and added as subparagraph (a)(4) a definition for "representative of the client" that includes within the privilege disclosures not only of the client and the client's formal spokesperson, but also employees who are specifically authorized to communicate to the lawyer concerning a legal matter. The word "specifically" is intended to preclude a general authorization from the client for the client's employees to communicate under the cloak of the privilege, but is intended to allow the client, as related to a specific matter, to authorize the client's employees as "representatives" to disclose information to the lawyer as to that specific matter with confidence that the disclosures will remain within the lawyer-client privilege.

A "representative" of the lawyer need not be directly paid by the lawyer as long as the representative meets the requirement of being engaged to assist the lawyer in providing legal services. Thus, a person paid directly by the client but working under the control and direction of the lawyer for the purposes of providing legal services satisfies the requirements of subparagraph (a)(3). Similarly, a representative of the client who may be an independent contractor, such as an independent accountant, consultant or person providing other services, is a representative of the client for purposes of subparagraph (a)(5) if such person has been engaged to provide services reasonably related to the subject matter of the legal services or

whose service is necessary to provide such service.

The client is entitled not only to refuse to disclose the confidential communication, but also to prevent disclosure by the lawyer or others who were involved in the conference or learned, without the knowledge of the client, the content of the confidential communication. Problems of waiver are dealt with by Rule 507.

Under subparagraph (b) communications among the various people involved in the legal matter, relating to the providing of legal services, are all privileged, except for communications between clients. Those are privileged only if they are part of a conference with others involved in legal services.

Subparagraph (c) allows the "successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence" to claim the privilege. Where there is a dispute as to which of several persons has claims to the rights of a previously existing entity, the court will be required to determine from the facts which entity's claim is most consistent with the purposes of this rule.

The Committee considered and rejected an exception to the rule for communications in furtherance of a tort. Disallowing the privilege where the lawyer's services are sought in furtherance of a crime or fraud is consistent with the trend in other states. The Committee considered extending the exception to include "intentional torts," but concluded that because of the broad range of conduct that may be found to be an intentional tort, such an exception would create undesirable ambiguities and uncertainties as to when the privilege applies.

The Committee felt that exceptions to the privilege should be specifically enumerated, and further endorsed the concept that in the area of exceptions, the rule should simply state that no privilege existed, rather than expressing the exception in terms of a "waiver" of the privilege. The Committee wanted to avoid any possible clashes with the common law concepts of "waiver."

#### NOTES TO DECISIONS

##### **Lawyer-client relationship.**

Where attorney advised defendant that he would not assist defendant in any capacity, legal or otherwise, the relationship of attorney-client never existed and communications made by the defendant to the attorney were not privileged. *State v. Carter*, 578 P.2d 1275 (Utah 1978).

If a lawyer and his client engage in a criminal conspiracy to commit a crime or a tort, contrary to law and good morals, there is not a protected confidential relationship as to any

statements made by the client. *State v. Carter*, 578 P.2d 1275 (Utah 1978).

The standard determining when the presence of a third party during communications between a lawyer and client results in a waiver of the attorney-client privilege is whether the third person's presence is reasonably necessary under the circumstances, not whether the presence of the third person is necessary for urgent or life saving procedures. *Hofmann v. Conder*, 712 P.2d 216 (Utah 1985).

The privilege includes those who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist. For example, a certified social worker practicing under the supervision of a clinical social worker would be included. See Utah Code Ann. § 58-35-6.

The patient is entitled not only to refuse to disclose the confidential communication, but also to prevent disclosure by the physician or psychotherapist or others who were properly involved or others who overheard, without the knowledge of the patient, the confidential communication. Problems of waiver are dealt with by Rule 507.

The Committee felt that exceptions to the privilege should be specifically enumerated, and further endorsed the concept that in the area of exceptions, the rule should simply state that no privilege existed, rather than expressing the exception in terms of a "waiver" of the privilege. The Committee wanted to avoid any possible clashes with the common law concepts of "waiver."

The Committee did not intend this rule to limit or conflict with the health care data statutes listed in the Committee Note to Rule 501.

Rule 506 is not intended to override the child abuse reporting requirements contained in Utah Code Ann. § 62A-4-501 et seq.

#### COLLATERAL REFERENCES

**A.L.R.** — Physician-patient privilege as extending to patient's medical or hospital records, 10 A.L.R.4th 552.

### Rule 507. Miscellaneous matters.

(a) A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or a predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure. This rule does not apply if the disclosure is itself a privileged communication.

(b) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was

(1) compelled erroneously or

(2) made without opportunity to claim the privilege.

(c) (1) **Comment or inference not permitted.** The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(2) **Claiming privilege without knowledge of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) **Jury instruction.** Upon request, any party against whom the jury might draw an adverse inference from the claim of privilege is entitled to instruction that no inference may be drawn therefrom.

(4) **Exception.** In a civil action, the provisions of subparagraph (c) do not apply when the privilege against self-incrimination has been invoked.

**Advisory Committee Note.** — The subject matter of Rule 507 was previously included in Utah Rules of Evidence 37, 38, 39 and 40. The language recommended by the Committee, however, is largely that of proposed Federal Rules 511, 512 and 513, rules not included among those adopted by Congress.

Proposed Federal Rule 511 became Rule 507(a), replacing Rule 37. Proposed Federal Rule 512 became Rule 507(b), replacing Rule 38. Proposed Federal Rule 513 became Rule 507(c), replacing Rule 39. No replacement was adopted for Rule 40 since the Committee determined that the subject matter of that rule need not be covered by a rule of evidence.

