2009

Jack W. Peterson v. D. Scott Jackson, Alan D. Allred, and Peterson Allred Jackson, P.C. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JACK W. PETERSON,

Plaintiff, Counterclaim Defendant, and Appellee/Cross-Appellant

vs.

D. SCOTT JACKSON; ALAN D. ALLRED; and PETERSON ALLRED JACKSON, P.C.,

Defendants, Counterclaim Plaintiffs, and Appellants/Cross Appellees.

REPLY BRIEF OF APPELLANTS AND BRIEF OF CROSS - APPELLEES

Case No. 20090710-CA

Trial Court No. 06-0102504
Judge Kevin K. Allen

REPLY BRIEF OF APPELLANTS AND BRIEF OF CROSS-APPELLEES

Appeal from a Judgment of the
First Judicial District Court
Cache County, Utah
The Honorable Judge Kevin K. Allen Presiding

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(ORAL ARGUMENT REQUESTED)

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I

PAJ'S DUTY TO MARSHAL ON QUESTIONS OF FACT NOT RIPE BECAUSE OF THE TRIAL COURT'S INSUFFICIENT FINDINGS OF FACT.

As asserted in PAJ's original brief, the Trial Court failed to make sufficient findings that are sufficiently detailed to show that the "court's judgment or decree follows logically from, and is supported by the evidence. The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *See Rasband v. Rasband,* 752 P.2d 1331, 1334 (Utah Ct. App. 1988) (quoting *Acton v. Deliran,* 737 P.2d 996, 999 (Utah 1987) (internal quotations and citation omitted). In the absence of sufficient findings, it is impossible for PAJ to marshal the evidence, especially where the Trial Court left it unclear as to what specific evidence it relied upon and failed to disclose the steps it took in reaching its ultimate conclusion as to the value of PAJ shares. In short, there are no specific findings for which PAJ can marshal evidence. Or as further stated in *Acton v. Deliran*, "The absence of findings of fact is a fundamental defect that makes it impossible to review the issues that were briefed without invading the trial court's fact finding domain." *Id.*

One must marshal the evidence to successfully "challenge the correctness of a trial court's finding of fact." *See Alta Industries LDT v. Hurst*, 846 P.2d 1282 (Utah 1993).

Thus, the existence of sufficient trial court findings is a pre-requisite to the obligation to marshal. The marshalling requirements do not circumvent the Trial Court's obligation to make sufficient findings.

PAJ fully intends to meet its duty to marshal the evidence as necessary once the Trial Court clarifies its ruling by making sufficient findings of fact that can be logically followed and clearly indicate the steps by which the Trial Court reached its conclusions.

No need to Marshal on Questions of Law

As it relates to the choice of valuation methods, the Utah Supreme Court has held that such choice is a question of law and therefore does not require marshalling of evidence. *See Hogle v. Zinetics Medical, Inc.*, 63 P.3d 80, 86 (Utah 2002). The Utah Supreme Court further indicated that: "We note that the selection of guideline companies was part of the determination of market value, which is one of the three primary valuation models." *Id.* at 87. "[W]hile the ultimate determination of fair value is a question of fact, the determination of whether a given fact or circumstance is relevant to fair value under [state law] is a question of law we review *de novo*." *Id.* at 84 (internal citations omitted).

II

PAJ PRESERVED THE ISSUE OF INSUFFICIENCY OF THE TRIAL COURT'S FINDINGS FOR APPEAL

The idea of Peterson arguing PAJ failed to preserve the issue of insufficient findings is ironic. PAJ brought the Rule 52(b) Motion[1] before the Trial Court. In reality

[1] Together with its Motions under Rules 59(a), 60(a), 60(b)(1) 60(b)(6) and 62(b) Ut. R. Civ. Proc.

it was Peterson who failed to preserve the issues he has now appealed. Peterson did not file a cross Rule 52(b) Motion.

Peterson contends PAJ only asked the Trial Court to address incomplete or erroneous findings rather than insufficient findings. Contrary to Peterson's assertions, a plain reading of PAJ's initial and reply Memorandums in Support of Motions for Amendment of Judgment, Relief from Judgment and Amendment of Findings clearly demonstrate otherwise. PAJ's Reply Memorandum stated:

"PAJ further seeks 7 additional findings under Rule 52(b) URCP. Absent these findings, PAJ submits the Decision is not "sufficiently detailed [to] include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *See Andrus v. Andrus*, 196 P.3d 754 (Ut. Ct. App. 2009) at 759; *See Exhibit F, Brief of Appellants."*

PAJ also notes its Motion for Amendment of Findings under rule 52(b) was filed together with a motion to correct erroneous findings under Rule 60(a)(b(1) and b(6) and a Motion to for Relief of Judgment under Rule 59(b) URCP. While PAJ did ask the Trial Court to correct mathematical errors, such was only one aspect of the post-judgment relief it sought. As summarized in PAJ's Reply Memorandum, PAJ gave the Trial Court the opportunity to correct its findings on all issues currently on appeal.

PAJ reiterates three of the questions left unanswered by the Trial Court:

Additional Finding Requested #1 - The Court failed to address the issue of whether, as a matter of law, an adjustment to fair value should be made when taking into account enterprise versus personal goodwill. This issue was well briefed beginning on Page 17 of the Bowles Report, and the court heard significant testimony on this issue at trial.

Additional Finding Requested #2 - Once the legal conclusion regarding goodwill is resolved, the Court then must make a finding as to the proper adjustment to fair value.

Additional Finding Requested #4 - The Court failed to make any findings justifying the applicability of Townsend's market analysis, including a finding as to whether Townsend's market data is comparable to PAJ given the vast discrepancy between Townsend's market and income approaches.

The Trial Court went so far as to issue a new Memorandum Decision dated July 20, 2009[2]. Nevertheless, on the key issues stated in PAJ's appeal, the Trial Court's findings are not sufficient to "disclose the steps by which the ultimate conclusion on each factual issue was reached." *See Gardner v. Gardner,* 748 P.2d 1076 (Utah 1988) (citing *Rucker v. Dalton,* 598 P2d 1336, 1388 (Utah 1979).

