

1994

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MERLE LEE ALLRED,
Plaintiff, Counterclaim
Defendant and Appellee,
v.
ANN ANASTASION, SEAN ANASTASION
Defendants, Crossclaim
Defendants and
Appellee
v.
PACIFICORP
ELECTRIC OPERATION, and
AETNA HEALTH PLANS,
Defendants, Crossclaim
Plaintiffs, Counterclaim
Plaintiffs and Appellants.)

UTAH COURT OF APPEALS
BRIEF

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940535

Case No. 940535-CA

Priority: 15

REPLY BRIEF OF APPELLANTS

APPEAL FROM ORDER AND JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
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FILED

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Plaintiff, Counterclaim)
Defendant and Appellee,)
v.)
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ANN ANASTASION, SEAN ANASTASION)
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Defendants and)
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Pursuant to Rule 26(a), Utah Rules of Appellate Procedure, Appellants Pacificorp Electric Operation and Aetna Health Plans submit this Reply Brief in response to the arguments raised by Appellee Ann Anastasion in her Brief.

I. RELEVANT FACTS.

Appellee Ann Anastasion's Brief sets forth numerous facts regarding her subjective intent in making the Offer of Judgment. These facts, many of which have absolutely no evidentiary support in the record, are not relevant under Utah law in deciding the chief issue before this Court: whether there was a binding agreement between the parties when Pacificorp and Aetna accepted Ann Anastasion's Offer of Judgment that was hand-served on them and did not specify or limit which adverse party could accept it.

When the proper legal standards and issues are addressed, there are relatively few relevant facts in this appeal and they are as follows:

1. Merle Allred initially brought this negligence action against Appellee Ann Anastasion for injuries suffered on Ms. Anastasion's property. (Record pp. 2-5).

2. Appellants Pacificorp Electric Operation and Aetna Health Plans were brought into this action by Original Plaintiff's amended complaint. (Record pp. 57-60).

3. Pacificorp Electric Operation and Aetna Health Plans became an adverse party to Appellee Ann Anastasion by filing a crossclaim for reimbursement of medical expenses they had paid to Original Plaintiff as a result of Appellee Ann Anastasion's

(hereinafter "Crossclaim Defendant") negligence. (Record pp. 72-77). Pacificorp Electric Operation and Aetna Health Plans (hereinafter collectively "Crossclaim Plaintiffs") also claimed interest on this sum, and their costs and attorneys fees. (Record pp. 72-77).

4. On June 30, 1993, Crossclaim Defendant filed a motion and memorandum attempting to have Crossclaim Plaintiffs dropped from the lawsuit or, in the alternative, to have the parties realigned to more accurately reflect Crossclaim Plaintiffs' interests as a Plaintiff. (Record pp. 105-110).

5. On July 27, 1993 Crossclaim Defendant served by hand-delivery on Crossclaim Plaintiffs a Rule 68(b) offer of judgment. (Record pp. 135-138). By its terms, that offer of judgment was to be open and available to be accepted for ten days. (Record pp. 135-138).

6. The Offer of Judgment Crossclaim Defendant hand-served on Crossclaim Plaintiffs provided, in pertinent part, as follows:

Pursuant to Rule 68(b) of the Utah Rules of Civil Procedure, Defendant Ann Anastasion, by and through her attorney, offers to allow judgment to be taken against it in the amount of Seventeen Thousand Five Hundred and No/100 Dollars (\$17,500) together with costs presently accrued.

Pursuant to Rule 68 of the Utah Rules of Civil Procedure, this offer will remain open and available to be accepted for ten (10) days. If not accepted in writing within that time period it will be deemed rejected and withdrawn and Defendant Ann Anastasion intends to introduce it in order to recover costs incurred.

(Record pp. 135-138).

7. On July 29, 1993, well within the 10-day acceptance period, Crossclaim Plaintiffs accepted Crossclaim Defendants' Offer of Judgment by sending her a Notice of Acceptance of her Offer of Judgment. (Record pp. 145-156). Further, in compliance with Utah R. Civ. P. 68(b), Crossclaim Plaintiffs filed with the lower court both the Offer of Judgment and Notice of Acceptance together with proof of service. (Record pp. 135-138, 145-146). All of this was done before Crossclaim Defendant made any indication that she had any objection to Crossclaim Plaintiffs' accepting her Offer of Judgment. In accordance with Crossclaim Plaintiffs acceptance of her Offer of Judgment, the lower court entered judgment against Crossclaim Defendant on August 4, 1993. (Record pp. 190-198, 219-225).

