

2006

# Kendell Insurance v. R&R Group : Brief of Appellant

Utah Court of Appeals

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**IN THE COURT OF APPEALS  
STATE OF UTAH**

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KENDALL INSURANCE, INC., and  
SHIRLEY ANN MORGAN, and  
CHARLES MORGAN

Plaintiffs and Appellees,

v.

R & R GROUP, INC., and  
RICK B. STANZIONE,

Defendants and Appellants

**APPELLANTS' OPENING BRIEF**

Case #: 20060570

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Appeal from Findings of Fact, Order of Judgment, & Post-judgment Orders

Second Judicial District Court  
Weber County, State of Utah

Trial Case #: 040901442 PD

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**FILED**

**UTAH APPELLATE COURTS**

**NOV 24 2006**

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### IDENTIFICATION OF THE PARTIES

Appellants are R & R GROUP, INC., and RICK B. STANZIONE, represented by Drew Briney

Appellees are KENDALL INSURANCE, INC., and SHIRLEY ANN MORGAN, and CHARLES MORGAN, represented by Noel Hyde.

To the best of Appellants' knowledge and belief, there are no other interested parties to this appeal.

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Defendants and Appellants

**APPELLANTS' OPENING BRIEF**

Case #: 20060570

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**JURISDICTION**

This appeal is from a civil judgment in the Second District Court, Weber County.

Utah Code Annotated §78-2-2(j) and later §78-2a-3(j) conferred jurisdiction upon this court.

**STATEMENT OF ISSUES ON APPEAL**

1. Did the lower court err as a matter of law by finding that there was a mutual mistake of fact as to the value of the business when the Morgans signed an integrated contract containing a clause stating that they had made an accounting of the business previous to the sale and that they were satisfied with that accounting?
2. Did the lower court abuse its discretion in making a finding that there was a "mutual mistake of fact" when that finding is contrary to the evidence offered at trial?

3. Did the lower court commit prejudicial error by failing to make findings of fact and conclusions of law to dispose of issues addressed in the order to show cause?
4. Did the lower court err as a matter of law by failing to award Stanzione his attorney's fees where the promissory note calls for "all" fees to be reimbursed and where Stanzione prevailed on all contractual claims?
5. Did the lower court improperly deny Appellants' Rule 60(b) motion for relief from judgment?

#### **STATUTORY PROVISION WHOSE INTERPRETATION IS DETERMINATIVE**

UTAH RULES OF CIVIL PROCEDURE RULE 60(B) (complete text in addendum)

#### **RELATED APPEALS**

Appellants are not aware of any related appeals.

#### **STATEMENT OF THE CASE**

##### **Nature of the Case**

This appeal is from a final civil judgment entered on February 27, 2006; findings of fact and conclusions of law were entered concurrently. This appeal is also from a memorandum decision filed by the lower court on August 2, 2006 denying a timely filed Rule 60(b) motion.



### Course of Proceedings and Disposition Below

On October 31 and November 1, 2005, the lower court held a bench trial on the instant dispute. Trial proceedings were merged with order to show cause issues that were previously heard by the lower court (in part) but were not decided previous to trial because many issues that remained to be heard overlapped with trial issues. *See Trial Transcript*, 1. Issues from the Order to Show Cause included whether or not the Appellees (“Morgans”) should be held in contempt of court for failure to comply with the August 9, 2004 order directing them to forward the entire book of business to the Appellants (“Stanzione”) and whether or not the Morgans should be held in contempt of court for attempting to circumvent the intent of the lower court’s order by deceptively encouraging clients of Kendell Insurance Agency, Inc. or Kendell Insurance LLC (“Kendall Insurance”) to transfer their insurance policies to a new entity operated, owned, and controlled by the Plaintiffs instead of remaining under the control of the Defendants when said client accounts were to be forwarded as an asset to the Defendants. Attorney’s fees were also requested as a part of said order to show cause. *See Record Index*, 111-13; 118-23, 133-38. These order to show cause issues were repeatedly referred to and addressed during trial (e.g., *See Trial Transcript*, 16:11-25 – 18:1-11; 19:20-25 – 21:1-20; 22:5-19; 124:17-25).

