

2008

In the Matter of the George Fisher, Jr. Family Inter Vivos Revocable Trust, Kim Fisher and Michael Fisher v. Brent Fisher : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE GEORGE FISHER, JR. FAMILY INTER VIVOS REVOCABLE TRUST, An Irrevocable Trust.	Appellate Case No. 20080389-CA Trial Court Case No. 043800019 Judge A. Lynn Payne
KIM FISHER AND MICHAEL FISHER, Appellants, vs. BRENT FISHER, Appellee.	

APPELLANT'S BRIEF

**APPEAL FROM THE JUDGMENT
OF THE EIGHTH JUDICIAL DISTRICT COURT**

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**FILED
UTAH APPELLATE COURTS**

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TABLE OF CONTENTS

Description	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
ISSUES FOR REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES ETC.	3
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	10
SUMMARY OF ARGUMENT	14
ARGUMENT	15
1. The Trial Court Erred When it Held that Brent Converted 50 Head of Cattle on May 8, 1995 Valued at \$550 per Head.	15
a. The Trial Court Misinterpreted the May 8, 1995 Allocation and Erred as a Matter of Law in Setting the Conversion Date as May 8, 1995.	15
b. The Trial Court Erred By Ruling on Matters Contrary to the Parties' Claims When it Implicitly Found that Brent's Agreement with George Continued after George's Date of Death.	18
c. The Trial Court's Finding that Brent Converted 50 Head of Cattle is Clearly Erroneous.	20
d. The Trial Court Erred as a Matter of Law in Valuing the Converted Cattle at \$550 per head.	24
2. The Trial Court Erred as a Matter of Law When it Gave Brent a Credit for Property Taxes and Water Assessments He Paid While Converting the Use of the Fisher Trust's Land.	25
3. The Trial Court Abused its Discretion in Failing to Award Attorney Fees Against Brent Fisher Personally.	27

Description	Page
a. The Trial Court Erred by Ignoring the Crucial Role the Prohibition Against Self-dealing Plays as a Deterrent to the Trustee’s Use of the Trust for His Personal Benefit.	27
b. The Trial Court Erred by Improperly Excusing Brent’s Failure to Produce Documentary Evidence He Was Ordered to Produce.	32
c. The Trial Court Abused its Discretion in Not Awarding Attorney Fees Against Brent Personally.	36
CONCLUSION	40
CERTIFICATE OF SERVICE	42

ADDENDUM

DESCRIPTION	TAB
Judgment, filed April 10, 2006	1
Ruling, filed July 13, 2006	2
Ruling, filed October 2, 2006	3
Ruling, filed May 1, 2005	4
Ruling and Order, filed November 16, 2007	5
Trial Exhibit 15, “Trustees Allocation of the Properties Held Under the George Fisher, Jr. Family Revocable Trust Dated October 10, 1975”	6
Trial Exhibit 17, February 22, 1997 Updated Appraisal Letter	7

TABLE OF AUTHORITIES

Citation	Page
Cases	
<i>A K & R Whipple Plumbing and Heating v Guy</i> , 2004 UT 47, 94 P.3d 270	37, 39
<i>Broadwater v Old Republic Sur</i> , 854 P.2d 527 (Utah 1993)	24
<i>Callister v Callister</i> , 15 Utah 2d 380, 393 P.2d 477 (Utah 1964)	31
<i>Christensen & Jensen, P C v Barrett & Daines</i> , 2008 UT 64, 194 P.3d 931	2
<i>Combe v Warren's Family Drive-Inns, Inc</i> , 680 P.2d 733 (Utah 1984)	18, 19
<i>Fibro Trust, Inc v Brahman Fin , Inc</i> , 1999 UT 13, 974 P.2d 288	1, 2
<i>Hughes v Cafferty</i> , 2004 UT 22, 89 P.3d 148	2, 36, 37, 40
<i>J Pochynok Co , Inc v Smedsrud</i> , 2005 UT 39, 116 P.3d 353	38
<i>Lake v Hermes Associates</i> , 552 P.2d 126 (Utah 1976)	1
<i>Meinhard v Salmon</i> , 164 N.E. 545 (N.Y. 1928)	30
<i>Mountain States Broadcasting Co v Neale</i> , 783 P.2d 551 (Utah App. 1989)	38
<i>State v Levine</i> , 2006 UT 50, 144 P.3d 1096	2, 3, 36
<i>State v Pena</i> , 869 P.2d 932 (Utah 1994)	36
<i>Walker v Walker</i> , 17 Utah 2d 53, 404 P.2d 253 (Utah 1965)	26, 27, 32, 34
<i>Wheeler ex rel Wheeler v Mann</i> , 763 P.2d 758 (Utah 1988)	27, 31, 37

Citation	Page
Statutes	
Utah Code Ann. §75-7-1004	36
Utah Code Ann. §75-7-1103(3)	
Utah Code Ann. §78A-3-102(3)(j)	1
Utah Code Ann. §78A-4-103(2)(j)	1
Utah Rules of Civil Procedure	
Utah R. Civ. P. 34	34
Miscellaneous	
George Gleason Bogert, George Taylor Bogert, Amy Morris Hess, <i>Bogert's Trusts And Trustees</i> , § 543, "Trustee's Duty of Loyalty to the Beneficiaries," (Current through 2008 update)	27
Jesse Dukeminier, Stanley M. Johanson, James Lindgren, and Robert H. Sitkoff, <i>Wills, Trusts, and Estates</i> , Aspen Publishers, 7 th Ed. 2005	29
Cecil J. Hunt, II, <i>The Price of Trust: an Examination of Fiduciary Duty and the Lender-Borrower Relationship</i> , 29 Wake Forest L. Rev. 719, Fall 1994	29
John H. Langbein, <i>The Contractarian Basis of the Law of Trusts</i> , 105 Yale L.J. 625 (1995)	28, 29
Restatement (Second) of Trusts, §205, comment i (1959)	26
Restatement (Third) of Trusts, § 83. Duty To Keep Records And Provide Reports (Current through August 2008)	26, 27

STATEMENT OF JURISDICTION

This is an appeal from the final judgment of the Eighth Judicial District Court for Duchesne County. The Supreme Court had jurisdiction pursuant to Utah Code Ann. §78A-3-102(3)(j). Based on the Supreme Court's Order dated June 4, 2008, the Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. §78A-4-103(2)(j).

ISSUES FOR REVIEW

Issue for Review: Regarding the cattle that trustee, Brent Fisher (“Brent”), converted, did the trial court correctly determine the date of the conversion, the number of cattle converted, and the value of the cattle converted? Preserved at H.19-28;¹ R.379-80.

Standard of Review: “Whether the trial court properly applied the law of conversion is a legal question, which we review for correctness.” *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, ¶ 19, 974 P.2d 288. Because the trial court's findings concerning the date of conversion, the cattle converted, and their value are ultimately based on the proper interpretation of written documents, the standard of review is correction of error. *Lake v. Hermes Associates*, 552 P.2d 126, 128 (Utah 1976).

Issue for Review: Regarding the calculation of damages for the trustee's self-dealing in using the Trust's ranch and farm land, did the trial court improperly give the trustee credit for the payment of property taxes and water assessments? Preserved at R.381-87; H.18, 29-33.

¹ “H.” refers to the transcript of the April 25, 2006 hearing at R.904.

Standard of Review: “Whether the trial court properly applied the law of conversion is a legal question, which we review for correctness.” *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, ¶ 19, 974 P.2d 288. Whether a party paid a particular expense and in what amount would normally be treated as a question of fact, reversible only for “clear error.” *Christensen & Jensen, P.C. v. Barrett & Daines*, 2008 UT 64, ¶20, 194 P.3d 931. However, where the party claiming the expense is a trustee who was ordered to produce all documents supporting the claimed expense, the issue is a mixed question of fact and law. Under the circumstances of this case, the Court of Appeals should give less deference to the trial court’s ruling than it might otherwise give. *State v. Levine*, 2006 UT 50, ¶25, 144 P.3d 1096.

Issue for Review: Did the trial court correctly refuse to award attorney fees and expenses against Brent Fisher personally and in favor of Michael and Kim Fisher?

Preserved at R.387; H.34-35.

Standard of Review: Because the Fishers’ claim for payment of their attorney fees and expenses is based on the inherent power of the trial court to award attorney fees and expenses in trust litigation, the trial court’s decision is reviewed under the abuse of discretion standard. *Hughes v. Cafferty*, 2004 UT 22, ¶20, 89 P.3d 148. Because the trial court failed to consider the trustee’s culpability and the policy behind Utah’s absolute prohibition of self-dealing, the Court of Appeals should give less deference to the trial

court's rulings than it might otherwise give. *State v. Levine*, 2006 UT 50, ¶25, 144 P.3d 1096.

CONSTITUTIONAL PROVISIONS, STATUTES ETC.

There are no constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is determinative of or of central importance to the appeal.

STATEMENT OF THE CASE

While serving as Trustee of the George Fisher, Jr. Family Inter Vivos Revocable Trust (the "Fisher Trust") between April 18, 1992 and May 26, 2001, Brent Fisher converted valuable trust assets to his own use and benefit. R.534-539. On December 27, 2003, Michael Fisher and Kim Fisher (the "Fishers") and their sister, Susan Thacker, filed a petition to recover all trust assets that Brent had taken or lost. R.1-42. When Susan withdrew her support for the petition (R.69), the Fishers, appellants herein, continued the lawsuit against Brent.

On February 23, 2004, Brent delivered to the Fishers a document Brent claimed was "an accounting for the trust covering the period from 1992 to 2000." R.215, ¶4. This "accounting" was admitted into evidence as trial exhibit 1.²

² For ease of reference, trial exhibit 1 is referred to as the "Accounting" or "Brent's Accounting." It has no beginning inventory, no ending inventory, nor any reconciliation establishing that the assets on hand equal the ending inventory. Further, it is titled a "Cash Flow Analysis." As noted, Brent identified it as an accounting. R.213-221; 222-232; *see* R.215, ¶4.

Thereafter, the Fishers filed their “Motion for Judgment on the Pleadings; in the Alternative, Motion for Order Compelling Brent Fisher to Verify His Answers Regarding Required Accountings.” R.128-132.³ They sought a judgment that Brent had failed to account, reserving the amount of damages. *Id.* Anticipating that Brent in response would assert he had accounted and had provided supporting documentation, they asked the trial court in the alternative to order Brent to respond under oath that he had provided all of the required supporting documents. R.130.⁴

Prior to the scheduled hearing on the Fishers’ Motion, Brent and the Fishers stipulated and the trial court ordered:

2. [T]he Court orders Brent Fisher to produce to Kim and Michael Fisher all of the underlying documents and records that show the beginning inventory of assets when he began his administration of the [Fisher] Trust, that show all receipts during his administration of the Trust, that show all disbursements during the administration of the Trust, that show all sales during his administration of the Trust, and that show the assets of the Trust remaining on hand at the end of the accounting period.

For purposes of this Order, the Court sets the accounting period as beginning on April 18, 1992 and ending on May 26, 2001.

3. The Court orders Brent Fisher to file a formal response . . . aver[ring] he has produced all documents that the Court has ordered him to produce and the date of that production.

³ The Clerk numbered record pages 128 through 132 twice (as 128, 129, 130, 131, 132, 128, 129, 130, 131, and 132). This reference is to the pages first numbered 128-132.

⁴ See preceding footnote re numbering of pages 128-132.

R. 269-73. In response to the Order, Brent delivered 1,575 pages of documents to the Fishers. R.301, ¶8, R.302, ¶10. On August 5, 2005, Brent filed a “Notice of Production of Documents Pursuant to Court Order” (R.276-78) in which his counsel averred:

To the extent the documents identified in the order exist and are in the possession of [Brent Fisher], they will have been produced on August 11, 2005. In the event additional documents related to [Brent Fisher’s] administration during the accounting period are discovered hereafter, then [sic] responses shall be supplemented.

R.277, ¶5.⁵ There was no supplementation until after the close of evidence at the end of the trial. R.391-93.

Because the documents Brent produced contained only a handful of documents related to the Fisher Trust and the vast majority were Brent Fisher’s personal financial records (*see* testimony of David Castleton at T.80-91), the Fishers then filed a motion for a contempt citation. R.277-80.⁶ As part of that motion, the Fishers alleged that the Trial court order required Brent to aver personally and under oath, and he had not done so.

R.285.

The trial court denied the Fishers’ motion and held that the response by Brent’s attorney constituted Brent’s averment. R.325-26. It further stated its view that the Fishers should have filed a motion to compel and suggested the parties move as quickly

⁵ In preparing the record for appeal, the clerk of the court inadvertently numbered two pages 277 and two pages 278 in this order, 277, 278, 277, 278. This reference is to the first page 277.

⁶ Beginning on the second page 277. *See* preceding footnote.

as possible so the trial court could order an evidentiary hearing. *Id.* Thereafter, the Fishers filed their Rule 16 motion for a scheduling conference, and that led to the one day evidentiary hearing on March 16, 2006. R. 350-51, 367, T. at 393.

Following the close of evidence, the trial court ordered the Fishers to prepare a calculation of damages and file it with the trial court. T.310-11. The trial court scheduled closing arguments to be held on April 25, 2006. R.494-95.

The Fishers filed their damage calculation on April 4, 2006. R.379-89. On April 20, 2006, Brent Fisher moved to reopen the evidence in order to submit documentary evidence regarding a claim that he had taken or lost \$170,556 in sales proceeds shown on his Accounting. R. 391-92; *see* T.Exh 1, at 2. That matter was briefed, and following closing arguments, the trial court granted that motion at the hearing held on April 26, 2008. H.101. Thereafter, the parties agreed to submit affidavits and have the trial court rule on the case with the additional evidence contained in the affidavits. R.506-07.

The trial court entered its “Ruling” on July 13, 2006. Regarding Brent’s conversion of the Trust’s cattle, the trial court ruled:

4. On May 8, 1995 LaRue Fisher and Brent Fisher allocated the properties held by the original trust. The real property (200 acres of farm land and one- half interest in 320 acres of ranch land) was divided equally between the Marital and Family Trusts. Fifty head of cattle was divided, with 30 head (60%) going to the Family Trust and 20 heard [sic] (40%) going to the Marital Trust.

