

1995

Victor Ogden, Angie Ogden v. IB Printing Company : Brief of Appellant

Utah Court of Appeals

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Randy Ludlow, Esq.; Attorney for Appellees/Defendants.

Julian D. Jensen, Esq.; Jensen, Duffin, Carman, Dibb & Jackson; Counsel for Appellants/Plaintiffs.

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UTAH COURT OF APPEALS
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

VICTOR OGDEN and ANGIE OGDEN,
husband and wife

Appellants/Plaintiffs,

vs

IB PRINTING COMPANY, a Utah Joint
Venture, and Gary Richards, Mary
Richards, Michelle Richards, and
Ronald Richards and related parties,

Appellees/Defendants.

95-0725-CA

Supreme Ct Case No. 950126

Priority No. 15

[Dis Ct No. 940300038]

BRIEF OF APPELLANTS

**Appeal from Final Order of Dismissal and Order
Affirming Dismissal as Entered by the Honorable John A. Rokich
a Judge of the Third District Court, Tooele County.**

Julian D. Jensen, Esq. (1679)
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON
Counsel for Appellants/Plaintiffs
311 South State, Suite 380
Salt Lake City UT 84111
Telephone (801) 531-6600

Attorneys for Ogdens

Randy Ludlow, Esq
311 South State Street, Suite 280
Salt Lake City, UT 84111
Telephone (801) 531-1300

Attorney for Appellees/Defendants

FILED

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CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

VICTOR OGDEN and ANGIE OGDEN,	:	
husband and wife,)	
	:	
Appellants/Plaintiffs,)	
	:	
vs.)	Supreme Ct. Case No. 950126
	:	
IB PRINTING COMPANY, a Utah Joint)	Priority No. 15
Venture, and Gary Richards, Mary	:	
Richards, Michelle Richards, and)	
Ronald Richards, and related parties,	:	
)	[Dis. Ct. No. 940300038]
Appellees/Defendants.	:	

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Julian D. Jensen, Esq. (1679)
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON
Counsel for Appellants/Plaintiffs
311 South State, Suite 380
Salt Lake City, UT 84111
Telephone: (801) 531-6600

Attorneys for Ogdens

Randy Ludlow, Esq.
311 South State Street, Suite 280
Salt Lake City, UT 84111
Telephone: (801) 531-1300

Attorney for Appellees/Defendants

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IN THE SUPREME COURT OF THE STATE OF UTAH

VICTOR OGDEN and ANGIE OGDEN, husband and wife,	:	
)	BRIEF OF APPELLANT
	:	
Appellants/Plaintiffs,)	
	:	
vs.)	Supreme Ct. Case No. 950126
	:	
IB PRINTING COMPANY, a Utah Joint Venture, and Gary Richards, Mary Richards, Michelle Richards, and Ronald Richards, and related parties,)	Priority No.
	:	
)	[Dis. Ct. No. 940300038]
Appellees/Defendants.	:	

STATEMENT OF JURISDICTION

This is an appeal brought pursuant to Rule 3 of the Utah Rules of Appellate Procedure; which provides, in part, that an appeal may be taken from a District Court to an appropriate Appellate Court from all final orders. Jurisdiction before this Court is further based upon the fact that the Utah Court of Appeals does not have mandatory statutory jurisdiction over this appeal; nor has this matter, to the knowledge of appellants, been assigned to the Court of Appeals pursuant to Utah Code Annotated §78-2a-3, 1953 as amended.

STATEMENT OF ISSUES

The appellant in this case is raising three (3) issues:

POINT I

THE TRIAL COURT HAD BEFORE IT SUFFICIENT CREDIBLE FACTS, WHICH ARE DEEMED ADMITTED PURSUANT TO A MOTION TO DISMISS, TO PRECLUDE THE GRANTING OF THE MOTION TO DISMISS, OR A SUMMARY JUDGMENT.

Standard of Appellate Review and Supporting Authority:

This Court, in the case of Demond v. FHP, 849 P.2d 598, 599 (Utah 1993) ruled it will uphold the granting of a motion to dismiss, "only where it appears that the Plaintiff or Plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim." The court continued, " We accept the facts as alleged in the complaint as true and consider the facts in a light most favorable to the Plaintiff." Whether the motion to dismiss was properly granted is a question of law which is reviewed for correctness. See St. Benedict's Dev. Co. v. St. Benedict's Hospital, 811 P.2d 194, 196 (Utah 1991). Appellants believe that under a correctness standard, the reviewing court should give no deference to the trial court's finding of fact or application of law, but should resolve the issue de novo from the record before it.

A substantially similar standard is applied to a motion to dismiss treated as a motion for summary judgment when matters outside the pleadings are, or may be, considered. See Lynn v. Lynch, 665 P.2d 1276, 1278 (Utah 1983); Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 124 (Utah 1994).

Citation to Record showing preservation of issue: Complaint of Plaintiffs, particularly paragraphs 2, 5, 7, 8, 9, 10, and 11. [Record on Appeal ("ROA"), pgs. 1-20]; Affidavit of Victor Ogden [ROA pgs. 87 to 96]; Memorandum of Plaintiffs' in Opposition

to Motion to Dismiss [ROA pgs. 70 to 86]; Plaintiffs' Informal Petition for Reconsideration [ROA pgs. 114-124].

POINT II

THE TRIAL COURT COMMITTED MANIFEST AND REVERSIBLE ERROR IN GRANTING DEFENDANTS' MOTION TO DISMISS BY APPARENTLY EXCLUDING FROM ITS CONSIDERATION MATERIAL FACTS, AND BY MISSTATING OTHER MATERIAL FACTS.

Standard of Appellate Review and Supporting Authority:

In Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990), this Court held dismissal is a severe measure and should be granted only if there are no state of facts supporting the claim. Here, the court could only fail to find supporting facts for exercising jurisdiction over the defendants by consciously excluding consideration of the imputed "facts" as stated in the complaint and the affidavit of Mr. Ogden. See prior authority as to "review for correctness" standard to be applied.

Citation to Record: See above.

POINT III

THE COURT ERRORED IN THE LEGAL APPLICATION OF THE FORUM NON CONVENIENS DOCTRINE IN DISMISSING PLAINTIFFS' COMPLAINT.

Standard of Appellate Review and Supporting Authority:

Presuming this Court does not summarily remand to the trial court for failure to consider necessary and relevant jurisdictional facts as outlined above, plaintiffs maintain the defendants would not meet the tests for an equitable dismissal under the forum non conveniens doctrine. Utah law on forum non conveniens is almost exclusively contained in the case of Summa Corporation v. Laneer Industries, Inc., 559 P.2d 544, 546 (Utah 1977).

In Summa, this Court held that the doctrine of forum non conveniens should be applied with "great caution" and only under "compelling circumstances" when it was clear that the interests or rights of non-resident defendants would be substantially impaired in proceeding. In this case, there has been no such showing or finding of impairment. It is apparently a matter of first impression before the court as to whether the Summa doctrine is not subsumed and incorporated in the long arm statute "tests" for insuring "fair play" and "substantial justice." Because the doctrine involves dismissal the review standard should be one of "review for correctness" as annotated above.

Citation to Record: Plaintiffs' Memorandum in Opposition to Motion to Dismiss, particularly pgs. 11-12, [ROA pgs. 75-76]; Plaintiffs' Informal Petition for Reconsideration; particularly pgs. 3-4. [ROA pgs. 114-124].

DETERMINATIVE STATUTES OR RULES

Appellants do not believe that there are any determinative statutes in this case, but believe the Court will need to review the Utah Long Arm Statute, U C A § 78-27-22 et. seq; and, particularly, § 78-27-24 of the Act. Appellants would also maintain that URCP,

Rule 12(b) and, URCP Rule 56, by implication and reference, may be determinative of some or all of the issues presented in this proceeding.

STATEMENT OF CASE

A. Nature of the Case.

On August 5, 1994, the Ogdens commenced this case by filing a Complaint in the Third District Court, in and for Tooele County, State of Utah, alleging that Gary Richards, Mary Richards, Michelle Richards and Ronald Richards (hereinafter collectively referred to as "the Richards"), in an individual capacity and acting as participants in the IB Printing Company (hereinafter "IB") had breached a business agreement with the Ogdens resulting in substantial damages to the Ogdens.

Specifically, the Ogdens alleged as to the Richards and IB as follows:

- (i) That the Richards had breached a specific contractual agreement to return investment capital to the Ogdens as earlier agreed, plus granting to them a twenty-five percent (25%) interest in the IB Printing business for the Ogdens' contribution of all initial capitalization and various start-up services and expertise.
- (ii) Alternatively, that the Ogdens were damaged as alleged above, but were entitled to relief under a theory of partnership by estoppel.
- (iii) Alternatively, that the Ogdens were entitled to recovery against the Richards under a doctrine of contract implied-in-law or fact arising out of the failure of the Richards to return the agreed upon capital and interest to the Ogdens and failing to grant them any interest in the company.
- (iv) For additional and resulting damages from alleged fraud, conversion and mismanagement by the Richards in the operation of the IB business.

- (v) A special claim for equitable relief requesting the trial court to order the return of all of the capital equipment from the Richards to the Ogdens upon the basis that monetary damages would not adequately protect the Ogdens from ongoing losses and damages in this proceeding and that the printing equipment was not being employed in the business.