At trial, Morgans claimed that Stanzione represented the value of the sale of the book of business at issue to be between \$850,000 and \$1,000,000 while it was in fact worth approximately 50% of those representations. *See Trial Transcript*, 7:20-23; 4:40; 7:2. Stanzione responded that an accounting of the income from the book of business would show that the business was not only represented accurately but that the Morgans had three to four weeks to audit the records and that the contract they signed represented that they had an opportunity to audit the records and were satisfied with the results and that the sale was “as is”. *See Trial Transcript*, 16:11-18; 15:14-19.

Stanzione further claimed that the Morgans failed to abide by a previous order to turn the business over to Stanzione by cannibalizing the business by diverting clientele into a newly created entity owned by the Morgans and that he suffered damages as a result of these actions. *See Trial Transcript*, 16:19-25.

In its final order, the lower court declared that Stanzione was the prevailing party, that he had control of all of the stocks and assets of Kendall Insurance, that he was entitled to attorneys fees in an amount not to exceed \$17,500.00, and that he had to return \$75,000.00 in payments made by the Morgans as a result of a “mutual mistake” made at the time of negotiating said contract. *See Findings of Fact and Conclusions of Law*, findings paragraphs 28, 30; conclusions paragraphs 2, 4 (included in *Addendum*, 1-10).

Stanzione thereafter filed a Rule 60(b) motion requesting relief from the judgment. The lower court declined to make any findings regarding the Rule 60(b) motion apart from finding that “there is no reason justifying the relief sought” and if any findings of fact and conclusions of law were in error “that determination will be made by the higher court.” *See Memorandum Decision* dated August 2, 2006 (included in *Addendum*, 35).

While Stanzione was not requesting the lower court to correct its findings of fact and conclusions of law in the rule 60(b) motion, the findings were at issue because they required the “prevailing party” to pay the non-prevailing party substantial sums of money because there were no findings of fact and conclusions of law made concerning the order to show cause that should have offset any potential liability of the “prevailing party” to pay the non-prevailing party many thousands of dollars while at the same time being awarded a then cannibalized business that was healthy and viable before the litigation began. The rule 60(b) motion merely requested relief from having to pay monies on a judgment because the lower court made an error in not making findings

of fact and conclusions of law surrounding the order to show cause issues that demonstrated substantial monies lost by the “prevailing party” far exceeded monies that the “prevailing party” was ordered to pay to the non-prevailing parties – it did not request any relief in the form of any new findings of fact or conclusions of law or by requesting any modification of the judgment. See *Motion and Memorandum for Relief from Judgment or Order* (Record Index, 280-83).

### STATEMENT OF FACTS

The instant dispute is over a contract for the sale of a business – Kendall Insurance. Stanzione sold all of the stock and related assets of Kendall Insurance to the Morgans. Paul Nelson, an insurance agent, assisted the Morgans in the negotiation of said contract and said contract was signed and entered into on September 1, 2003. See *Findings of Fact and Conclusions of Law*, paragraph 1, 7, 10 (*Record Index*, 240 et seq.) and *Addendum*, 18-25. The primary cause of action brought by the Morgans at trial was whether or not Stanzione misrepresented the value of the business. See *Trial Transcript*. 7:20-23; 4:40; 7:2.

In addition to an integration clause,<sup>1</sup> the contract specifically stated that “Copies of the latest information concerning the business activities and financial affairs of Kendell Insurance Inc. have been made available to and have been inspected by buyer [Morgans] to its complete and total satisfaction incident to which buyer has received the professional advice and expertise of a certified public accountant retained by buyer”. See *Trial Transcript*, 135:14-25 – 136:1-8 and *Addendum*, 23. Shirley Morgan testified that she agreed to this statement when she signed it. See *Trial*

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<sup>1</sup> The clause reads “This purchase agreement embodies the entire agreement between seller and buyer and will not be modified or terminated except by an agreement in writing.” Nevertheless, despite this clause and the acknowledgement of an accounting being made to the Morgans’ satisfaction in the same contract, the

*Transcript*, 137:6-10.<sup>2</sup> She further testified that the Morgans not only had the opportunity to modify the contract but that they took advantage of that opportunity and made some changes to another portion of the contract. See *Trial Transcript* 137:21-25 - 138:1-18. Lastly, she testified that she was “pretty sure” that her legal counsel looked over the contract on the Morgans’ behalf. See *Trial Transcript* 147:16-24.