**Subparagraph (a).** Since the purpose of evidentiary privileges is the protection of some societal interest or confidential relationship, the privilege should end when the purpose is no longer served because the holder of the priv-

ilege has allowed disclosure or made disclosure. For the same reason, although Rule 37 required a knowing waiver of the privilege, Rule 507(a) as drafted does not require such knowledge. A stranger to the communication may testify to an otherwise privileged communication, if the participants have failed to take reasonable precautions to preserve privacy.

**Subparagraph (b).** Once disclosure of privileged matter has occurred, although confidentiality cannot be restored, the purpose of the privilege may still be served in some instances by preventing use of the evidence against the holder of the privilege. For that reason, privileged matter may still be excluded when the disclosure was not voluntary or was made without an opportunity to claim the privilege.

**Subparagraph (c).**

(1) Allowing inferences to be drawn from the invocation of a privilege might undermine the

717 (1922) (referred to in Committee Note); State v. Green, 578 P.2d 512 (Utah 1978); State v. Hubbard, 601 P.2d 929 (Utah 1979); State v. Tarafa, 720 P.2d 1368 (Utah 1986);

State v. Morehouse, 748 P.2d 217 (Utah Ct. App. 1988); State v. Johnson, 784 P.2d 1135 (Utah 1989).

#### COLLATERAL REFERENCES

**Utah Law Review.** — Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1987 Utah L. Rev. 137.

*Green v. Bock Laundry* — Federal Rule 609(a)(1) in Civil Cases: The Supreme Court Takes an Imbalanced Approach, 1990 Utah L. Rev. 613.

**Am. Jur. 2d.** — 81 Am. Jur. 2d Witnesses § 569 et seq.

**C.J.S.** — 98 C.J.S. Witnesses § 507.

**A.L.R.** — Permissibility of impeaching cred-

ibility of witness by showing former conviction as affected by pendency of appeal from conviction or motion for new trial, 16 A.L.R.3d 726.

Propriety, on impeaching credibility of witness in civil case by showing former conviction, of questions relating to nature and extent of punishment, 67 A.L.R.3d 761.

Right to impeach credibility of accused by showing prior conviction as affected by remoteness in time of prior offense, 67 A.L.R.3d 824.

**Key Numbers.** — Witnesses ⇌ 345.

### Rule 610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

(Amended effective October 1, 1992.)

**Advisory Committee Note.** — This rule is the federal rule, verbatim, and is in accord with Rule 20 [Rule 30], Utah Rules of Evidence (1971).

**Cross-References.** — Religious belief not

basis of incompetency as a witness, Utah Const., Art. I, Sec. 4.

**Amendment Notes.** — The 1992 amendment, effective October 1, 1992, revised this rule to make the language gender-neutral.

### Rule 611. Mode and order of interrogation and presentation.

(a) **Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) **Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. (Amended effective October 1, 1992.)

**Advisory Committee Note.** — This rule is the federal rule, verbatim, and restates the inherent power of the court to control the judicial process. Cf. *Vanderpool v. Hargis*, 23 Utah 2d 210, 461 P.2d 56 (1969). There was no comparable provision to Subsection (b) in Utah Rules of Evidence (1971), but it is comparable to current Utah case law and practice. *Degnan*, Non-

Rules Evidence Law: Cross-Examination, 6 Utah L. Rev. 323 (1959). Subsection (c) is comparable to current Utah practice. Cf. Rule 43(b), Utah Rules of Civil Procedure.

**Amendment Notes.** — The 1992 amendment, effective October 1, 1992, revised this rule to make the language gender-neutral.

#### NOTES TO DECISIONS

##### ANALYSIS

Cross-examination.

Exclusion of witnesses.

Leading questions.

##### Cross-examination.

Trial court did not abuse its discretion in

control of cross-examination by defense counsel. See *Vanderpool v. Hargis*, 23 Utah 2d 210, 461 P.2d 56 (1969).

The latitude that may be allowed in cross-examination is largely within the discretion of the trial court, to be exercised and governed by the facts and circumstances of each particular

Tab 5

Third Judicial District

FEB 17 1993

SALT LAKE COUNTY

By Swaff  
Deputy Clerk

Michael N. Zundel (#3755)  
Jeffery J. Devashrayee (#6209)  
JARDINE, LINEBAUGH, BROWN & DUNN  
A Professional Corporation  
370 East South Temple, Suite 400  
Salt Lake City, Utah 84111-1290  
Telephone: (801) 532-7700

Attorneys for Defendant/  
Counterclaimant Alan Asay

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---

ZOLL & BRANCH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	FINDINGS OF FACT AND
ALAN ASAY,	)	CONCLUSIONS OF LAW
	)	
Defendant.	)	
	)	
	)	
ALAN ASAY,	)	
	)	
Counterclaimant,	)	
	)	
vs.	)	
	)	Civil No. 89-0905672CV
ZOLL & BRANCH,	)	
	)	Judge Michael R. Murphy
Counterclaim Defendant.	)	

---

The Counterclaim of Defendant/Counterclaimant Alan Asay having come on for trial on January 8, 1993, before the Third Judicial District Court, the Honorable Michael R. Murphy presiding, the Court having noted that the claims of Plaintiff/Counterclaim

00450

Defendant Zoll & Branch against Mr. Asay were discharged in bankruptcy pursuant to a February 10, 1992 Order of the United States Bankruptcy Court. The parties have proceeded to trial on the basis that the discharge does not affect any offsets to which Zoll & Branch may be entitled against Mr. Asay's Counterclaim.

