

2007

Jimmy Zufelt v. Haste, Inc., Harry Gounaris : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

---OOOOO---

JIMMY ZUFELT, an individual,)	
)	
Plaintiff/Appellee,)	
)	
v.)	Appellate Court No. 20070140-CA
)	
)	
HASTE, INC., a Utah Corporation, and)	
HARRY GOUNARIS, an individual,)	
)	
Defendants/ Appellants.)	

BRIEF OF APPELLEE

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, UTAH, THE
HONORABLE FRED D. HOWARD PRESIDING

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ORAL ARGUMENT NOT REQUESTED

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APPELLATE JURISDICTION

Utah Code Annotated (hereinafter U.C.A.) Section 78-2a-3(2)(j) gives this Court jurisdiction pursuant to the Order of the Supreme Court of the State of Utah transferring this case from the Supreme Court to the Utah Court of Appeals pursuant to U.C.A. Section 78-2-2(4).

ISSUE PRESENTED ON APPEAL

1. Whether under the circumstances the trial court erred in granting Plaintiff Jimmy Zufelt’s (hereinafter “Zufelt”) Motion to Dismiss. (Hereinafter “Motion”).

STANDARD OF REVIEW

“A trial court’s ruling on a motion to dismiss is a question of law.” *Pleasant Grove City v. Orvis*, 2007 P.3d (2007 UT App 74) citing to *State v. Mower*, 2005 UT App 438, 124 P3d 265. As a general rule, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances. *State v. Schwenke*, 2007 UTCA 20050791-110107.

DETERMINATIVE LAW

1. Due Process

-*Brigham Young v. Tremco Consultants, Inc.*, 2007 UT 17, Utah Adv. Rep. 66
(2007)

2. Inadequate Briefing

-*State v. Thomas*, 961 P.2d 299, (Utah 1998)

-*MacKay v. Hardy*, 973 P.2d 941 (Utah 1998)

STATEMENT OF THE CASE

Nature of the Case. Zufelt initiated this action to recover a fraudulent conveyance. However, after seven (7) years of protracted litigation, the costs of litigation have long since eclipsed the amount in dispute, i.e., approximately \$32,072.45.

Course of Proceedings. Initially the trial court granted Zufelt's motion to strike Gounaris' pleadings and for entry of judgment. On August 3, 2006, the Utah Court of Appeals reversed and remanded that decision to the trial court for further proceedings consistent with the opinion. See 2006 UT App 326, a copy of which is attached hereto as Exhibit 2. (Hereinafter "the first appeal").

Zufelt filed his Motion. Because Gounaris had neither plead nor filed any counterclaim and only indirectly objected to Zufelt's Motion, the trial court granted Zufelt's Motion. In its ruling on Zufelt's Motion, the trial court excoriated Gounaris for his failure to adequately brief all of the legal issues. (Appellant's Brief, Exhibit 1, pp. 2-

5). In essence, the trial court declined to permit Gounaris to have any more bites at the apple or to compel Zufelt to litigate on!

Gounaris again appealed the trial court's decision. Once again, the court is asked to address inadequately briefed legal issues. Consistent with the history of this litigation, Gounaris again completely ignores or at best glosses over his own shortcomings in seeking redress from this court for the second time. This time, Gounaris' argument is that he has been denied due process by virtue of the trial court's decision to grant Zufelt's Motion. Once again Gounaris seeks relief without accepting or acknowledging any responsibility for his own pleading inadequacies, oversights, mistakes and/or failures.

Disposition Below. Zufelt filed a motion to dismiss his complaint. Gounaris never objected to Zufelt's Motion. Instead, Gounaris filed multiple motions including a motion for rescission of certain prior orders of the trial court and a motion for return of certain monies and a request for hearing. The Court considered but declined to grant a hearing either on Zufelt's Motion or Gounaris' other motions.¹ The trial court then entered its Ruling on January 11, 2007. (Appellant's Brief, Exhibit 1).

STATEMENT OF THE FACTS

1. Zufelt adopts Gounaris' Statement of Facts, No's 1-11, 13, 16-17.

¹ Rule 7(e) of the Utah Rules of Civil Procedure states that a court "shall grant a request for a hearing on a motion...that would dispose of the action or any claim or any defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided. Zufelt requested a decision on his Motion. Gounaris filed a request for a hearing on his other motions.

