

2006

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

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](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.

Drew Briney; Attorney for Appellants.

Noel S. Hyde; Attorney for Appellees.

---

### Recommended Citation

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

[https://digitalcommons.law.byu.edu/byu\\_ca2/6624](https://digitalcommons.law.byu.edu/byu_ca2/6624)

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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

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

Plaintiffs / Appellees,

vs.

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

Defendants / Appellants.

Appeal No: 20060570

(Appeal from Final Order and Judgment  
of the Second District Court of Weber  
County, State of Utah,  
Judge Parley R. Baldwin.)

District Court No: 040901442

---

**APPELLEES' BRIEF**

---

**Opposing Counsel:**

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

**Counsel Filing Brief:**

NOEL S. HYDE #3721  
Attorney for Appellees  
5926 So. Fashion Pointe Dr. #200  
So. Ogden, Utah 84403  
Phone: 801-394-1900  
Facsimile: 801-622-2200

FILED  
UTAH APPELLATE COURTS  
DEC 29 2006

---

IN THE UTAH COURT OF APPEALS

---

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

Plaintiffs / Appellees,

vs.

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

Defendants / Appellants.

Appeal No: 20060570

(Appeal from Final Order and Judgment  
of the Second District Court of Weber  
County, State of Utah,  
Judge Parley R. Baldwin)

District Court No: 040901442

---

**APPELLEES' BRIEF**

---

## **LIST OF PARTIES**

The caption in this matter shows all parties

## **TABLE OF CONTENTS**

LIST OF PARTIES .....	iii
TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES .....	vi
STATEMENT OF APPELLATE JURISDICTION .....	1
QUESTIONS PRESENTED .....	1
DETERMINATIVE STATUTES .....	2
STATEMENT OF THE CASE .....	2
Procedural History .....	2
Statement of Facts .....	3
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	9

### **I. RECISION OF THE CONTRACT WAS AN APPROPRIATE RESULT IN THIS CASE. .... 9**

A. Mutual Mistake is a Proper Basis for Equitable Recision of a  
Contract. .... 9

B. Effective Recision of the Contract was Sought by Sellers . . . . 11

C. The Court's Findings and Conclusions are Sufficient to  
Support Recision of the Contract. .... 13

D. The Award of a Money Judgment to Morgans and Recovery and  
Retention of the Business by Sellers are Consistent with Recision 13

### **II. SELLERS' CHALLENGES TO THE COURT'S FINDINGS ARE NOT PROPERLY SUPPORTED .... 14**

A. The "Clearly Erroneous" Standard of Review with Respect to  
Challenged Findings of Fact Has Not Been Met. .... 14

B. Sellers have Failed to Marshal the Evidence Sufficiently to  
Challenge the Findings of the Trial Court. .... 16

III. THE COURT’S RULING PROPERLY ADDRESSES AND DISPOSES OF ALL FACTUAL ISSUES RAISED BY THE ORDER TO SHOW CAUSE. ....	17
IV. CHALLENGES TO THE AWARD OF ATTORNEYS FEES ARE MOOT. ....	19
V. ARGUMENTS REGARDING DENIAL OF THE RULE 60(b) MOTION ARE NOT PROPERLY BEFORE THE COURT. ....	20
CONCLUSION . ....	21

## TABLE OF AUTHORITIES

### (Cases)

<u>Duncan v. Hemmelwright</u> , 186 P.2d 965, 112 Utah 262, 265 (1947). . . . .	17
<u>Landes v. Capital City Bank</u> , 795 P.2d 1127 (Utah 1990) . . . . .	1
<u>Maack v. Resource Design &amp; Construction Inc.</u> , 875 P.2d 570 (Utah App. 1994) . . . . .	9, 10
<u>Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc.</u> , 872 P.2d 1051 (Utah App. 1994). . . . .	16
<u>Perry v. Woodall</u> , 438 P.2d 813 (Utah 1968). . . . .	10
<u>Robert Langston, Ltd. v. McQuarrie</u> , 741 P.2d 554 (Utah App. 1987). . .	10, 13, 14
<u>State v. All Real Property</u> , 37 P.3d 276 (Utah App. 2001). . . . .	1, 15
<u>Tanner v. District Judges</u> , 649 P.2d 5 (Utah 1982). . . . .	11
<u>Tarrant v. Monson</u> , 619 P.2d 1210 (Nev. 1980). . . . .	11
<u>Union Bank v. Swenson</u> , 707 P.2d 663 (Utah 1985). . . . .	9, 10
<u>West Valley City v. Majestic Investment Co.</u> , 818 P.2d 1311 (Utah App. 1991). .	17

### (Statutes and Rules)

RULE 60(b) of the Utah Rules of Civil Procedure. . . . .	3, 8, 20
RULE 24(a)(9) of the Utah Rules of Appellate Procedure. . . . .	16

## **STATEMENT OF APPELLATE JURISDICTION**

Appellees accept Appellants' statement of jurisdiction as accurate.

