

1994

Michael A. Mower v. James D. Craghead, F. Lynn Padan : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL A. MOWER,

Plaintiff/Appellee

vs.

JAMES D. CRAGHEAD, F. LYNN
PADAN, aka ASPEN CONSTRUCTION
INC., MARTIN BENNETT, and
JOHN and JANE DOES 1
through 20,

Defendants/Appellants

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BRIEF OF APPELLANT

Case No. 940682-CA

APPEAL FROM THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE
COUNTY, JUDGE SHEILA K. McCLEVE

Priority No. 15

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UTAH COURT OF

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DOCKET NO. 940682

FILED

FEB 21 1995

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None

JURISDICTION

Default Judgment was entered against the Defendant on August 24, 1994. The trial court denied Defendant's Objection to Proposed Order (Default Judgment), Motion to Stay Entry of the Default Judgment and in the alternative Motion for Relief from Order and/or for a New Trial on September 22, 1994. (R. 235) A timely Notice of Appeal was filed on October 12, 1994. (R. 237) This court has jurisdiction under Utah Code Ann. §78-2a-3(d).

ISSUES PRESENTED

1. Did the trial court abuse its discretion in dismissing the Defendants' Answer as sanctions for failure to comply with discovery given Defendant's inability to comply rather than wilful noncompliance? (R. 153 & 207).

2. Did the trial court err in dismissing the Defendants' Counterclaim in view of the fact that no previous order gives any notice of such action and no opportunity for any hearing was afforded the Defendants prior to the court sua sponte striking such? (R. 195 & 208.)?

3. Were the Defendants denied due process when the trial court failed to have the Plaintiff or itself transmit signed copies of either the order compelling discovery or judgment to the Defendants after entry as required by the Utah Code of Judicial Administration? (R. 196 & 208-9)?¹

4. Did the trial court err in not requiring some type of evidentiary hearing and allowing the Plaintiff to incorporate into

¹ Did the Circuit Court's practice of failing to issue Memorandum Decisions (simply notifying the parties by mailing highlighted copies of the court's Docket) comply with the Utah Code of Judicial Administration?

its judgment "just over \$11,000" of the \$13,515.58 in claimed damages of a third party who was barred from attempting further collection and the Plaintiff in this case was technically barred under the doctrines of claim preclusion and issue preclusion from including such in its damage claim? (R. 207-209)

STATUTES

The text of the Utah Code Ann. §§58-55-17, now §58-55-604, §4-504 UCJA and Rule 4(b) U.R.C.P. are contained in Appendix F.

STATEMENT OF THE CASE

A. Nature of the Case

Defendant James D. Craghead is the owner of a home located up Millcreek Canyon, Salt Lake County, Utah, (hereinafter "property"). Defendant Aspen Construction Co. and F. Lynn Padan, respectively, are the general contractor and the responsible licensee whom Mr. Craghead contracted with to do a significant remodeling of the property.

Michael Mower is a subcontractor who contracted with Aspen to do the sheetrocking and related work in relationship to the remodeling. Mower in turn, subcontracted a portion of his sheetrocking job to Martin Bennett. Aspen and Mower are duly licensed general contractors. Bennett is not licensed.

In late 1992, both Bennett and Mower filed mechanic liens against the property claiming \$13,135.77 and \$13,515.58, respectively. Craghead and Aspen disputed the liens and claimed an offset for damage to the premises when Mower and/or Bennett failed to cover certain beam work which had been previously painted and lacquered. The damage resulted in the beam work having to be completely refinished at a cost of between \$3,900 - \$4,500.

B. Course of Proceedings

Both Bennett and Mower filed separate mechanics liens against the property. Later, Bennett filed suit in the District Court to foreclose his lien,² and Mower filed suit in Circuit Court to foreclose his lien. Mower moved in both the Circuit and District Courts to consolidate the two cases. Before either court could address the propriety of consolidating the two cases, the District Court granted the Defendants' Motion to Dismiss the Bennett case pursuant to §58-55-17 U.C.A. and awarded attorney's fees of approximately \$3,000 against Bennett pursuant to §38-1-18 Utah Code Ann. (1989)³. (see Appendix A-1 and A-2).

Before addressing significant dates of the procedural history in the present case it is important to understand what information the Plaintiff had obtained from the two proceedings.

The attorney for the Plaintiff, Ms. Falk, also represented Mr. Mower in the District Court case. Before the District Court granted the Motion to Dismiss in the Bennett case the Defendant submitted significant discovery (see Appendix B), including taking

² Mower's and Bennett's relationship was such that Mower issued Bennett a 1099 (not a W-2) and treated him as an independent contractor - not an employee. Bennett therefore sought his remedy independent of Mower rather than as an employee through the Industrial Commission.

³ 1. *Significance of the Bennett Case Third District Court 93-0904047CV.*

The Bennett proceeding (District Court) is important to this case because significant discovery was undertaken in the Bennett case, including depositions of Mower and Bennett, of which Plaintiff's counsel was aware. In order to analyze whether the Defendants were acting in good faith (whether the order striking the Answer and granting a Default Judgment as sanctions was appropriate), we would respectfully submit that the discovery undertaken in both proceedings must be reviewed since significant action took place in the Bennett case that is relevant to the present case.

