

2006

Layne D. Hess v. Jody Johnston : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



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.

Paxton R. Guymon; Joel T. Zenger; Miller Guymon; Attorneys for Plaintiff/Appellant and Cross-Appellee Layne D. Hess.

David W. Scofield; Peters Scofield and Price; Attorneys for Defendant/Appellee and Cross Appellant Jody Johnston.

Recommended Citation

Brief of Appellee, *Hess v. Johnston*, No. 20060497 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/6559

This Brief of Appellee 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. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

Layne D. Hess,

Appellant and Cross-Appellee,

-vs-

Jody Johnston,

Appellee and Cross-Appellant.

Case No. 20060497-CA

Third District Court No. 050919801

OPENING BRIEF OF CROSS-APPELLANT AND APPELLEE

**APPEAL FROM THE FINAL ORDER OF THE HONORABLE J. DENNIS FREDERICK,
DATED APRIL 25, 2006, DISMISSING ACTION, WITH PREJUDICE**

Paxton R. Guymon - 8188
Joel T. Zenger - 8926
MILLER GUYMON, P.C.
165 South Regent Street
Salt Lake City, Utah 84111
Telephone: (801) 363-5600
Facsimile: (801) 363-5601
Attorneys for Layne D. Hess

David W. Scofield - 4140
PETERS SCOFIELD PRICE
A Professional Corporation
340 Broadway Centre
111 East Broadway
Salt Lake City, Utah 84111
Telephone: (801) 322-2002
Telephone: (801) 322-2002
Attorneys for Jody Johnston

**FILED
UTAH APPELLATE COURTS
OCT 26 2006**

IN THE UTAH COURT OF APPEALS

Layne D. Hess,

Appellant and Cross-Appellee,

-vs-

Jody Johnston,

Appellee and Cross-Appellant.

Case No. 20060497-CA

Third District Court No. 050919801

OPENING BRIEF OF CROSS-APPELLANT AND APPELLEE

**APPEAL FROM THE FINAL ORDER OF THE HONORABLE J. DENNIS FREDERICK,
DATED APRIL 25, 2006, DISMISSING ACTION, WITH PREJUDICE**

Paxton R. Guymon - 8188
Joel T. Zenger - 8926
MILLER GUYMON, P.C.
165 South Regent Street
Salt Lake City, Utah 84111
Telephone: (801) 363-5600
Facsimile: (801) 363-5601
Attorneys for Layne D. Hess

David W. Scofield - 4140
PETERS SCOFIELD PRICE
A Professional Corporation
340 Broadway Centre
111 East Broadway
Salt Lake City, Utah 84111
Telephone: (801) 322-2002
Telephone: (801) 322-2002
Attorneys for Jody Johnston

TABLE OF CONTENTS

	<u>Page</u>
Jurisdiction	1
Statement of Issues Presented On Cross-Appeal	1
Applicable Statutes And Rules	1
Statement of the Case	3
A. Nature of the Case.	3
B. Course of Proceedings.	4
C. Disposition By Trial Court.	4
APPELLEE’S BRIEF	5
Summary of Argument	5
ARGUMENT	6
I. THE TRIAL COURT CORRECTLY INTERPRETED <i>JACKSON V. BROWN</i> IN DISMISSING HESS’ COMPLAINT.	6
II. NO REMEDY OF RESTITUTION IS AVAILABLE, UNDER THE RUBRIC OF UNJUST ENRICHMENT, PROMISSORY ESTOPPEL OR OTHERWISE, FOR COURTSHIP EXPENSES.	9
A. Authorities Relied Upon By Hess From Other Jurisdictions Are Inapposite.	12
Cross-Appellant’s Brief	17
Summary of Argument	17
ARGUMENT	18
III. UTAH HAS ABOLISHED ANY CAUSE OF ACTION FOR BREACH OF THE MARRIAGE PROMISE AS AGAINST PUBLIC POLICY.	18

TABLE OF CONTENTS

	<u>Page</u>
Conclusion	19
Certificate of Service	20

ADDENDA:

Minute Entry, dated April 10, 2006	1
Final Order Dismissing Action, With Prejudice, dated April 25, 2006	2

TABLE OF AUTHORITIES

Page

Cases:

<i>Albinger v. Harris</i> , 310 Mont. 27, 48 P.3d 711 (2002)	15
<i>Bailey-Allen Co., Inc. v. Kurzet</i> , 945 P.2d 180 (Utah Ct.App. 1997)	1
<i>Barnard v. Sutliff</i> , 846 P.2d 1229 (Utah 1992)	1
<i>Brown v. Strum</i> , 350 F.Supp.2d 346 (D. Conn. 2004)	13
<i>Davies v. Olson</i> , 746 P.2d 264 (Utah Ct. App. 1987)	10
<i>Fanning v. Iversen</i> , 535 N.W.2d 770 (S.D. 1995)	14-16
<i>Giffen v. R.W.L.</i> , 913 P.2d 761 (Utah App. 1996)	18
<i>Jackson v. Brown</i> , 904 P.2d 685 (Utah 1995)	4-7
<i>Lund v. District Court</i> , 62 P.2d 278 (Utah 1936)	8
<i>McClain v. Gilliam</i> , 389 S.W.2d 131 (Tex. Civ. App. 1965)	16
<i>Piccininni v. Hajus</i> , 180 Conn. 369, 429 A.2d 886 (1980)	12, 13
<i>Price v. Armour</i> , 949 P.2d 1251 (Utah 1997)	8, 9
<i>Stone v. Salt Lake City</i> , 11 Utah 2d 196, 356 P.2d 631 (1960)	15
<i>Taylor v. Estate of Taylor</i> , 770 P.2d 163 (Utah App.1989)	1, 18

TABLE OF AUTHORITIES

Page

Cases:

