

Shumate

UTAH SUPREME COURT FOR THE STATE OF UTAH

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JUN 05 1997

STATE OF UTAH
JUDICIAL CONDUCT COMMISSION

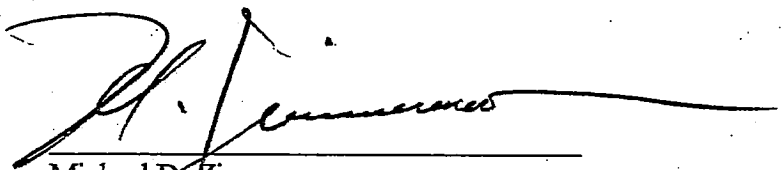
Re: Inquiry Concerning A Judge
James L. Shumate, Judge

No. 970227
F-038-95

ORDER

Pursuant to the authority vested in the Supreme Court by article VIII, section 13 of the Utah Constitution, and section 78-7-30(4)(a) of the Code, the court accepts the stipulation consenting to the implementation of the Commission's Findings of Fact, Conclusions of Law, and Order, in this matter.

Date 6/1/97



Michael D. Zimmerman
Chief Justice
For The Court

BEFORE THE JUDICIAL CONDUCT COMMISSION

INQUIRY CONCERNING

A JUDGE

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

Case No. F-038-95

A quorum of the Commission, having considered the record in this case, enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

The following facts were stipulated to by the parties:

1. Prior to his appointment to the bench and while a private practice attorney, Judge Shumate began representing John D. Garrett (Garrett) in the spring of 1984 when Garrett engaged Judge Shumate to assist in collecting a debt owed on a construction contract with the Brian Head Hotel. Judge Shumate entered into a contingency-fee agreement with Garrett in connection with the Brian Head Hotel collection matter.
2. On June 4, 1984, Judge Shumate recorded a Notice of Lien on behalf of Garrett with the Iron County Recorder's office.
3. Judge Shumate failed to record a notice of lis pendens with the Iron County Recorder's office in connection with the Garrett lien.
4. On June 24, 1984, Judge Shumate filed suit in the District Court for Iron County, Utah, to foreclose the Garrett lien.

5. Brian Head Hotel removed the Garrett lien-foreclosure action from the Iron County District Court to federal court.

6. On November 12, 1985, Brian Head Hotel filed a Chapter 11 bankruptcy petition with the United States Bankruptcy Court for the District of Utah, Central Division.

7. On August 28, 1986, Brian Head Hotel's Chapter 11 bankruptcy proceeding was converted to a Chapter 7 proceeding.

8. On January 16, 1989, Garrett, through J. Keith Henderson (Henderson), a Salt Lake City attorney who had been engaged to assist with the Garrett lien, filed an adversary proceeding in the bankruptcy court which sought to establish the validity and priority of the Garrett lien.

9. On February 2, 1989, First American Group (First American), one of Brian Head Hotel's secured creditors, filed a motion to dismiss the Garrett adversary proceeding on two grounds: (1) the "jurat" (notary seal) was defective because it did not show the notary public's county of residence; and (2) no notice of lis pendens was recorded in connection with the Garrett lien.

10. On April 15, 1989, the Garrett lien was invalidated by the bankruptcy court because no county of residence was identified in the notary seal. Garrett, through Henderson, appealed that ruling, and the United States District Court for the District of Utah certified the issues presented to the Utah Supreme Court for consideration.

11. On October 20, 1990, the Utah Supreme Court ruled that "there was substantial compliance with Utah Code Ann. Section 46-1-8 (1981) and that Garrett's lien is not invalid because of the absence of the notary's place of residence from the jurat."

12. On November 21, 1990, Judge Shumate filed an application for judicial appointment with the Administrative Office of the Courts, seeking appointment to the office of Circuit Judge in the Fifth Judicial District Court of Washington County, Utah. Question 31-e on Judge Shumate's application asks whether the applicant has ever been or is currently a defendant in a malpractice suit. Judge Shumate answered "no." Question 33 asks whether the applicant is "currently the subject of an investigation which could result in civil or criminal action[.]" Judge Shumate answered "no."

13. On December 21, 1990, Judge Shumate was informed by Governor Bangerter's office that he had been selected as the Governor's nominee to fill the vacancy in the Fifth Circuit Court in St. George, Utah. At that point, Judge Shumate began to close out his law practice and informed Garrett that he was going to be leaving the private practice of law. Garrett authorized Judge Shumate to turn the Brian Head Hotel lien-foreclosure matter over to Henderson, who had handled the appeal of the bankruptcy court's ruling to the Utah Supreme Court.

14. On January 15, 1991, Judge Shumate was confirmed a Circuit Judge by the Utah Senate, and was sworn into office.

15. Judge Shumate never filed a notice of withdrawal or motion to withdraw as counsel in the Garrett lien-foreclosure action, either with the Fifth Judicial District Court of Iron County, Utah, or with the United States Bankruptcy Court.

16. After his appointment as a full-time Circuit Judge, Judge Shumate was precluded from practicing law (except for acting *pro se* or giving advice to family members) by Canon 4G of the Code of Judicial Conduct (CJC).

