2003

Mi Vida Enterprises v. Mark A. Steen-Adams v. Nancy Ciddio Steen-Adams and Charles A. Steen, III : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

MI VIDA ENTERPRISES, a Utah Corporation, Plaintiff and Appellee, and MARK A. STEEN, individually and as personal representative of the Estate of M.L. Steen, Defendant and Appellee, vs. NANCY CIDDIO STEEN-ADAMS and CHARLES A. STEEN, III; Defendants and Appellants,	Appellate No.: 20030022

BRIEF OF APPELLANTS

APPEAL FROM A FINAL ORDER OF THE SEVENTH DISTRICT COURT
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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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IV. JURISDICTION

The court has jurisdiction pursuant to Utah Code Ann. 78-2-2(3)(j).

V. STATEMENT OF ISSUES, STANDARD OF APPELLATE REVIEW, AUTHORITY, AND PRESERVATION OF ISSUES IN RECORD

1. Whether the trial court erred in its Findings of Fact, Conclusions of Law and Final Order entered September 16, 2002, in determining that no issues of material fact exist as to when appellant Nancy Steen Adams knew, or had reason to know, of the claims she has advanced against Mi Vida and Mark Steen, and in dismissing the majority of

her claims based on expiration of the statute of limitations.

a. Standard of Review. Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In determining whether the trial court correctly found that there was no genuine issue of material fact, the facts and inferences are to be accepted in the light most favorable to the [nonmoving] party. Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991). In deciding whether the trial court correctly granted judgment as a matter of law, the appellate court gives no deference to the trial court's view of the law, and reviews it for correctness. SME Industries, Inc. v. Thompson, Ventulett, 28 P.3d 669, 673-74 (Utah 2001).

b. Authority. The relevant citations to this issue are Rules 9(h) and 56(a) and (f), Utah Rules of Civil Procedure, Faussett v. American Resources Management Corp., 542 F.Supp. 1234 (D.C. Utah, 1982); Wasatch Mines Company v. Hopkinson, 24 Utah 2d 70, 465 P.2d 1007 (1970); American Theater Co. v. Glasmann, 95 Utah 305, 80 P.2d 922 (1938); Warren v. Provo City Corp., 838 P.2d 1125 (Utah 1992); Lowry v. Lowry, 590 N.E.2d 612 (Ind. App. 1992); Snortland v. State, 615 N.W.2d 574, 578 (N.D. 2000); LeBrun v. D.W. Connor, Jr., 702 N.E.2d 754 (Ind. 1998).

c. Preservation of issue in record. These issues were preserved in the record by

the parties briefings, particularly, Nancy Steen-Adams' Memorandum Brief In Response to Motion For Summary Judgment, TCR 2706-2739.

2. Whether the trial court erred in its December 3, 2002, order by certifying as final under Rule 54(b) Utah Rules of Civil Procedure, the Findings of Fact, Conclusions of Law and Final Order entered by the trial court on September 16, 2002, dismissing the majority of appellants' claims.

   a. Standard of review. Whether an order is eligible for certification under Rule 54(b) is a question of law which the Appellate Court reviews for correctness. UTCO Associates, Ltd. v. Zimmerman, 27 P.3d 177 (Utah App. 2001).

   b. Authority. The relevant citation to this issue are Rule 54(b), Utah Rules of Civil Procedure, Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099 (Utah 1991); Bennion v. Pennzoil Co., 826 P.2d 137, 139 (Utah 1992).

   c. Preservation of issue in record. These issues were preserved in the trial court record through the pleadings.

3. Whether the trial court erred in finding that Appellants abused process, brought their claims in bad faith, and/or in violation of Utah Rules of Civil Procedure 11(b), with respect to their claims for dissolution and receivership brought in Colorado.

   a. Standard of review. Questions of common law and statutory interpretation are reviewed for correctness. Trujillo v. Jenkins, 840 P.2d 517, 518 (Utah App. 1992); Rushton v. Salt Lake County, 977 P.2d 1201, 1203 (Utah 1999).

Whether Appellants abused the civil process or acted in bad faith are questions of fact, and are therefore reviewed for clear error. The standard of appellate review for mixed questions of law and fact is abuse of discretion. State v. Pena, 869 P.2d 932, 935-39 (Utah 1994).

b. Authority. The relevant citations to this issue are Utah Rules of Civil Procedure 11(b); § 78-27-56, Utah Code Annotated; Bennett v. Jones, Waldo, Holbrook & McDonough, 70 P.3d 17 (Utah 2003); Gilbert v. Ince, 981 P.2d 841 (Utah 1999); Crease v. Pleasant Grove City, 519 P.2d 888 (Utah 1974); Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563 (D. Utah 1995); Cady v. Johnson, 671 P.2d 149 (Utah 1983); Jesche v. Willis, 811 P.2d 202 (Utah App. 1991); Restatement (Second) of Torts § 682.

c. Preservation of issue in record. These issues were preserved in the trial court record through testimony and argument.

4. Whether the trial court erred in finding that Appellants did not have reasonable cause to bring their derivative claims in Colorado.

a. Standard of review. Issues of statutory interpretation present questions of law that the appellate courts review for correctness. Hansen v. Eyre, 74 P.3d 1182, 1185 (Utah 2003); Rushton v. Salt Lake County, 977 P.2d 1201, 1203 (Utah 1999); Taylor ex rel. C.T. v. Johnson, 977 P.2d 479, 480 (Utah 1999).

b. Authority. The relevant derivative shareholder statute citation is § 16-

10a-740, Utah Code Annotated. There is no Utah case law interpreting the "without reasonable cause" language of the Utah derivative shareholder statute § 16-10a-740, U.C.A. How this standard is interpreted is a matter of first impression in Utah.

c. Preservation of issue in record. These issues were preserved in the trial court record through testimony and argument.

5. Whether the trial court erred in determining that Utah law applied to claims brought by Appellants in Colorado rather than Colorado law.

a. Standard of review. The trial court's choice of law is reviewed for correctness. Shawn v. Layton Constr. Co., 872 P.2d 1059, 1061 (Utah App. 1994).

b. Authority. The relevant citations to this issue are *Waddoups v. Amalgamated Sugar Co.*, 54 P.3d 1054, 1059 (Utah 2002); *Trillium USA, Inc. v. Board of County Com'rs of Broward County, Florida*, 37 P.3d 1093, 1096-97 (Utah 2001); The Restatement (Second) Conflicts of Laws §§ 299-310.

c. Preservation of issue in record. These issues were preserved in the trial court record through testimony and argument.

1. Whether the trial court erred when it failed to find that Mark Steen and Mi Vida breached the fiduciary duties they owed to Nancy Steen-Adams and awarded attorneys fees and costs in excess of $250,000 against Nancy Steen-Adams.

a. Standard of Review. This is a mixed question of law and fact which the appellate courts review for an abuse of discretion. Kraatz v. Heritage Imports, 71 P.3d 188, 202 (Utah App. 2003); Salmon v. Davis County, 916 P.2d 890, 892 (Utah 1996); Pennington v. Allstate Ins. Co., 973 P.2d 932, 939 (Utah 1998); Baldwin v. Burton, 850 P.2d 1188, 1198 (Utah 1993); J.V. Hatch Constr., Inc. v. Kampros, 971 P.2d 8, 13 (Utah App. 1998).

b. Authority. The relevant citations to this issue are Nicholson v. Evans, 642 P.2d 727, 730 (Utah 1982); Branch v. Western Factors, Inc., 28 Utah 2d 361, 502 P.2d 570 (1972); 4447 Assocs. v. First Sec. Fin., 889 P.2d 467, 471 (Utah App. 1995).

c. Preservation of issue in record. These issues were preserved in the trial court record through testimony and argument.

VI. STATUTES

The primary statute that underlies al of the arguments on appeal is Utah's derivative shareholder statute, U.C.A. §16-10a-740. Utah has not yet determined what standard a shareholder is held to in bringing derivative claims against directors of a corporation with facts alleging claims such as breach of fiduciary duty, as alleged in this case.