<i>Turner v. Shavers</i> , 96 Ohio App.3d 769, 645 N.E.2d 1324 (Ohio Ct. App. 1994)	8, 16
<i>West v. West</i> , 387 P.2d 686 (Utah 1963)	10
<i>Wilson v. Dabo</i> , 10 Ohio App.3d 169, 461 N.E.2d 8 (Ct. App. 1983)	16

Statutes:

Utah Code Ann. § 78-2-2(3)(j)	1
Utah Code Ann. § 78-2-2(4)	1

Rules:

UTAH R. CIV. P. 11	1-4, 17-19
------------------------------	------------

Other Authorities:

12 AM. JUR. 2D. <i>Breach of Promise</i> § 14	8
RESTATEMENT OF RESTITUTION (1937)	10-15, 17

JURISDICTION

This matter was transferred to the Court of Appeals by the Utah Supreme Court pursuant to UTAH CODE ANN. § 78-2-2(4). This Court has Jurisdiction to decide cross-appellants' appeal pursuant to UTAH CODE ANN. § 78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED ON CROSS-APPEAL

1. Issue: Did the district court err by ruling that there was no violation of UTAH R. CIV. P. 11 and denying defendant's motion for sanctions?

Standard of Review: "Whether specific conduct amounts to a violation of Rule 11 is a question of law." *Bailey-Allen Co., Inc. v. Kurzet*, 945 P.2d 180, 193-94 (Utah Ct.App. 1997), citing *Taylor v. Estate of Taylor*, 770 P.2d 163, 171 (Utah Ct.App. 1989); and *Barnard v. Sutliff*, 846 P.2d 1229, 1234 (Utah 1992) ("The trial court's ultimate conclusion that rule 11 was violated . . . [is] reviewed under the correction of error standard.").

APPLICABLE STATUTES AND RULES

UTAH R. CIV. P. 11 – Signing of pleadings, motions, and other papers; representations to court; sanctions.

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or later advocating), an attorney or unrepresented party

is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated.

(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of sanction; limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff and appellant, Layne D. Hess ("Hess") brought by this action to be reimbursed for the expenses he incurred and gifts he made in his ultimately-
unsuccessful courtship of defendant, Jody [Johanna] Johnston ("Johnston"), including

such items as one-half (½) of vacation costs, contending *post hoc* that his payment for all expenses was a conditional gift or constitutes unjust enrichment, because Johnston later decided not to follow-through on her promise to marry Hess.

B. Course of Proceedings.

Hess' complaint against Johnston was filed after Hess, through counsel, made written demand for the sums later demanded in his complaint. On October 17, 2005, Johnston, through counsel, responded to that demand, referring Hess to *Jackson v. Brown*, 904 P.2d 685 (Utah 1995), which abolished any "independent action" for breach of promise to marry. R. 16.

In response, Hess filed his complaint (R. 1-11). On or about November 19, 2005, in accordance with the requirements of UTAH R. CIV. P. 11(c)(1)(A), Johnston mailed to Hess' counsel a proposed motion for sanctions and supporting memorandum (R.22), requesting that the complaint be withdrawn. Hess refused to dismiss his complaint and Johnston's motion to dismiss and motion for sanctions were filed on January 9, 2006. R. 22-23 and R. 14-15.

A hearing was held on Johnston's motions on April 10, 2006. R. 60.

C. Disposition By Trial Court.

The trial court dismissed the complaint, with prejudice, but denied Johnston's motion for sanctions, noting that it was not persuaded the action was filed frivolously. R. 62.

STATEMENT OF FACTS

For purposes of a motion to dismiss, the well pleaded factual allegations of the complaint are to be taken as true. Johnston, therefore, accepts the Statement of Facts contained in Hess' opening brief. Johnston supplements those facts with the following

facts:

1. Hess' claims relating to the engagement ring given to Johnston relate only to Hess' allegation that he has been unable to re-sell the ring for the full price he paid to obtain it. Hess does not allege that Johnston damaged the ring or did anything to decrease its market value.

APPELLEE'S BRIEF

SUMMARY OF ARGUMENT

Hess' complaint contained four causes of action: (1) Unjust Enrichment; (2) Conditional Gift; (3) Promissory Estoppel; and (4) Breach of Contract. Each claim is based upon Hess' attempt to recover courtship expenses. Hess says as much in his opening brief.

The trial court erred in holding that the abolishment of the cause of action for breach of a promise to marry by the Utah Supreme Court in *Jackson v. Brown* 904 P.2d 685 (Utah 1995), bars Mr. Hess' claims for restitution of the expenses and losses he has incurred or will incur as a result of his courtship of Ms. Johnston.

Hess Opening Brief at 8. The trial court correctly rejected Hess' arguments. Had it not done so, the binding precedent of the Utah Supreme Court in *Jackson v. Brown*, 904 P.2d 685 (Utah 1995), would have been rendered a complete nullity. At core, Hess' argument is simply that: "If [he] had known that Ms. Johnston did not wi[s]h to marry him, he would not have incurred the expenses" Hess Brief at 7. In other words, had Johnston not changed her mind about the marriage, we would not find ourselves before the court now. That claim, irrespective of its name, is a breach of promise to marry; a cause of action that no longer exists in this state.

ARGUMENT

I. THE TRIAL COURT CORRECTLY INTERPRETED *JACKSON V. BROWN* IN DISMISSING HESS' COMPLAINT.

In 1995, the Utah Supreme Court abolished any cause of action for breach of a marriage promise, in *Jackson v. Brown*, 904 P.2d 685, 687 (Utah 1995) ("in light of modern customs and jurisprudence we now abolish the cause of action in this state.") The express rationale for abolition of the cause of action was that it was against the public policy of this state, for the following reasons:

However, we see no benefit in discouraging or penalizing persons who realize, before making these vows, that for whatever reason, they are unprepared to take such an important step. Plaintiff in this case concedes that if we were to uphold the action, any time an engaged party were to cancel wedding plans for any reason, the other party would have a prima facie case for breach of promise to marry. Such an action would be highly susceptible to abuse by persons whose feelings are damaged by a former fiancée's decision to cancel a wedding. In *Norton*, we held that actions so manipulable and vulnerable to this type of abuse are "counterproductive" to the good of the state.