2. Gounaris filed his Brief in the first appeal on April 13, 2005.
3. Gounaris's first Brief fails to mention or identify the January 15, 2005, order (hereinafter "the disbursement Order") (Appellant's Brief, Exhibit 4) of the trial court authorizing the disbursement of funds from the trial court's registry.²
4. Gounaris' first brief fails to mention, discuss or request relief from the disbursement Order.
5. In conjunction with the first appeal, Gounaris filed and sought a motion for stay pending appeal pursuant to Utah Rule of Appellate Procedure 8. The Utah Court of Appeals found Gounaris' stay motion "deficient in several respects" and denied the motion without prejudice. A copy of the Court's order denying the stay motion is attached hereto as Exhibit 1.
6. Gounaris never amended nor refiled his motion for stay pending appeal.
7. By his own admission, Gounaris filed no objection to Zufelt's Motion for dismissal with prejudice. (Appellant's Brief, Statement of Facts, Paragraph 13, p. 5).
8. Zufelt did not file a request for hearing on his Motion. Zufelt did file a request for ruling on his Motion on or about December 13, 2006.
9. Gounaris never requested or filed a petition for a rehearing of the Court's decision in the first appeal, (Rule 35 of the Utah Rules of Appellate Procedure) i.e., such

² Gounaris' first brief was filed on April 13, 2005. The disbursement order was granted by the trial court on January 15, 2005. (Appellants Brief, at p. 5, ¶ 9). However, the stamped "entry date" of the order appears to be in error as it is date "3/15/05."

as for a clarification relating to the return of the disbursed monies.

SUMMARY OF ARGUMENT

The trial court found that Defendants, Haste, Inc., and Harry Gounaris (hereinafter collectively referred to as “Gounaris”) arguments and briefing before it were inadequate. The Court of Appeals may and should likewise find that Gounaris’ Brief is inadequate and devoid of meaningful legal analysis. Gounaris’ brief is particularly lacking in meaningful analysis relating to his claim that he has been deprived of due process. Gounaris had many opportunities to cure his inadequate briefing, including but not limited to raising and identifying the disbursement order in his first appeal, filing a petition for a rehearing asking the court to clarify the return of monies, timely seeking and adequately requesting a stay pending appeal, posting a supersedeas bond and affirmatively opposing the motion to dismiss etc.

Under these circumstances, Gounaris was provided many opportunities to have his grievance(s) considered. Because his briefing was found to be and is still inadequate, he was not deprived of due process. In fact, the Court now lacks jurisdiction over Zufelt and this appeal on the basis that Gounaris could have obtained but failed to obtain a stay pending appeal. Circumstances have now changed so as to make further pursuit of the appeal moot. In the interests of judicial economy, finality and the interest of the parties, Gounaris should not now be permitted to bring yet another separate piecemeal appeal.

ARGUMENT

I GOUNARIS' CLAIM FOR THAT HE WAS DENIED SUBSTANTIVE DUE PROCESS CAN'T BE RAISED FOR THE FIRST TIME ON APPEAL

Gounaris' present Brief, like his briefing before the trial court, is inadequate.

(Appellant's Brief, Exhibit 1, Paragraph 1, p. 2-5). The thrust of Gounaris' argument in the first half of his Brief seems to be that a reversal by the Court of Appeals "...vacates all proceedings and orders [including those he failed to identify in his first brief] dependent upon the decision which was reversed." (Appellant's Brief, p. 8).³ In short, Gounaris' present Brief again treats this Court as if it is "a depository in which the appealing party [Gounaris] may dump the burden of argument and research." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998).

Rule 24(a) of the Utah Rules of Appellate Procedure (hereinafter "URAP") states that the argument in the Appellant's brief "shall contain the contentions and reasons of the appellant with respect to the issues presented...with citations to the authorities, statutes and parts of the record relied on." Most importantly, URAP 24(a) "...requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." *Id.* at 305. Moreover, it is the responsibility of the Appellant to marshal the evidence, i.e., connect the dots and properly cite to the record. Gounaris

³ Gounaris cites to *Phebus v. Dunford*, 198 P.2d 973 (Utah 1948) for this proposition. Zufelt does not disagree with this proposition. However, as a practical matter if Gounaris fails to specifically identify those orders within the case which are relevant to the appeal, particularly if a reversal ensues, then it is difficult to understand how any court is supposed to *ipso facto* include or exclude the same from a judgment or order.

Brief fails to either provide reasoned analysis or marshal the evidence.⁴

The second half of Gounaris' Brief is devoted to asserting a constitutional claim for violation of substantive due process. (Appellant's Brief, p. 13). However, Gounaris' Brief fails to raise or discuss the intricacies involved in asserting and properly briefing such claims, including the standard of review and especially where such claims are raised for the first time on appeal. Constitutional arguments regarding ...due process present questions of law. *See State v. One 1980 Cadillac*, 2001 UT 26, ¶ 8, 21 P.3d 211 (Utah 2001).