5. Prior to the 1995 allocation, the Trust assets had been appraised (in late 1992 or early 1993). This appraisal listed, as a [sic] Trust assets, 50 head of cattle with a value of \$42,000.00. In 1997 a second appraisal was

completed which listed 100 head of cattle having a value of \$55,000.00. Brent Fisher was aware of each appraisal and made no objection to the inclusion of cattle in either appraisal. Brent Fisher was serving as Trustee at the time each appraisal was prepared and should have contested the inclusion of cattle which did not exist.

6. On February 20, 2004 (which was after this action was filed) Brent Fisher and LaRue Fisher acting as Trustees of the original Trust amended the 1995 allocation. The amendment purportedly corrected the 1995 allocations statement that there were fifty head of cows and stated that when George Fisher died, the Trust owned no cows.

7. . . . The Court accepts the testimony that the arrangement between Brent Fisher and his father was that he keep the calf crop as partial compensation for his efforts and labor in running the farming operation. Nevertheless, based on the original allocations, which was signed by Brent Fisher and which attested to the ownership of 50 head of cows, the Court finds that the trust owned 50 head of cows on May 8, 1995. Certainly Brent Fisher, who was then operating the farm, knew or should have known, the number of cows. His statement attesting to the existence of 50 head is strong and convincing evidence. Value is another issue. The Court has not received any evidence as to the value of the cattle other than the 1992-1993 and 1997 appraisals. The Courts [sic] specific finding is that 50 cows were owned by the Trust in May 1995. The agreement between Brent and his father (George Jr) pre dated the Trust. Based upon this, the Court believes that many, if not all, of the cows remaining in the Trust in 1995 were older cows. The second appraisal properly reduces the values of older cows. Older cows have a shorter remaining life expectancy and therefore less value as producing livestock. While the Court does not give weight to the 1977 appraisal as to the number of cattle, there is no reason to doubt the accuracy of the valuations. Valuation of cattle is readily available through existing markets. The 1997 valuation of older cattle was \$550.00 for cattle seven to eight years old. Based upon the evidence before the Court, the Court will value the 50 head at \$550.00 a head, or \$27,500.00. In doing so the Court must express some frustration with the fact that there was no direct evidence as to valuation in 1995. However, based upon the evidence before the Court, I am comfortable that this is the most accurate figure available to the Court.

8. These cattle are no longer held by the Trust and there has been no explanation as to their disposition or accounting for proceeds received. The agreement between Mr. Brent Fisher and his father (George) was that the Trust would receive the proceeds as the Trust cows were culled from the herd.⁷ The Court will therefore find that Mr. Brent Fisher appropriated the sum of \$27,500.00 from the Trust and that judgement should enter in favor of the family trust for \$16,5000.00 (60%) and \$11,000.00 (40%) for the Marital trust.

R. 534-36.

Regarding Brent's conversion of the Trust's lands, it set the damages for Brent's use of the ranch and farm land and gave Brent credit for property taxes and water assessments he paid. R.536-39, ¶¶9-14. It denied the claim for recovery of \$170,566.00. R.539-40, ¶15. It further denied the Fishers' claim against Brent personally that he pay all of the attorney fees incurred by the Fishers. R.590, ¶17.

Thereafter, the Fishers filed a motion in the nature of a Rule 59 motion claiming the trial court erred: (I) in deciding not to award attorney fees against Brent on a "prevailing party" theory rather than a consideration of the trustee's culpability in converting assets; and (ii) in determining the cattle conversion occurred on May 8, 1995 (rather than George's date of death), using a valuation from 1997, and in using 50 head of cattle rather than 100 head of cattle. R. 543-545. They argued that the trial court failed to consider that Brent was the trustee, it was his duty to account, and he had been ordered to produce all documents in support of his accounting. R.554-55. The trial court denied that

⁷ Culling cows is a livestock management technique in which older cattle are sold to insure the health of the herd. *See* T.180:23-181:4.

motion in its “Ruling” entered on October 2, 2006. R.600-02. As to the cattle conversion, the trial court ruled:

There was no direct evidence as to when conversion occurred. However, the Court believed the testimony of Brent Fisher that he and his father agreed that Brent Fisher would keep the calves and George Fisher would receive the proceeds from the sale of older cattle as they were culled from the herd. There was no evidence as to when each individual animal was sold. However, it is obvious that this did not occurred at one time, but was something that took place over several years. Nor was there any evidence as to the value of older cattle at market. The Court used the values and numbers of cattle that it felt was most convincing based upon a review of the evidence.

R.601-02. It also ruled that it “was never asked to make a finding that Brent Fisher violated his duties as a trustees [sic] to keep records, and did not do so.” R.600-601.

Thereafter, the Fishers prepared findings of fact and conclusions of law and a judgment. Brent objected to those pleadings. R.604-719. The Fishers responded. R.721a through -z, and 721a1 through -a34. On May 1, 2007, the trial court entered its “Ruling” on the proposed findings, conclusions, and judgment. It resolved a number of disputes. In one regard, it reversed its July 13, 2006 Ruling by holding that no prejudgment interest would be awarded on the converted cattle because the date of conversion had not been proven to the trial court. R.724-26. Since this issue had not been briefed by the parties, the trial court granted the Fishers the right to file an objection to this ruling. R.726.

The Fishers then filed their objection. 729-732. Brent responded. 733-40. On November 16, 2007, the trial court issued its decision reinstating its ruling granting

prejudgment interest on the cattle from May 8, 1995 forward. R.748-51. It also directed counsel for the Fishers to prepare a judgment consistent with the trial court's Rulings of July 13, 2006, October 2, 2006, May 1, 2007, and November 16, 2007 and ruled that those rulings together would constitute the trial court's findings of fact and conclusions of law. *Id.*

The Fishers thereafter prepared a single set of findings of fact and conclusions of law, but the trial court refused to enter those pleadings. R.793-94. On April 10, 2008, the trial court entered its judgment. R.787-92. The Fishers filed their appeal on May 6, 2008. R.795-96. Brent filed a cross appeal on May 20, 2006. R.802-804.

STATEMENT OF THE FACTS

George Fisher, Jr. ("George") died on April 18, 1992. R.534. He was survived by his wife, LaRue Fisher ("LaRue"), and five children, Brent Fisher ("Brent"), Michael Fisher ("Michael"), Kim Fisher ("Kim"), Susan Thatcher ("Susan"), and Max Fisher. R.1-42. Max Fisher is not a party to these proceedings.

On October 10, 1975, LaRue and George as settlors executed the Fisher Trust. T.Exh. 18.⁸ They were its initial trustees. Original Trust; Article VIII A. at 9. Upon George's death, LaRue, Max Fisher, and Brent were nominated as successor co-trustees.

⁸ The last four pages of trial exhibit 18 is the First Amendment to Revocable Trust dated December 7, 1978 (hereafter the "Amended Trust").

However, LaRue “shall not act as Co-trustee of the Family Trust and the Marital Trust.”

Id. Due to a prior dispute, Max was either removed or resigned as a co-Trustee. T.224.⁹

Upon George’s death, the Fisher Trust directed its trustees to divide the trust into two new trusts: a Marital Trust and a Family Trust. *See* T.Exh. 18, Amended Trust, Article III A. at 1. The Marital Trust and the Family Trust were irrevocable trusts that held a percentage of the assets that George owned at death. *Id.* Original Trust, Article XIII A. at 14-15 (both trusts irrevocable); Amended Trust, Article III B. at 2-3 (percentage division between Marital and Family Trusts); Amended Trust, Article III C. at 2 (Marital Trust); Amended Trust, Article III E. at 2-3 (Family Trust). LaRue was the lifetime beneficiary of the Marital and Family Trusts. *Id.* The children of LaRue and George were the remainder beneficiaries of the Marital Trust and potential lifetime beneficiaries of the Family Trust. *Id.*, Original Trust, Article IV at 6-8 (remainder beneficiaries); Amended Trust, Article III E. ¶1 at 3 (potential lifetime beneficiaries).

In establishing the Fisher Trust, LaRue and George identified several pieces of real property as being owned by the Fisher Trust and expressly included “all present and future personal property located thereon.” *Id.*, Schedule A (following page 18 of the Original Trust); *see also* Original Trust, Article X B. at 13 (“all real and personal property now owned” and “all future real and personal properties acquired by the [settlers] are to be part of” the Fisher Trust).

⁹ “T.” stands for the trial transcript found at R.903.

At George's death, the Fisher Trust owned certain farm and ranch land comprising approximately 480 acres. T.Exh. 17. It also owned mineral rights, a bank account, and a tractor. T.Exh. 15 at 4, ¶¶2-3. The parties dispute whether the Fisher Trust owned cattle at George's date of death. As noted above, the trial court held the Fisher Trust owned 50 head of cattle on May 8, 1995, and it held Brent converted the cattle. R.535-36, ¶¶8-9.

The trial court found that Brent and George had an "arrangement" that permitted Brent to use the farm and ranch land in return for Brent's management of the farm and ranch. R.535-36, ¶7. There was no testimony that the oral "arrangement" survived George's date of death or that it was binding on the Fisher Trust.

Following his father's death, Brent sought and obtained LaRue's permission to continue to manage the ranch and farm. T.266. He also asked the trust's lawyer about whether to sell or run the ranch and farm. T.266-67; *see also* H.49:17-50:13 (closing argument by Brent's counsel). Prior to George's death, Brent sold the cull cows and gave the proceeds to his father. T.180. After his father's death, he kept those proceeds. T.Exh. 1 (Brent's accounting reported no income to the Fisher Trust related to cattle).

On May 8, 1995, LaRue and Brent as co-Trustees of the Fisher Trust executed the "Trustees Allocation of the Properties Held Under the George Fisher, Jr. Family Revocable Trust Dated October 10, 1975" (the "May 8, 1995 Trust Allocation"). T.Exh. 15 at 1. The allocation stated it was being made "pursuant to Article III" of the Fisher Trust. Article III A. stated:

At the death of first of the [settlers] to die, the Trustees shall divide the Trust Estate into two separate trusts, hereinafter designated as the Marital Trust and Family Trust, respectively.

T.Exh. 18, Amended Trust, Article III A. at 1. Thus, the allocation identified each property owned by the Fisher Trust, its date of death value, and how it was being allocated between the Marital and Family Trusts. Among other assets, the allocation identified: “50 head of mixed breed beef cows valued at \$42,0000 at date of death of decedent.” T.Exh. 15 at 4.

On February 21, 2001, LaRue, Brent, Susan, Michael and Kim executed a Designation of Trustees. T.Exh. 21. They named each of themselves as a co-trustee of the Fisher Trust. On May 26, 2001, Brent, Michael, Kim, and Susan agreed on a division of the real property owned by the Fisher Trust, and they distributed that property. T. 133:22-133:2. When they could not agree on the distribution of the remaining assets, Michael, Kim, and Susan filed the petition for recovery of assets that had been lost or taken. R.1-42.

Thereafter, on February 20, 2004, Brent and LaRue executed a document entitled “First Amendment to Trustee’s Allocation of the Properties Held Under the George Fisher, Jr. Family Revocable Trust dated October 10, 1975.” T.Exh. 16. In relevant part, it stated:

[I]t has now come to the collective attention of said Co-trustees that the Initial Allocation incorrectly reflected the Trust as owning fifty (50) head of mixed breed beef cows on the date of death of George Fisher Jr. when in fact the Trust owned no such cows;

Id. at 1 (emphasis added). The amendment then purported to delete the cattle from the May 8, 1995 Trust Allocation. *Id.* at 2.

SUMMARY OF ARGUMENT

The trial court misread the May 8, 1995 Trust Allocation and the February 22, 1997 updated appraisals. As a result, it valued the wrong number of cattle on the wrong date. The correct interpretation of the May 8, 1995 Trust Allocation and the February 22, 1997 updated appraisals establish that Trustee Brent Fisher converted 100 head of cattle on April 18, 1992 valued at \$840.00 per head.

The trial court erred when it granted Trustee Brent Fisher a credit for property taxes and water assessments he paid. Having converted the Fisher Trust's land, Brent Fisher was not entitled to a credit for payments that benefit his personal use of the converted property.

The trial court abused its discretion when it refused to award attorney fees and expenses in favor of the Fishers and against Trustee Brent Fisher personally. The trial court should have ordered the trustee to personally pay the Fishers' fees in order to make the Fisher Trust whole and to do justice and equity in this matter.

ARGUMENT

- 1. The Trial Court Erred When it Held that Brent Converted 50 Head of Cattle on May 8, 1995 Valued at \$550 per Head.**
 - a. The Trial Court Misinterpreted the May 8, 1995 Allocation and Erred as a Matter of Law in Setting the Conversion Date as May 8, 1995.**

The trial court ruled:

The Court accepts the testimony that the arrangement between Brent Fisher and his father was that he keep the calf crop as partial compensation for his efforts and labor in running the farming operation. *Nevertheless, based on the original allocations, which was signed by Brent Fisher and which attested to the ownership of 50 head of cows, the Court finds that the trust owned 50 head of cows on May 8, 1995. Certainly Brent Fisher, who was then operating the farm, knew or should have known, the number of cows. His statement attesting to the existence of 50 head is strong and convincing evidence. . . . The Courts [sic] specific finding is that 50 cows were owned by the Trust in May 1995.*

R.535 (emphasis added). While the trial court found that Brent and George had a binding agreement, its finding that May 8, 1995 was the date of conversion was “based on the original allocations.” *Id.* Thus, the date of conversion depends upon the terms of the May 8, 1995 Trust Allocation. A careful reading of the trust allocation shows that the allocation was effective as of George’s date of death, April 18, 1992, and that it was allocating assets the trust owned on that date.

The Fisher Trust directed the division of the Fisher Trust as follows:

At the death of the first of the [George and LaRue] to die, the Trustees shall divide the Trust Estate into two separate trusts, hereinafter designated as the Marital Trust and the Family Trust, respectively.