8. On September 28, 1993 the lower court, upon Crossclaim Defendant's Motion for Relief from Judgment vacated the judgment against Crossclaim Defendant which was based on Crossclaim Plaintiffs' acceptance of the Offer of Judgment. (Record pp. 361-370). The lower court, in making that ruling, did not take any testimony or evidence other than a single affidavit by Crossclaim Defendant's counsel which is discussed infra at pp. 6-7 and is attached hereto as Exhibit "A."

Based on these relevant facts, it is clear that under Utah law Crossclaim Plaintiffs had the power to accept Crossclaim Defendant's Offer of Judgment and that acceptance created a legally binding agreement that should be enforced.

II. THE LOWER COURT'S RULING THAT CROSSCLAIM DEFENDANT'S PERSONAL SERVICE VIA HAND-DELIVERY ON CROSSCLAIM PLAINTIFFS OF A RULE 68 OFFER OF JUDGMENT THAT NEITHER SPECIFIES NOR LIMITS WHO CAN ACCEPT THE OFFER DID NOT CREATE THE POWER OF ACCEPTANCE IN CROSSCLAIM PLAINTIFFS IS REVIEWED UNDER A CORRECTION OF ERROR STANDARD.

The issue of whether or not a power of acceptance was created in Crossclaim Plaintiffs by Crossclaim Defendant's Offer of Judgment raises a question of law and the standard of review is a correction of error standard.¹ E.g., Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah Ct. App. 1992) ("Whether a contract exists between parties is a question of law; therefore, we review the trial court's conclusion of law under a correction of error standard."); Bailey v. Call, 767 P.2d 138, 143 (Utah Ct. App.), cert. denied, 773 P.2d 45 (Utah 1989).

Crossclaim Defendant argues that because the lower court made "findings of fact" in striking the Crossclaim Plaintiffs' acceptance of the Offer of Judgment it somehow changes the nature of this Court's standard of review to the abuse of discretion standard. That is not the case. Where, as here, the lower court makes its determinations based solely upon proffers and pleadings, and does not evaluate the credibility of witnesses, the appellate court "has as good an opportunity as the trial court to examine the evidence and may review the facts de novo." Bench v. Bechtel Civil & Minerals, Inc., 758 P.2d 460, 461 (Utah Ct. App. 1988); see also Equitable Life & Casualty Ins. Co. v. Ross, 849 P.2d 1187, 1192 (Utah Ct. App. 1993) (when lower court does not resort to extrinsic

¹ There is no dispute as to the standards of review applicable to the two remaining issues involved in this appeal.

evidence the lower court's decision is not afforded any presumption of correctness). Additionally, several of the purported "findings of fact" are actually conclusions of law and, as such, are accorded no deference. For instance, "finding of fact" number two finds that the Offer of Judgment was never made nor extended to Crossclaim Plaintiffs. That is based solely on the language of the actual Offer of Judgment and that construction is a matter of law. Likewise number 8, which finds that Crossclaim Plaintiffs' subjective belief that the Offer of Judgment was made to them was not reasonable, is also a conclusion of law. Numbers 9 and 10 are also conclusions of law. Thus, in addition to the findings of fact being based solely on pleadings and other evidence (or no evidence at all), many of the "findings of fact" are actually conclusions of law which are also reviewed under the correction of standard. E.g., Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah Ct. App. 1992); State in Interest of J.J.T., 877 P.2d 161 (Utah Ct. App. 1994).

In deciding the first issue on appeal, the lower court did not take any testimony or have the opportunity to review the credibility of any witnesses. The only "evidence" even arguably supporting the lower court's "findings of facts" is the self-serving, conclusory, after-the-fact affidavit of Crossclaim Defendant's own counsel. (See Record pp. 210-212, a copy of which is attached hereto as Exhibit "A"). That affidavit, however, clearly does not support findings of fact numbers 1, 2, 5, 6, 7, 8

and 9, and there is no record evidence which does.² Thus, this Court should look to the pleadings in the record and review the lower court's ruling under the correction of error standard. E.g., Bench, 758 P.2d at 461; Equitable, 849 P.2d at 1192.

III. THE CROSSCLAIM PLAINTIFFS' ACCEPTANCE OF THE OFFER OF JUDGMENT WAS VALID AND BINDING, AND ENFORCEMENT OF THAT ACCEPTANCE IS REQUIRED BY THE OBJECTIVE EVIDENCE, UTAH CONTRACT LAW, AND RULE 68 OF THE UTAH RULES OF CIVIL PROCEDURE.

The four arguments Crossclaim Defendant raises against enforcement of the judgment based on Crossclaim Plaintiffs' acceptance of Crossclaim Defendant's Offer of Judgment are wrong as a matter of law, procedure and evidence. Each argument will be addressed in turn.