On January 10, 1995, the Court entered a Minute Entry denying defendants' Request for Evidentiary Hearing and granting defendants' Motion to Dismiss upon the apparent basis of lack of sufficient contacts by defendants with the forum jurisdiction; and, alternatively, under a forum non conveniens doctrine.

Subsequently, on January 16, 1995, counsel for the Ogdens filed an informal memorandum by letter requesting reconsideration by the Court of its dismissal based upon the allegation that the Court had supported its Memorandum Decision from facts which were disputed or in error from the Affidavits before the Court and asking the Court to informally amend or rescind its prior ruling.

On January 24, 1995, the Court again entered a Minute Entry affirming its decision to Dismiss, apparently more specifically limiting the basis of its ruling to the equitable doctrine of forum non conveniens. On or about February 23, 1995, the Court entered a formal Order affirming its earlier Order of Dismissal. The Ogdens then perfected an Appeal from both the Order of Dismissal and the subsequent Order Affirming Dismissal as filed with the Third District Court on March 16, 1995 and filed a cash cost bond on appeal on or about such date.

B. Essential Course of Proceedings.

(1) On August 5, 1994, plaintiffs caused their counsel of record to file a Complaint in this proceeding, [ROA, pgs. 0 to 20].

(2) Defendants were personally served in the State of Nevada by a Nevada Process Server with Return of Service filed with this Court, [ROA pgs. 40 to 45].

(3) The Richards and IB Printing filed a Motion to Dismiss by their present counsel of record, Mr. Randy S. Ludlow, Esq., with the Third District Court on September 27, 1994, essentially alleging a lack of personal jurisdiction and the forum non conveniens defense, [ROA pgs. 49 to 50].

(4) The Motion to Dismiss of defendants was supported by a Memorandum in Support, [ROA pgs. 51 to 62].

(5) The defendants also filed an Affidavit by Mr. Gary Richards, one of the named defendants, in support of their Motion to Dismiss on or about September 27, 1994, [ROA pgs. 63 to 69].

(6) The Ogdens then filed a Memorandum in Opposition to the Motion to Dismiss with Exhibits, dated September 29, 1994 and filed October 4, 1994, [ROA pgs. 70 to 86].

(7) The plaintiffs further filed a Affidavit of Victor Ogden in Support of their Memorandum in Opposition to Defendants' Motion to Dismiss, filed October 4, 1994, [ROA pgs. 87 to 96].

(8) On or about October 6, 1994, the Richards and IB Printing filed a Request for Evidentiary Hearing on the issues before the Trial Court, [ROA pgs. 99 to 100].

(9) On October 11, 1994, the Ogdens filed a brief Memorandum in Opposition to Evidentiary Hearing, [ROA pgs. 101 to 103].

(10) The Ogdens then filed a Notice to Submit for Decision on October 20, 1995, [ROA pgs. 104 to 105].

(11) At some point between approximately October 20, 1994 and a hearing in this matter on December 6, 1994, Judge Rokich was substituted as the Trial Judge for Judge Fuchs. The Ogdens do not believe that there is any official entry or notice contained in the record on appeal as to the substitution of Trial Judges, but believe that both parties were informally notified of this reassignment by the Clerk of the Court.

(12) On or about December 6, 1994, Judge Rokich requested a pre-trial scheduling conference before the Court. This conference was, by stipulation of the parties, continued to January 3, 1995, [ROA pgs. 108 to 110].

(13) The Ogdens have determined that no transcript record was made of the January 3, 1995 pre-trial conference before Judge Rokich. The Ogdens assert that Judge Rokich briefly heard informal arguments of both parties pertaining to the pending motions. The Ogdens further assert that Judge Rokich asserted that he would review the matter and get back to the parties when next in Salt Lake City, and that he would, most likely, require further argument pertaining to the issues.

(14) Appellants reasonably believed, from the January 3, 1995 hearing, that Judge Rokich intended to schedule a further hearing for formal arguments on the issues.

(15) The Ogdens next received a Minute Entry entered January 10, 1995 indicating the Court had denied the Richards' and IB's Request for Evidentiary Hearing,

but had granted the defendants' Motion to Dismiss upon the basis that the defendants' contacts with Utah were minimal, and that the most convenient forum to hear this case would be Nevada, [ROA pgs. 111 to 113].

(16) The Court then had counsel for Richards and IB prepare a formal Order, which was entered by the Court, on the 8th day of March, 1995. Appellants have no explanation as to why the Order Affirming the Dismissal was formally entered by the Court prior to the entry of the Order of Dismissal (February 23, 1995), but assumes that such was merely a clerical problem of finding, locating and entering the proper Orders in chronological sequence by the Clerk's office, [ROA pgs. 127 to 128; 129 to 131].

(17) Promptly after receiving the Minute Entry of Dismissal from Judge Rokich, counsel for Ogdens elected on January 16, 1995 to file an informal letter petition requesting the trial judge to reconsider the Minute Entry based upon the assertion by counsel for Ogdens that the Minute Entry was based upon certain factual errors which were undisputed and was also premised upon other controverted facts which should have been construed in favor of the Ogdens. A copy of this informal petition dated January 16, 1995 and filed with the Court on January 24, 1995 is made a part of the Record on Appeal, [ROA pgs. 114 to 124].

(18) The Court, on January 23, 1995, entered a Minute Entry affirming its earlier decision to dismiss plaintiffs' Complaint, without prejudice, based upon the allegations that plaintiffs' had apparently participated in an incorporation of the IB business in Nevada, and that there was a sufficient finding that the Utah forum was a forum non conveniens, [ROA pg. 125].

(19) The Minute Entry of the trial judge affirming dismissal was incorporated in a formal Order Affirming Dismissal signed and entered by the Court on February 23, 1995, [ROA pgs. 126 to 128].

(20) The Ogdens then perfected and filed of record with this Court, a Notice of Appeal on March 16, 1995 and accompanied by a Notice of Filing Cost Bond on Appeal, [ROA pgs. 132 to 145].

(21) The Ogdens then perfected and filed with the above Court a Motion for Summary Disposition on or about April 14, 1995, (Appellate Court Records).

(22) This Court then issued an Order on March 31, 1995 deferring a ruling on Appellants Motion for Summary Disposition and requesting the parties to proceed with the briefing of issues, (Appellate Court Record).

C. Disposition by the Court.

The foregoing statement of Course of Proceedings outlines all of the material procedures and judicial facts in this case. At no time was there ever any hearing or trial of the issues. The Court ultimately entered a final Order of Dismissal from which an Appeal was properly perfected, as outlined above.

D. Relevant Facts.

(1) The Ogdens contend that in September through October of 1993, they discussed and initiated a joint venture or contract arrangement with various members of the Richards family, who are named as the defendants/appellees in this action, to establish a printing business and outlet in the City of Wendover, County of Tooele, State of Utah, to be known as "IB Printing". IB Printing then engaged in an active

printing business in Utah from approximately the latter part of 1993 up to and approximately March or April of 1994. During all of this period, the Ogdens were and remained Utah residents. See attached Affidavit of Victor Ogden in Opposition to Defendants Motion to Dismiss ("Aff. O.") ¶'s 1, 4 and 28 - [ROA pgs. 95 to 96 and 89].

(2) The Ogdens contend that the initial determination by all parties was that the IB Printing business would be set-up in Tooele County, Utah and that initial discussion centered around the actual printing business being a Utah business entity. Aff. O. ¶ 5 - [ROA pg. 95].

(3) The Ogdens maintain that a leasehold for the printing business was obtained in the City of Wendover, Utah and IB obtained a business license from the City of Wendover, State of Utah, for the operation of the IB Printing business. Aff. O. ¶'s 6 & 13 - [ROA pgs. 93 to 95].

(4) The Ogdens invested approximately Thirty Thousand Dollars (\$30,000.00) in all aspects of the start-up of the IB business, primarily through the contribution of printing equipment, financed for purchase by the Ogdens, as well as improvements to the leasehold. In all events, the Ogdens were the sole capital contributors to the initial business up to, and including, the initiation of litigation in this matter. Aff. O. ¶'s 9 & 10 - [ROA pg. 94].

(5) The Ogdens maintain their understanding of the contractual relationship with the Richards family was that the Ogdens would retain ownership in all of the contributed capital and equipment of the IB Printing business until they were repaid for such contribution after the first year of operations. Thereafter, the Ogdens

contend that they understood they would own a twenty five percent (25%) residual interest in the IB Printing business and they would provide continuing consulting as needed. Aff. O. ¶ 15 - [ROA pg. 93]. See particularly Exhibit A attached to the Ogden Affidavit as the only extent writing proffered by the Richards. [ROA pg. 87].

(6) The Ogdens maintain that at no time incident to the start-up of the joint venture business was there any discussion about the formation of a Nevada corporation to operate the business, nor the placement of the printing business within the State of Nevada. It was discussed and agreed that the products of the business would primarily be sold as advertising supplements to casinos located in Wendover, Nevada, but that the business would be operated from its original site selection and leasehold in Wendover, Utah. Aff. O. ¶'s 16, 28 & 29 - [ROA pgs. 89 to 93].

