

2006

Kendell Insurance, Inc., Shirley Ann Morgan,
Charles Morgan v. R&R Group Inc., Rick B.
Stanzione : Brief of Appellant

Utah Court of Appeals

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Drew Briney; Attorney for Appellants.

Noel S. Hyde; Attorney for Appellees.

Recommended Citation

Brief of Appellant, *Kendell Insurance, Inc., Shirley Ann Morgan, Charles Morgan v. R&R Group Inc., Rick B. Stanzione*, No. 20060570 (Utah Court of Appeals, 2006).

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IN THE COURT OF APPEALS
STATE OF UTAH

KENDELL 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' ADDENDUM
EXHIBITS

Case # 20060570

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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265 North Main Street # 100
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FILED
UTAH APPELLATE COURT

NOV 24 2006

TABLE OF CONTENTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW	1
FINAL ORDER AND JUDGMENT	11
ORDER ON ORDER TO SHOW CAUSE	15
PURCHASE AGREEMENT	18
PROMISSORY NOTE AND SECURITY AGREEMENT	25
DAVID T. KANO, CPA, ACCOUNTING OF COMMISSIONS	26
RULE 60(b) STATUTE	28
60B MOTION FOR RELIEF FROM JUDGMENT OR ORDER	29
DEFENDANTS' MEMORANDUM IN SUPPORT OF 60B MOTION FOR RELIEF FROM JUDGMENT OR ORDER	31
MEMORANDUM DECISION	35

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Attorney for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
COUNTY OF WEBER, OGDEN DEPARTMENT

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

Plaintiffs,

vs

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

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Civil No 040901442 PD

Honorable Parley R. Baldwin

A trial in the above-titled case was conducted before the undersigned on October 31, 2005 and November 1, 2005. Plaintiffs Charles Morgan and Shirley Ann Morgan (hereinafter referred to as "the Morgans") were present at the trial and represented by their counsel, Noel S. Hyde. Defendants R&R Group, Inc. (hereinafter referred to as "the R&R Group") and Rick Stanzione (hereinafter referred to as "Stanzione") were also present at the trial and represented by their counsel, Drew Briney.

The court having fully considered all evidence presented at the trial, including evidence submitted in previous proceedings relating to the court's order to show cause issued to Plaintiffs and relating to Defendants' request for the return of the business of Kendall Insurance to Defendants, and the court having also considered the pleadings and all other relevant documents and exhibits introduced during the proceedings before the court, and also the arguments of counsel, and good cause appearing therefore, the court hereby enters its findings of fact and conclusions of law herein as follows:

FINDINGS OF FACT

1 This case concerns a contract for the sale of a business whereby Defendants intended to sell and Morgans intended to acquire all of the stock and related assets of the Kendall Insurance Agency, a Utah corporation (hereinafter referred to as "the Kendall Agency").

2 The Kendall Agency was originally founded by Mr. Max Kendall, and operated by Mr. Kendall for many years as a duly-licensed insurance agency in the state of Utah.

3 During the time that Mr. Kendall operated the Kendall Agency, he maintained all of his files as paper files, and used the actual paper documentation to manage, monitor, and administer the business.

4 In approximately March 2002, Mr. Kendall entered into an agreement with Defendants whereby the Kendall Agency, including all the stock of the company and its

related assets. were sold by Mr. Kendall to Mr Stanzione At the time of his acquisition of the Kendall Agency, Stanzione also owned and operated the R&R Group.

5 Stanzione and the R&R Group operated the business of the Kendall Agency from the time it was acquired from Mr. Kendall until August 31, 2003.

6. In early 2003, Stanzione and the R&R Group began the process of converging the paper client files of the Kendall Agency to an automated system in which the management and administration of all client matters was handled through the computerized imaging of client files and the entry of client data into computer databases. This process was ongoing and had not been completed as of August 2003.

7. In August 2003, negotiations were undertaken between Defendants and the Morgans relating to the sale and transfer of the Kendall Agency and its related assets from Defendants to the Morgans..

8 At the time of the negotiations between Defendants and the Morgans, in August 2003, it was the intent of Charles Morgan to acquire the Kendall Agency for the purpose of establishing a business which could be operated by his wife, Shirley Ann Morgan.

9. In August 2003 Shirley Ann Morgan was not competent to manage or supervise the business activities of an insurance agency, having had virtually no prior experience in such a business.

10. In order to assist the Morgans in the negotiation of the sale contract, and also in connection with the management of the insurance agency, the Morgans employed Paul Nelson, who was an experienced insurance agent.

11. During the negotiations which took place in August 2003, Stanzione made representations to the Morgans and Mr. Nelson regarding the value and composition of the Kendall Agency and its "book of business."

12. A written agreement for the sale and transfer of the Kendall Agency from Defendants to the Morgans was ultimately signed by all parties, which agreement provided that the transfer became effective on September 1, 2003.