A. THERE WAS A MEETING OF THE MINDS CREATING A LEGALLY BINDING AGREEMENT WHICH THIS COURT SHOULD ENFORCE.

The first argument raised by the Crossclaim Defendant in hopes the Court will not enforce the binding agreement between the parties is that there was no meeting of the minds.³ Their argument, however, completely ignores Utah law, as set forth fully in Crossclaim Plaintiffs' initial brief, which requires that mutual assent be measured by the objective evidence of the parties'

² This also explains the Crossclaim Plaintiffs' alleged failure to marshal the evidence. Given that there is no record evidence to support the lower court's findings of fact, there is no duty as it would be impossible to marshal evidence which does not exist.

³ The third argument is very similar to the first in that it says Crossclaim Plaintiffs have failed to show there was a meeting of the minds. This argument, like the first argument, is unavailing because there was a meeting of the minds under Utah law. See infra at pp. 7-12.

intentions.⁴ Under that standard, there is no doubt that there was a legally binding agreement this Court should enforce.

Utah law is clear that it is the objective, expressed intention that determines whether there was mutual assent to create a legally, binding agreement:

The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered by the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of its words and acts. It judges of his intentions by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts judged by reasonable standards manifests an intention to agree to the matter in question, that agreement is established and it is immaterial what may be the real but unexpressed state of his mind upon the subject.

Jaramillo v. Farmers Ins. Group, 669 P.2d 1231, 1233 (Utah 1983)(emphases added)(quoting Allen v. Bissinger & Co., 62 Utah 226, 219 P. 539, 541-42 (1923)).

Moreover, Crossclaim Defendant's own cases recognize tat the extrinsic evidence such as the language of the contract, and not some unexpressed reservation or intention, is determinative of whether there was a meeting of the minds. E.g., John Call Engineering v. Manti City Corp., 743 P.2d 1205, 1207 (Utah 1987)(in determining mutual assent the intention of the parties to a contract are controlling and those intentions are usually found in the instrument itself); Oberhansly v. Earle, 572 P.2d 1384, 1386

⁴ In fact, Crossclaim Defendant's brief argues the exact opposite (i.e., her subjective, unexpressed intent was such that Crossclaim Plaintiffs could not accept her offer of judgment and, thus, there could be no meeting of the minds). See Brief of Appellee at p. 17. Not only is such a statement self-serving and conclusory, it is also irrelevant under Utah law as discussed below.

(Utah 1987)(same); Zions First Nat'l Bank v. Hurst, 570 P.2d 1031, 1033 (Utah 1977)(language of agreement demonstrates intentions of parties).

The objective evidence showing that there was a mutual assent between the parties is extensive and begins with the Crossclaim Defendant's Offer of Judgment that was hand-delivered to Crossclaim Plaintiff and provided:

Pursuant to Rule 68(b) of the Utah Rules of Civil Procedure, Defendant Ann Anastasion, by and through her attorney, offers to allow judgment to be taken against it in the amount of Seventeen Thousand Five Hundred and No/100 Dollars (\$17,500) together with costs presently accrued.

Pursuant to Rule 68 of the Utah Rules of Civil Procedure, this offer will remain open and available to be accepted for ten (10) days. If not accepted in writing within that time period it will be deemed rejected and withdrawn and Defendant Ann Anastasion intends to introduce it in order to recover costs incurred.

(Record pp. 135-138).

An offer such as the foregoing is controlled by the express intention of the offeror. See Corbin on Contracts, Section 11, at 25 (1963). The clear and unexpressed intention of Crossclaim Defendants' Offer of Judgment was to allow Crossclaim Plaintiff or Original Plaintiff (upon whom the Offer was also hand-delivered), or both, to take judgment against her or risk the potential of paying the post-offer costs incurred by Crossclaim Defendant. The language of the offer, therefore, leads to but one conclusion: Crossclaim Defendant's Offer of Judgment was "a manifestation of willingness to enter into a bargain, so made as to justify [Crossclaim Plaintiffs] in understanding that [their]

assent to the bargain [was] invited and [would] conclude it." Restatement, Contract (Second) § 24. Crossclaim Plaintiffs could and did properly accept the Offer of Judgment and Judgment should be entered in their favor against Crossclaim Defendant in the amount of \$17,500.

Crossclaim Defendant also urges that "a multitude of facts" supports her claim that the Offer of Judgment was not intended for Crossclaim Plaintiffs. These facts, however, are further objective evidence that a power of acceptance was created in Crossclaim Plaintiffs. First, Crossclaim Plaintiff was an "adverse party" as required under Rule 68 which provides in relevant part:

Rule 68. Offer of Judgment.

- (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. . . . 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.

Utah R. Civ. P. 68 (emphasis added).

