Agenda

Advisory Committee on Rules of Civil Procedure

May 24, 2006
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Approval of minutes.	Fran Wikstrom
Sanctions. Rules 16, 35 and 37.	Tim Shea
Limited appearance rules. Rules 5, 11, 74, 75.	Jonathan Hafen
Finality of judgments. Rule 7.	Leslie Slaugh
Rule 23.1. Derivative actions by shareholders.	Anthony Schofield
Motions to reconsider. Rule 59, 60.	Fran Wikstrom

Meeting Schedule

June 28, 2006
September 27, 2006
October 25, 2006
November 29, 2006 (5th Wednesday)

Committee Web Page: http://www.utcourts.gov/committees/civproc/

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 26, 2006
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Leslie W. Slaugh, James T. Blanch, Honorable David O. Nuffer, Jonathan Hafen, Thomas R. Lee, Virginia S. Smith, Todd M. Shaughnessy, Honorable Anthony B. Quinn, David W. Scofield, Lori Woffinden, Cullen Battle

EXCUSED: Thomas R. Karrenberg, Francis J. Carney, Honorable Anthony W. Schofield, Debora Threedy, Honorable Lyle R. Anderson, Janet H. Smith, Judge R. Scott Waterfall

STAFF: Tim Shea, Trystan B. Smith, Matty Branch

Mr. Wikstrom called the meeting to order at 4:00 p.m. and welcomed new member Lori Woffinden to the committee. Ms. Woffinden is a clerk in Fourth District.

I. APPROVAL OF MINUTES.

Mr. Blanch moved to approve the March 22, 2006 minutes as submitted. The committee unanimously approved the minutes.

II. RULE 37. SPOLIATION OF EVIDENCE.

Mr. Wikstrom brought Rule 37 back to the committee.

Ms. McIntosh began the discussion recommending a revision to the beginning of subsection (b)(2)(D) to make the rule consistent with the corresponding subsections. She suggested the phrase "an order requiring the parties." The committee agreed with the change.

As to Subsection (g), Mr. Battle expressed concern about how subsection (g) may affect electronic discovery. Mr. Battle also expressed concern the word "duty" may have too broad a meaning, and the committee may create substantive law with the use of the term.

Mr. Blanch suggested the intent of the subsection is not to provide a heightened duty. The intent is to explicitly codify the Court's inherent power.

Mr. Shaughnessy recommended the committee parallel its changes to Rule 37 to Federal Rule 37 which would allow practitioners to rely on the established case law in the 10th circuit regarding spoliation.

Mr. Scofield recommended striking "and produce" from the first sentence of subsection (g) citing concern that a party may not have a duty to produce.

Mr. Lee suggested starting the last sentence of subsection (g) with "The Court" and striking the word "And." Mr. Lee further recommended striking the references to the various subsections in line 129 and simply stating (b)(2). The committee supported the suggestion adding that the reference to subsection (b)(2) is meant to be inclusive of the subparagraphs of (b)(2).

Judge Nuffer moved to replace the phrase "which the party had a duty to preserve" in the first sentence of subsection (g) with "in violation of a duty." The committee approved the change.

Mr. Shea indicated he will include the reference to Rule 35(a) in subsection (b)(2)(F) in the first paragraph of subsection (b)(2).

Ms. McIntosh moved to revisit the revisions at the next meeting. Seeing a consensus, Mr. Wikstrom asked the committee to revisit Rule 37 at the next meeting.

III. LIMITED APPEARANCE RULES. RULES 5, 11, 74, 75.

Mr. Hafen brought the unbundling rules back to the committee.

As to Rule 75, Mr. Scofield expressed concern about the language "general appearance" in subsection (d). Judge Schofield suggested adding language in subsection (b) that would indicate the pro se litigant would appear for all other matters.

Judge Quinn moved to replace "shall enter a general appearance" in subsection (d) with "remains responsible for all other aspects of the litigation not specifically identified in the notice of limited appearance."

Mr. Wikstrom suggested replacing "client" with "party" in subsection (b), line 15.

Mr. Lee moved that the committee add the language Judge Quinn suggested in subsection (d) to subsection (b) and include such language with the Notice to help the pro se litigant to understand the significance of the rule.

As to Rule 74, Mr. Hafen discussed the two proposed alternatives, but recommended the alternative that requires an attorney to file a formal withdrawal. The committee unanimously approved the recommendation.

Mr. Slaugh recommended a change to the beginning of subsection (c) to state, "If an attorney withdraws, other than under subsection (b), dies, ..." The committee approved the change.

As for Rule 5, the committee discussed the two proposed alternatives to subsection (b)(1) for service in light of a limited appearance. The committee agreed on the alternative that requires service upon the attorney and the party with the following changes, "upon the attorney and the party within the scope of the notice of limited appearance."

As for Rule 11, the committee thoroughly discussed the ethics of ghost writing. The committee discussed various factual scenarios where an attorney assists with a filing prior to a deadline. Judge Nuffer indicated his concern was full disclosure. He did not have as much concern about Rule 11 sanctions.