(7) The Ogdens admit that in approximately February 1994, a Nevada corporation by the name of IB Printing, Inc. was formed to conduct the day to day business of the printing operation. The Ogdens maintain that they understood such Nevada corporation, as suggested and promoted by the Richards family, was merely to be an operating entity to conduct day-to-day affairs and operations of the IB Printing business; but, at no time, was it suggested, implied, recommended or understood that such entity would "own" the business assets or substitute itself for the contract or partnership relationship of the parties as to the division and return of the original capital as previously agreed. Aff. O. ¶'s 18 - 20 - [ROA pgs. 91 to 92].

(8) At no time did the Ogdens ever agree to the transfer of their capital, assets or contributions to IB Printing, Inc. as the "operating corporation" which was

formed, nor have the Ogdens ever consented to the removal of such capital assets from the jurisdiction to the State of Nevada as currently occurred. Aff. O. ¶'s 7 & 14, *ibid* ¶'s 18 - 20 - [ROA pgs. 91 to 92].

(9) Victor Ogden admits, based upon the foregoing factual recitals, that he was to be named as a director of the Nevada corporation, but did not become a shareholder, nor did he ever have any understanding that he would be an active officer or engage in any day-to-day management of such corporate entity, the same was to be handled by the Richards family, pursuant to prior agreement, as the active managers/operators of the IB Printing business. Aff. O. ¶'s 19 & 20 - [ROA pgs. 91 to 92].

(10) The Ogdens now contend that the IB Printing corporation was never properly organized. Victor Ogden, as a member of the board, had no involvement in any Organizational Meetings, nor was ever presented with any Organizational Minutes for review or signature, nor did there ever occur any proposal, to his knowledge, to transfer the capital assets of IB Printing to the corporation upon any terms. Aff. O. ¶ 7, 22, 23 & 26 - [ROA pgs. 90 to 91 and 95].

(11) By early May 1994, the Ogdens and the Richards were unable to resolve their growing differences over what the Ogdens characterized as the failure to conduct the printing business in a workmanlike and proper manner, the alleged failure of the Richards to provide any accounting concerning the proper return of capital contributions, and a growing concern that the Richards would not honor the earlier

agreement and resolution between the parties as to the return of capital and interest. Aff. O. ¶ 27 - [ROA pg. 90].

(12) The Ogdens contend that all investments, improvements and other business dealings related to the formation and initiation of the printing activities of IB occurred exclusively in Wendover, Utah. Aff. O. ¶ 29 - [ROA pg. 29].

(13) The Ogdens were informed by the Richards that they were moving the IB Printing equipment and business *with or without* the consent of the appellants, to a Nevada site in Wendover, Nevada in approximately May of 1994. See plaintiffs' Complaint ¶'s 31 & 32 and Affidavit of Gary Richards ¶ 8 in which he admitted moving the equipment to Wendover, Nevada in May of 1994 - [ROA pgs. 13 and 14 as to Plaintiffs' Complaint; and pg. 67 as to Affidavit of Gary Richards].

(14) The Ogdens attempted to negotiate some form of settlement from May into late July of 1994 after retaining the services of their present legal counsel, but were unable to effect any settlement. A final settlement meeting occurred between the parties at the Richards home in Wendover, Nevada in late July 1994. No record reflecting such negotiations or meetings are on file.

(15) The Ogdens then made the decision, based upon the Richards' statements, that the Richards were not going to return the capital equipment and that it was necessary for them to proceed with the present litigation. At or about this time the Richards also indicated to the Ogdens their intent to potentially proceed with litigation to resolve the differences of the parties. No part of the record would affirm these discussions between the parties in July 1994.

(16) On or about August 18, 1994, the Ogdens were served with a Complaint filed by the Richards family and IB Printing in the Fourth Judicial District Court of the State of Nevada in and for Elko County alleging *inter alia* that Victor Ogden had breached the agreement to go forward with the corporation and caused other damages to IB Printing and the Richards family in the amount of approximately \$10,000.00, or as otherwise proven. This action was styled as Gary Richards, Michelle Richards, Donald D. Richards, Mary Richards and IB Printing, Inc. v. Victor Ogden and was filed on or about July 27, 1994. A true and correct copy of this Nevada action is attached hereto and incorporated by this reference as part of the Addendum. See also, Memorandum of Appellants in Opposition to Motion to Dismiss ¶ 18 - [ROA pg. 81].

(17) Concurrently to the foregoing proceeding, Victor Ogden was proceeding forward with the preparation of the filing of his own Complaint (of record in this proceeding) against the Richards family in Tooele County, Utah. This Complaint was filed on August 5, 1994. Service of this complaint was completed upon the defendants on August 12, 1994 in Elko County, City of Wendover, State of Nevada. See Complaint of plaintiffs' and Return of Service - [ROA pgs. 1 to 20 for Complaint and pgs. 40 through 48 for Returns of Service].

(18) On September 23, 1994 the Richards family and IB Printing, through their present counsel of record, filed a Motion to dismiss the Ogdens' action in the Third District Court in and for Tooele County, Utah - [ROA pgs. 49 to 50].

(19) The Ogdens have not filed to date a responsive pleading to the Complaint pending in the County of Elko, State of Nevada, based upon an informal

agreement for a continuance to the defendants to file a responsive pleading in that forum between Nevada counsel for the Ogdens and Nevada counsel for the Richards family and IB Printing, Inc. The Ogdens would further assert their understanding of the reasons for the continuance, in part, was that the Richards were going to voluntarily produce some essential records related to the formation of IB Printing, Inc. which have never been produced to date. No formal portion of the Record on Appeal reflects this informal understanding, however, various correspondence between counsel upon which this understanding was based are incorporated as part of the Addendum.

(20) The Ogdens would contest the jurisdictions of the State of Nevada over them incident to their relations with the Richards family. This assertion is stated by appellants herein as a jurisdictional fact.

(21) Under the preceding Statement of the Case, the Ogdens have set-out with particularity the treatment of the Motion to Dismiss filed by the Richards family within the State of Utah, the apparent underlying rationale of the Court in reaching its decision to Dismiss, and the other facts surrounding the Dismissal and subsequent perfection of this appeal. The Ogdens incorporate, by this reference, these prior references and citations to the Record on Appeal from the Statement of the Case.

(22) The Ogdens do not believe that the formal Order of Dismissal or Order Affirming Dismissal essentially adds any material to the Minute Entries and the same are not attached as an Addendum, but constitute part of the Record on Appeal, as previously cited.

(23) As previously stated, no transcript of any proceeding before the Court was maintained. The Ogdens believe that the foregoing fully and adequately sets out the relevant facts pertaining to this proceeding.

SUMMARY OF ARGUMENT

The Ogdens will argue, and support more particularity below, the following essential errors they believe were committed by the trial court in dismissing their pending action against the Richards and IB Printing:

(1) The trial court first erred by failing to consider in its decision process the material factual issues presented by the pleadings and the Affidavits of the parties. Any fair reading of these materials should have shown a *prima facie* basis for the exercise of jurisdiction over the defendants because of their significant contacts with the forum State of Utah. The trial court was required to apply a standard in the dismissal of an action wherein it should have indulged all disputed material factual issues in favor of the parties being moved against, the Ogdens. In point of fact, the Ogdens believe the record will substantiate that the trial court not only did not construe disputed material facts in favor of the Ogdens, but failed to recognize and weigh any material facts pertaining to the jurisdictional issues.

(2) The trial court committed reversible and manifest error by reaching conclusions in its memorandum decision dismissing plaintiffs' complaint which were, in some instances, in conflict with the undisputed facts before the Court; and, in other instances, failed to properly recite disputed issues of fact in favor of the party being moved against, the Ogdens.

(3) Even if the trial court were to have properly viewed all of the evidence, the defendants have not met the threshold requirements for establishing the basis for a dismissal for lack of jurisdiction under the doctrine of forum non conveniens.

ARGUMENT

POINT I

THE TRIAL COURT HAD BEFORE IT SUFFICIENT CREDIBLE FACTS, WHICH ARE DEEMED ADMITTED PURSUANT TO THE GRANTING OF THE MOTION TO DISMISS PROCEEDING, TO PRECLUDE A MOTION TO DISMISS, OR A SUMMARY JUDGMENT.

In the recent case of Atiya v. Salt Lake County, 852 P.2d 1007, 1008 (Ut. App. 1993), the Court reiterated Utah case law that on appeal from a trial court's grant of a motion to dismiss for lack of subject matter jurisdiction under URCP, Rule 12, factual allegations in a plaintiff's complaint must be deemed as true. This Court has further stated all reasonable inferences drawn from the complaint must be construed in favor of the party moved against, see Mounteer v. Utah Power and Light Co., 823 P.2d 1055, 1058 (Utah 1991). Our Court of Appeals in Anderson v. Dean Witter Reynolds, Inc., 841 P.2d 742, 744 (Ut. App. 1992) further said such allegations and all reasonable inferences drawn from them must be "liberally" construed in favor or the Plaintiff.