Clearly these elements were satisfied. The Crossclaim Plaintiffs were undoubtedly the "adverse party" of Crossclaim Defendant and Crossclaim Defendant was "defending against a claim" at the time she hand-served the offer of judgment on Crossclaim Plaintiffs. That the parties were adverse is made even clearer by the fact that, at the time the Offer of Judgment was made, there was a motion pending whereby Crossclaim Defendant was seeking "to have

the parties realigned to more accurately reflect [Crossclaim Plaintiffs'] interests as a plaintiff." See Brief of Appellee at p. 6 and Record pp. 105-110.⁵ In fact, Crossclaim Defendant has had the audacity to claim that Crossclaim Plaintiffs are bound by an order directed solely to the Original Plaintiff because of this alignment with the Original Plaintiff. See Exhibit "B" attached hereto at p. 2. Crossclaim Defendant, thus, clearly recognized at the time the Offer of Judgment was made that Crossclaim Plaintiffs were an adverse party and, pursuant to Rule 68, Crossclaim Plaintiffs had the power and properly accepted Crossclaim Defendants' Offer of Judgment.

Crossclaim Defendant also attempts to explain away its service of the Offer of Judgment on Crossclaim Plaintiffs by hand-delivery. Although it is true that service is required under Rule 5, Utah Rules of Civil Procedure, it is highly suspect that she would choose to personally serve the Offer of Judgment on Crossclaim Plaintiffs if she truly in fact did not intend to make the offer available to them. More importantly, it certainly created the objective appearance that the Offer of Judgment was being presented for Crossclaim Plaintiffs' acceptance. Thus, Crossclaim Plaintiffs' acceptance of that Offer of Judgment was entirely reasonable, appropriate and the judgment resulting therefrom should be enforced.

⁵ The Crossclaim Defendant's Brief repeatedly refers to this motion as a motion to "dismiss Crossclaim Plaintiff from the lawsuit." This is misleading as Crossclaim Defendant was also expressly seeking to realign Crossclaim Plaintiffs as a Plaintiff to more accurately reflect their interests in this action.

Another fact relied on by Crossclaim Defendant is that Crossclaim Plaintiffs' claim somehow was less than the amount of the Offer of Judgment. That simply is not true. The relief sought by Crossclaim Plaintiffs was not only for the mere reimbursement of their outlays but also for interest, costs, and possibly attorney's fees. When interest alone was added to their initial claim, Crossclaim Plaintiffs were entitled to more than the \$17,500 offered by Crossclaim Defendant and accepted by Crossclaim Plaintiffs. Moreover, the Offer of the Judgment clearly indicated Crossclaim Defendant was seeking to use the Offer of Judgment as a potential weapon to recover all subsequent, post-offer costs. Thus, not only were Crossclaim Plaintiffs' claims by themselves for an amount greater than the Offer of Judgment, the potential benefit to Crossclaim Defendant also increased the amount Crossclaim Defendant would be willing to, and in fact did, offer to Crossclaim Plaintiff.⁶

B. CROSSCLAIM DEFENDANT'S UNEXPRESSED INTENTION CANNOT CREATE A MISTAKE.

The second argument raised by Crossclaim Defendant is that because she, contrary to the surrounding circumstances and the express terms of her offer, held the unexpressed intention not to permit Crossclaim Plaintiffs to take judgment against her there was a difference of understanding that precluded the creation of a

⁶ The lower court's purported "findings of fact" also do not assist Crossclaim Defendant in this regard. The only finding the court made was that the Crossclaim Plaintiffs' outlays were less than the \$17,500, it did not address the amounts they may have been entitled to as a result of interest, costs and attorney's fees.

contract. Supporting that claim, she cited Ingram v. Forrer, 563 P.2d 181 (Utah 1987).⁷ Ingram, however, enforced an agreement according to its terms and not the unexpressed agreements or intentions of the party. Id. at 182. Here, like in Ingram, the express provisions of the offer to contract which was accepted defines the terms of the parties' agreement and that agreement must be enforced.

The strict construction of the offer is particularly appropriate where a Rule 68 Offer of Judgment is involved:

To allow a Rule 68 offeror to inject ambiguities into its offer after the fact would be tantamount to requiring the offeree to guess what meaning a Court will give to the terms of that offer before deciding whether to accept it or not. . . . Because [the rule 68 offeree is bound to pay post-offer costs if he does not unreservedly accept the offer,] he is entitled to construe the offer's terms strictly, and Courts should be reluctant to allow the offeror's extrinsic evidence to affect that construction.

Said v. Virginia Com. Univ./Medical College, 130 F.R.D. 60, 63 (E.D. Va. 1990)(citations omitted).