The committee discussed why it was important to disclose. One reason is the perception that Courts may make concessions for pro se parties. Judge Nuffer further indicated it was helpful to understand the full facts behind a pleading.

Judge Quinn indicated he did not know what he would do differently if he knew who ghost wrote a pleading. Judge Schofield agreed and added he thought ghost writing should be treated as an ethical issue.

Mr. Lee suggested defining the word "presenting" in subsection (b). Mr. Wikstrom indicated the parenthetical in subsection (b) "(whether by signing, filing, submitting, or later advocating)" adequately defined "presenting."

Mr. Slaugh moved to amend Rule 11 (b) to state, "By presenting to the Court (signing, filing, submitting, or later advocating), a pleading . . . ." The committee did not act on the motion.

After extensive discussion, the committee concluded it did not object to ghost writing, and did not want it addressed in Rule 11. Mr. Wikstrom asked Mr. Shea to bring the approved revisions to Rule 11 back to the committee.

IV. SB 148. PUNITIVE DAMAGES; DISCOVERY OF WEALTH.

Mr. Shea presented the legislation enacted this May concerning the parameters in which a party can conduct discovery of a party's wealth or financial condition.

Mr. Shea asked the committee if it wanted to deal with the new legislation as a rule of procedure. Mr. Wikstrom asked the committee to consider if it wanted to address the legislation at the next meeting.

V. FINALITY OF JUDGMENTS.

Mr. Slaugh brought Rule 7 to the committee.

The committee debated the need to amend Rule 7 to clarify when a trial court's ruling becomes a final order. Mr. Slaugh suggested an amendment to Rule 7 that would not require a party to submit a proposed order, unless otherwise directed by the Court.

Mr. Blanch suggested an amendment that would clarify that unless the ruling states it is a final order, the prevailing party would need to submit a final order or judgment.

Mr. Slaugh volunteered to redraft Rule 7 in light of Mr. Blanch's suggestion.

VI. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next committee meeting is scheduled for 4:00 p.m. on Wednesday, May 24, 2006, at the Administrative Office of the Courts.

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Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: May 18, 2006
Re: Sanctions. Rules 16, 35 and 37.

Our work on the new paragraph for sanctioning spoliation has resulted in some research into sanctions generally. Tom Lee's research shows some reasons for keeping the limits on sanctions for failing to undergo an examination. Tom's email is attached. The current rules are not a model of clarity, and they contain at least one inconsistency. Trying to parse what is permitted and what is prohibited and in what circumstances leads me to the following conclusions.

If you violate a discovery order, you are subject to:

1. the matter being taken as established;
2. not being able to offer evidence about the matter;
3. having the pleadings struck;
4. contempt;
5. attorney fees; and
6. such other orders as are just.

If you violate an order to submit for an examination, you are subject to all of the above except contempt.

If you are able to produce a person for an examination and don't, you are subject to all of the above except contempt. But, if you are unable to produce the person, then you are not subject to the first 3. Presumably because it's not just. You are still subject to attorney fees, unless you convince the judge that the failure to produce is substantially justified. Presumably the failure is substantially justified, since you cannot do it.

If you violate a scheduling order entered under Rule 16, we have a conflict in the rules. Rule 37 says you are subject to all of the above. Rule 16(d) says the judge cannot order that the matter be taken as established.

In Rule 35(a), there is no express sanction for failing to submit for an exam or for failing to produce a person for an exam, so Rule 37 sanctions and their limits apply. In Rule 35(c), the express sanctions for failing to produce the previous examination results and treatment by an examiner employed by a party are exclusion of the examiner's testimony and other sanctions under Rule 37. In Rule 35(b)(1) the express sanction for failing to produce the results of any previous exams performed on the examined person is exclusion of the examiner's testimony, but there is no reference to the other sanctions of Rule 37. So there is not a direct conflict, but a bit of confusion since the later paragraph, 35(c), does have the cross reference.

The amendments, which include the spoliation paragraph, are intended to treat sanctions in a more uniform manner. To that end, Rule 16 would be amended simply to refer to the sanctions in Rule 37. Rule 35 also would be amended to refer to Rule 37. The prohibition on contempt for failing to submit to an examination and for failing to produce someone for an examination would be moved from Rule 37 to Rule 35, which regulates the only circumstances in which the prohibition applies. The list of sanctions is delineated, I hope in a more straightforward manner, in Rule 37.