T. Exh. 18, Amended Trust at 1, Article III, ¶A. The May 8, 1995 Trust Allocation fulfills the direction in the Fisher Trust to divide the assets between the Marital and Family Trust. Thus, the May 8, 1995 Trust Allocation states:

Pursuant to the death of GEORGE FISHER, JR. on April 18, 1992, LaRUE FISHER and BRENT ELMER FISHER, as Trustees of the above-mentioned Trust, do hereby allocate the properties of said Trust between the Family Trust Portion and the Marital Trust Portion pursuant to Article III of said Trust as follows:

T. Exh. 15 at 1 (emphasis added). The May 8, 1995 Trust Allocation then identifies four separate categories of property to be divided between the Marital Trust and the Family Trust. *Id.* at 1-5, ¶¶1-4. In addition to providing a description of each property listed, the allocation further states the date of death value of each listed property. *Id.* at 1-4. With regard to cattle, the allocation states: “50 head of mixed breed beef cows valued at \$42,000 at date of death of decedent.” *Id.* at 4.

The allocation carefully identifies the “date of death” value for each item because “*Pursuant to the death of GEORGE FISHER, JR. on April 18, 1992*” and “*per the terms of Article III,*” the Fisher Trust directed the Trustees to “divide” the Fisher Trust “at the date of death of [George Fisher].” T.Exh. 15 at 1; T.Exh. 18, Amended Trust at 1. Thus, the May 8, 1995 Trust Allocation supports only one conclusion: On April 18, 1992, the Fisher Trust held “50 head of mixed breed beef cows valued at \$42,000.”¹⁰ The May 8,

¹⁰ As discussed in subparagraph 1.c. below, there were actually 100 head of cattle at the time of George’s death.

1995 Trust Allocation allocated cows that were in existence on George's date of death as required by Article III of the Fisher Trust.

The "First Amendment to Trustee's Allocation of the Properties Held Under the George Fisher, Jr. Family Revocable Trust dated October 10, 1975" confirms this analysis. T. Exh. 16. That document, intended by Brent to correct his intentional misrepresentation of the number of cattle in the first allocation (*Compare* T.159:2-23 with T.165:2-5), stated in relevant part:

[I]t has now come to the collective attention of said Co-trustees that the Initial Allocation incorrectly reflected the Trust as owning fifty (50) head of mixed breed beef cows *on the date of death of George Fisher Jr.*

Id. at 1 (emphasis added).

Finally, there is no financial evidence of any kind showing that Brent treated the Fisher Trust as owning any cattle at any time after George's death. *See* T.Exh. 1 (Brent's Accounting shows no income from cattle to the Fisher Trust). Instead, Brent treated all of the farm *expenses* on a separate ledger as having been paid by Brent personally. *See* T.Exh. 1 at 3. He never accounted for any income he received from any of the cattle after George's death. *Id.* at 1-2.

As the trial court ruled: "These cattle are no longer held by the Trust and there has been no explanation as to their disposition or accounting for proceeds received." R.536, ¶8. The terms of the Fisher Trust and the May 8, 1995 Trust Allocation establish that "50 head of mixed breed beef cows" were owned by the Fisher Trust on April 18, 1992.

There being “no explanation as to their disposition or accounting for proceeds received,” that was the date of the conversion.

b. The Trial Court Erred By Ruling on Matters Contrary to the Parties’ Claims When it Implicitly Found that Brent’s Agreement with George Continued after George’s Date of Death.

The trial court ruled:

The Courts [sic] specific finding is that 50 cows were owned by the Trust in May 1995. The agreement between Brent and his father (George Jr) pre dated the Trust. Based upon this, the Court believes that many, if not all, of the cows remaining in the Trust in 1995 were older cows.

R.536, ¶7. Since the trial court determined that the converted cows were “older” “in 1995,” it impliedly found that Brent’s agreement with George continued beyond George’s death. If the agreement terminated at George’s death, their age in 1995 would be irrelevant. This implicit finding constitutes a finding rendered outside the issues presented to the trial court and is thus a reversible error of law. *Combe v. Warren's Family Drive-Inns, Inc.*, 680 P.2d 733, 736 (Utah 1984).

In closing argument, the Fishers’ counsel argued:

Well, the issue, though, is what was the value at the date of death? That's when the conversion takes place because the estate has a value at that point, and the way we got there was we used the hundred head of cattle, that is identified here [in trial exhibit 17], but not this appraisal because this is an updated appraisal. We used the value that was established back in 1992, and that came from the [May 8, 1995 Trust Allocation].

H.20:20-21:3. While the Fishers did not acknowledge the verity of the alleged “arrangement” between Brent and his father, they nonetheless implicitly argued it terminated at George’s death.

On the other hand, Brent’s counsel admitted the agreement terminated on George’s death.

That arrangement [between Brent and George] was proper. In 1980, in 1981, in '82, '83, every year *until George passed*. And George passes in 1992, and Brent talks with his mom . . . He involves his attorney, Paul Barton, and says, "What am I to do now?" *And the decision [was] made*, in consultation with these people is: *Keep doing what you've always done*.

H.49:21–50:6 (emphasis added); *see also* T.266:7-267:11 (Brent’s testimony supporting counsel’s statement). Brent’s acknowledgment that the agreement terminated on George’s death was binding on Brent and the trial court.

It is error to adjudicate issues not raised before or during trial and unsupported by the record. The trial court is not privileged to determine matters outside the issues of the case, and if [it] does, [its] findings will have no force or effect. In law or in equity, a judgment must be responsive to the issues framed by the pleadings, and a trial court has no authority to render a decision on issues not presented for determination. Any findings rendered outside the issues are a nullity.

Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733, 736 (Utah 1984) (citations omitted).

Thus, the trial court’s implicit finding that Brent’s agreement with his father continued beyond his father’s date of death rendered outside the issues presented to it was a legal nullity.

c. The Trial Court's Finding that Brent Converted 50 Head of Cattle is Clearly Erroneous.

The trial court held that Brent converted 50 head of cattle based on the May 8, 1995 Trust Allocation. R. 535-36, ¶¶7-8. It found that Brent would have known how many head of cattle he owned on that date and his statement in the May 8, 1995 Trust Allocation was “strong and convincing evidence” of the number of cattle held by the Fisher Trust on May 8, 1995. R. 535, ¶7. As illustrated above, the trial court’s findings on these points are incorrect based on its misreading of the May 8, 1995 Trust Allocation.

There is no evidence to marshal in support of the trial court’s finding, because Brent testified that he intentionally misrepresented the number of cattle the Fisher Trust owned in the May 8, 1995 Trust Allocation. T.159- 161, 166, 210-11. He testified that the Fisher Trust owned no cattle at his father’s date of death. T.158-59; 210; 281. He even went so far as to execute a written disclaimer on February 20, 2004, purporting to modify the May 8, 1995 Trust Allocation. T. Exh. 16. Brent’s counsel confirmed this intentional misrepresentation in closing arguments. H. 65:22-66:16. As to *why* he misrepresented the number of cattle, Brent gave differing reasons. T.159:10-14 (dispute with siblings); T.160:24-161:8 (not sure what date he documented Fisher Trust’s cattle was gone); T.161:9-14 (“never sold none of the cows” so “the cows would still be there”); T.208:8-17 (thought there might have been cows there but made a mistake); 209:22-210:1 (when siblings made claims against him, he “got turned around”); T.210:2-5 (finally: “I don’t know”).

On the other hand, there was untainted evidence of the number of head of cattle that the Fisher Trust owned on the date George died. On February 22, 1997, Darren Anderson, on behalf of Cloward's Appraisal Service, wrote Brent a letter opining as to the then current value for each item of property owned by the Fisher Trust at George's date of death and originally appraised on November 12, 1992. T. Exh. 17. The letter was addressed to Brent Fisher. In relevant part it stated:

Re: George Fisher Jr. Family Trust Consisting of Four Separate Parcels
Land w/ Water Rights . . . Fisher Livestock – 100 Bred Beef Cows

Dear Brent:

According to your request, I have herein completed updated values on the above described properties belonging to the George Fisher Jr. Family Trust. For further detailed descriptions of these properties, please refer to the original appraisal that were completed on November 12, 1992 on these parcels as well as on the livestock. In fact, the updated values contained herein are invalid unless this letter is accompanied by the November 12, 1992, appraisals.

. . .

Concerning the value(s) of the livestock consisting of some 100 mixed breed, bred cows ranging in age from five to ten years, I am of the opinion that the five to seven year old cows would be worth somewhere in the range of \$650.00. The seven to eight year old cows \$550.00, and the nine to ten year old cows \$450.00, with a running average for the herd as a whole of \$550 per head.

T. Exh. 17 at 1, 2.

The trial court rejected the letter's identification of 100 head of cattle being owned by the Fisher Trust at George's date of death. It reasoned:

Based upon the evidence the Court has no confidence that the 1997 appraisal accurately reported the existence of 100 cows in the Trust. There

is no evidence that the appraiser, who lived in Colorado, ever came to Utah and observed or counted cows. Indeed the evidence is that he did not.

R.535, ¶7.

This finding is clearly erroneous. Again, there is no evidence to marshal in support of this finding. Rather, it is expressly contradicted by Brent Fisher's testimony.

No, I've never talked to Darin [sic] Anderson until -- I've never talked to him. Except when the first time when he made the very first appraisal when he come up, but after the second one, I never had no contact.

T.129:8-12; *see also* T.123:11-16 (Anderson did not come back to appraise the ground the second time "like he did the first time"); T.124:14-16 ("he made the first appraisal here"). Mr. Anderson "came up" and met with Brent to work on the first appraisal prior to November 12, 1992. Thus, Mr. Anderson was present and could count the cows before the initial appraisal was completed.

Moreover, even if the trial court's finding were in fact correct, its conclusion that the report was unreliable is illogical. The identification of the property could have been based on information supplied by Brent Fisher or someone else. The issue is whether the first appraisal and the second appraisal correctly identified the number of cattle owned by the Fisher Trust on George's date of death. The letter itself states:

For further detailed descriptions of these properties, please refer to the original appraisal that were completed on November 12, 1992 on these parcels as well as on the livestock. In fact, the updated values contained herein are invalid unless this letter is accompanied by the November 12, 1992, appraisals.

T.Exh. 17 at 1. This establishes that the properties listed in the February 22, 1997 letter were identical to those listed in the first appraisal, when Mr. Anderson “came up” to the property.

Furthermore, other evidence established that the February 22, 1997 accurately identified the number of head of cattle originally appraised and that were subject to the updated reappraisal. Kim Fisher testified that the Fisher family held a meeting in the office of the trust lawyer (Mr. Barton) in October 1997. T.219:15-220:3. Mr. Barton, LaRue, and her four children, Brent, Michael, Kim and Susan, were all present. T.220:6-15. Everyone at the meeting was given a copy of the letter. T.221:2-9. The parties used the letter to discuss how to divide the trust properties. T.220:19-22; 221:10-12. Kim testified that Brent never objected to the letter’s representation that there were 100 head of cattle at George’s date of death. T.221:13-24. *Id.* As the trial court found: “Brent Fisher was serving as Trustee at the time each appraisal was prepared and should have contested the inclusion of cattle which did not exist.” R.535, ¶5.

The original appraisal appraised 100 head of mixed breed, bred cows as of George’s date of death. Thus, the second appraisal also appraised 100 head of mixed breed, bred cows as of February 22, 1997. Kim’s testimony established that Brent, his mother, his siblings, and Mr. Barton used and relied on the February 22, 1997 letter without any objection by Brent. The trial court recognized that Brent should have objected if the number of cattle was inaccurate. Had the trial court not misread the May

8, 1995 Trust Allocation, it is likely it would have found that there were 100 mixed bred cows on George's date of death. Its finding that there were 50 head of cattle on May 8, 1995 is clearly erroneous as to both the relevant date and the number of cattle that Brent converted.

d. The Trial Court Erred as a Matter of Law in Valuing the Converted Cattle at \$550 per head.

Although the trial court placed the conversion as occurring on May 8, 1995, it used the updated appraisal from the February 22, 1997 letter as the basis for its valuation of the cattle on May 8, 1995. It stated:

While the Court does not give weight to the 1977 [sic] appraisal as to the number of cattle, there is no reason to doubt the accuracy of the valuations. The 1997 valuation of older cattle was \$550.00 for cattle seven to eight years old. Based upon the evidence before the Court, the Court will value the 50 head at \$550.00 a head, or \$27,500.00.

R.536, ¶8. In choosing to value the cattle based on their value in February 1997, the Trial court erred as a matter of law.

“As a general rule, the measure of damages for the conversion of property is the value of the property at the time of the conversion, plus interest.” *Broadwater v. Old Republic Sur.*, 854 P.2d 527, 531 (Utah 1993). The exceptions to this general rule provide greater damages when the converted asset fluctuates in value. *Id.* In this case, the Fishers sought “the value of the [cattle] at the time of conversion, plus interest.”

R.379-80. Using a valuation of the cattle done 21 months after the trial court's conversion date or nearly 5 years after the actual conversion date was an error of law.

Had the trial court correctly held that the conversion took place on April 18, 1992, there was un rebutted evidence as to the valuation of the cattle on that date. *See* T.162:3-163:1 (Brent's testimony that cattle valued at \$840); T.Exh. 15 at 4 (identifying date of death value of cattle). Moreover, the trial court agreed that the initial appraisal valued the cattle at \$840.00 per head.

Prior to the 1995 allocation, the Trust assets had been appraised (in late 1992 or early 1993). This appraisal listed, as a Trust assets, 50 head of cattle with a value of \$42,000.00.

R.535, ¶5.

Based on its belief that the conversion date was May 8, 1995, the trial court rejected the use of the 1992 appraisal. Based on the correct conversion date, the trial court should have valued 100 head of cattle at \$840.00 per head for a total value on the date of conversion of \$84,000.00.

2. The Trial Court Erred as a Matter of Law When it Gave Brent a Credit for Property Taxes and Water Assessments He Paid While Converting the Use of the Fisher Trust's Land.

In arriving at its computation of damages for Brent's conversion of the Fisher Trust's land, the trial court granted Brent a credit for monies he allegedly paid for property taxes and water assessments. After noting that Brent's Accounting was inherently unreliable, the trial court ruled:

However, the stated amounts which were paid for Dry Gulch Water, Indian Water, and taxes are readily verifiable through public or corporate records. These amounts are properly offset against amounts owed for rent. The Court will find that Brent Fisher paid a total of \$19,954.28 for water and

taxes. . . . Therefore, he is entitled to [19,954.28] as an offset against rent owed.

R.536-37, ¶9.