PAJ cited facts and case law in support of its several requests for the Trial Court to make its findings more specific and sufficient to satisfy the requirements articulated in *438 Main Street. See 438 Main Street v. Easy Heat, Inc.*, 99 P.3d 801 (Utah 2004).

As far back as 1928, the Utah Supreme Court held in *Prows v. Hawley*, 271 P. 31 (Utah 1928), that "it is the undoubted rule, that until the court has found on all material issues raised by the pleadings, the findings are insufficient to support a judgment; and that findings should be sufficiently distinct and certain as not to require an investigation or review to determine what issues are decided. *Id.* at 33. The "additional" findings sought by PAJ in its Motion were "necessary" findings and required as a result of the pleadings it filed and arguments it made at trial together with the necessity for the Trial Court to make sufficient findings not to require an investigation on the part of PAJ or guess as to how the Trial Court reached its conclusions.

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[2] The Trial Court's Initial Memorandum Decision was dated April 17, 2009.

III

THE TRIAL COURT'S FINDINGS ARE INSUFFICIENT AS A MATTER OF LAW

Peterson asserts that the mere statement by the Trial Court that the fair value of PAJ's shares is $459,000 is a sufficient finding when combined with its statement that it found the Townsend Report to be more credible. Peterson further contends that all other findings are "additional" findings bolstering the Trial Court's opinion and are not "necessary" findings. PAJ submits this are incorrect statements. While the Trial Court is clearly authorized to exercise its broad discretion in weighing the evidence presented to it, mere reliance upon an expert's opinion without providing any instructive guidance on the steps the Trial Court took in reaching its own conclusions is problematic because it requires "invading the trail courts fact-finding domain." *See Acton v. Deliran,* 737 P.2d 996, 999 (Utah 1987).

Under this rationale, a Trial Court's decision regarding fair value only has to include a dollar figure coupled with a statement that expert one is right and expert two is wrong. This approach provides no guidance and certainly is inconsistent with the rule of law stated above that the findings must be "sufficiently detailed to and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *See Rasband v. Rasband,* 752 P.2d 1331, 1334 (Utah Ct. App. 1988) (quoting *Acton v. Deliran,* 737 P.2d 996, 999 (Utah 1987) (internal quotations and citation omitted). A Trial Court still must articulate the basis upon which it reached its conclusions and confirm the analysis of the expert witness relied upon in reaching its own

conclusions. The opinion of the expert witness does not replace the required analysis of the Trial Court in making sufficient findings of fact.

For the reasons stated herein and as outlined in PAJ's opening Brief, the Trial Court failed as a matter of law to make sufficient findings in reaching its conclusion as to the value of the PAJ shares and otherwise justifying its reliance upon the Townsend Report, the application of Townsend's market approach, its misguided understanding of .92, etc.

IV

WHETHER THE NON-SOLICITATION AGREEMENT CONVERTED PERSONAL GOODWILL TO ENTERPRISE GOODWILL IS A QUESTION OF LAW AND IS A MATTER OF FIRST IMPRESSION

The term "fair value" is used in at least three areas of Utah law: namely divorce, dissenter rights and judicial dissolution. *See Stonehocker v. Stonehocker*, 176 P.3d 476 (Utah 2008) (Divorce); UCA §16-10a-1301 (Dissenter's Rights); UCA §16-10a-1434(4) (Judicial Dissolution).

It would appear in each instance the same definition applies. For example, *Hogle* was a Dissenter's Rights case, which has been relied on by both parties in this Judicial Dissolution case.

In helping trial courts determine fair value, the Appellate Courts have provided some guidance. For example, *Hogle* also made it clear that "fair value" does not allow for minority interest or lack of marketability discounts. *See Hogle v. Zinetics Medical, Inc.*, 63 P.3d 80, 90 (Utah 2002). *Hogle* also noted that fair value is not "liquidation value" but "going concern value" in a Dissenter's Rights action. *Id.* at 86.

As outlined in PAJ's opening Brief, the Utah Supreme Court has held that the fair value of a business in a divorce case "...should be determined independent of any goodwill component. There can be no goodwill in a business that is dependent for its existence upon the individual who conducts the enterprise and would vanish were the individual to die, retire or quit work." *See Stonehocker v. Stonehocker*, 176 P.3d 476, 490 (Utah 2008).

The question before this Court is whether goodwill should also be excluded when determining fair value in a judicial dissolution action.[3] A related question before the Court is whether the undisputed "non-solicitation"[4] provision in the shareholders' employment agreements converts shareholder personal goodwill to enterprise goodwill?

The effect of a non-solicitation provision on personal goodwill is of great importance to any shareholder asked to sign a "standard" non-solicitation or non-competition agreement. If such an agreement destroys the value of a shareholder's personal goodwill, the use of such "standard" agreements would be greatly affected. As already articulated in PAJ's opening Brief, it would seem impossible for a non-solicitation agreement to have any effect on personal goodwill, since the non-solicitation agreement cannot transfer that person's qualifications, experiences, degrees, knowledge, etc.

The question of how Utah Trial Courts should deal with goodwill in fair value cases needs Appellate Court guidance—similar to how the courts have addressed

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[3] And likely a dissenters rights action as well.
[4] As apposed to a non-competition agreement.

minority interest and lack of marketability discounts as well as "going concern value" versus "liquidation value." PAJ respectfully requests that this Court provide instructions that when determining fair value in a judicial dissolution action that the shareholders' personal goodwill not be included in determining the fair value of the business.