Additionally, of the \$13,515.58 claimed by Mower, he clearly acknowledged that "just over \$11,000.00" is due to Bennett's work, i.e., that only \$2,500.00 (approximate) is due to him separately as a markup or for materials. (See Mower deposition in District Court proceedings, page 26 lines 4-6 attached hereto as Appendix C.)

Mr. Bennett's and Mr. Mower's depositions. (See Appendix B-4 and B-5.) This is important because the facts and circumstances surrounding the Bennett case were exactly the same facts and circumstances involved in the present case. Because counsel for the Plaintiff in the present case had in her possession significant discovery in the Bennett case she was privy to all the information obtained from the Bennett discovery, including the Bennett and Mower depositions. (This discovery is information the Circuit Court was never aware of.) The Appellants would respectfully request this court to keep this in mind when it determines whether the Plaintiff suffered any real prejudice due to the problems with the discovery in the present case.

1. Procedural Timeline of Present Case

With the discovery facts regarding the Bennett case in mind, let us now turn to the timeline of the case at issue. On January 24, 1993, the Plaintiff filed an Amended Complaint in Circuit Court. On March 28, the Plaintiff submitted his first Request for Documents and Interrogatories. Among those Interrogatories were four (4) specific questions.

Interrogatory No. 20:

Identify the names and addresses of each and every individual or entity who supplied labor and materials or both to the project.

The Defendants' answer to Interrogatory No. 20 was:

Object as being overly broad and not relating to any issue involved in this particular suit. In addition, such information is confidential as it presents a group of tradesmen available to the Defendant which gives him an economic edge. Without further clarification as to the relevance of this information these parties object as being overly broad and burdensome. In addition Mower, if he was on the job as much as he claims, would know much of this information.

Interrogatory No. 31:

Identify all correspondence, contracts or any writing of any kind or description between and among the contractor, architect/engineer, subcontractors, material and equipment suppliers, the owner, field representatives, bonding and surety companies, consultants, or any other person, firm, or entity concerning or affecting the project.

The Defendants' answer to Interrogatory No. 31 was:

Object as being overly broad and not related to issues relative to the mechanics lien foreclosure action and related offsets and counterclaims. If counsel for Plaintiff can provide the basis of why such a broad question needs to be addressed or what the scope or the extent of the work is leading to, we would be happy to reevaluate our answer; however, based on the foregoing and without waiving any objection I know of no correspondence, contracts, or writing of any kind with any subcontractor, material and equipment suppliers, field representatives, bonding and surety companies, consultants, or other persons, firms, or entity affecting the project. There was correspondence with the contractor and with such certain architect/engineers, however, to the extent such would lead to any discoverable information or are relevant in this case are highly questionable.

Interrogatory No. 34:

Identify all documents evidencing loans taken out by you of which any proceeds were used in connection with the project. Appellants answer was "In relationship to Aspen Construction and/or Lynn Padan: none."

Interrogatory No. 36:

"Identify all conversations or communications between you and the Plaintiff in connection with the project.

The Defendants' answer to Interrogatory No. 36 was:

It is difficult at best to identify all conversations. If you can identify a particular topic I can attempt to answer with some degree of certainty, but with such a broad question it is difficult.

A complete list of Interrogatories submitted by the Plaintiff/Appellee is found in Appendix C-4 and C-5. Many of

Plaintiff's request for documents were equally broad and vague. See Appendix C-4 and C-5.

Between March 28 and May 17 the Defendants' counsel was unable to obtain his clients' cooperation to adequately respond to the Interrogatories and Request for Documents.

On May 17 Plaintiff filed a Motion to Compel Discovery⁴. And on June 13 the trial court judge entered an Order Compelling Discovery as evidenced by the record. (R. 78.)

However, as the mailing certificate will indicate the Defendants were never served a copy of the signed Order and therefore had no notice that such an Order was in fact ever issued. See Affidavit of Joseph M. Chambers. (R. 79. mailing certificate on June 9, 1994, order dated May 7, 1994.)

Defendants did answer Plaintiff's first set of Interrogatories on June 15 (within the timeframe of the June 9, 1994, Order which was never sent to Attorney Chambers) save for the four (4) Interrogatories as to which Defendants objected. As for the remaining Interrogatories, Defendants felt they, in good faith, had filed complete answers and complied with Plaintiff's Request for Documents.⁵ However, on July 6, Plaintiff filed a Motion to Compel answers to the four (4) Interrogatories and documents.

⁴ The Defendants' attorney did not submit a response to the Motion because the reason the discovery was not answered was due to his clients not taking time to provide responses. Counsel felt submitting a reply under such circumstances would likely violate Rule 11 U.R.C.P.

⁵ The responses submitted by the Defendants to the Plaintiff Mower's Request for Production of Documents were similar to Mower's response to the Defendants request in the Bennett case. Compare Appendix C-2 and Appendix C-5.

The language of Plaintiff's Motion to Compel is crucial since the language of the Motion was much narrower than the language in the Order actually granted by the judge.

The Plaintiff's Motion requested "that his motion to compel and for sanctions be granted and that he be awarded his fees and costs incurred in bringing this motion." (R. 109.)

On July 8, two (2) days later, the Plaintiff deposed Mr. Padan. During this deposition Plaintiff was able to sufficiently clarify his discovery requests so that the Defendants could provide the documents that Plaintiff desired. Having finally understood what the Plaintiff was requesting, Mr. Padan agreed to provide the documents requested by July 15. (See Appendix C-8 pages 3-6.)