### **QUESTIONS PRESENTED**

1. Is "mutual mistake" a proper basis for equitable rescission of a contract?

Standard of Review: This is a question of law that is subject to de novo review. Landes v. Capital City Bank, 795 P.2d 1127, 1129 (Utah 1990)

2. Were the findings of fact made by the trial court clearly erroneous, in light of the evidence presented at trial?

Standard of Review: Issues relating to the sufficiency of the evidence to support a trial court's factual findings and the adequacy of those findings are reviewed on an "abuse of discretion" or "clearly erroneous" standard. State v. All Real Property, 37 P.3d 276, 278 (Utah App. 2001)

3. Did the trial court properly address and rule upon all the material issues of fact that were presented in the case?

Standard of Review: Issues relating to the sufficiency of the evidence to support a trial court's factual findings and the adequacy of those findings are reviewed on an "abuse of discretion" or "clearly erroneous" standard. State v. All Real Property, 37 P.3d 276, 278 (Utah App. 2001)



## **DETERMINATIVE STATUTES**

There are not statutory provisions that are determinative of the issues in this appeal.

## **STATEMENT OF THE CASE**

### **Procedural History**

This case was commenced by the filing of a Complaint by Kendall Insurance, Inc., Shirley Ann Morgan, and Charles Morgan (hereinafter collectively referred to as “Morgans”) on February 24, 2004. On March 24, 2004, R&R Group and Rick Stanzione (hereinafter collectively referred to as “Sellers”) filed their Answer and Counterclaim. During the course of the proceeding, Sellers pursued orders to show cause in April 2004, and in April 2005. An order relating to proceedings on the first order to show cause was entered on August 9, 2004. Issues raised in the second order to show cause were merged with all other trial issues and considered by the court at a trial conducted on October 31 and November 1, 2005.

Following the trial, the court entered its Findings of Fact and Conclusions of Law, and also its Final Order and Judgment herein on February 27, 2006. On

May 26, 2006, Sellers filed their Motion for Relief from Judgment pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. By its Memorandum Decision dated August 2, 2006, the trial court denied the motion.

### **Statement of Facts**

This case involves a contract for the sale of an insurance agency “book of business”, which sale was negotiated between Morgans, as purchasers, and Sellers, as sellers, and memorialized by a written contract dated on or about August 26, 2003. (Record at 30). During the negotiations leading up to the execution of the contract, Sellers made representations to Morgans regarding the number and nature of ongoing clients and insurance policies which were being serviced by the business, and also relating to the value of the “book of business” which was purportedly being transferred by the contract. (Trial Transcript at 35 and 39-40). The particular book of business which was the subject of the negotiations was the book of business of the Kendall Insurance Agency, which business had been acquired by Sellers approximately seventeen months earlier. (Trial Transcript at 337).

At the time the Kendall Insurance Agency was originally acquired by Sellers, all records and accounting information of the agency were maintained in

the form of non-automated paper records, ledgers, etc. (Trial Transcript at 32). Between the time of Sellers' original acquisition of the Kendall Insurance Agency and the negotiated transfer to Morgans, Sellers had undertaken the process of converting all records and accounting information of the agency to an automated format. (Trial Transcript at 38-39 and 334-336). During the period of negotiation of the contract, Sellers represented that the conversion of the agency records to an automated format had been completed, and that the summarized business and accounting information provided by Sellers to Morgans during the negotiation of the contract were accurate. (Trial Transcript at 39).

In fact, at the time of the contract, the automation of the agency business records and accounting information had not been completed, and the information provided by Sellers to Morgans did not accurately reflect either the nature or value of the book of business being transferred. (Trial Transcript at 48-50 and 73-74). Upon execution of the contract, Morgans paid their initial down payment of at least \$75,000 toward the purchase price. (Trial Transcript at 127-128 and Trial Exhibits 12 and 13). Thereafter Morgans made additional advances to the business in amounts in excess of \$42,000.00. (Trial Exhibits 12 and 13).