V

THE TRIAL COURT COMMITTED ERROR WHEN IT RELIED UPON AN INCORRECT CALCULATION OF THE 2001 BUY IN

As outlined in PAJ's opening Brief, the Trial Court indicated in its original Memorandum Decision that it relied upon Jackson's 2001 buy-in as a "guidepost in its decision." As part of PAJ's Motion for Relief of Judgment under Rule 60(a)(6) and 60(b)(1) and (6) , PAJ directed the Trial Court to undisputed evidence introduced at trial establishing that Jackson's 2001 buy-in was not a cash sale but rather financed by non-interest bearing Promissory Notes and asked the Trial Court to apply a present value analysis to its calculations. *See Motion to Amend Findings, Addendum F, pg. 5-7; TR at 688 and 875.*

Rather than acknowledging and correcting its error, the trial court flip-flopped by then stating it did not rely on the same information it previously called a "guidepost." This flip illustrates an apparent abuse of discretion in the Trial Court for failure to acknowledge the consequences of its reliance on an inaccurate formula.

CONCLUSION

For these reasons, PAJ respectfully requests that this Court remand this case with guidance to the Trial Court that will aid it in making sufficient findings regarding the fair value of PAJ shares with detailed instructions as follows:

1) That the Trial Court specifically address the comparability of the sample companies used in Townsend's market approach to PAJ by making findings of fact addressing the comparability in terms of company size, geographic location, revenues, cash flow, etc.;

2) That the Trial Court specifically address the issue of personal goodwill with a holding by this Court that a fair value determination in dissolution cases does not include personal goodwill of the shareholders;

3) That this Court holds as a matter of law that the non-solicitation clause of the employment agreement does not convert shareholder personal goodwill to enterprise goodwill;

4) That the Trial Court re-determine the fair value of PAJ exclusive of the shareholders' personal goodwill;

5) That the Trial Court correct the mathematical error regarding the Jackson 2001 buy-in correct the consequence from any reliance thereon; and,

6) That the Trial Court conduct an evidentiary hearing or new trial as may be necessary to enable the Trial Court to make sufficient findings regarding these matters.

ARGUMENT IN RESPONSE TO APPELLEE'S CROSS-APPEAL BRIEF

STATEMENT OF FACTS

PAJ incorporates only Statements of Fact 2 and 3 proffered by Peterson. Peterson's remaining "Statements of Facts" are better described as "allegations."

In regards to Statement four (4), Townsend valued Peterson's 36.37% interest as of December 31, 2006 as $459,000, and concluded further that Peterson should be entitled to $46,625 of the undistributed cash as of December 31, 2006. The allegation that Peterson's interest was valued at $505,625 is incorrect. This issue is more particularly argued in Argument Section I below herein.

Statements six (6) and seven (7) pertain to the interest rate awarded by the Trial Court. PAJ notes that this matter was not brought as a breach of contract case but rather judicial dissolution under Utah Code Ann. §16-10a-1430. PAJ has more fully addressed the issues regarding the interest rate in Argument Section II below herein.

Statements five (5), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), and fifteen (15), pertain to Peterson's allegations of oppressive conduct, which are more particularly addressed in Argument Section III below herein.

I

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ITS DETERMINATION THAT PETERSON WAS NOT ENTITLED TO A DISTRIBUTION OF CLAIMED EXCESS CASH

Peterson asserts that he was entitled to a distribution of additional cash on hand as of December 31, 2006. This Court should uphold the Trial Court's decision not to award

Peterson any portion of the cash on hand held as of December 31, 2006, for the following reasons:

Incorrect Standard of Review

Peterson contends the standard of review on this issue is *de novo*. This standard is incorrect. A trial court's findings of fact will be upheld unless they are clearly erroneous. *See Lefavi v. Bertoch, 994 P.2d 817 (Utah Ct. App. 2000).*

The Amount of Excess Cash is a Question of Fact

The real issue is whether the Trial Court abused its discretion in finding that none of the $128,196 cash on hand on December 31, 2006 was excess cash.

PAJ contended all of the cash on hand was necessary to run the business as a going concern, Peterson contended that only $10,000 of the cash on hand was necessary to run the business.

Failure to Marshal Evidence

While Peterson advances several positions he raised at trial, he fails to marshal the evidence presented by PAJ as to why all of the cash on hand should remain with PAJ as a going concern. In order to properly marshal evidence, Peterson must:

> "Moreover, 'to mount a successful challenge to the correctness of a trial court's findings of fact, [the]appellant must first marshal all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even viewing it in the light most favorable to the court below.' *Alta Indus. Ltd. V Hurst,* 846 P.2d 1282, 1284 (Utah 1993) (quoting *Reid v Mut. Of Omaha Ins. Co.,* 776 P.2d 896, 899 (Utah 1989))."

Peterson simply cites to evidence challenging the Trial Court's finding rather than the evidence supporting the finding. The following references to the trial record

demonstrate that Peterson failed to marshal evidence thereby precluding the overturning of the Trial Court's decision on this issue.

Evidence on which the Trial Court relied in determining PAJ had no excess cash:

Historical Cash Flow Problems Due to Lack of Sufficient Capital Reserves

Jackson described the change of management in 2004 when daily responsibility was shifted from Peterson to Allred. *See,* Trial Transcript, Vol. II at Page 238, lines 5-8. Jackson recalled how PAJ quite often existed " hand-to-mouth and the stress of meeting the monthly payroll and the bills really created some anxiety for Alan and so we felt that it would be necessary, prudent, and wise for us to start to work towards gaining cash as we could," *see*, Trial Transcript, Vol. II at Page 238, lines 11-15. Jackson further described how, as PAJ expenses continued to grow, so has their need for a greater cash reserve on hand.

Jackson also described historically that there were many times that PAJ "had to hold rent checks... had to delay payment of bills." *See*, Trial Transcript, Vol. II at Page 235, lines 2-3. Jackson continued on to state that PAJ "got to a point in 2006, we started to be able to accumulate more cash flow." *See*, Trial Transcript, Vol. II at Page 235, lines 10-12.

