

IN THE UTAH COURT OF APPEALS

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William G. Beddoes,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellant,)	
)	Case No. 20051154-CA
v.)	F I L E D
)	(March 30, 2006)
Gary Giffin,)	
)	2006 UT App 130
Defendant and Appellee.)	

Third District, Salt Lake Department, 040907525
The Honorable Anthony B. Quinn

Attorneys: William P. Morrison and Grant W.P. Morrison, Salt
Lake City, for Appellant
Sean A. Monson, Salt Lake City, for Appellee

Before Judges Bench, Greenwood, and Billings.

PER CURIAM:

Appellee Gary Giffin moves to dismiss this appeal for lack of jurisdiction and also seeks sanctions under rule 33 of the Utah Rules of Appellate Procedure.

On September 22, 2005, the district court entered an order granting summary judgment and dismissing Beddoes's complaint with prejudice on the merits. On September 29, 2005, Giffin moved for an award of costs under rule 54(d)(1) of the Utah Rules of Civil Procedure. On November 2, 2005, the district court denied the request in a signed minute entry. Beddoes prepared a formal order, which was signed and filed on November 28, 2005. Beddoes filed a notice of appeal from the summary judgment on December 22, 2005. Giffin argues that the appeal must be dismissed because the September 22, 2005 order granting summary judgment, rather than the November 28, 2005 order denying costs, was the final, appealable judgment.

The jurisdictional issue is addressed in ProMax Dev. Corp. v. Raile, 2000 UT 4, 998 P.2d 254, and Nielson v. Gurley, 888 P.2d 130 (Utah Ct. App. 1994). In Nielson, we stated that an amendment to a judgment clarifying that the prevailing party was entitled to recover costs "did not create a new judgment for

purposes of determining the timeliness of appeal, and the time [for] appeal commenced to run from the date of the original judgment." Nielson, 888 P.2d at 133. In ProMax, the Utah Supreme Court denied a motion to dismiss an appeal filed after entry of an order awarding a liquidated amount of attorney fees, but more than thirty days after the original judgment dismissed the complaint on the merits. The supreme court concluded:

Where attorney fees are awarded to a party, whether denominated as an item of "costs" or not, and the amount is not stated in the judgment rendered on the merits of the case, and evidence must be taken afterwards by the trial court either by affidavit or live testimony, there is no final judgment for the purposes of appeal until the amount of the fees has been ascertained and granted. However, when, as in Nielson, no attorney fees are involved but only court costs, which are usually small statutory amounts or liquidated amounts, such costs can be added later to a judgment without affecting its finality.

Promax, 2000 UT 4 at ¶12.

The September 22, 2005 order granting summary judgment and dismissing Beddoes's claims was the final, appealable judgment. As the prevailing party, Giffin sought to recover costs under rule 54(d)(1) of the Utah Rules of Civil Procedure; however, Giffin did not seek an award of attorney fees. The addition of costs to the judgment, if the request had been granted, would not have affected the finality of the September 22 order for purposes of appeal. Because Beddoes's notice of appeal was not filed within thirty days after entry of final judgment, we lack jurisdiction to consider the appeal.

In support of the request for sanctions under rule 33 of the Utah Rules of Appellate Procedure, counsel for Giffin asserts that he wrote to counsel for Beddoes stating that the appeal was not timely and also stating his intention to seek sanctions under rule 33 if the appeal was not voluntarily dismissed. Beddoes's counsel declined to voluntarily dismiss the appeal. Giffin seeks an award of attorney fees as a sanction for filing a frivolous appeal. Although Beddoes's arguments are inconsistent with both ProMax and Nielson, we liberally construe them as good faith arguments for a modification of the existing case law and deny Giffin's request for sanctions on that basis.

We dismiss the appeal for lack of jurisdiction but deny the request for sanctions under rule 33 of the Utah Rules of Appellate Procedure.

Russell W. Bench,
Presiding Judge

Pamela T. Greenwood,
Associate Presiding Judge

Judith M. Billings, Judge