The trial court computed damages based on the fair market rental value of the trust land that Brent converted. R. 537-39. Granting Brent a credit for payments for property taxes and water assessments is erroneous as a matter of law. These offsets are permissible only when the beneficiary seeks damages against the trustee based on the trustee's net profits. Restatement (Second) of Trusts, §205, comment I (1959). In those circumstances, the trustee's net profit is based on gross income less expenses, and property taxes and water assessments are expenses that would reduce the gross profit. However, when the claim is based on the fair market rental value of the land, there is no grounds for an offset. Instead, these yearly payments of property taxes and water assessments are beneficial to the property owner (or more accurately, the property converter) in the year made. In the absence of a claim for damages based on Brent's net profits, it is error to give him any credit for payments that personally benefitted him in his use of the converted land.

Moreover, by referring to the ability to verify payments through "public or corporate records," the trial court erroneously placed the burden on the Fishers to establish that these payments were not made or were different than the amount reported. That was not their burden. *Walker v. Walker*, 17 Utah 2d 53, 60, 404 P.2d 253, 258 (Utah 1965); Restatement (Third) of Trusts, § 83. Duty To Keep Records And Provide Reports

(Current through August 2008); *id.*, comment a. If made, those payments should have been included in the 1,575 pages of documents that were in the courtroom during the trial. T.80-91. It was Brent's responsibility to find the check or voucher and present it to the court in order to obtain credit for the expenditure. *Id.* Since he did not do so, for this reason the trial court also erred in giving Brent a credit for these payments.

3. The Trial Court Abused its Discretion in Failing to Award Attorney Fees Against Brent Fisher Personally.

The trial court abused its discretion because it failed to consider: (I) The prohibition against self-dealing and its crucial role in keeping trustees from using trust assets for their personal benefit; (ii) The duty that a trustee has to account for its administration, particularly when the trustee is guilty of converting trust assets to the trustee's own use and benefit; and (iii) In deciding not to award attorney fees, the inadequacy of its "Prevailing Party" analysis under the circumstances of this case.

a. The Trial Court Erred by Ignoring the Crucial Role the Prohibition Against Self-dealing Plays as a Deterrent to the Trustee's Use of the Trust for His Personal Benefit.

"The prohibition against self-dealing does not depend upon proof of bad faith, but is absolute so as to avoid the possibility of fraud and the temptation of self-interest." *Wheeler ex. rel. Wheeler v. Mann*, 763 P.2d 758, 760 (Utah 1988) (citations omitted; emphasis added). A trustee who purchases trust property for itself or leases trust property to itself, even if the trustee pays fair market value, is guilty of breaching the duty of loyalty and the prohibition against self dealing. George Gleason Bogert, George Taylor

Bogert, Amy Morris Hess, *Bogert's Trusts And Trustees*, § 543, "Trustee's Duty of Loyalty to the Beneficiaries," (Current through 2008 update). Here Brent simply took the Trust's cattle without any compensation whatsoever. R.536, ¶8. He used the Trust's land with limited compensation. R.537, ¶9. Brent was the epitome of the trustee who could not be trusted. His conduct showed disdain for his duty of loyalty, the prohibition against self-dealing, and other duties that his obligation to act with loyalty and care.

The development of the absolute prohibition against self-dealing as a restraining force on trustee conduct mirrors the changing use of trusts themselves. Initially, trustees were:

mostly stakeholders for ancestral land, . . . *kept tightly in check by being disabled from doing much with the trust property. . . .* The trustees had only those powers that the trust instrument expressly granted, which were typically few, since the trustees' job was simply to hold and then to convey to the remainderpersons.

John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 640 (1995) (emphasis added).

As more complex forms of property developed, the restrictive approach to keeping trustees in check gave way to statutes that empowered trustees to deal with new financial conditions and markets. As a result:

The need for active administration of the modern trust portfolio of financial assets rendered obsolete this scheme of disempowering the trustee to transact with the trust property. . . . Empowering the trustee to transact freely in the financial markets has shifted the locus of protection for beneficiaries from powers law to fiduciary law. Whereas disempowerment prevented the trustee from acting, modern trustees' powers law confers vast

managerial discretion. *Discretion entails the risk of harm* as well as the opportunity to enhance the trust assets.

Id. at 641-42 (emphasis added). To protect against the misuse of the broad powers granted trustees to manage trusts, the law strictly enforces the prohibition against self-dealing and the trustee's duty of loyalty.

Without a deterrent to misconduct, "the problem is that [the] trustee lacks a direct financial incentive to act with loyalty and care in managing the trust fund." Jesse Dukeminier, Stanley M. Johanson, James Lindgren, and Robert H. Sitkoff, *Wills, Trusts, and Estates*, Aspen Publishers, 7th Ed. 2005, at 771. Indeed, absent a significant deterrent, the trustee has a strong financial incentive to act *disloyally*.

One solution to this systemic problem would be to require every trust to be monitored by a government official. But because that approach would be far too cumbersome and expensive, it is better to enforce the prohibition against self-dealing and the duty of loyalty strictly in order to deter fiduciary misconduct.

[T]he fiduciary obligation [comprising the duty of loyalty and the duty of care] also serves to reduce the economic costs associated with conducting complex commercial transactions. One prestigious team of scholars has described the process this way: "The fiduciary principle is an alternative to direct monitoring. It replaces prior supervision with deterrence, much as the criminal law uses penalties for bank robbery rather than pat-down searches of everyone entering banks."

Cecil J. Hunt, II, *The Price of Trust: an Examination of Fiduciary Duty and the Lender-Borrower Relationship*, 29 Wake Forest L. Rev. 719, 734-35, Fall 1994 (citations omitted).

Justice Benjamin Cardozo understood the pivotal role the duty of undivided loyalty fulfills in insuring appropriate fiduciary conduct.

Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. . . . Uncompromising rigidity has been the attitude of court's of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct by fiduciaries been kept at a level higher than that trodden by the crowd.

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). Utah trial courts should heed

Justice Cardozo's concluding statement: "[The level of conduct by fiduciaries] will not be consciously lowered by any judgment of this court." *Id.*

In this case, the trial court excused Brent's misconduct, setting the "level of conduct" for Brent *even lower* than that "trodden by the crowd." In its July 13, 2006 Ruling, the trial court never identified *any* duty that Brent breached. There is no reference to "duty," "loyalty," or "self dealing" anywhere in the decision. R. 534-42. The trial court used the word "obligation" only when it was *defending* Brent's misconduct:

Having said that, the Court does recognize that Brent Fisher has not acted or engaged in any conduct which approaches malicious or intentional conduct. His conduct with respect to the cattle and rent was born of a good faith, albeit mistaken belief as to his rights and obligations with respect to the Trusts.

R. 537.

This ruling is truly amazing. During the trial, based on questioning by the Fishers (T.158:23-59:1), by his own counsel (T.281:16-18), and by the trial court (T.208:8-17;

210:23-211:6), Brent testified the Fisher Trust owned no cattle at the time of George's death. In holding Brent converted 50 head of cattle on May 8, 1995, the trial court rejected that testimony. R.536, ¶8. The trial court does not explain how Brent could testify falsely that the Fisher Trust owned no cattle and could convert the Fisher Trust's cattle and land to his own use "unintentionally" and "in a good faith belief as to his rights and obligations." The trial court abused its discretion in ignoring this crucial evidence.

The Utah Supreme Court has adopted Judge Cardozo's view of the duty of loyalty.

A trustee's duty of loyalty requires the trustee to administer the trust "solely in the interest of the beneficiary." As such, a trustee is *not permitted* to engage in self-dealing, or "to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries." *The prohibition against self-dealing* does not depend upon proof of bad faith, but is absolute *so as to avoid the possibility of fraud and the temptation of self-interest.*

Wheeler, 763 P.2d at 760 (Utah 1988) (citations omitted; emphasis added); *see also Callister v. Callister*, 15 Utah 2d 380, 387, 393 P.2d 477, 481 (Utah 1964) (fn. 8, quoting *Meinhard* regarding the fiduciary duty of a court appointed executor).

The trial court's failure to understand and strictly apply the absolute prohibition against self-dealing and the duty of loyalty caused it to excuse the inexcusable. Had the trial court given proper deference to the role of the absolute prohibition against self-dealing in restraining fiduciary misconduct, it would not have abused its discretion in denying the Fishers' claim that attorney fees be assessed against Brent personally.

b. The Trial Court Erred by Improperly Excusing Brent's Failure to Produce Documentary Evidence He Was Ordered to Produce.

Under Utah law: "It is [the trustee's] duty to keep full, accurate and orderly records. When any question arises as to their sufficiency or accuracy, the burden is upon him to show the correctness of his accounts; and doubts may be resolved adversely to him." *Walker*, 17 Utah 2d at 60, 404 P.2d at 258. When a trustee self-deals, an accurate accounting by the trustee gives the beneficiaries and the court the opportunity to calculate the damages done to the trust and make it whole. On the other hand, a trustee who refuses to produce underlying documents can easily avoid the consequences of self-dealing if the trial court is not vigilant in enforcing fiduciary law.

Following the trial court's initial Ruling on July 13, 2006, and prior to the entry of its Judgment, the Fishers filed a motion to correct an alleged error of law. R.543-46. In part, the Fishers argued that the burden of producing records in support of Brent's Accounting was on Brent. R.553-55. In denying that motion, the Trial court stated in part:

The Court was never asked to make a finding that Brent Fisher violated his duties as a trustees [sic] to keep records, and did not do so. Indeed, in its October 31, 2005 Ruling, the Court indicated that the allegations that there were additional documents which were not provided, were mere conclusions. The Court then invited the movants in this motion to file a Motion to Compel, which was, in the Court opinion, the proper procedural tool to resolve that issue. At trial counsel for the movant in this motion indicated that he had decided to forego further attempts to locate documents and had instead decided to go to trial on the facts which they then had. Having made the decision to go forward without resolving the issues of

whether there were additional document, the movant cannot now claim that there were additional documents, and that Brent Fisher should be penalized for not producing them.

R.600-601. The trial court was thoroughly mistaken both as to the facts and the law.

In closing arguments, the Fishers' counsel argued initially and at several times thereafter that Brent had a duty to keep and produce accurate supporting documentation. *See* H.5-7, 77-81, 90, 97; *see* H.81:22-25. As shown by the following exchange with Brent's counsel, the trial court (as well as opposing counsel) appeared to understand and agree with the Fishers' argument:

THE COURT: The duty of the trustee is to account, is to maintain accurate records.

MR. HILL: Uh-huh.

THE COURT: Now, what you are telling me is, is that your guy cannot keep the records and they can't recover because they can't prove. And I think what [the Fishers' counsel] said is probably true, is that once they show, for instance, an amount coming in, then it becomes the responsibility of the trustee to show how it was dealt with because no one else could do that, could they?

MR. HILL: You are probably correct, Your Honor . . .

H.41:16-42:2.

Moreover, while it might be said that the trial court invited the Fishers to file a new motion to compel, at the same time, it clearly encouraged them to proceed to trial.

The problems that the movants see in Mr. Brent Coopers [sic] response are more properly addressed in a motion to compel. The original petition was for an accounting. This Petition was filed almost two years ago. I would suggest that the parties proceed as quickly as possible to the point where the Court can schedule an evidentiary hearing to consider the issue of whether and [sic] accounting should be ordered.

R.326.

Thus, where Brent had a duty to account and to keep accurate records (*Walker v. Walker, supra*), where the trial court had ordered him to produce all supporting documentation (R.269-73), where Brent had averred that he had produced all of the records he was required to produce (R.277), the Fishers chose to follow the trial court's recommendation to proceed to trial. Brent's production had not been in response to a Rule 34 document request. Utah R. Civ. P. 34. Had the Fishers filed and the trial court granted a motion to compel, the trial court's order of enforcement would have been no different than the stipulated order already entered. R.269-73. Accordingly, the Fishers filed a Rule 16 Motion seeking a hearing date on "whether Brent Fisher's accounting should be approved and whether Brent Fisher should be surcharged for damages for breach of fiduciary duty." R.350.

Moreover, the Fishers never suggested to the trial court that they were assuming any responsibility for unproduced records. At the inception of the trial, the trial court stated its belief that the hearing was to determine whether it should order Brent to file an accounting. Counsel for the Fishers responded:

Your Honor, I believe the evidence will show that ordering an accounting will not be effective. We [are] prepared to go forward on the petition that we originally filed which included a request for return of property and damages; so that's our preparation for today.

...

What I envision today, Your Honor, is that we will present the information that has been given to us by Brent Fisher. We'll show the deficiencies in that information. We will then calculate what damages flows [sic] as a

result of the deficiencies. And then we'll hear from Mr. Fisher and his Counsel and decide the case.

R.8:15-20; 9:6-12.

Thus, there is no basis for the trial court's underlying assumption that proceeding to trial in these circumstances shifted the burden of production to the Fishers. The trial court basically excused Brent's failure to comply with its order to produce all records without justification.

As noted above, Cloward's Appraisal Service prepared an appraisal on all of the assets of the Fisher Trust on November 12, 1992. T. Exh. 17. However, Brent Fisher did not produce that document. T.80-91. That appraisal would have conclusively established the character and number of cattle that the Fisher Trust owned at George's date of death. Without that appraisal, the Fishers were forced to use related documents to establish the number of cattle at the date of death and their value. In analyzing the weight to be given the evidence before it, the trial court should have kept in mind that the best evidence was not available because the trustee had failed to produce it.

Accordingly, the Fishers did argue that Brent had a duty to keep and produce accurate records, and the trial court apparently agreed with their position. H.41:16-42:2. It should have held so in its July 13, 2006 "Ruling." By ruling to the contrary (R.600-01), the trial court set the stage for its abusive decision denying the Fishers' claim that Brent personally pay their attorney fees.

c. The Trial Court Abused its Discretion in Not Awarding Attorney Fees Against Brent Personally.

In trust litigation, a trial court has discretion to “decide whether an award of attorney fees is ‘appropriate in the interest(s) of justice and equity’ in any given case.” *Hughes v. Cafferty*, 2004 UT 22, ¶22, 89 P.3d 148.¹¹ In exercising its discretion, the trial court’s “obligation is to effectuate a result that serves equity given the overall fact and circumstances of the individual case.” *Id.*, ¶24. The trial court’s decision is due “considerable deference” because it is “in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole . . .” *Id.*, ¶24, fn.2 (citing *State v. Pena*, 869 P.2d 932-936 (Utah 1994)).