Company January 2007 Obligations

Jackson also testified that his "feeling on the cash at the end of 2006 was that we have obligations to pay. Jack wants to make a big deal that we kept that cash in the intentional of squeezing him out, of not paying him the money. The reality is is that we had a business to operate. We have $115,000 of expenses. We have been for some time

trying to have plenty of reserve..." *See*, Trial Transcript, Vol. III at Page 416, lines 12-18. PAJ wanted to avoid the circumstances where "if we have a bad month, we're done." *See,* Trial Transcript, Vol. III at Page 416, lines 18-19. PAJ wanted to further avoid having to "ask our employees to not to take a payroll....To ask vendors to accept payments." *See,* Trial Transcript, Vol. III at Page 416, lines 20-23.

Dr. Tyler Bowles, PAJ's expert witness, testified that, "...we have a CPA firm here with approximately $1.4 million in expenses every year. This firm had a payroll coming due of approximately $65,000 in five days after 12-31-06, plus employment taxes related to that payroll of another $10,000, plus rent of about $10,000, plus there are other ongoing expenses. It is not unusual; in fact, it's good management practice to have some cash on hand at 12-31-06 to meet expenses that are going to be due very, very quickly. Otherwise you're illiquid." *See,* Trial Transcript, Vol. II at Page 168, lines 15-23.

Bowles also described the change in management structure, ""management structure of the firm changed and they deemed it a particularly poor management practice to bleed the company dry at the end of every month, that holding cash, having some cash to meet payroll five days later was a reasonable idea." *See,* Trial Transcript, Vol. II at Page 225, lines 5-10. Bowles further noted that after his review, the books demonstrated PAJ did "have trouble making payroll and rent and other things in previous years..." *See,* Trial Transcript, Vol. II at Page 225, lines 16-17.

Mr. R. Brad Townsend, Peterson's expert witness, acknowledged in cross examination if PAJ had a payroll obligation the first part of January it could affect his determination of cash on hand. *See,* Trial Transcript, Vol. I at Page 118, lines 4-5.

Townsend also all but acknowledged that it made sense to have enough cash to cover $60,000 of payroll and $10,000 in rent coming due shortly. *See,* Trial Transcript, Vol. I at Page 118, lines 18-25.

While Townsend stated, during cross examination, that he believed he was told that PAJ had only $6,500 in year-end liabilities, this statement illustrates the shallowness of Townsend's research. Even if Townsend believed he was told PAJ had only $6,500 in expenses, Townsend had a duty to correlate that assumption with Townsend's own conclusion that PAJ had over $1,362,498 in projected operating expenses for 2007, including projected salaries and wages of $669,287 and rents of $119,220. *See,* Schedule B, Trial Exhibit 90 (Townsend's Expert Report). The Trial Court recognized this inconsistency when it failed to award Peterson any portion of the cash on hand.

One particular exchange between Townsend and PAJ's counsel, Mr. Hancey, during cross examination illustrates the need for a capital reserve. "Q As a practical matter, you're talking about an ongoing concern (inaudible), is it wise for a business to hold in their cash reserves sufficient to cover maybe a month or so of expenses? A Ummm, sure." *See,* Trial Transcript, Vol. I at Page 120, lines 6-10.

PAJ's Cash Reserves were in Line with Risk Management Associates (RMA) Numbers

Bowles also described that PAJ's cash on hand was "right in line with the Research [sic] Management Associates reporting of firms of this size, CPA firms of this size had $185,000 cash on hand at the end of the year. So $185,000 in cash is not unreasonable given all the liabilities and ongoing expenses they have." *See,* Trial

Transcript at 169, lines 1-5. The RMA report was submitted as Trial Exhibit 94. Townsend also acknowledged that he relies upon RMA reports. *See,* Trial Transcript, Vol. I at Page 120, lines 14-18. Upon review of Trial Exhibit 94, Townsend acknowledged that according to RMA, companies between $1 and $3 million annual revenue hold cash equivalents is $185,077. *See,* Trial Transcript, Vol. I at Page 121, lines 1-13.

While the Trial Court was presented with contradictory evidence on the issue of the cash on hand, it nevertheless made the decision that the cash on hand should remain with PAJ. The Trial Court rejected Townsend's opinion that PAJ should only maintain a year end cash reserve of $10,000. The Trial Court was within its discretion to make that decision. That decision should not be overturned.

PAJ Maintained its Capital Reserves

Peterson seeks to portray PAJ's retention of cash on hand as of December 31, 2006 as a conspiracy by the remaining shareholders to keep the money for themselves. For this argument to take root, the remaining shareholders would need to have disbursed the money after December 31, 2006. This did not happen. Jackson confirmed that there was no distribution in January of 2007. *See,* Trial Transcript, Vol. II at Page 236, lines 10-11. Trial Exhibit 93 demonstrates PAJ continued to build its capital reserves after January 2007. Again, after weighing all the evidence the Trial Court determined that Peterson was not entitled to any of the cash on had on December 31, 2006. Again, this decision should not be overturned.

Fair Value Must Take into Account Liabilities of PAJ

Peterson also argues that "as a matter of law the fair value determination can not and should not take into account liabilities which do not become due until after the valuation date." *See* Page 41 of Peterson's Appellee Brief. Peterson failed to cite any relevant authority for this unique position. Peterson's position is equivalent to saying that a corporation with $1 million in assets and $2 million of debt should still be able to sell its shares for $1 million. Such a position can not withstand legal or logical scrutiny.

Peterson attempts to bolster this argument by stating PAJ should cover accounts payable with its accounts receivable. If Peterson's logic is continued, than accounts receivable should not be considered as part of the valuation of PAJ. However, Peterson's expert Townsend included accounts receivable of $369,432 and liabilities of $61,765 in is valuation of PAJ. *See*, Trial Exhibit 90, Schedule D (Townsend's Expert Report).

While the Trial Court ultimately rejected Townsend's determination of liabilities, it is important to note that Peterson's own expert considered both accounts receivable and liabilities in his determination of fair value of PAJ.