Plaintiff/Counterclaim Defendant Zoll & Branch appeared at the trial by and through its counsel, B. Ray Zoll and Tom D. Branch of Zoll & Branch. Mr. Asay was present and represented by his counsel, Michael N. Zundel and Jeffery J. Devashrayee of Jardine, Linebaugh, Brown & Dunn. Mr. Asay first came forward and presented evidence in support of his Counterclaim, after which Zoll & Branch came forward and presented evidence in support of its claimed offsets against Mr. Asay's Counterclaim.

The Court has considered the evidence and credibility of the witnesses, has carefully reviewed the arguments of counsel and the brief submitted by Mr. Asay, and has made an independent review of the pertinent statutes and case law. Now, being fully informed, the Court hereby finds the following facts and makes the following conclusions of law:

#### FINDINGS OF FACT

1. In early 1987, Mr. Asay was hired as an associate by the law firm of Zoll & Branch at a salary of \$3,000.00 per month.



Mr. Asay brought with him and used his own office furniture and furnishings and computer/word processing system.

2. Mr. Asay performed all of his work for Zoll & Branch on his computer system using a standard WordPerfect for DOS, word processing software program. He purchased the WordPerfect software himself in early 1987.

3. At the time Mr. Asay became a full-time employee for Zoll & Branch, he made his computer system available to the firm and continued to use his own office furniture and furnishings.

4. At that time, Zoll & Branch agreed to make payments toward the cost of Mr. Asay's computer equipment (by making payments to the credit card company financing Mr. Asay's acquisition of the computer system). However, no definite agreement was reached at that time as to whether or not Zoll & Branch would actually purchase the computer system and software.

5. During his employment with Zoll & Branch, Mr. Asay learned to distrust Mr. B. Ray Zoll. Consequently, near the end of his employment, Mr. Asay placed the password "fuckoff" on the computer system to ensure that he controlled the system until a final agreement for its purchase was reached.

6. Mr. Asay placed the password on the word processing files using the standard WordPerfect command, "Password"/"Add".

Once the password was revealed, it could be removed by using the standard WordPerfect command, "Password"/"Remove".

7. In mid-November, 1988, Mr. Asay gave notice that he intended to terminate his employment with Zoll & Branch and did so effective December 1, 1988.

8. The amount of time which Mr. Asay billed during his employment with Zoll & Branch was fair and consistent with his obligation to Zoll & Branch and its clients and was fairly and accurately reported on Mr. Asay's time sheets.

9. Zoll & Branch did not provide Mr. Asay with adequate support staff while he was with the firm. Consequently, Mr. Asay had to provide many services for himself and for Zoll & Branch which should have been provided by a non-lawyer support staff.

10. Near the end of his employment and in conjunction with his announcement of his intent to leave the firm, Mr. Asay offered to sell the computer system and his office furniture and furnishings to the firm for \$4,356.00.

11. Following negotiations, Zoll & Branch agreed to buy only the computer system for \$1,030.00, which was the fair market value of the computer system. Mr. Asay accurately represented all material facts to Zoll & Branch during the negotiations.

12. The exact terms and conditions of the purchase of the computer system by Zoll & Branch were never finalized or formalized until after Mr. Asay gave notice of his intent to leave the firm.

13. Mr. Asay informed Mr. Zoll that he would give him the password to the files on the computer system in exchange for full payment.

14. The exchange occurred on December 1, 1988. On that date, Mr. Asay also revealed the password to Garry Wilmore, an attorney hired to replace Mr. Asay.

15. The password provided full access to every file in the computer system. At no time did Mr. Asay sabotage the computer in any way.

16. Any problems which Zoll & Branch had in accessing the computer system either pre-existed the exchange of the password for the check for the computer system or were the result of Zoll & Branch or its representatives being untrained or uneducated in the use of the computer system.

17. None of Defendant's actions and conduct regarding the computer system were improper or inappropriate.

18. After Mr. Asay terminated his employment, he removed his office furniture and furnishings from the firm and also took with him some computer diskettes which he had not sold to the firm.

19. When Mr. Asay left Zoll & Branch, he left behind all of his work product pertaining to any case on which he had worked. Mr. Asay also properly left behind his time sheets at Zoll & Branch, which should have been found by Zoll & Branch on the premises with no difficulty whatsoever.

20. Upon Mr. Asay's departure from Zoll & Branch, he received the following two checks: (1) check number 2058 in the net amount of \$1,176.75 for wages accrued during the last two weeks of his employment, and (2) check number 2059 in the amount of \$1,176.75 as payment for the computer system.

21. Both checks were dishonored upon presentment on December 8, 1988 because Zoll & Branch had ordered its bank to stop payment.

22. In defense of Zoll and Branch's actions, Mr. Zoll testified that he stopped payment on the checks because Zoll & Branch had offsetting claims against Mr. Asay. The Court disagrees. Zoll & Branch stopped payment on the checks it issued to Mr. Asay for the sole reason that Mr. Zoll was angered by the password after he found out what it was. Mr. Zoll's testimony regarding the basis for the offsets claimed by Zoll & Branch is not credible.

23. At no time prior to Mr. Asay's departure from the firm did Zoll & Branch give any notice to Mr. Asay that the firm claimed any offset or deduction against the amounts otherwise due Mr. Asay.

24. Zoll & Branch never furnished Mr. Asay with a statement showing the total amount of any deduction made from his wages.