Whether due process has been violated depends upon the amount of due process granted. *See Brigham Young Univ. v. Tremco Consultants, Inc.*, 2007 P.3d (2007 UT 17) Whether Gounaris was afforded adequate due process is a question of law which may be explored "without extending deference to the district court. Issues, including...due process, are questions of law which we review for correctness. *Id.* citing to *D.A. v. State (State ex rel. S.A.)*, 2001 UT App 307, ¶ 8. While the measurement of the amount of due process in a particular setting may be difficult, "[t]he bare essentials of due process thus mandate adequate notice to those with an interest in the matter and an opportunity for them to be heard in a meaningful manner." In other words, due process simply requires a

⁴ This is why Zufelt was dissatisfied with Gounaris' statement of the issues and chose to supplement the same within the meaning of URAP 24(b)(1).

hearing before condemnation. *Brigham Young Univ.*, at ¶ 28.⁵

Gounaris had the opportunity and obligation to raise this issue with respect to the first appeal. However, Gounaris failed to mention, disclose or discuss the impact or importance of the disbursement order in his first brief and appeal. The decision of the Court of Appeals reversing the district court, not surprisingly, fails to specifically mention the disbursement order. Gounaris argued to the district court (Appellant's Brief, Exhibit 1, p. 2, ¶ 1) and now argues to this Court that the reversal by this Court implicitly includes the disbursement order. However, "[i]ssues that could have been raised in the first appeal but were not raised are waived. *MacKay v. Hardy*, 973 P.2d 941, 947 (Utah 1998).⁶ The reason for this is that judicial economy and the parties' interests (emphasis added) in the finality of judgments are in no way furthered if the parties are allowed to engage in piecemeal appeals." *MacKay*, at 947.

Gounaris could have likewise cured the problem which he faces if he had obtained

⁵ Gounaris, unlike the Duncan defendant in *Brigham Young Univ.*, who was not a named party, did have ample opportunity to defend his interests in this civil action. "The same process is not, however, due everyone who comes before the court. *Brigham Young Univ.*, ¶ 30.

⁶ In *MacKay*, the court stated that "[t]his issue involves the district court's original judgment. Therefore, they [Gounaris] should have raised this issue in their [his] first appeal." *Id.* at p. 947. Not only did Gounaris properly fail to raise the issue in the first appeal, but Gounaris likewise failed to petition the Court for a rehearing within the meaning of Rule 35 of the Utah Rules of Appellate Procedure. Judge Howard specifically stated in his Ruling that "...the Defendants do not point the Court to any language from the opinion of the Court of Appeals to support this assertion. The Court has reviewed the Appellate Court's decision and the Court cannot identify the language upon which the Defendants base their assertion relative to the return of the money." (Appellants' Brief, Exhibit 1, pp. 1-2).

a stay pending appeal. His attempt to obtain a stay was similarly deficient. This court, like the trial court, determined that his motion was deficient. *See Exhibit 1 hereto*. The record is replete with numerous instances in which Gounaris could have, or should have, cured these deficiencies—but failed to do so. Is it any wonder that the district court, exasperated with such deficiencies, finally and appropriately determined that Gounaris had already had sufficient “bites at the apple?”

In this case, it is apparent that the trial court considered Gounaris’ motions and memoranda to rescind all prior orders of the Court and for return of the monies and for disgorgement of the same. (Appellant’s Brief, p. 6, ¶ 16(a)). *See Ruling Re: Plaintiff’s Motion to Dismiss*. (Appellant’s Brief, Exhibit 1, p. 1, ¶ 2). The trial court found Gounaris’ motions, memoranda, analysis and reasoning to be deficient. The trial court declined (and rightfully so given the protracted and costly litigation history) to divine what the Defendant’s arguments should be and how it [Gounaris] should connect law or evidence with argument. *Id.* at p 3, ¶ 2. Therefore, Gounaris was not denied due process. His claims were considered (albeit without a hearing because the court determined that no hearing was necessary) and rejected, primarily because Gounaris had sufficient opportunity, failed to carry his burden of proof, and the interests of finality and judicial economy so warranted.

II THE COURT LACKS JURISDICTION TO CONSIDER THIS APPEAL OR ALTERNATIVELY, THE APPEAL IS MOOT.

Gounaris failed to object to Zufelt’s dismissal with prejudice. Furthermore,

Gounaris' notice of appeal did not raise Zufelt's dismissal as part of the order being appealed⁷. Failure to object to the dismissal of Zufelt and to note the same in its notice of appeal is jurisdictional. See *Jensen Intermountain Power Agency*, 977 P.2d 474, 476 (Utah 1999). The exclusion within the notice of appeal appears to be intentional and not a mere oversight or error in description. Without jurisdiction over Zufelt, one of the entities that received the funds which are the subject of this appeal, the appeal must be dismissed. See *Brigham Young University v. Tremco Consultants, Inc.*, 110 P.3d 678, ¶'s 45-46, (Utah 2005). Zufelt hereby renews his request for summary disposition of the appeal.⁸ Consequently, this issue (the denial of substantive due process) is being raised improperly for the first time on appeal and is therefore untimely. See *R.T. Nielsen v. Cook*, 40 P.3d 1119 (Utah 2002).