VII. STATEMENT OF THE CASE

B. Procedural History

The Steen family found great wealth mining uranium in the early 1950's in

southeastern Utah. Unfortunate circumstances led to bankruptcy by 1968, and the family members – Charles Steen, Sr. ("Charles Sr."), his wife Minnie Lee Steen ("M.L. Steen"), and their four sons, Charles Steen, Jr. ("Charles Jr."), Andrew Steen ("Andy"), John Steen ("John"), and Mark Steen ("Mark") – have been fighting over what was left of the family fortune for decades. Mi Vida Enterprises, Inc. ("Mi Vida"), was the entity formed to hold the assets that remained after the bankruptcy proceedings terminated, in which each of the family members initially held a one-sixth interest. Due to a debilitating head injury suffered by Charles Sr. in 1971, the death of M.L. Steen in 1997, John Steen's lack of participation, and other circumstances, Mark Steen has been the controlling director and shareholder of Mi Vida.

In 1999, a group of minority shareholders of Mi Vida commenced a derivative action in Boulder County District Court (the "Colorado action") against Mi Vida, Mark Steen, Charles Steen Sr., John Steen, and the several Colorado companies Mark had created alleging, *inter alia*, breach of fiduciary duties as directors of Mi Vida, and requesting an accounting, dissolution, receivership, and a declaratory judgment. Trial Exhibit B-1.

The defendants moved to dismiss the complaint based on several arguments including that the court lacked subject matter jurisdiction as Mi Vida is a Utah corporation. The motion was denied on November 10, 1999. Addendum Exhibit 1; Trial Exhibit 450[1].

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[1]Citations in this brief are abbreviated as follows: **TCR** is the Trial Court Record where the court clerk assigned each page a number in pencil. **Trial Exhibits** are those exhibits used at trial that remain in notebooks and are tabbed accordingly. The **Addendum**

Subsequently, a joint motion and renewed motion to dismiss was filed by Mark Steen, Mi Vida and others. Thereafter, three plaintiffs who had filed for bankruptcy protection before the Colorado action had been filed, Charles Steen Jr., his wife Jayne, and Monica Steen, were dismissed for lack of standing. The joint motion was denied as to the other plaintiffs including Nancy Steen-Adams ("Nancy") and Charles Steen III, who were permitted to proceed with their action except for the request for dissolution. Addendum Exhibit 2; Trial Exhibit 451.

Mi Vida then filed its complaint in Grand County District Court, Utah, on March 28, 2000, against the plaintiffs in the Colorado action asserting claims seeking to buyout the dissident shareholders, to enjoin them from pursuing their action in Colorado, and alleging damages, fees and costs for wrongfully pursuing the Colorado action. TCR 1-34. On April 12, 2000, the Utah trial court agreed with Mi Vida and ruled that the Colorado plaintiffs are barred from pursuing dissolution, receivership, and any claims against Mi Vida in Colorado that involved Utah assets and activities. It also ruled the Colorado plaintiffs could maintain their claims in Colorado that involved Colorado assets and activities. TCR 92-100.

The parties subsequently stipulated to dismissing the action in Colorado and bringing all of the claims into the Grand County, Utah jurisdiction. TCR 3693, ll. 7-19. The Utah plaintiffs then moved to have Charles III and Andrew Kirk Steen, Jr. ("Kirk") dismissed

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Ex. citations correspond to the tabbed addendum documents submitted to the Court of Appeals along with this brief. The line references ("l." or "ll.") correspond to the lines of a page.

from the case for lack of standing as their interests were ruled inchoate as the shares bequeathed to them in Mi Vida from their late grandmother, M.L. Steen, were still in probate and had not yet been distributed (and still have not as Mark Steen is the personal representative). The court found Charles III and Kirk lacked standing and dismissed their counterclaims against Mark Steen in a ruling dated November 6, 2001 (TCR 1132-34), but kept jurisdiction over Charles III for claims against him for potential set-off against any shares he may receive in the future under the will of M.L. Steen. Addendum Exhibit 4, p. 7, 11. 5-8; TCR 3695.

The Utah plaintiffs including Mi Vida, Mark Steen, and John Steen, jointly moved for summary judgment based on a statute of limitations defense to dismiss the counterclaims of Nancy Steen-Adams asserted in the Utah action. That motion was granted on July 10, 2002 and the order was entered September 16, 2002 as to the derivative claims involving the Boulder County real property alleged to have been owned by Mi Vida. Addendum Exhibit 3; TCR 3042-65. The trial court then certified the summary judgment order as final in an order entered December 3, 2002. TCR 3275-78. Appellants have appealed those two orders.

Nancy Steen-Adams was left to litigate the remaining claims which were tried to the bench on April 14-16, 2003, and May 21-23, 2003. The claims remaining for trial included: valuation and buyout of the shares of Mi Vida; Nancy's derivative claims against Mark and Mi Vida including breach of fiduciary duties by Mark Steen for his failure to provide an accounting of Mi Vida, failure to hold shareholder meetings, usurping corporate

opportunities, using Mi Vida funds to purchase assets, and attorney fees under the Utah derivative statute based on breach of fiduciary duty common law.

At the end of trial, the court found that the value of shares in Mi Vida owned by Nancy Steen-Adams was $261,086.88. TCR 2734. The court also found that Nancy brought her claims in Colorado for an improper purpose and without reasonable cause, and similarly abused the judicial process by bringing her claims in Utah and ordered her to pay attorney fees and costs of Mi Vida and Mark Steen for defending her claims and other matters in the amount of $329,710. These findings are also a part of this appeal.

C. Factual History

In 1951, Charles Steen, Sr. ("Charles Sr.") discovered what is believed to be the biggest uranium deposit ever unearthed in the United States. With the incredible wealth derived from the mining activities, the Steen family invested in diverse businesses that eventually led to financial trouble and Chapter 11 bankruptcy protection in 1968. Addendum Exhibit 1, p. 2; Trial Exhibit 450.

The closely held Steen family corporation, Mi Vida Enterprises, Inc., was formed to hold the assets that remained following the bankruptcy proceedings. Those assets included real property interests in the Gold Hill area of Boulder County, Colorado, and in Grand County, Utah. The properties were encumbered by multiple mortgages and an IRS tax lien, and as a result were essentially worthless for many years. Addendum Exhibit 4, p. 7; TCR 3695.

In 1971, Charles Sr. suffered a serious head injury that resulted in his inability to conduct his business and personal affairs. Additionally, Charles Sr. began to suffer with Alzheimer's disease in the mid 1990's rendering him totally incompetent. Mark Steen has conducted the affairs of his father since 1971. Id. In 1997, Mark's mother, M.L. Steen, passed away and Mark became the personal representative of his mother's estate. Further, Mark controls the business affairs of his brother, John. It is because of these circumstances that Mark Steen has been the controlling director and shareholder of Mi Vida. Addendum Exhibit 1, pp. 2-4; Trial Exhibit 450.

Appellant Nancy Steen-Adams was a minority shareholder of Mi Vida, a Utah corporation with its principal place of business in Boulder County, Colorado, with 250,000 shares of Mi Vida. Nancy acquired her shares through her divorce from Charles Jr. Appellant Charles III is a putative devisee of shares of Mi Vida representing approximately 1.67% of the company. Charles III was bequeathed shares in Mi Vida through the will of his late grandmother, M.L. Steen. Addendum Exhibit 1, pp. 2-3; Trial Exhibit 450. M.L. Steen's estate has been stuck in probate for years and the bequests have yet to be fulfilled.

Shareholder meetings of Mi Vida have been held sporadically throughout the years of the company's existence, and no shareholder meetings have been held since 1994. In 1993 the IRS tax lien expired and Mi Vida became an entity holding assets with significant value. Addendum Exhibit 4, p. 11, ll. 1-6; TCR 3699.

