

1994

Merle Lee Allred v. Ann Anastasion Sean Anastasion, Pacificorp Electric Operation, Aetna Health Plans : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MERLE LEE ALLRED,
Plaintiff and Counterclaim :
Defendant, :
vs. : Court of Appeals # 940535-CA
ANN ANASTASTION,
Defendant, Crossclaim :
Defendant and Appellee, District Court # 910906462
SEAN ANASTASION,
Defendant and Crossclaim :
Defendant, :
PACIFICORP ELECTRIC OPERATION and
AETNA HEALTH PLANS, : Priority # 15
Defendants, Counterclaim :
Plaintiffs, Crossclaim :
Plaintiffs and Appellants :
:

BRIEF OF APPELLEE ANN ANASTASION

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE
TIMOTHY R. HANSON, DISTRICT COURT JUDGE**

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**UTAH COURT OF APPEALS
BRIEF**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUES PRESENTED.	1
STANDARD OF REVIEW	2
DETERMINATIVE STATUTES AND CONSTITUTIONAL PROVISIONS	4
STATEMENT OF THE CASE	4
A. Nature of the Case.	4
B. Course of Proceedings and Disposition Below	5
STATEMENT OF FACTS	13
SUMMARY OF THE ARGUMENT.	13
ARGUMENT	15
I. Because Ann Anastasion Made An Offer of Judgment To Plaintiff To End All Litigation And Did Not Make Any Offer to Aetna, Aetna Did Not Have Any Right, Power Or Authority To Accept The Offer of Judgment And Therefore There Was No Meeting Of The Minds Necessary To Create An Enforceable Agreement And Aetna's Purported Acceptance Of The Offer Of Judgment Was Void.	15
II. Because Aetna's Purported Acceptance Of Ann Anastasion's Offer Of Judgment To Plaintiff Was Meaningless, The Judgment Entered Based Upon That Purported Acceptance Was Properly Set Aside.	20
III. The Trial Court's Decision To Award Ann Anastasion Her Costs Against Aetna Is Supported By The Facts And Mandated By Rule 54(c) Utah R. Civ. P..	21
IV. Aetna's Appeal Was Frivolous Or For Delay And Ann Anastasion Should Be Awarded Double Her Costs and Reasonable Attorney Fees For Responding To Aetna's Brief	23

CONCLUSION 24

MAILING CERTIFICATE OF MAILING 25

ADDENDA

ADDENDUM A: Utah Rules of Civil Procedure, Rule 5

ADDENDUM B: Utah Rules of Civil Procedure, Rule 54

ADDENDUM C: Utah Rules of Civil Procedure, Rule 60(b)

ADDENDUM D: Utah Rules of Civil Procedure, Rule 68(b)

ADDENDUM E: Findings of Fact, Conclusions of Law and
Order setting aside the judgment entered
against Ann Anastasion

ADDENDUM F: Judgment on the Jury Verdict

ADDENDUM G: Findings of Fact, Conclusions of Law and
Order regarding the award of costs

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Ames v. Mass</u> , 846 P.2d 468 (Utah App. 1993).....	4, 21
<u>B & R Supply Co. v. Bringham</u> , 503 P.2d 1216 (Utah 1972)...	18
<u>Cessna Fin. Corp. v. Meyer</u> , 575 P.2d 1048 (Utah 1978).....	17
<u>Cottonwood Mall v. Sine</u> , 767 P.2d 499 (Utah 1988).....	16
<u>Crimson v. Western Co. of North America</u> , 742 P.2d 1219 (Utah 1983).....	17
<u>Frampton v. Wilson</u> , 605 P.2d 771 (Utah 1980).....	21, 22
<u>Household Utilities v. The Andreiss Co.</u> , 236 N.W.2d 663 (Wis. 1976).....	17
<u>Ingram v. Forrer</u> , 563 P.2d 181 (Utah 1977).....	18
<u>Jacobs v. Hafen</u> , 875 P.2d 559 (Utah App. 1994).....	3
<u>John Call Engineering, Inc. v. Manti City Corp.</u> , 743 P.2d 1205 (Utah 1987).....	16
<u>Katz v. Pierce</u> , 732 P.2d 92 (Utah 1987).....	3
<u>Lloyd's Unlimited v. Nature's Way</u> , 753 P.2d 507 (Utah App. 1988).....	4
<u>Oberhansly v. Earle</u> , 572 P.2d 1384 (Utah 1977).....	17, 18
<u>O'Brien v. Rush</u> , 744 P.2d 306 (Utah App. 1987).....	24
<u>O'Hara v. Hall</u> , 628 P.2d 1289 (Utah 1981).....	17
<u>Ong Intl. (U.S.A.) v. 11th Ave. Corp.</u> , 850 P.2d 447 (Utah 1993).....	21
<u>Seare v. University of Utah School of Med.</u> , 248 Utah Adv. Rep. 7 (Utah App. 1994).....	18
<u>Spanish Fork Packing Co. v. House of Fine Meats</u> , 508 P.2d 1186 (Utah 1973).....	18
<u>State in Interest of J.J.T.</u> , 877 P.2d 161 (Utah App. 1994)...	2

<u>State v. Murphy</u> , 872 P.2d 480 (Utah App. 1994).....	3
<u>Suniland Corp. v. Radcliffe</u> , 576 P.2d 847 (Utah 1978).....	22, 23
<u>Valcarce v. Bitters</u> , 362 P.2d 427 (Utah 1961).....	16
<u>Watson v. Watson</u> , 837 P.2d 1 (Utah App. 1992).....	3
<u>Zions First Natl. Bank v. Hurst</u> , 570 P.2d 1031 (Utah 1977)..<	17

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

Article VIII § 1 of the Constitution of Utah.....	1
Article VIII § 3 of the Constitution of Utah.....	1
Utah Code Annotated Section 78-2a-3(2)(j) (Supp. 1993).....	1
Rule 5 Utah R. Civ. P. (1993).....	4, 7, 14, 15, 16
Rule 54 Utah R. Civ. P. (1993).....	11, 14, 21
Rule 60 Utah R. Civ. P. (1993).....	3, 4
Rule 68 Utah R. Civ. P. (1993).....	4, 16, 19, 20
Rule 3 Utah R. App. P. (1993).....	1
Rule 4 Utah R. App. P. (1993).....	1
Rule 24 Utah R. App. P (1993).....	4
Rule 33 Utah R. App. P. (1993).....	23, 24

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: Priority # 15

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BRIEF OF APPELLEE ANN ANASTASION

JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Article VIII Sections 1 and 3 of the Constitution of Utah; Utah Code Annotated Section 78-2a-3(2)(j)(Supp. 1993); and Rules 3 and 4 of the Utah Rules of Appellate Procedure (1993).

STATEMENT OF THE ISSUES PRESENTED

ISSUE ONE:

Whether the trial court was correct in ruling that because the Offer of Judgment was made to Plaintiff Merle Lee Allred (hereinafter "Plaintiff"), and was not made to Pacificorp Electric Operations and Aetna Health Plans (hereinafter "Aetna"), that Aetna did not have any right or authority to accept the Offer of Judgment Ann Anastasion made to Plaintiff.

ISSUE TWO:

Whether the trial court was correct in ruling that, based on all the facts and circumstances presented by this case, the Judgment entered against Ann Anastasion should be set aside.

ISSUE THREE:

Whether the trial court was correct in awarding Ann Anastasion the costs she necessarily and reasonably incurred in successfully disputing Aetna's claims for damages.

STANDARDS OF REVIEW

STANDARD OF REVIEW FOR ISSUE ONE:

The Court's determination that Aetna had no right or authority to accept the Offer of Judgment Ann Anastasion made to Plaintiff is a conclusion of law and should be reviewed for correctness and accorded no particular deference. State in Interest of J.J.T., 877 P.2d 161 (Utah App. 1994). The trial

court's conclusion of law, however, is based upon factual findings which have not been challenged on appeal. Since Aetna has failed to marshal the evidence or challenge the trial court's factual determinations the Appellate Court should assume that the record supports the findings of the trial court and review of the accuracy of the trial court's conclusions of law and the application of that law to the facts found by the trial court. Jacobs v. Hafen, 875 P.2d 559, 561 (Utah App. 1994). A clearly erroneous standard is used to review a trial court's findings of fact. They will not be overturned unless they are "against the clear weight of the evidence or the appellate court reaches a definite and firm conviction that a mistake has been made." State v. Murphy, 872 P.2d 480, 481 (Utah App. 1994) citations omitted.