Notwithstanding the discretion afforded the trial court in *Hughes*, the Supreme Court has refined in subsequent cases the pasture analysis in *State v. Pena* cited in *Hughes*. *State v. Levin*, 2006 UT 50, ¶25, 144 P.3d 1096. As a result, in determining the amount of discretion to accord the trial court, the appellate court considers:

(1) the degree of variety and complexity in the facts to which the legal rule is to be applied; (2) the degree to which a trial court's application of the legal rule relies on “facts” observed by the trial judge, “such as a witness’s appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts;” and (3) other “policy reasons that weigh for or against granting discretion to trial courts.”

¹¹ The misconduct in this case occurred between 1992 and 2001. Thus, the Fishers have not referred to Utah Code Ann. §75-7-1004, Attorney Fees and Costs, enacted in 2004. *See* Utah Code Ann. §75-7-1103(3). Regardless, the Fishers believe the Court of Appeals would reach the same result under that statute.

Id. Here, the trial court did not resolve this matter based on matters that fall within the trial court's special purview. Instead, the trial court used a mechanical comparison of the damages sought with the damages obtained in denying attorney fees. R.540. Importantly, the trial court showed no concern for the nature of the trustee's misconduct and how that conduct affected the very test it applied. Further, it failed to consider that: "*The prohibition against self-dealing does not depend upon proof of bad faith, but is absolute so as to avoid the possibility of fraud and the temptation of self-interest.*" *Wheeler ex. rel. Wheeler v. Mann*, 763 P.2d 758, 760 (Utah 1988) (citations omitted; emphasis added). When it comes to insuring that the "prohibition against self-dealing . . . is absolute," this Court is equally, if not better, suited to protect that bedrock of fiduciary law. Where a trustee is guilty of self-dealing, the trustee's culpability should be a central focus of the trial court's decision on the award of fees. *Hughes*, ¶29, fn.5.

By comparing the damages sought with those obtained, the trial court denied the Fishers' claim for attorney fees because "it is not apparent that [the Fishers] were the prevailing parties on any issue." R.540. The trial court apparently used the "flexible and reasoned approach" for determining who is the "prevailing party." *A.K. & R. Whipple Plumbing and Heating v. Guy*, 2004 UT 47, 94 P.3d 270. While the use of a "flexible and reasoned approach" has been approved in awarding fees under both contracts and statutory provisions, all of the reported cases involve conflicting claims between the defendant and the plaintiff or between multiple parties, where each had a partial victory

and a partial loss. *See, e.g., J. Pochynok Co., Inc. v. Smedsrud*, 2005 UT 39, ¶¶9-24, 116 P.3d 353.

The “flexible and reasoned approach” traces its origin to a contract dispute that required attorney fees to be awarded to the prevailing party. *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551 (Utah App. 1989), at 556 fn.7. Although using the “net judgment rule” under the facts of that case to identify the “prevailing party,” the Court of Appeals noted that “[t]he determination of a ‘prevailing party’ becomes even more complicated in cases involving multiple claims and parties,” and it identified several cases where “a flexible and reasoned approach to deciding . . . who actually is the ‘prevailing party’” would be appropriate. *Id.*

But prior to discussing the “flexible and reasoned approach,” the Court of Appeals noted:

Typically, determining the “prevailing party” for purposes of awarding fees and costs is quite simple. Plaintiff sues defendant for money damages; if plaintiff is awarded a judgment, plaintiff has prevailed, and if defendant successfully defends and avoids an adverse judgment, defendant has prevailed.

Id. at 555. Where the Fishers established that Brent breached his duty of loyalty and the prohibition against self dealing, where Brent did not comply with his duties to account and to produce documents pursuant to a court order, and where the Fishers recovered over \$100,000 in damages for the benefit of the trust estate (R.790-91), there should be no question that the Fishers prevailed. Importantly, the Fishers achieved this result

notwithstanding Brent's failure to account and produce the documents he was ordered to produce.

Even if the "flexible and reasoned approach" is appropriate in this case, Utah appellate courts have repeatedly stated that its application is based on "the notion that courts should not ignore common sense when deciding which party prevailed." *A.K. & R. Whipple Plumbing & Heating v. Guy*, 2004 UT 47, ¶ 11, 94 P.3d 270. Here the trial court used a mechanical comparison of amounts claimed with amounts awarded without any consideration of the context in which those claims were made and the importance of holding Brent accountable for failing to produce documents he was ordered to produce.

Had Brent produced the documents as ordered, R.269-73, the Fishers would have made no claim to \$170,566.00. *See* Stipulation R.506-33 (the documents showing what happened to those funds). After the close of evidence and based on Brent's failure to produce the documents as ordered, the Fishers sought those damages. R.379-89. The trial court ignored the obvious benefit that inured to Brent by not producing documents he was ordered to produce. Instead, it reopened the evidence so that Brent could submit the documents he had been ordered to produce. H.101. Its action bordered on an abuse of discretion, but in any event, it defies common sense for the trial court to then claim that

Brent prevailed on that issue. He “prevailed” as a direct result of his failure to comply with a court order.¹²

In this case, Brent was guilty of converting valuable trust assets and failing to account. The trial court should have considered first and foremost Brent’s “degree of culpability.” *Hughes*, ¶29, fn. 5. Where it failed to even consider that issue, the Court of Appeals should review its decision and correct this error. Even under the abuse of discretion standard, given the importance of enforcing the fiduciary obligation as a deterrent to fiduciary misconduct, the trial court abused its discretion in not awarding attorney fees and expenses against Brent personally. Neither the Fisher Trust, the Marital Trust, nor the Family Trust is made whole for Brent’s disloyal conduct *unless* Brent also pays the attorney fees incurred in bringing his misconduct to light.

CONCLUSION

The Fishers ask the Court of Appeals to reverse the trial court’s decision as follows:

¹² The trial court advised the parties at the start of closing arguments that it was taking the motion to reopen under advisement. H.3-4. At the end of the argument, the trial court then granted the motion to reopen. H.101. During closing arguments, the Fishers did note that the trial court could conform the pleadings to the evidence. H.78. The trial court found that Brent had not accounted for oil and gas royalties received by the Fisher Trust. R. 537. Nonetheless, it did not award any damages for that failure. *Compare* T.Exh. 6, Form 1099 Misc for Linmar Petroleum *showing* \$10,960.37 in income to the Fisher Trust in 1993 *with* T.Exh. 1 (no income in 1993).

1. Order the trial court to recompute the damages for Brent Fisher's conversion of the cattle by holding that Brent converted 100 head of cattle with a value of \$84,000.00 on April 18, 1992;
2. Order the trial court to recompute the damages for Brent Fisher's conversion of the ranch and farm land by disallowing the credits for property taxes and water assessments;
3. Order the trial court to award the Fishers all of their reasonable attorney fees and expenses and order Brent to pay such fees personally; and
4. Remand for the recalculation of damages and the determination of reasonable attorney fees and expenses.

Dated this 17 day of December, 2008.

BLACKBURN & STOLL, LC



Charles M. Bennett
Attorneys for Appellants, Michael and
Kim Fisher

CERTIFICATE OF SERVICE

On the 17 day of December, 2008, I mailed two copies of the foregoing
Appellant's Brief to the following persons at the addresses shown:

Christopher S. Hill
Kirton & McConkie
PO Box 45120
Salt Lake City, UT 84145-0120

A handwritten signature in black ink, appearing to read "Chris Hill", written over a horizontal line.

ADDENDUM

DESCRIPTION	TAB
Judgment, filed April 10, 2006	1
Ruling, filed July 13, 2006	2
Ruling, filed October 2, 2006	3
Ruling, filed May 1, 2005	4
Ruling and Order, filed November 16, 2007	5
Trial Exhibit 15, "Trustees Allocation of the Properties Held Under the George Fisher, Jr. Family Revocable Trust Dated October 10, 1975"	6
Trial Exhibit 17, February 22, 1997 Updated Appraisal Letter	7

Tab 1

FILED
DISTRICT COURT
DUCHESE COUNTY UTAH

APR 10 2008

JOANNE MCGREE, CLERK
BY  DEPUTY

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Telephone: (801) 521-7900

Attorneys for Kim Fisher and Michael Fisher

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR DUCHESE COUNTY

STATE OF UTAH

IN THE MATTER OF THE: GEORGE FISHER, JR. FAMILY INTER VIVOS REVOCABLE TRUST, An Irrevocable Trust.	JUDGMENT Probate No. 043800019 Judge Payne
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On March 16, 2006, the Court, the Honorable A Lynn Payne presiding, held a bench trial on the Petition of Kim Fisher, Michael Fisher,¹ and Susan Thacker entitled: "Petition for Order Requiring Trustee Brent E. Fisher to Provide a Complete and Full Accounting, to Return to the Trust All Assets Improperly Distributed from the Trust, and to Pay the Trust for Use of Assets or for Assets that Have Been Improperly Lost or Otherwise Diminished in Value" (the "Petition"). Charles M. Bennett of Blackburn & Stoll, LC appeared for the Petitioners, and Christopher S. Hill of Kirton & McConkie appeared for the Trustee, Brent E. Fisher (the "Respondent").

On March 16, 2006, the Court received evidence and each party rested. Due to time constraints, the Court set April 25, 2006 as the date for the parties to make their closing

¹ Collectively, Kim and Michael are referred to in this pleading as the "Petitioners." Susan K. Thacker did not participate in the trial.

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arguments. It further ordered the Petitioners prepare and file a calculation of the damages due the Trust.

Thereafter, Petitioners filed their damage calculations. Upon receipt of the damage claim, Trustee Brent E. Fisher ("Respondent") filed a motion to reopen the trial to receive new evidence. Petitioners opposed Respondent's motion. At the hearing on April 25, 2006 that had originally been scheduled for closing arguments, the Court first considered Respondent's motion. Following arguments, the Court granted Respondent's motion to reopen. Following the Court's ruling, the Court heard closing arguments that were scheduled to be heard at that time.

Thereafter, Petitioners and Respondent stipulated as to what the new evidence would be. Stipulation Re: Admittance of Evidence, dated May 31, 2006. The Court then received into evidence the Stipulation with its attached affidavits and exhibits.

On July 13, 2006, the Court issued its Ruling in this matter. The Ruling granted the Petitioners' petition in part, denied it in part, and held that there would be no award of attorney fees.

Prior to the entry of Findings of Fact and Conclusions of Law and a Judgment, Petitioners filed their Rule 59 Motion to Amend the Court's July 13, 2006 Ruling. After the briefing of this issue was completed, the Court thereafter considered and denied Petitioners' Motion for the reasons set forth the Court's Ruling dated October 2, 2006.

Based on the Court's rulings, Petitioners prepared and served on Brent Fisher their proposed Findings of Fact and Conclusions of Law and Judgment. Thereafter, on March 1, 2007, Brent Fisher filed his objection to the proposed Findings of Fact and Conclusions of Law and

Judgment. On March 20, 2007, Petitioners filed their Memorandum in Support of the proposed Findings of Fact and Conclusions of Law and a notice to submit.

On May 1, 2007, the Court entered its ruling resolving the dispute. Thereafter, on May 8, 2007, Petitioners filed their objection to part of the Court's May 1st Ruling. On May 24, 2007, Brent Fisher filed his Memorandum in opposition to the Petitioner's Objection, and on June 1, 2007, the Petitioners filed their Reply Memorandum and their Notice to Submit.

On November 16, 2007, the Court entered its Order resolving the Petitioners' Objection. In light of the Court's written rulings in this matter on July 13, 2006, October 2, 2007, May 1, 2007 and November 16, 2007, the Court has determined that those decisions collectively shall constitute its findings of fact and conclusions of law. Having therefore now executed its findings of fact and conclusions of law, the Court is now prepared to enter its Judgment in this matter.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that

1. The Petitioners' Petition is granted in part and denied in part, as more fully set forth below.
2. Respondent breached his fiduciary duties as Trustee of the George Fisher Jr. Family Inter Vivos Revocable Trust (the "Trust") by converting 50 head of the Trust's cattle to himself and by using real property owned by the Trust for his own personal benefit without paying rent.
3. In satisfaction of Petitioners' claim as to cattle owned by the Family Trust created under the Trust, judgment is granted against Respondent and in favor of the Family Trust as follows:

a. Respondent is hereby ordered to pay \$16,500 to the trustees of the Family Trust.

b. Additionally, Respondent is hereby ordered to pay prejudgment interest to the Family Trust on \$16,500.00, less any payments made by Brent Fisher, from May 8, 1995, through November 30, 2006). Such interest through October 17, 2006 equals \$18,882.33

c. Respondent shall pay Post Judgment interest on the unpaid amount of these damages at the rate of 6.36% per year from December 1, 2006 until payment is made in full to the Family Trust.

4. In satisfaction of Petitioners' claim as to cattle owned by the Marital Trust created under the Trust, judgment is granted against Respondent and in favor of the Family Trust as follows:

a. Respondent is hereby ordered to pay \$11,000 to the Marital Trust created under the terms of the Trust.

b. Additionally, Respondent is hereby ordered to pay prejudgment interest on \$11,000, less any payments made by Brent Fisher, from May 8, 1995, through November 30, 2006. Such interest through October 17, 2006 equals \$12,588.22.

c. Respondent shall pay Post Judgment interest on the unpaid amount of these damages at the rate of 6.36% per year from December 1, 2006 until payment is made in full to the Marital Trust.

5. In satisfaction of Petitioners' claim as to Respondent's use of the real property owned by the Trust, judgment is granted against Respondent and in favor of the Family Trust and the Marital Trust as follows:

a. Respondent is ordered to pay \$26,491.20 to the Trust, ½ to be paid to the Family Trust and ½ to the Marital Trust. This represents rental payments less credits granted to Respondent.

b. Respondent is ordered to pay prejudgment interest on the rental payments less credits, and less any payments made by Brent Fisher, through November 30, 2006. Such interest through October 17, 2006 equals \$29,706.87.


c. Respondent shall pay Post Judgment interest on the unpaid amount of these damages at the rate of 6.36% per year from December 1, 2006 until payment is made in full, with ½ to be paid to the Family Trust and ½ paid to the Marital Trust.