25. Mr. Asay did not convert any documents or other property of Zoll & Branch to his own use.

26. Mr. Asay did not make any misrepresentation to Zoll & Branch regarding any aspect of the computer he sold to Zoll & Branch.

27. Mr. Asay did not slander Zoll & Branch as alleged in the complaint filed by that firm.

28. There is no justification for Zoll & Branch's stop payment order to its bank with respect to the checks at issue in this case.

29. On December 9, 1988, Mr. Asay made demand on Zoll & Branch for payment of his wages in accordance with the Utah Payment of Wages Act (the "Act"). The demand was timely made under the Act and Mr. Asay's counter claim was not brought until after 15 days after the demand was made as required by the Act. The amount of the demand did not exceed the amount found to be justly due at the trial of this action as more fully explained below.

30. Zoll & Branch responded with a letter dated December 13, 1988, wherein the firm threatened suit against Mr. Asay. On the same day, Zoll & Branch commenced this action by filing a Complaint alleging that Mr. Asay was liable to Zoll & Branch for conversion, fraud, and slander and that the firm was entitled to an offset against the amounts otherwise owed to Mr. Asay.

31. Also on the same day, Zoll & Branch deposited \$1,176.75 with the clerk of the court with a paper entitled "Tender of Payment" requesting that the clerk of the court hold the funds until all issues in the case were resolved.

32. During the trial of the above-entitled actions, the testimony of Mr. Asay was more credible than the testimony of Mr. Zoll.

33. Mr. Asay is entitled to receive the following monetary damages from Zoll & Branch as a result of Zoll & Branch's failure to pay Mr. Asay his wages due and its failure to pay for the computer system:

	<u>Principal</u>	<u>Interest</u>
<u>Wages and Penalties:</u>		
Wage check 12/01/88 -	\$ 1,500.00	
Statutory Continuation		
of Salary -	<u>\$ 6,000.00</u>	
		\$ 7,500.00
Plus interest from 02/01/89		
through 01/08/93 @ 10% or		
\$ 2.05479 per diem for 1,438 days		\$ 2,951.79

**Breach of Contract:**

Computer payment	\$ 1,030.00
Plus interest from 12/01/88 through 01/08/93 @ 10% or \$ .2821 per diem for 1,498 days	\$ 327.10

**Attorneys' Fees:**

Through preparation of Findings of Fact and Conclusions of Law and Judgment	\$ 12,000.00
Out-of-pocket expenses and costs	<u>\$ 1,602.79</u>

**TOTAL DAMAGES: \$ 25,411.68**

34. Mr. Asay is also entitled to additional interest from and after January 8, 1993, at the rates provided under Utah Code Ann. §§ 15-1-1 and 15-1-4.

35. The Court has considered all of the relevant factors in determining the reasonableness of the fees and costs requested by Mr. Asay and his attorneys. In this regard the testimony of Mr. Asay, who is a licensed attorney in this state, was helpful as well as the affidavit of Mr. Asay's counsel, Mr. Michael N. Zundel. The Court also observed the organized and efficient manner in which Mr. Asay's counsel conducted the presentation of Mr. Asay's case at trial. All of the services provided by Mr. Asay's counsel were reasonable and necessary.

36. The hourly rates charged to Mr. Asay by his attorneys, for their time and the time of their paralegals, are reasonable in light of the training, experience and expertise of the service providers and as measured by the hourly rates customarily charged for similar services in the Salt Lake City community.

37. Through November 30, 1992, a total of 129.30 hours of legal services were provided to Mr. Asay by his attorneys in connection with Mr. Asay's attempts to recover the wages due him from Zoll & Branch. The hours of service were necessitated by the actions of Zoll & Branch both before and after this action was begun, including the following actions: 1) failing to pay Mr. Asay the wages justly due him, 2) commencing this action as a tactic to pressure Mr. Asay into abandoning his legitimate claims against Zoll & Branch, 3) refusing to provide discovery as required by the Utah Rules of Civil Procedure, and 4) alleging numerous defenses, including factually contested offsets, to Mr. Asay's claims.

38. Upon consideration of all of the circumstances it is the judgment of this court that Mr. Asay should be awarded \$12,000.00 in attorneys' fees through the preparation of the findings of fact, conclusions of law and judgment in this case and that Mr. Asay's attorneys' out-of-pocket costs of \$1,602.79 should also be awarded.



### CONCLUSIONS OF LAW

1. Zoll & Branch is not entitled to any offset against Mr. Asay's unpaid wages or the amount due Mr. Asay for the computer.

2. Zoll & Branch was not justified in stopping payment on the check for \$1,176.75 representing Mr. Asay's wages earned during the last two weeks of his employment or on the check for \$1,030.00 representing payment for the computer system.

3. Zoll & Branch violated section 34-28-5(2) of the Utah Code in effect at the time Mr. Asay's employment was terminated, which provides that in the absence of any contractual provisions to the contrary, an employee giving at least "seventy-two hours previous notice of his intention to quit . . . shall receive his wages at the specified place of payment at the time of quitting."

4. Zoll & Branch violated section 34-28-3 of the Utah Code in effect at the time Mr. Asay's employment was terminated by failing to furnish Mr. Asay with a statement showing the total amount of each deduction made from his wages.

5. Mr. Asay is entitled to an award of \$1,500.00 constituting the gross pay of Mr. Asay's last check received on December 1, 1988.

