

1995

Kay Gneiting; Kerry Rick Hubble; and Wilderness  
Building Systems, Inc., a Utah Corporation v.  
Dennis Blaine Vance : Brief of Appellant

Utah Court of Appeals

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Jeffrey Weston Shields, Lawrence R. Dingivan; Purser, Edwards & Shields; attorney for appellant.  
Kent L. Christiansen; Christiansen & Sonntag; attorney for appellees.

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#### Recommended Citation

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KAY GNEITING; KERRY RICK HUBBLE;  
and WILDERNESS BUILDING SYSTEMS,  
INC., a Utah Corporation,

**Case No. 950342-CA**

DENNIS BLAINE VANCE,

950342CA

**Appeal from the Third Judicial District Court,  
In and For Salt Lake County  
The Honorable Homer F. Wilkinson  
Argument Priority Classification 15**

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**FILED**  
Utah Court of Appeals  
**AUG 24 1995**  
Marilyn M. Branch  
Clerk of the Court

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## EXHIBITS

1. Judgement, October 20, 1994, Third Judicial District Court . . . . .	Exhibit "A"
2. Transcript, proceedings before the Third Judicial District Court, August 18, 1994 . . . . .	Exhibit "B"
3. Third-Party Plaintiffs' Memorandum in Response to Third-Party Defendant Dennis Vance's Motion to Set Aside Judgment and Counterclaim for Compensatory Damages, November 1, 1994 . . . . .	Exhibit "C"
4. Amended Findings of Fact and Conclusions of Law, March 13, 1995 . . . . .	Exhibit "D"
5. Amended Judgment, March 13, 1995 . . . . .	Exhibit "E"
6. Utah Rule of Civil Procedure 52 . . . . .	Exhibit "F"
7. Utah Rule of Civil Procedure 59 . . . . .	Exhibit "G"

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**IN THE UTAH COURT OF APPEALS**

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KAY GNEITING; KERRY RICK HUBBLE;  
and WILDERNESS BUILDING SYSTEMS,  
INC., a Utah Corporation,

Third-Party Plaintiffs  
and Appellees

vs.

DENNIS BLAINE VANCE,

Third-Party Defendant  
and Appellant.

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Case No. 950342-CA

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**BRIEF OF APPELLANT**

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**JURISDICTIONAL STATEMENT**

This Court has jurisdiction in this matter pursuant to  
Section 78-2a-3(2)(k) of the Utah Code.

**STATEMENT OF THE ISSUES AND STANDARD OF REVIEW**

1. Did the trial court err as a matter of law when it  
heard the Countermotion for Compensatory Damages under Utah Rule  
of Civil Procedure 59(e).

2. Did the trial court err as a matter of law when it  
amended its Findings of Fact and Judgment under Utah Rule of  
Civil Procedure 52(b).

3. Did the trial court err as a matter of law when it originally awarded punitive damages against Dennis Vance without also awarding compensatory damages.

Each of these issues presents a question of law. The standard of review for questions of law is the "correctness" in which no particular difference is given to the trial court's ruling on questions of law, Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993).

#### **DETERMINATIVE LAWS OR STATUTES**

Utah Rules of Civil Procedure 6(a) and (b), 52(b), and 59(e).

#### **NATURE OF THE CASE**

The litigation underlying this appeal stems from an action to quiet title to a parcel of real property in the Summit Park subdivision in Wasatch County. The plaintiffs in the trial court (the "Robinsons"), who are not parties to this appeal, brought an action in fraud, among other claims, against Kay Gneiting, Kerry Rick Hubble and Wilderness Building Systems, Inc. (collectively, the "Hubble Plaintiffs"), alleging that the Hubble Plaintiffs participated in a scheme to deprive the Plaintiffs of their interest in the Summit Park property. In turn, the Hubble Plaintiffs brought suit against Mr. Dennis Vance, the Appellant before this Court, claiming that Mr. Vance had initiated the

allegedly fraudulent scheme without their knowledge. On August 18, 1994, following a one-day trial to the bench, the Honorable Homer Wilkinson ruled orally that the Hubble Plaintiffs were liable to the Robinsons for compensatory and punitive damages and that Mr. Vance was liable to the Hubble Plaintiffs for punitive damages only.

#### **STATEMENT OF RELEVANT FACTS**

On October 20, 1994 the District Court entered its judgment awarding the Hubble Plaintiffs \$24,780.56 in punitive damages against Mr. Vance. See Exhibit "A" to this Brief. Consistent with the Court's oral ruling of August 18, 1994, the Judgment did not include any award of compensatory damages in favor of the Plaintiffs and against Mr. Vance. See Exhibit "B" to this Brief (Transcript, Proceedings before the Third Judicial District Court, August 18, 1995) at 6-7.

On November 1, 1994, the Hubble Plaintiffs filed with the District Court moving papers which they captioned in relevant part "Counter-motion for Compensatory Damages." (The "Counter-motion") See Exhibit "C" to this Brief. In the Counter-motion, the Hubble Plaintiffs acknowledge that the District Court's October 20, 1994 Judgment which awarded only punitive damages against Mr. Vance must be amended because "in addition to the award for punitive damages, they are entitled to

compensatory damages against Third-Party Defendant Vance, and that existing law dictates that compensatory damages be awarded incident to an award of punitive damages." Countermotion at 3. Mr. Vance filed a written response to the Countermotion and the District Court conducted a hearing in the matter on January 13, 1995.

On March 13, 1995 the District Court entered its "Amended Findings of Fact and Conclusions of Law," see Exhibit "D" to this Brief, and a corresponding "Amended Judgment," see Exhibit "E" to this Brief, on the docket. In the Amended Judgment, and based on the Amended Findings of Fact and Conclusions of Law, the District Court concluded that Mr. Vance was liable to the Hubble Plaintiffs for various sums of compensatory damages and pre-judgment interest. The Amended Judgment also reiterated the Court's October 20, 1994 award of punitive damages. On April 11, 1995, Mr. Vance timely filed this appeal from the Amended Judgment.

#### **SUMMARY OF THE ARGUMENT**

The argument set out below attacks the District Court's dual Judgments against Mr. Vance in reverse chronological order. It first shows that the District Court lacked jurisdiction to conduct the proceedings that led to the March 13, 1995 Amended



Judgement. As a result, the Amended Judgment is void within the meaning of Utah law and therefore of no force or effect.

The argument then addresses the validity of the District Court's original Judgment, a ruling entered on the docket of that court on October 20, 1994. By reference to the transcript of the proceedings in which that Judgment was framed, the text of the October 20 Judgment itself, and by citation to governing decisional law, the argument demonstrates that the Judgment, while not void, is contrary to law and may not stand.

#### ARGUMENT

##### POINT I

#### THE DISTRICT COURT LACKED JURISDICTION TO ACT ON THE "COUNTERMOTION FOR COMPENSATORY DAMAGES"

By their Countermotion, the Hubble Plaintiffs attempted to invoke the District Court's authority to amend its October 20, 1995 Findings of Fact and Conclusions of Law and its Judgment of the same date. Indeed, the Hubble Plaintiffs appear to have succeeded in their procedural gambit because on January 13, 1995, the District Court heard argument on the Countermotion and on March 13, 1995, issued its Amended Judgment and Amended Findings of Fact and Conclusions of Law. Whatever the Hubble Plaintiffs may believe they achieved by submission of the Countermotion, all of their efforts were in vain.