Alternatively, Gounaris' appeal has been rendered moot. In *Richards. v. Baum*, 914 P.2d 719 (Utah 1996) the Utah Supreme Court considered an analogous situation. Plaintiff, Richards, sought a decree quieting title and an order requiring specific

⁷ Rule 3(d) of the Federal Rules of Appellate Procedure mandates that the notice of appeal designate the "judgment, order, or part thereof being appealed." designate the judgment, order, or part thereof being appealed." See *State v. Valdovinos*, 82 P.3d 1167 (Ut Ct. App 2003) encouraging appellants to reference all judgments appealed from in their notice of appeal.

⁸ Utah courts require specific objections in order 'to bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate.'" *State v. Hardy*, 2002 UT App 244, ¶14, 54 P.3d 645 (quoting *State v. Brown*, 856 P.2d 358, 361 (Utah Ct. App. 1993)).

performance to sell certain real property. Defendant, Baum, counterclaimed.⁹ The trial court quieted title in favor of Baum. Richards appealed but failed to seek or obtain a stay of the trial court's decree.¹⁰ Similar to Zufelt's motion for summary disposition, Baum moved for dismissal of the appeal contending that it had become moot.¹¹

The *Richards* court then went on to discuss the effect of changed circumstances or the elimination of the controversy, or rendering of the relief requested "impossible or of no legal effect." *Richards*, at 720. In this case, the changed circumstances are that the proceeds were disbursed to Zufelt and the intervenor during the pendency of the appeal because Gounaris failed, among other things, to obtain a stay of the disbursement Order. See Appellee's Statement of Fact, No.'s 3-6 above.

Zufelt's position, like the defendant Baum contended in *Richards*, is that since the trial court entered the disbursement Order and no stay was obtained, Zufelt was free to treat the monies as his own.¹² The Richards Court agreed with Zufelt. In this case,

⁹ In this case as Gounaris concedes, Gounaris neither filed nor asserted a counterclaim

¹⁰ Gounaris unsuccessfully sought a stay but the Court rejected Gounaris' motion because it was deficient. See above Statement of Facts, No's 5-6 and Exhibit 1 hereto.

¹¹ The rationale for why the appeal had become moot was "[t]he strong judicial policy against giving advisory opinions dictates that courts refrain from adjudicating moot questions. *Richards*, p. 720.

¹² Zufelt (an allowed unsecured creditor with the largest claim in the bankruptcy estate of Haste's principal, Kallinikos) and the Bankruptcy Trustee(who voided a Gounaris transfer) obtained a judgment against Gounaris have stipulated to divide the monies between them 50/50. Zufelt's proof of claim will be reduced to the extent of his receipt of any funds from Gounaris. Similarly, if Zufelt were required to disgorge funds, Zufelt would file an

monies have been released by the Court's registry to Zufelt. Zufelt has retained approximately one-half of these monies and the other half were disbursed to a third-party, intervenor, a bankruptcy trustee. In the context of considering Gounaris' inadequate legal arguments, Gounaris must accept culpability for the Court's ruling. By his own admission, Gounaris concedes that he filed no objection to Zufelt's motion for dismissal.

The notice of appeal filed by Gounaris did not raise or include as part of the appeal the dismissal of Zufelt (with prejudice) from the case. The Notice of Appeal states that "[d]efendants appeal from the portion of the trial court's judgment which did '...not require the return of the \$59, 584.55 as requested by defendants' to the Registry of the trial court."¹³ Accordingly, this Court lacks jurisdiction to consider this appeal because the Court no longer has personal jurisdiction over Zufelt.¹⁴ *See Brigham Young University v. Tremco Consultants, Inc.*, 110 P.3d 678, (Utah 2005).

Without jurisdiction over Zufelt, the entity that received the funds which are the subject of this appeal, the appeal must be dismissed. Zufelt hereby renews his request for

amended proof of claim for an increased amount, i.e., whatever the amount is that Zufelt disgorges.

¹³ On March 15, 2007, Appellee filed a Motion for Summary Disposition of Appeal and accompanying Memorandum raising this very point. An Order by the Court of Appeals dated April 9, 2007 deferred ruling on the this motion "pending plenary presentation and consideration of the appeal. A copy of the Court's Order is attached hereto as Exhibit 2.