Thus, Crossclaim Defendant's failure to limit the offer to only a particular adverse party (which she easily could have done) must be construed against her and the ambiguity she created should not be

⁷ Crossclaim Defendant's reliance on Seare v. University of Utah School of Med., 248 Utah Adv. Rep. 7, 9-10 (Utah Ct. App. 1994) is also misplaced. In Seare, the Court held that appellant could not enforce a contract because his unexpressed intentions could not constitute a meeting of the minds. While that is true, it is the exact opposite to the situation here where Crossclaim Defendant incorrectly asserts that her unexpressed intentions preclude a meeting of the minds. Moreover, Seare is cited in direct violation of Rule 4-508, Utah Code of Judicial Administration, which prohibits the citation to unpublished opinions.

used to punish the Crossclaim Plaintiffs by removing their power to accept that offer.

C. ENFORCEMENT OF CROSSCLAIM PLAINTIFFS' ACCEPTANCE OF THE OFFER OF JUDGMENT WOULD FURTHER THE PURPOSES OF RULE 68, UTAH RULES OF CIVIL PROCEDURE.

Crossclaim Defendant's final argument against enforcing Crossclaim Plaintiffs' acceptance of her Offer of Judgment attempts to create an additional requirement that the Offer of Judgment can only be accepted if it somehow furthers the purposes of Rule 68. That argument is equally unavailing because there is no requirement and, more importantly, the purposes of Rule 68 are furthered in this case. The purposes of Rule 68 include encouraging settlements, avoiding protracted litigation and diminishing the burden of litigation. Wright & Miller, Federal Practice and Procedure, § 3001. Each of these purposes would have been furthered had the lower court recognized Crossclaim Plaintiffs' acceptance of Crossclaim Defendant's Offer of Judgment. Moreover, it is highly possible Crossclaim Defendant believed that Crossclaim Plaintiffs' acceptance of the offer would end the litigation as the Original Plaintiff would not pursue the case having received a substantial sum of money from Crossclaim Plaintiffs. This potential is further evidenced by the fact that Original Plaintiff's involvement in this appeal has been very minimal. Thus, the Offer of Judgment would not only have drastically simplified the trial of this matter, but it also possibly could have completely ended the matter before trial. As such, a finding that Crossclaim Defendant's Offer of Judgment created a power of

acceptance in Crossclaim Plaintiffs is entirely consistent with and furthers the purposes of Rule 68 of the Utah Rules of Civil Procedure.

IV. THE LOWER COURT'S RULING SETTING ASIDE THE AUGUST 4, 1993 JUDGMENT WAS ERROR UNDER UTAH LAW AND THAT RULING SHOULD BE REVERSED.

The lower court based its decision to set aside the judgment entered against the Crossclaim Defendant on mistake. (Record at p. 323, 935-953). That decision was manifest error and should be reversed.

The only evidence from which the lower court could derive the intent of the Crossclaim Defendant in making her Offer of Judgment was the actual offer which, by its terms and the applicable procedural rules, created a power of acceptance in Crossclaim Plaintiffs. Thus, there is no legal justification for setting aside the judgment that was entered based on Crossclaim Plaintiffs' acceptance of the Offer of Judgment. The lower court's setting aside of that judgment amounts to an abrogation of the contract entered into the parties pursuant to Rule 68, Utah Rules of Civil Procedure.

The bases for the lower court's setting aside of the judgment are nothing more than an after-the-fact attempt to change or limit the Offer of Acceptance after it has been accepted. The law does not allow this. E.g., Blair v. Shanahan, 795 F.Supp. 309, 315-316 (N.D.Cal. 1992). As the Blair court noted, the power of Rule 68 should not be increased "by allowing an offer that had been accepted to be revised to reflect post-acceptance changes in the

offeror's legal analysis concerning an issue. . . ." Id. at 316. Likewise, it was error for the lower court to set aside the judgment in this case merely because the Crossclaim Defendant now deems the contract inexpedient, unwise or unable to achieve her initial purpose of forcing Crossclaim Plaintiffs to pay the post-offer costs following their non-acceptance of the offer. Id. The procedural rules regarding offers of judgment, the language and intent of the parties, and the law clearly establish it was error for the lower court to set aside the August 4, 1993 judgment that was based on Crossclaim Plaintiffs' acceptance of the Offer of Judgment. Accordingly, that ruling should be reversed and the lower court should be directed to reinstate the August 4, 1993 judgment for \$17,500 against Crossclaim Defendant and in favor of Crossclaim Plaintiffs.