Under Utah law, a trial court's findings of fact and conclusions of law are amended pursuant to Utah Rule of Civil Procedure 52(b). Similarly, a trial court's final judgment may be amended pursuant to Utah Rule of Civil Procedure 59(e). Unfortunately for the Hubble Plaintiffs, both Rule 52 and 59 fasten a tether to the District Court's authority to hear motions brought under either rule. Rule 52 declares that any motion seeking an amendment of findings of fact and a corresponding amendment of the judgment must be brought within ten days of the allegedly defective judgment. See Exhibit "F" to this Brief. Correspondingly, Rule 59(e) states that "[a] motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment." See Exhibit "G" to this Brief.

The Hubble Plaintiffs' Countermotion was both filed with the District Court and served on opposing counsel on November 1, 1994. But the judgment to which the Countermotion related was docketed with the District Court on October 20, 1994, twelve days earlier. The Hubble Plaintiffs' failure to timely file the Countermotion erected a jurisdictional bar to the District Court considering the Countermotion and acting on it to amend the October 20, 1994 Findings of Fact and Conclusions of Law and Judgment. Wright v. Preferred Research, Inc., 891 F.2d 886, 890 (11th Cir. 1990). Where a District Court lacks jurisdiction over

the subject matter before it, its judgment is void. Richins v. Delbert Chipman & Son's Co., 817 P.2d 382, 385 (Utah App. 1991). As a result, the March 13, 1995 Amended Judgment is a nullity and may not be enforced against Mr. Vance.

## POINT II

### **THE DISTRICT COURT'S OCTOBER 20, 1994 JUDGMENT WAS ENTERED CONTRARY TO LAW**

As every party to the proceedings in the District Court concedes and as the transcript of the District Court's August 18, 1994 proceedings puts beyond good faith dispute, the District Court's original judgment against Mr. Vance and in favor of the Hubble Plaintiffs was for punitive damages only. Such a judgment, while not "void" within the meaning of Richins, supra, is nonetheless directly contrary to Utah decisional law in point and may not stand. Crookston v. Fire Ins. Exch., 860 P.2d 937 (Utah 1993); Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991); Atkin, Wright & Miles v. Mountain States Tel., 709 P.2d 330, 337 (Utah 1985). As a result, this Court must vacate the judgment and remand this case to the District Court for a new trial.

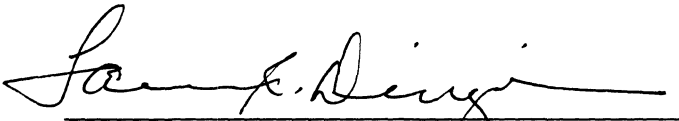
### **CONCLUSION AND RELIEF SOUGHT**

Because the District Court lacked jurisdiction to act on the Counterclaim, the Court's Amended Judgment of March 13, 1995 is void and must be stricken by this Court. Moreover, because the

District Court's October 20, 1995 judgment against Mr. Vance is contrary to Utah law, it to must be vacated by this Court. To date there has been no proper resolution of the merits of the Hubble Plaintiffs' claims against Mr. Vance and Mr. Vance's defenses to those claims. Accordingly, this Court must vacate the entirety of the proceedings against Mr. Vance and direct the District Court to conduct a new trial in this matter.

DATED this 23<sup>D</sup> day of August, 1995.

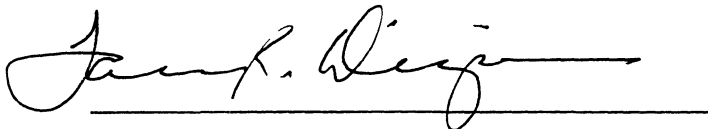
PURSER EDWARDS & SHIELDS, L.L.C.

  
Jeffrey Weston Shields  
Lawrence R. Dingivan  
Attorneys for Appellant

**CERTIFICATE OF MAILING**

I hereby certify that on the 23<sup>D</sup> day of August, 1995, I served a true and correct copy of the foregoing **Brief of Appellant** by depositing copies thereof in the United States mail, postage prepaid, and addressed to:

Kent L. Christiansen, Esq.  
CHRISTIANSEN & SONNTAG  
420 East South Temple, No. 345  
Salt Lake City, Utah 84111



Tab A

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420 East South Temple  
Salt Lake City, Utah 84111  
Telephone: (801) 359-3762

**JUDGMENT**

**FILED DISTRICT COURT**  
Third Judicial District

OCT 20 1994

By D. Carner  
Deputy Clerk

Attorneys for Hubble and Wilderness Building Systems

---

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---

LEON W. ROBINSON and  
ARLENE ROBINSON,

Plaintiffs,

vs.

KAY GNEITING; KERRY RICK  
HUBBLE; and WILDERNESS  
BUILDING SYSTEMS, INC.,  
a Utah corporation,

Defendants,

---

KAY GNEITING; KERRY RICK  
HUBBLE; and WILDERNESS  
BUILDING SYSTEMS, INC., a  
Utah corporation,

Third Party Plaintiffs,

vs.

DENNIS VANCE,

Third Party Defendant.

**JUDGMENT**

2195658  
10-24-94-8.06am

Civil No. 920902754

Judge Homer F. Wilkinson


---

This matter came on regularly before the Court for a non-jury trial on the Third-Party Complaint filed by Kerry Rick Hubble and Wilderness Building Systems, against Third-Party Defendant, Dennis Vance, on June 1, 1994, the Honorable Homer F. Wilkinson, Third District Court Judge, presiding; and was again before the court for a hearing on Third-Party Plaintiffs' Motion for Clarification of Judgment Against Third-Party Defendant Dennis Vance on September 23, 1994. Kent L. Christiansen of the law firm of Christiansen & Sonntag, appeared on behalf of the Third-Party Plaintiffs, Kerry Rick Hubble and Wilderness Building Systems, Inc. Scott Mitchell of the law firm of Lehman, Mitchell & Waldo, appeared on behalf of the Plaintiffs, Leon and Arlene Robinson (hereinafter "Robinsons"). Dennis Vance, Third-Party Defendant, appeared pro se. The parties having adduced evidence by way of testimony and documentary exhibits, and having argued the matter to the Court, and the Court having reviewed the file, exhibits, and memoranda submitted by the parties, the Court having entered its Findings of Fact and Conclusions of Law, the Court being fully advised in the premises, and good cause appearing therefore, it is hereby:

**ORDERED, ADJUDGED, AND DECREED** that judgment upon the merits be entered in favor of the Third-Party Plaintiffs Kerry Rick Hubble and Wilderness Building Systems, Inc., and against Third-Party Defendant, Dennis Vance, in the amount of \$24,780.56, together with interest thereon as allowed by Utah Code Annotated § 15-1-4.

DATED this 20 day of October, 1994.