Encl. Email from Tom Lee
Rules 16, 35 and 37

From: Tom Lee
To: Fran Wikstrom, Tim Shea
Date: 5/11/06 12:29PM
Subject: Re: Rule 37

Tim & Fran:

My research assignment was to look at the evolution of Rule 37 in order to determine whether there is a good reason to treat physical examination orders different from other discovery orders. The current structure of the rule provides (in what is now (b)(2)(D)) that contempt cannot be used as a sanction for failure to comply with a Rule 35 physical examination order, and (in what is now (b)(2)(E)) that sanctions are not appropriate where the party is unable to produce a person for physical examination. In our last meeting, I raised the question whether there was any need for carving out Rule 35 physical examination orders at all--i.e., whether it might make more sense to leave it up to the court's discretion whether and how to sanction a party for failing to comply with any kind of discovery order (including a Rule 35 physical examination order).

Having looked at the history of the rule, I'm no longer in favor of a revision. Although I think that the change we contemplated might not change the practice much (given that the general standard of reasonableness would usually foreclose the imposition of a contempt order for failure to comply with a Rule 35 order), there may be good reasons to leave the rule alone. Physical examinations have long been treated as different, and I'm not sure I want to open up the can of worms involved in taking a different course.

My research shows that the (b)(2)(D) exception, carving out contempt as a sanction for failure to comply with a Rule 35 order, appeared in the first draft of the 1937 federal rules (available at <http://www.uscourts.gov/rules/reports.htm> by clicking on April 1937 under Advisory Committee on Rules of Civil Procedure). No substantive changes have been made to this exception since the original draft. Although I haven't found much support for this, I suspect that this provision stemmed from a concern that physical examination orders involve an invasion of privacy and bodily integrity that is different from other kinds of discovery orders such as the mere production of documents. There may be a quasi-substantive basis for refusing to accord judicial authority to impose contempt sanctions in support of a Rule 35 order, and I'm not sure I'm comfortable making a snap decision to overturn the longstanding practice on this point.

The (b)(2)(E) exception seems to be aimed at precluding the imposition of sanctions for failure to produce a third person for examination where it is impossible to produce the third person. This provision was added in 1970. The Advisory Committee Notes for the 1970 revision state that the change was designed to follow the change in Rule 35 that allowed court orders requiring a physical examination of a third party over whom a party has some legal control (a parent or guardian, for example). Section (E) simply provided for sanctions for failure to comply with this type of order and allowed an exception for inability to produce the third party.

In light of this history, it may also make sense to leave the admittedly confusing language and structure of (b)(2)(E) alone. If we change the rule to omit the language about inability to produce, we may be seen as effecting a substantive change in the rule.

For whatever it's worth, a brief survey of other states reveals that the structure of the federal rules (including the (b)(2)(D) & (E) exceptions) is followed in various states, including California - CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 2032.410-2032.420, Texas - TEXAS RULES OF CIVIL PROCEDURE 215.2(b)(6), Colorado - COLORADO RULES OF CIVIL PROCEDURE 37(b)(2)(D). I am not aware of any state that has opted to omit the (b)(2)(D) OR (b)(2)(E) exceptions, and I'm no longer inclined to move in that direction.

Tom

Rule 16. Pretrial conferences, scheduling, and management conferences.

(a) Pretrial conferences. In any action, the court in its discretion or upon motion of a party, may direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

(a)(1) expediting the disposition of the action;

(a)(2) establishing early and continuing control so that the case will not be protracted for lack of management;

(a)(3) discouraging wasteful pretrial activities;

(a)(4) improving the quality of the trial through more thorough preparation;

(a)(5) facilitating the settlement of the case; and

(a)(6) considering all matters as may aid in the disposition of the case.

(b) Scheduling and management conference and orders. In any action, in addition to any other pretrial conferences that may be scheduled, the court, upon its own motion or upon the motion of a party, may conduct a scheduling and management conference. The attorneys and unrepresented parties shall appear at the scheduling and management conference in person or by remote electronic means. Regardless whether a scheduling and management conference is held, on motion of a party the court shall enter a scheduling order that governs the time:

(b)(1) to join other parties and to amend the pleadings;

(b)(2) to file motions; and

(b)(3) to complete discovery.

The scheduling order may also include:

(b)(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(b)(5) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(b)(6) any other matters appropriate in the circumstances of the case.

Unless the order sets the date of trial, any party may and the plaintiff shall, at the close of all discovery, certify to the court that the case is ready for trial. The court shall schedule the trial as soon as mutually convenient to the court and parties. The court shall notify parties of the date of trial and of any pretrial conference.

(c) Final pretrial or settlement conferences. In any action where a final pretrial conference has been ordered, it shall be held as close to the time of trial as reasonable under the circumstances. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties, and the attorneys attending the pretrial, unless waived by the court, shall have available, either in person or by telephone, the appropriate parties who have authority to make binding decisions regarding settlement.

(d) Sanctions. If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, ~~may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanctions, the court shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust~~ may take any action authorized by Rule 37(b)(2).

Rule 35. Physical and mental examination of persons.

(a) Order for examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party or person to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control, unless the party is unable to produce the person for examination. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of examining physician.

(b)(1) If requested by a party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the person examined and/or the other party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the report cannot be obtained. The court on motion may order delivery of a report on such terms as are just~~, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial~~.