13. For several months after September 1, 2003, the Kendall Agency, under the management of Shirley Ann Morgan, continued to operate out of the same business location as Stanzione and the R&R Group. During such time period, Defendants continued to have access to the relevant business information relating to the operations of the Kendall Agency.

14. In the three months immediately following the transfer of the Kendall Agency to the Morgans, the Morgans and Paul Nelson perceived that the actual value and composition of the Kendall Agency was significantly different than the representations which had been made concerning the agency by Stanzione in August 2003. The differences perceived by the Morgans and Mr. Nelson included commission income which was significantly less than the representations which they had received, and also

that many of the client files which had been identified as being current and active in the book of business of the Kendall Agency were not accurately reflected in the automated databases to which the files were being converted.

15. Upon the discovery by the Morgans of the differences between the represented status and composition of the Kendall Agency and its actual status and composition, the Morgans requested of Stanzione and the R&R Group that the contract be reformed. Thereafter, the Morgans also suspended further payments to Defendants under the contract.

16. In response to the Morgan's request for reformation of the purchase contract, Stanzione and the R&R Group refused to make any modifications to the contract, and in December 2003, demanded its full and immediate performance.

17. In December 2003 and January 2004, the Morgans continued their suspension of payments under the original contract and physically moved the location of the Kendall Agency to a premises separate and apart from the business premises of the R&R Group.

18. In January 2004, Stanzione unilaterally directed the postmaster to redirect the mail of the Kendall Agency so that it would be received at the business premises of Defendants rather than the separate business premises of the Kendall Agency maintained by the Morgans.

19. In his steps to reclaim the assets and operations of the Kendall Insurance Agency in 2004, Starizione acted in a controlling and compulsive manner.

20. The present lawsuit was commenced by the Morgans while the disputes between the parties relating to the Kendall Agency continued.

21. Through a motion filed with this court, Defendants sought to obtain possession and operational control of the Kendall Agency and its assets. A hearing on Defendants' motion was conducted in late June 2004, at which time the court ordered that operational control of the Kendall Agency be returned to Defendants. The formal court order directing the return of the Kendall Agency to Defendants was entered in the above-entitled court on or about August 9, 2004.

22. The value and continuing viability of the Kendall Agency was based upon the personal agency/client relationships which had developed over the time period of the agency's existence.

23. The actions of both Plaintiffs and Defendants, including their communications with third parties, clients, and insurance agencies, were detrimental to and impaired the relationships which had been established previously through the operations of the Kendall Agency.

24. All assets of the Kendall Agency have been returned and are presently controlled by Defendants.

25. The Morgans do not have a continuing insurance business.

26. The operations of the Kendall Agency have been terminated as a result of the incorporation of that business into the business of the R&R Group under the management of Stanzione.

27. Through his actions in this case, Mr. Stanzione has sought and obtained a return of the Kendall Agency and its related assets.

28. 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.

29. In connection with their acquisition of the Kendall Agency, the Morgans made a series of initial payments to the R&R Group in August and September 2003, the aggregate amount of which payments was \$74,768.00. Other amounts, alleged by Morgans to exceed \$10,300.00 were paid by the Morgans to the R&R Group or advanced to the Kendall Agency between September 1, 2003 and August 2004.

30. In connection with the pursuit of his claims in this matter, Defendant Rick Stanzione has incurred attorney's fees and related costs, the actual amount of which has not yet been determined. The reasonable amount of such fees and costs which may be recovered by Mr. Stanzione in this action does not exceed \$17,500.00

CONCLUSIONS OF LAW

1. As a result of the court's finding a mutual mistake of fact at the time of formation of the contract which is the subject of this action, said contract should be rescinded, as a matter of equity.

2. Based upon the rescission of the contract, Plaintiffs Charles Morgan and Shirley Ann Morgan should recover the sum of \$75,000.00 from Defendants, which represents amounts paid as the down payment by the Morgans for the purchase of the Kendall Agency.

3. Defendants are the prevailing parties on the issue of ownership and control of the Kendall Agency, inasmuch as they requested and obtained a recovery of the Kendall Agency and its related assets, which recovery effected the rescission of the contract between the parties.

4. As the prevailing parties, Defendants are entitled to recover their attorney's fees and related costs reasonably and necessarily incurred herein in an amount not to exceed \$17,500.00.

5. The actual amount of attorney's fees and costs to be awarded to Defendants herein may be determined upon the submission of appropriate affidavits establishing such fees and costs, which affidavits should be submitted within ten (10) days after the entry of the court's order, herein.

6. Plaintiffs Charles Morgan and Shirley Ann Morgan should be granted a judgment against Defendants in the amount of \$75,000.00, together with interest to accrue at the legal rate from and after the entry of such judgment.

7. Upon determination of the actual amount of attorney's fees and costs to be awarded to Defendants herein, Defendants should be entitled to offset the amount of such allowed fees and costs against the judgment to be awarded against Defendants and in favor of Plaintiffs Charles Morgan and Shirley Ann Morgan.