In 1998, a group of minority shareholders of Mi Vida, including Nancy Steen-Adams

and Charles Steen III, became aware of at least one newspaper article that mentioned land transactions were taking place between Colorado companies controlled by Mark Steen and another entity named ITEC Environmental involving real property interests in the Gold Hill area of Boulder County, Colorado. When the minority shareholders requested an accounting from Mark Steen for Mi Vida, key documents were not produced. Letters requesting accounting were written on three occasions from December 18, 1998-February 3, 1999. Trial Exhibits 391-393. The minority shareholders including Nancy and Charles III filed an action in Colorado in July of 1999 against Mark Steen and his group of Colorado companies requesting an accounting of Mi Vida, a declaratory judgment regarding diverted corporate opportunities, breach of fiduciary duties, review of certain corporate documents of Mi Vida, dissolution of Mi Vida, and a request that a receiver be appointed. Trial Exhibit B-1, also see Addendum Exhibit 1, p.4; Trial Exhibit 450.

On May 2, 2001, three Colorado companies controlled by Mark Steen entered into a purchase agreement with the County of Boulder, where the county would pay $2,550,000 in consideration for real property consisting of patented and unpatented mining claims located in the Gold Hill area of Boulder County. In early May, 2001, Boulder County paid $2,700,000 for the property described in the Boulder County Purchase Agreement and some additional property. Addendum Exhibit 3, p. 4, 11.22-23, p. 5, 11.1-7;TCR pp. 3045-46.

A substantial amount of the property sold to Boulder County was originally acquired by Mark Steen as agent for some type of business entity where Mi Vida was a joint venturer,

partner, or general partner in a limited partnership. Despite Mi Vida's participation in each of the entities, no part of the sales proceeds was given or transferred to Mi Vida or Nancy Steen-Adams. This alleged diversion of corporate assets and opportunities was the focal point of the derivative claims in Colorado and Utah action.

Appellants also alleged in her complaint that a certain financial instrument which was represented by Mi Vida's counsel as bought by Mi Vida out of the bankruptcy court for the benefit of the shareholders was actually paid for by Mi Vida but then transferred to Mark Steen for no consideration. The fact that Mi Vida could have retired this debt for its own benefit but then surreptitiously transferred it to Mark Steen for his benefit, is an opportunity that, at a minimum, should have been disclosed to Nancy Steen-Adams. Appellants asserted that the transaction was a breach of fiduciary duty and fraud.

When Mark Steen and Mi Vida moved to dismiss the Boulder case based on lack of subject matter jurisdiction, Judge Bailin of the Boulder District Court found in favor the plaintiffs and denied the motion to dismiss. Addendum Exhibit 1, Trial Exhibit 450. Judge Bailin found that the modern trend in the law is to allow dissolution and receivership of a foreign corporation, and this corporation fit the bill as most of its contacts were in Colorado. Id. In the Utah trial, Mi Vida and Mark Steen prevailed on their claim that the dissident shareholders abused judicial process by continuing to pursue dissolution of Mi Vida and appointment of receiver in the Boulder court, despite the fact that the preliminary injunction order issued by the Utah court did not order that all proceedings in Boulder County were to

stop, but allowed the dissident shareholders to maintain their claims against Mark Steen and Mi Vida involving actions and properties in Colorado. TCR 171-179.

By stipulation dated October 13, 2000, the parties agreed to dismiss the claims in Colorado and reassert their claims in Utah. TCR 3693, ll 7-19.

In Utah the appellants had their shares valued, and had their other claims dismissed or determined to be of insignificant benefit to Mi Vida. Attorneys fees were awarded against them. Appellants are appealing their loss of their claim for breach of fiduciary duty and the judgments against them for attorneys fees.

VIII. SUMMARY OF THE ARGUMENTS

Nancy Steen-Adams and Charles Steen III appeal from the September 30, 2003 trial court order, Addendum Exhibit 4; TCR 3689-3725, awarding attorneys fees against them in the amount of $329,710 against Ms. Steen-Adams and $8,950.55 against Charles Steen III. The pieces to this appeal consist of a prior appeal of the court's granting of summary judgment against Nancy Steen-Adams and dismissal of her claims for breach of fiduciary duty relating to transfers of real estate made by Mark Steen. That order, Addendum Exhibit 3, TCR 3042-3065, was principally based upon the court's finding that Ms. Steen-Adams was put on notice and/or should have inquired about the real estate transfers prior to the expiration of her three year statute of limitations.

In this appeal, Ms. Steen-Adams asserts that the real estate transfers were part of a continuing scheme that came to light approximately one year before filing the minority

shareholders' initial complaint, thus precluding the running of the statute of limitations. Nancy Steen-Adams also appeals the court's certification of the summary judgment order as final, as the facts related to the dismissed claims and the facts remaining overlap.

Although the arguments in this brief are broken out separately, they are complex and intertwine. The trial record indicates that Mark Steen breached his fiduciary duties to Nancy Steen-Adams by failing to make shareholder distributions to her. Nancy Steen-Adams was forced to initiate litigation in Colorado in order to obtain an accounting from Mi Vida as the company's principal place of business and transactions were conducted from Mark Steen's residence in Boulder County, and Mi Vida assets were located in Boulder County.

At trial, Mi Vida failed to provide a full accounting – the last two year's tax returns, or any of the general ledger entries for the last nine months prior to the valuation date of October 12, 2000. This failure of accounting in and of itself is a sufficient basis for Ms. Steen-Adams to bring her claim for breach of fiduciary duty and accounting.

Nancy Steen-Adams proved a breach of fiduciary duty by Mark Steen through his acquisition of Charles Steen, Jr.'s interest in the Continental Bank and Trust note and mortgage placed upon the Mi Vida property. Mark Steen used Mi Vida funds to buy the Mi Vida debt at a discounted rate and in the process obtain credit for the shareholder advances Mi Vida had made to Charles Steen, Jr. This conduct could not be explained by Mr. Steen or his attorney and constitutes a breach of fiduciary duty such that attorneys fees for the derivative claims should not have been awarded against Nancy Steen-Adams for her actions

in either Colorado or Utah.

IX. ARGUMENT

1. THE TRIAL COURT ERRED IN DETERMINING THAT THE STATUTE OF LIMITATIONS HAD EXPIRED IN ITS ORDER ENTERED SEPTEMBER 16, 2002, AS THE BAD ACTS ALLEGED BY THE APPELLANTS WERE CONTINUING ACTIVITIES THAT CAME TO LIGHT IN 1998

In its Findings of Fact, Conclusions of Law and Final Order dated September 30, 2002, the Grand County District Court found that most of the derivative claims asserted by Nancy Steen-Adams were barred by the statute of limitations as she received or should have received notice of real estate transactions from a shareholder meeting or shareholder meetings in the late 1980s and/or early 1990's. Addendum Ex. 3, TCR 3042-65.

In their brief to the court, Mi Vida and Mark Steen conceded that Nancy was entitled to benefit as a shareholder from the value of the Boulder County and Grand County properties owned by Mi Vida. Id. at p. 4, ll. 13-14. The movants argued that Nancy's claim that certain properties purchased in 1982 and 1983 in the Gold Hill area of Boulder County and titled in Mark Steen's name (the"Cosmos Claims") and other properties purchased in the same area in 1990 and titled in Mark's name (the "Little and Rodgers Claims"), which were then sold to Boulder County for 2.7 million dollars in 2001 and should also be included as assets of Mi Vida, was barred by the statute of limitations. Id. at 4, ll. 13-22, p. 5, ll. 1-7.

The court found that Nancy Steen-Adams failed to state in her brief in opposition to summary judgment when it was she first became aware of facts supporting a claim against

Mark as an officer of Mi Vida. Id. at 11, ll. 16-17. The court stated in part:

> The Summary Judgment Motion was accompanied by a detailed statement of facts supported by affidavit. Nancy attempted to controvert a number of those statements. However, her efforts to do so simply by stating that she disagrees cannot be honored.... A party resisting summary judgment is not entitled to rest on pleadings, but must come forward with specific averments contradicting specific facts asserted by the moving party.