BY THE COURT:

  
\_\_\_\_\_  
Homer F. Wilkinson  
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Judgment by placing a true and correct copy thereof in the U.S. Mails, postage prepaid, this 6 day of October, 1994, and properly addressed as follows:

Scott B. Mitchell  
**LEHMAN, MITCHELL & WALDO**  
An Association of Sole Proprietorships  
Kearns Building, Suite 721  
136 South Main Street  
Salt Lake City, Utah 84101

Dennis Vance  
7702 West 13090 South  
Herriman, Utah 84065

Brenda Riddle



Tab B

SEP 2 1994

By Marjorie L. Loepp  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR

SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

LEON W. ROBINSON,

Plaintiff,

-vs-

KAY GNEITING, et al.,

Defendant.

COPY

Case No. 920902754 CV

DECISION, 8-18-94

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BE IT REMEMBERED that on the 18th day  
of August, 1994, at 10:30 o'clock a.m., this cause  
came on for telephone conference before the HONORABLE  
HOMER WILKINSON, District Court, without a jury in  
the Salt Lake County Courthouse, Salt Lake City,  
Utah.

-----

A P P E A R A N C E S:

For the Plaintiff: SCOTT MITCHELL  
Attorney at Law

For the Defendant: DENNIS VANCE  
Pro Se

CAT by: CARLTON S. WAY, CSR, RPR

P R O C E E D I N G S

THE COURT: Okay, counsel, we are on the record.

We have Scott Mitchell, are you there?

MR. MITCHELL: Yes, your Honor.

THE COURT: Kent Christiansen, are you there?

MR. CHRISTIANSEN: Yes, your Honor.

THE COURT: And Dennis Vance, are you there?

MR. VANCE: Yes, sir.

THE COURT: I'm calling regarding the case of Leon W. Robinson versus Kerry Rick Hubble and others, and Kerry Rick Hubble and others versus Dennis Vance.

I want to give you my decision regarding the question of punitive damages.

The Court would find in favor of the Plaintiff, the Robinsons, and against Kerry Rick Hubble and Wilderness Building on the punitive damages. And would also find in favor of the Third Party Plaintiffs, Kerry Rick Hubble and Wilderness Building against Dennis Vance.

The Court would award to the Defendants the sum of \$49,561.12 as punitive damages.

1                   The Court would find and award to the  
2 Third Party Plaintiff against the Third Party  
3 Defendant the sum of \$24,780.56 as punitive damages.

4                   Now, I'm going to give you some -- the  
5 reasoning behind my ruling, the findings of fact. I  
6 would expect, counsel, for you to supplement these  
7 more in detail as far as what I'm referring to.

8                   I would ask that, Mr. Mitchell, you  
9 prepare the pleadings for your case, and,  
10 Mr. Christiansen, you prepare the pleadings for your  
11 case.

12                   The Court would find that the actions  
13 of the defendant, Kerry Rick Hubble and the  
14 Wilderness Building Systems, manifested knowing,  
15 reckless indifference and disregard towards the  
16 rights of others; that they were willful, knowingly  
17 and even malicious in some aspects, in that the  
18 Defendant indicated, testified, that he would -- did  
19 not feel that he owed the money to the Plaintiffs and  
20 was almost prepared to do anything to get out of  
21 paying the same; that the -- and also -- well, no,  
22 let me -- that's fine there.

23                   And the relative wealth of the  
24 Defendants indicate that the Wilderness Building has  
25 a gross income, based on the income tax returns that

1 are filed -- and I'm not finding that this is -- is  
2 definitely the amounts, but find that they have  
3 sufficient incomes to pay a judgment of this sort;  
4 and that Hubble also has sufficient income. And even  
5 though Hubble's income is less than the -- what has  
6 been referred to in the income tax as \$18,750, that  
7 he's had many years to pay on this. I am not  
8 penalizing him for taking out bankruptcy. That's a  
9 right that he had, but that he has done nothing to  
10 pay off this judgment.

11 That the nature of the conduct --  
12 Hubble caused a new action to be filed and a  
13 foreclosure of the real property. He had Gneiting  
14 get involved in it so that the -- alleged that the  
15 mortgage had been filed wrong on it. And the  
16 property was sold as being owned by Gneiting. And  
17 then the money was, of course, paid over to Hubble.  
18 And all this was done knowingly and fraudulently  
19 against the concerns of the Plaintiff; that this has  
20 had a very devastating affect on the lives of the  
21 Plaintiff in that they have had to file bankruptcy,  
22 that they have lost items, had to forego many items  
23 as a result of the judgment not being paid and the  
24 loss of which they have had.

25 As far as the probability of future

1 reoccurrence of the misconduct, we see that Hubble is  
2 still in business, Wilderness is still in business.  
3 They are still building homes. They can continue to  
4 do this. And there is a likelihood that it could be  
5 a reoccurrence because there seems to be no  
6 dependence on the part of Hubble or Wilderness  
7 indicating that they did anything wrong in the first  
8 instance.

9                   The relationship of the parties in the  
10 the original instance was a principal relationship of  
11 where the Plaintiffs did trust Hubble and Wilderness  
12 to build a home for them and that they were taken  
13 advantage of and a judgment resulted in the 27,000  
14 figure.

15                   Based on that, I would find in favor of  
16 the Plaintiffs and against the Defendants for the  
17 amount indicated.

18                   MR. MITCHELL: Scott Mitchell, your  
19 Honor.

20                   THE COURT: What is your question?

21                   MR. MITCHELL: I caught the amount  
22 49,500 and something, but I didn't catch the end of  
23 it.

24                   THE COURT: It was \$49,561.12 or two  
25 times the amount of the actual damages.

1 MR. MITCHELL: Very good. Thank you,  
2 your Honor.

3 THE COURT: And the Court would find as  
4 far, as the Third Party Plaintiff was concerned, that  
5 the Third Party Defendant, Dennis Vance, engineered  
6 much of this scheme, that he retained -- or I  
7 shouldn't say "retained" -- that he contacted the  
8 attorney to carry this out; that the attorneys knew  
9 nothing about the scheme that was being set up; that  
10 Vance knew what was going on; that he told the  
11 parties that he was going to set up a system where  
12 they wouldn't have to pay it. Hubble let him go  
13 ahead. Hubble knowingly allowed him to do it. And  
14 Vance proceeded to do it. And, therefore, of course,  
15 and based on that, I'm finding that Vance is liable,  
16 also, but that he's not liable for the full amount,  
17 but that Hubble should be liable for the 49, but  
18 Vance should be liable for 27 -- one half of that,  
19 \$24,780.56 is awarded to Hubble against Vance.

20 Any questions?

21 MR. MITCHELL: None from me, your  
22 Honor.

23 MR. CHRISTIANSEN: Your Honor, Kent  
24 Christiansen. The only question that I would have  
25 is: Does the Court make any specific finding on the

1 effect of Kerry Rick Hubble's bankruptcy?

2 THE COURT: No. I think that was  
3 resolved in the motion for summary judgment. As I  
4 review the law, that the bankruptcy court did not  
5 avoid the lien on the property, that the lien passed  
6 through the bankruptcy, the bankruptcy did not take  
7 the property at all.