V. THE COSTS AWARDED TO CROSSCLAIM DEFENDANT SHOULD BE ASSESSED SOLELY AGAINST ORIGINAL PLAINTIFF.

As with the other issues on appeal, the Crossclaim Defendant's brief incorrectly states this issue that is now before the Court. Crossclaim Plaintiffs have not and are not claiming that Crossclaim Defendant is not entitled to recover her costs. They are merely appealing the lower court's assessment of costs that were related solely to the claims raised by Original Plaintiff, were irrelevant to the claims raised by Crossclaim Plaintiffs, and/or were incurred prior to Crossclaim Plaintiffs becoming parties to this action against them and not solely against

Original Plaintiff.⁸

Utah law is clear that where, as here, there are no "additional" costs incurred as a result of joining another party, any assessed costs should be assessed solely against the original opposing party. Suniland Corp. v. Radcliffe, 576 P.2d 847, 849 (Utah 1978). In this case, all of the costs awarded by the lower court related solely to claims raised by Original Plaintiff. Moreover, some of the costs were incurred even before Crossclaim Plaintiffs became parties to this action. Thus, under Utah law, it was error for the lower court to fail to assess all costs solely against Original Plaintiff and the judgment assessing costs against the Crossclaim Plaintiffs should be modified as such.

VI. CROSSCLAIM PLAINTIFFS APPEAL HAS MERIT AND WAS NOT INTERPOSED FOR ANY IMPROPER PURPOSE.

Crossclaim Defendant's argument that this appeal lacks merit or was interposed for some improper purpose is entirely untenable. Not only do the Crossclaim Plaintiffs' briefs clearly demonstrate that their position has merit, the Utah Supreme Court has denied a Motion for Summary Disposition previously made by Crossclaim Defendant on this appeal. There is absolutely no basis upon which it could be found that Crossclaim Plaintiffs' appeal is anything but meritorious and proper.

VII. CONCLUSION.

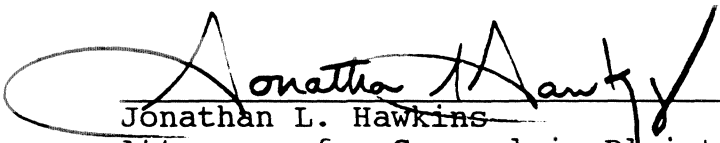
Pursuant to Utah R. Civ. P. 68(b) the Court, as a matter of law, should direct the lower court to reinstate judgment against

⁸ This issue, obviously, becomes moot if the Court rules in Crossclaim Plaintiffs' favor on either of the two other issues.

Crossclaim Defendant in favor of Crossclaim Plaintiffs for \$17,500. In the alternative, the Court should vacate the lower court's September 28, 1993 setting aside of the \$17,500 judgment entered against Crossclaim Defendant as a result of the Crossclaim Plaintiffs' acceptance of her offer of judgment, and order the lower court to reenter the same. Finally, the Court should Order that the costs awarded to Crossclaim Defendant be assessed solely against Original Plaintiff.

DATED this 9th day of January, 1995.

ATKIN & LILJA



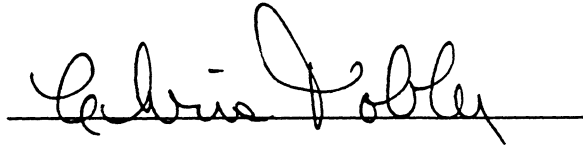
Jonathan L. Hawkins
Attorneys for Crossclaim Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing REPLY BRIEF OF APPELLANTS was mailed, postage prepaid, this 10th day of January, 1995 to the following:

Steven B. Smith
SCALLEY & READING
261 E. 300 South, Suite 200
Salt Lake City, Utah 84111
Attorney for Defendants-Crossdefendants
Ann Anastasion and Shawn Anastasion

Kelly R. Sheffield
1364 Emigration Street
Salt Lake City, Utah 84108
Attorney for Plaintiff-Counterdefendant
Merle Lee Allred

A handwritten signature in cursive script, appearing to read "Kevin P. Kelly", is written over a horizontal line.

JOHN EDWARD HANSEN, #4590
STEVEN B. SMITH, #5797
SCALLEY & READING
Attorneys for Defendant
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,	:	AFFIDAVIT OF STEVEN B. SMITH
Plaintiff,	:	
vs.	:	
	:	Civil No. 910906462PI
ANN ANASTASION and SHAWN	:	
ANASTASION,	:	Judge Timothy R. Hanson
Defendants.	:	

Steven B. Smith, being first duly sworn upon oath,
deposes and says:

1. I am an attorney licensed to practice law in the state of Utah.
2. I am the attorney for Defendant Ann Anastasion in this action.
3. Numerous attempts have been made by counsel for Defendant, Ann Anastasion, and Plaintiff, Merle Lee Allred, to negotiate a settlement to this dispute.