DATED: _____

Judge Parley R. Baldwin

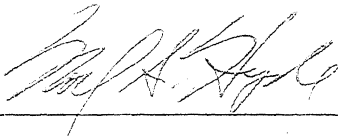
Approved as to form:

Drew Briney
Attorney for Defendants Rick Stanzione and R&R Group, Inc.

ATTORNEY'S CERTIFICATE

I hereby certify that on this 2nd day of February, 2006, I mailed and transmitted by facsimile true and correct copies of the above and foregoing proposed FINDINGS OF FACT AND CONCLUSIONS OF LAW postage prepaid, by United States Mail, to:

Drew Briney
265 North Main Street #100
Spanish Fork, UT 84660
Fax (801) 798-8202



Noel S. Hyde #3721
5926 S. Fashion Pointe Dr., Suite 200-D
S. Ogden, UT 84403
Telephone: (801) 394-1900
Facsimile: (801) 622-2200

Attorney for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
COUNTY OF WEBER, OGDEN DEPARTMENT

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

Plaintiffs,

vs.

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

Defendants.

FINAL ORDER AND JUDGMENT

Civil No. 040901442 PD

Honorable Parley R. Baldwin

A trial in the above-titled case was conducted before the undersigned on October 31, 2005 and November 1, 2005. Plaintiffs Charles Morgan and Shirley Ann Morgan were present at the trial and represented by their counsel, Noel S. Hyde. Defendants R&R Group, Inc. and Rick Stanzone were also present at the trial and represented by their counsel, Drew Briney.

The court having fully considered all evidence presented at the trial, including evidence submitted in previous proceedings relating to the court's order to show cause issued to Plaintiffs and relating to Defendants' request for the return of the business of the Kendall Insurance Agency to Defendants, and the court having also considered the pleadings and all other relevant documents and exhibits introduced during the proceedings before the court, and also the arguments of counsel, and good cause appearing therefore, and the court having entered its written findings of fact and conclusions of law herein, and good cause appearing therefore, it is hereby

ORDERED as follows:

1. As a result of the court's finding a mutual mistake of fact at the time of formation of the contract which is the subject of this action, said contract is hereby rescinded, as a matter of equity.

2 Plaintiffs Charles Morgan and Shirley Ann Morgan are hereby awarded a judgment against Defendants, jointly and severally, in the sum of \$75,000.00, together with interest to accrue thereon at the legal rate from and after entry until such judgment shall have been satisfied in full.

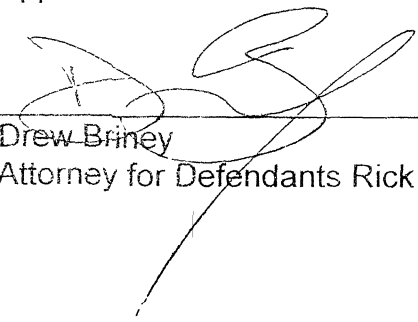
3 As the prevailing parties on the issue of ownership and control of the Kendall Insurance Agency, Defendants Rick Stanzione and the R&R Group are hereby awarded their attorney's fees and related costs reasonably and necessarily incurred herein in an amount not to exceed \$17,500.00.

4. The actual amount of attorney's fees and costs to be awarded to Defendants herein shall be determined upon the submission of appropriate affidavits establishing such fees and costs, which affidavits shall be filed with the court and served upon counsel for Plaintiffs within ten (10) days after the entry of this order. Plaintiff may object to such fees and costs, if they so choose, only upon the grounds of reasonableness. Upon the court's determination of the actual amount of fees and costs to be awarded to Defendants pursuant to this paragraph, such amount may be offset against and reduce the judgment awarded to Plaintiffs herein.

DATED: _____

Judge Parley R. Baldwin

Approved as to form:



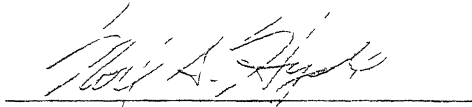
Drew Briney

Attorney for Defendants Rick Stanzione and R&R Group, Inc.

ATTORNEY'S CERTIFICATE

I hereby certify that on this 2nd day of February, 2006, I mailed a true and correct copy of the above and foregoing proposed FINAL JUDGMENT AND ORDER postage prepaid, by United States Mail, to

Drew Briney
265 North Main Street #100
Spanish Fork, UT 84660
Fax (801) 798-8202



A handwritten signature in black ink, appearing to read "Mark A. Hinkle", is written over a horizontal line.

2. The Plaintiffs now dispute both the purchase price that they agreed to pay in the purchase contract and the total value of the business. From the time the Plaintiffs purchased the Kendell Insurance Agency, Inc., Plaintiffs have been receiving monthly commission income from the Kendell Insurance Agency, but have not made the required monthly payments pursuant to the purchase agreement, security interest and promissory note. Because the Plaintiffs have failed to make the requisite monthly payments, the Defendant is in default to Max Kendell.