8 MR. CHRISTIANSEN: Okay.

9 THE COURT: The lien last remained on  
10 the property, and it's something that can be  
11 foreclosed. It is not being renewed. If it was  
12 being renewed, then there would be a different  
13 question.

14 MR. CHRISTIANSEN: Okay, thanks, I  
15 appreciate that clarification.

16 THE COURT: Mr. Vance, any questions?

17 MR. VANCE: There's no compensatory  
18 damages. There's punitive damages against me from  
19 the Third Party Plaintiff; is that correct?

20 THE COURT: Yes, punitive damages,  
21 only.

22 MR. VANCE: Okay, I understand.

23 THE COURT: Okay. If, counsel, will  
24 you prepare the pleadings as I have indicated to you?

25 MR. CHRISTIANSEN: Thank you, your



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Honor.

MR. MITCHELL: Very good. Thank you,  
your Honor.

(Hearing adjourned.)

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Tab C

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Attorneys for Third-Party Plaintiffs

FILED  
DISTRICT COURT

NOV -1 PM 1:06

THIRD DISTRICT  
SALT LAKE COUNTY

BY *m. J. [signature]*  
CLERK

---

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---

LEON W. ROBINSON and  
ARLENE ROBINSON,

Plaintiffs,

vs.

KAY GNEITING; KERRY RICK  
HUBBLE; and WILDERNESS  
BUILDING SYSTEMS, INC.,  
a Utah corporation,

Defendants,

THIRD-PARTY PLAINTIFFS'  
MEMORANDUM IN RESPONSE  
TO THIRD-PARTY DEFENDANT  
DENNIS VANCE'S MOTION  
TO SET ASIDE JUDGMENT  
AND COUNTERMOTION FOR  
COMPENSATORY DAMAGES ✓

Civil No. 920902754

---

KAY GNEITING; KERRY RICK  
HUBBLE; and WILDERNESS  
BUILDING SYSTEMS, INC., a  
Utah corporation,

Third Party Plaintiffs,

vs.

DENNIS VANCE,

Third Party Defendant.

Judge Homer F. Wilkinson

Third-Party Plaintiffs, Kerry Rick Hubble, and Wilderness Building Systems, Inc., a Utah corporation, by and through their attorney, Kent L. Christiansen of the law firm Christiansen & Sonntag, and pursuant to Rule 4-501 of the Utah Code of Judicial Administration, hereby responds to the Third-Party Defendant, Dennis Blaine Vance's Motion to Set Aside Judgment, and submits this Countermotion requesting that this honorable court enter judgment for compensatory damages against Third-Party Defendant Dennis Vance in conjunction with the award for punitive damages previously entered in this matter. In response to Vance's Motion to Set Aside the Judgment, and in support of their Countermotion, said Third-party Plaintiffs respectfully submit as follows:

1. A trial was held on the Third-Party Complaint against Dennis Vance on June 1, 1994. At the close of that trial, and pursuant to the allegations of the Third-Party Complaint, Third-Party Plaintiffs requested that the court enter judgment against Third-Party Defendant Vance in the amount of \$24,780.56 compensatory damages, together with pre-judgment interest in the amount of \$16,583.97, plus interest at the rate of twelve (12) percent from April 21, 1993--the same amount the court awarded the Robinsons against Defendants and Third-Party Plaintiffs Hubble and Wilderness Building Systems. Third-Party Plaintiffs also sought an award of damages on their conversion claim in the amount of \$9,800.00, plus punitive damages against Defendant Vance.

2. As a result of the evidence presented at trial, the court granted Third-Party Plaintiffs judgment for punitive damages against Dennis Vance in the amount of \$24,780.56. No amount for compensatory damages was included in the judgment.

3. The evidence supports the fact, and the court so found, that Third-Party Plaintiffs

were damaged by the willful and malicious acts of Dennis Vance. As a direct and proximate result of Vance's actions, Third-Party Plaintiffs have been damaged in that judgment was entered against them and in favor of the Plaintiffs for compensatory damages totalling \$41,364.53 plus interest at twelve percent (12%) from April 21, 1993.

4. Movants herein respectfully submit that in addition to the award for punitive damages, they are entitled to compensatory damages against Third-Party Defendant Vance, and that existing law dictates that compensatory damages be awarded incident to an award of punitive damages. Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991); Atkin Wright & Miles v. Mountain States Tel., 709 P.2d 330, 337 (Utah 1985); Maw v. Weber Basin Water Conservancy District, 436 P.2d 230 (Utah 1968); Graham v. Street, 270 P.2d 456 (Utah 1954).

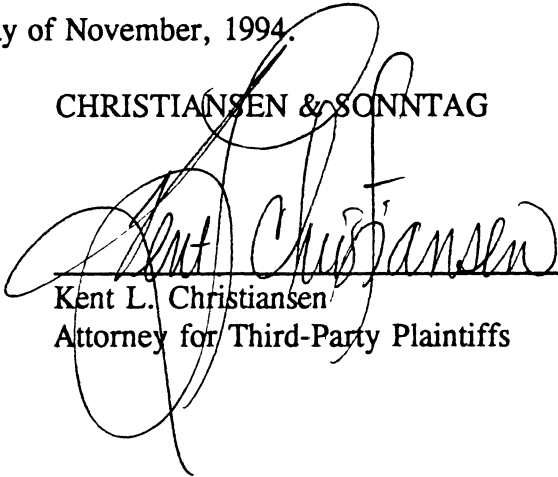
5. Further, the evidence at trial was undisputed that Third-Party Plaintiffs had been damaged in the amount of \$9,000.00 for the Third-Party Defendant's wrongful conversion of their property. Accordingly, Third-Party Plaintiff's request that the judgment against Vance also include the \$9,000.00 damage related to the conversion of the property belonging to Wilderness Building Systems, Inc. Again, evidence on the issue of compensatory damages for conversion against Defendant Vance in the Third-Party Complaint, was presented and not refuted at the time of trial. Therefore, Third-Party Plaintiffs submit that the evidence supports a finding on the fifth cause of action against Defendant Vance for judgment in the amount of \$9,800.00, plus recovery of the \$816.00 Third-Party Plaintiffs paid to Defendant Vance to perform work related to collection of their accounts, which he never did.

WHEREFORE, Third-Party Plaintiffs respectfully request that Third-Party Defendant's Motion to Set Aside the Judgment be denied, and that the court enter judgment for compensatory

damages against Dennis Vance consistent with those rendered against Defendants Hubble and Wilderness Building Systems in the amount of \$24,780.56, plus \$16,583.97 for a total of \$41,364.53, plus interest at the rate of twelve percent (12%) from April 21, 1993; for compensatory damages on Third-Party Plaintiffs conversion claim in the amount of \$9,800.00; and for damages against Defendant Vance for his breach of the services contract and the \$816.00 paid to him for work on lot J-63.

DATED this 15<sup>th</sup> day of November, 1994.