STANDARD OF REVIEW FOR ISSUE TWO:

Trial courts are "vested with considerable discretion under Rule 60(b) in granting or denying [motions] to set aside [] judgment[s]." Katz v. Pierce, 732 P.2d 92, 93 (Utah 1987). A trial court's decision to set aside a judgment under Rule 60(b) can only be reversed if an abuse of discretion is clearly shown. Id.

STANDARD OF REVIEW FOR ISSUE THREE:

A trial court's determination regarding the award of costs is also reviewed "under an abuse of discretion standard" Watson v. Watson, 837 P.2d 1, 7 (Utah App. 1992) and should only

be disturbed if "it is so unreasonable as to manifest a clear abuse of discretion." Ames v. Mass, 846 P.2d 468, 476 (Utah App. 1993) quoting Lloyd's Unlimited v. Nature's Way, 753 P.2d 507, 512 (Utah App. 1988).

DETERMINATIVE STATUTES AND CONSTITUTIONAL PROVISIONS

Rules 5, 54, 60(b), and 68(b) of the Utah Rules of Civil Procedure are determinative of the issues on appeal and pursuant to Rule 24(f) of the Utah Rules of Appellate Procedure, are included respectively as: Addendum "A"; Addendum "B"; Addendum "C"; and Addendum "D" to Defendant's Brief.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case was commenced as a negligence action against Ann Anastasion for personal injuries suffered by Plaintiff when she cut her ankle on a sheet of metal located in Ann Anastasion's garage. After commencement of this action Plaintiff amended her Complaint to include Sean Anastasion and Aetna as parties. Plaintiff's claims against Sean Anastasion were also based in negligence. Because Aetna had paid a portion of Plaintiff's medical bills resulting from her injury, Plaintiff named Aetna as a Defendant so its subrogation rights arising from the incident

at the heart of this lawsuit could be ascertained. Following Aetna's injection into this lawsuit, it filed Crossclaims against Ann Anastasion and Sean Anastasion and a Counterclaim against Plaintiff for any monies recovered as a result of the lawsuit.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiff's First Amended Complaint was filed on October 13, 1991, and served on Ann Anastasion on October 24, 1991. [R. pp.6-11]¹. Aetna was made a party to this lawsuit when it was served with Plaintiff's Third Amended Complaint on June 2, 1992. Plaintiff's Third Amended Complaint, among other things, alleged that:

Defendant [Aetna] is the health insurance carrier for the plaintiff, and has a subrogation interest in any funds received by plaintiff herein, either by way of verdict, judgment or settlement in this action. Further, plaintiff's prosecution of this action and/or settlement of this action may tend to have the effect of settling or compromising the subrogation rights of [Aetna], and, therefore, [Aetna], by reason of its subrogation interest, is a correct and proper party to this action.

Aetna [] is the administrator of [Plaintiff's] health insurance plan....

[R. pp.57-60]. Aetna answered Plaintiff's Third Amended Complaint and admitted it had a subrogation right in any funds received by plaintiff as a result of this lawsuit. [R. p.73].

¹ Unless otherwise stated all references are to the Record as paginated by the Clerk of the Third District Court of Salt Lake County, State of Utah.

Aetna's Answer included a Counterclaim against Plaintiff which asserted both contractual and common law rights to be subrogated to Plaintiff's claims against Ann Anastasion and Sean Anastasion. [R. p.74]. Aetna's Answer also included Crossclaims against Ann Anastasion and Sean Anastasion. Aetna's Crossclaim contended that "[b]y virtue of its payment [of plaintiff's medical bills, it was] entitled, both contractually and under common law principles to be subrogated to the claims of plaintiff against defendants Anastasion in this matter." [R. p.75]. Ann Anastasion answered Aetna's Crossclaim denying that she was negligent or liable to Plaintiff or Aetna for any amount. [R. p.78].

Throughout the discovery and settlement negotiations of this case Ann Anastasion denied any liability for Plaintiff's injuries or the medical bills paid by Aetna. On June 30, 1993, Ann Anastasion filed a motion and memorandum attempting to have Aetna dropped from the lawsuit or in the alternative to have the parties realigned to more accurately reflect Aetna's interests as a plaintiff. [R. pp.105-10]. Aetna opposed Ann Anastasion's motion, arguing that it was subrogated to the claims of its insured and was a necessary party to this lawsuit. [R. p.118]. On August 2, 1993, Judge Hanson issued a Minute Entry setting forth his decision to deny Ann Anastasion's motion to drop Aetna from this lawsuit or realign the parties. [R. pp.185-86]. Judge

Hanson signed an order denying Ann Anastasion's motion on August 17, 1993. [R. pp.287-88A].

After Ann Anastasion filed her Motion to drop Aetna from this lawsuit, but before Judge Hanson ruled on that motion, Ann Anastasion submitted an Offer of Judgment to Plaintiff offering to allow judgment to be taken against her for Seventeen Thousand Five Hundred and No/100 Dollars. [R. pp. 139-40 and 361-65]. Plaintiff did not accept Ann Anastasion's Offer of Judgment. Aetna, however, did attempt to accept Ann Anastasion's offer to Plaintiff. [R. pp. 145-46]. Immediately after learning of Aetna's desire to accept the Offer of Judgment which she had made to Plaintiff, Ann Anastasion contacted Aetna to clarify its mistake. Ann Anastasion informed Aetna that the Offer of Judgment: WAS NOT intended for Aetna's acceptance; WAS made to Plaintiff; WAS intended to end all litigation associated with this claim; WAS served on Aetna pursuant to the service requirements of Rule 5 Utah R. Civ. P.; and WAS clearly in excess of Aetna's total claim against Ann Anastasion. [R. pp. 188-89, 210-12, and 361-65]. In spite of that information Aetna informed Ann Anastasion that it intended to attempt to enforce its purported acceptance of the Offer of Judgment. Thereafter, Ann Anastasion filed a motion and memorandum to have Aetna's purported acceptance of the Offer of Judgment stricken. [R. pp.199-218]. In total disregard for the disputed nature of Aetna's purported acceptance of Ann Anastasion's Offer of

Judgment to Plaintiff, Aetna requested and obtained a Judgment against Ann Anastasion based upon the disputed acceptance of the Offer of Judgment. [R. pp.233-37]. Ann Anastasion then moved the trial court for an order setting aside the Judgment entered against her. [R. pp.259-81]. After reviewing the memoranda submitted and hearing oral argument on the issue Judge Hanson granted Ann Anastasion's Motion to strike Aetna's purported acceptance of the Offer of Judgment to Plaintiff. Consequently, Judge Hanson also granted Ann Anastasion's Motion to set aside the Judgment entered against her.

The trial court's decision to strike Aetna's purported acceptance of the Offer of Judgment to Plaintiff and to set aside the Judgment entered against Ann Anastasion was based upon the following facts:

1. Ann Anastasion made an Offer of Judgment to Merle Allred.
2. The Offer of Judgment was never made nor extended to Pacificorp or Aetna for their acceptance.
3. The Offer of Judgment was intended to end all litigation associated with Merle Allred's claim for personal injuries against Ann Anastasion.
4. Pacificorp and Aetna attempted to accept the Offer of Judgment and obtained a judgment against Ann Anastasion pursuant to that purported acceptance.
5. Pacificorp and Aetna's only interest in this lawsuit is a subrogation interest in Merle Allred's claim against Ann Anastasion for reimbursement of monies it paid out for and on behalf of Merle Allred.
6. The amount set forth in Ann Anastasion's Offer of Judgment to Merle Allred (\$17,500.00) was over

\$2,500.00 greater than the amount Pacificorp and Aetna had paid for Merle Allred's medical bills.