The events that occurred during the Padan deposition are crucial in judging the intent of the Defendants. During the Padan deposition, the Plaintiff was able to clarify his discovery request. During the deposition all parties were able to establish a timetable to satisfy the discovery requests and during the deposition, Defendants were given the impression that Plaintiff had waived her Motion to Compel. (R. 161 paragraph 8 Padan Affidavit.)

After the deposition, Mr. Padan went to work gathering the requested information from computer records at his office by pulling requested documents from his computer hard drive and other computer disks and compiling them onto a few computer disks that he could then transfer to Plaintiff. However, on July 13, Mr. Padan's office was burglarized. (R. 164.)

Quoting from the Salt Lake County Sheriff's Office initial report, the police stated, "it has been determined that there are approximately three miniature computers, two desktop model

computers, one of which was an IBM PS1 still in a box, one telephone, a fax machine and other assorted office items to include personal disks, company disks, and preprogrammed disks." The report continued by stating:

Kevin Monson reports that he left the business at 21:00 hours on 7/13/94 and when he returned at 07:30 hours he found someone had pried the front door to the north, made entry into the business and removed the listed property. It was apparent that the suspects were intent on obtaining only computer equipment, because other items such as air staple gun and some other power tools had been passed by.

Monson reports that it appears that each of the disks had been gone through, and in fact, in his office the small disks had been thumbled through and only certain disks removed.

Among the disks and computer files taken during the burglary were the primary files Mr. Padan used to compile the documents for the Plaintiff as well as the disks containing the files he had already compiled.

Immediately, Mr. Padan and Defendants' counsel called Plaintiff's counsel, Ms. Falk. Numerous calls were made and messages left, both with Ms. Falk's answering service and through her secretary. However, she did not return any of the calls to Mr. Padan or Mr. Chambers. At this time defense counsel was suffering from pneumonia and was unable to practice law for a period of time. (R. 155 Affidavit J. Chambers.) (This is the reason for Mr. Padan attempting to contact Plaintiff's counsel directly.)

Because Ms. Falk and Mr. Chambers had not in fact been able to communicate concerning the burglary, on July 20, Plaintiff's counsel filed a Motion to Submit for Decision her July 6 Motion to Compel. Without a hearing, the trial court granted Plaintiff's Motion on July 27, 1994. (R. 142.)

It is not so important that the court granted the Motion; but rather, it is the scope of the trial court's Order that is significant. The Plaintiff's Motion to Compel only asked for: compelled discovery, sanctions, and fees. (R. 109.) However, in the trial court's docketing statement the court mentioned for the first time the language, "the Defendant is to respond within twenty (20) days or the answer is stricken and judgment entered." (R. 148.) This language was not in the Motion to Compel nor was Plaintiff sent a copy of the internal disposition summary included in the court docket.

Only after August 4 did Plaintiff's counsel respond for the first time to the numerous messages left by the Defendant and Defendant's counsel regarding the burglary. In the fax, counsel refers to the Order granted by the trial court on July 27 and states that the defense must respond fully within twenty (20) or the judgment against them would be granted pursuant to the Order issued by the judge on the 27th of July. See Appendix D. Additionally, counsel for the Plaintiff was unwilling to grant any leeway due to the burglary or the medical problems of defense counsel. As the fax shows, she was simply unwilling to work with Defendants nor was she willing to accommodate the practical impossibility of complying with discovery because of the burglary.

A few days later, on August 8 counsel for the defense sent a letter to Plaintiff's counsel, including an Affidavit documenting his medical problems. (Appendix E) In this letter, defense counsel accused Plaintiff's counsel of intentionally attempting to stay ignorant of the facts of the case, of her failure to return the numerous messages left by both Mr. Padan and defense counsel,

and her knowledge and a reminder that it was not until the Padan deposition on July 8 that she sufficiently clarified the scope of her discovery that would allow the Defendants to comply.

Instead of responding to the letter, Plaintiff filed a Motion for Entry of Judgment on August 19, (R. 167) based Defendant's failure to comply with the August 4 Order to Compel. It is important to be aware that Plaintiff's Motion for Entry of Judgment was filed only fifteen (15) days after the trial court signed the Order which gave Defendants twenty (20) days to comply. The Defendants feel they have complied with all the discovery requests to the full extent of their ability to do so.

C. Disposition in Trial Court

On August 24, the trial judge granted judgment against the Defendants for over \$18,000. (R. 189.) However, the Defendants were only mailed an unsigned copy of the judgment back on August 19 when Plaintiff filed her motion for judgment. Appellants repeat they never received a copy of a signed judgment and no mailing certificate by a clerk or counsel states such was ever sent after entry by the court.

On August 26, the Defendants filed an Objection to the Proposed Order (Default Judgment), and Request to Stay Entry of Judgment and in the Alternative Motion for Relief from Judgment and for a New Trial. On September 22, the trial court denied the Defendants Motion. On October 12, Defendants filed a Notice of Appeal and this case now stands before this court to be addressed.

SUMMARY OF ARGUMENT

Given the totality of the circumstances, where the Defendants had answered a significant amount of the discovery submitted and

because of a burglary were unable to produce the remainder of certain documents, it was an abuse of discretion to strike the Answer and a substantial Default Judgment against the Defendants.

ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DISMISSING THE DEFENDANTS' ANSWER AS SANCTIONS FOR FAILURE TO COMPLY WITH DISCOVERY GIVEN DEFENDANTS' INABILITY TO COMPLY RATHER THAN WILLFUL NONCOMPLIANCE.

A. A Default Judgment Is the "Capital Punishment" of All Sanctions and Should be Used Only as a Last Resort When Other Less Stringent Sanctions Would be Ineffective.

Rule 37 of the Utah Rules of Civil Procedure outlines the numerous sanctions available to a trial court when a party fails to cooperate with discovery. The Rule requires the court to issue sanctions that "are just." It then outlines specific sanctions. Such sanctions range from staying the proceedings until the order is obeyed, to contempt charges. However, all would agree that the "capital punishment" of all sanctions described in Rule 37 is the "dismissing [of] the action or proceeding or any part thereof, [or] rendering a default judgment." Utah. R. Civ. P. 37(b)(2)(C) (1994).

In Tucker Realty, Inc. v. Nunley, 396 P.2d 401 (Utah 1964), the Utah Supreme Court stated, "[w]e recognize that granting of a judgment against a party solely for disobeying an order to cooperate in discovery procedure is a stringent measure which should be employed with caution and restraint and only where the

failure has been willful and the interest of justice so demand."

Id. at 412

The Tucker court went on to caution the lower court that, "[E]xcept in very aggravated cases, less serious sanctions undoubtedly could be applied to accomplish the desired results, particularly where there is any likelihood of injustice by depriving a party of a meritorious cause of action or defense." Id.

B. The Discretion of the Trial Court Must Comport with Reason and Justice and Should Resolve Doubts in Favor of Permitting Parties to Have Their Day in Court on the Merits of the Controversy.

The standard of review for this issue is abuse of discretion. When reviewing the issuance of sanctions, the appellate courts have given trial courts considerable latitude. However, as the Supreme Court noted in Carman v. Slavens, 546 P.2d 601 (1976), (after recognizing the trial court's latitude):

[T]his [discretion] does not mean that the court has unrestrained power to act in an arbitrary manner. Fundamental to the concept of the rule of law is the principle that reason and justice shall prevail over the arbitrary and uncontrolled will of any one person; and that this applies to all men in every status: to courts and judges, as well as to autocrats or bureaucrats. The meaning of the term 'discretion' itself imports that the action should be taken within reason and good conscience in the interest of protecting the rights of both parties and serving the ends of justice.

Id. at 603.

After reviewing the reasons Defendants were unable to comply with the twenty (20) day limit, the Appellant invites this court to ask itself whether ordering Judgment against the Defendants was: (1) employed with caution and restraint and only where the failure has been willful and the interests of justice so demand; (2) issued only after determining the Defendants' actions constituted a very aggravated case; (3) imposed only after determining less serious

sanctions could not accomplish the desired results; (3) unlikely to cause injustice or deprive the Defendants of a meritorious defense; or, (4) imposed after determining that the Defendants' failure to comply within the twenty (20) day limit had been willful?

If this Court answers no to such questions, then the Appellant submits the trial court's decision was not "taken with reason and good conscience and in the interest of protecting the rights of both parties and serving the ends of justice" And if such is the case, this Court should find that the trial court did abuse its discretion.

C. Because of the July 13th Burglary, Defendants' Failure to Comply was Due to Inability Rather than Willful Noncompliance, thus Striking the Defendants' Answer and Counterclaim Awarding Judgment for Plaintiff was an Abuse of Discretion.

The trial court issued Judgment for Plaintiff on August 24 solely because the Defendants supposedly failed to comply with the twenty (20) day timeframe stated in the August 4 Order compelling discovery. It is therefore essential to focus on the Defendants' violation of the twenty (20) day timeframe in order to determine whether the trial court abused its discretion in granting Judgment.

The trial court's August 4 Order compelling discovery stated:

"Plaintiff's Motion to compel is granted. Defendants are to provide their response to Plaintiff's within 20 days or Defendants' answer will be deemed stricken and judgment entered." (R. 109.)

Twenty (20) days after this Order was issued, the trial court entered a Judgment against the Defendants. The Judgment stated: "the Court ordered defendants to produce the requested discovery by no later than 20 days from the date of the Court's ruling, or judgment will be entered in favor of the Plaintiff." (R. 148.) As

to when the twenty (20) days was to commence seems to have caused some confusion. Plaintiff's counsel filed her Motion for Entry of Judgment on August 19--only fifteen (15) days after the trial court signed the Order which gave Defendant twenty (20) days to comply with the Order to Compel. The trial court waited until August 24 before signing the Entry of Judgment, twenty (20) days after signing the August 4 Order to Compel. However, in order to give Defendants a full twenty (20) days to comply with the Order to Compel, the trial court should have signed the Judgment on the morning of the 25th of August.

Notwithstanding the problem above, the issue before this court is whether the trial court abused its discretion when it granted Judgment for the Plaintiff because the Defendants supposedly failed to comply with the Order within twenty (20) days.