6. Mr. Asay is entitled to an award of a civil penalty of \$6,000.00 pursuant to section 34-28-5(1) of the Utah Code in effect

at the time Mr. Asay's employment was terminated, which provides that, in the event an employee does not receive wages "within 24 hours of the demand therefor, the wages of such an employee shall continue from the date of separation until paid, but in no event to exceed sixty days, at the same rate which the employee received at the time of separation."

7. The deposit by Zoll & Branch of \$1,176.75 with the clerk of this court did not constitute a "tender" of payment of the wages due Mr. Asay, because the offer of payment was conditional, being expressly conditioned on the resolution of all issues in this case.

8. Mr. Asay is entitled to an award of \$2,951.29 as interest accruing from February 1, 1988 (the date on which his wages stopped accruing under the applicable statute) through January 8, 1993 at ten percent (10%) based on \$7,500.00, the combined amount of wages and penalties owing to Mr. Asay on that date, or \$2.05479 per diem for 1,438 days.

9. Mr. Asay is entitled to an award of \$1,030.00 as payment for the computer system.

10. Mr. Asay is entitled to an award of \$327.10 as interest accruing from December 1, 1988 through January 8, 1993 at ten percent (10%) based on \$1,030.00, the amount of the contract price for the computer system, or \$.2821 per diem for 1,498 days.

11. Mr. Asay is entitled to an award of \$12,000.00 as reasonable attorneys' fees pursuant to section 34-27-1 of the Utah Code.

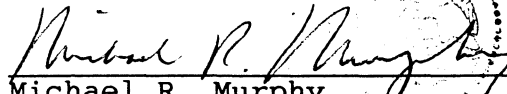
12. Mr. Asay is entitled to an award of \$12,000.00 as reasonable attorneys' fees based on such fees constituting consequential damages incurred by Mr. Asay.

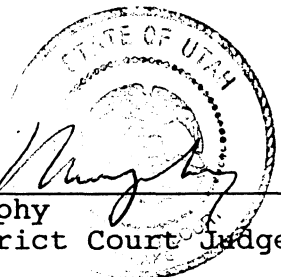
13. Mr. Asay is entitled to an award of costs and expenses incurred during the litigation in the amount of \$1,673.79.

14. Mr. Asay is entitled to interest on the principal amounts awarded herein at the rate of 10% per annum from and after January 8, 1993 to the date judgment is entered in this action and thereafter, interest at the rate of 12% per annum on the entire unpaid portion of the judgment, until paid in full.

DATED this 17<sup>th</sup> day of February, 1993.

BY THE COURT:

  
Michael R. Murphy  
Presiding District Court Judge



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Tab 6

FILED DISTRICT COURT  
Third Judicial District

MAR 11 1993

SALT LAKE COUNTY  
By Judith Hallgren  
Deputy Clerk

Michael N. Zundel (#3755)  
Jeffery J. Devashrayee (#6209)  
**JARDINE, LINEBAUGH, BROWN & DUNN**  
A Professional Corporation  
370 East South Temple, Suite 400  
Salt Lake City, Utah 84111-1290  
Telephone: (801) 532-7700

Attorneys for Defendant/  
Counterclaimant Alan Asay

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ZOLL & BRANCH,  
  
Plaintiff,  
  
vs.  
  
ALAN ASAY,  
  
Defendant.

ALAN ASAY,  
  
Counterclaimant,  
  
vs.  
  
ZOLL & BRANCH,  
  
Counterclaim Defendant.

ORDER GRANTING  
ZOLL & BRANCH'S MOTION  
FOR STAY OF EXECUTION AND  
RELEASING GARNISHMENT

Civil No. 89-0905672CV

Judge Michael R. Murphy

This matter having come before the Court on February 23, 1993, upon motion of Zoll & Branch seeking a stay pursuant to Rule 62(b), Utah Rules of Civil Procedure, of any action or proceeding by Alan Asay to enforce or collect the judgment entered

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herein; B. Ray Zoll, Esq. of Zoll & Branch appearing on behalf of the judgment debtor, and Michael N. Zundel, Esq. of Jardine, Linebaugh, Brown & Dunn appearing on behalf of Alan Asay, the judgment creditor; the Court having considered the arguments and representations of counsel and good cause appearing therefor; it is hereby

**ORDERED**, that upon compliance with all of the provisions of this Order by Zoll & Branch, all proceedings and actions to enforce or collect the judgment entered in this case in favor of Alan Asay shall be stayed until May 25, 1993 (8 weeks and 30 days after February 23, 1993), or until thirty days after Zoll & Branch's motion for new trial and motion to alter or amend judgment are heard and decided by this Court, whichever first occurs; and it is further

**ORDERED**, that as a condition precedent to the effectiveness of the stay ordered herein, Zoll & Branch shall provide security to Alan Asay, as provided herein, securing payment of the entire judgment, plus interest as provided in the judgment; and it is further

**ORDERED**, that the following assets in the possession of the Clerk of the Court be, and same hereby are, held by the Clerk as security for payment of the judgment issued in favor of Alan Asay in this action: \$1,176.75 delivered to the Clerk of the Court on

or about December 12, 1988 (pursuant to document entitled "Tender of Payment") and a Certificate of Deposit, receipt account no. 14830034033 issued by American Investment Bank, N.A., in the principal amount of \$25,000.00); and it is further

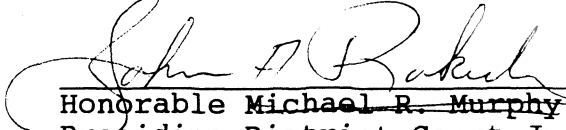
**ORDERED**, that in order to protect the collateral described herein from the claims of potential third-party creditors of Zoll & Branch, Zoll & Branch shall execute a security agreement in favor of Alan Asay in the form attached hereto as Exhibit "A", and a form UCC-1 financing statement; and it is further

**ORDERED**, that the Clerk of Court shall immediately cause Certificate of Deposit No. 14830034033 to be reissued in the name of "Clerk of the Third Judicial District Court, Case No. 89-0905672"; and it is further

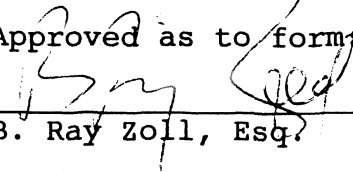
**ORDERED**, that all garnishments heretofore issued pursuant to the Judgment in favor of Alan Asay in this action, shall be released and extinguished upon compliance with this order by Zoll & Branch.