Id. at 2, ll. 12-19.

The court also found that Nancy asserted "that she could not sue until after the Cosmos Claims and the Little and Rodgers Claims were sold to Boulder County, but she obviously felt aggrieved before that because she filed a lawsuit in Colorado in 1999." Id. at 11, ll. 17-20. The court found that there was no genuine issue as to the material fact that the statute of limitations expired:

> long before June 8, 1999[2], because Nancy, with the exercise of reasonable diligence, based upon knowledge she had or was charged with, would have discovered that Mi Vida claimed no interest in those properties and that Mark did not hold them in trust for Mi Vida, long before June 8, 1996. Mi Vida and Mark are therefore entitled to summary judgment excluding those properties from the valuation of Nancy's shares.

Id. at 14, ll. 9-17.

The record evidence that supports the trial court's decision is that Nancy hired two lawyers, Lynn McKeever and Ann Mosely, who attended the shareholder meeting on May

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[2]The original Verified Complaint was signed on June 8, 1999, and filed in Boulder County District Court on July 6, 1999.

2, 1987, on Nancy's behalf. Id. at 5, ll. 21-22. At that time, it may have been possible for the Nancy to have been put on notice through her lawyers that the Cosmos claims were purchased by Mark with money from Cosmos to advance the Gold Hill Venture Agreement, of which Mi Vida was a partner and contributor of its own properties. Due to the knowledge gained at that May 2 meeting, Nancy may be considered on notice, due to the animosity and accusations at that meeting between the Steen family members, that perhaps some skullduggery was afoot, and the clock began to run on her claim for breach of fiduciary duty.

The trial court does not acknowledge, however, that Nancy Steen Adams states in her affidavit attached to her brief in opposition to summary judgment that:

> I did not become aware that Mark Steen had formed or improperly used Gold Hill Mines, Inc., Gold Reef Mining Company, Southern Cross Prospect Mining Company or Golden Tontine, LLC until sometime after M.L. Steen dies on July 14, 1997.

TCR 2682, ¶ 3.

> I was unaware that Mark Steen acted improperly with regard to my stock interests in Mi Vida until sometime after M.L. died on July 14, 1997. I have never received any distribution or payment from Mi Vida.

TCR 2682, ¶ 4.

These statements by Nancy in her affidavit opposing summary judgment contradict assertions made by Mi Vida and are specific averments as to when, perhaps not precisely, but generally, she first became aware that new companies had been formed and new transactions were being conducted relevant to the properties in Boulder County of which she

had an interest.

The court does take note that Mi Vida is a party to the ITEC transaction which involves the Boulder County properties, and that agreement may have value to be shared with the shareholders of Mi Vida. Addendum Ex. 1, p. 14, ll. 19-21, p. 15. ll. 1-2. The court does not take notice, however, that the ITEC deal underlies all of the claims for relief, and therefore because the ITEC transaction was properly pled within the statute of limitations, none of the claims should have been dismissed. Id. at 19, ll. 16-21.

Additionally, no shareholder meetings have been held since 1994 and therefore Nancy Steen-Adams had no way to gather information regarding any corporate transactions. Addendum Ex. 1, p. 19, ll. 7-8. Moreover, an accounting was repeatedly requested by the minority shareholders beginning in December of 1998 but the critical documents regarding the Mark Steen Company transactions and other requested materials were not produced. Trial Exhibits 391-393.

It was the affirmative actions of Mark Steen to deflect the minority shareholders' attempts at obtaining information regarding the transactions in the late 1990's involving the Mark Steen Companies, Mi Vida, and the Boulder County properties that led to initiating the action Colorado in June of 1999. The disclosure of new transactions reported in the newspapers was investigated and formal attempts were made by the minority shareholders to obtain the relevant information to the ITEC deal and other transactions by way of requesting the corporate documents pursuant to Colorado and Utah law. When those

requests went unfulfilled, the initial complaint in Boulder County was promptly filed. Nancy Steen-Adams was owed a fiduciary duty such that she was not placed on inquiry notice by any mailing or activities of Mark Steen.

2. THE TRIAL COURT ERRED IN ITS DECEMBER 3, 2002, ORDER BY CERTIFYING AS FINAL UNDER RULE 54(b) UTAH RULES OF CIVIL PROCEDURE, THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER ENTERED BY THE TRIAL COURT ON SEPTEMBER 16, 2002, DISMISSING THE MAJORITY OF APPELLANT'S CLAIMS.

On September 16, 2002, the court entered an order dismissing some of the claims asserted against Mark Steen and Mi Vida. The claims not dismissed include those related to the ITEC Agreement, the claim for breach of fiduciary duties, and the request for an accounting. Addendum Exhibit 3; TCR 3042-3065. On October 28, 2002, Mi Vida moved for an order certifying its September 16 Order as final pursuant to U.R.Civ. Pro. 54(b). TCR 3128 - 29. After briefing on December 3, 2002, the trial court entered its Order Certifying Summary Judgment as Final. Addendum Exhibit 12; TCR 3275-3278.

Rule 54(b) allows certification "only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment." The rule further provides that "[i]n the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights

and liabilities of all the parties." Id.

The court's certification was a waste of judicial resources as the final judgment did not dispose of any single claim or party. See Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1103 (Utah 1991) ("[w]hen this factual overlap is such that separate claims appear to be based on the same operative facts or on the same operative facts with minor variations, they are held not to constitute separate claims for rule 54(b) purposes"); *see also* Briggs v. Valley Spas, Inc., 2001 WL 1636757 (Utah App. 2001) (unpublished decision) ("due to the factual overlap of the claims remaining before the trial court and those asserted on appeal, the trial court improperly granted certification under rule 54(b)").

Several claims remain in this case which stem from the same facts upon which the dismissed claims are based. For example, the court has dismissed the claim for breach of fiduciary duties which asserts a diversion of real property away from Mi Vida. However, other fiduciary duties which are alleged to have been breached and have not been dismissed include failure to communicate with the shareholders, failure to provide the shareholders with certain financial information, including an accounting, failure to convene shareholder and director meetings, corporate waste, self dealing by Mark Steen, and devaluation of the company. There is much factual overlap between the issues relating to the alleged diversion of real estate, and the failure to apprise or receive approval from the shareholders for Mi Vida's intention to engage in certain corporate transactions which involved those same assets.

> In order to facilitate this court's review of judgments certified as final under rule 54(b), trial courts should henceforth enter findings supporting the conclusion that such orders are final. The findings should explain the lack of factual overlap between the certified and remaining claims and thus satisfy the Kennecott criterion for certification to be proper.

Bennion v. Pennzoil Co., 826 P.2d 137, 139 (Utah 1992).

The court failed to include findings explaining that the issues are separate and there is a lack of factual overlap between the certified claims and the remaining claims. Here, the separate claims were based on many of the same operative facts and therefore should not have been certified.

The trial court awarded Mi Vida and Mark Steen the full amount of the attorney fees incurred during the period October, 2000 to April 2003. Addendum Exhibit 4, p. 35; TCR 3723. The award includes time spent by Mr. Finch discussing and reviewing the issues relating to the Rule 54(b) request for certification and briefing. Those amounts consist of approximately $1,855.00 in charges approximately one half of which appears to be related to the Rule 54(b) request. See plaintiffs Exhibit A-5, Exhibit A, October, 2002 bill for the 27th and 28th; November bill for the 13th and 22nd; January, 2003 bill for 2nd, 3rd, 27th and 30th; February, 2003 bill for the 28th; March, 2003 bill for the 6th and 31st. Also see Exhibit B.

Additional amounts were awarded to Mi Vida. in its defense of the derivative claims in the amount of $103,467. Addendum A, p. 34; TCR 3722. Although it is more difficult to

trace said amount it appears that on November 19, 2002, Ms Kennedy billed $435 for "Draft Reply on 54(b) request, revise Response to Motion to File S.J." Trial Exhibit A-6.