7. Counsel for Ann Anastasion disputed Pacificorp's and Aetna's right and capacity to accept the Offer of Judgment as soon as they learned Pacificorp and Aetna had attempted to accept it.
8. Pacificorp's and Aetna's claimed subjective belief that the Offer of Judgment was made to them was not reasonable.
9. Pacificorp's and Aetna's failure to accept Ann Anastasion's Offer of Judgment would not have obliged Pacificorp and Aetna to pay Ann Anastasion's costs in the event a verdict less favorable than the Offer of Judgment was obtained against Ann Anastasion.

[R. pp.361-365]. A copy of the Findings of Fact, Conclusions of Law and Order are attached hereto as "Addendum E."

This case was tried to a jury in February of 1994. After a trial on the merits, the case was submitted to the jury on special verdict interrogatories. The jury answered the following interrogatories:

1. Considering all of the evidence in this case, do you find from a preponderance of the evidence that the Defendant, Ann Anastasion was negligent?

YES_____

NO XX

2. Considering all of the evidence in this case, do you find from a preponderance of the evidence that the Defendant, Sean Anastasion was negligent?

YES_____

NO XX

The trial court then entered a Judgment on the Jury Verdict which dismissed all of Plaintiff's claims and Aetna's Crossclaims against Ann Anastasion with prejudice. A copy of the Judgment on the Jury Verdict is attached hereto as "Addendum F."

The Judgment on the Jury Verdict also awarded Ann Anastasion the costs she incurred in successfully defending this action. [R. pp.681-83]. Aetna objected to the Judgment on the Jury Verdict and to the award of costs to Ann Anastasion. [R. pp.684-87]. The initial Judgment on the Jury Verdict did not apportion payment of those costs between Aetna and Plaintiff. Nevertheless, after receiving and considering memoranda on Aetna's objections the trial court clarified its ruling on the costs awarded to Ann Anastasion. In a June 8, 1994, Minute Entry Judge Hanson ruled that because Aetna's subrogation claim for the amount it paid to or on behalf of Plaintiff was not disputed, Aetna would not be responsible for any costs incurred by Ann Anastasion to dispute Plaintiff's claims for damages. The court also ruled that Aetna would be obligated for those costs "relating to liability questions...." [R. pp.889-95]. After additional objections and some confusion the trial court finally signed and entered Findings of Fact, Conclusions of Law and an Order which stated:

FINDINGS OF FACT

1. Plaintiff paid the statutory jury demand fee of \$50.00.
2. Subsequently and unnecessarily, Defendant Ann Anastasion also paid the statutory jury demand fee of \$50.00.
3. Aetna's only involvement in this litigation dealt with its subrogation rights as Plaintiff's health insurance carrier and, throughout this litigation and for all purposes, stood in the shoes of Plaintiff.

4. The amount paid by Aetna for and on behalf of Merle Allred was not in dispute.
5. Aetna's only role in the trial of this matter was in regards to Defendants' liability for the incident that caused Plaintiff's injury.
6. Depositions of the following individuals were all necessarily and reasonably taken to properly defend this action:
 - a) Plaintiff, Merle Lee Allred;
 - b) Defendant, Sean Anastasion;
 - c) Defendant, Ann Anastasion;
 - d) Becky Sue Neville;
 - e) Dr. Robert Hansen; and
 - f) Dr. G. Lynn Rasmussen.
7. Defendant Ann Anastasion necessarily and reasonably paid the statutory witness fee of Seventeen and No/100 Dollars (\$17.00) to the following individuals:
 - a) Holy Cross Hospital;
 - b) Dr. Robert P. Hansen;
 - c) Defendant, Sean Anastasion;
 - d) Ted Conger, D.C.;
 - e) Dr. David E. Curtis;
 - f) Bryan Drennan; and
 - g) Dr. G. Lynn Rasmussen.
8. After a trial on the merits Defendant, Ann Anastasion, was the prevailing party.

CONCLUSIONS OF LAW

1. Pursuant to Rule 54(d) Defendant Ann Anastasion, as the prevailing party, is entitled to recover those costs and fees she necessarily and reasonably incurred in defending this action.
2. Defendant Ann Anastasion cannot recover the amount she unnecessarily paid to request a jury.
3. Aetna and Plaintiff are jointly and severally liable for the costs incurred by Defendant Ann Anastasion which relate to liability for the accident which injured Plaintiff.

4. Plaintiff is solely liable for the costs and fees incurred by Defendant Ann Anastasion which related to the establishment or rebuttal of Plaintiff's claimed damages.

ORDER

After reviewing the memoranda submitted by all parties and the applicable law, being fully informed and for good cause shown the Court hereby Orders that:

1. Both Aetna and Plaintiff are jointly and severally liable to Ann Anastasion, the prevailing party, for the following costs:
 - a) court reporter fees for the depositions of Defendant Ann Anastasion, Defendant Sean Anastasion and Plaintiff, Merle L. Allred (first deposition only) in an amount of \$ 288.10; and
 - b) witness fees paid to Sean Anastasion and Bryan Drennan in an amount of \$34.00.
2. Plaintiff is solely liable to Ann Anastasion, the prevailing party, for the following costs:
 - a) court reporter fees for the depositions of Merle L. Allred (2nd deposition only), Becky Sue Neville, Dr. Robert P. Hansen, and Dr. G. Lynn Rasmussen in the amount of \$874.70; and
 - b) witness fees paid to Holy Cross Hospital, Dr. Robert P. Hansen, Ted Conger, D.C., Dr. David E. Curtis, Bryan Drennan, and Dr. G. Lynn Rasmussen in the amount of \$119.00.
3. Defendant Ann Anastasion can only collect a total of One Thousand Three Hundred Fifteen and 80/100 Dollars (\$1,315.80) of the costs necessarily incurred in successfully defending against Plaintiff's and Aetna's claims. Plaintiff Merle L. Allred, is solely liable for \$993.70 of that amount and Defendant Ann Anastasion can collect the remaining \$322.10 from either of the parties or a portion from each of them.
4. Judgment shall be entered against Pacificorp Electric Operations and Aetna Health Plans in favor of Ann Anastasion in the amount of Three Hundred Twenty Two and 10/100 Dollars (\$322.10).

5. Judgment shall be entered against Merle Lee Allred in favor of Ann Anastasion in the amount of One Thousand Three Hundred Fifteen and 80/100 Dollars (\$1,315.80).

[R. pp.970-75]². A copy of the Findings of Fact, Conclusions of Law and Order regarding the award of costs is attached hereto as "Addendum "G"

Aetna has appealed the trial court's decision to strike its purported acceptance of the Offer of Judgment to Plaintiff, the trial court's decision to set aside the judgment based upon that ineffective acceptance, and the trial court's award of some of the costs in this case to Ann Anastasion and against Aetna.

STATEMENT OF FACTS

The facts relevant to the issues on appeal are included in the preceding section "Course of Proceedings and Disposition Below." Ann Anastasion does not believe there are any additional facts that have any bearing on the issues involved in this appeal.

SUMMARY OF ARGUMENT

Ann Anastasion made an Offer of Judgment to Plaintiff in order to end all litigation associated with Plaintiff's claim.

² As of the date on which this Brief was prepared the Clerk of the Third District Court had not yet numbered the pages of the Findings of Fact, Conclusions of Law and Order regarding costs which was finally signed by Judge Hanson. Pages 970-75 represent the page numbers that would be affixed to the pages of the record if the unnumbered pages were consecutively numbered by the clerk from the last page of the transcript of oral argument until the last page in the file.

Aetna was not the recipient or offeree of that Offer of Judgment and had no right, power or authority to accept it. An essential element of a legally enforceable agreement is a meeting of the minds, or mutual assent by ALL parties. In this case there was no meeting of the minds. An offer was made to Plaintiff to end all litigation and Aetna attempted to distort that offer into a judgment against Ann Anastasion. Aetna was provided with a copy of the Offer of Judgment as required by Rule 5 of the Utah Rules of Civil Procedure which states: "...every written notice, appearance, demand, offer of judgment...and similar paper shall be served upon each of the parties." (emphasis added) Rule 5 Utah R. Civ. P. Ann Anastasion's compliance with Rule 5, however, should not be misconstrued to create an unintended obligation on Ann Anastasion.