In the case of Lynn v. Lynch, 665 P.2d 1276, 1278 (Utah 1983), this court provided that in any Motion to Dismiss, based upon Rule 12(b), if matters outside of the pleadings may be considered by the trial court and are not specifically excluded, then the motion to dismiss should be treated, in substance, as one for summary judgment. It appears

this Court in Lynn v. Lynch, supra., was extending this doctrine not only to motions to dismiss for "failure to state a cause of action" under Rule 12(b)(6), but to other Rule 12(b) motions as well. See also Thayne v. Beneficial Utah, Inc., supra. 874 P.2d at 124. Under the summary judgment standards when matters outside the pleadings are considered in any motion to dismiss both the allegations of the complaint and the matters outside the pleadings should be construed in a light most favorable to the party being moved against, as well as all reasonable inferences derived therefrom.

Under the present state of the record, there appears to be a clear showing that the trial judge did not properly consider material jurisdictional issues which would show, at least *prima facially* from the pleadings and the affidavits, that the Richards had submitted personally and generally to the jurisdiction of the State of Utah. Selectively, plaintiffs would assert that the following factual issues presented by the complaint and the affidavit of Victor Ogden were not considered by the Court, or were improperly stated:

1. The trial court incorrectly stated in its initial Memorandum Decision that the IB Printing Company business had its principal place of business within the State of Nevada. In point of fact, the pleadings and affidavits show that the IB Printing Company was operated by the consent of the parties exclusively in Wendover, **Utah**, and the actual printing business was conducted under such name from approximately November 1993 to early May of 1994 within the State of Utah.

2. It also appears undisputed between the parties that most original organizational efforts for the IB business occurred in the State of Utah, with the physical location and business lease being situated in Wendover, **Utah**.

3. The Court does not further treat appellants' apparently controverted statement, (but which statement must be assumed in favor of the Ogdens for the purposes of a motion to dismiss proceeding,) that the IB Printing Corporation, while organized as a Nevada corporation, was intended only as an operating entity for the printing business in Utah, and did not receive any transfer of the assets, as contributed by the Ogdens to the business, nor was it ever intended to modify the original capital agreement between the parties and was intended solely as an operating entity.

4. The Court apparently did not review the facts of whether the IB Printing Corporation was even properly organized, since Victor Olden, as a member of the initial Board of Directors, states by affidavit that he was not involved in any organizational meetings or any discussion concerning removal or transfer of assets to the State of Nevada or to the corporate entity.

5. The Court gave no consideration to whether the Richards may be acting adversely and improperly in removing assets to the State of Nevada after disputes arose with the Ogdens; and, therefore, may have acted inequitably and with "unclean hands" towards a Utah resident in adversely affecting a Utah business situated within Wendover, Utah.

Each of these jurisdictional facts should have been considered and imputed to the Ogdens by the trial court in considering the motion to dismiss. The apparent absence

of any consideration of these jurisdictional facts, and the apparent misstatement by the trial court that it felt the IB Printing business was a Nevada business at all times material to the action, evidences a clearly erroneous factual standard upon which the motion to dismiss was based.

POINT II

THE TRIAL COURT COMMITTED MANIFEST AND REVERSIBLE ERROR IN GRANTING DEFENDANTS' MOTION TO DISMISS BY APPARENTLY EXCLUDING FROM ITS CONSIDERATION MATERIAL FACTS, AND BY MISSTATING OTHER MATERIAL FACTS.

There should be no question that a motion to dismiss, with or without prejudice, is a final appealable decision denying the plaintiffs their day in Court, or any further remedy before the trial courts of this state. This Court has long held that dismissal is a severe measure and should be granted by a trial court only if it is clear that a party is not entitled to any relief under any stated facts which could be proved in support of its claim. See Colman v. Utah State Land Bd., *supra*.

In the Colman decision, and other cases previously cited, this Court has adopted the standard that in a motion to dismiss proceeding, it is necessary to indulge the factual allegations of the complaint as true statements in favor of the party being moved against, as well as all materials outside of the complaint which may be considered when not rejected by the trial court. See Lynn v. Lynch, *supra*, 665 P.2d at 1278; and St. Benedicts Dev. Co. v. St. Benedict's Hospital, *supra*, 811 P.2d at 196.

In this particular case, there was before the Court detailed memorandums with supporting exhibits submitted by both plaintiffs' and defendants' counsel, as well as

sworn Affidavits by Mr. Victor Ogden and Mr. Gary Richards. It was incumbent upon the trial court, unless it made an actual determination to exclude from consideration those Affidavits and Memorandums, to consider such factual statements in reaching its decision to dismiss. Facially, even considering the Complaint alone, Plaintiffs clearly established the Richards not only engaged in business within the State of Utah, but induced and encouraged Utah residents, Victor and Angie Ogden, to participate with them in a business located in Tooele County, Utah. This fact alone should be jurisdictionally sufficient to deny a Motion to Dismiss; either under the doctrine that the defendants had no material contacts with the State of Utah; or, under the related and collateral equitable doctrine of forum non conveniens as more fully discussed under the third point, below.

In Demond v. FHP, supra., 849 P.2d at 599, our Appellate Court held that it would not sustain a Motion to Dismiss if the plaintiffs were entitled to relief under facts alleged or under any stated facts they could prove to support their claim. It now appears to plaintiffs, it was manifest and reversible error for the trial court not to indulge the Affidavit evidence and Memorandum evidence in connection with the statements in the plaintiffs' pleadings to clearly show that a *prima facie* case for substantial involvement of the Richards and IB Printing within the State of Utah had been demonstrated as a threshold matter.

While there is a general paucity of Utah case law dealing of the Doctrine of forum non conveniens it does appear to be rationally necessary to imply that the same standards of review and conduct as in other motions to dismiss should be applied in

considering a dismissal under the forum non conveniens when the end effect (dismissal) is the same.

Finally, the Ogdens would contend that the failure to consider what is manifestly evident from the record as legitimate issues pertaining to the trial court's jurisdiction over the defendants rises to the level of manifest error or abuse of discretion in the trial court's ruling under Utah Law.

Our Appellate Court has repeatedly held that it is not bound by the trial court's determination of either fact or law in reviewing a motion to dismiss treated as a summary judgment, Canfield v. Albertsons, Inc., 841 P.2d 1224, 1226 (Ut. App. 1992). The standard of review by this court is the "correctness standard", that is the trial court's decision should be afforded no presumption of validity or deterrence but this Court should determine the correctness of the ruling de novo from the record before it. See also Hansen v. Department of Financial Institutions, 858 P.2d 184, 186 (Ut. App. 1993); St. Benedicts, supra. 811 P.2d 196.

POINT III

THE COURT ERRORED IN THE LEGAL APPLICATION OF THE FORUM NON CONVENIENS DOCTRINE IN DISMISSING PLAINTIFFS' COMPLAINT.

As previously cited to this Court, the case of Colman v. Utah State Land Bd., supra., 795 P.2d at 622, 624, clearly stands for the proposition that dismissal is not a favored remedy and should be granted only when there are not any facts which would preclude the granting of such a motion.

Assuming, for the purposes of argument only, that the trial court did fully consider the allegations of the Ogdens that the defendants had technically submitted themselves to the general jurisdiction of the courts of the State of Utah; this Court is still faced with an apparent first impression dilemma of whether, in a case showing *prima facie* jurisdiction over defendants, there remains an independent basis for dismissal under the doctrine of forum non conveniens.

Appellants are at a loss to determine, lacking a clear and explicit statement by the trial court, whether the trial court believed personal jurisdiction had been shown to exist, but otherwise dismissed barred upon the equitable doctrine of dismissal pursuant to the forum non conveniens doctrine; or whether the court believed it lacked jurisdiction over the Richards under any application of the facts.

In Utah, there is scant case authority explaining or applying the doctrine of forum non conveniens. To the knowledge of the Ogdens and their counsel, there is no Utah case authority treating the potential interface and relationship of the doctrine of personal jurisdiction over non-resident defendants (either pursuant to general or long arm jurisdiction) with dismissal standards under the doctrine of forum non conveniens.

The most recent and probably only substantive case law within the State of Utah dealing with the doctrine of forum non conveniens was the 1977 case of Summa Corp. v. Lancer Industries, Inc., supra. 559 P.2d at 546 in which this Court held that the equitable doctrine of forum non conveniens is not based upon any statute or rule. The doctrine, as then enunciated, apparently held an action may be dismissed as to a non-resident in select circumstances, even if jurisdiction is otherwise appropriate.

Factors considered included (i) location of the primary parties, (ii) where the claim/facts arose, (iii) ease of access to proof, (iv) enforceability, and (v) consideration of burdens placed upon the court and the parties. The apparent standard is that when the forum is inconvenient to a defendant, when the dismissal would not impose unreasonable or undue hardship upon the plaintiffs, when another forum exists, and when there are no prevailing equities or doctrines which would mandate that the matter continue to be heard by the forum court, then dismissal may be considered.

In discussing this doctrine, this Court clearly held in the Summa case, supra., that the doctrine should be applied only with "great caution" and under "compelling circumstances".

Analytically, this Court is first confronted with the problem of whether the forum non conveniens doctrine would generally have any application to a situation in which a defendant may have submitted to the general jurisdictions of the courts of Utah by systematically conducting business in this state. Again, returning to the factual allegations of the Ogdens' complaint, the Ogdens have clearly demonstrated a *prima facie* showing that the Richards family participated actively with the Ogdens in leasing property for the operation for the IB Printing business in Tooele County, and started up and conducted business with the Ogdens in Tooele County from late 1993 until the Spring of 1994.