Id. The instant action represents just such an abusive effort, by a jilted boyfriend.

Indeed, there is not even an allegation of any expense incurred in wedding preparations, such as the dictum in *Jackson* (which dictum was, itself, rejected by the majority of Justices voting) might allow.

Hess' complaint is nothing but a thinly-veiled effort to plead around *Jackson* by clinging to dictum, alleging the facts for a breach of promise action, but cloaking those facts in other names. Hess was unsuccessful in courting Johnston's affections. No cause of action exists to allow him to sue her to recover his courtship expenditures.

The Complaint alleges: "In July 2004, Mr. Hess and Ms. Johnston began serious discussions about getting married, and decided that they would get married,...." (¶ 13,

Complaint, R. 2) "While in France [September, 2004], Mr. Hess formally proposed to Ms. Johnston." (§ 29, R. 4) "Ms. Johnston accepted Mr. Hess' proposal, and Mr. Hess gave Ms. Johnston the engagement ring." (§ 30, R. 4) "In late April 2005, without any forewarning or explanation, Ms. Johnston broke off the engagement with Mr. Hess." (§ 46, R. 5) "Mr. Hess would not have incurred the expenses of the Alaska cruise, the trip to France, the vasectomy requested by Ms. Johnston, the purchase of the engagement ring, and the purchase of a vehicle for Ms. Johnston's son, but for Ms. Johnston's promise to marry him." (§ 49, R. 6) If we all knew the future, none of us would make a false step.

A single Justice set forth as dictum in the *Jackson* opinion, that "any economic losses suffered because of Jackson's reasonable reliance upon Brown's promise to marry her (such as normal expenses **attendant to a wedding**) may be recoverable under a theory of reasonable reliance or breach of contract." *Jackson*, 904 P.2d at 687 (emphasis added). That dictum was expressly **not adopted** as the law of this state, by the majority of the Justices. See *id.* at 688 ("I concur in most of the majority opinion **but cannot concur in the dictum** that 'any economic losses suffered because of Jackson's reasonable reliance on Brown's promise to marry her (such as normal expenses attendant to a wedding) may be recoverable under a theory of reasonable reliance or breach of contract. [Emphasis added]'" (Stewart, A.C.J., concurring, joined by Zimmerman, C.J. and Russon, J). The law of this state plainly is that any cause of action for breach of promise was, and is, abolished. No public policy is served by allowing Hess to abuse Johnston because he now wishes he had not spent money courting her.

For purposes of determining whether a cause of action is recognized in the State

of Utah, it does not matter how the legal theories in a pleading are labeled, it is the subject matter of the pleading that is determinative. *Lund v. District Court*, 62 P.2d 278, 280 (Utah 1936). Where a cause of action has been expressly abolished as violative of the public policy of the state, it is abolished in all its forms. See 12 AM. JUR. 2D. *Breach of Promise* § 14 ("Generally speaking, any action based upon or arising out of a breach of contract to marry is barred under a statute abolishing such actions, irrespective of the nature of the damages or relief sought, or the grounds alleged for such a recovery."). By example, where a breach of promise cause of action is barred, "promissory estoppel" is likewise barred. See *Turner v. Shavers*, 96 Ohio App.3d 769, 770, 645 N.E.2d 1324, 1325 (Ohio Ct. App. 1994) ("We agree with the trial court that the breach of promise theory is expressly barred by R.C. 2305.29. We further agree that promissory estoppel does not apply, since recovery on the underlying "contract" to wed has been barred by R.C. 2305.29.")

An analogous matter was decided in *Price v. Armour*, 949 P.2d 1251 (Utah 1997), where the Utah Supreme Court was confronted with the issue of whether the judicial proceedings privilege applied to causes of action other than defamation. See *id.* at 1258. This issue arose in *Price*, like it does here, because a plaintiff seeking to avoid the plain effect of the law on a cause of action, there, defamation, cloaked the same claim for damages caused by a defamatory statement in a different label, viz., "intentional interference with business relations." *Id.*

The Court commenced its analysis by examining the public policy behind the judicial proceedings privilege. See *id.* ("The whole purpose of the judicial privilege is to ensure free and open expression by all participants in judicial proceedings by alleviating any and all fear that participation will subject them to the risk of subsequent legal

actions.”) In light of that public policy, the conclusion was inescapable that all causes of action based on damages alleged to flow from defamatory statements, whether called defamation, interference or otherwise, were barred by the public policy:

There is no reason to distinguish statements that may defame a person from statements that may interfere with that person's business relations. The purpose of the judicial privilege remains the same. Holding that a defamatory statement made during a judicial proceeding is absolutely privileged but then holding that the privilege does not apply to the claim that the statement interfered with a business relation would defeat the very purpose of the privilege and would chill free and open expression in the judicial setting.

Id. Likewise, here, no matter what he calls it, Hess purports to claim damages due to the fact that Johnston breached her promise to marry. The very purpose of the Utah Supreme Court's abolition of the tort of breach of promise to marry, as a matter of public policy, would be defeated if Hess could plead the same facts, call the cause of action by a different name, and be allowed to proceed. Hess' effort to survive in asserting an outlawed cause of action, by the simple expedient of calling it something else, is sanctionable and his claims were appropriately dismissed, with prejudice.