4. On July 27, 1993, I, as the attorney for Defendant Ann Anastasion, prepared, filed and served an Offer of Judgment on counsel for Plaintiff Merle Lee Allred in an attempt to fully and finally resolve this dispute.

5. On July 30, 1993, I received a copy of Defendants Aetna's and PacifiCorp's acceptance of the Offer of Judgment which was submitted for Plaintiff's Merle Lee Allred's acceptance.

6. Upon receipt of that purported acceptance of Defendant Ann Anastasion's Offer of Judgment to Plaintiff Merle Lee Allred, I contacted Blake Atkin, the attorney for Aetna and PacifiCorp and informed him that the Offer of Judgment had been made to Plaintiff and not to PacifiCorp and Aetna and that we would refuse to recognize his purported acceptance of the offer of Judgment.

7. On August 4, 1993, I had hand delivered a letter to Blake Atkin setting forth our position regarding Defendants

PacifiCorp's and Aetna's acceptance of Defendant Ann Anastasion's
Offer of Judgment to Plaintiff, Merle Lee Allred.

DATED this 8th day of August, 1993.

SCALLEY & READING

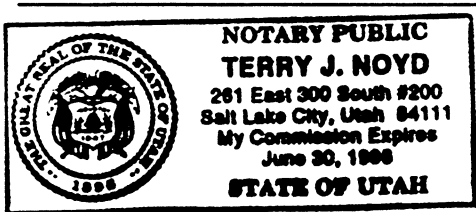
Attorneys for Defendant

SB Smith
Steven B. Smith

SUBSCRIBED AND SWORN to before me this 5th day of
August, 1993.

Terry J. Noyd
Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:



Tab B

RECEIVED
NOV 17 1994

JOHN EDWARD HANSEN, #4590
STEVEN B. SMITH, #5797
SCALLEY & READING
Attorneys for Defendant
Sean 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,	:	SEAN ANASTASION'S RESPONSE TO
	:	AETNA'S OBJECTIONS TO FINDINGS
Plaintiff,	:	OF FACT AND CONCLUSIONS OF LAW
	:	
vs.	:	Civil No. 910906462PI
ANN ANASTASION, SEAN	:	
ANASTASION, PACIFICORP	:	
ELECTRIC OPERATION AND AETNA	:	
HEALTH PLANS	:	Judge Timothy R. Hanson
	:	
Defendants.	:	
	:	

Sean Anastasion, by and through counsel, hereby submits this Response to Aetna's Objections the Proposed Findings of Fact and Conclusions of Law submitted in conjunction with this Court's decision to set aside the Default and Default Judgments entered against Sean Anastasion. Throughout this Response Third Party Plaintiffs Aetna and Pacificorp are collectively referred to as Aetna.

Aetna claims the Court did not order Sean to be served prior to the entry of his Default and the Default Judgment against

him. Attached hereto as Exhibit "A" is this Court's Minute Entry dated June 15, 1993, which among other things states "PLAINTIFF HAS 10 DAYS TO FILE DEFAULT CERTIFICATE AGAINST DEFENDANT, SEAN ANASTATION [sic] IF HE HAS BEEN SERVED. IF HE HAS NOT BEEN SERVED, COUNSEL IS TO SERVE HIM." While the term plaintiff in the forgoing quotation could refer only to Merle Allred, counsel's memory and the other facts and circumstances indicate the term "plaintiff" in the Minute Entry referred to Third Party Plaintiffs Aetna and Pacificorp. The fact that Aetna actually served Sean Anastasion with its Crossclaim after the Minute Entry supports Sean's position. Further support for Sean's position is that Blake Atkin, the attorney for Aetna, is identified on the Minute Entry as Plaintiff's attorney. Sean Anastasion submits and continues to assert that Aetna was ordered to see that Sean was served prior to entry of his default and the default judgment against him.

Sean's response to Aetna's objection to the proposed finding of fact 14 rests on the language of the Special Verdict filled out by the Jury Foreperson and filed with this Court on February 9, 1994. A copy of that Special Verdict is attached hereto as Exhibit "B."

Paragraph 3 of that Special Verdict states "[c]onsidering all the evidence in this case, do you find from a preponderance of the evidence that the defendant, Sean Anastasion, was negligent?

ANSWER: Yes_____ No_____"

In response to the question in paragraph 3 the jury foreperson marked "No." While Aetna contends it did not put on its best possible case against Sean Anastasion it has neglected to set forth with specificity anything different it would have done. Aetna has likewise totally ignored the fact that it was totally at fault for the improper entry of the Default and Default Judgment which prevented Sean from participating in the trial and allegedly resulted in Aetna putting on its impotent case. While issues of res judicata and collateral estoppel will have to be resolved at a different time, the jury's finding is the jury's finding and it found "from a preponderance of the evidence that [Sean] was [not] negligent."