6. The Court denies the Petitioners claims for damages for the \$170,000.00 shown in the Respondent's Accounting.

7. Petitioners' claim for attorneys' fees to be assessed in favor of the Trust and against Respondent personally is denied. The Court awards no attorney fees.

DATED this 8 day of ~~February~~ ^{April}, 2008.

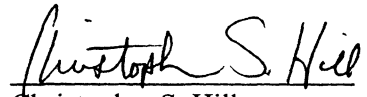
BY THE COURT



The Honorable A. Lynn Payne
Eighth Judicial District Court Judge

APPROVED AS TO FORM:

KIRTON & McCONKIE

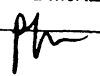
A handwritten signature in cursive script that reads "Christopher S. Hill". The signature is written in black ink and is positioned above a horizontal line.

Christopher S. Hill
Attorneys for Brent E. Fisher

Tab 2

**IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, STATE OF UTAH**

FILED
DISTRICT COURT
DUCHESNE COUNTY, UTAH

<p>In the Matter of the</p> <p>George Fisher, Jr. Family Inter Vivos Revocable Trust,</p> <p style="text-align: center;">An Irrevocable Trust,</p>	<p style="text-align: right;">JUL 13 2006</p> <p>Ruling</p> <p>Judge A. Lynn Payne</p> <p>Case No. 043800019</p> <p style="text-align: right;">JOANNE McKEE, CLERK BY  DEPUTY</p>
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This matter was tried to the Court on March 16, 2006. The Court later agreed to take additional evidence regarding allegations that Brent Fisher had converted \$170,000.00 received from the sale of trust lands.

1. The George Fisher Jr. Family Intervivos Trust was created on October 10, 1975 by George Fisher Jr. The Trust provided that upon the death of either George Fisher Jr or his wife, LaRue Fisher, Trust assets would be divided between a Family Trust and a Marital Trust. The survivor would be the sole beneficiary of both the Marital and Family Trusts.

2. George Fisher Jr. Died on April 18, 1992, leaving his wife as the sole beneficiary of the Trusts.

3. Brent Fisher served as a Trustee from his fathers death until August 18, 2001.

4. On May 8, 1995 LaRue Fisher and Brent Fisher allocated the properties held by the original trust. The real property (200 acres of farm land and one-half interest in 320 acres of ranch land) was divided equally between the Marital and Family Trusts. Fifty head of cattle was divided, with 30 head (60%) going to the Family Trust and 20 heard (40%) going to the Marital

Trust.

5. Prior to the 1995 allocation, the Trust assets had been appraised (in late 1992 or early 1993). This appraisal listed, as a Trust assets, 50 head of cattle with a value of \$42,000.00. In 1997 a second appraisal was completed which listed 100 head of cattle having a value of \$55,000.00. Brent Fisher was aware of each appraisal and made no objection to the inclusion of cattle in either appraisal. Brent Fisher was serving as Trustee at the time each appraisal was prepared and should have contested the inclusion of cattle which did not exist.

6. On February 20, 2004 (which was after this action was filed) Brent Fisher and LaRue Fisher acting as Trustees of the original Trust amended the 1995 allocation. The amendment purportedly corrected the 1995 allocations statement that there were fifty head of cows and stated that when George Fisher died, the Trust owned no cows.

7. Based upon the evidence the Court has no confidence that the 1997 appraisal accurately reported the existence of 100 cows in the Trust. There is no evidence that the appraiser, who lived in Colorado, ever came to Utah and observed or counted cows. Indeed the evidence is that he did not. The Court accepts the testimony that the arrangement between Brent Fisher and his father was that he keep the calf crop as partial compensation for his efforts and labor in running the farming operation. Nevertheless, based on the original allocations, which was signed by Brent Fisher and which attested to the ownership of 50 head of cows, the Court finds that the trust owned 50 head of cows on May 8, 1995. Certainly Brent Fisher, who was then operating the farm, knew or should have known, the number of cows. His statement attesting to the existence of 50 head is strong and convincing evidence. Value is another issue. The Court has not received any evidence as to the value of the cattle other than the 1992-1993

and 1997 appraisals. The Courts specific finding is that 50 cows were owned by the Trust in May 1995. The agreement between Brent and his father (George Jr) pre dated the Trust. Based upon this, the Court believes that many, if not all, of the cows remaining in the Trust in 1995 were older cows. The second appraisal properly reduces the values of older cows. Older cows have a shorter remaining life expectancy and therefore less value as producing livestock. While the Court does not give weight to the 1977 appraisal as to the number of cattle, there is no reason to doubt the accuracy of the valuations. Valuation of cattle is readily available through existing markets. The 1997 valuation of older cattle was \$550.00 for cattle seven to eight years old. Based upon the evidence before the Court, the Court will value the 50 head at \$550.00 a head, or \$27,500.00. In doing so the Court must express some frustration with the fact that there was no direct evidence as to valuation in 1995. However, based upon the evidence before the Court, I am comfortable that this is the most accurate figure available to the Court.

8. These cattle are no longer held by the Trust and there has been no explanation as to their disposition or accounting for proceeds received. The agreement between Mr. Brent Fisher and his father (George) was that the Trust would receive the proceeds as the Trust cows were culled from the herd. The Court will therefore find that Mr. Brent Fisher appropriated the sum of \$27,500.00 from the Trust and that judgement should enter in favor of the family trust for \$16,5000.00 (60%) and \$11,000.00 (40%) for the Marital trust.

9. The Court has received into evidence exhibit one. With the exception of expenses for Dry Gulch Water, Indian Water, and taxes, the Court has little confidence in the accuracy of the amounts set forth on this exhibit. The Court does not believe that the amounts relating to the income and expense relating to the farm are highly relevant to the issues before the Court. Brent

Fisher was clearly not operating the farm in his capacity as Trustee, he was operating it for himself. Indeed that very fact gives rise to the claim that he should have paid rent. The profitability of the Farm therefore does not help resolve the issues before the Court. In addition, the Court does not, with the exception noted above, have confidence in the accuracy of the amounts stated. Oil Royalties were clearly earned which were not listed. The data used to prepare the reports was not verified or documented by Mr. Aycock. However, the stated amounts which were paid for Dry Gulch Water, Indian Water, and taxes are readily verifiable through public or corporate records. These amounts are properly offset against amounts owed for rent. The Court will find that Brent Fisher paid a total of \$19,954.28 for water and taxes. The Court will also find that Brent Fisher paid \$10,000.00 as rent in 1996. Therefore, he is entitled to \$29,954.28 as an offset against rent owed.

10. Brent Fisher clearly used Trust lands for his farming operation. He should therefore pay a reasonable amount for using the land. Brent Fisher believes he should not have to pay rent because he was operating the farm and maintaining the land as a viable farming operation. In the process of operating the farm he did maintain the land so that its value as a farm was maintained. However, his efforts can not be readily distinguished from the efforts of any renter of farm lands. If the land would have been rented to another, the Trust would have received similar if not identical benefits. The Court can not give him additional credit based upon his efforts to farm the Trust Lands. Having said that, the Court does recognize that Brent Fisher has not acted or engaged in any conduct which approaches malicious or intentional conduct. His conduct with respect to the cattle and rent was born of a good faith, albeit mistaken belief as to his rights and obligations with respect to the Trusts..

11. The Ranch land had a rental value of 7.50 an acre. The Trust was the owner of a $\frac{1}{2}$ interest in the 320 acres. The Trust was therefore entitled to \$1, 200.00 a year for its ownership interest in the ranch land ($\frac{7.5 \times 320}{2} = 1200.00$) a year.

12. The rental value of the farm land is much more difficult. The testimony as to value of the farm land was:

a). Clark property - 90 acres leased (one-half ranch - one-half farm) - for \$1,500.00. The Court believes that 7.50 an acre is a reasonable rent for ranch lands. 45 acres at 7.50 would represent rent of \$337.50 for the ranch. This would leave \$1,162.50 ($\$1500.00 - \$337.50 = \1162.50) as rent for 45 acres of farm land. The farm land would then be rented for \$25.83 an acre ($\$1162.50/45 = 25.83$).

b). Carrol property - 200 acres leased (150 farm and 50 ranch) for from 3,000 to 5,000 depending on the year. Valuing the ranch land at 7.50, there would be rent on 50 acres of 375.00 ($50 \times 7.5 = 375$). Using an average rent of 4000.00, the amount of rent for the farm land would be 24.17 an acre ($4000 - 375 = 3625/150 = 24.17$).

c). Michael Fisher property - one years lease of 80 acres of farm land for 5000 or 62.50 an acre.

13. Obviously every piece of land is to some extent, unique. The value of a particular parcel for rental purposes would fluctuate over time based upon such considerations as demand, weather, and availability of water to raise crops. Although there was evidence introduced as to comparable leases (see above), there was no direct testimony as to how the trust land compared to the comparables. The per acre rent paid for the Michael Fisher property is not convincing. It was for only one year and was more than two times the amounts paid for other farm land which

was rented over many years. Based upon the evidence, the Court will find that the farm land had a value of \$25.00 an acre per year, or \$5,000.00 a year (25 X 200 = 5,000).

14. The Petitioners claim that the Trust should have been paid rent from April 18, 1992 (the date George Fisher Jr died) until May 26, 2001 (the date the Trust distributed farm and ranch lands). See calculation of damages submitted by Petitioners dated March 31, 2006. This is 9 years 1 month and 8 days. Rent is therefore:

Ranch:	For 9 years	1,200 x 9 =	\$10,800.00
	For 1 month	1,200 / 12 =	100.00
	For 8 days	1,200/365 =	<u>26.30</u>
	Total		\$10,926.30
Farm:	For 9 years	5,000 x 9 =	\$45,000.00
	For 1 month	5,000/12 =	416.67
	For 9 days	5,000/365 =	<u>109.59</u>
	Total		\$45,526.26
Total Rent Due:	For Ranch land		\$10,926.30
	For Farm land		<u>\$45,526.26</u>
			\$56,452.56

As previously stated, Brent Fisher paid water assessments, taxes, and rent totally \$29,954.28. The Court finds that under the circumstances presented in this case the taxes and water assessment were expenses of the Trust. Brent Fisher is therefore entitled to a credit in the amount of \$29, 954.28. The total amount which is owing as rent is \$26,498.28 (Total rent due of 56,452.56 less allowed credits paid of \$29,954.28 = \$26,498.28). This amount should be split equally between the Marital and Family Trust pursuant to the 1995 allocation.

15. In 1996 the Trust received \$170,000.00 from the sale of Trust property. One half of this amount was distributed directly to LaRue Fisher. Taxes were paid from the remaining one-half and, after paying several Trust debts, all other proceeds were deposited in an 18 month

certificate of deposit issued in the name of the Trust. This certificate renewed for an additional 18 months on February 12, 2000. Mr. Brent Fisher ceased to act as Trustee on August 18, 2001 and has accounted for all funds up to that time. There is no evidence that he has ever misappropriated or otherwise converted liquid assets for his own use.

16. The Trust are entitled to pre-judgment simple interest (not compounded) for the cows from and after May 10, 1995 and on the rent as the rent accrued yearly (with the credits for water, taxes, and rent applied in the year paid).

17. The Court will not award attorney fees. There were three issues tried. The petitioners claimed Brent Fisher converted \$170,000.00 in cash. They did not prevail on this issue. They claim he converted 100 cows having a value of \$84,000.00. The Court found 50 cattle with a value of \$27,500 which recovery is a little over 1/3 of the amount claimed. The Plaintiffs claimed rent in the amount of over \$123,000.00 (12,500 farm + 1,200 ranch = 13,700 x 9 years = 123,300), the Court found \$56,452.56 which was less than one-half the amount claimed. Although the Petitioners did obtain a recovery, it is not apparent that Petitioners were the prevailing parties on any issue. Indeed, given the Courts ruling, Brent Fisher prevailed on one issue and was successful in reducing the claims to less than 1/2 on the other issues. He clearly prevailed on the claim that he converted funds, his defense reduced the requested recovery on the cows by 2/3 and the recovery on requested rent by over 1/2. Where claims are grossly overstated, it is reasonable that a defense be made. Given all the circumstances in this case, no attorney fee will be awarded.

DATED this _____ day of July, 2006.

BY ORDER OF THE COURT:

A. L. Payne

~~Stamped at judge's direction~~
Judge A. Lynn Payne

By *Patrick*

Certificate of Notification

I hereby certify that mailed a true and correct copy of the foregoing Ruling to the following parties:

Blackburn & Stoll, LC
Charles M. Bennett
257 East 200 South. St. Ste 800
Salt Lake City Utah 84111-2048

Benson L. Hathaway
Kirton & McConkie
POB 45120
Salt Lake City Utah 84145-0120

By depositing, postage prepaid in the US Post Office at Duchesne Utah 84021 on the 13th day of July, 2006

By: Pat Mullins
Pat Mullins
Deputy Court Clerk

Tab 3

**IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, STATE OF UTAH**

FILED
DISTRICT COURT
DUCHESNE COUNTY, UTAH

<p>In the Matter of the</p> <p>George Fisher, Jr. Family Inter Vivos Revocable Trust,</p> <p style="text-align: center;">An Irrevocable Trust,</p>	<p style="text-align: right;">OCT 02 2006</p> <p>Ruling</p> <p style="text-align: right;">JOANNE McKEE, CLERK BY <u>patm</u> DEPUTY</p> <p>Judge A. Lynn Payne</p> <p>Case No. 043800019</p>
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The Court has received and reviewed the Motion of Kim and Michael Fisher to Amend its July 13, 2006 Ruling as well as response and reply which have been filed by the parties. This motion is denied. This has been a difficult case for the parties and, as the Court stated in its Ruling, for the Court. Basically the motion contends that the Court has entered findings contrary to the weight of the evidence. Weighing evidence is however the responsibility of the finder of facts (in this case the Court). After weighing the evidence the Court reached the finding and conclusions announced in it's ruling. I recognize there is evidence which may have led the Court in a different direction, but the Court must weight evidence and make conclusions according to its findings. I believe that this was done in this case. This motion also assumes findings that the Court did not reach. The Court was never asked to make a finding that Brent Fisher violated his duties as a trustees to keep records, and did not do so. Indeed, in its October 31, 2005 Ruling, the Court indicated that the allegations that there were additional documents which were not provided, were mere conclusions. The Court then invited the movants in this motion to file a Motion to Compel, which was, in the Court opinion, the proper procedural tool to resolve that

issue. At trial counsel for the movant in this motion indicated that he had decided to forego further attempts to locate documents and had instead decided to go to trial on the facts which they then had. Having made the decision to go forward without resolving the issues of whether there were additional document, the movant can not now claim that there were additional documents, and that Brent Fisher should be penalized for not producing them. Moreover, after the case was initially presented additional critical documents were found which were not in possession of Brent Fisher and were not available to him. This would make it difficult for the Court to find that Mr. Brent Fisher had documents which he did not produce or that he failed to keep records. Further, I think the movants confuse the law which relates to a trustee's responsibilities with the rules which the Court must employ to determine who the prevailing party was in order to decide the issue of attorney fees. The fact that the law imposes on a Trustee an obligation is not dispositive as to whether a trustee who breaches his duty is always liable to pay attorney fees. I believe that the Court has applied the appropriate process for determining attorney fees and believe that fees are not appropriate given all of the facts and circumstances of this case.