The bills make it hard to discern precisely how much time was spent on the Rule 54 appeal; nonetheless, the appeal was improvidently granted and approximately half of said fees should be subtracted from the Mi Vida judgment.

3. THE TRIAL COURT ERRED IN DETERMINING THAT NANCY STEEN-ADAMS AND CHARLES STEEN III HAD AN IMPROPER PURPOSE AND LACK OF MERIT IN FILING THEIR ACTION FOR DISSOLUTION AND RECEIVERSHIP IN COLORADO AS MI VIDA AND MARK STEEN HAVE A SIGNIFICANT RELATIONSHIP WITH BOULDER COUNTY, COLORADO

In its Final Order and Judgment, Addendum Exhibit 4, the trial court found that the action filed in Colorado by Nancy Steen-Adams and Charles Steen III for dissolution and receivership was brought for an improper purpose and lacked merit and therefore was an abuse of the civil process, and the derivative claims were brought without a reasonable basis. Addendum Exhibit 4, pp. 28-30; TCR pp. 3716-18. The trial court assessed fees in the amount of $60,259.40 ($21,576.17 in fees and costs for Mark Steen + $38,515.70 in fees for Mi Vida) against Nancy Steen-Adams for pursuing the Colorado action. Addendum Exhibit 4, pp. 33-36; TCR 3721-24. The trial court also assessed fees against Charles Steen III in the amount of $4115.35 in pursuit of the Colorado action.

The trial court found that it was not reasonable and there was an improper purpose to file the original action in Colorado. Addendum Exhibit 4, p. 28, ll. 10-13; p. 30, ll. 15-16;

TCR p. 3716, 3718. The court also found that it was "not reasonable...for Nancy...to claim what they did when they filed the lawsuit in mid-1999 seeking liquidation and a receivership of this corporation." Addendum Exhibit 4, p. 28, ll. 10-12; TCR p. 3716. The trial court also found that it was not reasonable for Nancy and Charles III to have asserted the derivative claims in Colorado. Addendum Exhibit 4, p. 28, ll. 14-15; TCR p. 3716.

At trial, Mi Vida asserted that the minority shareholders abused the civil process in bringing the action for dissolution and receivership in Colorado not because those remedies were groundless, but because they were allegedly brought in the wrong forum.

> Mi Vida's position is not that those two claims were brought with no grounds, because I think you can look at the statutes, and simply the fact that these shareholders were at each others' throats, that that was perhaps not groundless. However, it was an abuse of process. Not by virtue of bringing those claims, or those causes, but by virtue of bringing them in the wrong forum, to defeat Mi Vida's right to have this buy-out option as opposed to a total dissolution. That's our theory on abuse of process for those claims themselves.

Trial Transcript Vol. II, p. 453, ll. 2-12.

The record evidence that supports the trial court's findings includes the fact that Mi Vida is a Utah corporation and therefore the Boulder County court may not have had jurisdiction over Mi Vida for dissolution, and therefore the request for dissolution should have been brought in the district court of the Utah county where the registered agent of the corporation is located pursuant to Utah Code of Administration § 16-10a-1431. Trial Transcript Vol. I, p. 42; Vol. V, p. 1308-09; Vol. VI, p. 1469. The record evidence that

supports the trial court's findings is Mi Vida's assertion that "Mi Vida was never given, in the context of the Colorado action, the option to simply buy these people out and get rid of them." Trial Transcript Vol. I, p. 35, ll. 13-15.

What the trial court did not recognize is that a court can exercise jurisdiction over a foreign corporation such as Mi Vida and wind up its affairs if there are 'strong ties to the forum, especially where the bulk of corporate assets are located there, the bulk of business has been done there, and corporate officers and directors are subject to the court's jurisdiction.' Addendum Exhibit 1, p. 10; Trial Exhibit 450 (quoting Annotation, Dissolving or Winding Up Affairs of Corporation Domiciled in Another State, 19 A.L.R.3d 1285-86); In Re Application of Dohring, 537 N.Y.S.2d 767, 769 (N.Y. Sup. Ct. 1989) (court concluded "jurisdiction to resolve the internal disputes of foreign corporations may be far more readily exercised where the corporation's contacts with [the venue] are substantial"); Fletcher's Cyclopedia of Corporations § 8579 ("local courts may appoint receivers for the property and assets of a foreign corporation located in the state and wind up the affairs of such corporation so far as they are within the jurisdiction").

Nancy Steen-Adams and Charles Steen III originally filed their claims in Boulder County District Court for several reasons. All of the defendants including Mark Steen, Charles Steen, Sr., and John Steen lived in Boulder County, Colorado, and the action was filed against several Colorado companies owned by Mark Steen, John Steen and others. Mi Vida's principal place of business is run out of the home of Mark Steen in Boulder County,

and most of the business of Mi Vida was conducted from Boulder. It is these significant contacts and obvious convenience that support the decision to file the original action by Nancy Steen-Adams and Charles Steen III in Colorado.

More importantly, it is understandable that two judges in different jurisdictions may disagree as to what law applies as to an action regarding the internal affairs of a corporation, however, it is illogical to find Nancy Steen Adams and Charles Steen III liable for an abuse of process in bringing their action in Colorado where the chief trial judge determined that the jurisdiction that the plaintiffs chose had a significant relationship with the corporation and was therefore proper. Addendum Exhibit 1. A fair reading of Judge Bailin's opinion and reasoning would exonerate Nancy Steen-Adams and Charles Steen III from the judgment for attorney fees.

4. THE TRIAL COURT ERRED IN DETERMINING THAT NANCY STEEN-ADAMS AND CHARLES STEEN III HAD NO REASONABLE CAUSE TO ASSERT THEIR DERIVATIVE CLAIMS AGAINST MI VIDA IN COLORADO

The lynchpin to this case and the basis for most of the award of over $250,000 in attorney fees and costs awarded against Nancy Steen-Adams and Charles Steen III is that the trial court found they had brought the derivative claims "without reasonable cause" as that term is used in the Utah shareholder derivative statute. U.C.A.§ 16-10a-740. The trial court found that Mi Vida and Mark Steen are entitled to recover their attorney fees pursuant to U.C.A. § 16-10a-740. That statute reads in part:

> (6) On termination of the derivative proceeding the court may order:
> (a) the corporation to pay the plaintiff's reasonable expenses, including counsel fees, incurred in the proceeding, if it finds that the proceeding has resulted in a substantial benefit to the corporation;
> (b) the plaintiff to pay any defendant's reasonable expenses, including counsel fees, incurred in defending the proceeding, if it finds that the proceeding was commenced or maintained:
> (i) without reasonable cause; or
> (ii) for an improper purpose

U.C.A. § 16-10a-740.

Utah, like many states, patterned its shareholder derivative statute after the Model Business Corporation Act. Nancy Steen Adams and Charles III were unable to locate any Utah cases interpreting the "without reasonable cause" language of the Utah shareholder derivative statute.

Other Courts, however, have addressed this precise issue. In White v. Banes, 866 P. 2d 339 (N.M. 1993), the New Mexico Supreme Court considered issues related to New Mexico's shareholder derivative action statute, including an interpretation of the "without reasonable cause" language relating to an award of attorney fees. Like Utah, New Mexico's shareholder derivative statute is patterned after the Model Business Corporation Act. In White, the New Mexico Supreme Court considered application of the subjective test or alternatively, a more objective standard akin to an award of attorney fees for unreasonable denial of an insurance claim (the reasonably prudent insurer standard). In adopting the subjective standard, the White court stated:

> If our purpose in awarding attorney's fees is to protect plaintiffs whose suits have a reasonable foundation, we believe the

> "groundless" test is a better test to pattern the "reasonable cause test" after. Thus, if White knew when he filed the action that his complaint was without a reasonable foundation, Banes would be entitled to attorney's fees.

Id. at 344.

