

1994

# Michael A. Mower v. James D. Craghead, F. Lynn Padan : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

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

Jennifer L. Falk; Winder & Haslam; Attorney for Appellee.

Joseph M. Chambers; Preston & Chambers; Scott Marriott Hadley; Van Cott, Bagley, Cornwall & McCarthy; Attorney for Appellants.

---

## Recommended Citation

Reply Brief, *Mower v. Craghead*, No. 940682 (Utah Court of Appeals, 1994).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/6296](https://digitalcommons.law.byu.edu/byu_ca1/6296)

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

UTAH COURT OF APPEALS

---

MICHAEL A. MOWER,	*	
Plaintiff/Appellee	*	APPELLANTS' REPLY BRIEF
	*	
vs.	*	
	*	
JAMES D. CRAGHEAD, F. LYNN PADAN, aka ASPEN CONSTRUCTION INC., MARTIN BENNETT, and JOHN and JANE DOES 1 through 20,	*	No. 940682-CA
	*	
Defendants/Appellants		Priority 15

---

Jennifer L. Falk  
WINDER & HASLAM  
175 West 200 South, Suite 4000  
P.O. Box 2668  
Salt Lake City, UT 84110-2668  
Tel: (801) 322-2222

Attorney for Appellee,  
Michael A. Mower

Joseph M. Chambers  
PRESTON & CHAMBERS  
31 Federal Avenue  
Logan, Utah 84321  
Tel: (801) 752-3551

Attorney for Appellants,  
James D. Craghead, F.  
Lynn Padan and Aspen  
Construction

**UTAH COURT OF APPEALS  
BRIEF**

Scott Marriott Hadley  
VAN COTT, BAGLEY, CORNWALL  
& MCCARTHY  
2404 Washington Blvd.,  
Suite 900  
Ogden, Utah 84401  
Tel: (801) 394-5783

Attorney for Appellants,  
James D. Craghead, F.  
Lynn Padan and Aspen  
Construction

1  
13  
DOCKET NO. 940682

**FILED**

JUN 29 1995

COURT OF APPEALS

UTAH COURT OF APPEALS

---

MICHAEL A. MOWER,	*	
Plaintiff/Appellee	*	APPELLANTS' REPLY BRIEF
	*	
vs.	*	
JAMES D. CRAGHEAD, F. LYNN		
PADAN, aka ASPEN CONSTRUCTION	*	
INC., MARTIN BENNETT, and		
JOHN and JANE DOES 1	*	No. 940682-CA
through 20,	*	
Defendants/Appellants		

---

Jennifer L. Falk  
WINDER & HASLAM  
175 West 200 South, Suite 4000  
P.O. Box 2668  
Salt Lake City, UT 84110-2668  
Tel: (801) 322-2222

Attorney for Appellee,  
Michael A. Mower

Joseph M. Chambers  
PRESTON & CHAMBERS  
31 Federal Avenue  
Logan, Utah 84321  
Tel: (801) 752-3551

Attorney for Appellants,  
James D. Craghead, F.  
Lynn Padan and Aspen  
Construction

Scott Marriott Hadley  
VAN COTT, BAGLEY, CORNWALL  
& MCCARTHY  
2404 Washington Blvd.,  
Suite 900  
Ogden, Utah 84401  
Tel: (801) 394-5783

Attorney for Appellants,  
James D. Craghead, F.  
Lynn Padan and Aspen  
Construction

TABLE OF CONTENTS

INTRODUCTION . . . . .	1
ARGUMENT . . . . .	1
I.    THE ENTIRE RECORD DEMONSTRATES THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE CASE AND DENYING THE DEFENDANTS' MOTION FOR RECONSIDERATION . . . . .	1
II.   IMPOSSIBILITY OF PROVIDING DOCUMENTS AFTER THE BURGLARY . . . . .	4
III.  AS A MATTER OF LAW THE TRIAL COURT'S ENTRY OF A JUDGMENT AGAINST THE DEFENDANTS SHOULD BE OVERTURNED FOR FAILURE TO COMPORT WITH RULE 4-504(2) OF THE CODE OF JUDICIAL ADMINISTRATION. . . . .	6
IV.   AS A MATTER OF LAW TRIAL COURT'S ENTRY OF JUDGMENT AGAINST DEFENDANTS BE OVERTURNED FOR FAILURE TO COMPORT WITH RULE 4-504(4) OF THE UTAH CODE OF JUDICIAL ADMINISTRATION. . . . .	7
V.    DEFENDANTS HAVE PRESERVED THE ISSUES OF CLAIM AND ISSUE PRECLUSION AND THEY ARE PROPERLY BEFORE THIS COURT. . . . .	7
VI.   THE ISSUE WAS LITIGATED ON THE MERITS. . . . .	8
CONCLUSION . . . . .	9

## TABLE OF AUTHORITIES

<u>Carman v. Slavens</u> , 546 P.2d 601 (Utah 1976) . . . . .	6
<u>Cornish Town v. Koller</u> , 798 P.2d 753 (Utah 1990) . . . . .	7
<u>Ringwood v. Foreign Auto Works, Inc.</u> 786 P.2d 1350 (Utah App. 1990), . . . . .	8,9
<u>Steiner v. State</u> , 495 P.2d 809 (Utah 1972). . . . .	9

## INTRODUCTION

Comes now Defendants/Appellants pursuant to Rule 24(c) and offer the following reply and clarification to certain issues raised by Plaintiff/Appellee's brief.