(b)(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(b)(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude

discovery of a report of any other examiner or the taking of a deposition of an examiner in accordance with the provisions of any other rule.

(c) Right of party examined to other medical reports. At the time of making an order to submit to an examination under Subdivision (a) ~~of this rule~~, the court shall, upon motion of the party to be examined, order the party seeking such examination to furnish to the party to be examined a report of any examination previously made or medical treatment previously given by any examiner employed directly or indirectly by the party seeking the order for a physical or mental examination, or at whose instance or request such medical examination or treatment has previously been conducted. ~~If the party seeking the examination refuses to deliver such report, the court on motion and notice may make an order requiring delivery on such terms as are just; and if an examiner fails or refuses to make such a report the court may exclude the examiner's testimony if offered at the trial, or may make such other order as is authorized under Rule 37.~~

(d) Sanctions.

(d)(1) If a party fails to obey an order entered under Subdivision (c), the court on motion may take any action authorized by Rule37(b)(2).

(d)(2) If a party or a person in the custody or under the legal control of a party fails to obey an order entered under Subdivision (a), the court on motion may take any action authorized by Rule 37(b)(2), except that the failure cannot be treated as contempt of court.

Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a)(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(a)(2) Motion.

(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(a)(2)(B) If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(a)(3) Evasive or incomplete disclosure, answer, or response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(a)(4) Expenses and sanctions.

(a)(4)(A) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(a)(4)(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the attorney or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(b)(1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b)(2) Sanctions by court in which action is pending. If a party fails to obey an order entered under Rule 16(b) or if a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, ~~or if a party fails to obey an order entered under Rule 16(b)~~, unless the court finds that the failure was substantially justified, the court in

which the action is pending may ~~make such orders~~ take such action in regard to the failure as are just, ~~and among others~~ including the following:

(b)(2)(A) ~~an order that the matters regarding which the order was made or any other designated facts shall be~~ taken ~~n~~ the matter or any other designated facts to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b)(2)(B) ~~an order refusing to allow~~ prohibit the disobedient party ~~to support or oppose~~ from supporting or opposing designated claims or defenses~~,~~ or ~~prohibiting him~~ from introducing designated matters in evidence;

(b)(2)(C) ~~an order striking out~~ strike pleadings or parts thereof, stay~~ing~~ further proceedings until the order is obeyed, dismiss~~ing~~ the action or proceeding or any part thereof, or render~~ing a~~ judgment by default against the disobedient party;

~~(b)(2)(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;~~

~~(b)(2)(E) where a party has failed to comply with an order under Rule 35(a), such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply is unable to produce such person for examination.~~

~~In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney or both of them to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.~~

(b)(2)(D) order the party or the attorney or both of them to pay the reasonable expenses, including attorney fees, caused by the failure;

(b)(2)(E) treat the failure to obey an order as contempt of court; and

(b)(2)(F) instruct the jury regarding an adverse inference or effect of what the evidence would have shown.

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the

truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court ~~in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule~~. ~~In lieu of any order or in addition thereto, the court shall require the party failing to act or the party's attorney or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust~~ on motion may take any action authorized by Subdivision (b)(2).

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Failure to participate in the framing of a discovery plan. If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court ~~may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure~~ on motion may take any action authorized by Subdivision (b)(2).

(f) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court ~~may order any other sanction, including payment of reasonable costs and attorney fees, any order permitted under subpart (b)(2)(A), (B) or (C) and informing the jury of the failure to disclose~~ on motion may take any action authorized by Subdivision (b)(2).

(g) Failure to preserve evidence. If a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty, the court on motion may take any action authorized by Subdivision (b)(2).

Rule 5. Service and filing of pleadings and other papers.

(a) Service: When required.

(a)(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(a)(2) No service need be made on parties in default except that:

(a)(2)(A) a party in default shall be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear shall be served with all pleadings and papers;

(a)(2)(C) a party in default for any reason shall be served with notice of any hearing necessary to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason shall be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) pleadings asserting new or additional claims for relief against a party in default for any reason shall be served in the manner provided for service of summons in Rule 4.

(a)(3) In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made and by whom.

(b)(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. If an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice, service shall be made upon the attorney and the party. Service upon the attorney or upon a party shall be made by delivering a copy or by

mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.

(b)(1)(A) Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or, if consented to in writing by the person to be served, delivering a copy by electronic or other means.

(b)(1)(B) Service by mail is complete upon mailing. If the paper served is notice of a hearing and if the hearing is scheduled 5 days or less from the date of service, service shall be by delivery or other method of actual notice. Service by electronic means is complete on transmission if transmission is completed during normal business hours at the place receiving the service; otherwise, service is complete on the next business day.

(b)(2) Unless otherwise directed by the court:

(b)(2)(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(b)(2)(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(b)(2)(C) an order or judgment prepared by the court shall be served by the court.