DATED this 11 day of March, 1993.

BY THE COURT:

  
Honorable ~~Michael R. Murphy~~  
Presiding District Court Judge

Approved as to form:

  
B. Ray Zoll, Esq.

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## Security Agreement

THIS AGREEMENT (this "Agreement") is entered into the \_\_\_\_ day of March, 1993, by ZOLL & BRANCH, P.C. ("Debtor"), whose address is 5300 South 360 West, #360, Murray, Utah 84123 (federal tax ID number 87-0458492), in favor of ALAN B. ASAY, whose address is 131 Third Avenue, #4, Salt Lake City, Utah 84103 ("Secured Party").

### Recitals:

A. Judgment. On February 17, 1993, a Judgment (the "Judgment") was entered in the case (the "Case") of Zoll & Branch v. Alan Asay, Civil No. 89-0905672, in the District Court of Salt Lake County, State of Utah (the "Court"), for the principal sum of \$25,424.74, together with interest thereon at the legal rate of 12% per annum.

B. Motion for New Trial. Debtor has filed with the court a Motion for New Trial or in the Alternative to Alter or Amend the Judgment pursuant to Rule 59, Utah Rules of Civil Procedure, and has requested a stay of execution pending the court's ruling on those motions.

C. Security for Stay. Debtor has offered a certificate of deposit and funds on deposit with the clerk of the court as security for a stay.

### Agreement:

#### Article 1

#### Security Interest

1.1. Grant of Security Interest. Debtor hereby grants Secured Party a security interest (the "Security Interest") in all of Debtor's right, title and interest, whether now existing or hereafter acquired, in and to the following (collectively the "Collateral") in order to secure payment of the entire judgment plus interest:

1.1.1. Certificate. That certain Certificate of Deposit (the "Certificate") issued by American Investment Bank as Certificate No. 14830034033 in the amount of \$25,000.00 in the name of Zoll & Branch, P.C., c/o Third District Court, Civil No. 890505672, and all proceeds derived therefrom however designated, including money, general intangibles, and substitute certificates of deposit.



1.1.2. Cash. All cash deposited with the clerk of the court in the case on or about December 12, 1988, pursuant to a document entitled "tender of payment."

## Article 2 Status of Collateral

2.1. Possession of Collateral. Debtor shall cause the certificate to be reissued to "Clerk of the Third Judicial District Court, Civil No. 89-0905672" and the clerk of court shall hold the certificate and cash for the benefit of Alan Asay in order to establish and perfect the Security Interest in the Collateral. Notwithstanding Secured Party's Security Interest in the Collateral, Debtor shall continue to own the Collateral, subject to the Security Interest and the provisions of this Agreement.

2.2. Accrual of Interest. All interest that accrues on the Collateral shall accrue for the account of the Debtor, as owner of the Collateral, but such interest shall remain subject to this Security Agreement as part of the Collateral.

2.3. Affirmation of Judgment. If the District Court affirms Secured Party's Judgment against Debtor, then Secured Party may, after 30 days following entry of the District Court's Order, redeem the Certificate and apply the proceeds toward satisfaction of the Judgment. *Unless otherwise ordered by the Court.*

2.4. Reversal of Judgment. If the District Court reverses Secured Party's Judgment against Debtor in whole, then Secured Party shall release its Security Interest in the Collateral.

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2.5. Renewal of Certificate. During the term of this Agreement, the clerk of the court may renew the Certificate, or with the proceeds of the Certificate (or replacement certificates of deposit), purchase one or more replacement certificates of deposit with financial institutions that are insured by the Federal Deposit Corporation, for terms not to exceed 90 days. All such renewed or purchased certificates of deposit shall form part of the Collateral. American Investment Bank is hereby instructed to deliver the original certificate and all replacements or reissues thereof directly to the clerk of the court at the following address:

Clerk of the Court  
Third Judicial District Court  
240 East 400 South  
Salt Lake City, Utah 84111  
Attn: David Shewell

DEBTOR:

ZOLL & BRANCH, P.C.

By:  president

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MAY 25 1993

SALT LAKE COUNTY  
By [Signature]  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

Civil No. 89-0905672CV  
Judge Michael R. Murphy

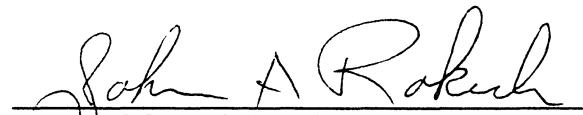
00506

Branch, and it appearing that the parties have stipulated that the bond will expire on June 25, 1993; the Court having considered the Stipulation to Extend Bond Expiration Date, and the Court being otherwise fully advised in the premises, it is hereby

ORDERED, that the expiration date for the bond is extended for thirty (30) days until June 25, 1993.