Shortly after undertaking operation of the insurance agency, Morgans discovered significant discrepancies between the information they had received and the actual customers and policies which were being serviced by the agency. (Trial Transcript at 48-50 and 73-74). The magnitude of the errors in the information was that approximately forty to fifty percent of the customers and policies which were reflected in the business records received by Morgans were not accurate and had been either discontinued or otherwise terminated. (Trial Transcript at 49 and 73-74).

Upon discovering the significant discrepancies in the business information, Morgans requested a reformation of the contract. (Trial Transcript at 128). This request was denied by Sellers. (Trial Transcript at 128 and 130). As a result of such denial, the present complaint was filed by Morgans in February 2004. (Record at 1). In their response to the complaint, Sellers asserted several alternative defenses, including an affirmative request for return of the insurance agency to Sellers. (Record at 22 and 27). Thereafter, in April 2004, after an attempted self-help recovery of the business by Sellers was unsuccessful, Sellers sought and obtained an order to show cause, the focus of which was an effort by Sellers to obtain complete control over the disputed insurance agency and its

assets. (Record at 46). At the conclusion of the hearing on the order to show cause, the court ruled that the agency and its assets should be returned to the control of Sellers, which ruling was memorialized in the court's formal order entered on or about August 9, 2004. (Record at 101).

Following entry of the court's order on August 9, 2004, Morgans took steps to return to Sellers all assets and information relating to the originally- transferred insurance agency. (Trial Transcript at 102-108). At the same time, Morgans attempted to maintain their own independent agency based upon clients and policies which were not associated with the Kendall Insurance Agency being returned to Sellers. (Trial Transcript at 121-122). Disputes over the return of Kendall Insurance Agency information and assets continued from August 2004 through approximately April 2005, at which time Sellers sought a second order to show cause relating to the return of the agency information. (Record at 125).

As indicated in the procedural history, above, issues raised in this second Order to Show Cause were merged with all trial issues and tried before the court on October 31 and November 1, 2005. Both parties acknowledge that the continuing disputes had a negative impact on the value of the insurance agency book of business that was the subject of the original contract.

### **SUMMARY OF ARGUMENT**

The essence of the present appeal is Sellers' dissatisfaction with the consequences of a result which they, themselves, sought. The court's ruling that the underlying contract between the parties should be rescinded is supported by the trial court's finding of a mutual mistake as to material facts at the time the contract was negotiated. Controlling case law in the State of Utah recognizes mutual mistake as a proper basis for equitable rescission of a contract, even when that contract may appear on its face to be an integrated agreement.

Much of the impetus for the trial court's ultimate decision to rescind the contract, as a matter of equity, was provided by the aggressive efforts of Sellers, themselves, to recover and control the insurance agency business and its assets. Sellers were ultimately successful, through the court's rescission order, in regaining ownership and control of the insurance agency book of business and related assets. However, Sellers are dissatisfied with the result to the extent that it also places Morgans, as nearly as possible, into their pre-contract position by requiring the return of \$75,000 of the payments made by Morgans to Sellers at the initiation of the contract.

Accordingly, Sellers challenge the adequacy of the trial court's findings that support the equitable rescission result. While acknowledging that a challenge to

the trial court's factual findings must be reviewed under a "clearly erroneous" or "abuse of discretion" standard, Sellers fail to meet that standard. Rather than marshaling all of the available evidence which may support the court's findings and then analyzing that evidence to demonstrate flaws in the court's analysis, Sellers cite only those portions of the factual record which support an alternative version of the facts. This method of argument is inappropriate in the present appeal and fails to meet Sellers' burden in challenging the trial court's findings.

Arguments opposing the court's imposition of limits on the amount of attorneys fees which may be awarded to Sellers in the case, and additional challenges to the court's denial of Sellers' request for relief under Rule 60(b) of the Utah Rules of Civil Procedure, contain no factual support upon which the court of appeals could conclude that the trial court abused its discretion in such determinations. Further, Sellers' failure to timely request the allowance of any attorneys fees in this case and their similar failure to seek any stay pending appeal render these issues moot in the present appeal.