Valuing PAJ as a Going Concern

The *Hogle* Court, *inter alia*, held that in determining fair value one does not use liquidation value but rather valuing the business as a "going concern." *See Hogle v. Zinetics Medical, Inc.*, 63 P.3d 80 (Utah 2002).

A "going concern" requires cash reserves. The fact that Townsend allocated $10,000 to cash reserves acknowledges the need for cash reserves. The Trial Court ultimately rejected Townsend's position that $10,000 was a sufficient amount of cash

reserves for a company with approximately $115,000 in monthly expenses. *See*, Trial Transcript, Vol. II at Pages 237-238, lines 24-1. The Trial Court made the factual determination that PAJ should retain all of its cash on hand as cash reserves.

If the Trial Court were tasked with determining the liquidation value of PAJ then the cash on hand (after paying all liabilities) would be an appropriate measure. But Townsend, Bowles and the Trial Court, as well as controlling precedent, each acknowledge undervaluation that results from using a liquidation approach.

II

THE TRIAL COURT APPROPRIATELY EXERCISED ITS STATUTORY DISCRETION IN ITS AWARD OF INTEREST

Peterson contends the Trial Court erred by failing to award interest at ten percent (10%) pursuant to Utah Code Ann. §15-1-1(2). Rather than rely on Utah Code Ann. §15-1-1(2), the Court awarded interest to Peterson as follows:

> "[I]t is equitable to award the Plaintiff prejudgment interest. The Court finds guidance in the in the Post Judgment Interest Rates set by the State of Utah. These rates are based on a variety of economic indicators and generally reflect a fair interest rate, absent an agreement otherwise. The Post Judgment Interest Rates for the years in which this amount is due are as follows: 2007 – 6.99%; 2008 – 5.42%; 2009 – 2.40%. The Court orders that these rates will apply for the applicable time period in which Plaintiff was entitled to judgment." April 17, 2009 Decision, page 10.

This Court should uphold the Trial Court's decision on the interest rate for the following reasons:

Incorrect Standard of Review

Peterson asserts that the standard of review on the issues is correctness and contends that the issues of prejudgment interest are a question of law. This is an

incorrect standard of review in this particular case. Peterson's argument, if properly addressed, contains two questions: One, whether interest should be awarded; and if so than Two, what is the rate of that interest? While the award of prejudgment interest may be a question of law in many circumstances, it is not in this particular matter. Peterson brought a statutory cause of action, namely a judicial decree of dissolution under Utah Code Ann. §16-10a-1430. PAJ elected to purchase Peterson's shares in lieu of that dissolution under Utah Code Ann. §16-10a-1434, which contains particular language regarding first, whether to award interest, and second, the rate of that interest; see Utah Code Ann. §16-10a-1434(5)(c) which states: "interest may be allowed at the rate and from the date determined by the court to be equitable..."

Thus, according to the explicit language of the statute, both the decision on whether to award interest and the rate of that interest is left to the discretion of the Trial Court, which must be reviewed under an abuse of discretion standard.

Peterson cites *Kealamkia v Kealamakia*, 2009 UT App 148, ¶4, 213 P.3d 13 (*quoting Trail Mt. Coal Co. v. Utah Div. of State Lands & Forestry*, 884 P.2d 1265, 1271-72 (Utah Ct. App. 1994)), which states: "The trial court's award of prejudgment interest, and the amount thereof, presents a question of law which we review for correctness." The *Kealamkia* Court also stated the following: "A trial court's interpretation of unambiguous contract constitutes a question of law," *Id.* at 1269.

The instant case does not present such a question, but rather, the Trial Court's discretionary determination of an "equitable" rate of interest.

Peterson has Failed to Marshal Evidence

Given that Utah Code Ann. §16-10a-1434(5)(c) specifically states: "Interest may be allowed at a rate and from a date determined by the court to be equitable," this necessitates a marshaling of the evidence that would allow this Court to analyze this equitable determination by the Trial Court.

> "Evaluating conflicting testimony is the proper role of the finder of fact. When an appellant asserts that the evidence is insufficient to support the lower court's findings of fact, '[an appellate court does] not weigh the evidence de novo.' *In re Estate of Bartell,* 776 P.2d 885, 886 (Utah 989). Rather, [the appellate court] accords great deference to the lower court's findings, 'especially when they are based on an evaluation of conflicting live testimony.' *Id.* at 886. Moreover, 'to mount a successful challenge to the correctness of a trial court's findings of fact, [the]appellant must first marshal all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even viewing it in the light most favorable to the court below.' *Alta Indus. Ltd. V Hurst,* 846 P.2d 1282, 1284 (Utah 1993) (quoting *Reid v. Mut. Of Omaha Ins. Co.,* 776 P.2d 896, 899 (Utah 1989))."

Peterson has made no attempt to marshal any evidence in regard to the Trial Court's decision regarding interest.

Utah Code Ann. §15-1-1 is not Applicable

In 2007, the Utah Supreme Court issued a decision in *Wilcox v. Anchor Wate Co.,* 164 P.3d 353 (Utah 2007). In *Wilcox*, the Appellant in part, argued that the Trial Court's use of Utah Code Ann. §15-1-1 in an action involving "voidable preferences" under Utah's Insurers Rehabilitation and Liquidation Act, was incorrect. The Supreme Court overturned the Trial Court's reliance on Utah Code Ann. §15-1-1. The Supreme Court reasoned that, "[T]he theoretical underpinning behind section 15-1-1 is that the parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of

money, goods, or causes of action that are the subject of their contract. Only when the parties to a contract fail to specify a rate of interest does the default rate specified in section 15-1-1(2) apply. But this case is not a contract action." (Emphasis added).

In *Wilcox*, the Court was left with a gap in interpretation of an ambiguous provision of the Utah's Insurers Rehabilitation and Liquidation Act because said Act failed to state the manner in which a Court should calculate interest. The Trial Court was required therefore to find "when filling in gaps or interpreting ambiguous provisions of the Liquidation Act, we look to the preference provisions of federal bankruptcy law, which have the same purpose as the preference provisions of the Liquidation Act. Therefore, when calculating the prejudgment interest on remand the District Court should use the rate applied to judgments obtained in federal preference actions which is the federal post-judgment interest rate". *Id.* at 364.