At trial, Paul Nelson (witness for the Morgans) testified that Stanzione represented that the book of business was worth one million dollars. He further stated that if this value was correct, the Morgans would expect to see a monthly income equal to one twelfth of ten percent of that figure. In other words, the Morgans should have expected to see a monthly income equal to ten percent of \$1,000,000 divided by 12. Simple math shows that this would be a monthly income of \$8,333.33. See *Trial Transcript*, 50:13-25 – 51:1-4; 69:8-11. No other witness for the Morgans gave any contradicting methodology as to how to compute the value of a book of business or gave any information as to any expectations that may have been contrary to this calculation.

At trial, Stanzione’s accountant testified that a review of the Kendall Insurance general account showed that Stanzione averaged a gross pre-sale monthly income of \$9,761.00<sup>3</sup> while operating Kendall Insurance from approximately March 2002 until August 31, 2003 – a figure higher than that expected by Paul Nelson. See *Trial Transcript*, 274:4 and *Addendum*, 26. He further testified that based upon his review of the same general account, the Morgans averaged a gross income of \$11,805.00 from September 1, 2003 to August 31, 2004 and that there was no

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Morgans’ entire case revolved around claims that the value of the business was misrepresented. See *Trial Transcript* 440:8-16 and *Addendum*, 24.

<sup>2</sup> Ms. Morgan subsequently stated that this information in the contract was inaccurate. See the following lines of the transcript.

<sup>3</sup> Stanzione testified that the net commission income was approximately \$7,200.00. See *Trial Transcript* 322:5-7.

indication of any significant deposits from non-commission sources that would substantially change this conclusion – this monthly income is nearly \$3,500.00 higher than that expected by Paul Nelson.<sup>4</sup> See *Trial Transcript*, 274:15-17 and *Addendum*, 26. Contrary to the accountant’s summary of commission income received during the Morgans’ control of Kendall Insurance (*Addendum*, 26-27), Ms. Morgan testified that there was “no commissions coming in for a couple of months.” See *Trial Transcript*, 16:20.

After the business was returned to Stanzione, the monthly commission income was reduced by approximately 75%. His accountant further testified that Stanzione averaged a gross income of \$2,358.00 monthly from September 2004 until July of the following year (Stanzione gained *partial* control of Kendall Insurance on or about September 2004). See *Trial Transcript*, 275:22-24 and *Addendum*, 27.

Nevertheless, the lower court concluded that a “mutual mistake of fact relating to the value and composition of the Kendall Insurance Agency and its book of business existed at the time that the sale of the agency was negotiated between Defendants and the Morgans.” See *Findings of Fact and Conclusions of Law*, paragraph 28. The lower court further found that “commission income [] was significantly less than the representations which [Morgans] had received [from Stanzione].” See *Findings of Fact and Conclusions of Law*, paragraph 14; *Trial Transcript*, 113:16-23.

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<sup>4</sup> The lower court found that the Morgans paid to Stanzione and/or the Kendall Insurance an amount exceeding \$10,300.00 and while this fact was not specifically connected to the value of the business, it seems reasonable to infer that the lower court was finding that the \$11,805.00 monthly commission income figure should have been reduced by approximately \$10,300.00 a year or \$858.33 a month – this suggests that the lower judge was accepting additional testimony of Stanzione’s accountant in regards to this issue (*Trial Transcript*, 276:19-25 – 277:1 and *Findings of Fact and Conclusions of Law*, paragraph 29) and/or the court could have been relying on Ms. Morgan’s testimony (*Trial Transcript*, 113:16-23 and/or *Plaintiffs’ Exhibit 100*, Tabs 14-15).

The Morgans operated the Kendall Insurance for several months. During that time, Shirley Ann Morgan was to operate the business but she was not competent to manage or supervise the business activities. See *Findings of Fact and Conclusions of Law*, paragraphs 8-9. However, it was only three months following the sale when the Morgans and Paul Nelson began alleging that the commission income (represented by monies received into the general account) was significantly less than the representations they had been given by Stanzione. See *Trial Transcript*, 51:5-11; 128:19-25 – 129:1-20; *but see* 161:24-25 – 162:1-3. Other allegations were made about the representations of the number of active clients identified as part of the book of business of Kendall Insurance. See *Trial Transcript*, 48:11-25 – 49:1-10. Consequently, the Morgans requested a reformation of said contract. See *Trial Transcript*, 128:20-25 - 129:1-2; 130:14-18. Stanzione refused to reform the contract and in December 2003, he demanded full performance under said contract and payment in full. *Findings of Fact and Conclusions of Law*, paragraph 16. The Morgans did not make any further payments under the contract. See *Findings of Fact and Conclusions of Law*, paragraph 15. Subsequently, the Morgans filed the instant action.