CHRISTIANSEN & SONNTAG



Kent L. Christiansen  
Attorney for Third-Party Plaintiffs

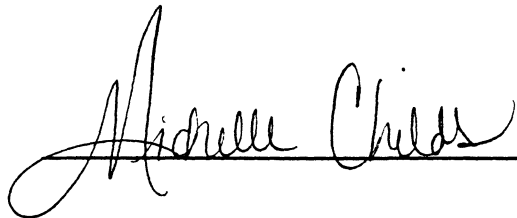
MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Third-Party Plaintiffs' Memorandum in Response to Third-Party Defendant Dennis Vance's Motion to Set Aside Judgment and Countermotion for Compensatory Damages was mailed, postage prepaid this 1<sup>st</sup> day of November, 1994, to the following:

Michael G. Barker, Esq.  
56 E. Broadway, Suite 600  
Salt Lake City, Utah 84111

Scott B. Mitchell, Esq.  
**LEHMAN, MITCHELL & WALDO**  
An Association of Sole Proprietorships  
Kearns Building, Suite 721  
136 South Main Street  
Salt Lake City, Utah 84101

Kay Gneiting  
8194 South 2470 West  
West Jordan, Utah 84088



A handwritten signature in cursive script, reading "Michelle Childs", is written over a horizontal line.



Tab D

KENT L. CHRISTIANSEN of  
CHRISTIANSEN & SONNTAG  
345 IBM Plaza  
420 East South Temple  
Salt Lake City, Utah 84111  
Telephone: (801) 359-3762

RECEIVED  
1/18/95

Attorneys for Hubble and Wilderness Building Systems

---

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---

LEON W. ROBINSON and  
ARLENE ROBINSON,

Plaintiffs,

vs.

KAY GNEITING; KERRY RICK  
HUBBLE; and WILDERNESS  
BUILDING SYSTEMS, INC.,  
a Utah corporation,

Defendants,

AMENDED  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Civil No. 920902754

---

KAY GNEITING; KERRY RICK  
HUBBLE; and WILDERNESS  
BUILDING SYSTEMS, INC., a  
Utah corporation,

Third Party Plaintiffs,

vs.

DENNIS VANCE,

Third Party Defendant.

Judge Homer F. Wilkinson

This matter came on regularly before the Court for trial on June 1, 1994, the Honorable Homer F. Wilkinson, Third District Court Judge, presiding. Kent L. Christiansen of the law firm of Christiansen & Sonntag, appeared on behalf of the Defendants, Kerry Rick Hubble and Wilderness Building Systems, Inc. Scott Mitchell of the law firm of Lehman, Mitchell & Waldo, appeared on behalf of the Plaintiffs, Leon and Arlene Robinson. Dennis Blaine Vance appeared pro se at the trial. The parties having adduced evidence by way of testimony and documentary exhibits, and having argued the matter to the Court, and the Court having reviewed the file, exhibits, and memoranda submitted by the parties, the Court being fully advised in the premises, and good cause appearing therefore, the Court initially entered its original Findings of Fact and Conclusions of Law on October 20, 1994.

Thereafter, on January 13, 1995, the matter again came before the court for hearing on various motions of the parties, including Third-Party Plaintiff's Countermotion for Compensatory Damages against Third-Party Defendant Dennis Vance. Kent L. Christiansen of the law firm of Christiansen & Sonntag, appeared on behalf of the Defendants and Third-Party Plaintiffs, Wilderness Building Systems, Inc. and Kerry Rick Hubble. Scott B. Mitchell appeared on behalf of the Plaintiffs, Leon W. and Arlene Robinson. Michael G. Barker appeared on behalf of Third-Party Defendant, Dennis Vance. The parties having submitted legal Memoranda, and having filed various motions and other documents in support of their respective positions, the Court having reviewed the testimony and documentary exhibits presented to the Court, and the parties having argued the matter to the Court, the Court having considered the arguments of the parties, and now being fully advised in the premises enters the following:

### **AMENDED FINDINGS OF FACT**

1. On February 22, 1988, an Amended Judgment was entered in favor of Plaintiffs, Leon W. Robinson and Arlene Robinson, and against Kerry Rick Hubble in the Third Judicial District Court, Case No. C87-3023. The total principal amount of the judgment was \$27,280.56.

2. Subsequent thereto, Third-Party Defendant, Dennis Blaine Vance, contacted Wilderness Building Systems, Inc. and offered his services as a "paralegal" and collection agent.

3. Vance was hired as an independent contractor by Wilderness Building Systems to collect various delinquent accounts.

4. Vance thereafter learned that Leon W. and Arlene Robinson had a judgment against Kerry Rick Hubble in the amount of \$27,280.56 which appeared as a judgment lien against Lot J-63 in Summit Park Subdivision.

5. Vance was interested in acquiring Lot J-63 and explored the possibility of purchasing it.

6. Vance offered his services to Wilderness Building Systems, indicating that he could clear the encumbrances and liens which appeared of record against Lot J-63.

7. Vance initially arranged a meeting with a prospective buyer for Lot J-63 at the law offices of Gerald Conder.

8. Due to the fact that Mr. Conder had previously done work for Kerry Rick Hubble, he indicated that he believed there was a conflict of interest and declined to proceed further.

9. On or about January 27, 1992, Third-Party Defendant, Dennis Blaine Vance,

contacted attorney James T. Dunn and requested him to file a Complaint for Reformation of a mortgage between Hubble and Gneiting in the Third Judicial District Court in and for Summit County, State of Utah; Civil No. 92-11322. The Complaint purportedly identified Kay Gneiting as the Plaintiff and the Defendants were identified as Kerry Rick Hubble, Leon and Arlene Robinson, and a person claiming an equitable lien on the subject Summit County property, an individual by the name of Jim Quinn.

10. Defendants, Kerry Rick Hubble, Kay Gneiting and Wilderness Building Systems, were not advised concerning Third-Party Defendant Dennis Blaine Vance's actions relative to the foreclosure complaint, nor did any of them meet with Attorney Dunn to pursue the foreclosure action.

11. The foreclosure action alleged that a "Mortgage" filed of record in the Summit County Recorder's Office on November 3, 1987, identifying Gneiting as mortgagor and Hubble as mortgagee, was prepared in error.

12. In the First Cause of Action of the Foreclosure Action, the Complaint asserted a claim for reformation alleging the existence of a mortgage, and further alleging that:

Neither [Gneiting] nor [Hubble] were represented by counsel or a title company and the mortgage is prepared incorrectly. Kerry R. Hubble should show as the mortgagor and the person obligated to make payment and Kay Gneiting should show as the mortgagee to whom money is owed.

13. In the Second Cause of Action in the Foreclosure Action, the Complaint asserted a claim for "Mortgage Foreclosure", alleging the existence of the Mortgage, that Gneiting should be the Mortgagee and Hubble the Mortgagor, and that:

The Defendant Hubble has failed to make payment of the \$37,000.00, together with interest at the pre-judgment rate of 10% per annum, and there is now due and owing ... the sum of \$53,421.92.