Because the Offer of Judgment was not made to Aetna, the Judgment entered pursuant to Aetna's purported acceptance of the Offer of Judgment was properly set aside. The nature of Plaintiff's claims, the facts of the case and the jury's verdict in this matter all support Judge Hanson's decision that due to the mistake, fairness, equity and justice required the Judgment to be set aside.

Rule 54(d) Utah R. Civ. P. mandates that the prevailing party recover its costs in successfully defending a claim. In the instant case Ann Anastasion was the prevailing party. Judge Hanson's decision to award Ann Anastasion her costs is supported

by the facts and circumstances of this case as well as the applicable rules. His decision to make Aetna responsible for only those costs associated with disputing liability is well founded in reason, equity and the law.

ARGUMENT

I. BECAUSE ANN ANASTASION MADE AN OFFER OF JUDGMENT TO PLAINTIFF TO END ALL LITIGATION AND DID NOT MAKE ANY OFFER TO AETNA, AETNA DID NOT HAVE ANY RIGHT, POWER OR AUTHORITY TO ACCEPT THE OFFER OF JUDGMENT AND THEREFORE THERE WAS NO MEETING OF THE MINDS NECESSARY TO CREATE AN ENFORCEABLE AGREEMENT AND AETNA'S PURPORTED ACCEPTANCE OF THE OFFER OF JUDGMENT WAS VOID

The trial court determined that Ann Anastasion made an Offer of Judgment to Plaintiff and that the Offer of Judgment was intended to end all litigation in this matter and was not made to or intended for Aetna. The court also found that, in light of the facts and circumstances surrounding the Offer of Judgment, Aetna's claimed subjective belief that it could accept the Offer of Judgment was unreasonable. [R. pp.361-65]. Since Aetna has failed to challenge those factual determinations they should form the basis for this Court's decision.

Aetna contends that its receipt of Ann Anastasion's Offer of Judgment to Plaintiff created, in it, a power of acceptance. That claimed power of acceptance is apparently based upon contract principles. Aetna, however, has failed to recognize that it only received a copy of Ann Anastasion's Offer of Judgment to Plaintiff because Rule 5 of the Utah Rules of

Civil Procedure requires that all offers of judgment be provided to all parties. Rule 5 Utah R. Civ. P. (1993). While the Offer of Judgment did not specify on its face that it was for Plaintiff's acceptance only, a multitude of facts in existence at the time the Offer of Judgment was filed evidence that the Offer of Judgment was intended for Plaintiff and not for Aetna. Those facts include: Aetna's admitted role in this litigation as nothing more than a subrogated party to Plaintiff's claim; the purposes of a Rule 68 Utah R. Civ. P. offer of judgment; the pending motion to have Aetna dismissed from the litigation; the fact that Aetna's total claim was significantly less than the Offer of Judgment; the hotly contested liability issues involved in this dispute; and prior attempts to negotiate a settlement of this dispute with a lump sum payment.

A. A Meeting Of The Minds Is Necessary Before A Legally Binding Agreement Can Be Reached

Aetna's arguments also ignore the well settled principle of contract law that an essential condition "precedent to the enforcement of any contract is that there be meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced." Cottonwood Mall v. Sine, 767 P.2d 499, 502 (Utah 1988); quoting Valcarce v. Bitters, 362 P.2d 427, 428 (Utah 1961). "[T]here can be no contract without the mutual assent of the parties." John Call Engineering, Inc. v. Manti City Corp.,

743 P.2d 1205, 1207 (Utah 1987). "[M]utual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all terms." Crimson v. Western Co. of North America, 742 P.2d 1219, 1221 (Utah 1983); quoting Cessna Fin. Corp. v. Meyer, 575 P.2d 1048, 1050 (Utah 1978). In order to determine whether there is mutual assent by the parties, the parties' intentions are controlling. Oberhansly v. Earle, 572 P.2d 1384, 1386 (Utah 1977). See also Zions First Natl. Bank v. Hurst, 570 P.2d 1031, 1033 (Utah 1977). Whether or not a party intended to enter into a contract is a question of fact to be decided by the trial court. O'Hara v. Hall, 628 P.2d 1289, 1290 (Utah 1981). The Utah Supreme Court's ruling in O'Hara was based in part upon a quote from a Wisconsin Supreme Court decision which stated "[t]here is not a meeting of the minds where the parties do not intend to contract and the question of intent generally is one to be determined by the trier of fact." Household Utilities v. The Andreiss Co., 236 N.W.2d 663 (Wis. 1976).

In the instant case the trial court determined that Ann Anastasion's Offer of Judgment was an attempt to settle this lawsuit and was not an invitation intended for Aetna's acceptance. Without the intent to enter into an agreement, there could be no mutual assent by Ann Anastasion and Aetna. Consequently, a meeting of the minds would have been impossible. Without a meeting of the minds there is no enforceable agreement

and Judge Hanson's decision to strike Aetna's purported acceptance of Ann Anastasion's Offer of Judgment to Plaintiff was proper and should be upheld.

B. One Party's Expectation Or Belief Cannot Create A Meeting Of The Minds

One party's unsubstantiated expectations cannot establish a meeting of the minds sufficient to create an enforceable contact. Seare v. University of Utah School of Med., 248 Utah Adv. Rep. 7, 9-10 (Utah App. 1994). An honest difference of understanding is fatal to the creation of a contract. Ingram v. Forrer, 563 P.2d 181 (Utah 1977). In the instant case, Aetna's claimed belief that Ann Anastasion offered to permit it to take a judgment against her demonstrates the differing beliefs of the two involved parties. Such a difference of understanding is a barrier preventing the creation of an enforceable agreement.

C. The Party Attempting To Enforce A Contract Has The Burden Of Proving The Existence Of A Contract

The burden to prove the existence of a contract is on the party seeking to enforce it. Oberhansly, 572 P.2d at 1386; citing B & R Supply Co. v. Bringham, 503 P.2d 1216 (Utah 1972). See also Spanish Fork Packing Co. v. House of Fine Meats, 508 P.2d 1186, 1187 (Utah 1973). Aetna has hinged its entire argument on its claimed subjective belief that Ann Anastasion's Offer of Judgment to Plaintiff was intended for its acceptance. Aetna, however, has failed to produce any support for the

elements necessary to establish a meeting of the minds and the existence of an enforceable agreement. Judge Hanson, found Aetna's alleged belief to be unreasonable. Aetna's erroneous assumption should, therefore, make no difference in the outcome of this appeal, and Judge Hanson's decision to strike Aetna's purported acceptance of Ann Anastasion's Offer of Judgment to Plaintiff should be upheld.

Judge Hanson's determination that Ann Anastasion's Offer of Judgment would have no force or effect on Aetna eliminates Aetna's argument that it was forced to accept the Offer of Judgment. Additionally, Aetna was specifically advised that the Offer of Judgment was not intended for its acceptance and would not impact Aetna. Aetna, however, disregarded that information and took additional steps to attempt to accept and enforce the Offer of Judgment. [R. pp.947-50]. Irregardless of the potential impact of the Offer of Judgment on Aetna, there was no meeting of the minds and, therefore, Ann Anastasion has no legal obligation to recognize Aetna's meaningless acceptance of her Offer of Judgment to Plaintiff.

D. Rule 68 Utah R. Civ. P. Would Be Frustrated If Aetna's Acceptance Of Ann Anastasion's Offer Of Judgment To Plaintiff Is Recognized As Valid

Rule 68 of the Utah Rules of Civil Procedure is intended to facilitate the economic, reasonable and efficient resolution of claims. To force Ann Anastasion to be indebted to Aetna for the amount set forth in her Offer of Judgment to Plaintiff and still

defend her claims against Aetna would frustrate rather than promote the purpose behind Rule 68. This is particularly true where the status of the party attempting to accept an offer of judgment is nothing more than a subrogated party. Aetna did not have any independent claim against Ann Anastasion. Its claim was based entirely and solely on Plaintiff's claim. It would be ludicrous to subject Ann Anastasion to a Judgment pursuant to Aetna's purported acceptance of the Offer of Judgment and then subject Ann Anastasion to the rigors of jury trial. In order to promote the purposes of the Utah Rules of Civil Procedure and to protect the interests of the parties to this lawsuit Judge Hanson's decision striking Aetna's purported acceptance of the Offer of Judgment should be upheld.