Appellants submit that the July 13th burglary of Mr. Padan's office made it impossible for Defendants to comply with the trial court's Order within the twenty (20) day limit. The police report from the Salt Lake County Sheriff's office states:

At this time, it has been determined that there are approximately three Miniature [sic] computers One telephone, a Fax machine and other assorted office items, to include personal disks, company disks, and pre programmed disks. Estimated loss at this time is thirty thousand dollars (\$30,000). (Police report, see R. 164).

The police report narrative commented that:

It was apparent that the suspects were intent on obtaining only computer equipment, because other items such as air staple gun and some other power tools, had been passed by.

Monson reports that it appears that each of the desks had been gone through, and in fact, in this office the small disks had been thumbbed through and only certain disks removed. (See R. 164).

In Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 962 (Utah App. 1989) This court reasoned:

Imposing [default] sanctions for a party's refusal to respond to a court order compelling discovery is a harsh sanction and therefore, requires "a showing of 'willfulness, bad faith, or fault' on the part of the non-complying party." "Willful failure" has been defined as "any intentional failure as distinguished from involuntary noncompliance."⁸

In Amica, the Defendant asserted that the only basis for sanctions was his failure to produce personal tax returns, and such failure was not willful but due to inability. In response, this Court held: "Schettler's position is not supported by the record. It is clear from the trial court's order that failure to produce personal tax returns was not the only reason for entering Schettler's default. Furthermore, Schettler failed to demonstrate . . . that his failure to produce the tax return was due to inability." Id. at 962.

Unlike the facts in Amica, it is clear from the trial court's order that Defendants' failure to produce the requested discovery within the twenty (20) day time limit was the reason the trial court granted judgment for the Plaintiff. (R. 164.)

Moreover, from the sheriff's report, Mr. Padan's Affidavit (R. 160), and Mr. Chambers' Affidavit (R. 155 and 160), the Defendants in the present case have demonstrated that their failure to comply with discovery within the twenty (20) days was due to inability.

⁷ (Citing Fed. Sav. & Loan Ass'n, 684 P.2d at 1266 (quoting Societe Internationale v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L.Ed.2d 1255 (1958))).

⁸ (Citing M.E.N. Co. v. Control Fluidics, Inc., 834, F. 2d 869, 872-73 (10th Cir. 1987)).

Mr. Padan's Affidavit established that "documentation which [he] had spent several hours pulling together, was taken along with all [his] office equipment." (See R. 161). The S.L.C. sheriff's report establishes there was in fact a burglary of Mr. Padan's office and that many computers and computer files were stolen. (R. 164.)

Immediately after the burglary, Mr. Padan states "[he had] attempted to contact Attorney Falk with respect to these matters but [had] not made contact at this time, having left messages and her in turn attempting to return calls to me [him]." (R. 161.)

Pursuant to the trial court's August 4 Order, the Defendants had through August 24 to comply with discovery. Eleven (11) days prior to that deadline, a burglary of Mr. Padan's office made it impossible to comply with the court's twenty (20) day limit.

Defendants, in good faith, attempted to contact Plaintiff's counsel and inform her of the burglary and discuss alternatives. Without possession of the necessary documentation, Defendants' failure to comply was involuntary rather than willful or an intentional failure to comply. Given this court's language in Amica, the trial court abused its discretion when it entered Judgment against Defendants.

To put the level of noncompliance in perspective, Defendants had already responded to thirty-five (35) of the thirty-nine (39) Interrogatories and had provided many documents. The Defendant Padan, the contract, or had been deposed and had stipulated to have his deposition continued to another date. This is not a case where the Defendants were not cooperating--there was significant

compliance. The whole issue of noncompliance is over four (4) broad Interrogatories and some stolen documents.

When speaking on the abuse of discretion standard as it relates to upholding or reversing sanctions imposed by the trial court, the Utah Supreme Court stated: "it has always been the policy of our law to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy." Carman v. Slavens, 546 P.2d 601,603 (Utah 1976).

The merits of the Defendants' case are especially compelling. Of the \$13,515.58 sought for in Plaintiff's Complaint, the Plaintiff himself admits that "just over 11,000.00" is attributable to a claim the District Court dismissed in a sister proceeding to this action. (Mower deposition in District Court proceeding, page 26 lines 4-6). Additionally, Defendants can document a \$3,900 - 4,500 offset due to damage Plaintiff caused to varnished beam work giving rise to his \$13,515.58 claim against Defendants.

To deny Defendants the opportunity to present their case solely because a burglary made it impossible for Defendants to respond to four (4) Interrogatories and produce documents within the twenty (20) day time limit, is not within the spirit or intent of Rule 30.

The Supreme Court has addressed similar issues and resolved the problem by giving the parties a day in court. In Carman, the Defendant did not appear at a scheduled deposition and failed to produce the requested documents. The trial court ordered the Defendants' answer stricken and his default entered because "there did not appear in the record any justification for [the Defendants'] failure to appear at the deposition and produce the

documents" Id. at 602. However, the Supreme Court held that under the circumstances shown, the striking of defendant's . . . pleadings and entering judgment against [defendant] was an abuse of discretion; and the interest of justice will be best served by vacating that order and remanding the case for trial." Id. at 603.

Appellants respectfully submit the circumstance in the present case compels this Court to allow the Defendants their day in court.