14. In the Third Cause of Action in the Foreclosure Action, the Complaint asserted a claim for "Quiet Title", alleging that:

All of the right title and interest of [Gneiting] to the [Summit County Property] is superior to the claim of all other parties Defendant [including the Robinsons]...

15. After filing the Foreclosure Action, the attorney retained by Dennis Vance contacted the Robinsons, falsely represented to them that Gneiting's interest in the property was superior to theirs, and offered to pay the Robinsons \$2,500.00 to release their judgment lien against the Summit County Property. In reliance upon that representation, the Robinsons, in fact, released their judgment lien.

16. Third-Party Defendant, Dennis Vance, concocted, engaged in, and orchestrated a scheme to defraud the Robinsons, Hubble, Gneiting, and Wilderness Building Systems, knowingly, willfully, maliciously, and with reckless disregard for their rights.

17. Third-Party Defendant, Dennis Vance's conduct has had a devastating affect upon the lives of the Robinsons, Kerry Rick Hubble, and Kay Gneiting, and has significantly harmed Wilderness Building Systems, Inc.

18. As a consequence of Third-Party Defendant, Dennis Vance's actions, the Robinsons were forced to file a Petition for Relief in the Bankruptcy Court; Kerry Rick Hubble, Kay Gneiting and Wilderness Building Systems, have had judgment rendered against them and in favor of the Robinsons, including punitive damages.

19. Vance inappropriately charged Wilderness Building Systems, Inc. \$816.00 for his alleged services, for which he was paid \$816.00 by Wilderness Building Systems, Inc.

20. In or about May, 1992, Vance had a significant falling out with Wilderness Building Systems and threatened to "get back at them."

21. Vance contacted the Robinsons and advised them that Wilderness had undertaken a scheme to defraud them of their judgment lien against Lot J-63.

22. He agreed to provide them information about the scheme in exchange for a percentage of the money they might stand to collect from Wilderness Building Systems and Hubble.

23. Vance also made terroristic threats against Wilderness Building Systems employees, and was subsequently convicted of "making terroristic threats" in a separate criminal action.

24. Vance also failed to pay James T. Dunn for his services rendered in connection with Lot J-63.

25. James T. Dunn filed a lawsuit and obtained a judgment against Dennis Vance for those legal fees. Vance is the only individual or entity against whom collection of those fees were sought.

26. Vance also took and converted to his own use customer files and accounts belonging to Wilderness Building Systems, Inc., having a value of \$9,800.00.

Despite repeated demands by Wilderness Building Systems, Inc., for the return of said files, Vance refused to provide the files and accounts he had wrongfully removed.

27. Prior to the June 1, 1994 trial of this matter, on May 18, 1994, Dennis Vance contacted Kevin Gneiting by telephone and attempted to persuade Gneiting to change his testimony concerning this case in exchange a promise that Gneiting would bear no liability in the outcome of the Robinsons' claim against him. Gneiting refused to change his testimony.

28. Third-Party Defendant, Dennis Blaine Vance's relative wealth is substantially in

excess of that of the Robinsons, Kay Gneiting and Kerry Rick Hubble.

29. Third-Party Defendant, Dennis Vance, has steadfastly refused to acknowledge any wrongdoing in this case, despite the fact that the fraud he perpetrated upon all of the parties in this case is manifest. The fact that Dennis Vance has shown no remorse, regret, or repentance of any kind whatsoever, leads to the conclusion that there is a great likelihood that he will engage in similar conduct in the future.

30. Third-Party Defendant, Dennis Vance, engaged in a conspiracy to defraud the Robinsons, Hubble, Gneiting, and Wilderness Building Systems, Inc., to the substantial detriment to each of those parties.

31. An award of compensatory damages in the amount of \$24,780.56, together with prejudgment interest in the amount of \$16,583.97, and postjudgment interest at the rate of 12% per annum from April 21, 1993, should be awarded in favor of Kerry Rick Hubble and Wilderness Building Systems, Inc.

32. In addition, it is appropriate that Kerry Rick Hubble and Wilderness Building Systems, Inc., be awarded damages against Dennis Blaine Vance in the amount of \$816.00, which amount represents monies wrongfully obtained by Vance.

33. Kerry Rick Hubble and Wilderness Building Systems, Inc., should also be awarded damages against Dennis Blaine Vance in the amount of \$9,800.00 for the wrongful conversion of customer files and accounts to his own use.

34. An award of punitive damages in the amount of \$24,780.56 should be awarded in favor of Kerry Rick Hubble and Wilderness Building Systems, Inc. in order to punish Third-Party Defendant, Dennis Blaine Vance, and deter him from engaging in like conduct in the



future.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, the Court concludes that Kerry Rick Hubble and Wilderness Building Systems, Inc. should be awarded compensatory damages in the amount of \$24,780.56, together with prejudgment interest in the amount of \$16,583.97, and postjudgment interest at the rate of 12% per annum from April 21, 1993, until paid; for damages relating to monies wrongfully received by Vance in the amount of \$816.00; damages in the amount of \$9,800.00 on the conversion claim; and punitive damages in the amount of \$24,780.56 in order to punish Dennis Blaine Vance, and deter him from engaging in similar conduct in the future.

DATED this \_\_\_\_ day of January, 1995.

BY THE COURT:

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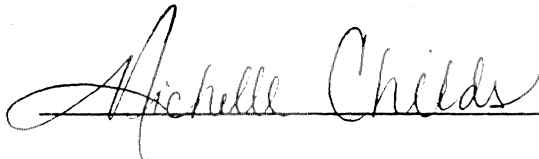
Homer F. Wilkinson  
District Court Judge

### CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Amended Findings of Fact and Conclusions of Law by placing a true and correct copy thereof in the U.S. Mails, postage prepaid, this 13 day of January, 1995, and properly addressed as follows:

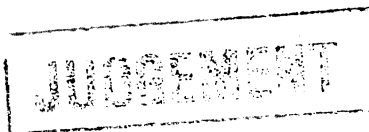
Scott B. Mitchell  
Attorney at Law  
Suite 620  
8 East 300 South  
Salt Lake City, Utah 84111

Michael G. Barker  
Attorney at Law  
56 E. Broadway, Suite 600  
Salt Lake City, Utah 84111

\_\_\_\_\_

Tab E

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CHRISTIANSEN & SONNTAG  
345 IBM Plaza  
420 East South Temple  
Salt Lake City, Utah 84111  
Telephone: (801) 359-3762



THIRD DISTRICT COURT  
Third Judicial District

MAR 13 1995

By D. Garner  
Deputy Clerk

Attorneys for Hubble and Wilderness Building Systems

---

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---

LEON W. ROBINSON and  
ARLENE ROBINSON,

Plaintiffs,

vs.

KAY GNEITING; KERRY RICK  
HUBBLE; and WILDERNESS  
BUILDING SYSTEMS, INC.,  
a Utah corporation,

Defendants,

AMENDED JUDGMENT

# 2195658

Civil No. 920902754

---

KAY GNEITING; KERRY RICK  
HUBBLE; and WILDERNESS  
BUILDING SYSTEMS, INC., a  
Utah corporation,

Third Party Plaintiffs,

vs.