## **ARGUMENT**

### **I. RESCISION OF THE CONTRACT WAS AN APPROPRIATE RESULT IN THIS CASE.**

#### **A. Mutual Mistake is a Proper Basis for Equitable Rescision of a Contract**

The initial argument made in Sellers' brief, at pages 10 through 12, is that "mutual mistake" cannot, as a matter of law, support the equitable rescision of an integrated contract. Sellers' references to the case of Maack v. Resource Design & Construction, Inc., 875 P.2d 570 (Utah App. 1994), are not correct in their suggestion that only "positive fraud" can support the equitable rescision of an integrated contract. The court's analysis in the Maack case includes a discussion of the parole evidence rule as it relates to the admissibility of evidence relating to contract formation issues, and quotes the Utah Supreme Court decision of Union Bank v. Swenson, 707 P.2d 663 (Utah 1985), as follows:

The parole evidence rule as a principle of contract interpretation has a very narrow application. Simply stated, the rule operates in the absence of fraud to exclude contemporaneous conversations, statements, or representations offered for the purpose of varying or adding to the terms of an *integrated* contract . .

.. This general rule as stated contains an exception for fraud. Parol evidence is admissible to show the circumstances under which the contract was made or the purpose for which the writing was executed. This is so even after the writing is determined to be an integrated contract. Admitting parol evidence in such circumstances



avoids the judicial enforcement of a writing that appears to be a binding integration but in fact is not.

“What appears to be a complete and binding integrated agreement may be a forgery, a joke, a sham, or an agreement without consideration, or it may be voidable for fraud, duress, mistake, or the like, or it may be illegal. Such invalidation causes need not and commonly do not appear on the face of the writing.”

Maack v. Resource Design, 875 P. 2d at 575, quoting from Union Bank v.

Swenson, 707 P. 2d at 665 (citing Restatement (Second) of Contracts § 214 cmt. c (1981)).

Rescission of a contract is an equitable remedy, the effect of which is to return both parties to the contract, as nearly as possible, to the positions they were in prior to the execution of the purported contract. Perry v. Woodall, 438 P.2d 813, 815 (Utah 1968). The ruling of the court in the present case, that the contract at issue should be equitably rescinded as a result of a mutual mistake of fact relating to the nature and value of the underlying insurance agency book of business, is consistent with the decision of courts in this state which have addressed the issue of equitable rescission. “A mutual mistake occurs when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they base their bargain.” Robert Langston, Ltd. v. McQuarrie, 741 P.2d 554, 557 (Utah App. 1987). “Mutual mistake of fact makes a contract voidable, and is a basis for equitable rescission.” Id. (citing

Tanner v. District Judges, 649 P. 2d 5, 6 (Utah 1982); Tarrant v. Monson, 619 P. 2d 1210, 1211 (Nev. 1980)).

In the present case, as properly found by the district court, the parties shared a misconception as to the nature and value of the book of business which was the subject of the purchase contract. The misconception related directly to the valuation of the book of business, and was confirmed by evidence presented to the court, including testimony which indicated that the financial and business records of the company were undergoing a process of automation that rendered the reports relied upon during the contract negotiations grossly inaccurate. Shortly after the Morgans undertook operation of the insurance agency, they discovered the significant inaccuracies in the books and records which had been provided to them, and ultimately determined that the book of business which they received was substantially less, both in size and value, than was contemplated by both parties at the time the contract was entered into.

#### B. Effective Recision of the Contract was Sought by Sellers

At the inception of the litigation, and consistently throughout the proceedings in the trial court, Sellers aggressively asserted the right to recover and control the business operations and assets of the agency which had purportedly been sold. These efforts, which included an affirmative request in

Appellant's counterclaim for recovery of the business, and also two orders to show cause whereby Sellers sought to recover complete control over the business and its assets, are consistent with a rescission of the contract, but are not consistent with the presently-stated desire of Sellers to enforce the terms of the contract, as written.

Sellers' dissatisfaction with the result ordered by the court, and particularly the refunding to Morgans of the initial purchase price paid toward the acquisition of the book of business, is based more upon a misunderstanding of the effect of a rescission than it is on any suggestion that Sellers did not seek a rescission of the contract in this case.

Contrary to the position maintained by Sellers throughout the litigation, the argument contained in their present brief is that "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." (see Appellant's Opening Brief at page 12). By advancing, on appeal, the position that the court should now require Sellers to return ownership and control of the insurance agency to Morgans, Sellers are attempting to disavow the principal positions maintained in the trial court. This can be explained by Sellers' present realization that the

recision which they sought did not provide the financial result which they had hoped for.