## ARGUMENT

### **I. THE ENTIRE RECORD DEMONSTRATES THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE CASE AND DENYING THE DEFENDANTS' MOTION FOR RECONSIDERATION**

Plaintiff's counsel, as a strong advocate for her client, focuses solely upon the number of days between Plaintiff's first request of discovery to the date of the default judgment. However, in emphasizing only the time frame, Plaintiff's counsel fails to recognize significant events that took place during the intern time frame.

To begin with, Defendants in good faith answered thirty-five (35) of the thirty-nine (39) interrogatories, sixty-nine (69) days before the trial court entered default judgment. See the Defendants' brief page 4 and 5.

Moreover, the Plaintiff ignores the discovery obtained in the Bennett v. Craghead almost three hundred (300) days before Plaintiff sought discovery in the present case. See Defendants' Appendix B. The discovery Plaintiff sought in the present case was very duplicative of the discovery they had already obtained in the Bennett case. Therefore, any lack of discovery in the present case has caused little, if any, prejudice upon the Plaintiff.

Plaintiff also fails to admit that it took themselves one hundred six days (106) days to clarify their requests for

documents and the four (4) objectionable interrogatories. Such clarification did not occur until July 8, 1994, during deposition of Mr. Padan. (Defendants Appendix C-8 pages 3-6).

Plaintiff's efforts to characterize Defendants as individuals willfully refusing to comply with discovery requests is simply unfounded in the facts as set forth in the record. On June 17, 1994, the Defendants filed what they considered good faith and complete answers to the interrogatories and asked for clarifications on the types of documents sought by the Plaintiff. See Appendix C of the Appellants' brief. It was not until July 8 of Mr. Padan's deposition that the Plaintiff clarified documents they sought and narrowed the remaining four (4) of the thirty-nine (39) interrogatories. At that time both parties agreed that the documents should be provided by July 15, 1994. See Appellants' brief page 7. Five (5) days later the Defendant Padan's office was burglarized.

As an example of Plaintiff's counsel's continual failure to recognize all the facts of the case, Defendants refer this Court to the Affidavit of Ms. Jennifer Falk dated 19th of August, 1994. This Affidavit was in support of the Plaintiff's Motion for Entry of Judgment. In the Affidavit Plaintiff's counsel simply states:

I have received no documents from Defendants since the entry of the court's ruling of July 27, 1994.

I have not received any discovery whatsoever, including answers to interrogatories from Defendants since the date of the court's ruling.

More than twenty days have passed since the date of the court's ruling of July 27, 1995.

Nowhere in the affidavit does Plaintiff's counsel mention the July 8 Padan deposition, the July 13 burglary, or the

numerous messages left her by Defendant Padan and Defendant's counsel. This Affidavit demonstrates how the Plaintiff focuses on certain facts but ignores significant other facts.

Neither in the above described Affidavit nor in Plaintiff's Brief does Plaintiff address the fact that both the Defendant Padan and Defendants' counsel left several messages with Plaintiff's counsel disclosing the burglary and asking for a return phone call to work out contingencies. Plaintiff's counsel fails to mention that she did not return any such phone calls or seek an explanation from the Defendants as to why discovery had not been made. In fact, it was not until August 4, 1994, the date the court entered an order and judgment against the Defendants, that the Plaintiff's counsel first responded to the numerous messages left by the Defendant and Defendants' counsel. The letter dated August 8, 1994, which is included in Defendants' Appendix E illustrates the extent to which Plaintiff's counsel went in an effort to stay ignorant of the facts to utilize the lack of knowledge of the burglary of the Defendant Padan's office to her client's benefit.

The letter reads in part as follows:

I have attempted to contact you during the last three weeks leaving various phone message with your personal secretary, most recently on August 4, as well as with the receptionist of Winder and Haslam. The purpose of my attempts to contact you, as well as Mr. Padan's separate attempts, was to inform you that Mr. Padan's business was burglarized on July 13, 1994. Rather than giving me the courtesy of returning my phone calls, you have proceeded to pursue your motion for sanctions. Rather than talk to me directly you have responded by letter which was faxed to my office on August 4, 1994. Perhaps you feel justified in maintaining an intentional ignorance of the events, however I believe your actions are not justifiable.