II. NO REMEDY OF RESTITUTION IS AVAILABLE, UNDER THE RUBRIC OF UNJUST ENRICHMENT, PROMISSORY ESTOPPEL OR OTHERWISE, FOR COURTSHIP EXPENSES.

Hess' claims are even less meritorious when one considers that, even in the rejected-dictum in *Jackson*, there was no suggestion that ***courtship*** expenses or gifts made during ***courtship*** could be recoverable. That dictum spoke only of expenses of a planned wedding. There can be no "unjust enrichment" when Hess benefitted through the courtship by the company of a human being he chose to pursue. The apparent suggestion that baubles or trips have some greater intrinsic value than the sought-after company of a woman, in its best light, would purport to equate women with property, a

concept anathema to this society. Asserting a claim on such a basis is sanctionable. Having had Johnston's company on the trips, which is presumably what he desired, Hess cannot establish that he conferred upon Johnston a benefit "under circumstances that would make it unjust for the Johnston to retain the benefit without paying for it." *Davies v. Olson*, 746 P.2d 264, 269 (Utah Ct. App. 1987).

Johnston has found no Utah case supporting the existence of a cause of action for "conditional gift" for courtship expenses. Even if a "conditional gift" might have been recovered under law, however, when the condition was the consummation of a promise to marry, the abolition of relief for breach of promise, based on public policy, precludes such action now. In any event, it is by no means clear that such a claim has ever existed under Utah law. Utah law does not allow a "gift" without donative intent and donative intent is not conditional. See *West v. West*, 387 P.2d 686, 688-89 & n.1 (Utah 1963). Most importantly, though, Hess' claim does not relate to gifts specifically tied to the condition of marriage, such as an engagement ring might be, but only, again, to courtship expenses. Hess' "contingent gift" claim is just another cynical effort to abuse Johnston because she decided not to marry him.

Since no Utah cases seem to support such a cause of action, Johnston looks to the American Law Institute's official promulgation of the common law in the RESTATEMENT OF RESTITUTION (1937) ["RESTATEMENT"].¹ The RESTATEMENT provision on point states:

A person who has conferred a benefit upon another, manifesting

¹Although a RESTATEMENT (SECOND) OF RESTITUTION went through several drafts in the 1980s, the project was abandoned without issuance by the Commissioners of the American Law Institute. There currently is a RESTATEMENT (THIRD) OF RESTITUTION effort underway, but as yet, it has not gone beyond the tentative draft stages.

that he does not expect compensation therefor, is not entitled to restitution merely because his expectation that an existing relation will continue or that a future relation will come into existence is not realized, unless the conferring of the benefit is conditioned thereon.

Id. § 58. Comment c to RESTATEMENT § 58 makes plain that there are only two limited circumstances where such restitutionary remedy would ever exist when a marriage did not occur: First, “[i]f . . . the donee obtained the gift fraudulently . . .” *Id.* comment c. Second, “if the gift was made for a purpose which could be achieved only by the marriage . . .” *Id.* Thus, a gift, by a parent, of a car, to a putative future son-in-law, “[i]n anticipation of a honeymoon motor trip” is recoverable because the “purpose” of a honeymoon motor trip could be achieved only by the marriage. See *id.*, illustration 6. Thus, no cause of action could exist for a gift of a truck to Johnston’s son, because the purpose of that gift could not be achieved “only by the marriage.” Further, as to the gift of the “truck” to Johnston’s son, not only is it unrelated to the condition of marriage, Johnston is not even the donee.

But the lack of merit in Hess’ complaint does not end there. Comment c further acknowledges in the common law an absolute limit as to the nature of the items for which restitution might be obtained, even if the break-up by the donee is wrongful:

If there is an engagement to marry and the donee, having received the gift without fraud, later wrongfully breaks the promise of marriage, the donor is entitled to restitution if the gift is an engagement ring, a family heirloom or other similar thing intimately connected with the marriage, but not if the gift is one of money intended to be used by the donee before the marriage.

RESTATEMENT § 58, comment c. Hess does not sue over (1) an engagement ring;² a

²Johnston returned the ring long before suit was filed.

family heirloom;³ or (3) some other, similar thing intimately connected with the marriage.⁴

Illustration 7 of the RESTATEMENT is right on point:

A makes gifts of money and of family heirlooms to B who has promised to marry him. B spends the money for living expenses as was expected but retains the jewelry. Later B comes to the conclusion that she does not wish to marry A and refuses to do so. ***A is not entitled to restitution of the money*** but is entitled to the return of the heirlooms.

RESTATEMENT § 58, illustration 7 (emphasis added). Hess spent money during, and as part of, an ultimately unsuccessful courtship. In addition to Utah having abolished the cause of action for breach of promise and having never recognized unjust enrichment or conditional gifts for courtship expenses, the common law as recognized and officially promulgated by the American Law Institute makes clear that no cause of action could exist for what Hess has alleged.

A. Authorities Relied Upon By Hess From Other Jurisdictions Are Inapposite.

Finding no support in Utah law, Hess turns to other jurisdictions for support of his position. Not only are those cases consistent with the RESTATEMENT, they also support dismissal and an award of sanctions against Hess.

Piccininni v. Hajus, 180 Conn. 369, 429 A.2d 886 (1980), is Hess' leading case. Analyzed in its entirety, however *Piccininni* is perfectly consistent with the RESTATEMENT principles:

The Act [abolishing so-called "heart-balm" actions for breach of the promise to marry] does not preclude an action ***for***

³None were given to Johnston.

⁴None given to Johnston.

restitution of specific property or money transferred in reliance on various false and fraudulent representations, apart from any promise to marry, as to their intended use.

180 Conn. at 373, 429 A.2d at 888-89 (emphasis added). The Court held:

In sum, the gravamen of the second count is that the plaintiff was induced to transfer property to the defendant ***in reliance upon her fraudulent representations*** that she intended to marry him and ***that the property transferred would be used for their mutual benefit and enjoyment.*** The plaintiff does not here assert that the defendant wronged him in failing to marry him; rather, he is asserting that the defendant wronged him in fraudulently inducing him to transfer property to her.