II. THE CIRCUIT COURT ERRED IN DISMISSING THE DEFENDANTS' COUNTERCLAIM IN VIEW OF THE FACTS THAT NO PREVIOUS ORDER GIVES ANY DEFENDANT NOTICE OF SUCH AUTHORITY AND NO OPPORTUNITY FOR ANY HEARING WAS AFFORDED THE DEFENDANTS PRIOR TO THE COURT SUA SPONTE STRIKING THEIR ANSWER.

This appeal involves two Orders, neither of which gave Defendants notice that the court would strike their Answer or that their Counterclaim would be dismissed. Plaintiff first submitted an Order compelling discovery May 17, 1994. On June 9, 1994, the trial court granted that Order. However, Plaintiff failed to mail a copy of the signed Order to Defendants' counsel. The Certificate of Service on the signed Order states that a true and correct copy of the above Order was mailed to the Defendants' counsel on May, 17, 1994--23 days before the judge signed and issued the Order. Defendants were never given notice of this Order when it was signed, and were therefore unable to govern themselves in accordance with it. Nevertheless, Defendants did respond to Plaintiff's discovery requests in good faith and gave what they felt were complete answers given the vagueness of Plaintiff's request.

Apparently, Plaintiff was unhappy with certain answers and filed a second Motion to Compel answers to the four (4) Interrogatories and for sanctions on July 6, 1994, (See Appendix C-

6 and C-7, R. 109).⁹ This is the Motion that lead to the trial court's order granting Judgment for Plaintiff. In this Motion, the Plaintiff only requested "that this Motion to Compel and for Sanctions be granted and he [Plaintiff] be awarded his fees and costs incurred in bringing the Motion." (See R. 109-10.) Plaintiff's supporting Memorandum requests only that the Court:

[E]nter an order requiring defendants to respond to plaintiff's discovery requests, to produce the documents forthwith, to award plaintiff reasonable costs and attorney's fees incurred by plaintiff in bringing this Motion to Compel dated May 17, 1994, and for Sanctions." R. 114.

Plaintiff made no suggestion that the court strike Defendants' answer and grant Judgment for Plaintiff.

Two days after Plaintiff filed this Motion to Compel, the Plaintiff deposed Mr. Padan. At this deposition, counsel for Plaintiff clarified and narrowed her Request for Documents and Interrogatories--resolving the problem which lead to the July 6 Motion. At the deposition, both parties agreed that Defendants would provide Plaintiff with the needed information by July 15. (Appendix C-8).

Mr. Padan spent many hours during the next days copying documents from company computers and various floppy disks in an effort to comply with Plaintiff's request (See Padan Affidavit, R. 160). However, two (2) days before the documents were due, Defendants' office was burglarized, and all the primary files as well as the compiled copies to be turned over to Plaintiff were stolen. Both Mr. Chambers and Mr. Padan left several messages with

⁹ Counsel for the Defendants was equally dissatisfied with the Plaintiff's response to their discovery (letter dated March 24, 1994) but had not yet sought a Motion to Compel. See Appendix C-3.

Plaintiff's counsel informing her of the burglary. However, she did not return any of the messages. Instead, Plaintiff filed a Notice to Submit for Decision, on Plaintiff's July 6 Motion to Compel and for Sanctions.

On July 26, the trial court, without a hearing, granted Plaintiff's Motion. The court's only record of its judgment is recorded in the Courts internal docket entry. In the Comments section of this docket entry, the language regarding the twenty (20) day timetable appeared for the first time. The Defendants had no notice of this language. The mailing certificate in the August 4 Order states that Defendants were mailed a copy of the proposed Order on August 2, only two (2) days before Judge McCleve signed the Order.

Rule 4-504(2) of the Code of Judicial Administration states:

Copies of all proposed findings judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

The purpose of 4-504(2) is to give opposing counsel an opportunity to challenge a proposed order. However, having mailed a proposed Order from Salt Lake City two (2) days before the Court signs the Order denied Defendants of any practical opportunity to object to the Order. The Circuit Court did receive Defendants' objection to the proposed order on August 8 (giving Defendants six (6) days for the Order to come from S.L.C. to Logan, have Defendants draft a motion in opposition, and then mail that back to S.L.C.). However, the objection was of no avail, the Order had already been signed four (4) days earlier.

If Defendants had been given notice of the first Order compelling discovery or if they had been given notice of a proposed twenty (20) day limit, and given more than two (2) days to respond, Defendants would have responded more forcefully and extensively. In short, Plaintiff would have responded to the Motion in the same manner and with the same evidence they offered in their Objection to Order Granting Attorney's Fees and Motion for Relief from Order. (See R. 150.)

In Cornish Town v. Koller, 798 P.2d 753 (1990), the Utah Supreme Court addressed the notice required for motions filed pursuant to Rule 4-501(1), the very rule applicable to Plaintiff's Motion to Compel and Judgment. The Supreme Court in Cornish held:

Rule 4-501 assures timely notice of the nature of proceedings against a party. In *Nelson v. Jacobson*, we stated, 'Timely and adequate notice and an opportunity to be heard in a meaningful way are the very heart of procedural fairness.' In *Nelson* we further noted: 'Many cases have held that where notice is ambiguous or inadequate to inform a party of the nature of the proceeding against him or not given sufficiency in advance of the proceeding to permit preparation, a party is deprived of due process.'