After various disputes over the ownership of Kendall Insurance, Stanzione motioned the lower court to order the Morgans to return control of the Kendall Insurance book of business to Stanzione. An order directing the return of Kendal Insurance to Stanzione was entered on August 9, 2004. See *Addendum*, 35. Subsequently, Stanzione filed an order to show cause alleging that the Morgans did not return the entire book of business and that the Morgans had engaged in fraudulent and illicit business practice to disassociate a substantial majority of profitable clients from Kendall Insurance before returning the book of business to Stanzione. The order to show cause requested a finding of contempt and reimbursement for various damages incurred as a result of the Morgans' actions. See *Record Index*, 111-13; 118-23; 133-38. The lower court merged the

order to show issues with the trial issues and all issues were presented, defended, and pursued at trial. See *Trial Transcript*, 1. However, the lower court made no findings concerning whether or not the Morgans failed to timely or substantially abide by the August 9, 2004 order or whether or not they engaged in illicit business practices (and thereby circumvented the purposes of said order) by diverting Kendall Insurance policies into another entity owned by the Morgans before turning the business over to Stanzione. Further, the lower court did not make any findings addressing the damage issues raised by Stanzione in the order to show cause.

Lastly, the lower court awarded attorney's fees to the "prevailing party" but capped those fees at \$17,500.00 without offering any rationale or justification when the promissory note itself allows for "all" fees to be rewarded to the prevailing party. See *Findings of Fact and Conclusions of Law*, 30; *Addendum*, 25.<sup>5</sup>

## SUMMARY OF ARGUMENT

The lower court improperly found that there was a "mutual mistake" as to the value of the business because the apparent findings of the lower court were that the monthly commission of the Morgans was approximately \$11,000.00 (as explained in footnote 4 above) and, when considered in conjunction with all other evidence introduced at trial, these findings can only be read to demonstrate that the Morgans were making monthly commission income in excess of what they should have expected to receive were the business to be valued in accordance with their own testimony and the testimony of their own witness – if all of the evidence delineated in the findings

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<sup>5</sup> Although no exact figure was offered to the court, Stanzione's current counsel's fees were approximately \$17,500.00 immediately after the trial but Stanzione had incurred many thousands of dollars in attorney's fees previous to that time and no explanation was given as to why those fees would be considered "unreasonable" (See *Findings of Fact and Conclusions of Law*, paragraph 30).

of fact were construed in favor of the Morgans and if the remaining evidence is considered, this figure would be about \$3,000.00 a month more than the Morgans claimed that they would have expected to receive.

Even if there was a “mutual mistake” as to the value of the business in question, the lower court improperly rescinded the contract in dispute based upon a “mutual mistake” because the contract in question contained both an integration clause and an “as is” clause and because there was no finding of affirmative or positive fraud justifying a rescission of the contract.

The lower court improperly failed to make findings of fact and conclusions of law concerning the order to show cause that was merged with the trial proceedings and the lower court improperly failed to make any findings of fact justifying a cap on the prevailing parties’ attorney’s fees because the contract calls for “all” fees to be reimbursed.

Lastly, the lower court improperly denied Stanzione’s Rule 60(b) motion because it failed to understand that Stanzione was not requesting an amended judgment or amended findings of fact and conclusions of law – Stanzione was merely requesting a relief from the judgment as allowed by the rule and his motion should have been considered on its merits.

## ARGUMENT

**Did the lower court err as a matter of law by finding that there was a mutual mistake of fact as to the value of the business when the Morgans signed an integrated contract containing a clause stating that they had made an accounting of the business previous to the sale and that they were satisfied with that accounting?**

Appellate courts in Utah should grant no deference to questions of law reached by lower courts. *Scharf v. BMG Corp.* 700, P.2d 1068 (Utah, 1985); *Landes v. Capital City Bank*, 795 P.2d 1127 (Utah 1990); The Utah Supreme Court has consistently held that matters of law are



specifically applied to the interpretation and review of contracts. *Nova Cas. Co. v. Able Const., Inc.*, 983 P.2d 575 (Utah 1999).