Id., 180 Conn. at 374 (emphasis added). Thus, the cause of action in *Piccicicci* was apart from the promise to marry; it arose instead from the fraudulent representation made as to the intended use of the property transferred. See *Brown v. Strum*, 350 F.Supp.2d 346, 351 (D. Conn. 2004) (discussing *Piccicicci* as limited in its scope). Johnston acknowledges that the RESTATEMENT recognizes fraud claims: "Comment c to RESTATEMENT § 58 makes plain that there are only two limited circumstances where such restitutionary remedy would ever exist when a marriage did not occur: First, "[i]f...the donee obtained the gift fraudulently" *Id.* In fact, *Brown* interprets *Piccicicci* as standing for the proposition that even fraud-based claims that are not "apart from" the promise to marry, were abolished by the Connecticut statute. See *Brown*, 350 F.Supp.2d at 351 ("The Connecticut Supreme Court has also made clear that an action for fraud may not be maintained as a method of circumventing § 52-572b.")

No claim for fraud was pleaded. Despite what his own legal authorities and the Restatement § 58 instruct him, Hess did not amend his Complaint to even attempt to assert a claim for fraud. The effort to apply *Piccicicci* to the facts alleged here is not

supportable.

Hess' next effort to sustain a claim, through *Fanning v. Iversen*, 535 N.W.2d 770 (S.D. 1995), is to same effect. There, plaintiff sought recovery of \$10,000 that had been advanced to the defendant for the specific purpose of use for the cost of the anticipated wedding and gifts.. The funds were transmitted by check with the following inscription on the memo line: "W.L.-F.W. & G." The finding of the court as to its meaning: "With love, for wedding and gifts." *Id.* at 772. Plaintiff also sought recovery of one-half (½) of a home he had purchased, but placed in both his and his fiancée's name once the home became intended as the marital homestead. *Fanning* recognized that such gifts, made clearly in contemplation of the marriage, were conditional and subject to return. See *id.* at 774-75. But these circumstances also fall squarely within RESTATEMENT § 58, comment b, which states:

The gift may be conditional upon the continuance or creation of a relation, and if conditional the donor is entitled to its return if the relation terminates or is not entered into. ***The condition may be stated in specific words or it may be inferred from the circumstances.*** Likewise, as in the case of engagement and wedding gifts, justice may require the creation of a condition although the donor had no such condition in mind.

Id. (emphasis added). Since there was no wedding, the advance for wedding expenses and gifts could not be used for the intended purpose. Likewise, since there was no wedding, the home could not be used for its intended purpose, as a marital home. In such circumstances, the money and interest in the home were held returnable. Here, there is no allegation that any gift was made in contemplation of use for a marital purpose or for the wedding, itself. To the contrary, Illustration 7 to RESTATEMENT § 58 shows exactly why the plaintiff in *Fanning* prevailed, but why, here, Hess has alleged no viable claim:

7. A makes gifts of money and of family heirlooms to B who has promised to marry him. B spends the money for living expenses as was expected but retains the jewelry. Later B comes to the conclusion that she does not wish to marry A and refuses to do so. A is not entitled to restitution of the money but is entitled to the return of the heirlooms.

RESTATEMENT § 58, illustration 7. This illustration is instructive— “Family heirlooms” are plainly intended to remain with a “family.” The purpose is defeated and they must be returned if there is no marriage. Gifts of money, not attached to the wedding, itself, or to used for a marital purpose, are absolute gifts and may not be recovered.

Johnston points out that Utah has not recognized “conditional gifts” of the type recognized by the RESTATEMENT and in *Fanning*, at all. Utah law is clear that a gift requires donative intent and Hess’ citation to *Stone v. Salt Lake City*, 11 Utah 2d 196, 356 P.2d 631 (1960) does not stand for any contrary proposition. *Stone*, in its brief statement about placing a condition on a charitable gift, did so in the context of refusing standing to a member of the Church of Jesus Christ of Latter-Day Saints to contest the church’s use of church money for a non-church purpose. See *id.*, 11 Utah 2d at 200-201, 356 P.2d at 633-34. The Court observed that the church member could, if he wanted to restrict the use of funds donated, “impose conditions of trust which he could require the grantee to agree to in accepting the money.” *Id.* Such an agreement does not exist in this case, save possibly for the promise to marry, which, as a matter of law, cannot sustain a cause of action.⁵

⁵. It is worth observing that the Montana Supreme Court has accurately characterized such “conditional gifts” as, in reality, contracts. See *Albinger v. Harris*, 310 Mont. 27, 38, 48 P.3d 711, 719 (2002). According to *Allington*, which case, incidentally, also discusses *Fanning*, once such a “conditional gift” is recognized for what it really is, a contract, the abolition of a breach of promise cause of action abolishes, likewise, any action for the breach of that contract. See *id.* (“Since actions
(continued...)”)

Hess also cites *Wilson v. Dabo*, 10 Ohio App.3d 169, 461 N.E.2d 8 (Ct. App. 1983). *Wilson* is just another conditional gift case. There are no recitations of what property or money was sought to be recovered, so that we cannot examine the “in contemplation of marriage” requirement as we could in *Fanning*.” We do know, however, that the plaintiff in *Wilson* alleged, not only that she was entitled to recover the value of money and property transferred to the defendant in reliance upon his promise of marriage to her, but also that he had ***promised to return*** the property and money. 461 N.E.2d at 10. We do know that a later Ohio case recognized a promissory estoppel claim as abolished,⁶ and so we can reasonably infer that *Dabo* must have dealt with the same character of property as the RESTATEMENT and *Fanning*, which character of property is not present here.