Equitably, the question may be stated: can a party who knowingly and willfully submits to general jurisdiction in Utah through the conduct of business within this state, subsequently be entitled to raise a defense of forum non conveniens when problems

arise with a Utah participant in that business? The Ogdens answer would simply be that under these circumstances, general jurisdiction should clearly preclude the subsequent application of the doctrine of forum non conveniens.

Again, the Ogdens are not aware of any specific Utah holding which has treated the potential interface between an allegation and showing of general personal jurisdiction with the application of the doctrine of forum non conveniens.

This Court may find helpful, in considering this issue, the Washington Appellate Court case of Wolf v. Boeing Company, 810 P.2d 943, 946 (Wash. App. 1991) wherein that Court considered a factual situation in which the estates of passengers killed in an airplane crash in Mexico brought a products liability action against the aircraft manufacturer (Boeing) in Washington. The Appellate Court of Washington upheld the trial court's determination that the action could appropriately be dismissed under forum non conveniens in that Mexico provided a more convenient and adequate forum for the hearing of the claims, particularly since most of the plaintiffs were Mexican nationals. The Ogdens believe that the Wolf v. Boeing case, supra., may be helpful to this Court, not only because it is a generally good summary of recent applicable law on forum non conveniens, but because the standards that Court applied are clearly distinguishable and mostly non-existent in the present factual situation. Essentially, the Court relied upon the following jurisdictional facts in finding that the Courts of the Nation of Mexico would be a more appropriate forum, none of which are believed to be extant in the present proceeding:

1. Almost all of the plaintiffs were Mexican nationals and had no contact with the State of Washington other than the misfortune to have perished in an aircraft which was built in a Boeing Plant located within the State of Washington. By contrast, in the present situation, we believe that any reasonable construction of the pleadings and proffered affidavit facts in this case show that the Richards entered into negotiations and discussion with the Ogdens in Utah for the formation of a Utah printing business, that there was an agreement to locate the business initially within the State of Utah, and, in fact, both parties, as well as the resulting IB Printing business, continued to conduct printing business within the State of Utah.

2. Access to witnesses and other evidence would be more easily located within the Nation of Mexico. In this case, substantial evidence may be located in both the State of Utah and the State of Nevada, but it is uncontroverted that all of the original organizational negotiations and documentation for the establishment of the IB Printing business occurred within the State of Utah and that various supporting documents, such as the Tooele County lease, would be located in the City of Tooele, State of Utah. Moreover, the initial accountant for the business resides in Salt Lake City, Utah.

3. Convenience to parties in attending proceedings. In our case, the inconvenience of the parties is somewhat equally divided. If this case is to proceed in Tooele, Utah, some of the Richards family would be compelled to travel a distance of approximately 100 miles from Wendover, Nevada to Tooele, Utah. If the action was to proceed in the District Courts of Elko, Nevada, the Ogdens would be compelled to travel a distance of over 220 miles to attend proceedings in Elko, Nevada.

4. The Court in Wolf v. Boeing also looked at the substantial interest of Mexico in protecting its citizens involved in injurious harm within its own jurisdiction and applying its own safety standards and process to such accidents. In this case, by contrast, the Ogdens would assert that there is a strong interest for the State of Utah to continue regulation of a business dispute over non-resident defendants, when those defendants knowingly and actively participated within the State of Utah in the initiation of a business derived income within the State of Utah from the operation of such business, and arguably inflicted harm on the Ogdens as Utah residents. Moreover, there is a further State interest in protecting the Ogdens who entered into a business relationship within the State of Utah and have what is believed to be a legitimate claim to the protection of the laws of the State of Utah and access to its courts for the resolution of disputes arising out of Utah business activities.

5. Finally, the Court considered the relative congestion of the court systems as a legitimate public policy factor. Fortunately, in our case, both Utah and Nevada Courts are generally considered to be blessed with having among the least congested calendars within the United States and this factor should not be considered as an issue.

Even if this Court were to determine that there has not been a *prima facie* showing by the Ogdens that the Richards family engaged in activities submitting them to a general jurisdiction within the State of Utah, there clearly is the secondary and collateral argument that the Richards, at one time or another, submitted to jurisdiction in Utah under the Long Arm Statute UCA §78-27-24.

The provisions of UCA §78-27-24 set out the basis by which non-resident defendants can submit themselves to the jurisdiction of the Courts of the State of Utah through the conduct of certain specified activities:

"Any person, notwithstanding Section 16-101-1501, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

1. the transaction of any business within this state;
2. contracting to supply services or goods in this state;
3. the causing of any injury within this state whether tortious or by breach of warranty;
4. the ownership, use or possession of any real estate situated in this state;
5. contracting to insure any person, property or risk located within this state at the time of contracting;
6. with respect to actions of divorce, separate maintenance, or child support, having resided, in the marital relationship, within this state notwithstanding subsequent departure from the state; or the commission in this state of the act giving rise to the claim, so long as that act is not a mere omission, failure to act, or occurrence over which the defendant had no control; or
7. the commission of sexual intercourse within this state which gives rise to a paternity suit under Title 78, Chapter 45e, to determine paternity for the purpose of establishing responsibility of child support."

This Court has consistently held the legislative policy and purpose underlying the Utah Long Arm Statute was to extend jurisdiction over non-resident defendants to the maximum extent possible consistent with the due process clause of the U. S. Constitution, including general principles of equity and fairness to protect the interest of Utah citizens, such as the Ogdens. See Mallory Engineering v. Ted R. Brown and

Associates, 618 P.2d 1004, 1006, F.N.4 (Utah 1980); Kamdar & Company v. Laray Co., 815 P.2d 245, 249 (Ut. App. 1991). It seems apparent the Ogdens have established a prima facie showing that the Richards have engaged in "specific acts" under subparagraphs 1, 3, & 4 of UCA §78-27-24, even absent a showing of general jurisdiction.

It would appear to the Ogdens to be a matter of first impression before this Court as to the potential resolution of the interface of the public policy arguments in favor of extending the Utah Long Arm Statute to non-resident defendants having sufficient minimal contacts within the forum jurisdiction to the maximum extent permissible, versus policy considerations that may be extent in the application of the doctrine of forum non conveniens.

Because there is no specific case law on this point, the Ogdens would argue that the general legislative policy behind the Utah Long Arm Statute should control and be given primary application to hold that a non-resident defendant is subject to the jurisdiction of the State of Utah and that an action should not be dismissed under the doctrine of forum non conveniens in most instances where the long arm threshold requirements have been demonstrated showing sufficient minimal contacts for the exercise of jurisdiction.

In shorthand fashion, where the defendant has availed himself or herself of the forum state to the extent that Long Arm Jurisdiction may be found, such defendant should concurrently be precluded from raising factors that such forum is an inconvenient forum for the resolution of related conflicts. In this case, there would appear to be no

extreme or unusual circumstances which would preclude the general application of the foregoing proposed principle, i.e. this Court should find, because of either general jurisdiction or Utah Long Arm jurisdiction, there would be no dismissal under the doctrine of forum non conveniens.

Various foreign jurisdictions which have considered this issue have held that the doctrine of forum non conveniens should have no application where either general personal jurisdiction, or jurisdiction under the equitable standards of their respective Long Arm Statutes, have been established over a party. See Jones v. Searle Laboratories, N.E.2d 917, 920 - 921 (Ill. App. 1981); Seaboard Coast Line Railroad Co. v. Swain, 362 S.2d 17, 18 (Fla. 1978); Chapman v. Southern Railway Co., 95 S.E.2d 170, 172-173 (S.C. 1956).

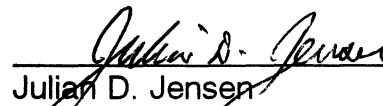
Additionally, would not the older equitable standards applied in utilizing the forum non conveniens doctrine be subsumed and satisfied in the "equitable balancing" required by this Court in applying long arm jurisdiction to insure substantial justice and fair play; see discussion of equitable balancing in Kamdar & Co. v. Laray Co. Inc., supra. 815 P.2d 245, 249-250, and Anderson v. American Society of Plastic Surgeons, 807 P.2d 825, 828 (Utah 1990).

CONCLUSION

The Ogdens believe that they have amply demonstrated to this Court that the trial court abused its discretion in failing to properly recognize or entertain evidence from the pleadings and affidavits before the court which should have been construed in favor of the Ogdens and considered by the Court in weighing the motion to dismiss. The

apparent failure of the Court to consider all disputed evidence in favor of the Ogdens, in and of itself and without further consideration of policy issues, should persuade to this Court to reverse the trial court's order of dismissal and mandate remanding the proceeding back to the trial court for further determination upon the merits. Alternatively, and only in the event that this Court does not agree with the foregoing premise, the Ogdens further argue that under a doctrinal application of forum non conveniens there is still not any showing of a basis for dismissal of this case on the merits.

RESPECTFULLY SUBMITTED this 20th day of July, 1995.



Julian D. Jensen
Attorney for Appellants/Plaintiffs

ADDENDUM

ADDENDUM DIRECTORY

1. UCA §78-27-22&24
2. URCP 12(b)
3. URCP 56
4. Memorandum Decision to Dismiss
5. Order of Dismissal
6. Memorandum Decision Affirming Dismissal
7. Order Affirming Dismissal
8. Notice of Appeal without Attachments
9. Miscellaneous attorney correspondence in re continuance of filing answer in Nevada action

COLLATERAL REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d Foreign Corporations § 538.