Fortunately, this Court is not left with a similar ambiguous statute. Utah Code Ann. §16-10a-1434 specifically gives the Trial Court discretion to establish an equitable rate. In exercising that discretion, the Trial Court relied upon Utah's post-judgment interest rates. This is the same approach that the Court of Appeals suggested the Trial Court, in *Wilcox*, undertake when it referred the Trial Court to rely upon federal post-judgment interest rates. *Id.* at 364.

Principles of Statutory Construction Compel the Court not to Rely on Utah Code Ann. §15-1-1

Setting aside the Supreme Court's clear articulation that Utah Code Ann. §15-1-1 only applies to contract rate cases, standard principles of statutory construction reject the

application of Utah Code Ann. §15-1-1. It would be inconsistent with the principles of statutory interpretation to ignore the more specific statute to rely upon the general statute. If the Court were to conclude that Utah Code Ann. §15-1-1 controlled, it would treat §16-10a-1434(5)(c) as meaningless or illusory. This result is contrary to *Thomas v. Color Country Management*, 84 P.3d 1201 (Utah 2004), wherein the Court stated: "Our rejection of statutory interpretations that render statutory rights 'worthless and of no material benefit' or 'meaningless or illusory' is consistent with the rule that we consider factors such as convenience, reasonableness, and justice in determining the procedural or substantive character of statutes." Similar rules of statutory interpretation are set forth in *Kennecott Copper Corp. v. Anderson*, 514 P.2d 217 (Utah 1973) and *State Division of Forestry, Fire and State Lands v. Tooele County*, 44 P.3d 680 (Utah 2002).

Because Utah Code Ann. §16-10a-1434 specifically states that it is the Court that may determine the interest rate and may determine the date by which the interest rate should be calculated, it is clear that Utah Code Ann. §15-1-1 does not govern, but rather the Trial Court. There was sufficient evidence to support the Trial Court's decision.

Failure to Preserve the Issue

PAJ does note that Peterson failed to raise the question of sufficiency of findings of prejudgment interest with the Trial Court. Thus any claim that the Court's findings are insufficient is waived. Nevertheless, PAJ does point to the record supporting the Court's reliance on post-judgment interest rate. Bowles testified that the rate of return should be commensurate with the risk of the investment. *See*, Trial Transcript, Vol. II at Pages 179-181, lines 12-25, 1-25, and 1-19 respectively.

The Trial Court had 100% of PAJ's assets with Peterson only at 36.37% percent shareholder. As such, Peterson's investment had very little risk. Peterson now contends "that no compelling equitable reasoning was given as to the reason why the Trial Court arbitrarily awarded a lesser rate of interest." Peterson failed to preserve this issue by not seeking additional findings of fact as required by *Alta Indus. Ltd. v. Hurst,* 846 P.2d 1282, 1284 (Utah 1993).

Bowles also cited comparable treasury yields of 4.91% in his expert report. *See*, Trial Exhibit 91, Exhibit 3 (Bowles Expert Report). Peterson's expert, Townsend, also referenced a treasury yield of 4.91% when establishing his capitalization rate. *See*, Trial Exhibit 90, Schedule F (Townsend Expert Report).

Finally, the Trial Court's reliance upon post-judgment interest rates is perfectly consistent with the instructions that the Supreme Court gave in *Wilcox*.

Inapplicability of Utah Code Ann. §16-10a-1301

Peterson argues that the Court should look to the language in Utah Code Ann. §16-10a-1301 involving Dissenter's Rights. Therein, the Utah State Legislature took the effort to define interest rates set forth in Utah Code Ann. §15-1-1. That language became effective in 1992, the very same year in which Utah Code Ann. §16-10a-1434 became effective. The fact that the Legislature did not use the same definition for interest should be of importance to the Court. The Legislature demonstrated an ability and a willingness to cite Utah Code Ann. §15-1-1 in the dissenter's right statute, but chose not to do so when determining interest on an election to purchase in lieu of dissolution under Utah Code Ann. §16-10a-1434. Rather, the Legislature chose to leave the award of interest

and the interest rate to the discretion of the Court on terms that are "equitable". This Court should honor the choice of the Legislature to craft different interest remedies under different statutory provisions and refuse to overturn the Trial Court's interest rates to be applied to the fair value of Peterson's shares.

III

THE TRIAL COURT WAS CORRECT IN NOT AWARDING EITHER PARTY COSTS OR ATTORNEY'S FEES.

The Trial was conducted as a bench trial and took place over three days. Testimony of the parties' expert witnesses were concluded at the end of day one. Significant time during the remaining two days was spent on evidence pertaining to the allegations of oppressive conduct and related allegations. PAJ admitted in their answer that the Company should be dissolved due to shareholder deadlock. Thus, the only reason Peterson raised these issues was an effort to recover attorney fees.

After hearing such testimony, the Trial Court referred back to a comment made during opening arguments that this case was "basically a marriage license away and this being a divorce case." *See,* Trial Transcript, Vol. I, at Page 7, lines 1-2. Emotions run high and feelings are hurt when shareholders experience operational deadlock. While the Trial Court recognized these feelings, it also recognized that this case did not warrant the awarding of attorneys' fees. This decision should not be disturbed

Standard Review

The awarding of attorneys' fees in this particular proceeding lies with the discretion of the Trial Court. "In general, Utah follows the traditional American rule that

attorney fees cannot be recovered by a prevailing party unless a statute or contract authorizes such an award." *Utahns for Better Dental Health-Davis, Inc. v. Davis County Clerk*, 175 P.3d 1036, 1039 ¶5 (Utah 2007) (*citing Hughes v. Cafferty,* 2004 UT 22, ¶21, 89 P.3d 148. This is not a contract case. Thus, the only means of recovering fees is under statute.