Finally, Hess cited *McClain v. Gilliam*, 389 S.W.2d 131 (Tex. Civ. App. 1965). This Texas case again applies the “conditional gift” doctrine to gifts “in contemplation of marriage.” As shown above, no such cause of action has been recognized in Utah, it violates Utah’s legal requirements for the making of a gift and, in any event, would have

⁵(...continued)
stemming from breach of the contract to marry are barred by our “anti-heart balm” statute, Albinger urges the Court to adopt a conditional gift theory patterned on the law relevant to a gift in view of death. Under Montana law, no gift is revocable after acceptance except a gift in view of death. While some may find marriage to be the end of life as one knows it, we are reluctant to analogize gifts in contemplation of marriage with a gift in contemplation of death. This Court declines the invitation to create a new category of gifting by judicial fiat.”).

⁶In Johnston’s opening memorandum supporting her motion to dismiss, she cited *Turner v. Shavers*, 96 Ohio App.3d 769, 770, 645 N.E.2d 1324, 1325 (Ohio Ct. App. 1994) (“We agree with the trial court that the breach of promise theory is expressly barred by R.C. 2305.29. We further agree that promissory estoppel does not apply, since recovery on the underlying “contract” to wed has been barred by R.C. 2305.29.”) R. 27.

to be limited to the RESTATEMENT, none of which situations are present in Hess' pleaded claims.

Hess spent his money on having a good time with Johnston. That is not money spent "in contemplation of marriage." Hess received back the engagement ring. Hess' gift to Johnston's son had no marital purpose. Finally, Hess' vasectomy was related to not having children as the result of sexual relations, not marriage. Following Hess' reasoning to its logical conclusion, had the marriage occurred and the parties later divorced, Hess would then have a cause of action against Johnston for damages.

CROSS-APPELLANT'S BRIEF

SUMMARY OF ARGUMENT

Prior to filing his complaint, Hess was advised that there was no cognizable claim in the state of Utah for breach of promise to marry. In compliance with the requirements of UTAH R. CIV. P. 11(c)(1)(A), Johnston provided Hess with her proposed motion and memorandum requesting sanctions for bringing an action against her that contained no claims upon which relief could be granted more than twenty-one days prior to filing the motion.

Despite having had two opportunities to withdraw his demands against Johnston, Hess refused to acknowledge the binding precedent of the Utah Supreme Court and instead engaged in fatuous arguments attempting to plead around what is clearly an action for breach of promise to marry, to create a cause of action where none exists. The trial court erred in failing to impose sanctions when there the claims asserted by Hess are not warranted "by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

UTAH R. CIV. P. 11(b).

ARGUMENT

III. UTAH HAS ABOLISHED ANY CAUSE OF ACTION FOR BREACH OF THE MARRIAGE PROMISE AS AGAINST PUBLIC POLICY.

As discussed in detail above, the Utah Supreme Court abolished any cause of action for breach of a marriage promise in 1995. Despite having been advised of binding precedent prior to filing the action, and again shortly thereafter, Hess continued to press his claims to recover what he, himself, characterizes as “courtship” expenses. Brief of Appellant at 8. The abolition of the cause of action for breach of promise, based expressly on the public policy of the state, *a fortiori* abolishes all causes of action predicated on the very breach that public policy says will not support a cause of action. Otherwise, public policy would be subjugated to the whimsical imagination of plaintiff’s attorneys, just as the plaintiffs, themselves, seek to subjugate the women who rejected them to the punishment of legal redress for disappointing them.

“The determination of whether conduct violates Rule 11 is made on an objective basis.” *Giffen v. R.W.L.*, 913 P.2d 761, 763 (Utah App. 1996) citing *Taylor v. Estate of Taylor*, 770 P.2d 163, 171 (Utah App.1989). A reasonable inquiry into the state of Utah law regarding the viability of an action for breach of promise to marry would have revealed that no such action existed in Utah. But in this case, Hess was given not one, but two opportunities to cease his efforts to recover courtship expenses from Johnston. Having been advised in a pre-litigation letter that his cause of action was not supportable under Utah law, as well as in the post-complaint motion, Hess reasonably should have known his complaint was defective. Since neither the Restatement nor any

of the cases Hess relies upon can be read to allow a claim, as pleaded in this case, they do not save him from an award of sanctions. Thus, Rule 11 sanctions were appropriate.

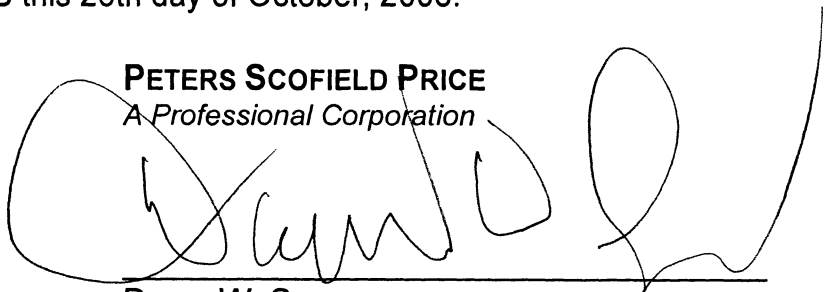
The trial court made no findings concerning its determination that the Hess's complaint was not frivolous. Because the cause of action had been abolished, Hess' complaint is without reasonable basis in law or fact and Johnston should have been awarded all of her attorney fees, costs and expenses incurred in defense of Hess' frivolous lawsuit.

CONCLUSION

For the foregoing reasons, the order of the trial court dismissing the complaint, with prejudice, should be affirmed. The trial court's order denying Johnston's motion for sanctions should be reversed, and the case remanded for further proceedings to determine the appropriate amount of sanctions to be imposed on Hess, for all of Johnston's attorney fees, costs and expenses, both below and on appeal.