C.J.S. — 20 C.J.S. Corporations § 1943; 72 C.J.S. Process § 31.

Key Numbers. — Corporations ⇐ 668; Process ⇐ 62.

78-27-22. Jurisdiction over nonresidents — Purpose of provision.

It is declared, as a matter of legislative determination, that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who, through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this state and persons of other states.

The provisions of this act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

History: L. 1969, ch. 246, § 1.

Meaning of "this act." — The term "this act," in the second paragraph, means Laws 1969, Chapter 246, which appears as §§ 78-27-22 to 78-27-28.

Cross-References. — Foreign corporations, registered office and agent, §§ 16-10-109 to 16-10-111.

Foreign fraternal, service of process upon commissioner, § 31A-14-203.

Nonresident motorists, long-arm provision, § 41-12a-403.

Service of process, Rules of Civil Procedure, Rule 4.

NOTES TO DECISIONS

ANALYSIS

Implementation.
Nonresident plaintiffs.
Special appearance.
Cited.

Implementation.

The courts have the responsibility to protect Utah citizens from suits in other states unless they have engaged in some conduct or activity there beyond mere presence, and to afford the citizens of other states the same protection in the courts of Utah. *Union Ski Co. v. Union Plastics Corp.*, 548 P.2d 1257 (Utah 1976).

Nonresident plaintiffs.

Language of this section indicating purpose of legislature in enacting long-arm statute was to protect citizens of the state does not render remedy afforded by long-arm statute unavail-

able to nonresident plaintiffs since § 78-27-24 neither expressly nor by implication precludes nonresidents who have a permit to do business in Utah from obtaining jurisdiction by long-arm service. *Hughes Tool Co. v. Meier*, 486 F.2d 593 (10th Cir. 1973).

Special appearance.

Where defendant, an out-of-state corporation not licensed to do business in Utah, appeared and moved to discharge writ of attachment on ground that it was improperly issued, the appearance was not general since there was no request for any affirmative relief, and the court did not obtain personal jurisdiction over the movant by virtue of it. *Ted R. Brown & Assocs. v. Carnes Corp.*, 547 P.2d 206 (Utah 1976).

Cited in *Lister v. Marangoni Meccanica*, 728 F. Supp. 1524 (D. Utah 1990); *DeMoss v. City Mkt., Inc.*, 762 F. Supp. 913 (D. Utah 1991).

COLLATERAL REFERENCES

Utah Law Review. — In Personam Jurisdiction Expanded: Utah's Long Arm Statute, 1970 Utah L. Rev. 222.

Note, Parry v. Ernst Home Center Corporation: The "Mauling" of Personal Jurisdiction Theory, 1990 Utah L. Rev. 479.

Brigham Young Law Review. — Mini-

mum Contacts in Single Contract Cases: Burger King Has Its Way, 1986 B.Y.U. L. Rev. 505.

Am. Jur. 2d. — 20 Am. Jur. 2d Courts § 146.

C.J.S. — 21 C.J.S. Courts § 39 et seq.

Key Numbers. — Courts ⇐ 10 et seq.

78-27-23. Jurisdiction over nonresidents — Definitions.

As used in this act:

(1) The words "any person" mean any individual, firm, company, association, or corporation.

(2) The words "transaction of business within this state" mean activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the state of Utah.

History: L. 1969, ch. 246, § 2.

CHAPTER 27

MISCELLANEOUS PROVISIONS

<p>Section 78-27-24. Jurisdiction over nonresidents — Acts submitting person to jurisdiction.</p> <p>78-27-33. Statement of injured person — When inadmissible as evidence.</p> <p>78-27-34. Release, settlement or statement by injured person — When rescission or disavowal provisions inapplicable.</p> <p>78-27-37. Definitions.</p> <p>78-27-38. Comparative negligence.</p> <p>78-27-39. Separate special verdicts on total damages and proportion of fault.</p> <p>78-27-40. Amount of liability limited to pro-</p>	<p>Section portion of fault — No contribution.</p> <p>78-27-41. Joinder of defendants.</p> <p>78-27-50. Financial information privacy — Chapter inapplicable to certain official investigations.</p> <p>78-27-52. Inherent risks of skiing — Definitions.</p> <p>78-27-58. Service of judicial process by persons other than law enforcement officers.</p> <p>78-27-60. Limited immunity for architects and engineers inspecting earthquake damage.</p>
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78-27-15. Salaries of public officers subject to garnishment.

NOTES TO DECISIONS

ANALYSIS

Nonpublic employee.
Tax refund.

Nonpublic employee.

This section authorizes the State Tax Commission to comply with a writ of garnishment of a state tax refund owing to nonpublic employees. *Funk v. State Tax Comm'n*, 839 P.2d 818 (Utah 1992).

Tax refund.

Since a state tax refund was not disposable

earnings for purposes of the Consumer Credit Protection Act and U.R.C.P. 64D(d)(vii), it was not subject to the limitations on garnishment contained in those provisions; a bank that obtained a judgment against plaintiff properly obtained a writ of garnishment that directed the Utah State Tax Commission to attach plaintiff's state tax refund. *Funk v. State Tax Comm'n*, 839 P.2d 818 (Utah 1992).

78-27-24. Jurisdiction over nonresidents — Acts submitting person to jurisdiction.

Any person, notwithstanding Section 16-10a-1501, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

- (1) the transaction of any business within this state;
- (2) contracting to supply services or goods in this state;
- (3) the causing of any injury within this state whether tortious or by breach of warranty;
- (4) the ownership, use, or possession of any real estate situated in this state;
- (5) contracting to insure any person, property, or risk located within this state at the time of contracting;

(6) with respect to actions of divorce, separate maintenance, or child support, having resided, in the marital relationship, within this state notwithstanding subsequent departure from the state; or the commission in this state of the act giving rise to the claim, so long as that act is not a mere omission, failure to act, or occurrence over which the defendant had no control; or

(7) the commission of sexual intercourse within this state which gives rise to a paternity suit under Title 78, Chapter 45a, to determine paternity for the purpose of establishing responsibility for child support.

History: L. 1969, ch. 246, § 3; 1983, ch. 160, § 1; 1987, ch. 35, § 1; 1992, ch. 277, § 247.

Amendment Notes. — The 1992 amend-

ment, effective July 1, 1992, substituted "Section 16-10a-1501" for "Section 16-10-102" in the introductory paragraph.

NOTES TO DECISIONS

ANALYSIS

Nonresident defendants.

—Auto dealer.

Transaction of any business.

—Minimal contacts.

Nonresident defendants.

—Auto dealer.

Texas auto dealer's intentional misrepresentation of mileage on a truck eventually sold in Utah brought the dealer under Subsection (3) of this section, but exercise of jurisdiction was nevertheless improper because dealer's contacts with state were not sufficient to satisfy due process requirements. *Clements v. Tomball Ford, Inc.*, 812 F. Supp. 202 (D. Utah 1993).

Transaction of any business.

—Minimal contacts.

A Texas manufacturer's sending a service

representative to Utah did not establish sufficient minimum contacts for the assertion of specific personal jurisdiction where its contacts in Utah were wholly unrelated to the cause of action asserted against it. *Arguello v. Industrial Wood-working Mach. Co.*, 838 P.2d 1120 (Utah 1992).

A Texas manufacturer could not have reasonably anticipated being brought into court in Utah when it sold no finger jointing machines in Utah and it did not seek to serve the Utah market for finger jointing machines through either sales representatives or advertising; the machine that was the subject of plaintiff's suit was sold to an ultimate buyer in California and resale of the machine in Utah was wholly unforeseeable. *Arguello v. Industrial Wood-working Mach. Co.*, 838 P.2d 1120 (Utah 1992).

78-27-33. Statement of injured person — When inadmissible as evidence.

Except as otherwise provided in this act, any statement, either written or oral, obtained from an injured person within 15 days of an occurrence or while this person is confined in a hospital or sanitarium as a result of injuries sustained in the occurrence, and which statement is obtained by a person whose interest is adverse or may become adverse to the injured person, except a law enforcement officer, shall not be admissible as evidence in any civil proceeding brought by or against the injured person for damages sustained as a result of the occurrence, unless:

(1) a written verbatim copy of the statement has been left with the injured party at the time the statement was taken; and

(2) the statement has not been disavowed in writing within fifteen days of the date of the statement or within fifteen days after the date of the injured person's initial discharge from the hospital or sanitarium in which the person has been confined, whichever date is later.

Rule 12. Defenses and objections.