Finally, one of the difficulties in deciding this case was determining the date of conversion. There was no direct evidence as to when conversion occurred. However, the Court believed the testimony of Brent Fisher that he and his father agreed that Brent Fisher would keep the calves and George Fisher would receive the proceeds from the sale of older cattle as they were culled from the herd. There was no evidence as to when each individual animal was sold. However, it is obvious that this did not occurred at one time, but was something that took place over several years. Nor was there any evidence as to the value of older cattle at market. The

Court used the values and numbers of cattle that it felt was most convincing based upon a review of the evidence.

DATED this 2 day of Oct, 2005.

BY ORDER OF THE COURT:



Judge A. Lynn Payne

Certificate of Notification

I hereby certify that mailed a true and correct copy of the foregoing Ruling to the following parties:

Blackburn & Stoll, LC
Charles M. Bennett
257 East 200 South. St. Ste 800
Salt Lake City Utah 84111-2048

Benson L. Hathaway
Kirton & McConkie
POB 45120
Salt Lake City Utah 84145-0120

By depositing, postage prepaid in the US Post Office at Duchesne Utah 84021 on the 2nd day of October, 2006

By: Pat Mullins
Pat Mullins
Deputy Court Clerk

Tab 4

FILED
DISTRICT COURT
DUCHESNE COUNTY, UTAH

MAY - 1 2007

BY JOANNE MAKEE, CLERK
100 DEPUTY

IN THE EIGHTH JUDICIAL DISTRICT COURT
DUCHESNE COUNTY, STATE OF UTAH

IN THE MATTER OF THE	RULING
THE GEORGE FISHER, JR. FAMILY INTER VIVOS REVOCABLE TRUST	CASE NO. 043800019 JUDGE A. LYNN PAYNE

This matter comes before the Court pursuant to a notice to submit the proposed findings of fact, conclusions of law, and judgment (as submitted by Kim and Michael Fisher) and the objections to the same as submitted by Brent Fisher. In ruling on the matter, the Court will address the objections of Brent Fisher to the proposed pleadings.

HISTORY:

A brief history of the proceedings may be helpful in disposing of the issues before the Court. Trial in this matter concluded on March 16, 2006. After the trial, the Court granted Brent Fisher's motion to receive additional evidence and, after considering such evidence, entered its ruling which was entered July 13, 2006. After considering, and denying, a motion to amend, the Court entered an additional ruling on October 02, 2006. After this second ruling, Mr. Bennett (counsel for Kim and Michael Fisher) and Mr. Hill (counsel for Brent Fisher) communicated with each other regarding various issues relating to this matter. The Court has reviewed the letters and email correspondences attached to Mr. Bennett's memorandum. For purposes of the issues before the Court, the Court notes: 1) Mr. Hill prepared a proposed order and mailed it to Mr. Bennett on October 09, 2006; 2) on October 16, 2006 Mr. Bennett objected to the proposed order and acknowledged that because his clients were entitled to relief under the Court's rulings he should prepare the judgment; 3) on October 17, 2006, Brent Fisher tendered pay-

ment of \$111,628.31 to Susan Thacker (as Trustee of the Trusts) and such payment was accepted; 4) on October 17, 2006, Mr. Bennett communicated to Mr. Hill that Mr. Bennett would prepare the judgment; 5) in response to #4 above, Mr. Hill communicated to Mr. Bennett that Mr. Hill would await the preparation of the judgment which Mr. Bennett had indicated that he would prepare; 6) beginning in September of 2006 and continuing to the end of January 2007, Mr. Bennett suffered a series of medical problems which prevented Mr. Bennett from working consistently. These medical problems accounted for the delay in the preparation of the proposed judgment. The judgment was not submitted to the Court until March 20, 2007.

ENTRY OF FINAL JUDGMENT:

Initially, the Court will determine whether either the July 13 ruling or the October 02 ruling constitute a final judgment pursuant to Rule 54 of the Utah Rules of Civil Procedure. The Court will rule that neither ruling is a final judgment. Nothing in the text of the Court's rulings indicates that the Court intended either ruling to constitute a final judgment. There are no words or phrases which would reasonably place the parties on notice that the entry of either ruling would begin the period during which the parties must file their appeals. The documents were titled as rulings, not as judgments or orders. The use of the words "by order of the Court" by the clerk when using the Court's signature stamp does not transform a document designated as a ruling (and which does not contain any wording putting the parties on notice that it was a final order) into a final order. Indeed, neither party initially viewed the ruling as a final order, as is evident by the fact that each party prepared proposed judgments / orders.

POST-JUDGMENT INTEREST:

The Court will next address the issue of when post-judgment interest should accrue. Under normal circumstances, post-judgment interest accrues from and after entry of the judgment. However, the proposed final judgment in this case was not prepared and submitted for signature in a timely manner. The judgment should have been prepared and submitted based upon the

Court's July 13, 2006 ruling. Instead, Kim and Michael Fisher filed a motion to amend the judgment. After the Court ruled on the motion to amend, Mr. Hill initially took upon himself the burden of preparing the judgment. When Mr. Bennett objected to the language in the order prepared by Mr. Hill, Mr. Bennett agreed to take the burden of preparing the judgment. He agreed to prepare the judgment on October 17, 2006 and did not submit a proposed judgment until February 20, 2007, more than four months later. This does not constitute timely preparation of the order. While Mr. Bennett's failure to prepare the findings is certainly understandable given his medical problems, the Court cannot ignore the fact that this delay operates to the prejudice of Brent Fisher, who is subject to the higher pre-judgment interest rate until a judgment is entered. Therefore, in order to do justice (see Rule 1 of the Utah Rules of Civil Procedure), the Court will order that the post-judgment interest rate applies from and after December 01, 2006. This would have allowed Mr. Bennett six weeks to complete the task he agreed to undertake and for the Court to rule on any issues necessary prior to entry of judgment.

PRE-JUDGMENT INTEREST:

As stated above, no final order or judgment has been entered in this case. In reviewing the issues which are now before the Court, it has been necessary for the Court to again consider the issue of pre-judgment interest for damage relating to the conversion of the proceeds received when trust cattle were sold. The parties are in disagreement as to when pre-judgment interest began and when it should end. To resolve this issue, the Court has reviewed its prior rulings and, based upon this review, the Court questions whether pre-judgment interest for the conversion of the cattle is appropriate under controlling law. Pre-judgment interest is appropriate from and after the date when damages are complete and the amount of loss fixed as to a particular time, so that interest can be computed with mathematical accuracy. See Cornia v. Wilcox, 898 P.2d 1379, 1387 (Utah 1995). With respect to the cattle, the Court has experienced difficulty finding a particular time when the damages were sustained (i.e., when the damages became fixed). In this matter, the Court accepted the testimony of Brent Fisher that

when his father no longer wished to run the farming operation, they agreed that Brent Fisher would run the cattle operation and pay the expenses associated with the cattle. In return, Brent Fisher was entitled to keep the calves that were born. When the existing cows were culled from the herd, George Fisher would receive the proceeds from the sale.

Based upon the appraisal of Trust assets, the Court found that the Trust owned 50 head of cattle on May 08, 1995. See July 13, 2006 Ruling 7. The Court found that, as of the date of trial, the Trust no longer owned any cattle and that Brent Fisher had provided no explanation as to the disposition of the cattle, nor had he accounted for any proceeds he received from the sale of these Trust cattle. See id. at 8. Based upon this, the Court valued the cattle and found that Brent Fisher had appropriated the sum of \$27,500.00 from the Trust. The Court authorized judgment in favor of the Trust in that amount. This resolved the issue of whether Brent Fisher had converted the cattle (or the proceeds from the sale of the cattle) and the amount of damages. However, it did not resolve the issue as to when the cattle were converted, which must be established before the Court can determine the particular moment in time that damages became fixed.

Later, in the October 02, 2006 ruling, the Court noted that it had experienced "difficulties in deciding . . . the date of conversion." Obviously, damages for conversion would not accrue until the cows were disposed of through sale or other means. As long as the Trust cattle were under Brent Fisher's control in the regular course of the cattle operation, no conversion occurred and no damages were established. The Court then noted that the Court had received no evidence as to when each individual animal had been sold. Indeed, the record is void of any evidence identifying to whom the cattle were sold or even when the cattle might have been sold.

Based upon the evidence, the Court does not believe that it has received evidence which the Court can rely upon to establish a specific date of conversion. In its July 13, 2006 ruling, the Court treated the conversion as taking place on May 08, 1995 (the date that the Trust properties had been allocated). How-

ever, upon reflection, there was no evidence presented to support May 08, 1995, as a date which any cattle were converted. As stated above, there was no evidence to establish a specific date for the conversion of cattle or for any single cow. The Court would have to speculate to fix a date for the actual conversion of the cattle. The cows may have been converted or the proceeds converted on May 08, 1995, or at any time after May 08, 1995. Moreover, as the Court noted in the October 02, 2006 ruling, it is likely that the cows were disposed of over a period of years. In any event, the parties failed to present any evidence as to the date of conversion. Therefore, the Court cannot fix a date upon which the damage occurred. Because the amount of interest would depend on when the damages occurred, it appears that the Court would be prohibited from awarding pre-judgment interest for damages associated with the conversion of the cattle. Because this issue has been raised on the Court's own initiative, the Court will invite the parties to provide the Court with memoranda concerning the issue of pre-judgment damages for conversion of the cattle. If a party desires to submit a memorandum, the memorandum is to be submitted within two weeks of the mailing of this ruling. Responding and reply memoranda are to be filed per Rule 7 of the Utah Rules of Civil Procedure.

RENT:

As paragraph 64 of Mr. Bennett's proposed findings of fact states, the evidence presented was that rent for farm land is prepaid. Rent shall be calculated based upon a yearly rental of \$6,200.00, beginning April 18, 1992, and continuing each April 18 thereafter. Rent from April 18, 2001, to May 26, 2001, shall accrue from April 18, 2001 for 38 days based upon a yearly rental of \$645.48 ($38 / 365 \times \$6,200.00 = \645.48). As stated in the July 13, 2006 ruling, Brent Fisher is entitled to offsets against the accruing rents for \$19,954.28 for water assessments and taxes that were paid. Brent Fisher is also entitled to a credit against accrued rent for the \$10,000.00 rent he paid in 1996. In computing the on-going rent due, the offsets for water assessments, taxes, and rent paid are to offset as of the date paid. For the convenience of the parties, however, the Court will allow Mr. Bennett to apply any offset paid after April 18 in each year as of April 18. For example, if there is a total

of \$1,000.00 of offset from April 18, 2000 to April 18, 2001, all offsets may be entered as of April 18, 2000, which would mean that the total due for rent as of April 18, 2000, would be \$5,200.00 (\$6,200.00 - \$1,000.00 = \$5,200.00). Interest is to be computed on the basis of simple interest on the amount owed. If offsets which occur during the year are not credited as of April 18, the accruing interest will have to be adjusted as of the date the payments are made. The \$10,000.00 rental payment will be applied against rent due in prior years and the interest due for the prior years will need to be re-calculated for the purpose of future pre-judgment interest.

The Court approve the language of paragraph eight of Mr. Bennett's proposed conclusions of law and will approve such language in the judgment.

The Court instructs Mr. Bennett to calculate pre-judgment interest based upon the above, but only after the Court has ruled upon any issues that may be raised by the parties in memoranda concerning pre-judgment interest on the sale of the cattle. If memoranda are filed on the issue of pre-judgment interest, final judgment will be submitted after the Court's ruling on the issues presented. If no memoranda are filed within the time specified above, the final judgment should then be submitted to Mr. Hill and then to the Court, pursuant to the rules of civil procedure.

Dated this 27 day of April, 2007.

BY THE COURT:



A. LYNN PAYNE, DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 043800019 by the method and on the date specified.

METHOD	NAME
Mail	CHARLES M BENNETT Attorney PET 257 E 200 S STE 800 SALT LAKE CITY, UT 84111
Mail	BENSON L HATHAWAY JR Attorney 60 E SOUTH TEMPLE STE 1800 POB 45120 SALT LAKE CITY UT 84145-0120
Mail	CHRISTOPHER S HILL Attorney 60 E S TEMPLE STE 1800 SALT LAKE CITY UT 84111

Dated this 1st day of MAY, 2007.

TS
Deputy Court Clerk

Tab 5

FILED
DISTRICT COURT
8TH JUDICIAL DISTRICT
COUNTY, UTAH

NOV 16 2007

CLERK
palm DEPUTY

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH

In the Matter of the George Fisher, Jr. Family Inter Vivos Revocable Trust,	RULING AND ORDER Case No. 043800019 Judge A. LYNN PAYNE
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The matter before the Court is whether prejudgment interest should be awarded for the conversion of cattle. The Court wishes to apologize to the parties about the delay in its ruling. When the matter was submitted for decision on June 1, 2007, the file was not given to the Court to review and rule upon.

An award of prejudgment interest is appropriate when the damages are complete and the amount of loss is fixed as to a particular time so that interest can be computed with mathematical accuracy. *Cornia v. Wilcox*, 898 P.2d 1379, 1387 (Utah 1995).

One of the purposes of prejudgment interest is to deter people from withholding an amount of money that is certain and owed. *Trail Mt. Coal Co. v. Utah Div. of State Lands & Forestry*, 921 P.2d 1365, 1370 (Utah 1996).