II. BECAUSE AETNA'S PURPORTED ACCEPTANCE OF ANN ANASTASION'S OFFER OF JUDGMENT TO PLAINTIFF WAS MEANINGLESS, THE JUDGMENT ENTERED BASED UPON THAT PURPORTED ACCEPTANCE WAS PROPERLY SET ASIDE

The trial court ordered that in the interests of justice the Judgment entered against Ann Anastasion be set aside due to mistake. [R. pp.950-51]. The facts and circumstances of this case and the law set forth above clearly supports that ruling. Aetna has failed to meet its burden to demonstrate that Judge Hanson's decision was an abuse of discretion and the trial court's ruling setting aside the judgment should be upheld.

III. THE TRIAL COURT'S DECISION TO AWARD ANN ANASTASION HER COSTS AGAINST AETNA IS SUPPORTED BY THE FACTS AND MANDATED BY RULE 54(c) UTAH R. CIV. P.

Ann Anastasion was forced into court against her will. She made reasonable efforts to resolve this dispute prior to the jury trial conducted in February of 1994. Nevertheless, due to the positions taken by Aetna and Plaintiff, this matter proceeded to trial. After the trial the jury found Ann Anastasion without fault for the incident at the heart of Aetna's and Plaintiff's claims. The Jury's verdict made Ann Anastasion the prevailing party to this lawsuit.

Rule 54(d) Utah R. Civ. P. states that "... costs **SHALL BE AWARDED AS OF COURSE** to the prevailing party..." (emphasis added). The award of "costs is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." Ong Intl. (U.S.A.) v. 11th Ave. Corp., 850 P.2d 447, 460 (Utah 1993). After the presentation of evidence and a trial on the merits Ann Anastasion was the prevailing party and as such should be awarded the costs she incurred to successfully defend Plaintiff's and Aetna's claims against her. The rule followed in Utah is that the prevailing party is entitled to recover "those fees which are required to be paid to the court and to witnesses" Frampton v. Wilson, 605 P.2d 771, 774 (Utah 1980) as well as the costs and expenses that are "necessary to the presentation and preparation of a case." Ames, 846 P.2d at 475; citing Frampton, 605 P.2d at 774. Taxable costs include

expenses for depositions "taken in good faith and, in light of the circumstances, appeared to be essential for the development and presentation of the case." Id.

Because Aetna's claimed damages were liquidated and the only contingency on its recovery was liability for Plaintiff's injury, the trial court ruled that Aetna would only be held responsible for the costs incurred to defend issues of liability. [R. pp. 970-75]³ The trial court found that the depositions of Plaintiff, Ann Anastasion and Sean Anastasion, as well as the witness fees paid to Sean Anastasion and Bryan Drennan, were necessarily and reasonably incurred to dispute liability. Those are the only costs that Aetna was ordered to pay. Plaintiff was burdened with all of the costs incurred to dispute her claims for damages. The trial court's ruling which requires Aetna to bear the costs incurred by Ann Anastasion in disputing liability for its claims is well within its discretion and should not be overturned on appeal.

Aetna propounds conflicting arguments. In one section of its brief it argues that it accepted the Offer of Judgment because it did not want to be held liable for Ann Anastasion's costs. In another section of its brief it argues that it cannot and should not be held responsible for Ann Anastasion's costs. Aetna's reliance on Suniland Corp. v. Radcliffe, 576 P.2d 847

³ See Footnote 2.

(Utah 1978), is misplaced. Suniland is factually and procedurally distinct from this case. In Suniland, the appellant was unable to demonstrate that the trial court's decision was an abuse of discretion. Furthermore, in Suniland, the plaintiff and not the defendant prevailed. In this case Aetna filed a Crossclaim against Ann Anastasion claiming that she was negligent and that her negligence had resulted in its having to pay a portion of Plaintiff's medical bills. Those claims were defeated at trial. Aetna collected nothing on its Crossclaim and the costs awarded by Judge Hanson were necessarily and reasonably incurred to defeat Aetna's contention of liability.

Utah law permits the prevailing party to recover the costs incurred to litigate a lawsuit. The costs are to be recovered from the losing parties. In the instant case Defendant Ann Anastasion was the prevailing party and Aetna lost. The trial court's decision to award Ann Anastasion her costs was reasonable, supported by the rules and the law and does not amount to an abuse of its discretion. Judge Hanson's decision, therefore should also be upheld.

IV. AETNA'S APPEAL WAS FRIVOLOUS OR FOR DELAY AND ANN ANASTASION SHOULD BE AWARDED DOUBLE HER COSTS AND REASONABLE ATTORNEY FEES FOR RESPONDING TO AETNA'S BRIEF

Rule 33 Utah R. App. P. permits this court to award double costs and attorney fees when an appeal "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" or is "interposed for an 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..." Rule 33(a) and (b) Utah R. App. P. Aetna's conduct throughout this entire case manifests an abuse of the legal system. This appeal has no reasonable factual or legal basis and an award of sanctions and costs would be appropriate. O'Brien v. Rush, 744 P.2d 306 (Utah App. 1987). Ann Anastasion, therefore, requests that she be awarded double her costs and the reasonable attorney fees incurred in responding to Aetna's appeal.

CONCLUSION

The Offer of Judgment filed by Ann Anastasion was made to Plaintiff and not to Aetna. Aetna had no right or authority to accept it. Its purported acceptance was unreasonable under the facts and circumstances of this case and Aetna has failed to demonstrate that there was or ever could have been a meeting of the minds regarding the Offer of Judgment. Aetna's arguments to the contrary are without factual and legal support. Judge Hanson correctly vacated Aetna's purported acceptance of Ann Anastasion's Offer of Judgment to Plaintiff and properly set aside the Judgment which was based upon that meaningless acceptance. Judge Hanson's award of costs against Aetna is supported by the facts of this case, the rules and was well

within the discretionary authority granted to trial courts. This appeal was taken without any substantial likelihood of success and Aetna and or its attorneys should be ordered to pay double Ann Anastasion's costs as well as the attorney fees incurred during this appeal.

RESPECTFULLY SUBMITTED this 7th day of December, 1994.

SCALLEY & READING
Attorneys for Ann Anastasion

Steven B. Smith
By: Steven B. Smith

MAILING CERTIFICATE

This is to certify that on the 7th day of December, 1994, I mailed two true and correct copies of Ann Anastasion's Brief, first class, U.S. mail, postage prepaid to the following:

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Steven B. Smith
Steven B. Smith

ADDENDUM "A"

Rule 5. Service and filing of pleadings and other papers.

(a) **Service: When required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, notice of signing or entry of judgment under Rule 58A(d), and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2) (default proceedings) or pleadings asserting new or additional claims for relief against them which shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Service: How made.**

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(2) A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any foreign attorney practicing in any of the courts of this state.

(c) **Service: Numerous defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may upon motion of a party or on its own initiative order that depositions, interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(e) **Filing with the court defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk, if any.

(Amended effective Sept. 4, 1985; Jan. 1, 1987.)

Advisory Committee Note. — Rule 5(d) is amended to give the trial court the option, either on an ad hoc basis or by local rule, of ordering that discovery papers, depositions, written interrogatories, document requests, requests for admission, and answers and responses need not be filed unless required for specific use in the case. The committee is of the view that a local rule of the district courts on the subject should be encouraged.

Compiler's Notes. — This rule is similar to Rule 5, F.R.C.P.

Cross-References. — How civil action commenced, U.R.C.P. 3(a).

Service by mail, additional time after, U.R.C.P. 6(e).

Third-party practice, U.R.C.P. 14.

NOTES TO DECISIONS

ANALYSIS

Filed depositions.