(c) Service: Numerous defendants. In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service

completed by the person effecting service. Rule 26(i) governs the filing of papers related to discovery.

(e) Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk.

Rule 11. Signing of pleadings, motions, and other papers; representations to court; sanctions.

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to court. By presenting a pleading, written motion, or other paper to the court ~~(whether by signing, filing, submitting, or later advocating)~~, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Definition of "present." As used in this rule, to "present" a pleading, paper or motion to the court means to sign, file or submit it or to advocate the law or facts stated in it. Present does not mean to draft a pleading, paper or motion for a client.[1]

[1] I've said nothing about disclosing the identity of the ghost writer because Rule 10(a) requires the name of the attorney "representing" the party to be on the pleading. It seems that an attorney who prepares but does not sign pleadings does not represent the party. If that's incorrect, Rule 10 should be amended to state that the attorney need not be named on the pleading. If preparing and signing the pleading is within the scope of the NOLA, then the attorney does represent the party and would prepare, sign and file the pleading in the usual way.

~~(c)~~ (d) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

~~(c)(1)~~ (d)(1) How initiated.

~~(c)(1)(A)~~ (d)(1)(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

~~(c)(1)(B)~~ (d)(1)(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

~~(c)(2)~~ (d)(2) Nature of sanction; limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

~~(c)(2)(A)~~ (d)(2)(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

~~(c)(2)(B)~~ (d)(2)(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or

settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

~~(c)(2)(3)~~ (d)(2)(C) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

~~(d)~~ (e) Inapplicability to discovery. Subdivisions (a) through ~~(c)~~ (d) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

Rule 74. Withdrawal of counsel.

(a) If a motion is not pending and a certificate of readiness for trial has not been filed, an attorney may withdraw from the case by filing with the court and serving on all parties a notice of withdrawal. The notice of withdrawal shall include the address of the attorney's client and a statement that no motion is pending and no certificate of readiness for trial has been filed. If a motion is pending or a certificate of readiness for trial has been filed, an attorney may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of any pending motion and the date and purpose of any scheduled hearing.

(b) An attorney who has entered a limited appearance under Rule 75 may withdraw from the case by filing and serving a notice of withdrawal upon the conclusion of the purpose or proceeding identified in the Notice of Limited Appearance. An attorney who seeks to withdraw before the conclusion of the purpose or proceeding shall proceed under subdivision (a)

~~(b)~~ (c) If an attorney withdraws other than under subdivision (b), dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.

~~(c)~~ (d) Substitution of counsel. An attorney may replace the counsel of record by filing and serving a notice of substitution of counsel signed by former counsel, new counsel and the client. Court approval is not required if new counsel certifies in the notice of substitution that counsel will comply with the existing hearing schedule and deadlines.

Rule 75. Limited appearance.

(a) An attorney acting pursuant to an agreement with a client for limited representation that complies with the Utah Rules of Professional Conduct may enter an appearance limited to one or more of the following purposes:

(a)(1) filing a pleading or other paper;

(a)(2) filing or arguing a specific motion or motions;

(a)(3) conducting one or more specific discovery procedures;

(a)(4) acting as counsel for a particular hearing, including a trial, pretrial conference, or an alternative dispute resolution proceeding;

(a)(5) acting as counsel for an appeal; or

(a)(6) with leave of the court, for a specific issue or a specific portion of a trial or hearing, or any other matter.

(b) To enter a limited appearance the attorney shall file and serve as soon as practical prior to commencement of the appearance a Notice of Limited Appearance signed by the attorney and the party. The Notice shall specifically describe the purpose and scope of the appearance and state that the party remains responsible for all matters not specifically described in the Notice. The clerk shall enter on the docket the attorney's name and a brief statement of the limited appearance. The Notice of Limited Appearance and all actions taken pursuant to it are subject to Rule 11.

(c) Any party may move to clarify the description of the purpose and scope of the limited appearance.

(d) A party on whose behalf an attorney enters a limited appearance remains responsible for all matters not specifically described in the Notice.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(c) Memoranda.

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) Length. Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and

supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(f)(1) ~~An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment.~~ Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) A court may rule on a matter in open court or by minute entry, memorandum decision, or other writing served on all parties. Unless a written ruling is signed by the court and expressly states that no further order need be prepared, or ~~Unless~~ unless the court approves the proposed order submitted with an initial memorandum, ~~or unless otherwise directed by the court,~~ the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. If the prevailing party fails to timely serve a proposed order, any party may serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

(g) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.

Rule ~~23.1~~ 23A. Derivative actions by shareholders.