In the instant case, the contract in question has an integration clause and states in plain language that the Morgans had “[c]opies of the latest information concerning the business activities and financial affairs of Kendell Insurance Agency, Inc.” and that these records were “made available to and [were] *inspected by* [the Morgans] *to [their] complete and total satisfaction* incident to which [the Morgans] received the professional advise and expertise of a certified public accountant retained by [the Morgans].” Emphasis added. See *Addendum*, 23. Accordingly, the question as to whether or not the business was inaccurately represented to the Morgans by Stanzione should not have been entertained by the court unless there was an accusation of affirmative and positive fraud. *Maack v. Resource Design & Const., Inc.*, 875 P.2d 570, Utah App., 1994 citing *Kaye v. Buehrle*, 8 Ohio App. 3d 381, 457 N.E.2d 373, 376 (1983) (holding that “as is” clause bars claim for fraudulent nondisclosure but permits claim for “positive” fraud).

As a matter of public policy, the *Maack* rule is a good one because parties should retain control of their contractual bargains; when a party signs their name to an agreement containing an “as is” clause designed to prevent future litigation over the value of a business (and the clause in the instant contract appears to be designed for that exact purpose), courts should not entertain subsequent complaints claiming that the statements in the contract are untrue (that their C.P.A. inspected copies of all of the latest business records to their complete and total satisfaction) unless a party is accused of affirmative or positive fraud that would justify relieving a party from being bound to an inequitable contract.

In the instant case, the Morgans *did* claim reckless or intentional misrepresentation of the contract under their initial complaint – however, the lower court made a finding that directly

precluded any reckless or intentional misrepresentation when it determined that there was a mutual *mistake*. Accordingly, since a “mutual mistake” does not satisfy the standard of an affirmative and/or positive fraud as articulated under *Maack*, this Court should reverse the lower court’s order rescinding the contract based upon a finding of a “mutual mistake”. See *Findings of Fact and Conclusions of Law*, Conclusion paragraph 1. Further, this Court should grant Stanzione’s request for relief below by enforcing the contractual terms requiring the Morgans to finish making payments for Kendall Insurance and by requiring Stanzione to return Kendall Insurance to the Morgans.

**Did the lower court abuse its discretion in making a finding that there was a “mutual mistake of fact” when that finding is contrary to the evidence offered at trial?**

Appellate courts have long held that challenges to factual findings made by lower courts are reviewed at the very high bar of an abuse of discretion standard. *State v. All Real Property*, 37 P.2d 276 (2001)(discretion of adopting findings is within the discretion of the court as long as the findings are not clearly contrary to the evidence).

As outlined in the statement of facts above, the only evidence before the lower court concerning the valuation of the business came from Paul Nelson’s testimony and he testified that a million dollar book of business should generate about \$8,000.00 in monthly commissions. In the instant case, the general account statements were all entered into evidence and were summarized by Stanzione’s accountant (*Addendum*, 26-27). This accounting demonstrated that the business

was actually generating \$9,761.00 previous to the sale to the Morgans<sup>6</sup> and demonstrated that the business generated \$11,805.00 under the Morgans control of the business. Again, even if the lower court was intending to find that the monthly commission figure under the Morgans control should have been reduced by the \$10,300.00 figure (\$858.33 monthly) cited in its findings of fact and conclusions of law, the monthly income was still well over the figure predicted by the Morgans' witness – the same witness that was advising them as to whether or not they should purchase the business under the contract in dispute. While Ms. Morgan did testify that there were a couple of months where no commission was received at all, the general bank account records and the summary of those records by the accountant demonstrate that this statement was simply not true and not justifiable.<sup>7</sup> Further, even if this statement were true, the *average* monthly income remained higher than the income predicted by Paul Nelson.<sup>8</sup> Therefore, there is simply nothing substantial in the record that would justify a finding that there was a “mutual mistake” as to the

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<sup>6</sup> Counsel for Morgans noted that some of the monies in the pre-sale transfer would have included broker fees that the Morgans did not feel comfortable charging their clients (their was a dispute below that is not before this Court as to whether or not these fees are legal and/or ethical). See *Trial Transcript*, 416:18-25 – 417:1-2. However, these broker fees were not included in the Morgans' monthly income. *Id.* Counsel further argued that these numbers could have significantly reduced the monthly income potential of the business. See *Trial Transcript*, 417:3-25 – 418:1-5. The fact that Stanzione's accountant and three other witnesses testified that broker fees were a minimal portion of the commissions (less than 1%; See *Trial Transcript*, 436:5-25 – 437:1-3) is almost irrelevant because, as noted above, the Morgans were making over \$3,000 a month more than their witness expected that they should make if the business was really worth what Stanzione said it was – the fact that Stanzione's lesser monthly income may have included other fees is entirely irrelevant.