Unique Statutory Language Regarding the Awarding of Attorney's Fees

Statutory language addressing attorney fees in this proceeding is articulated in Utah Code Ann. §16-10a-1434(5)(d), which reads, "[i]f the court finds that the petitioning shareholder had probable grounds for relief under Subsection 16-10a-1430(2)(b) or (d), it may award to the petitioning shareholder reasonable fees and expenses of counsel and experts employed by the petitioning shareholder". (Emphasis added).

The statute employs a two-step process prior to awarding fees. Both steps involve questions of fact and exercise of the Trial Court's discretion. In order to award fees, the Trial Court first must find probable grounds that the directors acted in illegal, oppressive or fraudulent manner, or that the corporate assets are misapplied or wasted. Even if the Trial Court makes that factual determination, it still has the discretion whether or not to award attorneys' fees.

This statute differs from several other attorneys' fees statutes that require a court to award attorneys' fees.

Failure to Marshal Evidence

The following references to the record demonstrate that Peterson failed to marshal

evidence which precludes the overturning of the Trial Court's decision on this issue.

Evidence upon which the Trial Court relied in Deciding not to Award Attorney Fees

Management Styles

Peterson failed to cite to evidence describing the different management styles of the shareholders that led to deadlock. Jackson preferred value billing to Peterson's hourly billing, with Jackson being more of a macro-manager in reaching overall client satisfaction versus Peterson being a micro-manager. *See*, Trial Transcript, Vol. III at Pages 399-400, lines 19-25, 1-16, respectively. Peterson's approach to handling finances for PAJ was a "hand-to-mouth" approach, which created significant anxiety, as compared to Allred's approach in retaining sufficient cash to cover unexpected expenses. *See* Trial Transcript, Vol. II at Pages 238-239, lines 2-25 and 1-5, respectively.

The Termination of Trevor Seamons

Jackson testified that Trevor Seamons was unsuccessful in helping to "develop and move forward the investment practices of the firm." *See*, Trial Transcript, Vol. III at Page 397, lines 10-11. Also, Jackson noted that before terminating Trevor, PAJ "tried to find different roles that Trevor could participate in the firm." *See*, Trial Transcript, Vol. III at Pages 397-398, lines 25, and 1-2, respectively. Further, Jackson noted that PAJ "tried to use him some in tax but Trevor wasn't trained in tax." *See*, Trial Transcript, Vol. III at Page 398, lines 5-7. Jackson summarized that when making the decision to let Trevor Seamons go, Jackson and Allred evaluated his productivity and found that Trevor Seamons' billings were $77,000 which amount was written down by Peterson to $2,000—a write off of over 97%. *See*, Trial Transcript, Vol. III at Page 399, lines 8-13.

Difficulty Allred faced choosing between Jackson and Peterson

Allred testified regarding the great difficulty he was placed in, in having to choose between Jackson's and Peterson's visions of the firm. Because of the discord in management between Jackson and Peterson, all agreed that "either one or the other would go..." *See*, Trial Transcript, Vol. III at Page 418, lines 24-25.

Jackson recounts this experience in his testimony as follows: "We were at a deadlock. We had led up to a point where Jack characterizes it very accurately when he says that I said either he's going or I'm going. We had led up to a point where I sat in, it was Alan's office, Jack was in there and I was in there and I was so frustrated with the lack of movement to resolve our differences that I simply reached a point where I was either leaving or Jack was leaving. It didn't matter to me which way it went at that point of time, it was one or the other." *See*, Trial Transcript, Vol. III at Pages 403-404, lines 19-25 and lines 1-2, respectively.

Jackson also recounts Allred's efforts to keep the parties together and has testified: "To Alan's credit and unfortunately and this part I do feel really bad about, is Jack doesn't know the length and the extent of efforts that Alan went to keep this thing together. Alan did everything he could do to get me and Jack to reconcile and work through our differences. It didn't work." *See*, Trial Transcript, Vol. III at Page 404, lines 9-14.

Allred described it as, "...one of the most difficult periods of my life, where I had to look at, educate myself and on and review every circumstance with regards to the avenues of resolution and finally it reached that point where we knew there would be

none..." *See*, Trial Transcript, Vol. III at Page 419, lines 9-13.

Jackson also acknowledged the difficulty in Allred's decision when he stated: "I believe Alan when he said he made the decision that was the best for the firm. But I think if Alan at that point in time had to make a personal decision, it would have been a different decision but he made a decision that was best for the employees of the firm and for the firm itself." *See*, Trial Transcript, Vol. III at Page 404, lines 15-20.

Change to the Bylaws

Peterson makes much ado about the efforts to amend the Bylaws that took place in the Fall of 2006. Peterson fails to point out that proposed amendments to the Bylaws (*see*, Trial Exhibit 13) simply adopted sections of Utah's Revised Business Incorporation Act regarding directors meetings, shareholder meetings, and quorums. Peterson also points out that his Motion for Preliminary Injunction preventing the approval of the Bylaws was denied by Judge Low.

Allred testified that PAJ only adopted the Bylaws after Judge Low authorized such. *See*, Trial Transcript, Vol. II at Pages 319-320, lines 23-25 and lines 1-16, respectively.

Claim of Withheld Salary

Peterson also raised an issue regarding the withholding of salary, but fails to describe Allred's decision to make distributions to the shareholders rather than payroll was "...to avoid the additional expenses of payroll taxes." *See*, Trial Transcript, Vol. II at Page 303, lines 11-12.

Growth to PAJ

Peterson aims to impugn the acts and attentions of Jackson and Allred. However during this same time, PAJ generated substantially more gross revenue by the end of 2006 then it had in September 2001; PAJ had basically doubled in size. *See*, Trial Transcript, Vol. I at Page 18, lines 2-5. This is hardly a wasting of assets or oppressive conduct.