IT IS HEREBY ORDERED that the entire book of business of the Kendell Insurance Agency, Inc., or the Kendell Insurance L.L.C. as it existed on the date of the above mentioned hearing be turned over to the Defendants, and any commissions received by Plaintiffs in regards to the Kendell Insurance Agency Inc., or the Kendell Insurance L.L.C. book of business after the time of the hearing, June 24th, 2004, be forwarded to Defendants.

IT IS FURTHER ORDERED that the following items, as part of the book of business, be forwarded to the Defendant at the following address: Kendell Insurance Agency, 3800 South Washington Blvd., South Ogden, Utah 84403; (1) a complete client list for Kendell Insurance Agency Inc., or Kendell Insurance L.L.C.; (2) all policy numbers and any outstanding invoices regarding the Kendell Insurance Agency Inc., or Kendell Insurance L.L.C. book of business; and (3) all other assets of the Kendell Insurance Agency or the Kendell Insurance L.L.C. that are necessary to run and operate the business.

All this is ordered to take place as of the above-mentioned date of the hearing. The other disputed matters in the lawsuit will be handled in further litigation. Defendants will forthwith prepare a Security Agreement concerning the Kendell Insurance assets to protect any interest that the Court may later determine the Plaintiffs possess in the business assets transferred pursuant to this agreement.

DATED this 9 day of August, 2004.


Parley R. Baldwin
District Court Judge

STATE OF UTAH }
COUNTY OF WEBER } SS

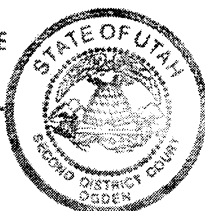
I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE
ORIGINAL ON FILE IN MY OFFICE.

DATED THIS 10 DAY OF Aug 20 04

PAULA CABR
CLERK OF THE COURT

BY [Signature] DEPUTY

PAGE 2 OF 3




CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order on Order to Show Cause was ~~mailed~~ and faxed, first-class, postage prepaid, on this 9th day of August, 2004, to the following:

Tim Dalton Dunn, Esq.
Kathleen M. Liuzzi, Esq.
Attorneys for Plaintiff
505 East 200 South 2nd Floor
Salt Lake City, Utah 84102

Reed M. Richards, Esq.
Attorney for Defendant
2568 Washington Blvd., Suite 102
Ogden, Utah 84401


In-Court Clerk

PURCHASE AGREEMENT

This Purchase Agreement has been made on August 26th, 2003, between Charles Morgan and Shirley Ann Morgan, 1778 E. Shadow Ridge Circle, Ogden, Utah 84403, (hereafter referred to as "Buyer") and R & R Group, Inc. d.b.a. R & R Group Insurance Services, 3800 South Washington Blvd., Ogden, Utah 84403 (hereafter referred to as "Seller").

RECITALS

1. Seller is the owner of all shares of stock of Kendell Insurance Agency, Inc.
2. The shares of common stock owned by Seller were issued with an assigned par value of \$1.00 per share.
3. Seller's shares constitute 100% of the issued voting shares of Kendell Insurance Agency, Inc.
4. Seller desires to sell its voting shares of common stock in Kendell Insurance Agency, Inc. and Buyer desires to purchase these shares.
5. Kendell Insurance Agency, Inc. has not accrued unpaid liabilities.

SALE OF STOCK

NOW THEREFORE for good and valuable consideration, Seller hereby sells, assigns, transfers and sets over to Buyer, all of Seller's shares of the issued common stock of Kendell Insurance Agency, Inc. Buyer hereby purchases these same shares of common stock and agrees to pay for this stock the Gross Purchase Price amount ~~of \$75,000.00~~ as follows:

(1) \$75,000.00 (which includes \$10,000.00 earnest money previously deposited with Seller) at time of closing which closing shall be conducted and completed no later than September 1, 2003, at 5:00 p.m.

Purchase Agreement
Page i

Defendant's Exhibit: D78
Name: Morgan v. Stanzone
Case #: 040901442
Date Received

(2) At closing, Seller shall endorse or transfer and shall deliver to Buyer, without restriction or qualification, physical possession of the share certificate (or each share certificate) evidencing the all shares of voting stock of Kendell Insurance Agency, Inc. owned by Seller.

(3) The \$ [REDACTED] balance from the \$ [REDACTED] Gross Purchase Price Amount shall accrue interest at six percent (6%) per annum and shall be paid by Buyer to Seller in thirty-six (36) monthly payments of \$ [REDACTED]. Buyer's monthly payment shall be made on or before the fifteenth (15th) day of each month beginning October 15, 2003. The Buyer will make these payments every month until the total remaining principal, interest and fees are paid in full as shown on the Amortization Schedule attached as "Exhibit 2". Buyer's monthly payments shall be made to the following location:

R & R Group, Inc d.b.a.
R & R Group Insurance Services
3800 South Washington Blvd.
Ogden, Utah 84403

(4) Buyer has the right to make advance payments in any amount and at any time before they are due. A payment greater than the required installment payment is a prepayment. When the Buyer makes a prepayment, Buyer will inform Seller in writing that it is doing so. Buyer may make a full prepayment or any partial prepayment without paying any prepayment charge. Seller will use all of Buyer's prepayments to reduce the unpaid Gross Purchase Price Amount that Buyer owes under this Purchase Agreement. If Buyer makes a partial prepayment, there will be no changes in the due date of any one of Buyer's payments unless Seller agrees in writing to those changes.