(a) **When presented.** A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary hearings.** The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the

fault judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇐ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule were presented in bad faith or solely for the purpose of delay, the court shall

forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Affidavit.
 —Contents.
 —Corporation.
 —Experts.
 —Inconsistency with deposition.
 —Necessity of opposing affidavits.
 —Resting on pleadings.
 —Objection.
 —Sufficiency.
 —Hearsay and opinion testimony.
 —Superseding pleadings.
 —Unpleaded defenses.
 —Verified pleading.
 —Waiver of right to contest.
 —When unavailable.
 —Exclusive control of facts.
 —Who may make.
 Affirmative defense.
 Answers to interrogatories.
 Appeal.
 —Adversely affected party.
 —Standard of review.
 Attorney's fees.
 Availability of motion.
 Compliance with rule.
 Cross-motions.
 Damages.
 Discovery.
 Disputed facts.
 Evidence.
 —Facts considered.
 —Improper evidence.
 —Proof.
 —Weight of testimony.
 Implicit rulings.
 Improper party plaintiff.
 Issue of fact.
 —Contract interpretation.
 —Corporate existence.
 —Deeds.
 —Lease as security.
 —Notice.
 Judicial attitude.
 Motion for new trial.
 Motion to dismiss.
 Motion to reconsider.
 Notice.
 —Provision not jurisdictional.
 —Waiver of defect.
 Procedural due process.
 Purpose.
 Scope.
 Summary judgment improper.
 —Damage to insured vehicle.
 —Dispersal of interest.
 —Findings by court.
 —Foreclosure of trust deeds.
 —Fraud or duress.
 —Guardianship.

—Mortgage note.
 —Negligence.
 —Nonspecific denial of requests for admission.
 —Note.
 —Recovery for goods and services.
 —Stock ownership.
 —Wrongful possession.
 Summary judgment proper.
 —Contract action.
 —Contract terms.
 —Deceit.
 —Jurisdiction.
 —Negligence.
 —Res ipsa loquitur.
 Time for motion.
 Written statement of grounds.
 Cited.

Affidavit.

—Contents.

Specific facts are required to show whether there is genuine issue for trial. *Reagan Outdoor Adv., Inc. v. Lundgren*, 692 P.2d 776 (Utah 1984).

When a motion for summary judgment is made under this rule, the affidavit of an adverse party must contain specific evidentiary facts showing that there is a genuine issue for trial. *Treloggan v. Treloggan*, 699 P.2d 74 (Utah 1985).

Affidavits submitted by plaintiff that contained opinion, legal conclusions, and facts not supported by adequate foundation but portions of which complied with Subdivision (e), because the objectionable statements did nothing more than supplement the arguments made in plaintiff's memorandum, did not prejudice defendants. *Broadwater v. Old Republic Sur.*, 737 P.2d 527 (Utah 1993).

—Corporation.

Where an affidavit is made by an officer of a corporation, it is generally considered to be an affidavit of the corporation itself. However, personal knowledge of an agent of the corporation who is not a corporate officer regarding the facts to which he has sworn will generally not be presumed, and therefore, the "means and sources" of his information should be shown. *Utah Farm Prod. Credit Ass'n v. Watts*, 737 P.2d 154 (Utah 1987).

—Experts.

Utah Rule of Evidence 704 allows the expert to state his opinion concerning the ultimate issue in the case, and an expert affidavit must also contain a sufficient factual basis for the opinion proffered. Thus, the affidavit is sufficient if it articulates the facts upon which the opinion was based and if the facts were of the "type usually relied upon by experts in the field." *Gaw v. State*, 798 P.2d 1130 (Utah App. 1990).

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FILED BY _____

IN THE THIRD DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH

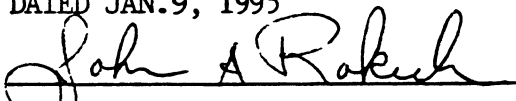
OGDEN, VICTOR	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 940300038 CN
	:	DATE 01/09/95
VS	:	HONORABLE JOHN A. ROKICH
	:	COURT REPORTER
IB PRINT COMPANY	:	COURT CLERK RGB
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY. JENSEN, JULIAN D
D. ATTY. LUDLOW, RANDY S

DEFENDANT'S REQUEST FOR EVIDENTIARY HEARING IS DENIED.
THE COURT GRANTS DEFENDANT'S MOTION TO DISMISS BECAUSE
DEFENDANT'S CONTACT WITH UTAH WERE MINIMAL AND THE MOST
CONVENIENT FORUM TO HEAR THIS CASE IS IN NEVADA. THE UNDISPUTED
FACTS ARE THAT THE BUSINESS WAS INCORPORATED IN THE STATE OF
NEVADA WITH IT'S PRINCIPAL PLACE OF BUSINESS BEING WENDOVER NEV.
THE PURPOSE OF THE BUSINESS WAS TO PROVIDE PRINTING FOR THE
CASINOS IN WENDOVER, NEVADA. THE OFFICERS AND DIRECTORS WERE
NEVADA RESIDENTS EXCEPT FOR PLAINTIFF.
THE COURT BELIEVES THAT THE MOST CONVENIENT FORUM TO HEAR
THIS MATTER IS IN NEVADA, BECAUSE THIS IS WHERE THE CONTROVERSY
Arose, THE EASE OF ACCESS TO PROVE OR DISPROVE THE CLAIMS, THE
COSTS INVOLVED, THE AVAILABILITY OF WITNESSES AND THE ENFORCEMENT
OF THE JUDGMENT.
THE COURT REFERS THE PARTIES TO DEFENDANT'S MEMORANDUM IN
SUPPORT OF GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT
PREJUDICE.
DEFENDANT'S COUNSEL SHALL PREPARE THE ORDER ACCORDINGLY.

DATED JAN.9, 1995


JOHN A. ROKICH

THIRD DISTRICT COURT JUDGE

000113

Case No: 940300038 CN

Certificate of Mailing

I certify that on the 10 day of Jan, 1995,
I sent by first class mail a true and correct copy of the
attached document to the following:

RANDY S. LUDOW
Atty for Plaintiff
311 SOUTH STATE STREET
SUITE 280
SALT LAKE CITY UT 84111

JULIAN D. JENSEN
Atty for Defendant
311 SOUTH STATE SUITE 380
SALT LAKE CITY UT 84111

District Court Clerk

By: Lisa Gammon
Deputy Clerk

95 JAN -3⁹ 11 2:36

FILED BY _____

IN THE THIRD DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH

OGDEN, VICTOR	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 940300038 CN
	:	DATE 01/03/95
VS	:	HONORABLE JOHN A. ROKICH
	:	COURT REPORTER
IB PRINT COMPANY	:	COURT CLERK RGB
DEFENDANT	:	

TYPE OF HEARING:
PRESENT: PLAINTIFF

STIPULATION

P. ATTY. JENSEN, JULIAN D
D. ATTY.

AN IN-COURT CONFERENCE IS BEFORE THE COURT. AN ORDER ON THE DENIAL OF THE MOTION PREVIOUSLY ENTERED BY JUDGE FUCHS IS TO BE SUBMITTED TO THE COURT FOR SIGNATURE. THE JURISDICTIONAL ISSUE WILL BE SUBMITTED TO THE COURT FOR DECISION. PARTIES RESOLVE THAT A TRIAL DATE IN MARCH WILL BE SET.

000111

95MAR-0 11:50
FILED BY: R

RANDY S. LUDLOW #2011
Attorney for Defendant
311 South State Street, Suite 280
Salt Lake City, Utah 84111
Telephone: (801) 531-1300
Fax: (801) 539-8236

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

VICTOR OGDEN, et al.,
Plaintiff,

vs.

IB PRINTING COMPANY, et al.,
Defendant.

ORDER OF DISMISSAL

Case No. 940900038CN

Judge John A. Rokich

THE ABOVE ENTITLED MATTER having been presented to the court on defendant's Motion to Dismiss pursuant to Rule 4-501 of the Code of Judicial Administration. Each of the parties filed Memorandums together with Affidavits and supporting documentation. It is undisputed that the business was incorporated in the State of Nevada with its principle place of business being in Wendover, Nevada. The purpose of the business was to provide printing for the casinos in Wendover, Nevada. The officers and directors are and were Nevada residents except for plaintiffs. The equipment is located in the State of Nevada. The contacts with Utah were minimal.

Based upon the foregoing it is hereby ordered as follows:

1. Defendant's request for evidentiary hearing is denied.

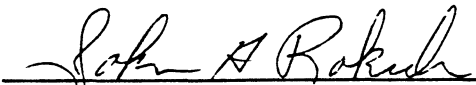
2. Defendants Motion to Dismiss is granted without prejudice.

The most convenient forum to hear this matter is in Nevada. The controversy arose in Nevada; the ease and access to prove or disprove the claims would be the State of Nevada; the costs involved are more readily adjudicated in the State of Nevada; and the availability of witnesses and the enforcement of the judgement would require that the matter be adjudicated in the State of Nevada.

3. The court incorporates by reference the defendant's memorandum in support of granting defendant's Motion to Dismiss.

DATED this 7 day of ^{March}~~January~~, 1995.