Accordingly, under White, for a party to be sanctioned with attorney's fees, a showing must be made that "[he or she] subjectively knew at the time the suit was filed that the complaint was groundless." *Id.* at 343.[3]

Regardless of which standard applies, in order to obtain fees under this section, *the entire action must have been brought without reasonable cause.* The commentary to the Model Business Corporation Act, on which the Utah Act is patterned, indicates that the "action" language was purposely chosen: "The test ... that the action was brought without reasonable cause is appropriate to deter strike suits on the one hand, and on the other hand to protect plaintiffs whose suits have a reasonable foundation." 2 Model Bus. Corp. Act Ann. § 7.40, at 720; accord Gizzard v. Petkas, 272 S.E. 2d 583 (1980). Because the goal was to deter strike suits, but not to chill meritorious suits, the "action" terminology was chosen. See, Winner v. Cataldo, 559 So.2d 696, 696 (Fla. App. 1990).

[3] Other Courts have adopted the objective standard. See for example, Bass v. Walker 2003 WL 751047 (Tex. App. 2003) (adopting the objective standard that a plaintiff acts without reasonable cause if, at the time he brings the suit: (1) plaintiff's claims in the lawsuit are not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; or (2) plaintiff's allegations in the suit are not well grounded in fact after reasonable inquiry.

5. THE TRIAL COURT ERRED IN DETERMINING THAT UTAH LAW APPLIED TO CLAIMS BROUGHT BY APPELLANTS IN COLORADO RATHER THAN COLORADO LAW

The action for dissolution and receivership, and the derivative claims brought by the minority shareholders against Mark Steen and Mi Vida were originally brought in Colorado. Since Colorado was the forum state, Colorado's choice of law determines the outcome of the conflict. Waddoups v. Amalgamated Sugar Co., 54 P.3d 1054, 1059 (Utah 2002). Chief Judge Roxanne Bailin of the Boulder County District Court presided over the Colorado action and performed a Colorado choice of law analysis in determining how to handle the Colorado action with respect to Mi Vida. Addendum Exhibit 1 pp. 12-14; Trial Exhibit 450. Judge Bailin determined that Colorado has the most significant relationship with Mi Vida finding:

> all of Mi Vida's corporate officers are Colorado residents and thus subject to personal jurisdiction in this Court. Mi Vida's principal place of business and corporate records are located in Colorado. Further, except for some land located around Moab, Utah, Mi Vida's assets are located in Colorado. In particular, many of the events complained of by the Plaintiffs involved Mi Vida assets in the form of real property located in Colorado. Mi Vida has no corporate office in Utah. Essentially, Mi Vida is a Utah corporation in name only. In addition, because the court has jurisdiction over the Plaintiffs' four other claims, it would be redundant and illogical to insist that the Plaintiffs bring suit in two different states when the facts giving rise to all the claims are the same.

Addendum Exhibit 1 p. 12, Trial Exhibit 450.

These facts substantiated Judge Bailin's finding that Mi Vida had the most significant relationship with Colorado and therefore Colorado law applied to all of the claims except

for the request for dissolution. As to dissolution, Judge Bailin found that Utah law applied but that she could determine whether dissolution was warranted, and if not, what alternative remedies would be appropriate, and if dissolution was warranted that such an action would be ordered to take place in Utah. Addendum Exhibit 1 p. 12-14, Trial Exhibit 450, quoting Comment g to Restatement (Second) Conflicts of Law § 302 ("it is situations where the corporation has little contact with the state of its incorporation that the local law of some other state is most likely to be applied"), also citing Restatement (Second) Conflicts of Law § 309 ("*Directors' or Officers' Liability* states that the local law of the state of incorporation will be applied, except where 'some other state has a more significant relationship under the principles stated in section 6 to the parties and the transaction, in which event the local law of the other state will be applied").

The record evidence that supports the trial court's findings includes the fact that Mi Vida brought its lawsuit in Utah and therefore Utah may be considered the forum state for purposes of the choice of law analysis. Additionally, Mi Vida is a Utah corporation and therefore the applicable statute for purposes of dissolution is Utah Code of Administration § 16-10a-1431, which states a dissolution action must be brought in the district court of the Utah county where the registered agent of the corporation is located. Trial Transcript Vol. I, p. 42; Vol. V, p. 1308-09; Vol. VI, p. 1469. The record evidence also supports the trial court's choice of Utah law in that the value of land owned by Mi Vida in Grand County, Utah, was appraised at a higher value than the real property interests in Boulder County,

Colorado, and therefore an argument can be made that there is also a significant relationship with Grand County, Utah. Addendum Exhibit 2; TCR 3703 p. 16, ll. 12-13.

The fatal flaw lies, however, in the trial court's determination that all of the internal affairs of Mi Vida could only be brought in Utah rather than allowing the Colorado action to continue except for the single action for dissolution, which if found warranted by the Colorado court, could have been ordered by the Colorado court to be litigated in Utah.

It is this difference in opinion between the judges as to choice of law, which is a complex issue, that is indicative of the fact that Nancy Steen-Adams and Charles Steen III had at least a reasonable basis for bringing their claims in Colorado in the first place.

The trial court abused its discretion in finding that the appellants did not have grounds to base their claims that were brought in Colorado, and awarded attorney fees.

6. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT MARK STEEN BREACHED THE FIDUCIARY DUTIES OWED TO MI VIDA AND NANCY STEEN-ADAMS, DISMISSED THE DERIVATIVE CLAIMS AND AWARDED ATTORNEYS FEES AND COSTS IN EXCESS OF $250,000 AGAINST NANCY STEEN-ADAMS.

The dismissal of those claims occurred in two separate procedures. First, most of the large dollar claims were dismissed on summary judgment when the court initially ruled in favor of Mark Steen and Mi Vida in the court's September 16, 2002, Findings of Fact, Conclusions of Law and Final Order, (hereafter Summary Judgment Order) Addendum Exhibit 3; TCR pp. 3042-3065, entering partial summary judgment on the Motion of Mi Vida, Mark Steen and John Steen to dismiss the claims set out in her pleading filed on

January 31, 2001, TCR 512 -531. The court in its Summary Judgment Order, Addendum Exhibit 3, pp. 10 - 14; TCR pp. 3051-3055, found there were no genuine issues of material fact such that claims relating to Mi Vida's ownership of certain properties expired long before June 8, 1996, the cut-off date for the applicable three year statute of limitations, Section 78-12-27, Utah Code, preceding the June 8, 1999 filing of the initial Boulder complaint.

The second dismissal of the balance of the fiduciary claims occurred at the conclusion of six days of trial before the court and is largely summarized in the Final Order, Addendum Exhibit 4, TCR pp. 3689 to 3725. As will be shown below, Mark Steen breached his fiduciary duties in a number of ways. Mark Steen failed to provide an accounting to Nancy Steen-Adams; he advanced money to select shareholders and other relatives without charging interest, obtaining a promissory note, or determining their ability to repay the monies; he failed to hold shareholder meetings after 1994; he failed to properly communicate the business of the corporation to Nancy Steen-Adams and he misled the trial court and counsel for Nancy Steen-Adams when he personally took an assignment of Charles, Jr.'s interest in the Continental Bank and Trust note and mortgage using Mi Vida's claims and money. Taken as a whole this conduct constitutes a breach of fiduciary duty by Mark Steen such that the trial court had an insufficient basis to render judgment against Nancy Steen-Adams and award Mark Steen and Mi Vida attorneys fees and costs in excess of $250,000.

Mark Steen mismanaged the funds Mi Vida received from the sale of the 3 acres of Mi Vida's land in Moab. There is no dispute that Mark Steen was the controlling officer and director of Mi Vida from 1990 to present. The IRS lien of approximately three to five million dollars expired in 1993. Trial Transcript p. 548. Thereafter, Mi Vida contracted to sell 3 acres of its Moab land. The court in its Final Order and Judgment correctly tracks the sequence of events and conflicts presented at the time Mi Vida attempted to sell the property. Addendum Exhibit 4, pp. 11-13, TCR 3699-3701. The court specifically acknowledged that as a result of litigation initiated by Charles Steen, Jr., the parties cut a deal where advances or loans to shareholders were made and advances were made to Tera Wright, Id.