DATED this 25 day of May, 1993.

BY THE COURT:

  
Honorable ~~Michael R. Murphy~~  
Presiding District Court Judge

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B. Ray Zoll  
ZOLL & BRANCH  
5300 South 360 West  
Suite 360  
Salt Lake City, Utah 84123  
Telephone: (801) 262-1500  
Attorney for Plaintiff

FILED DISTRICT COURT  
Third Judicial District

JUN 23 1993

SALT LAKE COUNTY  
By                      Deputy Clerk

---

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

---

ZOLL & BRANCH	)	
Plaintiff,	)	
vs.	)	
ALAN ASAY,	)	ORDER
Defendant.	)	
<hr/>		
ALAN ASAY,	)	
Counterclaimant,	)	
vs.	)	Civil No. 89-0905672CV
ZOLL & BRANCH	)	Judge Michael R. Murphy
Counterclaim Defendant.	)	

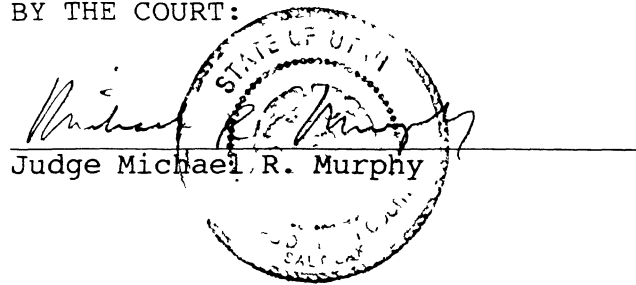
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This matter came before the Court on Plaintiff's Motion to Extend Stay of Execution Pending Location of the Court file.

The Court, having reviewed the motion and being fully advised, hereby grants Plaintiff's motion and extends the expiration date of the bond at issue in this case until such time as the Court file can be located and until the Court can make a ruling on Plaintiff's Request for Expedited Hearing on Motion for New Trial or in the Alternative Motion to Alter or Amend Judgment.

8 70 1012  
DATED this 23 day of June, 1993.

BY THE COURT:

  
Judge Michael R. Murphy

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, with postage prepaid thereon, to the following, this \_\_\_\_\_ day of June, 1993:

Michael N. Zundel  
Jeffery J. Devashrayee  
JARDINE, LINEBAUGH, BROWN & DUNN  
370 East South Temple, Suite 400  
Salt Lake City, Utah 84111-1290  
Attorneys for Defendant Alan Asay

---

Tab 7

JUL 20 1973

By M. Sparr  
SALT LAKE COUNTY  
Clerk of Court

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

-----

ZOLL & BRANCH,	:	SUMMARY DECISION
	:	AND ORDER
Plaintiff,	:	
vs.	:	CASE NO. 890905672
ALAN ASAY,	:	
Defendant.	:	
-----	:	
ALAN ASAY,	:	
Counterclaimant,	:	
vs.	:	
ZOLL & BRANCH,	:	
Counterclaim Defendant.	:	

-----

Plaintiff and counterclaim defendant has moved for a new trial or to alter or amend judgment. The motion seeks to change specific findings. Plaintiff fails to acknowledge, however, that evidence is not the equivalent of fact. The court heard all the evidence and, after viewing the demeanor of witnesses and making judgments of credibility, made its findings. If, as in this case, there is conflicting evidence, there will necessarily be a conflict between the findings and some evidence, the evidence which the court rejected in its role as a factfinder.

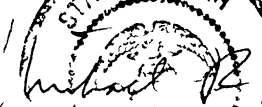
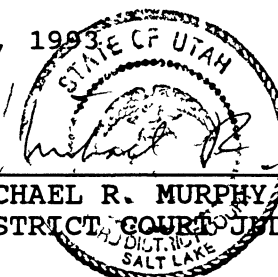
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The court finds it ironic that on the one hand plaintiff complains that the value of this case did not merit the amount of fees incurred by defendant and yet complains that the court improperly limited the time allowed plaintiff to present its case. The court was very concerned about this case, invoked Rule 611, Utah Rules of Evidence, allocated 50% of a trial day to each party and was a timekeeper for the time consumed. Plaintiff actually used more time than defendant and had adequate time to present its claims and defenses. It was the plaintiff's decision how it was to use its time. It is the court's view that plaintiff misallocated its time, spending too much time on unimportant matters and too little on important matters.

For the forgoing reasons, plaintiff's motion is denied. The parties are to confer with the clerk to schedule not more than one hour for an evidentiary hearing on defendant's motion to augment fees.

Dated this 20<sup>th</sup> day of July, 1993

  
MICHAEL R. MURPHY  
DISTRICT COURT JUDGE  


00603

**MAILING CERTIFICATE**

I hereby certify that I mailed a true and correct copy of the foregoing Summary Decision and Order, to the following, this 21 day of July, 1993:

B. Ray Zoll  
Attorney for Plaintiff  
5300 South 360 West, Suite 360  
Murray, Utah 84123

Michael L. Zundel  
Attorney for Defendant  
370 E. South Temple, Suite 400  
Salt Lake City, Utah 84111-1290

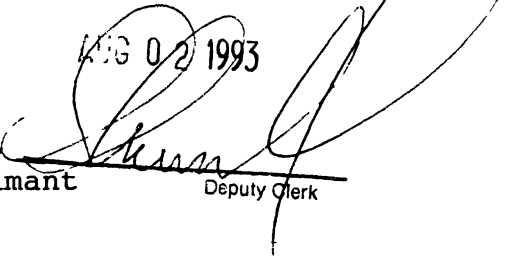
M. Snare

Tab 8

JUDGMENT

FILED IN CLERK'S OFFICE  
Salt Lake County Utah

AUG 02 1993

By   
Deputy Clerk

Michael N. Zundel (#3753)  
Jeffery J. Devashrayee (#6209)  
Attorneys for Defendant and Counterclaimant  
**JARDINE, LINEBAUGH, BROWN & DUNN**  
A Professional Corporation  
370 East South Temple, Suite 400  
Salt Lake City, Utah 84111-1290  
Telephone: (801) 532-7700

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

ZOLL & BRANCH,  
  
Plaintiff,  
  
vs.  
  