Because Defendants were without notice of either the first Order compelling discovery or the twenty (20) day timeframe, the urgency and significance of Plaintiff's July 6 Motion was all but absent. However, if Defendants had been given proper notice of either fact, then they would have opposed the Motion with the same vigor and evidence they exhibited in their Objection to Order Granting Attorney's Fees and Motion for Relief from Order. The difference would have been, that the Defendants would not have had to overcome the presumptions in Rule 60(b).

Defendants were twice denied proper notice by Plaintiff. Each created a great prejudice against the Defendants' case. Thus, Defendants pray for a vacating of the trial court's Judgment, which was based solely on the twenty (20) day time limit, and remand to the trial court for a trial on the merits of the case.

III. THE PLAINTIFF'S FAILURE TO TRANSMIT COPIES OF THE SIGNED ORDER COMPELLING DISCOVERY AND JUDGMENT DID NOT COMPLY WITH THE UTAH CODE OF JUDICIAL ADMINISTRATION

A. Standard of Review

This court in Hartford Leasing v. State of Utah, 255 Adv. Rep. 52 (1994) stated, "[a] trial court's interpretation of a rule in the Utah Code of Judicial Administration presents a question of law reviewed for correctness."

The trial court dismissed Defendants' Answer and entered Judgment for the Plaintiff based on an Order compelling discovery signed August 4, 1994. Whether that Order complied with Rule 4-504(4) is a question of law. Thus, the standard of review is *de novo*.

B. Neither the Order Compelling Discovery nor the Judgment were Transmitted to Defendants after Judge McCleve's Signature.

Rule 4-504(4) of the Utah Code of Judicial Administration states:

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party, and proof of service shall be filed with the court. All judgments . . . are to be transmitted after signature of the judge. (Emphasis added.)

The trial court's order: granting Plaintiff's Motion to Compel, requiring Defendants to comply with said order within twenty (20) days, and awarding Plaintiff \$200 in attorneys fees,

was signed and dated by Judge Sheila K. McCleve on August 4, 1994. (R. 148.) However, the Order's Certificate of Service states that a true and correct copy of the above Order was mailed to Defendants' counsel on August 2, 1994; only two (2) days before Judge McCleve signed the Order.

The Judgment, dismissing Defendants' Answer and entering Judgment for Plaintiff was signed August 24, 1994. However, the Mailing Certificate shows Defendants were mailed a copy on August 19--five (5) days before the judge signed the Judgment.

Defendants have never received a signed copy of either the Order compelling discovery, the Judgment for Plaintiff, nor a Notice of Entry of Judgment. This case presents the problem Rule 4-504(4) was designed to prevent.

Again in Hartford, this court held, "[i]n interpreting a statute or rule, we examine its 'plain language and resort to other methods . . . only if the language is ambiguous." Id. at 55 (citations omitted).

The language of Rule 4-504(4) is clear. All judgments are to be transmitted to opposing parties after being signed by the judge. The trial court's August 4 Order was transmitted two (2) days before it was signed by Judge McCleve. The record is absent of any other evidence that either the August 4 Order or the August 24 Judgment were ever transmitted to the Defendants after Judge McCleve signed them. The procedures of Rule 4-504(4), which ensure due process, were not followed. Such a breach constitutes error by the trial court, requiring the Judgment entered against the Defendants vacated and the case remanded for trial.

IV. UNDER THE DOCTRINES OF CLAIM PRECLUSION AND ISSUE PRECLUSION, THE CIRCUIT COURT ERRED IN NOT BARRING PLAINTIFF FROM RECOVERING "JUST OVER \$11,000" OF THE \$13,515.58 IN CLAIMED DAMAGES UNDER THE DOCTRINES OF CLAIM PRECLUSION AND ISSUE PRECLUSION.

A. Standard of Review

Res Judicata is a question of law requiring a *de novo* standard of review.

B. The District Court Dismissed Mr. Bennett's Claim Against Defendants Pursuant to Section 58-55-17, now Section 58-55-604 of the Utah Code, because Mr. Bennett was an Unlicensed Contractor.

In order to establish the connection between the present case and the case of Bennett v. James B. Craghead, F. Lynn Padan et.al Civ. No. 940904047CV it is necessary to briefly outline the relevant facts.

Beginning in March of 1992, Mr. Mower was hired as a licensed subcontractor to provide certain sheetrocking labor and supplies for the remodeling of the Craghead home. In turn, Mr. Mower contracted with Mr. Bennett (an unlicensed contractor) as an independent contractor to provide much of actual sheetrocking labor and supplies. The work was completed in August of 1992. Mr. Mower and Mr. Bennett claimed their services totalled \$31,874.53. Mr. Craghead and Mr. Padan background certain payments due Mr. Mower and Or. Bennett claiming they damaged the interior of the home. Mr. Mower and Mr. Bennett filed separate liens against the property in the amount of \$13,515.58 and \$13,135.77.

Then, in 1993, both Mr. Mower and Mr. Bennett commenced separate actions to foreclose on their respective mechanics liens. Mr. Mower filed in Circuit Court and Mr. Bennett filed in District Court.

Discovery was commenced in both cases. As part of discovery, Padan's counsel deposed Mr. Mower. Mr. Mower stated at his deposition that "just over \$11,000.00" of his \$13,515.58 claim was due to Bennett's work, i.e., only \$2,500 (approximate) is due him separately as a markup for the materials. (See Mower deposition in District Court proceedings, page 26 lines 4-6. Appendix B-5.)