<sup>7</sup> The accountant testified that some deposits may have been transfers from personal funds but determined that those transfers would have been limited to about \$10,000.00 and that the largest monthly series of deposits of this nature was around \$3,000.00 – a figure that would prohibit the possibility that there was ever more than one month of income that fit the description of Ms. Morgan's testimony. *Trial Transcript*, 276:19-25 – 277:1

<sup>8</sup> If Paul Nelson's method of valuing the business (monthly income X 12 X 10) is correct, the business under the Morgans' tenure [adjusting for the lower court's apparent finding] is \$1,313,600.40) – and it is worth noting that this was under the supervision of Ms. Morgan whom the lower court found was incompetent to run the business.

value of the business at the time the parties signed the contract and this Court should reverse the lower court's finding of fact on this issue.

**Did the lower court commit prejudicial error by failing to make findings of fact and conclusions of law to dispose of issues addressed in the order to show cause?**

Appellate courts in Utah have found that the failure of lower courts to make findings of fact and conclusions of law on all issues raised in the proceedings below is prejudicial error subject to remand. *Huber v. Newman*, 1944, 145 P.2d 780. (Trial court must make findings on all issues raised by the pleadings *and evidence*.); *Baird v. Upper Canal Irr. Co.*, 1927, 257 P. 1060. (In contested cases, court must find on *all material issues submitted* unless findings are waived.); *Boyer Co. v. Lignell*, 1977, 567 P.2d 1112. (It is the duty of the trial judge in contested cases to find facts upon *all material issues submitted for decision* unless findings are waived. See also *State v. All Real Property*, 2001, 37 P.3d 276); *Silliman v. Powell*, 1982, 642 P.2d 388. (As the determiner of fact, trial court is required to make findings on *all* material issues. See also *Quagliana v. Exquisite Home Builders, Inc.*, 1975, 538 P.2d 301; *Sorenson v. Beers*, 1980, 614 P.2d 159. (Trial court must make findings on all material *factual issues raised by evidence*. cf *Rule 15b*. See also *Thomas v. Clayton Piano Co.*, 1915.); *Parish v. Parish*, 1934, 35 P.2d 999. (Trial court need not follow language of pleadings in fact findings, but findings should be made on *every material issue presented*.); *O'Gorman v. Utah Realty & Construction Co.*, 1942, 102 Utah 523, 129 P.2d 981, modified 102 Utah 534, 133 P.2d 318. (A direct issue of a specific material fact requires a finding on that issue and there must be a finding on *all material issues*.); *Duncan v. Hemmelwright*, 1947, 112 Utah 262, 186 P.2d 965. (Failure to make findings a fact on material issues is error, and ordinarily prejudicial.). See also *General Ins. Co. of America v. Carnicero Dynasty Corp.*, 545 P.2d 502, 506

(Utah 1976) (trial of an issue by implicit consent allows an issue to be treated as if it was raised in the pleadings).

None of the issues raised by the order to show cause were addressed by the lower court in its findings of fact and conclusions of law. Specifically, there is no finding as to whether or not the Morgans failed to comply with the lower court's order to forward the entire book of business to Stanzione or whether or not the Morgans attempted to circumvent the intent of the lower court's order by deceptively encouraging clients of the business to transfer their policies to an entity owned and controlled by the Morgans. While Morgans are likely to argue that the lower court did make some findings *suggesting* that there was a mutual fault of the parties that prevented the Morgans from forwarding the entire book of business to Stanzione, there is nothing clear in the findings of fact and conclusions of law that states that this was the lower court's finding and further, there is absolutely nothing in the lower court's findings that remotely hints at whether or not the Morgans were attempting to deceive Kendall Insurance clients to transfer their policies to an entity owned and controlled by the Morgans – a primary issue of the order to show cause.<sup>9</sup> Further, there is nothing in the lower court's findings that addresses whether or not the Morgans are liable for any of the damages Stanzione claimed to suffer as a result of these alleged actions by the Morgans.

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<sup>9</sup> That this issue was a primary issue at trial is evidenced by the fact that counsel for Stanzione summarized the evidence and testimony given on this issue on pages 449-456 of the Trial Transcript – approximately half of his closing argument. See *Trial Transcript*, 432-456. Apart from dozens of places on the record where this issue is addressed by both parties, this issue was also the primary thrust behind Ben Opheikens (*Trial Transcript*, 176-198) and Darlene Stain (*Trial Transcript*, 199-216) being called to testify before the lower court. These witnesses were policy holders who were confused by the Morgans' efforts to transfer their policies away from Kendall Insurance (and into the Morgans' other business) and who alleged deceptive practices by the Morgans as part of the Morgans' effort to move business away from Kendall Insurance before returning the book of business to Stanzione as per the lower court's order.