(5) If Seller does not receive the full payment for a scheduled monthly payment on the date when that payment is due, Buyer will pay a late charge to Seller. The amount of the late charge will be 5% of the overdue payment. Buyer will pay this late charge promptly.

(6) If Buyer does not pay the full amount for a scheduled monthly payment on the date the payment is due, Buyer will be in default. If Buyer is in default, the Seller may send Buyer written notice informing Buyer that if the overdue amount, together with the late charge, is not paid within the following ten (10) calendar days Seller may require Buyer to pay Seller immediately the full amount of the Gross Purchase Price Amount which has not been paid and all late charges that Buyer then owes.

(7) Even if, at a time when Buyer is in default, Seller does not require Buyer to pay immediately in full as described above, Seller will still have the right to declare that the Buyer is in default at a later time.

(8) If Seller requires Buyer to pay immediately in full as described in paragraph 6, Seller shall have the right to be paid by Buyer for all costs and expenses incurred by Seller incident to him enforcing the payment/performance provisions imposed upon Buyer within this Purchase Agreement. These expenses include costs of court and reasonable attorney fees.

(9) Any written notice that must be given by Seller to Buyer incident to Seller enforcing the payment/performance provisions imposed upon Buyer under this Purchase Agreement shall be given by Seller delivering or mailing written notice by first class mail to Buyer at the property address designated within the first paragraph of this Purchase Agreement unless Buyer provides Seller with notice of a different address for Buyer.

(10) Any person who is a guarantor, surety or endorser of this Purchase Agreement is obligated to perform fully the payment/performance obligations imposed upon Buyer. Any person who takes over these payment/performance obligations, including the obligations of a guarantor, surety or endorser of this Purchase Agreement is also obligated to keep all of the promises made in this Purchase Agreement. Seller may enforce its rights under this Purchase Agreement against each person individually or against all guarantors, sureties or endorsers together.

Buyer's payment/performance obligations under this Purchase Agreement are further secured by a concurrent Guaranty, the original of which is attached to and made a part of this Purchase Agreement.

8. Buyer's purchase of Seller's shares of common stock is conditioned, in material part, upon the following considerations:

(1) Buyer is purchasing not less than one hundred percent (100%) of the authorized and issued voting shares of Kendell Insurance Agency, Inc.

(2) Kendell Insurance Agency Inc. is free from and is not burdened by any material financial liabilities.

(3) The following assets of Kendell Insurance Agency, Inc. are part of, and are included within the \$ [REDACTED] Gross Purchase Price Amount:

(a) The existing and ongoing insurance book of business of Kendell Insurance Agency, Inc., excepting those accounts listed on "Exhibit 1";

(b) all closed ("dead") and active insurance client files of Kendell Insurance Agency, Inc.;

(c) all of the file cabinets and storage containers in which the enclosed and active client files of Kendell Insurance Agency, Inc. are now housed;

(d) all of the financial and business records of Kendell Insurance Agency, Inc. as these records now exist and are currently organized, to include the past and current business trust account and general business account records of Kendell Insurance Agency, Inc.;

(e) the outside business sign of Kendell Insurance Agency, Inc. now located at 3800 South Washington Boulevard, Ogden, Utah 84403; and

(f) the existing errors and omission insurance coverage for activities of Kendell Insurance Agency, Inc. which insurance policy issued by American Automobile Insurance Company, Policy #ME 07-308207 (\$1,000,000.00 face amount coverage). The unearned premium of \$1,043.00 shall be paid by Buyer to Seller as additional consideration at closing.

(4) The following assets are not part of, and are not included within the \$ [REDACTED] Gross Purchase Price Amount:

(a) all the building, premises and improvements located at presently possessed and/or used by Seller, and

(b) all funds previously deposited in the general business and trust accounts of Kendell Insurance Agency, Inc. (These accounts will show a "zero" account balance at closing.)

(5) Buyer tendering at closing all funds then required for the purchase by it of all authorized and issued shares of Kendell Insurance Agency, Inc.

REPRESENTATIONS AND WARRANTIES

Seller represents and warrants as follows:

9. Kendell Insurance Agency, Inc. is a duly organized, validly existing corporation in good standing under the laws of the State of Utah.

10. The Kendell Insurance Agency, Inc. shares authorized and issued to Seller are recorded correctly in the official records of the corporation.