RESPECTFULLY SUBMITTED this 26th day of October, 2006.

PETERS SCOFIELD PRICE
A Professional Corporation

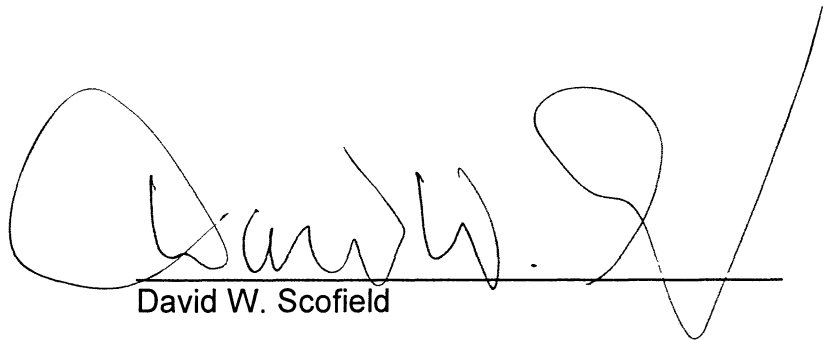
A large, stylized handwritten signature in black ink, appearing to read 'David W. Scofield', is written over a horizontal line.

DAVID W. SCOFIELD
Attorneys for Johanna Johnston
Appellee and Cross-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing Cross-Appellant's Opening Brief and Appellee's Brief were mailed, postage prepaid, this 26th day of October, 2006, to the following:

Paxton R. Guymon
Joel T. Zenger
MILLER GUYMON, P.C.
165 South Regent Street
Salt Lake City, Utah 84111



David W. Scofield

ADDENDUM I

APR 10 2006

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

SALT LAKE COUNTY

Deputy Clerk

LAYNE D. HESS,

Plaintiff,

vs

JODY JOHNSTON,

Defendant

MINUTE ENTRY

Case No 050919801

W. J. DUNN FREDERICK

April 11 2006

The above-entitled matter comes before the Court pursuant to Defendant's Motion to Dismiss with Prejudice and for Sanctions. The Court heard oral argument with respect to the motion on April 10, 2006. Following the hearing, the matter was taken under advisement.

The Court having considered the motion and memoranda and for the good cause shown, hereby enters the following ruling.

In *Jackson v. Brown*, 904 P.2d 600, the Supreme Court stated the following:

[W]e see no benefit in discouraging or penalizing persons who realize, before making these vows, that for whatever reason, they are unprepared to take such an important step. Plaintiff in this case concedes that if we were to uphold the action, any time an engaged party were to cancel wedding plans for any reason, the other party would have a prima facie case for breach of promise to marry. Such an action would be highly susceptible to abuse by persons whose feelings are damaged by a former fiancée's decision to cancel a wedding. In *Norton*, we held that actions so manipulable and vulnerable to this type of abuse are "counterproductive" to the good of the state. An action which would accrue any time a person, for whatever reason, cancels or indefinitely postpones wedding plans is

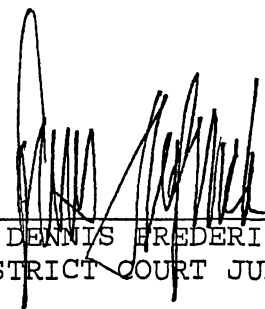
contrary to the public policy of this state. Not only would such an action be readily amenable to abuse, but it would discourage individuals with legitimate doubts or concerns about a planned wedding from cancelling the event. Encouraging people to marry out of fear of a lawsuit furthers no legitimate purpose and would undoubtedly cause many problems.

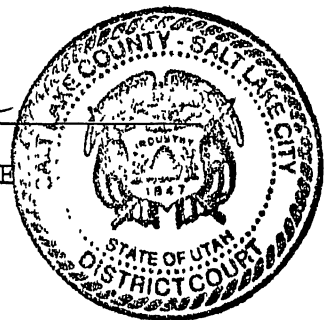
Id. at 687. (Internal citations omitted).

In the instant, Plaintiff has made no allegations of intentional infliction of emotional distress or fraud and although he has attempted to plead around *Jackson*, when the subject matter of the pleadings is considered¹, it is clear Plaintiff's Complaint is based upon or arises out of a breach of a contract to marry-a cause of action which has been expressly abolished in Utah.

In light of the forgoing, Defendant's Motion to Dismiss with Prejudice is granted. With respect to sanctions, the Court is not persuaded Plaintiff's claims were brought frivolously, consequently, Defendant's request for sanctions of costs, fees and expenses is, respectfully, denied.

DATED this 10th day of April, 2006.


J. DENNIS FREDERICK
DISTRICT COURT JUDGE



¹Construed in the light most favorable to Plaintiff and indulging all reasonable inferences therefrom, as required when ruling on a motion to dismiss. *Munteer v. Utah Power & Light Co.* 823 P.2d 1055 (Utah 1991).

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050919801 by the method and on the date specified.

METHOD	NAME
Mail	PAXTON R GUYMON ATTORNEY PLA 165 SOUTH REGENT ST SALT LAKE CITY, UT 84111
Mail	DAVID W SCOFIELD ATTORNEY DEF 340 BROADWAY CENTRE 111 EAST BROADWAY SALT LAKE CITY UT 84111
Mail	JOEL T ZENGER ATTORNEY PLA 165 SOUTH REGENT ST SALT LAKE CITY UT 84111

Dated this 11th day of April, 2006.

C. Bowerley
Deputy Court Clerk

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050919801 by the method and on the date specified.