¹⁴ The trial Court had jurisdiction over Zufelt. However, when Gounaris failed to object to Zufelt's dismissal and the trial court granted Zufelt's motion to dismiss with prejudice—the Court lost jurisdiction. The court might have retained jurisdiction had Gounaris' appeal included the dismissal of Zufelt—it did not!

summary disposition of the appeal.¹⁵ Consequently, this issue is being raised improperly for the first time on appeal and is therefore untimely. *See R.T. Nielsen v. Cook*, 40 P.3d 1119 (Utah 2002).

As a general rule, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances. *State v. Brown*, 856 P.2d 358, 359 (Ut. Ct. App. 1993) "The trial court is considered 'the proper forum in which to commence thoughtful and probing analysis' of issues." *Id.* at 360 (quoting *State v. Bobo*, 803 P.2d 1268, 1273 (Utah Ct. App. 1990)). "Failing to argue an issue and present pertinent evidence in that forum denies the trial court 'the opportunity to make any findings of fact or conclusions of law' pertinent to the claimed error." *Id.* (quoting *LeBaron & Assocs., Inc. v. Rebel Enters., Inc.*, 823 P.2d 479, 483 n.6 (Utah Ct. App. 1991)).

The number of cases highlighting "...inadequate briefing are legion." *MacKay v. Hardy*, 973 P.2d 941, footnote 9 (Utah 1998). Gounaris' failure to adequately brief the trial court on both his motions is substantiated within the trial court's Ruling.

(Appellant's Brief, Exhibit 1). Gounaris has failed to marshal the evidence or show that

¹⁵ In *State v. Brown*, 856 P.2d 358 (UT App. 1993) Utah courts require specific objections in order 'to bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate.'" *State v. Hardy*, 2002 UT App 244, ¶14, 54 P.3d 645 (quoting *State v. Brown*, 856 P.2d 358, 361 (Utah Ct. App. 1993)).

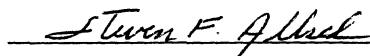
the trial court's Ruling was "plain error. Failure to show plain error or exceptional circumstances (on constitutional issues) is justification for the court to decline consideration of those issues. *See State v. Schwenke*, 2007 UTCA 20050791-110107; *State v. Irwin*, 924 P.2d 5 (Ut Ct. App. 1996). Not only is Gounaris' Brief inadequate from that perspective but it is "devoid of meaningful analysis." *Id.*

CONCLUSION

Gounaris has not been and was not deprived of due process. On the contrary, Gounaris had many opportunities to be heard and squandered those opportunities and failed to adequately brief both the trial court and the Court of Appeals—both in the first appeal and the present appeal. Gounaris further could have protected the monies in question by obtaining a stay pending appeal. He failed to do that. He never objected to the dismissal of Zufelt and therefore, this Court now lacks jurisdiction to hear and/or consider this appeal. Under these circumstances, judicial economy and the interests of the parties dictate that the Court affirm the decision of the district court dismissing Zufelt with prejudice.

DATED this 12th day of December, 2007.

LAW OFFICE OF STEVEN F. ALLRED, P.C.



Steven F. Allred
Attorney for Appellee

ADDENDUM

Exhibit 1: Order (re denial of stay of judgment pending appeal)

Exhibit 2: Opinion 2006 UT App 326

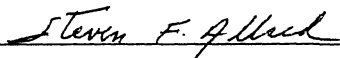
CERTIFICATE OF SERVICE

I, Steven F. Allred, certify that on December 12 , 2007, true and correct copies of the foregoing **BRIEF OF APPELLEE** were filed with the Utah Court of Appeals and served via first-class mail, postage prepaid, to Appellant's counsel, Nick Colesides at the following addresses:

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Steven F. Allred
Attorney for Appellee

Exhibit 1

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Jimmy Zufelt,)	
)	
Plaintiff and Appellee,)	ORDER
)	
v.)	Case No. 20041043-CA
)	
Haste, Inc., a Utah)	
Corporation; and Harry)	
Gounaris, and individual,)	
)	
Defendants and Appellants.)	

Before Judges Davis, Orme, and Jackson.

This matter is before the court on Appellants' motion for stay of judgment pending appeal. See Utah R. App. P. 8. The trial court ordered that a supersedeas bond in the amount of \$20,000 be posted by Appellants within forty-eight hours of issuance of the court's oral ruling on Appellee's motion for disbursement of funds. The court's oral ruling was made on January 5, 2005. If the bond was not posted, the court ordered the funds held by the court in the registry were to be disbursed.

In order to obtain a stay of judgment pending appeal Appellant must show, by motion,

that application for relief to the trial court is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion *shall be filed such parts of the record as are relevant.*

Utah R. App. P. 8(a) (emphasis added).