DENNIS VANCE,

Third Party Defendant.

---

Judge Homer F. Wilkinson


This matter came on regularly before the Court for a non-jury trial on the Third-Party Complaint filed by Kerry Rick Hubble and Wilderness Building Systems, against Third-Party Defendant, Dennis Vance, on June 1, 1994, the Honorable Homer F. Wilkinson, Third District Court Judge, presiding. Kent L. Christiansen of the law firm of Christiansen & Sonntag, appeared on behalf of the Defendants, Kerry Rick Hubble and Wilderness Building Systems, Inc. Scott Mitchell of the law firm of Lehman, Mitchell & Waldo, appeared on behalf of the Plaintiffs, Leon and Arlene Robinson. Dennis Blaine Vance appeared pro se at the trial. The parties having adduced evidence by way of testimony and documentary exhibits, and having argued the matter to the Court, and the Court having reviewed the file, exhibits, and memoranda submitted by the parties, the Court being fully advised in the premises, and good cause appearing therefore, the Court initially entered Judgment on October 20, 1994.

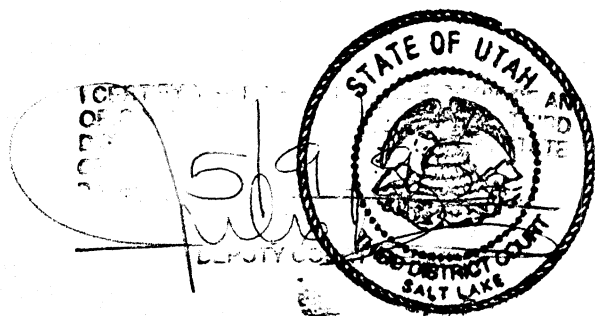
Thereafter, on January 13, 1995, the matter again came before the court for hearing on various motions of the parties, including Third-Party Plaintiff's Countermotion for Compensatory Damages against Third-Party Defendant Dennis Vance. Kent L. Christiansen of the law firm of Christiansen & Sonntag, appeared on behalf of the Defendants and Third-Party Plaintiffs, Wilderness Building Systems, Inc. and Kerry Rick Hubble. Scott B. Mitchell appeared on behalf of the Plaintiffs, Leon W. and Arlene Robinson. Michael G. Barker appeared on behalf of Third-Party Defendant, Dennis Vance. The parties having submitted legal Memoranda, and having filed various motions and other documents in support of their respective positions, the Court having reviewed the testimony and documentary exhibits presented to the Court, and the parties having argued the matter to the Court, the Court having considered the arguments of the parties, having entered its Amended Findings of Fact and Conclusions of Law, and now being fully advised in the premises and good cause appearing therefore, it is hereby:

**ORDERED, ADJUDGED, AND DECREED** that judgment upon the merits be entered in favor of the Third-Party Plaintiffs Kerry Rick Hubble and Wilderness Building Systems, Inc., and against Third-Party Defendant, Dennis Vance, for compensatory damages in the amount of \$24,780.56, together with prejudgment interest in the amount of \$16,583.97, and postjudgment interest at the rate of 12% per annum from April 21, 1993, until paid; for damages relating to monies wrongfully received by Vance in the amount of \$816.00; for damages in the amount of \$9,800.00 on the conversion claim; and punitive damages in the amount of \$24,780.56; together with interest on each of the above amounts as allowed by Utah Code Annotated § 15-1-4.

DATED this 13 day of <sup>March</sup> ~~January~~, 1995.

BY THE COURT:

  
Homer F. Wilkinson  
District Court Judge

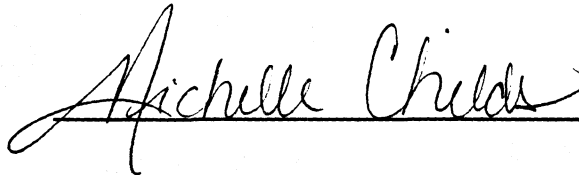


**CERTIFICATE OF SERVICE**

I hereby certify that I mailed a true and correct copy of the foregoing Amended Judgment by placing a true and correct copy thereof in the U.S. Mails, postage prepaid, this 13 day of January, 1995, and properly addressed as follows:

Scott B. Mitchell  
Attorney at Law  
Suite 620  
8 East 300 South  
Salt Lake City, Utah 84111

Michael G. Barker  
Attorney at Law  
56 E. Broadway, Suite 600  
Salt Lake City, Utah 84111

\_\_\_\_\_

Tab F



the ground for objection. *Godesky v. Provo City Corp.*, 690 P.2d 541 (Utah 1984).

An objection couched in language such as "the instruction is not suggested by and is contrary to law," or like terms, lacks the specificity required by this rule. *Morgan v. Quailbrook Condominium Co.*, 704 P.2d 573 (Utah 1985).

#### **Timeliness of objections.**

Objections to instructions would be considered on appeal even though the objections were not made until after the jury retired because the judge did not afford counsel the opportunity to enter objections on the record before that time. *Nielsen v. Pioneer Valley Hosp.*, 830 P.2d 270 (Utah 1992).

#### **Written instructions.**

—Failure to tender.

—Waiver.

Where plaintiff had failed to tender a written instruction on burden of proof he could not claim error in the lack of such instruction. *Fuller v. Zinik Sporting Goods Co.*, 538 P.2d 1036 (Utah 1975).

Cited in *Hill v. Cloward*, 14 Utah 2d 55, 377 P.2d 186 (1962); *Ortega v. Thomas*, 14 Utah 2d 296, 383 P.2d 406 (1963); *Meier v. Christensen*, 15 Utah 2d 182, 389 P.2d 734 (1964); *Memmott v. U.S. Fuel Co.*, 22 Utah 2d 356, 453 P.2d 155 (1969); *Telford v. Newell J. Olsen & Sons Constr. Co.*, 25 Utah 2d 270, 480 P.2d 462 (1971); *Flynn v. W.P. Harlin Constr. Co.*, 29 Utah 2d 327, 509 P.2d 356 (1973); *Henderson v. Meyer*, 533 P.2d 290 (Utah 1975); *Lamkin v. Lynch*, 600 P.2d 530 (Utah 1979); *State v. Hall*, 671 P.2d 201 (Utah 1983); *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042 (Utah 1984); *Gill v. Timm*, 720 P.2d 1352 (Utah 1986); *Penrod v. Carter*, 737 P.2d 199 (Utah 1987); *King v. Fereday*, 739 P.2d 618 (Utah 1987); *State v. Cox*, 751 P.2d 1152 (Utah Ct. App. 1988); *Ramon ex rel. Ramon v. Farr*, 770 P.2d 131 (Utah 1989); *Anton v. Thomas*, 806 P.2d 744 (Utah Ct. App. 1991); *Reeves v. Gentile*, 813 P.2d 111 (Utah 1991); *Hodges v. Gibson Prods. Co.*, 811 P.2d 151 (Utah 1991); *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 817 P.2d 341 (Utah Ct. App. 1991); *Russell v. Russell*, 852 P.2d 997 (Utah 1993).