**C. The Court's Findings and Conclusions are Sufficient to Support Recision of the Contract**

As set forth in Robert Langston Ltd. v. McQuarrie, the existence of a mutual mistake of fact makes a contract voidable, and is sufficient to support equitable recision. 741 P2d. at 557. In its findings and conclusions herein, the trial court did specifically find a mutual mistake of fact, which finding has factual support in the record, thereby providing a sufficient basis for the equitable recision ordered. Defendant does not dispute that a finding of "mutual mistake" was made, but challenges the sufficiency of the evidence to support that finding, which challenge will be addressed further, below.

**D. The Award of a Money Judgment to Morgans and Recovery and Retention of the Business by Sellers are Consistent with Recision.**

When the remedy of equitable recision is applied, the further role of the court is to craft the specific remedial steps that should be taken to return the parties, as nearly as possible, to the position that they were in before the contract was entered into. Id. In the present case the court appropriately, and consistent with Sellers' requests, returned to Sellers all assets and business operations

relating to the subject book of business. This effectively returned Sellers to the position they were in prior to execution of the contract.

In order to return Morgans, as nearly as possible, to the position they were in prior to the execution of the contract, and consistent with Robert Langston Ltd. v. McQuarrie, the court required that \$75,000.00 from the original down payment paid by Morgans be returned to them. It is significant that Sellers have not challenged the court's determination of the amount to be repaid to Morgans but, instead, only argue that the consequence of rescission of the contract which requires repayment to Morgans is not a proper result.

## II. SELLERS' CHALLENGES TO THE COURT'S FINDINGS ARE NOT PROPERLY SUPPORTED.

### A. The "Clearly Erroneous" Standard of Review with Respect to Challenged Findings of Fact Has Not Been Met.

Throughout their opening brief, Sellers take issue with the findings of the trial court. While acknowledging that the appellate standard for review of factual findings made by a trial court is a very high "abuse of discretion" or "clearly erroneous" standard, the substance of Sellers' argument goes only so far as to suggest that the evidence presented during the trial in this matter may, if viewed differently and given different weight by the trial court, have justified a different conclusion. Sellers are essentially arguing that the appellate court should review

the evidence itself, particularly the evidence which is more favorable to the Sellers' position, and reverse the trial court's findings based upon that review. This is not the role or function of an appellate court, and is inconsistent with the requirement that, on appeal, the findings of the trial court should not be modified or reversed absent a showing of "abuse of discretion." State v. All Real Property, 37 P. 3d at 278.

Much of Sellers' argument is based upon the testimony of David Kano, and the suggestion that such testimony confirms that the book of business did have the value represented by Sellers. Mr. Kano's testimony, however, carries little weight in the overall analysis of the case as a result of several factors, all of which are confirmed in the trial record. These factors include the absence of any independent verification by Mr. Kano of the sources of the funds that were reflected on the statements he reviewed (Trial Transcript at 278-279 and 281-282), the inclusion of significant premium payments that were generated by Morgans entirely independent of the Kendall Insurance book of business (Trial Transcript at 72, 130, and 161), the inclusion of funds advanced by Morgans to the insurance agency to cover operating shortfalls (Trial Exhibits 12 and 13), and the contribution of Paul Nelson's independent book of business into the agency

(Trial Transcript at 43). In light of these factors, the trial court did not abuse its discretion by giving little weight to Mr. Kano's testimony.

B. Sellers have Failed to Marshal the Evidence Sufficiently to Challenge the Findings of the Trial Court

Rule 24(a)(9) of the Utah Rules of Appellate Procedure states, "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding." Sellers have failed to marshal the fact evidence which supports the position they are challenging. The burden of proof lies with the party appealing the lower court decision. The challenging party must marshal all of the evidence supporting the contested findings and show that despite the supporting facts and in light of the conflicting contradictory evidence the decision of the trial court is clearly erroneous. The Utah Court of Appeals has previously held that:

Successful challenges to findings of fact thus must demonstrate to appellate courts first how the trial court found the facts from the evidence and second why such findings contradict the weight of the evidence.

Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1053

(Utah App. 1994). In describing the responsibility of the challenger the court noted:

In order to properly discharge the duty of marshaling the evidence, the challenger must present in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports

the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous. (Emphasis added.)

West Valley City v. Majestic Investment Co., 818 P.2d 1311, 1315 (Utah App.