(a) ~~In~~ The complaint in a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association~~, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint~~ shall be verified and shall allege:

(a)(1) the right that the corporation or association could have enforced and did not;

~~(1)~~ (a)(2) that the plaintiff was a shareholder or member at the time of the transaction ~~of which he complains~~ complained of or that ~~his~~ the plaintiff's share or membership thereafter devolved ~~on him~~ to the plaintiff by operation of law~~, and~~;

~~(2)~~ (a)(3) that the action is not a collusive one to confer jurisdiction on ~~a~~ the court ~~of the United States which~~ that it would not otherwise have~~.~~;

(a)(4) ~~The complaint shall also allege~~ with particularity, the plaintiff's efforts, if any, ~~made by the plaintiff~~ to obtain the desired action ~~he desires from the directors or comparable authority and, if necessary, from the shareholders or members,~~; and

(a)(5) the reasons for ~~his~~ the failure to obtain the action or for not making the effort.

(b) The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

(c) The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

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May 3, 2006

Thomas N. Thompson
Haskins & Associates P.C.
357 South 200 East #300
Salt Lake City, UT 84111

Re: Utah Rules of Civil Procedure; Proposed Amendment to Rule 59

Dear Mr. Thompson:

Thank you for your letter regarding the proposed amendment to Rule 59. We will put it on the agenda for discussion at the next Rules of Civil Procedures Committee meeting.

Sincerely,

Francis M. Wikstrom

FMW/cc
cc: Tim Shea

HASKINS & ASSOCIATES P.C.
THOMAS N. THOMPSON
ATTORNEY AT LAW

357 SOUTH 200 EAST, SUITE 300
SALT LAKE CITY, UTAH 84111
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May 2, 2006

Fran Wikstrom, Chairman
Supreme Court Advisory Committee on the Rules of Civil Procedure
PARSONS BEHLE & LATIMER
201 South Main Street
Suite 1800
P. O. Box 45898
Salt Lake City, Utah 84145

re: Proposed Amendment to R. 59

Dear Fran:

I write to bring to your attention the Utah Supreme Court's recent ruling in *Gillette v. Price*, 2006 UT 24 (Filed April 28, 2006), a copy of which is enclosed with this letter.

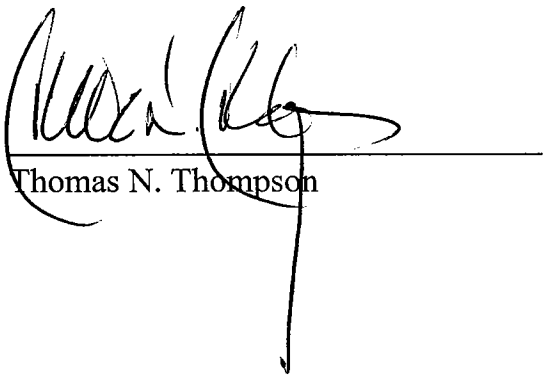
In *Gillette*, the Court in effect reverses many years of case law and directs attorneys to "discontinue the practice of filing post judgment motions to reconsider" the Court's judgment. As the Court quite properly points out, there is no provision in our current rules which permit such a motion. In the past, however, such motions have frequently been allowed on the (admittedly somewhat questionable basis) that they effectively seek to alter or amend the judgment and hence qualify for treatment under Rule 59. Equally frequently, the motion is based upon an error of law made by the trial judge, often because the judge has misconstrued the arguments of the parties or failed to adequately consider controlling precedent. Often, the error is clear enough that, if brought to the Court's attention in a timely fashion, corrective action is taken. Unfortunately, neither Rule 59 nor Rule 60 directly addresses this issue, and the purpose of my letter is to suggest that Rule 59 should be amended to allow for the filing of such motions under carefully prescribed circumstances. I leave to your Committee to determine just which circumstances would justify the filing of such a motion, but I believe it is vital that some mechanism be formulated to allow for such motions when there is no adequate remedy

under the rules as presently written. In *Gillett*, the Court does not address the practice of other state and federal courts on this issue, but without researching the question myself it is apparent that most other jurisdictions do allow motions to reconsider, either as a matter of informal practice or specifically in their own rules of civil procedure. In virtually all federal courts, for example, it is my impression that motions to reconsider are always allowed and are simply treated as motions to alter or amend the judgment under Rule 59. *See, e.g., Hawkins v. Evans*, 64 F.3d 543, 546 (10th Cir. 1995). Motions to alter or amend a judgment are typically justified based on only three narrow grounds: (1) an intervening change in the law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice. *See, e.g., Wendy's International, Inc. v. Nu-Cape Construction, Inc.*, 169 F.R.D. 680 (M. D. Fla. 1996).

Given the Utah Supreme Court's edict in *Gillette*, because no such motions are now permitted in Utah, and because Rules 59 and 60 do not adequately address the issue, the only remedy litigants will have in any given case will be to appeal the trial court's determination, thus substantially increasing the costs of litigation and adding to the caseload of our already overburdened appellate courts.

I will appreciate the Committee's consideration of this issue. Should you need or desire anything further from me, please feel free to contact me at your convenience.

Sincerely yours,



Thomas N. Thompson

2006 UT 24

This opinion is subject to revision before final publication in the Pacific Reporter.

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

David K. Gillett, an individual, and Majestic Air Services Incorporated, a Utah corporation,
Plaintiffs and Petitioners,

v.