> So it is hard to fault the corporation for giving a little favorable treatment to some shareholders that maybe legally they are not in a strong position, but morally, ethically, emotionally you might feel a strong bond to. These are the people without whom there probably would have been none of the rest.

Id. p. 12; TCR p. 3700.

More specifically the trial court addressed the breach of fiduciary claim and stated:

> It was true that disproportionate advances were made to shareholders in 1994 and some disproportionate advances of much less magnitude had been made before that time; but, Nancy would have known of these if she had paid attention to the notice she was given.

Id. p. 14; TCR p. 3702.

On August 9, 1994, John Henderson, legal counsel for Mark Steen, wrote a letter to Bart Bailey, counsel for Charles Steen, Jr. Addendum Exhibit 5, Trial Exhibit 203. In that

letter, Mr. Henderson addressed the concerns he had about the failure to pay Nancy any funds from the sale of the 3 acres. He stated:

> I feel that I must continue to express concern to the Mi Vida directors and the other family members on a number of items. I believe that the disbursements made to date, and those made in the future, must be rationalized based on the status of the recipient, either as a mortgage holder and/or shareholder and/or a contractee. To the extent the disbursements are made to shareholders or third parties, the interests of all shareholders must be protected, and all shareholders should be treated fairly and in a similar fashion.

Id. At trial he Mr. Henderson acknowledged that the letter was specifically addressing the non-payment of Nancy Steen-Adams. Trial Transcript, Vol. III, p. 670 l. 22 - 672 l.5.

The court, in its Final and Judgment and Order acknowledged that Mi Vida let its registration expire, the corporation wasn't in good standing for awhile, it filed its tax returns late. Addendum, Exhibit 4, p. 15, TCR 3703. The court concluded "I think those were all things that were easily remedied simply by a letter and cooperation of the shareholder. If that had been the only complaint this lawsuit would have been disposed of perhaps before it was filed." Id. In making that finding, and dismissing those claims, the court simply failed to acknowledge the true deadlock that existed in this corporation and its complete disregard for Nancy and her rights. At no time would a simple letter ever have sufficed. Those simple letters, Trial Exhibits 391, 392 and 393, were written and rejected before the initial litigation was filed, and ultimately attached to the original Boulder complaint.

It is unchallenged that Mi Vida was consistently late in filing its tax returns. Ultimately, Summary Trial Exhibit 616, Addendum, Exhibit 7, was admitted. The exhibit

tracks the filing of the tax returns, and it was uncontroverted that tax return filings were consistently late. Ms Steen-Adams was never provided the tax return for the year ending June 30, 1999 or year ending June 30, 2000, much less, the more current returns. Moreover, until she initiated litigation, she was never provided any accounting – general ledger records, cancelled checks, bills, et al. after 1994. This is a breach of fiduciary duty.

The trial court failed to acknowledge the uncontroverted evidence that Mark Steen never informed Nancy of what the trial court stated was "the single most crucial event in the post-1974 history of Mi Vida Enterprises," – the 1993 expiration of the multi-million dollar IRS lien on the Mi Vida real property. Final Order and Judgment, Addendum Exhibit 4, pp. 10 - 11; TCR 3698-99. The removal of that lien met that Mi Vida "actually had assets to sell." Id. Nancy consistently stated throughout the trial that she never knew about the removal of the lien until 1997, around the time M. L. Steen died. Mark Steen admitted that he never gave written notice of the removal of the lien because he didn't have her phone number or address. Trial Transcript Vol. II, p. 549 ll. 1 - 10. Mark Steen's only response to this assertion is that Mark assumed that Charles Jr. told her or that her daughter Monica told her. Id.

Mark Steen's acquisition of the Continental Bank and Trust note and mortgage was a breach of fiduciary duty. Mark Steen breached the fiduciary duties he owed to Mi Vida and to Nancy Steen-Adams when he used Mi Vida's funds and its attorney to acquire a valuable corporate opportunity for himself by acquiring the portion of the Continental Bank

and Trust note and mortgage on Mi Vida property owned by Charles Steen Jr. prior to his bankruptcy. He acquired the note and mortgage at a significant discount both by reason of the valuation he placed on the note and by using Mi Vida's shareholder advances of $32, 263 to Charles Jr. to further reduce the purchase price.

The trial court in its Final Order and Judgment, Addendum Exhibit 4, p. 18 - 19; TCR pp. 3706 - 07, reviewed the evidence relating to the CB&T note and found:

> that Mr. Sander would have been aware from the reference in the ten minutes I heard on October 12, that the deal included the "claims of CAS, Jr. also including a mortgage." The only mortgage CAS Jr. had was the Continental Bank & Trust mortgage. So if Mr. Sander saw the settlement documents, the most appropriate finding here is that Nancy, through her attorney, had an opportunity to say we want to benefit from that transaction, and that she didn't.

In so ruling, the court simply fails to appreciate that there was in fact a breach of fiduciary duty and that the valuations of the shareholder advances and CBT note should be changed. First, there is no evidence that anyone was aware that Mark Steen and not Mi Vida was going to make the acquisition. Second, even assuming the court is correct and Ms Steen-Adams' attorney Richard Sanders was aware of all the referenced documents, there is no reason for Nancy Steen-Adams to acquire the interest as everyone was led to believe Mi Vida was acquiring the interest and compromising the claims.

The acquisition was done, with the trial courts's approval at a status conference and oral arguments hearing on, October 12, 2000. The 59 page transcript has been made a part

of the record on appeal. TRC 3788. Relevant parts of that transcript are appended as Addendum Exhibit 10.

The October 12, 2000 hearing was in part, a result of a motion, brief and proposed order filed by Mi Vida on August 9, 2000. Addendum Exhibit 11; TCR 389-402. That filing contained no reference to anyone acquiring the CBT note and mortgage. The filing requested permission to borrow against Mi Vida land and access to the funds held in the registry of the court. The supporting memorandum brief requests registry funds for the purpose of buying 241,980 shares of Mi Vida stock. Addendum Exhibit 11 at 395; TCR 395. It does state:

> Furthermore, negotiations are being conducted with the Trustee for the estate of Charles, Jr. and Jayne to resolve any other claims and counterclaims in the context of the buy-out.(footnote omitted) It is in the best interest of Mi Vida to resolve any and all claims by and between itself and these former shareholders. Specifically, Charles, Jr. claimed to own by transfer certain mortgages held by Maxine Boyd.

Id. 396 - 97.

Ms Kennedy also states:

> Mi Vida asks for these funds to be made available to it for the purchase of the shares. ... If the funds are not released, Mi Vida will lose an opportunity to acquire the stock and claims formerly owned by Charles, Jr. and Jayne at a reasonable value. Clearly the action will inure to the benefit of Mi Vida's creditors (including Boyd) and the remaining shareholders.
>
> Maxine Boyd, upon whose insistence the funds were originally deposited, has asked only that the funds be disbursed or withdrawn only for the benefit of Mi Vida or to preserve the property of Mi Vida.Id. 397.

The memorandum brief makes other broad and non-specific references to compromising claims with the trustee in bankruptcy for the estates of Charles, Jr. and Jayne, and in footnote 4 estimates "a need for $70,000, based on the amount of claims in the Charles, Jr. and Jayne Steen bankruptcy." Id. 399. In its prayer Mi Vida requests access to the registry funds "to be used for the purchase of the shares formerly owned by Charles A. Steen, Jr. and Jayne Marie Steen in context of a settlement of all claims with their bankruptcy trustee." Id. 400.

Clearly, no reasonable reading of the motion, brief and order would lead any court or attorney to believe that anyone other than Mi Vida was going to pay and receive the benefit of its bargain.