Productivity of the Partners

Trial Exhibit 91, Table 3 (Bowles Expert Report), attached hereto and incorporated herein, illustrates the productivity of the three partners from 2002 to 2006 and demonstrates that during that period of time, Peterson's billings under Management dropped from 25% to 12%. Allred's billings in Management remained fairly consistent at 39% to 34%, and Jackson's billings in Management increased from 36% to 54%, demonstrating that Jackson was a 'rainmaker' in the firm and benefited Peterson greatly during that five-year period.

Change of Passwords

In regards to the allegations regarding changes of passwords, the Trial Court heard testimony that the passwords were changed only after Peterson had initiated litigation for dissolution and PAJ had exercised its rights to purchase in lieu of dissolution, which under Utah Code Ann. §16-10a-1434, would have placed the last day of Peterson's ownership of shares as November 6, 2006. In short, it was done after PAJ had elected to buy Peterson's shares and after the filing of the Verified Complaint. And, since it occurred after the Verified Complaint was filed, it could not have been an allegation pled

in the Verified Complaint. See Trial Transcript, Vol III at Page 421 lines 3-25 page 422 1-7.

Change of Locks

In regards to changing the locks on the office and building doors, again the Trial Court heard testimony from Allred that: 1. He was not even sure that there were even locks on individual office doors, *see*, Trial Transcript, Vol. II at Page 307, lines 3-8; 2. The locks to the exterior of the building were only changed in January 2007, after Peterson's employment was terminated and almost two months after the initiation of the litigation, *see*, Trial Transcript, Vol. II at Page 307, lines 9-14; and, 3. Peterson was given ample opportunity to go through his office and to get his personal belongings prior to the locks being changed, *see*, Trial Transcript, Vol. II at Page 307, lines 15-19.

Communication with Employees and Clients

Allred testified that neither he nor Jackson gave any instructions to employees about the anticipated termination of Peterson, that they never held a meeting with employees before Peterson left, and that they never had communication with clients that Peterson would be leaving before he was terminated. *See*, Trial Transcript, Vol. II at Pages 307-308, line 25 and lines 1-12, respectively.

The absence of reference to these points in the record demonstrates Peterson's failure to marshal evidence on this issue, precluding recovery. The Trial Court had sufficient information to find that Peterson did not have probable grounds for relief under Utah Code Ann. §16-10a-1432(b) or (d) and the Trial Court further had the ability to, and properly exercised its discretion, in not awarding either party reasonable attorneys' fees.

Peterson was Largest Shareholder

The parties stipulated to the respective percentage ownership in the company, namely: Peterson owned 36.37%, Allred owned 33.34%, and Jackson owned 30.63%. This ownership is as of June 1, 2006, as stated in Peterson's *Memorandum in Support of Motion for Injuctive [sic] Relief*, dated January 19, 2007. *See,* Trial Exhibit 152.1 ¶7. As such, Peterson was the largest holder of stock in PAJ. As the largest shareholder, Peterson had an equal fiduciary duty to the other shareholders. The circumstances surrounding this case are akin to a corporate marriage. Because of irreconcilable differences/deadlock, the matter was ripe for dissolution/divorce. Simply because shareholders disagree on how a company should move forward does not mean that they engaged in oppressive or fraudulent behavior. The fact that PAJ almost doubled in revenues over the previous five (5) years demonstrates the wisdom in the chosen approach to manage the company, despite the fact that that approach was contrary to the wishes of Peterson.

Such was not the case in *Bingham Consolidation Company v. Groesbeck,* 105 P.3d 365 (Utah Ct. App. 2004), where there was a single shareholder that held a majority of the stock who was "negotiating both sides of the transaction".

Expectation of a Job

On appeal, Peterson (for the first time) argues that the ownership in PAJ established his expectation of a job in PAJ, and that his termination constituted oppressive conduct. First and foremost, the issue was not argued at trial. Second, the only evidence Peterson now proffers is that he had worked there historically. Third,

Peterson was not terminated until January 6, 2007-- over 2 months after the Verified Complaint was filed. *See* Trial Transcript Vol. II at Page 306, lines 3-11; *See also* Trial Exhibit 17. The Notice of the Directors meeting reflects that this meeting was initially scheduled for December 29, 2006. Petersons' termination cannot, therefore, be grounds for filing the Verified Complaint.

Fourth, if Peterson had expected employment as a part of his ownership, then employment terms would have been included in PAJ's Bylaws — not a separate employment contract that explicitly provides that his employment was "at will." *See*, Trial Exhibit 54, constituting the Peterson Employment Contract, paragraph 1.4).

The fact that Allred and Jackson waited until two months after the filing of the Complaint and after settlement negotiations broke down to terminate Peterson demonstrates (in the words of the pentagon) "courageous restraint."

Incorrect Citation of Law

On Page 53 of Peterson's Brief, he states a five-point test for determining whether minority shareholders are entitled to use judicial dissolution based upon oppressive or unfairly prejudiced behavior. In doing so, Peterson cites *Kiriakides v. Atlas Foods Systems*, 541 S.E.2d 257 (S.C. 2001). These issues were not adopted by the Trial Court. These five elements were initially proffered by the Court of Appeals. However, in *Kiriakides* the South Carolina Supreme Court concluded that these definitions "are beyond the scope of [South Carolina's] judicial dissolution statute." *Id.* at 264.
In short not only are these five elements are not found in Utah law, they were rejected by South Carolina.

In summary, after three days of trial, the Trial Court found it was not equitable to award attorney's fees to Peterson. Accordingly, this ruling should not be disturbed.

CONCLUSION

For the forgoing reasons, PAJ respectfully requests that this Court reject Peterson's claims on cross-appeal for failure to marshal the evidence, or alternatively with a finding that the Trial Court appropriately exercised its discretion by holding that Peterson was not entitled to any additional cash distribution; that the "equitable" interest rate was appropriate; and, not awarding either party attorney's fees and costs.

DATED this 24 day of May, 2010.

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CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS and BRIEF OF CROSS-APPELLEES were mailed, postpaid, to the following this 24TH day of May, 2010:

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