Plaintiff's counsel should not be allowed to intentionally stay ignorant of the circumstances concerning discovery to this court. Defendants merely ask this court to review the Plaintiff's recitation of the total course of proceedings and determine if based upon the total circumstances, the Defendants have willfully abused the discovery process warranting the entry of the Default Judgment as sanctions.

## **II. IMPOSSIBILITY OF PROVIDING DOCUMENTS AFTER THE BURGLARY**

Plaintiff's Brief raises two issues concerning the Defendants' ability to provide certain information after the Burglary. The Defendants now seek to clarify.

The first question concerns the ability of Mr. Craghead to produce documents after the burglary. Mr. Padan, being the general contractor and operator of Aspen Construction, retained all business records at his office mostly on computer. Mr. Craghead did not retain any duplicative or additional business copies at a separate location. Given this fact it would be impossible for Mr. Craghead to produce any documents after the burglary for all of his documents and information were held at Mr. Padan's place of business which was burglarized.

As for the impossibility of producing certain printed documents after the burglary, Plaintiff should understand that the documents sought in his request for production of documents are merely printed copies of information electronically stored on the Defendants' computer. The computer data having been stolen, it became impossible for Defendants to produce hard copies of such information.

The burglary also prevented the Defendant's from producing the "architectural plans, Defendant Padan's 1992 and 1993 day planners, bills and bids and invoices submitted by the contractor." The individuals who burglarized Padan's office were not tidy. The entire office was "turned upside down." Not only was all the electronic information which Mr. Padan had complied for the Plaintiffs stolen, but everything that was left was scattered throughout the office. Mr. Padan was in no position to provide the documents mentioned above after the burglary since such papers were scattered along with all other papers and equipment throughout the office. Mr. Padan had to maintain an ongoing business despite the robbery, making it impossible for him to take a number of consecutive days away from work and repair the office. In short, all documents and information were contained on the computers except for a few papers that were scattered throughout the office amongst the rest of Mr. Padan's papers. The information having been stolen or lost, made it impossible for the Defendants to make hard copies of such documents and transfer them to the Plaintiff after the burglary.

With these facts in mind as well as additional facts set forth in more detail in Defendants' brief, Defendants submit that the trial court breached the boundaries of discretion as set forth in Carmen v. Slavens, 546 P.2d 601 (Utah 1976) and at page 12 of Defendants' Brief. Having abused the standards of discretion, the Defendant asks this court to Vacate the trial courts Judgment and remand the case for trial, thereby enforcing the policy articulated in Carman v. Slavens, 546 P.2d 601, 603

(Utah 1976) which "resolves doubts in favor of permitting parties to have their day in court on the merits of the controversy." Id.

**III. AS A MATTER OF LAW THE TRIAL COURT'S ENTRY OF A JUDGMENT AGAINST THE DEFENDANTS SHOULD BE OVERTURNED FOR FAILURE TO COMPORT WITH RULE 4-504(2) OF THE CODE OF JUDICIAL ADMINISTRATION.**

The Plaintiff misstates the Defendants second issue, by assuming that the Plaintiff is alleging a violation of Rule 4-504(1). Rather, the Defendants assert that the Plaintiff violated Rule 4-504(2) of the Code of Judicial Administration which requires that:

Copies of all proposed findings, judgments, and order shall be served upon the opposing party 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.

Based upon the certificate of mailing attached to the proposed order, the proposed order was mailed to the Defendants only two (2) days prior to the court signing the Order. The Defendants were not given five (5) days to respond to the proposed order as required by Rule 4-504(2)--an order which for the first time mentioned the twenty (20) day time limit. Given the time required for delivering mail from Salt Lake to Logan, the Defendants had no notice of the twenty (20) day time limit before the court signed the Order.

Plaintiff alleges that the Circuit Court's Minute Entry put the Defendants on notice. However, such is not the case. The Minute Entry was entered without a hearing. Nor was the Minute Entry sent to the Defendants.

To allow a party to mail a proposed order to the opposing party only two (2) days before the court rules on the order denies the opposing party "timely and adequate notice and opportunity to be heard in a meaningful way [which is] the very heart of procedural fairness." Cornish Town v. Koller, 798 P.2d 753 (Utah 1990).

**IV. AS A MATTER OF LAW TRIAL COURT'S ENTRY OF JUDGMENT AGAINST DEFENDANTS BE OVERTURNED FOR FAILURE TO COMPORT WITH RULE 4-504(4) OF THE UTAH CODE OF JUDICIAL ADMINISTRATION.**

The Plaintiff's brief fails to address the issues raised by Defendants' brief concerning Rule 4-504(4). The evidence in the record unequivocally demonstrates that a signed judgment was not transferred to the Defendants as required by Rule 4-504(4). See Defendants' Brief page 22. Such a breach constitutes error by trial court, requiring the judgment entered against the Defendants vacate and the case be remanded for trial. See Defendants' brief pp. 22-23.