1991). Sellers have failed to marshal the evidence in accordance with these decisions.

### III. THE COURT'S RULING PROPERLY ADDRESSES AND DISPOSES OF ALL FACTUAL ISSUES RAISED BY THE ORDER TO SHOW CAUSE.

Contrary to Sellers' suggestions, the findings made by the trial court in this matter are sufficient in every respect. The fact that the court did not rule favorably on Sellers' requests for a finding of contempt and other sanctions, does not mean that the court failed to rule on the issues upon which such requests were based. The responsibility of the trial court is to make findings on the ultimate facts. "It is not necessary to make findings on the subsidiary or evidentiary facts." Duncan v. Hemmelwright, 186 P.2d 965, 112 Utah 262, 265 (1947). The merger of the order to show cause into the trial issues rendered the order to show cause subsidiary to the overarching trial issues. Even so, the underlying issues which were the subject of the final order to show cause - whether or not Morgans had returned the book of business and related assets to



Sellers, and whether Morgans had, by their actions and business conduct, attempted to circumvent the court's earlier order in a manner sufficient to support a finding of contempt - were specifically dealt with in the trial court findings.

The specific findings made by the court which address these issues include the following:

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

\* \* \*

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 the 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.

\* \* \*

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.

\* \* \*

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."

Findings of fact and conclusions of law entered by the court herein and dated February 27, 2006, and included in Appellant's addendum of exhibits filed concurrently with Appellant's opening brief.

The foregoing findings confirm both the actual return of the assets to Sellers and the mutual responsibility of both parties for confusion and negative impact upon the value of those assets. Such findings are entirely consistent with the court's not granting any additional relief based upon the order to show cause previously obtained at Sellers' request.

#### IV. CHALLENGES TO THE AWARD OF ATTORNEYS FEES ARE MOOT.

In their arguments on appeal, Sellers allege error in the limitations imposed by the trial court on attorneys fees awarded to Sellers. This argument, however, must be overruled as a result of Sellers' failure to seek any award of attorneys fees in this case. In its ruling, the court specifically authorized an award of attorneys fees, but required that an application for such fees be submitted to the court, and subject to review and challenge by Morgans, within ten days after entry of the court's original order. While it is true that the court's order also imposes a limit on the attorneys fees which may be awarded to the sum of \$17,500.00, no amount has ever actually been requested or awarded to Sellers consistent with the order of the trial court. Having failed to request an allowance of any fees,

Sellers have waived the right to recover such fees in this action, thereby rendering moot any question relating to such award of fees in the present appeal.

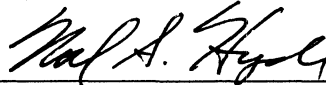
**V. ARGUMENTS REGARDING DENIAL OF THE RULE 60(b) MOTION ARE NOT PROPERLY BEFORE THE COURT.**

Following entry of the court's final order and judgment in this case, Sellers filed a motion pursuant to Rule 60 (b), which motion was ultimately denied by the court. Because Sellers' motion sought only procedural protection from the enforcement of the final judgment and order, it does not constitute a final and appealable order in the present case. Simply put, Sellers have not taken appropriate procedural steps to seek further protection from the enforceability of the court's judgment pending the outcome of the present appeal. Further, pursuing an appeal from the denial of such motion has no effect on the enforceability of the judgment, and also does nothing to change or enhance the arguments or positions which have otherwise been presented to the court for appellate review.

### CONCLUSION

The findings of fact and conclusions of law of the trial court in the present case were based upon sufficient evidence, and were correctly applied to support the court's determinations that the contract between the parties be rescinded, and that a money judgment for return of the down payment be awarded to Morgans. Appellant's arguments relating to the limitation on any award of attorney fees have been rendered moot by Appellant's failure to seek allowance of any fees within the time period specified by the court. The decision of the trial court should be affirmed.

DATED this 28<sup>th</sup> day of December, 2006.



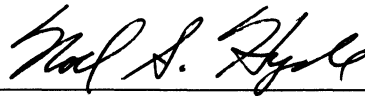
---

Noel S. Hyde  
Attorney for Morgans

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of December, 2006, I mailed two true and correct copies of the above and foregoing **BRIEF OF APPELLEES**, first-class postage prepaid, by United States Mail, to:

Drew Briney, Esq.  
265 North Main Street, #100  
Spanish Fork, UT 84660

  
\_\_\_\_\_