ALAN ASAY,  
  
Defendant.  
  
\_\_\_\_\_  
  
ALAN ASAY,  
  
Counterclaimant,  
  
vs.  
  
ZOLL & BRANCH,  
  
Counterclaim Defendant.

2/8/16/  
  
**ORDER AUGMENTING JUDGMENT  
AND RELEASING CASH BOND  
TO ALAN ASAY**  
  
  
  
  
  
  
  
Case No. 89-0905672 CV  
Judge Michael R. Murphy

This matter having come before the court on August 2, 1993,  
upon Alan Asay's Motion to Augment the Award of Costs and Attor-  
neys' Fees in this action; the Court having considered the  
affidavit of Michael N. Zundel filed in support of the motion, and  
having provided the judgment debtor, Zoll & Branch, opportunity to

cross-examine Mr. Zundel regarding the fees and costs described in Mr. Asay's motion; and good cause appearing therefor, it is hereby

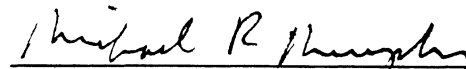
ORDERED, that the judgment entered in favor of Alan Asay in this action dated February 17, 1993, be, and the same hereby is, increased by the principal sum of \$ 4471.86 in order to reimburse Mr. Asay for reasonable costs and attorneys' fees expended in preserving and collecting said judgment; and it is further

ORDERED, that the stay of execution heretofore entered in this action is hereby vacated and the Clerk of this Court is directed to redeem the certificate of deposit held by this Court as a cash bond and to deliver the proceeds thereof to Michael N. Zundel, Esq., Mr. Asay's attorney; and it is further

ORDERED, that Mr. Asay shall, within ten (10) days after receipt of the funds, file a Notice of Partial Satisfaction in this action.

DATED this 2nd day of August, 1993.

BY THE COURT:

  
\_\_\_\_\_  
Honorable Michael R. Murphy  
Presiding District Judge

c:\docs\mnz\p\2764

Tab 9

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B. RAY ZOLL (3607)  
ZOLL & BRANCH  
5300 South 360 West  
Suite 360  
Salt Lake City, Utah 84123  
Telephone: (801) 262-1500  
Attorney for Plaintiff

711  
COURT  
AUG 10 4 52 PM '93  
BY Ch Wheeler CLERK

---

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

---

ZOLL & BRANCH,	)	
Plaintiff,	)	
vs.	)	
ALAN ASAY,	)	NOTICE OF APPEAL
Defendant.	)	
_____	)	
ALAN ASAY,	)	
Counterclaimant,	)	Civil No. 89-0905672 CV
vs.	)	Judge Michael R. Murphy
ZOLL & BRANCH	)	
Counterdefendant.	)	

---

COMES now Plaintiff Zoll & Branch, by and through its counsel of record, B. Ray Zoll, pursuant to Rule 3, Utah Rules of Appellate Procedure, and appeals the Judgment entered in the above-captioned case representing as follows:

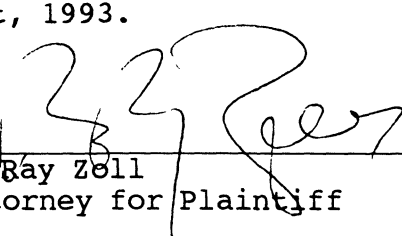
1. The party taking the appeal is the Plaintiff, Zoll & Branch.

2. The Judgments appealed from are the Order Releasing Bond and Order Augmenting Attorney's Fees, filed the 2nd day of August, 1993, as well as the Order denying Motion for New Trial or in the Alternative, Motion to Alter or Amend Findings, filed on July 20, 1993.

3. The Court from which the appeal is taken is the Third Judicial District Court in and for Salt Lake County, State of Utah.

4. The Court to which the appeal is taken is the Court of Appeals of Utah.

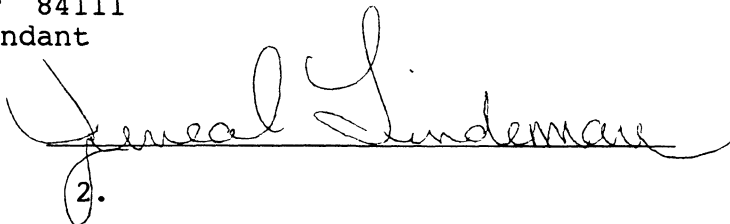
DATED this 9<sup>th</sup> day of August, 1993.

  
\_\_\_\_\_  
B. Ray Zell  
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, with postage prepaid thereon, on this 10<sup>th</sup> day of August, 1993, to the following:

Michael Zundel  
Jeffrey Devashrayee  
370 East South Temple  
Suite 400  
Salt Lake City, UT 84111  
Attorneys for Defendant

  
\_\_\_\_\_  
2.

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