17. On May 6, 1991, First American filed a motion for summary judgment in the Brian Head Hotel bankruptcy proceeding. Henderson should have filed a written response to First American's motion, but he did not do so. Henderson had also failed to conduct any discovery to determine whether First American had actual notice of the Garrett lien. First American may have had actual notice of the Garrett claim but denied having such notice in its motion for summary judgment.

18. On June 16, 1991, a hearing was held in the bankruptcy court on First American's motion for summary judgment. Henderson, representing Garrett, appeared at the hearing and stipulated that First American had no actual knowledge of the Garrett lien. As a result, the court granted First American's motion and invalidated the Garrett lien.

19. Shortly after the bankruptcy court invalidated his lien, Garrett engaged Blake Atkin (Atkin), a Salt Lake City attorney, to determine whether Garrett had a meritorious claim for malpractice against Judge Shumate and Henderson.

20. On May 12, 1992, Atkin, representing Garrett as the plaintiff, filed a complaint for malpractice against Judge Shumate and Henderson in the United States District Court for the District of Utah, Central Division.

21. On May 24, 1994, a federal-court jury entered a verdict against Judge Shumate and Henderson in the malpractice case and awarded \$99,962 in damages. The jury, and subsequently, the court, attributed 80% of the negligence to Judge Shumate and 20% to Henderson. The court also awarded \$99,600 in interest on the judgment, so that Judge Shumate was liable to Garrett for \$159,650 (80% of the total judgment of \$199,562).

22. On August 11, 1994, Judge Shumate filed a Chapter 11 bankruptcy petition in

the United States Bankruptcy Court for the District of Utah.

23. On October 7, 1994, Garrett filed a complaint against Judge Shumate with the Commission.

24. Sometime around February 10, 1995, Judge Shumate gave a copy of the complaint Garrett filed with the Commission to the judge's bankruptcy attorney, Duane H. Gillman (Gillman). Gillman advised Judge Shumate that Garrett's commencement of a judicial-disciplinary proceeding with the Commission was a clear violation of the automatic stay entered by the bankruptcy court that could subject Garrett to sanctions. Gillman suggested that Garrett be served with an order to show cause why Garrett should not be sanctioned for filing an ethics complaint with the Commission, and Judge Shumate said "go ahead." The order to show cause was issued and served on Garrett sometime around February 10, 1995.

25. On March 6, 1995, the order to show cause against Garrett was dismissed by stipulation.

26. Paragraph 5.2 of Judge Shumate's First Amended Plan of Reorganization Dated March 14, 1995 (Plan) provides that Garrett will receive \$38,000 from Judge Shumate personally and an additional \$2,000 from the judge's malpractice insurer within 30 days of the effective date of the Plan. The Plan also provides that Garrett will share pro-rata in any recovery in connection with Judge Shumate's claim against his professional liability insurer. The Plan further provides that Judge Shumate will retain his exempt personal property, his homestead exemption on the Los Padres Drive property, and receive a discharge of all other obligations, including any deficiency in connection with Garrett's judgment.

27. Judge Shumate filed suit against his professional liability insurer, and the case

was set for trial in the fall of 1996, but the trial was continued.

28. Judge Shumate paid \$38,000, and the judge's professional liability carrier paid \$2,000 to Garrett, leaving a deficiency of approximately \$119,650.

CONCLUSIONS OF LAW

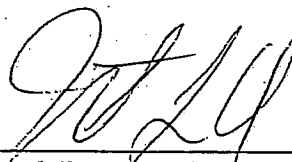
Judge Shumate engaged in conduct prejudicial to the administration of justice which brought a judicial office into disrepute, in violation of Section 78-7-28(1)(e) of the Utah Code, because he failed to conduct his extra-judicial activities in connection with the Garrett lien-foreclosure action so that those activities did not demean the judicial office, in violation of Canon 4A of the Code of Judicial Conduct.

ORDER

Judge Shumate is publicly reprimanded for engaging in conduct prejudicial to the administration of justice which brought a judicial office into disrepute, in violation of Section 78-7-28(1)(e) of the Utah Code, because he failed to conduct his extra-judicial activities in connection with the Garrett lien-foreclosure action so that those activities did not demean the judicial office, in violation of Canon 4A of the Code of Judicial Conduct.

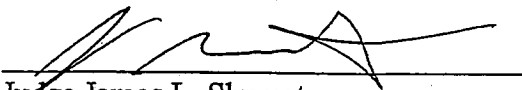
DATED this 13th day of May, 1997.

THE JUDICIAL CONDUCT COMMISSION



Kenneth L. Warnick, Chair

APPROVED AS TO FORM AND CONTENT

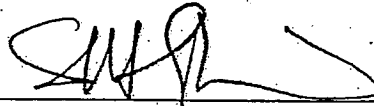


Judge James L. Shumate

6 May 97

CERTIFICATE OF SERVICE

I hereby certify that on the 15TH day of MAY, 1997, I mailed a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**, postage prepaid, to the Hon. James L. Shumate, Fifth District Court, Washington County Hall of Justice, 220 North 200 East, St. George, UT 84770.



Steven H. Stewart