The important factor to this question before this Court is whether or not the lower court's failure to address these issues in the findings of fact and conclusions of law resulted in any prejudice to Stanzione. The answer to that is evident from the harsh effects of the final judgment and is succinctly summarized in two lines of the trial transcript: Stanzione requested a minimum of \$111,000.00 in damages for lost revenue<sup>10</sup> as a result of the Morgan's failure to abide by the order to show cause. See *Trial Transcript* 455:18-19.

**Did the lower court err as a matter of law by failing to award Stanzione his attorney's fees where the promissory note calls for "all" fees to be reimbursed and where Stanzione prevailed on all contractual claims?**

The Utah Supreme Court has held that lower courts have the discretion to limit a contractual award of attorneys fees when the prevailing party did not prevail on all major causes of action. *Fullmer v. Blood*, 546 P.2d 606, (Utah 1976); see also *Jenkins v. Bailey*, 676 P.2d 391 (Utah 1984); but see *Cobabe v. Crawford*, 780 P.2d 834, 836 (Utah App. 1989) ("Courts have, in extraordinary situations, declined to award attorney fees to a prevailing party in spite of an enforceable contractual provision" – fn 3 [citing cases where forfeiture was invoked, where the prevailing party refused two generous offers of settlement, and where both parties acted improperly]). Accordingly, the question before this Court is whether or not the lower court abused its discretion in not awarding Stanzione his attorney's fees when the lower court found that he was the prevailing party as to all contractual causes of action and when there is nothing in the lower court's findings of fact and conclusions of law that suggests that there was any extraordinary situation justifying a refusal to grant Stanzione his full attorney's fees under the contract. *Cobabe*

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<sup>10</sup> This figure only represented lost revenue up until the date of trial and was a request additional to his prayer for relief to enforce the contract.

suggests that the lower court did *not* abuse its discretion if it found there was an “extraordinary situation” that would justify it in declining to award Stanzione his full attorneys fees. However, such a finding does not exist in the instant case. Although this Court could find that the lower court determined that both parties “acted improperly” after reviewing its findings of fact and conclusions of law, this Court should note that all of these actions were in reference to the issues raised in the *order to show cause* and had nothing to do with the causes of action raised in the complaint, which is the determining document as to the award of attorney’s fees. Further, there is nothing in the lower court’s findings of fact and conclusions of law stating that the award was reduced because of the order to show cause issues. In fact, the award seems to be limited to Stanzione’s current counsel’s fees at the time of trial (see footnote 5 above) and those fees included the order to show cause issues – the fees that the lower court failed to award were incurred under previous counsel and none of those fees were related to the order to show cause (which was filed by current counsel). It appears therefore that the lower court’s award of attorney’s fees was either capped without justification or the lower court intended to make a full award of attorney’s fees but made a simple administrative error by not noticing that Stanzione had incurred attorney’s fees that were not entirely a part of his current counsel’s fees.

Accordingly, this Court should reverse the lower court’s award of attorney’s fees and grant Stanzione his entire attorney’s fees as established by affidavit and under the relevant rules of civil procedure.

**Did the lower court improperly deny Appellants' Rule 60(b) motion for relief from judgment?**

If this Court grants Stanzione's requests to reverse the lower court's order for either of the issues dealing with the "mutual mistake" above, this portion of the appeal will most likely be rendered moot. Therefore, this issue is presented in the alternative and as follows:

Appellate courts in Utah should grant no deference to questions of law reached by lower courts. *Scharf v. BMG Corp.* 700, P.2d 1068 (Utah, 1985); *Landes v. Capital City Bank*, 795 P.2d 1127 (Utah 1990). Interpretation of rules is clearly a matter of law. Rule 60(b) of the Utah Rules of Civil Procedure provides that:

"On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect ... or (6) any other reason justifying relief from the operation of the judgment."