The Findings of Fact, Conclusions of Law and Order are consistent with the facts and the findings of this Court and should be signed as submitted.

DATED THIS 16TH day of November, 1994.

SCALLEY & READING
Attorneys for Sean Anastasion


BY: Steven B. Smith

MAILING CERTIFICATE

I hereby certify that on the 16th day of November, 1994, true and correct copies of Sean's Response to Aetna's Objections to

the Proposed Findings of Fact, Conclusions of Law and Order were deposited in the United States mails, postage prepaid, addressed to the following:

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

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

Robin Sacks

EXHIBIT "A"

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

ALLRED, MERLE LEE	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 910906462 PI
	:	DATE 06/15/93
VS	:	HONORABLE TIMOTHY R HANSON
	:	COURT REPORTER
ANASTATION, ANNA	:	COURT CLERK EVT
DEFENDANT	:	

TYPE OF HEARING: TELEPHONE CONFERENCE
PRESENT:

P. ATTY. SHEFFIELD, KELLY, BLAKE ATKIN
D. ATTY. SMITH, STEVEN B

PER TELEPHONE CONFERENCE,

1. DEFENDANT'S COUNSEL IS TO FILE ANY MOTION TO EXCLUDE ETNA INSURANCE FROM PARTICIPATION IN TRIAL WITHIN 15 DAYS.
2. PLAINTIFF HAS 10 DAYS TO FILE DEFAULT CERTIFICATE AGAINST DEFENDANT, SEAN ANASTATION IF HE HAS BEEN SERVED. IF HE HAS NOT BEEN SERVED, COUNSEL IS TO SERVE HIM.
3. REGARDING QUESTION RAISED BY PLAINTIFF'S COUNSEL TO AMEND THE COMPLAINT, THE COURT WILL NOT ALLOW ANY FURTHER AMENDMENTS TO THE COMPLAINT.

EXHIBIT "B"

FILED DISTRICT COURT
Third Judicial District

FEB - 9 1994

By *[Signature]* SALT LAKE COUNTY
DEPUTY CLERK

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

MERLE LEE ALLRED,	:	SPECIAL VERDICT
Plaintiff,	:	CASE NO. 910906462
vs.	:	
ANNE ANASTASION, et al.,	:	
Defendants.	:	

MEMBERS OF THE JURY:

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, then answer "yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "no." Also, any damages assessed must be proven by a preponderance of the evidence.

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

ANSWER: Yes _____ No X

If your answer to Question No. 1 is "yes," please answer Question No. 2.

2. Considering all the evidence in this case, do you find from a preponderance of the evidence that the negligence of the defendant, Anne Anastasion, was either the sole proximate cause or a contributing proximate cause of the plaintiff's injuries?

ANSWER: Yes_____ No ~~Q~~

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

ANSWER: Yes_____ No X

If your answer to Question No. 3 is "yes," please answer Question No. 4.

4. Considering all the evidence in this case, do you find from a preponderance of the evidence that the negligence of the defendant, Shawn Anastasion, was either the sole proximate cause or a contributing proximate cause of the plaintiff's injuries?

ANSWER: Yes_____ No_____

If you have answered Questions 1, 2, 3 and 4 all "no," or were not required to answer Question 2 or 4, you need not go further in answering additional questions. Please sign the verdict form and notify the bailiff that you are ready to return to the courtroom. If you have found negligence on the part of either or both of the defendants, and that negligence was a proximate cause of the plaintiff's injuries, then please proceed to the next question.

5. Considering all the evidence in this case, do you find from a preponderance of the evidence that plaintiff, Merle Allred, was negligent?

ANSWER: Yes_____ No_____

If your answer to Question No. 5 is "yes," please answer Question No. 6.

6. Considering all the evidence in this case, do you find from a preponderance of the evidence that the negligence of the plaintiff, Merle Allred, was either the sole proximate cause or a contributing proximate cause of her own injuries?

ANSWER: Yes_____ No_____

7. Assuming the combined negligence of all parties to total 100%, what percentage of fault is attributable to:

A.	Defendant Anne Anastasion	_____%
B.	Defendant Sean Anastasion	_____%
C.	Plaintiff Merle Allred	_____%
	TOTAL	_____100_____%

8. Please state the amount of special and general damages, if any, sustained by the plaintiff as a proximate result of the plaintiff's injuries.

Special Damages

(a)	medical expenses to date of trial	\$_____
(b)	future medical expenses	\$_____

General Damages (pain & suffering) \$ _____

TOTAL \$ _____

Dated this 9 day of February, 1994.

FOREPERSON

Trent Lowe