**V. DEFENDANTS HAVE PRESERVED THE ISSUES OF CLAIM AND ISSUE PRECLUSION AND THEY ARE PROPERLY BEFORE THIS COURT.**

The Defendants have preserved the issues of claim and issue preclusion through their Answer and Counterclaim. Defendants' Counterclaim addresses the offsets to the Plaintiff's claims. The \$11,000 which Bennett was precluded from collecting is an offset to Plaintiffs 13,515.58 claim. See Appendix A of the Defendants' brief.

Moreover, the fact that the trial court in the present case dismissed the Defendants' Answer and entered judgment for the

Plaintiff prior to trial (let alone any pre-trial conference) explains why the \$11,000 offset was not more specifically laid out and presented at the trial court. The Defendants simply were not yet in a position to more explicitly set forth the offset resulting from the dismissal of Mr. Bennett's claim.

However, the fact that Defendants' counsel questioned Mr. Mower at the deposition about the money attributable to Mr. Bennett's claim demonstrates that Defendants were pursuing such amounts as an offset.

In fact, at the time the trial court entered the default judgment, Defendants' counsel was in the process of drafting a summary judgment motion precluding Plaintiff from collecting the money owed to Bennett.

The Defendants did raise and preserve the issue of offsets in the trial court, given the infancy of the proceedings at the time the case was dismissed, Defendants assert that they have sufficiently preserved the issue for appeal.

#### **VI. THE ISSUE WAS LITIGATED ON THE MERITS.**

Plaintiff in his brief cites Ringwood v. Foreign Auto Works, Inc. 786 P.2d 1350, in support of the necessity of preserving issues for appeal. However, Plaintiff fails to cite the language on page 1358 of the Ringwood opinion footnote 5 which states:

The fact that the prior action was dismissed with prejudice does not nullify res judicata application, as such constitutes litigation on the merits. Ringwood at 1358 citing Utah Rules of Civil Procedure 52(a); Steiner v. State, 495 P.2d 809 (Utah 1972).

The language in the Bennett v. Craghead order of dismissal states:

For good cause appearing it is hereby: ORDERED, ADJUDGED, and DECREED that this action is hereby dismissed with prejudice for the reasons set forth in this order and the Minute Entry dated March 31, 1994. (Appendix A of Defendants' Brief.)

The basis for this dismissal with prejudice was Section 58-55-17 U.C.A., which prevents unlicensed contractors from suing for services rendered.

To allow Mr. Mower to collect the "just over \$11,000" for Mr. Bennett, when the District Court has ruled Mr. Bennett is not entitled to collect such money violates the essence of res judicata. To allow Mr. Mower to collect and retain just over \$11,000 of his \$13,515 claim to which he is not entitled constitutes unjust enrichment and one of the basis for the doctrines of claim and issue preclusion.

#### CONCLUSION

Given the totality of facts in record, the trial court did abuse its discretion in dismissing Defendant's answer and denying Defendants Motion to set aside the judgment.

The trial court erred by failing to follow the procedures required in Sections 4-504(2) and 4-504(4) of the Utah Code of Judicial Procedure.

And the \$11,000 offset to Plaintiff's 13.515.58 claim was properly preserved given the infancy of the trial courts proceedings. Since the District court entered a final judgment on the merits of Mr. BennetT's claim which constitutes "just over \$11,000" of Mr. Padan's claim, by his own admission, Plaintiff should be precluded from collecting that \$11,000 dollars.

For the reasons set forth in Defendants' Brief and Reply, Defendants respectfully request this Court order the Circuit

Court to Vacate the Default Judgment and reinstate Defendants' Answer and Counterclaim and remand for trial on the merits, including the \$11,000 offset. Alternatively, Defendants ask the court to remand for trial the issue of reducing Plaintiff's judgment by the amount attributable to Mr. Bennett's claim.

Respectfully submitted

  
\_\_\_\_\_  
JOSEPH M. CHAMBERS  
Counsel for Appellants

#### MAILING CERTIFICATE

I hereby certify that I personally delivered a true and correct copy of the above and foregoing APPELLANTS' REPLY BRIEF to:

Scott Marriott Hadley  
VAN COTT, BAGLEY, CORNWALL & MCCARTHY  
Attorney for Appellant  
2404 Washington Blvd., Suite 900  
Ogden, Utah 84401

Jennifer L. Falk  
WINDER & HASLAM  
Attorney for Appellee  
175 West 200 South, Suite 4000  
P.O. Box 2668  
Salt Lake City, UT 84110-2668

dated this 21 day of June, 1995.

  
\_\_\_\_\_