Appellants' motion is deficient in several respects. Appellants have not shown that a stay was requested in the trial court. The issue is not even addressed in Appellants motion. Nor did Appellants attach any portions of the record

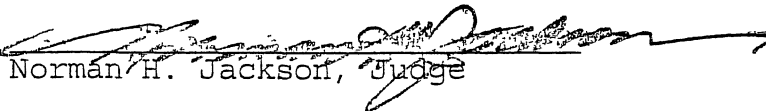
demonstrating that a request was made. This court is made aware of the request only because Appellee concedes that a request was made by Appellants and that posting of a supersedeas bond was ordered. Since Appellants provided no information regarding the stay request in the district court, this court was also not provided with the reasons for requiring a supersedeas bond in order to stay the judgment.

Appellants have also not addressed the reasons why the supersedeas bond ordered by the trial court is improper, nor do they indicate that they cannot meet that requirement. Appellants simply state that such a bond is not necessary.

IT IS HEREBY ORDERED THAT the motion for stay of judgment pending appeal is denied, without prejudice to filing of a motion for a stay of judgment pending appeal that meets the requirements of rule 8. See Utah R. App. P. 8.

DATED this 27th day of June, 2005.

FOR THE COURT:


Norman H. Jackson, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of June, 2005, a true and correct copy of the attached ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:


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HONORABLE FRED D. HOWARD
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125 N 100 W
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Deputy Clerk

TRIAL COURT: FOURTH DISTRICT, PROVO DEPT, 000403084
APPEALS CASE NO.: 20041043-CA

Exhibit 2

AUG 03 2006

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Jimmy Zufelt,)	OPINION
)	(For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20041043-CA
v.)	
)	
Haste, Inc., a Utah)	F I L E D
corporation; and Harry)	(August 3, 2006)
Gounaris, an individual,)	
)	2006 UT App 326
Defendants and Appellants.)	

Fourth District, Provo Department, 000403084
The Honorable Fred D. Howard

Attorneys: John Martinez and Nick J. Colessides, Salt Lake City,
for Appellants
Steven F. Allred, Orem, for Appellee

Before Judges Bench, Davis, and Thorne.

THORNE, Judge:

¶1 Haste, Inc., and Harry Gounaris appeal the district court's ruling granting Jimmy Zufelt's motion to strike Gounaris's pleadings and motion for summary judgment. Specifically, Haste and Gounaris argue that the district court erred by concluding that the doctrine of res judicata barred Gounaris from asserting an ownership interest in Haste and therefore Gounaris lacked standing to act on behalf of Haste. We reverse and remand.

BACKGROUND¹

¶2 Gounaris and Steven Kallinikos incorporated Haste as equal shareholders for the purpose of doing business as Burger Supreme. In 1997, Haste sold the restaurant to Richard and Connie Nuttall

1. "When reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Carrier v. Salt Lake County, 2004 UT 98, ¶3, 104 P.3d 1208. The facts are presented accordingly.

in exchange for two notes, one of which was made payable to Haste for \$72,000 (the Note). In 1998, Kallinikos entered into a lease with Jimmy Zufelt, the managing member of World Plaza, L.L.C.² In April 1999, Kallinikos abandoned the leased premises and executed a note to Zufelt for \$28,000 to resolve obligations under the lease. Kallinikos experienced financial difficulties and obtained a loan for \$20,000 from Gounaris in 1999. In February 2000, Kallinikos assigned his interest in the Note to Gounaris to satisfy monies owed to Gounaris.

¶3 In September 2000, Zufelt filed a complaint in the district court against Kallinikos and Haste seeking recovery of monies owed him from the failed lease. On February 13, 2001, Kallinikos filed a chapter 7 petition for bankruptcy.³ The bankruptcy trustee filed a complaint seeking avoidance of the assignment of Kallinikos's interest in the Note to Gounaris. At trial in the bankruptcy court, Kallinikos testified that he continued doing business through the Haste entity after the sale of the restaurant. Gounaris testified that he no longer participated in the entity. The bankruptcy court found that no documentation was offered to indicate when or how Gounaris relinquished his ownership interest in Haste. The bankruptcy court concluded that Gounaris owned a fifty percent interest in the Note; was a fifty percent stockholder, officer, and director of Haste; and was an insider for purposes of the bankruptcy case. The bankruptcy court avoided the assignment of Kallinikos's interest in the Note.

¶4 On July 16, 2002, the bankruptcy trustee filed a motion to intervene and a motion to strike the pleadings and any defenses filed by Gounaris on behalf of Haste in the district court case. The district court granted the motion to intervene. In June 2004, Zufelt filed a motion to strike or dismiss, or enter judgment for lack of standing, in which Zufelt asserted that the issue of ownership had been previously litigated in the bankruptcy court and that collateral estoppel prevented Haste and Gounaris from relitigating the issue of ownership in Haste. Gounaris asserted that he has always been a fifty percent owner of Haste, is entitled to a portion of Haste's assets, and has standing to litigate Haste's defenses against Zufelt's action.