Steve Price,
Defendant and Respondent.

No. 20050023

F I L E D

April 28, 2006

Third District, Sandy
The Honorable Royal I. Hansen
No. 030401300

Attorneys: Stephen G. Homer, Salt Lake City, for plaintiffs
Randall L. Skeen, Todd R. Mecham, Salt Lake City, for defendant

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On Certiorari to the Utah Court of Appeals

DURHAM, Chief Justice:

INTRODUCTION

¶1 The filing of postjudgment motions to reconsider has become a common litigation practice, notwithstanding the Utah Rules of Civil Procedure's failure to authorize it and our previous attempts to discourage it. In this opinion, we consider whether this practice tolls the time for filing a notice of appeal. We answer this question by absolutely rejecting the practice of filing postjudgment motions to reconsider. We also warn that future filings of postjudgment motions to reconsider will not toll the time for appeal and therefore may subject attorneys to malpractice claims.

BACKGROUND

¶2 This case began as a contract dispute. For our purposes, it is sufficient to note that the plaintiffs filed a complaint against the defendant claiming that he had breached an entrustment contract by stealing their property. The defendant filed a motion for summary judgment on the ground that the parties had an oral contract for which the applicable four-year statute of limitations had run. In response, the plaintiffs argued that the parties had a written contract and thus had a six-year statute of limitations period within which to file a complaint.[1] The district judge did not find any evidence of a written contract and granted the defendant's motion, issuing a memorandum decision on May 26, 2004, and entering a final order on June 16, 2004.

¶3 On June 9, 2004, after the issuance of the memorandum decision but before the entry of final judgment, the plaintiffs filed a motion titled "Plaintiffs' Motion for Reconsideration," arguing that the district court had misconstrued certain documents and ignored factual disputes. The district court denied this motion on July 21, 2004. On August 4, 2004, nearly two months after the district court granted the defendant's motion for summary judgment, the plaintiffs filed a notice of appeal.

¶4 The court of appeals held that the plaintiffs' notice of appeal was not timely because it was filed more than thirty days after the district court's final order granting summary judgment. Gillett v. Price, 2004 UT App 460U, Para. 7. In so holding, the court of appeals rejected the plaintiffs' contention that the motion for reconsideration should be construed as either a motion to alter or amend judgment or a motion for a new trial, id., both of which toll the thirty-day period under rule 4(b) of the Utah Rules of Appellate Procedure. We granted certiorari to determine whether a motion for reconsideration challenging a district court's reasoning for its earlier judgment constitutes a proper postjudgment motion, thereby tolling the time for appeal.

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[1] The plaintiffs' original complaint was dismissed for failure to serve the defendant with notice. However, the plaintiffs refiled the complaint within one year of the dismissal, thereby taking advantage Utah Code section 78-12-40 (2002), which provides that if an action is commenced within due time, and the action fails or is reversed on grounds other than the merits, the action survives for one year after the failure or reversal. Thus, if the statute of limitations in this case were six years, the plaintiffs' complaint would have been timely.

We have jurisdiction pursuant to Utah Code section 78-2-2(5) (2002).

STANDARD OF REVIEW

¶5 "On certiorari, we review the court of appeals' decision for correctness." State v. 736 N. Colo. St., 2005 UT 90, ¶ 6, __ P.3d __ (quoting State v. Garner, 2005 UT 6, ¶ 7, 106 P.3d 729). We affirm the court of appeals' judgment and hold that motions to reconsider are not sanctioned by our rules and therefore do not toll the time for appeal under any circumstance.

ANALYSIS

¶6 Under the Utah Rules of Appellate Procedure, a party may file a notice of appeal "within 30 days" of a final judgment. Utah R. App. P. 4(a). Rule 4(b) of the Utah Rules of Appellate procedure provides that some timely filed postjudgment motions will toll the thirty-day period until the district court enters an order regarding that motion. The motions that toll the time for appeal under rule 4(b) include (1) a motion for judgment notwithstanding the verdict under rule 50(b) of the Utah Rules of Civil Procedure, (2) a motion to amend or make additional findings of fact under rule 52(b) of the Utah Rules of Civil Procedure, and (3) a motion to amend or for a new trial under rule 59 of the Utah Rules of Civil Procedure. Not included within the 4(b) exceptions, however, is a postjudgment motion to reconsider. Id. In fact, postjudgment motions to reconsider are not recognized anywhere in either the Utah Rules of Appellate Procedure or the Utah Rules of Civil Procedure. See Ron Shepherd Ins., Inc. v. Shields, 882 P.2d 650, 653 n.4 (Utah 1994) ("[T]his court has consistently held that our rules of civil procedure do not provide for a motion for reconsideration of a trial court's order or judgment . . . ."); Watkiss & Campbell v. Foa & Son, 808 P.2d 1061, 1064 (Utah 1991)(recognizing that the Utah Rules of Civil Procedure do not technically allow motions to reconsider); Peay v. Peay, 607 P.2d 841, 842-43 (Utah 1980) (same).