Service upon attorney.

—Presumption of authorization.

When service required.

—Default judgment.

—Appeal.

Cited.

Filed depositions.

Sealed pretrial depositions filed with a court are presumptively public under the Utah Public and Private Writings Act (former § 78-26-1 et seq.; see now Title 63, Chapter 2) and can be kept secret only on a showing of good cause. *Carter v. Utah Power & Light Co.*, 800 P.2d 1095 (Utah 1990).

Service upon attorney.

—Presumption of authorization.

Where defendant engaged attorney only to file motion but never so notified court or attorney, appearance of attorney to file motion raised presumption that he represented defendant in full action. Where defendant presented no clear and convincing evidence to refute presumption, notice given to attorney of date set for trial was good notice to defendant. *Blake v. Blake*, 17 Utah 2d 369, 412 P.2d 454 (1966).

When service required.

—Default judgment.

Plaintiff was under no duty to notify defen-

dants of default judgment entered against them. *Central Bank & Trust Co. v. Jensen*, 656 P.2d 1009 (Utah 1982) (decided before 1985 addition of reference to Rule 55).

Plaintiffs' failure to mail a copy of the default judgment to defendants did not invalidate the default judgment when defendants received the notice of default in time to move to set aside the judgment. *Lincoln Benefit Life Ins. Co. v. D.T. Southern Properties*, 838 P.2d 672 (Utah Ct. App. 1992).

—Appeal.

Under former Rule 73(h), time for appeal from default judgment in city court runs from date of notice of entry of such judgment, rather than from the date of judgment. *Buckner v. Main Realty & Ins. Co.*, 4 Utah 2d 124, 288 P.2d 786 (1955) (but see Rule 58A(d)).

Cited in *Remington-Rand, Inc. v. O'Neil*, 4 Utah 2d 270, 293 P.2d 416 (1956); *Pillsbury Mills, Inc. v. Nephi Processing Plant, Inc.*, 7 Utah 2d 286, 323 P.2d 266 (1958); *Dehm v. Dehm*, 545 P.2d 525 (Utah 1976); *Triple I Supply, Inc. v. Sunset Rail, Inc.*, 652 P.2d 1298 (Utah 1982); *Sperry v. Smith*, 694 P.2d 581 (Utah 1984); *Williams v. State*, 716 P.2d 806 (Utah 1986); *Walker v. Carlson*, 740 P.2d 1372 (Utah Ct. App. 1987); *Maverik Country Stores, Inc. v. Industrial Comm'n*, 860 P.2d 944 (Utah Ct. App. 1993).

COLLATERAL REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d Attorneys at Law § 6; 61A Am. Jur. 2d Pleading §§ 350 to 352.

C.J.S. — 7 C.J.S. Attorney and Client § 15; 71 C.J.S. Pleading §§ 408, 409, 411, 413.

A.L.R. — Construction of phrase "usual place of abode," or similar terms referring to

abode, residence, or domicil, as used in statutes relating to service of process, 32 A.L.R.3d 112.

Service of process by mail in international civil action as permissible under Hague Convention, 112 A.L.R. Fed. 241.

Key Numbers. — Attorney and Client ⇐ 90; Pleading ⇐ 331 to 338.

Rule 6. Time.

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor

ADDENDUM "B"

when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) **Draft report.** Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) **Objections to appointment of master.** A party may object to the appointment of any person as a master on the same grounds as a party may challenge for cause any prospective trial juror in the trial of a civil action. Such objections must be heard and disposed of by the court in the same manner as a motion.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is similar to Rule 53, F.R.C.P.

Cross-References. — Challenging of jurors for cause, U.R.C.P. 47(f).

NOTES TO DECISIONS

ANALYSIS

Report.

—Failure to object.

—Waiver.

Scope of appointment.

Status as judicial officer.

Report.

—Failure to object.

—Waiver.

One who made no objection to master's report as required by this rule could not question the report for the first time on appeal from district court order adopting the master's findings. *Score v. Wilson*, 611 P.2d 367 (Utah 1980).

Scope of appointment.

A special master who was directed to review requests for cost reimbursements exceeded the scope of his appointment by investigating and reporting on the issue of attorney's fees since the court had already ordered an award of attorney's fees and the parties had no notice that the master was to review that award nor did the parties have an opportunity to participate in the master's proceedings. *Plumb v. State*, 809 P.2d 734 (Utah 1990).

Status as judicial officer.

A special master has the duties and obligations of a judicial officer, and thus should not engage in unethical ex parte contacts with the judge overseeing the case on matters pertinent to the substance of the referral. *Plumb v. State*, 809 P.2d 734 (Utah 1990).

COLLATERAL REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d Equity §§ 226, 228; 66 Am. Jur. 2d References §§ 1 et seq., 30 et seq.

C.J.S. — 30A C.J.S. Equity §§ 515, 520, 521 to 528, 532, 533, 535, 537, 539 et seq.; 76 C.J.S. References §§ 7 et seq., 60 to 110, 122 et seq.

A.L.R. — Bankruptcy, right of creditor who has not filed timely petition for review of referee's order to participate in appeal secured by another creditor, 22 A.L.R.3d 914.

Power of successor or substituted master or referee to render decision or enter judgment on

testimony heard by predecessor, 70 A.L.R.3d 1079.

Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 A.L.R.4th 889.

What are "exceptional conditions" justifying reference under Rule of Civil Procedure 53(b), 1 A.L.R. Fed. 922.

Key Numbers. — Equity ⇌ 393 to 395, 401, 404 to 406; Reference ⇌ 3 et seq., 35 to 77, 99 et seq.

PART VII. JUDGMENT.

Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determina-

tion and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) **Demand for judgment.**

(1) **Generally.** Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) **Costs.**

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3), (4) [Deleted.]

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket. (Amended effective January 1, 1985.)

Amendment Notes. — Subdivisions (d)(3) and (d)(4), relating to the award of costs by the appellate court and costs in original proceedings before the Supreme Court, were repealed with the adoption of the Utah Rules of Appellate Procedure, effective January 1, 1985. See, now, Rule 34(d), Utah R.App.P.

Compiler's Notes. — This rule is similar to Rule 54, F.R.C.P.

Cross-References. — Continuances, discre-

tion to require payment of costs, U.R.C.P. 40(b).

Judges' retirement fee, taxing as costs, § 49-6-301.

State, payment of costs awarded against, § 78-27-13.

Stay of judgment upon multiple claims, U.R.C.P. 62(h).

Witness fees, taxing as costs, § 21-5-8.

ADDENDUM "C"

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to

transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages — modern cases, 5 A.L.R.5th 875.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness — modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.) — modern cases, 97 A.L.R. Fed. 189.

Key Numbers. — New Trial ⇌ 13 et seq., 110, 116.

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Compiler's Notes. — This rule is similar to Rule 60, F.R.C.P.

Cross-References. — Fee for filing motion to set aside judgment, § 21-1-5.

NOTES TO DECISIONS

ANALYSIS

"Any other reason justifying relief."
—Default judgment.
—Impossibility of compliance with order.
—Incompetent counsel.
—Lack of due process.
—Merits of case.

—Mistake or inadvertence.
—Mutual mistake.
—Real party in interest.
Appeals.
Clerical mistakes.
—Computation of damages.
—Correction after appeal.
—Date of judgment.

ADDENDUM "D"

NOTES TO DECISIONS

Order to make deposit.

In a suit by an auto leasing agency against a bank for breach of a contract in which the latter had agreed to buy the rights to rentals on cars leased by the agency, the trial court's order that all the funds in question be paid into court or, alternatively, placed in a bank account was improper under this rule, since there was no evidence that the leasing agency either

possessed the funds or held them as trustee for the bank; even if the order had been proper, the trial court's dismissal of agency's complaint for failure to comply with the order was improper unless it appeared the agency had the ability to comply but contumaciously refused to do so. *Globe Leasing Corp. v. Bank of Salt Lake*, 547 P.2d 197 (Utah 1976).

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Deposits in Court § 1 et seq.