By the Court:


John A. Rokich

HAND DELIVERY CERTIFICATE

I hereby certify that I hand delivered a true and correct copy of the foregoing ORDER OF DISMISSAL, by hand delivering the same in a sealed envelope, this 13th day of January, 1995 to the following:

JULLIAN D. JENSEN
311 SOUTH STATE, SUITE 380
SALT LAKE CITY, UTAH 84111

Austin Frederick

HAND DELIVERY CERTIFICATE

The above document was also hand delivered on the 2nd day of March, 1995 to the following:

JULLIAN D. JENSEN
311 SOUTH STATE, SUITE 380
SALT LAKE CITY, UTAH 84111

Austin Frederick

95 JAN 24 10:04

FILED BY R

IN THE THIRD DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH

OGDEN, VICTOR	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 940300038 CN
	:	DATE 01/23/95
VS	:	HONORABLE JOHN A. ROKICH
	:	COURT REPORTER
IB PRINT COMPANY	:	COURT CLERK RGB
DEFENDANT	:	

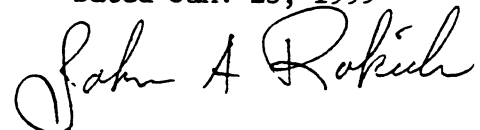
TYPE OF HEARING:
PRESENT:

P. ATTY. JENSEN, JULIAN D-NOT PRESENT
D. ATTY. LUDLOW, RANDY S-NOT PRESENT

THE COURT AFFIRMS ITS DECISION TO DISMISS PLAINTIFF'S COMPLAINT WITHOUT PREJUDICE BECAUSE PLAINTIFF VOLUNTARILY PARTICIPATED IN THE INCORPORATION OF THE BUSINESS IN NEVADA AND DESIGNATING NEVADA AS THE PRINCIPAL PLACE OF BUSINESS.

IN SUMMA CORPORATION VS. LANCER INDUSTRIES(559 P 2D 544)THE UTAH SUPREME COUNT RULED THAT DISTRICT COURTS, AS COURTS OF GENERAL JURISDICTION, HAVE INHERENT POWER TO REFUSE TO EXERCISE JURISDICTION IF CONVINCED THAT TO DO OTHERWISE WOULD PLACE AN UNREASONABLE BURDEN UPON SOME OR ALL OF THE PARTIES OR UPON THE COURT. THE COURT HAS EXCERCISED ITS INHERENT POWERS.

Dated Jan. 23, 1995



c/c Counsel

000125

RANDY S. LUDLOW #2011
Attorney for Defendant
311 South State Street, Suite 280
Salt Lake City, Utah 84111
Telephone: (801) 531-1300
Fax: (801) 539-8236

95 FEB 1 1995
FILED 8:15 AM
CLERK OF DISTRICT COURT
3rd JUDICIAL DISTRICT
SALT LAKE CITY, UTAH

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

VICTOR OGDEN,

Plaintiff,

vs.

IB PRINTING COMPANY,

Defendant.

ORDER AFFIRMING DISMISSAL

Case No. 940300038CN

Judge John A. Rokich

THE PLAINTIFF, by and through its attorney of record, Julian Jensen has requested the court through informal means to reconsider its decision. Based upon such request and for good cause appearing herein

IT IS HEREBY ORDERED as follows:


The Court affirms its decision to dismiss plaintiff's complaint without prejudice because plaintiff voluntarily participated in the incorporation of the business in Nevada and designating Nevada as the principal place of business.

In Summa Corporation vs. Lancer Industries (559 P 2D 544) the Utah Supreme Court ruled that District Courts, as courts of general jurisdiction, have inherent power to refuse to exercise

jurisdiction if convinced that to do otherwise would place an unreasonable burden upon some or all of the parties or upon the court. The court has exercised its inherent powers.

DATED this 23 day of ^{Feb}~~January~~, 1995.

BY THE COURT:


JOHN A. ROKICH
District Court Judge *for Judge Reese.*
for Judge Rokich

MAILING CERTIFICATE

I hereby certify that I caused to be mailed a true and correct copy of the foregoing ORDER AFFIRMING DISMISSAL, by placing the same in the United States Mail, in a postage pre-paid sealed envelope, this 27th day of January, 1995 to the following:

JULIAN D. JENSEN
311 SOUTH STATE, SUITE 380
SALT LAKE CITY, UTAH 84111



Leslie Frederick
Secretary

JULIAN D. JENSEN (1679)
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON
Attorneys for Plaintiff
311 South State, Suite 380
Salt Lake City, UT 84111
Telephone: (801) 531-6600

SEAL FILED
FILED: [Signature]

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR TOOELE COUNTY
STATE OF UTAH

VICTOR OGDEN and ANGIE OGDEN,	:	
husband and wife,)	
	:	<u>NOTICE OF APPEAL</u>
Plaintiffs,)	
	:	
vs.)	
	:	
IB PRINTING COMPANY, a Utah Joint)	Civil No. 940300038
Venture, and Gary Richards, Mary	:	
Richards, Michelle Richards, and)	
Ronald Richards, and related parties,	:	
)	Judge: John A. Rokich
Defendants.	:	

Notice is hereby given that VICTOR OGDEN hereby appeals to the Supreme Court of the State of Utah from that certain final Order Affirming Dismissal as entered the 23rd day of February, 1995, by the above entitled Court; and the previous Order of Dismissal entered the 8th day of March, 1995. A copy of the respective Orders are attached hereto.

DATED this 14 day of March, 1995.

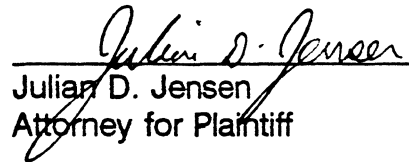
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON

Julian D. Jensen
Julian D. Jensen
Attorney for Victor Ogden

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL, by placing the same in the U. S. Mail, postage prepaid, on this 14 day of March, 1995, addressed to:

Mr. Randy S. Ludlow, Esq.
311 South State, Suite 280
Salt Lake City, UT 84111



Julian D. Jensen
Attorney for Plaintiff

WILSON AND BARROWS, LTD.
ATTORNEYS AT LAW

STEWART R. WILSON
RICHARD G. BARROWS

—
ORVILLE R. WILSON
OF COUNSEL

442 COURT ST.

ELKO, NEVADA 89801

PHONE# 702-738-7271

—
FAX# 702-738-5041

P.O. Box 389—ZIP 89803

October 24, 1994

W. Brett Hansen, Esq.
Attorney at Law
380 Court Street
Elko, Nevada 89801

Re: **Richards v. Ogden**

Dear Brett:

I'm writing as a follow up to my letter dated September 13, 1994. Because you have given me an open ended extension to file the Ogden Motion to Quash, and because neither I nor Mr. Ogden want me to unnecessarily incur fees, I am not in a hurry to receive the documentation that you have promised to give me with regard to the corporation and Mr. Ogden's contacts with the State of Nevada. However, I am writing now so that there is no misunderstanding that I am not working on the Motion to Quash, because I am still waiting for the documentation described in my letter to you dated September 13, 1994.

If you have any questions, please contact me.

Sincerely,

RICHARD G. BARROWS

cc:

Julian D. Jensen, Esq.
311 South State Street, Suite 380
Salt Lake City, Utah 84111

94100041.BDW

WILSON AND BARROWS, LTD.
ATTORNEYS AT LAW

STEWART R. WILSON
RICHARD G. BARROWS

—
ORVILLE R. WILSON
OF COUNSEL

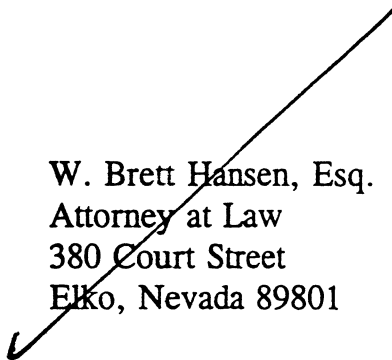
442 COURT ST.
ELKO, NEVADA 89801

PHONE# 702-738-7271

—
FAX# 702-738-5041

P O Box 389—ZIP 89803

September 13, 1994



W. Brett Hansen, Esq.
Attorney at Law
380 Court Street
Elko, Nevada 89801

Re: **Richards v. Ogden**

Dear Brett:

I am writing to confirm our recent conversations regarding the above case and to thank you for your courtesies:

1. I have advised you that I will be representing Victor Ogden who intends to defend the Nevada lawsuit of Richards v. Ogden.

2. I have been advised by Mr. Ogden's Utah counsel that Mr. Ogden has done *nothing* in Nevada out of which this cause of action arose. As a result, I have questioned whether Nevada has personal jurisdiction over Mr. Ogden.

3. You have graciously given me an open-ended extension to respond to the Complaint, revocable upon ten days' prior written notice for any reason.

4. Prior to me filing Motion to Quash Service of Process on jurisdictional grounds, you have agreed to give me the documentary and other evidence giving Nevada jurisdiction over Mr. Ogden in this case.

5. You have also agreed to give me a copy of all corporate documents, including Minutes of all meetings, Bylaws, etc.

W. Brett Hansen, Esq.
September 13, 1994
Page 2

Again, thank you for all of your courtesies.

Sincerely,

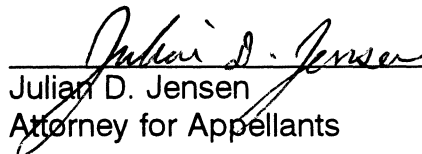
RICHARD G. BARROWS

cc: Julian Jensen, Esq.
94090331 JAS

CERTIFICATE OF SERVICE

Counsel for appellants affirms that he caused to be hand delivered on this 20th day of July, 1995 two (2) copies of the Brief of Appellants to the office of counsel for appellees addressed as follows:

Mr. Randy Ludlow, Esq.
Attorney for Appellees
311 South State Street, Suite 280
Salt Lake City, UT 84111



Julian D. Jensen
Attorney for Appellants