11. Seller is the owner of, free and clear of any liens, encumbrances, charges and has full power to sell and to transfer to Buyer, the shares of common stock of Kendell Insurance Agency, Inc. which have been authorized and issued to Seller.

12. The sale of stock, pursuant to this Purchase Agreement is an isolated transaction by Seller. Seller will not make any other sale and has not made any sales or purchases of such stock during the entire period of time that he has owned the common stock issued to him by Kendell Insurance Agency, Inc.

13. Copies of the latest information concerning the business activities and financial affairs of Kendell Insurance Agency, Inc. have been made available to and have been inspected by Buyer 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.

RESIGNATION

RESIGNATION

14. Upon the Buyer completing its purchase of all the authorized and issued voting common stock of Kendell Insurance Agency, Inc. on or before 5:00 p.m. on September 1, 2003, each director and officer of the corporation shall submit in writing his/her resignation.

INTEGRATION

15. This Purchase Agreement embodies the entire agreement between Seller and Buyer and will not be modified or terminated except by an agreement in writing.

CHOICE OF LAW

16. This Purchase Agreement shall be construed according to the laws of the State of Utah.

SELLER:

R&R GROUP, INC., d.b.a. R&R GROUP
INSURANCE SERVICES

By: R & R Group Inc

Its: Bill B. Storgaard / Shirley Ann Morgan

BUYER:

[Signature]
CHARLES MORGAN

[Signature]
SHIRLEY ANN MORGAN

PROMISSORY NOTE AND SECURITY AGREEMENT

AMOUNT: \$ [REDACTED]

DATE: August 26, 2003

PLACE: Ogden, Weber County, Utah

FOR VALUE RECEIVED, The undersigned promises to pay to the order of R&R GROUP INC., d.b.a. R&R GROUP INSURANCE SERVICES the principal sum of Two Hundred Twenty Thousand Dollars (\$ [REDACTED]) with interest from the date of August 26, 2003, at a rate of six per cent (6%) per annum on the unpaid balance until paid, payable in equal monthly installments of \$ [REDACTED], beginning ~~September 1~~ ^{Sept. 15}, 2003. Any late payment shall incur a late fee equal to five percent (5%) of the amount due. The said principal and interest shall be immediately due and payable in its entirety on or before August 31, 2006.

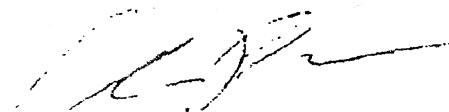
Privilege is reserved to prepay at any time, without a premium and a fee, the entire indebtedness herewith as above indicated. No prepayment penalty shall be assessed on any lump sum payment.

Prepayment shall be credited on the date received. Partial prepayment, other than on an installment due date, need not be credited until the next following installment due date or thirty days after such payment, whichever is earlier.

The maker and endorser severally waive presentment, protest and demand, notice of protest, demand and of dishonor and nonpayment of this note, and expressly agree that this note, or any payment thereunder, may be extended from time to time without in any way affecting the liability of the maker and endorser thereof. In the event of default, Holder may retake the business and collateral without notice to Makers. In the event of default, the defaulting party agrees to pay all costs incurred in the enforcement of this Note and the Security Agreement, including court costs and attorney fees.

This note is part of a Purchase Agreement dated August 26th, 2003, and is secured by the assets which are the subject matter of the Agreement and the personal assets of the Makers.

Makers:


CHARLES MORGAN


SHIRLEY ANN MORGAN

DAVID T. KANO & Co.
Certified Public Accountant
A Professional Corporation

972 East Chambers Street
Suite #6
Ogden, Utah 84403
Office 801-476-8308
Fax 801-476-1259
Email: dtkano@vii.com

October 27, 2005

Second Judicial District Court
State of Utah
Weber County
Ogden Department
Judge Parley R. Baldwin

To Second Judicial District Court,

I have analyzed the bank deposits of Kendell Insurance Agency Inc. for the period beginning April 2002 through August 2003, while under the ownership of Richard Stanzione, R&R Group Inc. and for the period September 2003 through August 11, 2004, while under the ownership of Shirley Ann Morgan and Charles Morgan. The analysis was made from the bank statements at Key Bank, of the General Account, account number 30002380, routing number 124000737, for the time period listed above.

The analysis is as follows:

Deposits Previous to Morgan per Bank Statements (Amounts rounded to whole dollars).

<u>Apr 02</u>	<u>May 02</u>	<u>Jun 02</u>	<u>Jul 02</u>	<u>Aug 02</u>	<u>Sep 02</u>	<u>Oct 02</u>	<u>Nov 02</u>	<u>Dec 02</u>
\$10,092	\$11,523	\$10,662	\$9,473	\$11,151	\$10,462	\$10,356	\$7,919	\$9,086
<u>Jan 03</u>	<u>Feb 03</u>	<u>Mar 03</u>	<u>Apr 03</u>	<u>May 03</u>	<u>Jun 03</u>	<u>Jul 03</u>	<u>Aug 03</u>	
\$10,454	\$12,041	\$10,195	\$9,731	Missing	\$7,038	\$8,721	\$7,272	

The total amount deposited for sixteen months of bank deposits equals \$156,176. The average monthly deposit is \$9,761. The month of May 2003 was not included because a copy of the bank statement was not provided.