C.J.S. — 26A C.J.S. Deposits in Court § 1 et seq.

A.L.R. — Garnishment, funds deposited in court as subject of, 1 A.L.R.3d 936.

Appealability of order directing payment of money into court, 15 A.L.R.3d 568.

Eminent domain: payment or deposit of award in court as affecting condemner's right to appeal, 40 A.L.R.3d 203.

Key Numbers. — Deposits in Court § 1 et seq.

Rule 68. Offer of judgment.

(a) **Tender of money before suit.** 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.

(b) **Offer before trial.** At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

Compiler's Notes. — Subdivision (a) is similar to Rule 68, F.R.C.P.

Cross-References. — Joint tort-feasors, settlement and release, §§ 78-27-40 to 78-27-43.

Payment of medical or similar expenses not admissible in evidence, U.R.E. 409.

Release, settlement or statement by injured person, rescission or disavowal, §§ 78-27-32 to 78-27-36.

NOTES TO DECISIONS

ANALYSIS

Offer before trial.

—Costs.

—Attorney fees.

—Bill of costs.

—Evidence.

—Privilege.

Tender of money before suit.

—Mortgage foreclosure.

—Quiet title.

—Waiver of defects.

Offer before trial.

—Costs.

—Attorney fees.

The costs provided for in this rule are limited to taxable costs only and do not include attor-

ney fees. *Nelson v. Newman*, 583 P.2d 601 (Utah 1978).

—Bill of costs.

Where defendants at commencement of trial offered in writing to allow judgment for certain sum and accrued costs in full satisfaction of plaintiff's claims, plaintiff could file bill of costs. *Smith v. Nelson*, 23 Utah 512, 65 P. 485 (1901).

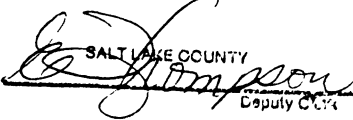
—Evidence.

—Privilege.

Letter written before suit offering to permit adverse party to take judgment for specific amount was privileged and could not be used as evidence. *McKinney v. Carson*, 35 Utah 180, 99 P. 660 (1909).

ADDENDUM "E"

SEP 28 1993

By  SALT LAKE COUNTY
Deputy Clerk

JOHN E. HANSEN, #4590
STEVEN B. SMITH, #5797
SCALLEY & READING
Attorneys for Defendant
Ann Anastasion
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

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

MERLE LEE ALLRED,	:	FINDINGS OF FACT, CONCLUSIONS
Plaintiff,	:	OF LAW AND ORDER
vs.	:	
ANN ANASTASION and SHAWN	:	Civil No. 910906462PI
ANASTASION,	:	
Defendants.	:	Judge Timothy R. Hanson

Defendant Ann Anastasion's Motions: for Relief from the Judgment rendered against her pursuant to her Offer of Judgment to Merle Allred; for costs, attorney fees and sanctions; and to dismiss PacifiCorp and Aetna from this lawsuit came regularly before the Court on the 27th day of August, 1993, at the hour of 4:00 p.m. pursuant to notice. Steven B. Smith of Scalley & Reading appeared on behalf of Ann Anastasion and Blake Atkin appeared on behalf of PacifiCorp and Aetna. Memoranda having been submitted by the respective parties and the matter having been argued and

submitted to the Court and the Court having rendered its decision makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Ann Anastasion made an Offer of Judgment to Merle Lee Allred.

2. That Offer of Judgment was never made nor extended to PacifiCorp and or Aetna for their acceptance.

3. That Offer of Judgment was intended to end all litigation associated with Merle Allred's claim for personal injuries against Ann Anastasion.

4. PacifiCorp and Aetna attempted to accept that Offer of Judgment and obtained a judgment against Ann Anastasion pursuant to that purported acceptance.

5. PacifiCorp and Aetna's only interest in this lawsuit is a subrogation interest in Merle Allred's claim against Ann Anastasion for reimbursement of monies it paid out for and on behalf of Merle Allred.

6. The amount set forth in Ann Anastasion's Offer of Judgment to Merle Allred (\$17,500.00) was over \$2,500.00 greater than the amount PacifiCorp and Aetna had paid for Merle Allred's medical bills.

7. Counsel for Ann Anastasion disputed PacifiCorp's and Aetna's right and capacity to accept the Offer of Judgment as soon as they learned PacifiCorp and Aetna had attempted to accept it.

8. PacifiCorp's and Aetna's claimed subjective belief that the Offer of Judgment was made to them was not reasonable.

9. PacifiCorp's and Aetna's failure to accept Ann Anastasion's Offer of Judgment would not have obliged PacifiCorp and Aetna to pay Ann Anastasion's costs in the event a verdict less favorable than the Offer of Judgment was obtained against Ann Anastasion.

10. Plaintiff's Third Amended Complaint naming PacifiCorp and Aetna as Defendants in this lawsuit was properly filed with this Court.

CONCLUSIONS OF LAW

1. No power of acceptance of Ann Anastasion's Offer of Judgment was ever created in PacifiCorp and or Aetna.

2. At no time did either PacifiCorp or Aetna have the right, power or authority to accept Ann Anastasion's Offer of Judgment.

3. The judgment obtained by PacifiCorp and Aetna is vacated and has no legal force or affect whatsoever.

4. Ann Anastasion's Offer of Judgment will have no legal force or affect whatsoever.

5. Each party is to bear its own costs and attorney fees.

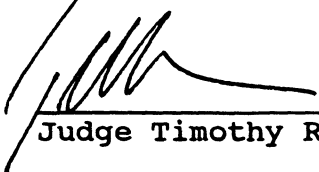
6. Sanctions are not appropriate under the facts and circumstances upon which this Order is based.

ORDER

The judgment rendered for PacifiCorp and Aetna against Ann Anastasion on August 4, 1993, is hereby vacated and Ann Anastasion is relieved from any and all legal force and or affect that judgment may have had. Ann Anastasion's Motion for Costs, Attorney's Fee and Sanctions is hereby denied and each party is to bear its own costs.

DATED this 28 day of September, 1993.

THIRD DISTRICT COURT


Judge Timothy R. Hanson

MAILING CERTIFICATE


I hereby certify that on the 28 day of September, 1993, a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Order was mailed, postage prepaid, to the following:

Steven B. Smith, Esq.
SCALLEY & READING
261 East 300 South, Suite 200
Salt Lake City, Utah 84111

Kelly R. Sheffield, Esq.
1364 Emigration Street
Salt Lake City, Utah 84108

Blake S. Atkin, Esq.
350 South 400 East, #114
Salt Lake City, Utah 84111

Sean Anastasion
Defendant Pro Se
364 East 600 South
Salt Lake City Utah 84111



ADDENDUM "F"

FILED DISTRICT COURT
Third Judicial District

MAR - 7 1994

[Signature]
CLERK OF DISTRICT COURT
DEPUTY CLERK

JOHN EDWARD HANSEN, #4590
STEVEN B. SMITH, #5797
SCALLEY & READING
Attorneys for Defendant
Ann Anastasion
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

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

MERLE LEE ALLRED,	:	JUDGMENT ON JURY VERDICT
Plaintiff,	:	
vs.	:	Civil No. 910906462PI
ANN ANASTASION and SHAWN	:	Judge Timothy R. Hanson
ANASTASION,	:	
Defendants.	:	

The above-entitled matter came on regularly for trial the 7th, 8th and 9th of February, 1994, with the Honorable Timothy R. Hanson presiding, the case being tried to a jury. Plaintiff Merle Lee Allred was represented by Kelly Sheffield. PacifiCorp Electric Operations and Aetna Health Plans were represented by David J. Bonner. Defendant Ann Anastasion was represented by Steven B. Smith and John Edward Hansen of Scalley & Reading. Defendant Sean Anastasion was personally present but due to a prior default judgment being taken against him did not participate as a party during trial.

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After conclusion of the evidence, the case was submitted to the jury on special verdict interrogatories and the jury answered the following pertinent interrogatories:

1 Considering all of the evidence in this case, do you find from a preponderance of the evidence that the Defendant, Ann Anastasion was negligent?