Discovery in the Bennett case disclosed that Mr. Bennett was not a licensed contractor, contrary to what Mr. Mower and Mr. Bennett led Defendants to believe during construction. In response to this information, Defendants filed a motion seeking dismissal of Mr. Bennett's case pursuant to §58-55-17 U.C.A. (now §58-55-604), which prohibits unlicensed contractors from commencing or maintaining an action for collection of compensation for performing any act for which a license was required. The District Court granted the motion and dismissed Mr. Bennett's mechanic's lien claim for \$13,135.77. (See Appendix A-1).

C. Dismissal of the Bennett Case Precludes Plaintiff in the Present Case from Recovering Just Over \$11,000" of the \$13,515.58 in Claimed Damages under the Doctrines of Claim Preclusion and Issue Preclusion.

Based on the District Court's dismissal of the Mower claim, Plaintiff should have been precluded from recovery "just over \$11,000" of his \$13,515.58 claim which, by Plaintiff's own admission, is due to work done by Mr. Bennett.

The Supreme Court of Utah defined issue preclusion and claim preclusion in Swainston v. Intermountain Health Care, 766 P.2d 1059 (Utah 1988). The court first discussed the two doctrines. It then went on to define a "claim" and an "issue." The court held "an issue" may be described as a "certain and material point, affirmed

by one party and denied by the other. . . No relief is inherent in the resolution of an issue" Id. at 1061 (citations omitted).

The court then held "a claim or cause of action" is 'the aggregate of operative facts which give rise to a right enforceable in the courts'. . . . A claim is the 'situation or state of facts which entitles a party to sustain an action and gives him the right to seek judicial interference in his behalf.'" Id. (citations omitted).

The dismissal of Mr. Bennett's case could be defined as an issue in the present case because, whether or not Mr. Mower can recover \$11,000.00 from the Defendants which was in fact owed to Bennett (when Bennett cannot maintain an action for that same \$11,000.00) is a material point at issue in the present case. However, this same scenario could also be described as an aggregate set of operative facts which give or deny the Plaintiff's claim to "just over \$11,000.00" of the \$13,515.58 prayed for in his Complaint. Given this ambiguity, Defendants will apply the facts to the elements of both issue and claim preclusion.

1. Issue Preclusion

The Swainston court set forth the elements of issue preclusion. They are:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
4. Was the issue in the first case competently, fully, and fairly litigated? Id. at 1061.

The issue in the Bennett case and the present case are identical. It is "Can the Defendants be held liable to pay for work done by an unlicensed contractor?"

In either the Bennett or Mower case, the fact remains, that at all times, the Defendants would only hire licensed contractors and at all times, Mower assured the Defendants that he was hiring only licensed subcontractors. However, Mower hired an unlicensed contractor--Bennett. As a result, significant damage was done to Mr. Craghead's home. This is the very harm §58-55-604 was designed to prevent. The Defendants' liability for work done by Bennett was the sole question in the Bennett case. And as for \$11,000.00 of Mowers \$13,515.58 claim, it is the sole question in this case. This issue was already decided in Bennett v. Craghead, et al. The first element is clearly established.

The District Court's dismissal of the Bennett case was final. Rule 41(b) of Utah R. of Civ. Proc. states:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

The District Court dismissed the Bennett claim based on §58-55-17, now §58-55-604. That dismissal was final and based upon the merits. The second element is clearly established.

Mr. Bennett and Mr. Mower were also in privity with one another in regards to their claims against Defendants. Each claim arises out of one separate construction agreement between Mr. Mower and the Defendants. There was no agreement between the Defendants and Bennett. Of Mower's \$13,515.58 claim, he admits over \$11,000.00 is due to Bennett's work. All parties in this action (Circuit Court) were also parties in the District Court action.

In either the Bennett or Mower case, the fact remains, that at all times, the Defendants would only hire licensed contractors and at all times, Mower assured the Defendants that he was hiring only licensed subcontractors. However, Mower hired an unlicensed contractor--Bennett. As a result, significant damage was done to Mr. Craghead's home. This is the very harm §58-55-604 was designed to prevent. The Defendants' liability for work done by Bennett was the sole question in the Bennett case. And as for \$11,000.00 of Mowers \$13,515.58 claim, it is the sole question in this case. This issue was already decided in Bennett v. Craghead, et al. The first element is clearly established.

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Mr. Bennett and Mr. Mower were also in privity with one another in regards to their claims against Defendants. Each claim arises out of one separate construction agreement between Mr. Mower and the Defendants. There was no agreement between the Defendants and Bennett. Of Mower's \$13,515.58 claim, he admits over \$11,000.00 is due to Bennett's work. All parties in this action (Circuit Court) were also parties in the District Court action.

The elements having been met, Mower is precluded from claiming the \$11,000.00 due to work done by Bennett, an unlicensed contractor.

CONCLUSION

For the reasons set forth above the Defendants respectfully requests this court order the Circuit Court to vacate the Default Judgment and reinstate Defendants' Answer and Counterclaim and enter an order that under the circumstances the Defendants did not willfully fail to answer the discovery and that barred thereon the matter should proceed to trial.

Respectfully submitted



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MAILING CERTIFICATE

I hereby certify that I personally delivered a true and correct copy of the above and foregoing BRIEF OF APPELLANT to:

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