Deposits Under Morgan per Bank Statements (Amounts rounded to whole dollars).

<u>Sep 03</u>	<u>Oct 03</u>	<u>Nov 03</u>	<u>Dec 03</u>				
\$6,521	\$1,139	\$19,979	\$3,593				
<u>Jan 04</u>	<u>Feb 04</u>	<u>Mar 04</u>	<u>Apr 04</u>	<u>May 04</u>	<u>Jun 04</u>	<u>Jul 04</u>	<u>Aug 04</u>
\$7,619	\$6,339	\$18,846	\$25,209	\$15,635	\$12,321	\$9,335	\$15,125

The total amount deposited for twelve months of bank deposits equals \$141,661. The average monthly deposit is \$11,805.

Defendant's Exhibit: D79
Name: Morgan v. Stanzione
Case #: 040901442
Date Received

Commission Income Since Turnover Back to Richard Stanzione, R&R Group Inc.:

Commissions of Kendell Insurance Agency Inc. since return to Richard Stanzione, R&R Group Inc., is based on documentation from each Insurance Agency showing the agent commission detail. The amounts provided are of all agencies that Kendell Insurance had an appointment under and are cumulative by month. (Amounts rounded to whole dollars).

<u>Sep 04</u>	<u>Oct 04</u>	<u>Nov 04</u>	<u>Dec 04</u>
\$3,056	\$1,168	\$2,121	\$3,625

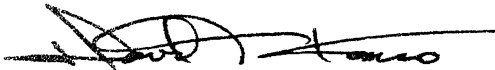
<u>Jan 05</u>	<u>Feb 05</u>	<u>Mar 05</u>	<u>Apr 05</u>	<u>May 05</u>	<u>Jun 05</u>	<u>Jul 05</u>
\$2,494	\$907	\$2,830	\$1,893	\$2,193	\$1,588	\$4,061

The total commissions per agent commission detail for the eleven month period from September 2004 through July 2005 equals \$25,936, for an average of \$2,358 per month.

The above analysis is made from bank statements and commission statements for the Kendell Insurance Agency Inc., provided to me by Attorney Drew Briney, on behalf of Richard Stanzione, President, R&R Group Inc.

I hereby attest that these numbers are based on these documents and are representative of the facts and information provided.

Respectfully,



David T. Kano, CPA, MBA

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** 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; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[Amended effective April 1, 1998.]

DREW BRINEY #9295
Attorney for Defendants
265 North Main Street #100
Spanish Fork, Utah 84660
Phone: 801-798-8201
Facsimile: 801-798-8202

**IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
WEBER COUNTY, OGDEN DEPARTMENT**

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

Plaintiffs,

v.

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

Defendants.

**60B MOTION FOR RELIEF FROM
JUDGMENT OR ORDER**

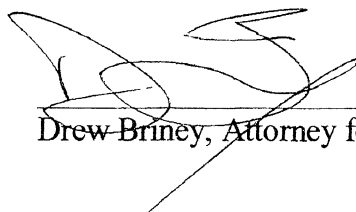
Case # 040901442 PD

Judge Parley R. Baldwin

COMES NOW, DEFENDANTS, by and through their counsel of record, Drew Briney, Attorney at Law, LLC and hereby motion this court in accordance with Rules 60(b)(1) and 60(b)(6) to relieve them from their obligation to refund monies to the Plaintiffs under this court's February 27, 2006 order. A memorandum is being filed concurrently in support of this motion.

DATED: 24 May 2006.

Respectfully Submitted,



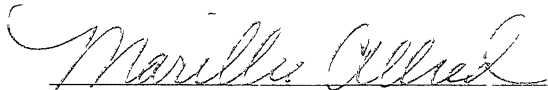
Drew Briney, Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May 2006, a copy of the foregoing 60b Motion for Relief from Judgment or Order and Defendants' Memorandum in Support of 60b Motion for Relief from Judgment or Order were served upon counsel of record by:

- ☐ hand delivering the same to opposing counsel of record;
- ☒ faxing the same to opposing counsel at 801-622-2200;
- ☒ depositing the same in the United States mail, postage prepaid and addressed as follows:

Noel S. Hyde
Attorney at Law
5926 S. Fashion Pointe Drive, Suite 200-D
South Ogden. UT 84403


Marillee Allred

Dated this 25th day of May, 2006

DREW BRINEY #9295
Attorney for Defendants
265 North Main Street #100
Spanish Fork, Utah 84660
Phone: 801-798-8201
Facsimile: 801-798-8202

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
WEBER COUNTY, OGDEN DEPARTMENT

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

Plaintiffs,

v.