YES _____ NO X

2. Considering all of the negligence in this case, do you find from a preponderance of the evidence that the Defendant, Sean Anastasion, was negligent?

YES _____ NO X

Based on the jury's response to the above-referenced interrogatories, it is

HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendant Ann Anastasion and against Plaintiff Merle Lee Allred of no cause of action. It is further ordered, adjudged and decreed that based upon the jury's verdict referred to above, Plaintiff Merle Allred's Complaint against Defendant Ann Anastasion is hereby dismissed with prejudice. Likewise, all cross-claims and counter-claims of PacifiCorp Electric Operations and Aetna Health Plans against Plaintiff Merle Lee Allred and Defendant Ann Anastasion are also hereby dismissed with prejudice. The default judgment taken by PacifiCorp Electric Operations and

Aetna Health Plans against Defendant Sean Anastasion is not affected by the jury's verdict or this order. Defendant Ann Anastasion is awarded costs as set forth in the Memorandum of Costs previously submitted.

DATED this 7 day of March, 1994.

BY THE COURT



Honorable Timothy R. Hanson

MAILING CERTIFICATE

I hereby certify that on the 7 day of March, 1994, a true and correct copy of the foregoing Judgment On Jury Verdict was mailed, postage prepaid, to the following:

Steven B. Smith, Esq.
SCALLEY & READING
261 East 300 South, Suite 200
Salt Lake City, Utah 84111

Kelly R. Sheffield, Esq.
1364 Emigration Street
Salt Lake City, Utah 84108

Blake S. Atkin, Esq.
350 South 400 East, #114
Salt Lake City, Utah 84111

Sean Anastasion
364 East 600 South
Salt Lake City, Utah 84111



SEE MAILING COPY FOR
WORDS OF COSTS.

ADDENDUM "G"

JUDGEMENT

FILED DISTRICT COURT
Third Judicial District

SEP 20 1994

JOHN EDWARD HANSEN, #4590
STEVEN B. SMITH, #5797
SCALLEY & READING
Attorneys for Defendant
Ann Anastasion
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

SALT LAKE COUNTY
Clerk
Emely Thompson
Clerk

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

MERLE LEE ALLRED,	:	FINDINGS OF FACT CONCLUSIONS
	:	OF LAW AND ORDER REGARDING
Plaintiff,	:	THE AWARD OF COSTS TO THE
	:	PREVAILING PARTY
	:	
vs.	:	Civil No. 910906467 ² PI
	:	
ANN ANASTASION, SEAN	:	Judge Timothy R. Hanson
ANASTASION, PACIFICORP	:	
ELECTRIC OPERATIONS, AND	:	2194933
AETNA HEALTH PLANS,	:	9-21-94
	:	8:55 am
Defendants.	:	

Defendant Ann Anastasion's request for costs and disbursements as the prevailing party and Defendant/Third-Party Plaintiffs Aetna Health Plans' and Pacificorp Electric Operations' (hereinafter collectively referred to as "Aetna") and Plaintiff, Merle Lee Allred's objections to Ann Anastasion's Memorandum of Costs and Disbursements having come regularly before the Court, and the Court having reviewed the materials submitted, hereby makes the

following findings of fact, conclusions of law and enters the following Order:

FINDINGS OF FACT

1. Plaintiff paid the statutory jury demand fee of \$50.00.

2. Subsequently and unnecessarily, Defendant Ann Anastasion also paid the statutory jury demand fee of \$50.00.

3. Aetna's only involvement in this litigation dealt with its subrogation rights as Plaintiff's health insurance carrier and, throughout this litigation and for all purposes, stood in the shoes of Plaintiff.

4. The amount paid by Aetna for and on behalf of Merle Allred was not in dispute.

5. Aetna's only role in the trial of this matter was in regards to Defendants' liability for the incident that caused Plaintiff's injury.

6. Depositions of the following individuals were all necessarily and reasonably taken to properly defend this action:

- a) Plaintiff, Merle Lee Allred;
- b) Defendant, Sean Anastasion;
- c) Defendant, Ann Anastasion;
- d) Becky Sue Neville;
- e) Dr. Robert Hansen; and
- f) Dr. G. Lynn Rasmussen.

7. Defendant Ann Anastasion necessarily and reasonably paid the statutory witness fee of Seventeen and No/100 Dollars (\$17.00) to the following individuals:

- a) Holy Cross Hospital;
- b) Dr. Robert P. Hansen;
- c) Defendant, Sean Anastasion;
- d) Ted Conger, D.C.;
- e) Dr. David E. Curtis;
- f) Bryan Drennan; and
- g) Dr. G. Lynn Rasmussen.

8. After a trial on the merits Defendant, Ann Anastasion, was the prevailing party.

CONCLUSIONS OF LAW

1. Pursuant to Rule 54(d) Defendant Ann Anastasion, as the prevailing party, is entitled to recover those costs and fees she necessarily and reasonably incurred in defending this action.

2. Defendant Ann Anastasion cannot recover the amount she unnecessarily paid to request a jury.

3. Aetna and Plaintiff are jointly and severally liable for the costs incurred by Defendant Ann Anastasion which relate to liability for the accident which injured Plaintiff.

4. Plaintiff is solely liable for the costs and fees incurred by Defendant Ann Anastasion which related to the establishment or rebuttal of Plaintiff's claimed damages.

ORDER

After reviewing the memoranda submitted by all parties and the applicable law, being fully informed and for good cause shown the Court hereby Orders that:

1. Both Aetna and Plaintiff are jointly and severally liable to Ann Anastasion, the prevailing party, for the following costs:

- a) court reporter fees for the depositions of Defendant Ann Anastasion, Defendant Sean Anastasion and Plaintiff, Merle L. Allred(first deposition only) in an amount of \$ 288.10; and
- b) witness fees paid to Sean Anastasion and Bryan Drennan in an amount of \$34.00.

2. Plaintiff is solely liable to Ann Anastasion, the prevailing party, for the following costs:

- a) court reporter fees for the depositions of Merle L. Allred(2nd deposition only), Becky Sue Neville, Dr. Robert P. Hansen, and Dr. G. Lynn Rasmussen in the amount of \$874.70; and
- b) witness fees paid to Holy Cross Hospital, Dr. Robert P. Hansen, Ted Conger, D.C., Dr. David E. Curtis, Bryan Drennan, and Dr. G. Lynn Rasmussen in the amount of \$119.00.

3. Defendant Ann Anastasion can only collect a total of One Thousand Three Hundred Fifteen and 80/100 Dollars (\$1,315.80) of the costs necessarily incurred in successfully defending against Plaintiff's and Aetna's claims. Plaintiff Merle L. Allred, is solely liable for \$993.70 of that amount and Defendant Ann

Anastasion can collect the remaining \$322.10 from either of the parties or a portion from each of them.

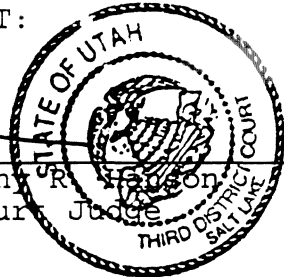
5. Judgment shall be entered against Pacificorp Electric Operations and Aetna Health Plans in favor of Ann Anastasion in the amount of Three Hundred Twenty Two and 10/100 Dollars (\$322.10).

6. Judgment shall be entered against Merle Lee Allred in favor of Ann Anastasion in the amount of One Thousand Three Hundred Fifteen and 80/100 Dollars (\$1,315.80).

DATED this 20 day of September, 1994.

BY THE COURT:


Judge Timothy R. Peterson
District Court Judge



MAILING CERTIFICATE

I hereby certify that on the ____ day of August, 1994,
that a true and correct copy of the forgoing Findings of Fact,
Conclusions of Law and Order was mailed postage prepaid, addressed
to the following:

Kelly R. Sheffield, Esq.
1364 Emigration Street
Salt Lake City, Utah 84108

Blake S. Atkin, Esq.
50 South Main Street, #1200
Salt Lake City, Utah 84144

Steven B. Smith
SCALLEY & READING
261 East 300 South, #200
Salt Lake City, Utah 84111