¶7 The plaintiffs do not contend that motions to reconsider are recognized under rule 4(b). Instead, they argue that their motion to reconsider was in substance a motion to alter or amend the judgment under rule 59, Utah Rules of Civil Procedure and therefore tolled the time for appeal. The court of appeals disagreed, finding that the motion's substance was not that of a motion to alter or amend. Gillett, 2004 UT App 460U, Para. 5. We go beyond the reasoning of the court of appeals and hold that, regardless of the motion's substance, postjudgment motions to reconsider and other similarly titled motions will not

toll the time for appeal because they are not recognized by our rules.[2]

¶8 We realize that this holding repudiates a long line of cases from both the court of appeals and this court treating motions to reconsider as rule-sanctioned motions based on the substance of the motion. See, e.g., Watkiss, 808 P.2d at 1064-65; Gallardo v. Bolinder, 800 P.2d 816, 817 (Utah 1990); Bonneville Billing & Collection v. Torres, 2000 UT App 338, ¶ 4, 15 P.3d 112; Regan v. Blount, 1999 UT App 154, ¶ 5, 978 P.2d 1051; Salt Lake Knee & Sports Rehab., Inc. v. Salt Lake City Knee & Sports Med., 909 P.2d 266, 268-69 (Utah Ct. App. 1995); Davis v. Grand County Serv. Area, 905 P.2d 888, 891-92 (Utah Ct. App. 1995); Brunetti v. Mascaro, 854 P.2d 555, 557 (Utah Ct. App. 1993). We are now persuaded that it is time this practice comes to an end. In our system, the rules provide the source of available relief. They "[are] designed to provide a pattern of regularity of procedure which the parties and the courts [can] follow and rely upon." Drury v. Lunceford, 415 P.2d 662, 663 (Utah 1966). Accordingly, the form of a motion does matter because it directs the court and litigants to the specific, and available, relief sought. See Utah R. Civ. P. 7(b) ("A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought."). Hereafter, when a party seeks relief from a judgment, it must turn to the rules to determine whether relief exists, and if so, direct the court to the specific relief available. Parties can no longer leave this task to the court by filing so-called motions to reconsider and relying upon district courts to construe the motions within the rules.

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[2] Arguably, the plaintiffs' motion could not even be construed as a postjudgment motion to amend under our prior case law because the plaintiffs filed it before the entry of a final judgment. We addressed a similar situation in Ron Shepherd Ins., Inc. v. Shields, where we held that a motion to reconsider filed after an unsigned minute entry but before a final judgment was not a postjudgment motion, but rather a reargument that the district court was free to consider any time before entering the final judgment. 882 P.2d 650, 653-54 (Utah 1994). In any event, such a prejudgment motion would not toll the time for appeal once a final judgment was entered. We also note that rule 4(c) of the Utah Rules of Appellate Procedure, which provides that a notice of appeal filed after the announcement but before the entry of judgment will be treated as a motion filed after the entry of judgment, is of no effect in this case.

¶9 We do not abandon our precedent lightly, but we have discouraged the use of motions to reconsider in the past. For example, in Shipman v. Evans, we noted that motions to reconsider "have proliferated in civil actions to the extent that they have become the cheatgrass of the litigation landscape" and encouraged attorneys to reverse the trend. 2004 UT 44, ¶ 18 n.5, 100 P.3d 1151 (internal citation omitted). Likewise, in Salt Lake Knee, we stated that we did not approve of "the use of pleadings identified as something not provided for in the Utah Rules of Civil Procedure" and warned that this practice could "seriously compromise" the position of a litigant. 909 P.2d at 269 n.2. Unfortunately, our advice does not appear to have had the desired effect.

¶10 We note that this holding applies to post-final-judgment motions to reconsider; it does not affect motions to or decisions by the district courts to reconsider or revise nonfinal judgments, which have no impact on the time to appeal and are sanctioned by our rules. See Utah R. Civ. P. 54(b) (providing that when a case involves multiple claims or parties, any order or other decision that does not adjudicate all of the claims is subject to revision at any time before a final judgment on all the claims).

¶11 The defendant has requested attorney fees under rules 33 and 34 of the Utah Rules of Appellate Procedure, claiming that plaintiffs' application for a writ of certiorari was frivolous. Given that filing motions to reconsider has been a common practice among Utah attorneys, we disagree that the plaintiffs' petition for certiorari was frivolous and therefore deny the defendant's request.

CONCLUSION

¶12 We therefore affirm the court of appeals and direct attorneys to immediately discontinue the practice of filing post judgment motions to reconsider.

¶13 Associate Chief Justice Wilkins, Justice Durrant, Justice Parrish, and Justice Nehring concur in Chief Justice Durham's opinion.

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:

(a)(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.

(a)(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.

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

(a)(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.

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

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

(a)(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.

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

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