METHOD	NAME
Mail	PAXTON R GUYMON ATTORNEY PLA 165 SOUTH REGENT ST SALT LAKE CITY, UT 84111
Mail	DAVID W SCOFIELD ATTORNEY DEF 340 BROADWAY CENTRE 111 EAST BROADWAY SALT LAKE CITY UT 84111
Mail	JOEL T ZENGER ATTORNEY PLA 165 SOUTH REGENT ST SALT LAKE CITY UT 84111

Dated this 11th day of April, 2006.

C. Bowerley
Deputy Court Clerk

APR 10 2006

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

SALT LAKE COUNTY

CH
Deputy Clerk

LAYNE D. HESS,

Plaintiff,

vs.

JODY JOHNSTON,

Defendant.

MINUTE ENTRY

Case No. 050919801

Hon. J. DENNIS FREDERICK

April 11, 2006

The above-entitled matter comes before the Court pursuant to Defendant's Motion to Dismiss with Prejudice and for Sanctions. The Court heard oral argument with respect to the motion on April 10, 2006. Following the hearing, the matter was taken under advisement.

The Court having considered the motion and memoranda and for the good cause shown, hereby enters the following ruling.

In *Jackson v. Brown*, 904 P.2d 685 (Utah 1995), the Utah Supreme Court stated the following:

[W]e see no benefit in discouraging or penalizing persons who realize, before making these vows, that for whatever reason, they are unprepared to take such an important step. Plaintiff in this case concedes that if we were to uphold the action, any time an engaged party were to cancel wedding plans for any reason, the other party would have a prima facie case for breach of promise to marry. Such an action would be highly susceptible to abuse by persons whose feelings are damaged by a former fiancée's decision to cancel a wedding. In *Norton*, we held that actions so manipulable and vulnerable to this type of abuse are "counterproductive" to the good of the state. An action which would accrue any time a person, for whatever reason, cancels or indefinitely postpones wedding plans is

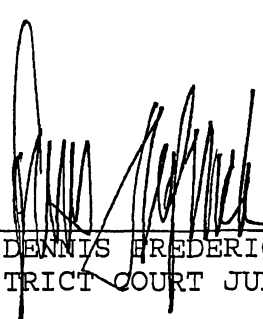
contrary to the public policy of this state. Not only would such an action be readily amenable to abuse, but it would discourage individuals with legitimate doubts or concerns about a planned wedding from cancelling the event. Encouraging people to marry out of fear of a lawsuit furthers no legitimate purpose and would undoubtedly cause many problems.

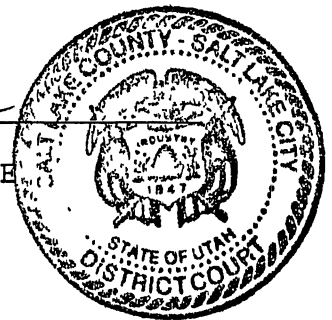
Id. at 687. (Internal citations omitted).

In the instant, Plaintiff has made no allegations of intentional infliction of emotional distress or fraud and although he has attempted to plead around *Jackson*, when the subject matter of the pleadings is considered¹, it is clear Plaintiff's Complaint is based upon or arises out of a breach of a contract to marry-a cause of action which has been expressly abolished in Utah.

In light of the forgoing, Defendant's Motion to Dismiss with Prejudice is granted. With respect to sanctions, the Court is not persuaded Plaintiff's claims were brought frivolously, consequently, Defendant's request for sanctions of costs, fees and expenses is, respectfully, denied.

DATED this 10th day of April, 2006.


J. DENNIS FREDERICK
DISTRICT COURT JUDGE



¹Construed in the light most favorable to Plaintiff and indulging all reasonable inferences therefrom, as required when ruling on a motion to dismiss. *Munteer v. Utah Power & Light Co.* 823 P.2d 1055 (Utah 1991).

ADDENDUM 2

FILED DISTRICT COURT
Third Judicial District

APR 25 2006

SALT LAKE COUNTY

By
Deputy Clerk

DAVID W. SCOFIELD - 4140
PETERS SCOFIELD PRICE
A Professional Corporation
340 Broadway Centre
111 East Broadway
Salt Lake City, Utah 84111
Telephone: (801) 322-2002
Facsimile: (801) 322-2003

Attorneys for Defendant

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

LAYNE D. HESS,

Plaintiff,

-VS-

JODY JOHNSTON,

Defendant.

FINAL ORDER DISMISSING ACTION
WITH PREJUDICE

Case No. 050919801

Honorable J. Dennis Frederick

Defendant's Motion to Dismiss With Prejudice and Motion for Sanctions came on regularly for hearing before the Honorable J. Dennis Frederick on Monday, April 10, 2006, at 9:00 a.m. MDT. Defendant was present in Court and represented by David W. Scofield, of the law firm of PETERS SCOFIELD PRICE, *A Professional Corporation*. Plaintiff was present in Court and represented by Paxton R. Guymon and Joel T. Zenger, of the law firm of MILLER GUYMON, P.C. Following the argument of counsel, the Court took the motions under advisement and issued its Minute Entry Ruling, dated April 10, 2006, granting the Motion to Dismiss With Prejudice and denying the Motion for Sanctions.

The Court having so ruled, and good cause shown,

IT IS ORDERED:

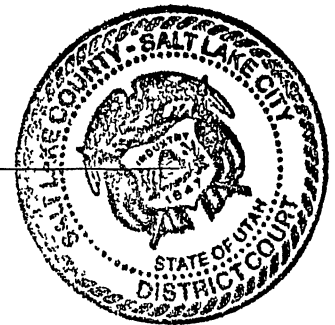
That this action in its entirety be, and the same hereby is, **DISMISSED WITH PREJUDICE.**

DONE this 25th day of April, 2006.

BY THE COURT:




HONORABLE J. DENNIS FREDERICK
Third District Court Judge



Approved as to Form:

MILLER GUYMON, P.C.



Paxton R. Guymon
Joel T. Zenger

Attorneys for Plaintiff