2. The parties dispute whether Kallinikos entered into the lease individually or as an agent of Haste.

3. On February 14, 2001, Zufelt amended the complaint in the district court case to dismiss Kallinikos, in compliance with the automatic stay of the bankruptcy case, and instead included Gounaris. The amended complaint asserted that Kallinikos assigned the Note to Gounaris, and the assignment of the Note to Gounaris rendered Kallinikos and Haste insolvent.

¶5 The district court, applying the doctrine of res judicata, found Gounaris had no ownership interest in Haste and therefore lacked standing to file pleadings or assert any defenses on behalf of Haste. The district court found: (1) Gounaris was a party to the action in the bankruptcy court, (2) the ultimate issue before the bankruptcy court was whether Kallinikos's transfer of his interest in the Note was fraudulent, but that the bankruptcy court heard evidence and made findings regarding Gounaris's ownership interest in Haste, (3) Gounaris had an opportunity to fully and fairly litigate the issue regarding his ownership interest in Haste since Gounaris testified before the bankruptcy court that he relinquished his ownership interest in Haste and provided tax returns showing relinquishment, and (4) the case resulted in a final judgment on the merits wherein the bankruptcy court avoided Kallinikos's transfer to Gounaris.

¶6 The district court also noted that, although the bankruptcy court's findings may not have addressed the precise issue of Gounaris's ownership interest in Haste with perfect clarity, reasonable conclusions could be drawn from the testimony and evidence presented before the bankruptcy court that Gounaris has no ownership interest in Haste. The district court granted Zufelt's motion to strike Gounaris's pleadings and motion for summary judgment.

ISSUES AND STANDARDS OF REVIEW

¶7 Haste and Gounaris appeal the district court's ruling granting Zufelt's motion to strike Gounaris's pleadings and motion for summary judgment. We review a trial court's grant of summary judgment for correctness, affording no deference to the trial court. See Ford v. American Express Fin. Advisors, 2004 UT 70, ¶21, 98 P.3d 15. A party is entitled to summary judgment if there is no genuine issue of material fact and "the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). Specifically, Haste and Gounaris argue that the district court erred by concluding that the doctrine of res judicata barred Gounaris from asserting defenses on behalf of Haste.

ANALYSIS

The Doctrine of Res Judicata

¶8 The district court ruled that the doctrine of res judicata, specifically issue preclusion, barred Gounaris from claiming an ownership interest in Haste and that without an ownership interest Gounaris lacked standing to act on behalf of Haste. A trial court's determination of whether res judicata bars an action presents a question of law. See Macris & Assocs., Inc. v. Neways, Inc., 2000 UT 93, ¶17, 16 P.3d 1214. We review such

questions for correctness, according no particular deference to the trial court. See id.

¶9 "'Issue preclusion, also referred to as collateral estoppel, prevents parties or their privies from relitigating issues which were once adjudicated on the merits and have resulted in a final judgment.'" 3D Constr. & Dev., L.L.C. v. Old Standard Life Ins. Co., 2005 UT App 307, ¶18, 117 P.3d 1082 (alteration omitted) (quoting Brigham Young Univ. v. Tremco Consultants, Inc., 2005 UT 19, ¶27, 110 P.3d 678). In order for issue preclusion to apply, four elements must be present:

"[1] The party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; [2] the issue decided in the prior adjudication must be identical to the one presented in the instant action; [3] the issue in the first action must have been completely, fully, and fairly litigated; and [4] the first suit must have resulted in a final judgment on the merits."

Id. (alterations in original) (quoting Tremco Consultants, Inc., 2005 UT 19 at ¶27). "If any one of these requirements is not satisfied, there can be no preclusion." Hill v. Seattle First Nat'l Bank, 827 P.2d 241, 245 (Utah 1992). The burden of establishing each of the elements of res judicata is on Zufelt, the party invoking the doctrine in this case. See PGM, Inc. v. Westchester Inv. Partners, 2000 UT App 20, ¶5, 995 P.2d 1252; see also Timm v. Dewsnap, 851 P.2d 1178, 1184 (Utah 1993). The specific issues of the instant case focus on whether the second and third elements are present.

¶10 Gounaris argues that the issue decided by the bankruptcy court and the issue before the district court were not identical. We agree. "What is critical [in determining identical issues] is whether the issue that was actually litigated in the first suit was essential to resolution of that suit and is the same factual issue as that raised in a second suit." Robertson v. Campbell, 674 P.2d 1226, 1230 (Utah 1983).