#### **COLLATERAL REFERENCES**

**Am. Jur. 2d.** — 75A Am. Jur. 2d Trial § 1077 et seq.

**C.J.S.** — 88 C.J.S. Trial §§ 266 to 448.

**A.L.R.** — Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case

stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

**Key Numbers.** — Trial ⇐ 182 to 296.

### **Rule 52. Findings by the court.**

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and

conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

**Compiler's Notes.** — This rule is similar to Rule 52, F.R.C.P.

#### NOTES TO DECISIONS

##### ANALYSIS

Adoption.  
 —Abandonment of contract.  
 —Advisory verdict.  
 —Breach of contract.  
 —Child custody.  
 —Credibility of witnesses.  
 —Denial of motion.  
 —Divorce decree modifications.  
 —Easement.  
 —Evidentiary disputes.  
 —Juvenile action.  
 —Material issues.  
 —Harmless error.  
 —Submission by prevailing party.  
 —Court's discretion.  
 —Water dispute.  
 —Findings of state engineer.  
 Amendment.  
 —Motion.  
 —Caption.  
 —Conformance with original findings.  
 —New trial.  
 —Notice of appeal.  
 —Time.  
 —Tolling of appeal period.  
 —When made.  
 —Overruling or vacation.  
 —Another district judge.  
 —Lack of notice.  
 Child custody awards.  
 Criminal cases.  
 Criminal contempt.  
 Effect.  
 —Preclusion of summary judgment.  
 —Relation to pleadings.  
 Failure to object to findings.  
 How findings entered.  
 Judgments upon multiple claims or parties.  
 Judicial review.  
 —Equity cases.

—Standard of review.  
 —Conclusions of law.  
 —Criminal cases.  
 —Criminal trials.  
 —Findings of facts by jury.  
 —Intent.  
 Juvenile proceedings.  
 Purpose of rule.  
 Stipulations.  
 Sufficiency.  
 —Allegations of pleadings.  
 —Burden on appeal.  
 —Found insufficient.  
 —Vacation of judgment.  
 —Found sufficient.  
 —Opinion or memorandum of decision.  
 —Recitals of procedures.  
 —Technical error.  
 —Ultimate facts.  
 Summary judgment.  
 —Statement of grounds.  
 Waiver.  
 —Failure of court.  
 When filed.  
 —Tardy filing.  
 Cited.

##### Adoption.

##### —Abandonment of contract.

In a contract action by a real estate broker for his commission, where the defendant raises the issue of abandonment of the contract by his answer, the court should make findings on the issue of abandonment. Failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial. *Gaddis Inv. Co. v. Morrison*, 3 Utah 2d 43, 278 P.2d 284 (1954).

##### —Advisory verdict.

The trial court has the responsibility to make findings of fact and conclusions of law,

Tab G

creditor to satisfy the same, or may enter an order declaring the same satisfied and direct satisfaction to be entered upon the docket.

(c) **Entry by clerk.** Upon receipt of a satisfaction of judgment, duly executed and acknowledged, the clerk shall file the same with the papers in the case, and enter it on the register of actions. He shall also enter a brief statement of the substance thereof, including the amount paid, on the margin of the judgment docket, with the date of filing of such satisfaction.

(d) **Effect of satisfaction.** When a judgment shall have been satisfied, in whole or in part, or as to any judgment debtor, and such satisfaction entered upon the docket by the clerk, such judgment shall, to the extent of such satisfaction, be discharged and cease to be a lien. In case of partial satisfaction, if any execution shall thereafter be issued on the judgment, such execution shall be endorsed with a memorandum of such partial satisfaction and shall direct the officer to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(e) **Filing transcript of satisfaction in other counties.** When any satisfaction of a judgment shall have been entered on the judgment docket of the county where such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.

**Compiler's Notes.** — There is no federal rule covering this subject matter.

#### NOTES TO DECISIONS

##### ANALYSIS

Acceptance of full payment.

—Effect.

Attachment.

Vacation of satisfaction.

**Acceptance of full payment.**

—Effect.

When plaintiff voluntarily accepted full payment of a judgment in his favor, the satisfaction and discharge operated to satisfy and discharge everything merged in and adjudicated by the judgment. *Sierra Nev. Mill Co. v. Keith O'Brien Co.*, 48 Utah 12, 156 P.2d 943 (1916).

##### Attachment.

Court had duty to make order directing partial satisfaction of judgment to extent of money collected through attachment proceeding. *Blake v. Farrell*, 31 Utah 110, 86 P. 805 (1906).

##### Vacation of satisfaction.

The recorded satisfaction of judgment signed by judgment creditor cannot be vacated without action and hearing in equity, and the lien of an attorney against the proceeds of the judgment does not include his personal right to execute against the judgment debtor. *Utah C.V. Fed. Credit Union v. Jenkins*, 528 P.2d 1187 (Utah 1974).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d Judgments § 1004 et seq.

**C.J.S.** — 49 C.J.S. Judgments §§ 574 to 584.

**A.L.R.** — Voluntary payment into court of

judgment against one joint tort-feasor as release of others, 40 A.L.R.3d 1181.

**Key Numbers.** — Judgment ⇌ 891 to 899.

### Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a

finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

**Compiler's Notes.** — This rule is similar to Rule 59, F.R.C.P.

**Cross-References.** — Harmless error not ground for new trial, Rule 61.

Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606.

#### NOTES TO DECISIONS

##### ANALYSIS

Abandonment of motion.  
Accident or surprise.  
Arbitration awards.  
Caption on motion for new trial.  
Correction of insufficient or informal verdict.  
Correction of record.  
Costs.  
Decision against law.  
Discretion of trial court.  
Effect of order granting new trial.  
Effect of untimely motion.  
Evidence.  
—Sufficiency.  
Excessive or inadequate damages.  
—Punitive damages.  
Failure to object to findings of fact.  
Filing of affidavits.  
Grounds for new trial.  
—Particularization in motion.  
Incompetence or negligence of counsel.  
Misconduct of jury.  
Motion to alter or amend judgment.  
Motion to be presented to trial court.  
Newly discovered evidence.  
New trial on initiative of court.  
Procedure for questioning grant of new trial.  
Reconsideration of motion for new trial.

Settlement bars appeal.  
Summary judgment.  
Time for motion.  
Tolling time for appeal.  
Waiver.  
Cited.

##### Abandonment of motion.

Abandonment of motion for new trial must be intentional, and the facts must indicate this intention. *Bailey v. Sound Lab, Inc.*, 694 P.2d 1043 (Utah 1984).

##### Accident or surprise.

This section requires that the moving party show that ordinary prudence was exercised to guard against the accident or surprise. *Powers v. Gene's Bldg. Materials, Inc.*, 567 P.2d 174 (Utah 1977).

Plaintiff was not entitled to a new trial on the basis of surprise concerning testimony of the defendant's expert witness where the plaintiff failed to object to the testimony either before, or immediately after, it was given. *Jensen v. Thomas*, 570 P.2d 695 (Utah 1977).

A "surprise" at trial which could have been easily guarded against by utilization of available discovery procedures may not serve as a ground for a new trial under Subdivision (a)(3).