In the instant case, Stanzione filed a Rule 60(b) motion requesting relief from the judgment because the lower court's failure to make findings of fact and conclusions of law surrounding the order to show cause issues resulted in Stanzione being inequitably burdened by an order to repay the Morgans their initial deposit of \$75,000.00 under the contract while losing at least \$110,000.00 of commission income and being awarded only a portion of his attorney's fees and a cannibalized business worth only about 25% of what it was worth previous to the sale to the Morgans.

Had the lower court declared Stanzione the non-prevailing party, a Rule 60(b) motion probably would not have had any merit worth the lower court's consideration. However, Stanzione was declared the "prevailing party" under the contractual causes of action but was dealt a very inequitable result by the lower court under its "equitable" rescission of contract theory. Stanzione's Rule 60(b) motion simply claimed that since the lower court failed to make findings of fact and conclusions of law surrounding the order to show cause issues (and thereby ignored his



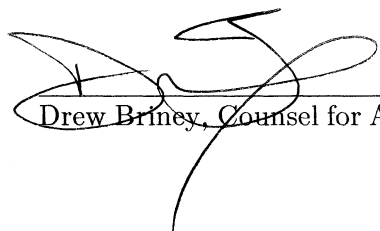
request for \$110,000.00 in lost revenue), and since the lower court failed to award Stanzione all of his attorney's fees, and since the lower court awarded him a gutted business worth only a fraction of its value before the contract was entered into, and since Stanzione was also required to pay the Morgans \$75,000.00, the judgment was unjust in such a way as to satisfy subsection 6 of Rule 60(b) and that this inequitable result was the result of the lower court's mistake under subsection 1 of Rule 60(b). His request for relief was not to remedy or reverse all of the other inequitable results he suffered below. The only relief he requested under the Rule 60(b) motion was to be relieved from paying the judgment Stanzione now has against him – the prevailing party.

Unfortunately for Stanzione, the lower court apparently understood this motion to be a request for new or additional findings of fact and conclusions of law because it responded by stating that “[i]f those findings and conclusions are in error, that determination will be made by the higher court.” See *Addendum*, 35. The lower court's confusion is somewhat understandable in light of the fact that the Rule 60(b) motion necessarily addressed case law identifying the lower court's failure to make any findings of fact and conclusions of law as prejudicial error (hence the mistake under subsection 1 of Rule 60(b)) and claimed that this mistake justified relief from the judgment. However, as argued above, Stanzione's request for relief was meritorious and ought to have been granted. As it stands, the “prevailing party” lost his bargain (approximately \$220,000.00 plus interest remains unpaid under the contract), he lost 75% of the value of his business under an “equitable” rescission of contract order, he lost approximately \$10,000.00 in attorney's fees that were not awarded to him as per contractual terms, he lost \$110,000 in revenue, and he was ordered to pay \$75,000.00 back to the losing party who agreed that they were completely and totally satisfied with their accounting of the business records before they signed the contract in the first place.

Stanzione's Rule 60(b) motion was meritorious and should have been considered by the lower court. The lower court was apparently confused by the issues presented in Stanzione's motion and thereby failed to consider it on its merits. Accordingly, this Court should reverse the lower court's Memorandum Decision and should remand the case for further decision.

### CONCLUSION

For all of the above and foregoing reasons, this Court should reverse and remand the lower court's final order, grant Stanzione his prayer for relief by enforcing the contractual terms as they stood previous to the filing of the complaint, and remand the case for further proceedings so that the lower court can determine whether or not Stanzione is entitled to further relief under his order to show cause issues presented and to determine the amount of Stanzione's attorney's fees. In addition or in the alternative, this Court should reverse the lower court's Memorandum Decision and remand this case for the lower court's consideration of Stanzione's Rule 60(b) motion.



Drew Briney, Counsel for Appellants

DATE: November 23, 2006

## **SIGNATURE PAGE & CERTIFICATE OF SERVICE**

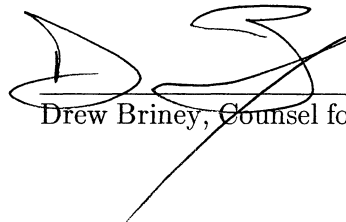
I hereby state that on November 24, 2006, I finished drafting this Appellants' Opening Brief without assistance and caused a true and correct copy of Appellant's Opening Brief to be served as follows:

Two copies via first class mail to:

NOEL S. HYDE  
5926 S. Fashion Pointe Dr. #200  
So. Ogden, Utah 84403

The original and seven copies of the brief were personally served on and filed with this Court.

Dated: November 24, 2006.



Drew Briney, Counsel for Appellants