The August 9, 2000, motion was heard on October 12, 2000. At that hearing, attorney Richard "Chip" Sanders and Kristine Rogers appeared on behalf of Nancy Steen-Adams and others. Addendum Exhibit 10, pp. 3-5; TCR 3788. Nancy Steen-Adams was also present. Id. Cynthia Kennedy and Keith Chiara appeared on behalf of Mi Vida and Mark Steen appeared pro se for himself. Id. p. 7. One of the purposes of the hearing was to obtain funds from the court registry to settle with Charles Steen Jr.'s bankruptcy trustee. Id. pp. 14 - 17.

Mi Vida attorney Cynthia Kennedy described the transaction for the court beginning with her discovery that Charles Steen Jr. and Jayne Steen had filed bankruptcy before they sued Mi Vida, and as a result, Mi Vida successfully brought a motion to dismiss for lack of

standing. Id. pp. 14, ll. 2 - 18. She contacted the bankruptcy trustee and offered to buy out the shares previously owned by Charles Jr. and his wife for book value around $26,000, and further explained that the purchase was for the benefit of all the other shareholders "because, pro rata, they own more of the corporation once those shares come back in." Id. p. 15 ll. 12 - 19.

Ms Kennedy continued her explanation of the transaction to the court stating at page 15 line 20:

20 We have also negotiated with that trustee to
21 buy out any claims that Charles, Jr. may have against
22 Mi Vida. And that includes what you may recall as the
23 wayward conveyance from Maxine Boyd. She had assigned
24 her claims to Charles, Jr. through some sort of strange
25 machinations.

16

1 THE COURT: Mm-hmm.
2 MS. KENNEDY: This settlement with that
3 trustee will then bring those back into our control.
4 Putting us then in a position where we can deal
5 directly with Maxine Boyd, as opposed to having to
6 litigate her conveyance of those -- or assignment of
7 her interests to Charles, Jr.
8 There also were -- there was a mortgage that
9 Charles, Jr. held on some Mi Vida property. There was
10 some shareholder advances that had been made.
11 We did a calculation of all of the various
12 counterclaims and claims and came up with a compromise
13 figure, which is around $32,000. So we have around a
14 $57,000 compromise with the bankruptcy trustee.
15 Now, we've just reached that in the last
16 couple of days.
17 As a matter of fact, I just had the
18 trustee's final offer to me faxed to your Court this
19 morning. But it's acceptable to Mi Vida, and we will

be moving forward on that.
THE COURT: Now, this is -- this is for the --
MS. KENNEDY: It purchases the shares of Charles, Jr. and Jayne, and brings them back into the corporation.

17

And it resolves all claims of Charles, Jr. against Mi Vida, and Charles, Jr. -- including Charles, Jr.'s ownership or assignment of the Maxine Boyd notes.
THE COURT: Okay. And that's for $26,000 -- or that's for $57,000 total.
MS. KENNEDY: Yes.
THE COURT: And that includes the 26,000 to buy out the shares?
MS. KENNEDY: Yes. Exactly.
And we'll get to this later because that's why we need access to the money, or the funds that are in the registry of the Court, is to, in part, pay that -- those amounts, and settle those accounts.

At the October 12, 2000 hearing the court heard other evidence relating to the status of the claims and borrowing money. Judge Anderson eventually ordered that the money be released from the court registry and authorized the corporation to use the money to buy out the bankruptcy interests, to pay litigation fees in unrelated cases, and to pay property taxes. Addendum Exhibit 10 p. 53, ll. 7-15; TCR 3788, p. 53, ll. 7-15.

Both Mark Steen and Mi Vida counsel have evaded a description of the actual transaction. At trial, during the first phase, on April 16, 2003, this counsel asked Mark Steen about the transaction and whether or not the actual contract for acquisition was produced in discovery. He responded that he thought it was produced and admitted that

when I asked him about it in deposition he simply referred me to the pleadings in the case. Trial Transcript Vol. III. pp. 783 - 84. Mark Steen ultimately described the transaction stating that Mi Vida did not have the money to by the asset so he did it personally. Trial Transcript Vol. III. p. 786 l. 7 - p. 788 l. 9.

Ms Kennedy represented Mi Vida in the transaction. Trial Transcript, Vol. III, p. 796, ll. 17 - 21. When Mark Steen was asked about the stated valuation of one-fourth of the CBT note, he admitted that $60,000 was low because the "note at that time was worth considerably more than that." Id. p. 796 ll. 3 - 16.

The trial court initially understood that the deal was with Mi Vida. Mark Steen explained to the court that Mi Vida did not have the money to purchase anything more than the stock, and Mark got everything himself. Id. p. 800 l.23 - p. 801 l. 24. Ms Kennedy confirmed that no court approved Mark Steen's receipt of the interests as he was denominated as the nominee in the original settlement agreement. TCR Vol. III, p. 802, l. 7 - p. 803 l. 14. This representation is directly contradicted by the court's November 15, 2000 revised order authorizing payment of Mi Vida funds to the bankruptcy trustee in the amount of $31,637.62. Addendum Exhibit 6, Trial Exhibit 633.

According to the Settlement Agreement, between the bankruptcy trustee for Charles Steen Jr. and Jayne Steen and Mi Vida, Trial Exhibit 601, Addendum Exhibit 8, at exhibit 1, page 3, Mi Vida valued a one-fourth interest of the CBT promissory note and mortgage at $60,202.76 as of January 19, 1999. That same document on the same page asserts that

Charles Steen Jr. owed $32,263 to Mi Vida for shareholder advances as of January 19, 1999.

The Settlement Agreement also transferred two other bankruptcy assets to Mark Steen – the claim by debtor, to an assignment of mortgages on Mi Vida from Maxine Boyd, and claims that the debtor had against Mi Vida or its officers or directors individually or derivatively. Id.

Mi Vida also claimed that debtor had liability for penalties and taxes incurred by Mi Vida, tortious interference and breach of fiduciary duty arising out of the commencement of a dissolution and receivership action against Mi Vida in Colorado. Mi Vida claimed a set-off for said amounts. Id. pp. 3-4.

The Settlement Agreement provided that Mi Vida was to pay the trustee $31,637.62 in full settlement of the above described claims; the parties also gave and received mutual releases. Id. pp. 5-6; and warranted that the representations and covenants of the Settlement Agreement were true and correct. Id. p. 7, para. 4.6

Trial Exhibit 600 (Addendum Exhibit 7) and Trial Exhibit 601 (Addendum Exhibit 8) were never filed with the trial court or made a part of the record until this counsel introduced them at trial on April 16, 2003, and questioned Mark Steen about the transaction. Trial Transcript Vol. III. pp. 79-810. Ms. Kennedy did not have her copy of the documentation and stated that she left that one file "out of 10,000 on my desk, and it was the - - I thought, there's no possible way that this one litigation could come into this issue" Id. 792 ll. 6 - 11.

The above described transaction was a fraud upon Mi Vida and its shareholders. Contrary to Mark Steen's assertion that it did not have the funds to purchase the CBT note, Mi Vida actually obtained a court order and apparently a check for the $31,637.62. Addendum Exhibit 6, Trial Exhibit 633. Mark Steen also placed a value on the note of approximately $60,000 for a one-fourth interest, and received a setoff for the $32,263 in Mi Vida shareholder advances. This appropriation of a corporate opportunity, purchased with Mi Vida money and Mi Vida advances is a breach of fiduciary duty which precludes Mi Vida or Mark Steen from being awarded attorney fees.

XI. CONCLUSION

Appellants request that the Court of Appeals review the attorneys fees awarded against Nancy Steen-Adams and Charles Steen, Jr. and make a determination that the trial court erred in awarding attorneys fees to Mi Vida for anything other than the fees charged as a result of discovery abuse.

Dated this 30th day of August, 2004.

HULT LAW FIRM, PC

James M. Hult, #9027

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of August, 2004, a true and correct copy of the foregoing **BRIEF OF APPELLANTS and ADDENDUM TO BRIEF OF APPELLANTS** was placed in the United States mail, postage prepaid, properly addressed to:

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