Also, interest from the date of conversion is generally included in an award of damages. *Broadwater v. Old Republic Sur.*, 854 P.2d

527, 531 (Utah 1993).

Here, the damages were complete upon Brent Fisher's conversion of the cattle. There is no dispute that Brent should be required to pay interest from the date he converted the cows. However, the date in which he converted the cows is unknown. Brent denies the existence of the cattle. Kim and Michael Fisher do not know the date conversion occurred because, as beneficiaries, they were not in control of the property.

The United States Court of Appeals for the Second Circuit determined it fair to place the burden of establishing the date goods were damaged on the wrongdoer when the date is unknown. *Mitsui & Co. Inc., v. Hudson Tank Terminals Corp.*, 790 F.2d 226, 231 (2nd. Cir. 1986). There, oil was contaminated while in possession of a bailee delivering goods from a seller to a buyer. *Id.* at 227. Consequently, the date the damages occurred and the measure of damages was uncertain. The court concluded that a bailee in possession of goods will know more about the circumstances of their damage than the bailor. *Id.* at 231. The court further reasoned that a bailee in possession of goods is in the best position to have access to proof establishing or refuting the date the goods were damaged. *Id.*

Here, the same policy reasons apply. The information concerning when the cows were sold was exclusively within Brent's possession as trustee. Brent is in the best position to confirm the date of

conversion, and to offer proof refuting the date. Therefore, it is fair to assign the burden of establishing when the conversion took place to Brent.

Furthermore, awarding interest from the date of conversion should act as a deterrent to those who would convert assets in their possession. Disallowing interest when the date of conversion is unknown would work to encourage people to keep the date secret. A person in Brent's position would be better off if they claimed they did not know when the conversion took place than if they did. Such a result would be unjust and contrary to the policy behind awarding interest. Therefore, the Court will order statutory prejudgment interest for the conversion of the cattle starting from May 8, 1995

Mr. Bennett is to prepare a judgment consistent with the above and the prior rulings of the Court. The Court will adopt its rulings (07-13-2006, 10-02-2006, 04-27-2007 and this ruling) as its findings and conclusions in this matter. Mr. Bennett does not need to prepare findings of fact and conclusions of law.

Dated this _____ day of November, 2007.

BY THE COURT:

Ct

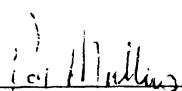
A. LYNN PAYNE, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 043800019 by the method and on the date specified.

METHOD	NAME
Mail	CHARLES M BENNETT Attorney PET 257 E 200 S STE 800 SALT LAKE CITY, UT 84111
Mail	BENSON L HATHAWAY JR Attorney 60 E SOUTH TEMPLE STE 1800 POB 45120 SALT LAKE CITY UT 84145-0120
Mail	CHRISTOPHER S HILL Attorney 60 E S TEMPLE STE 1800 SALT LAKE CITY UT 84111

Dated this 11th day of Nov, 2007.



Deputy Court Clerk

lab 6

TRUSTEES ALLOCATION OF THE PROPERTIES HELD UNDER
THE GEORGE FISHER, JR. FAMILY REVOCABLE
TRUST DATED OCTOBER 10, 1975

Pursuant to the death of GEORGE FISHER, JR. on April 18, 1992, LaRUE FISHER and BRENT ELMER FISHER, as trustees of the above-mentioned Trust, do hereby allocate the properties of said Trust between the Family Trust Portion and Marital Trust Portion pursuant to Article III of said Trust as follows:

The following property is allocated one-half to the Family Trust Portion and one-half to the Marital Trust Portion:

For Ten Dollars (\$10.00) and other good and valuable consideration, LaRue Fisher and Brent Elmer Fisher, as trustees of the above-mentioned Trust, hereby transfer, convey, assign and deliver an undivided one-half interest to Brent Elmer Fisher, trustee of the Family Trust Portion of the George Fisher, Jr. Family Trust dated October 10, 1975, and the remaining undivided one-half interest to LaRue Fisher, trustee of the Marital Trust Portion of the George Fisher, Jr. Family Trust dated October 10, 1975, as grantees, all right, title, interest, and obligations pertaining thereto, to the below-described properties:

1. The following real property situate in Duchesne County, Utah:

A. Township 1 South, Range 4 West, Uintah Special Meridian

Section 23:

Beginning 30 feet North of the Southeast corner of the Northeast quarter of the Northeast quarter; thence North 195 feet; thence West 198 feet; thence South 107 feet; thence Southeasterly 159 feet; thence East 90 feet to the point of beginning.

Contains 0.75 acre, more or less.

*The value of said property at date of death of decedent is \$78,500.00.

- B. Southwest quarter of the Northeast quarter, Section 13, Township 1 South, Range 4 West, U.S.M.

TOGETHER WITH all improvements and appurtenances thereto belonging. Also: 40 acres of water rights in the Indian Irrigation System.

EXCEPTING AND RESERVING therefrom all oil, gas and other minerals.

- C. Uinta Meridian, Township 1 South, Range 4 West, Section 24, NE~~SW~~~~NE~~, containing 40 acres.

TOGETHER WITH 40 acres of water rights in the Uinta Irrigation Project.

Subject to the reservation hereby made of all oil, gas and other minerals, together with the right to lease, extract and retain the same.

- D. The South Half of the Northwest Quarter of the Northeast Quarter (S~~NW~~~~NE~~) Section 25, Township 1 South, Range 4 West, U.S.M., containing 20 acres more or less, together with all improvements thereon and all water rights thereunto belonging.

- E. West half of the Northwest quarter; Section 17, Township 1 South, Range 3 West, Uintah Special Meridian. Together with improvements, appurtenances, rights of way and water rights thereunto belonging. Said water rights being more particularly described as 35 shares of Dry Gulch Irrigation Company.

- F. Township 1 South of Range 4 West of the Uintah Special Meridian. Section 25: N~~NW~~~~NE~~. Area 20.00 acres.

TOGETHER WITH all improvements thereon and appurtenances thereunto belonging, including all water and water rights however evidenced.

EXCEPTING AND RESERVING one-half interest in and to all oil, gas and other minerals, together with the right of ingress and egress for the purpose of mining and exploring for said mineral rights.

*The value of said parcels B., C., D., E., and F., known as the "farm land", is \$153,000 at date of

death of decedent.

- G. An undivided one-half ($\frac{1}{2}$) interest in the following:

Township 2 North, Range 5 West, Uintah Special Meridian:

Section 34:

South half of the North half of the North half of the Northwest quarter;
 North half of the South half of the Northwest quarter of the Northwest quarter;
 South half of the North half of the Northwest quarter of the Northeast quarter;
 South half of the North half of the Northeast quarter;
 North half of the Southwest quarter of the Northeast quarter;
 South half of the Northeast quarter of the Northwest quarter;
 East half of the Northeast quarter of the Southeast quarter.

Section 35:

Northwest quarter of the Northwest quarter of the Southwest quarter;
 South half of the Northwest quarter of the Southwest quarter: Lots 3 and 4.

TOGETHER WITH all improvements, rights of way and water rights thereunto belonging, said water rights being more particularly described as Application No. 9383, certificated by Certificate No. 2272 of the State of Utah, and Application No. 9384, certificated by Certificate No. 2273 of the State of Utah.

- H. An undivided one-half ($\frac{1}{2}$) interest in the following:

SE~~NE~~ $\frac{1}{4}$; Section 34, Township 2 North, Range 5 West, USM.

*An undivided one-half ($\frac{1}{2}$) interest in parcels G. and H., known as the "Ranch", is valued at \$107,500.00 at date of death of decedent.

- I. SE $\frac{1}{4}$; Section 6, Township 1 South, Range 3 West, U.S.M.
 S $\frac{1}{2}$ SW $\frac{1}{4}$; Section 6, Township 1 South, Range 3 West, U.S.M.
 N $\frac{1}{2}$ NE $\frac{1}{4}$; SW $\frac{1}{4}$ NE $\frac{1}{4}$; NW $\frac{1}{4}$; Section 7, Township 1 South, Range 3 West U.S.M.
 SW $\frac{1}{4}$ NE $\frac{1}{4}$; NW $\frac{1}{4}$ NE $\frac{1}{4}$; Section 12, Township 1 South, Range 4 West, U.S.M.

TOGETHER WITH an Escrow Agreement dated May 1, 1974, between George Fisher, Jr. and LaRue Fisher, Sellers, and Max George Fisher and Joyce Fisher, Buyers, pertaining to the above-described property.

*The value of said real property and/or contract or Escrow Agreement, known as the "Max Fisher Farm", at date of death of decedent is \$192,000.00.

2. Mineral rights as described in parcels C., D., E., & F. of paragraph 1., and valued at \$42,000.00 on date of death of decedent.
3. The following accounts at the following financial institution (values at date of death of decedent):

A. First Security Bank	<u>Value</u>
Checking Account No. 147 10034 16	\$10,130.00
Various Certificates of Deposit	<u>70,191.00</u>
	\$80,321.00

The following property is allocated forty percent (40%) to the Marital Trust Portion and sixty percent (60%) to the Family Trust Portion:

For Ten Dollars (\$10.00) and other good and valuable consideration, LaRue Fisher and Brent Elmer Fisher, as trustees of the above-mentioned Trust, hereby transfer, convey, assign and deliver an undivided sixty percent (60%) interest to Brent Elmer Fisher, trustee of the Family Trust Portion of the George Fisher, Jr. Family Trust dated October 10, 1975, and the remaining undivided forty percent (40%) interest to LaRue Fisher, trustee of the Marital Trust Portion of the George Fisher, Jr. Family Trust dated October 10, 1975, as grantees, all right, title, interest, and obligations pertaining thereto, to the below-described properties:

1. 50 head of mixed breed beef cows valued at \$42,000.00 at date of death of decedent.
2. International Tractor Model 674 valued at \$5,500 at date of death of decedent.

All transfers subject to approval in final audit.

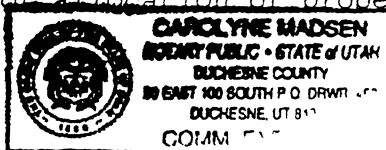
Dated this 8 day of May, 1995.

Larue Fisher
LARUE FISHER, trustee

Brent Elmer Fisher
BRENT ELMER FISHER, trustee

STATE OF UTAH)
 : ss.
COUNTY OF DUCHESNE)

On this 8 day of May, 1995, personally appeared before me LARUE FISHER and BRENT ELMER FISHER, as trustees, who acknowledged to me that they executed the foregoing deed of allocation of property.



Carlyne Madsen
Notary Public

The following death expenses of George Fisher, Jr. shall be the sole responsibility of the Family Trust Portion of said Trust and shall be paid from said Family Trust Portion:

Olpin Mortuary	\$ 5,034.00
Beasley Monument	1,600.00
Cloward Appraisal	
Service	3,500.00
Paul J. Barton,	797.06
legal fees	<u>817 31</u>

\$11,748.37

Tab 7

CLOWARD'S APPRAISAL SERVICE
P.O. Box 1264
Roosevelt, Utah 84066

February 22, 1997

Brent Fisher
HC 55 Box 90
Altonah, Utah 84002

RE: George Fisher Jr. Family Trust
Consisting of Four Separate Parcels Land
w/Water Rights, T-1-S, R-4-W, Sec. 13, 24, & 25
and T-1-S, R-3-W, Sec. 17, USB&M.
Fisher Ranch & Cabin, w/Water Rights & Filings,
T-2-N, R-5-W, Sections 34 & 35 USB&M.
Fisher Livestock - 100 Bred Beef Cows

Dear Brent:

According to your request, I have herein completed updated values on the above described properties belonging to the George Fisher Jr. Family Trust. For further detailed descriptions of these properties, please refer to the original appraisals that were completed on November 12, 1992 on these parcels as well as on the livestock. In fact, the updated values contained herein are invalid unless this letter is accompanied by the November 12, 1992, appraisals. I make this stipulation so that any reader of this letter may refer directly to the full descriptions and all known pertinent facts pertaining to the parcel and/or parcels that are herein being appraised.

In order to complete this analysis, I have researched and considered various sales of like kind properties in the Altamont area as well as throughout the Uintah Basin. As you are aware sales of similar lands with like improvements are scarce, however from my research, I feel comfortable with the values that I have derived and indicated herein.

These opinions of value are for the surface rights of the lands, building improvements and all accompanying water rights/filings, no values are given for the oils/minerals should there be any. The value estimates are for "market value" as defined on the Certification and Statement of Limiting Condition pages attached to the November 12, 1992, appraisals.

With regard to the current value and/or values of the four separate parcels located north-northeast of Altamont, I am of the opinion that; Parcel #1: T-1-S, R-4-W, Sec. 25 Containing 40.0 Acres M/L, Parcel #2: T-1-S, R-4-W, Sec. 24: Containing 40.0 Acres M/L, and Parcel #3: T-1-S, R-4-W, Sec. 13: Containing 40.0 Acres M/L, would all have a value of \$1,200.00 per acre or \$48,000.00 per parcel. Parcel #4: T-1-S, R-3-W, Sec. 17 Containing 79.0 Acres M/L, would have a value of \$1,000.00 per acre or \$79,000.00


Regarding the value of the Fisher Ranch; T-2-N, R-5-W, Sections 34 & 35. Containing 320.70 Acres M/L, newer style Log Cabin, and Water Rights/Filings; I am of the opinion this parcel would have a value somewhere in the range of \$350,000.00 as a whole; or could, if sold to the right buyer, or developed into smaller parcels, yield considerably higher. Nevertheless, the cost of developing and the longevity of selling smaller parcels would have to be seriously considered. Also, if developing there is the matter of access across Ute Tribal Lands which would have to be examined for feasibility.

Concerning the value(s) of the livestock; consisting of some 100 mixed breed, bred cows, ranging in age from five to ten years, I am of the opinion that the five to seven year old cows would be worth somewhere in the range of \$650.00. The seven to eight year \$550.00 and the nine to ten year \$450.00, with a running average for the herd as a whole of \$550.00 per head. Any cull cows I would suggest be taken to the auction.

Thank you kindly for this opportunity to be of Service.

Respectfully submitted,

Cloward's Appraisal Service



Darren Anderson