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

Defendants.

DEFENDANTS'
MEMORANDUM IN SUPPORT OF
60B MOTION FOR RELIEF FROM JUDGMENT
OR ORDER

Case # 040901442 PD

Judge Parley R. Baldwin

COMES NOW, DEFENDANTS, by and through their counsel of record, Drew Briney, Attorney at Law, LLC and hereby submit this memorandum in support of their Rule 60(b) motion to relieve them from their obligation to refund monies to the Plaintiffs under this court's February 27, 2006 order. Defendants should be relieved of their obligation under this court's order to refund monies to the Plaintiffs for the following reasons:

1. Rule 60(b) of the Utah Rules of Civil Procedure states that "[o]n 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.

The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken.”

2. Defendants are praying for relief under either or both subsections (1) and (6) because the final order in this case did not make any accounting for prayers for relief requested under Defendants’ Order to Show Cause dated April 1, 2005 and the affidavit filed in support thereof. This constitutes legal error under subsection (1) of Rule 60(b) as argued below; this also constitutes a substantial reason to justify Defendants’ prayer under subsection (6) of Rule 60(b) as argued below.
3. Specifically, Defendants’ order to show cause prayed for Plaintiffs to be held in contempt for failing to turn over the book of business as required by this court’s previous August 9, 2004 order, for attorney’s fees for having to bring that motion, and for damages resulting therefrom.
4. Defendant Stanzione’s affidavit in support of that order to show cause was substantiated by trial testimony and exhibits showing a loss of thousands of dollars a month.
5. This April 1, 2005 order to show cause was merged with the trial proceedings but no findings based upon the order to show cause were made and no adjustments were made in the final judgment or order.
6. Defendants are therefore doubly harmed. As the prevailing party to this lawsuit, they lost not only a business (which was generating a healthy monthly income) because of Plaintiffs’ alleged contemptuous and fraudulent business practices, they are now required to return the down payment monies made by the Plaintiffs for the business that Plaintiffs cannibalized before returning to the Defendants.
7. In support of Defendants’ contention that failing to make findings of fact and conclusions of law concerning issues raised in Defendants’ order to show cause, Defendants offer the following controlling case law:

8. *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*.); *Mendelson v. Roland*, 1926, 66 Utah 487, 243 P. 798. (Court erred in failing to find on question of renewal of defendant's offer to sublease property, in view of testimony of witness that such offer had been renewed and accepted.); *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.).
9. That findings of fact and conclusions of law should have been entered in conjunction with the order to show cause is especially significant in the instant case because the Defendants not only presented a substantial amount of exhibits and accounting testimony to prove their losses resulting from Plaintiffs' alleged contempt of court but because this court merged the order to show cause issues with the trial issues so that all of these issues were adequately pursued, documented, and entered


into evidence as trial issues – Defendants in no way abandoned these claims at trial. See *Colman v. Colman*, 743 P.2d 782, 785 (Ut. App. 1987) (Issues may be tried and adjudicated by implied consent); *General Ins. Co. of America v. Carnicero Dynasty Corp.*, 545 P.2d 502, 506 (Ut 1976) (trial of an issue by implicit consent allows an issue to be treated as if it was raised in the pleadings). These cases were primarily published in connection with Rule 15(b) of the Utah Rules of Civil Procedure but they clearly establish the error in law that was made in not making adequate findings of fact and conclusions of law in connection with the April 1, 2005 order to show cause when these issues were in fact tried (under court order as opposed to implicit consent) and when there were many exhibits offered in pursuit of these issues and when much of the testimony was directed at these issues.

10. Failing to make findings of fact and conclusions of law on issues surrounding the order to show cause therefore deprived the Defendants of having monies awarded in their favor that would have offset their obligation to refund the Plaintiffs' down payment as required by this court's order. Therefore, as the prevailing parties, they should not be obligated to pay any monies to the Plaintiffs and they should be relieved from their obligation to do so under this court's February 27, 2006 judgment and order.

WHEREFORE, DEFENDANTS PRAY that this court relieve them of their obligation to refund the down payment received by the Plaintiffs under the judgment in accordance with Rule 60(b)(1) and/or in accordance with Rule 60(b)(6) of the Utah Rules of Civil Procedure.


DATED: 24 May 2006.

Respectfully Submitted,



Drew Briney, Attorney for Defendants

[illegible]


Parley R. Baldwin
District Court Judge

Kendell v Stanzione
040901442 PD
Page Two

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing decision was mailed, first-class, postage prepaid, on this 3rd day of August, 2006, to the following:

Noel S. Hyde, Esq.
Attorney for Plaintiff
5926 S Fashion Pointe Drive, Suite 200-D
South Ogden, Utah 84403

Drew Briney, Esq.
Attorney for Defendant
265 North Main Street # 100
Spanish Fork, Utah 84660


In-Court Clerk