¶11 First, the findings made by the bankruptcy court do not factually support the district court's conclusion that Gounaris had no ownership of Haste. In fact, the bankruptcy court, to the extent it addressed Gounaris's ownership interest at all, found that Gounaris was a fifty percent stockholder, officer, and

director of Haste and that he owned a fifty percent interest in the Note.⁴

¶12 Second, the issue actually litigated in the bankruptcy court is different than the issue raised in the district court. The bankruptcy court addressed the issue of the avoidability of the transfer of Kallinikos's one-half interest in the Note to Gounaris and held that the transfer was avoidable under the bankruptcy code. The district court addressed the issue of Gounaris's ownership interest in Haste, and found that res judicata applied because the bankruptcy court heard testimony and made findings regarding Gounaris's ownership interest in Haste.

¶13 The district court in its ruling noted that the ultimate issue before it was Gounaris's ownership interest in Haste, and that while the "[b]ankruptcy court . . . may not [have] address[ed] the precise issue with perfect clarity, . . . that reasonable conclusions could be drawn from the testimony and the evidence presented before the [b]ankruptcy court which support a finding that issue preclusion is applicable." Issue preclusion, however, requires that the issue decided in the prior adjudication be identical to the one in the subsequent action. The issue of Gounaris's ownership interest in Haste is not the same issue decided by the bankruptcy court. The issue before the bankruptcy court was whether the transfer to Gounaris was avoidable as a preferential transfer without regard to whether Gounaris had an ownership interest in Haste.

¶14 Finally, the issue of Gounaris's ownership interest in Haste was not an essential issue in the bankruptcy court case. To avoid the transfer, the trustee was required to prove that Gounaris was an insider of Kallinikos, which prompted a discussion on Gounaris's ownership interest in Haste. The determination of ownership interest, however, was not essential to prove that Gounaris was an insider. The bankruptcy court concluded that even if Gounaris did not maintain an ownership interest in Haste he was still an insider due to his sufficiently close relationship with Kallinikos.

¶15 For issue preclusion to apply, the parties must have had a full and fair opportunity to litigate the issue. See 3D Constr. & Dev., L.L.C. v. Old Standard Life Ins. Co., 2005 UT App 307, ¶20, 117 P.3d 1082; see also Macris & Assocs., Inc. v. Neways, Inc., 2000 UT 93, ¶44, 16 P.3d 1214. The issue of Gounaris's ownership interest in Haste was not the central issue in the bankruptcy case, and was only superficially addressed in discussions pertaining to the determination of whether Gounaris

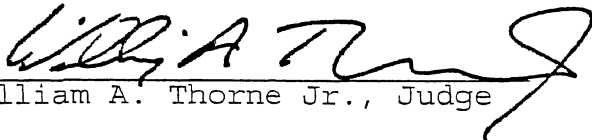
4. We address the issue of res judicata as raised by the parties. However, the bankruptcy court found that Gounaris had a fifty percent interest in the Note.

was an insider. Therefore, we cannot say that Gounaris had an opportunity to completely and fully litigate the issue. Moreover, "'collateral estoppel can yield an unjust outcome if applied without reasonable consideration and due care.'" 3D Constr., 2005 UT App 307 at ¶22 (quoting Buckner v. Kennard, 2004 UT 78, ¶15, 99 P.3d 842). And courts "'must carefully consider whether granting preclusive effect to a prior decision is appropriate.'" Id. (quoting Buckner, 2004 UT 78 at ¶15).

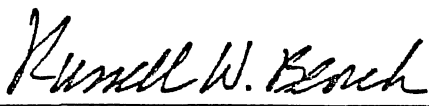
¶16 The issue of Gounaris's ownership interest in Haste is not the same issue decided by the bankruptcy court. The ownership issue was not essential to the determination of the avoidability of the transfer, and was not completely and fully litigated. The circumstances of this case, along with the policy considerations implicated by issue preclusion, make it apparent that issue preclusion is inappropriate here.

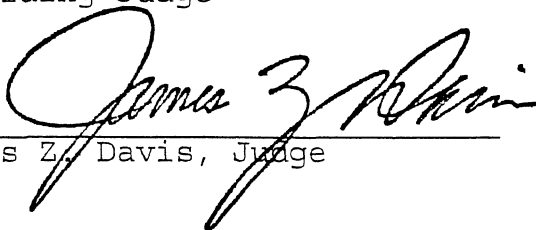
CONCLUSION

¶17 The hallmarks of issue preclusion--identity and centrality of issue and full and fair litigation--are not present in this case, and therefore issue preclusion is inapplicable. In so ruling, we do not decide whether Gounaris actually has or had an ownership interest in Haste; we merely note that the district court improperly relied on res judicata to make the challenged rulings. We reverse and remand to the district court for further proceedings consistent with this opinion.


William A. Thorne Jr., Judge

¶18 WE CONCUR:


Russell W. Bench,
Presiding Judge


James Z. Davis, Judge