

1977

Thurman David Heaberlin and Margie Heaberlin v. City of Fun Carnival et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THURMAN DAVID HEABERLIN and :
MARGIE HEABERLIN, his wife, :

Plaintiffs-Appellants, :

vs. :

CITY OF FUN CARNIVAL, a :
partnership and LOUIS :
MELENDEZ, :

Defendants-Respondents, :

vs. :

LOIS MELENDEZ, :

Third Party :
Defendant-Respondent. :

Case No. 15,214

BRIEF OF RESPONDENTS

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL
DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH
HONORABLE ALLEN B. SORENSEN, PRESIDING

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

Respondents agree with appellants statement of the nature of the case.

DISPOSITION IN THE LOWER COURT

Respondents disagree with the appellants statement of the disposition in the lower court.

Plaintiffs-appellants filed this action nearly seven years ago, on December 16, 1970, (R. 263-264) to determine the existence of a partnership, to dissolve the partnership, and to have an accounting and distribution. On January 3, 1972, slightly over a year later, defendants-respondents

filed their Notice of Readiness to Trial, (R. 226) to which

the plaintiffs-appellants objected. (R. 224). On April 28, 1972, defendants-respondents filed a Motion for Summary Judgment on the question of the terms of the partnership and the validity of a written partnership agreement between the parties. (R. 216). The Motion was expressly based on the depositions of Thurman David Heaberlin, Margie Heaberlin and Louis Melendez, Jr. On July 19, 1972, the trial court denied the motion for summary judgment specifically because the deposition of Margie Heaberlin had not been filed. (R. 200). Thereafter, Margie Heaberlin's deposition was filed.

A pre-trial conference was held on November 3, 1972. (R. 197). At that time the court bifurcated the trial, the first phase was to be "What was the Partnership?" and the second phase was to be the "Accounting". (R. 197). Pursuant to the pre-trial conference discussions, counsel for both parties submitted supplemental authorities on defendant-respondents previous motion for summary judgment on the issue of the partnership. (R. 192, 194). Oral arguments were held on the motion for summary judgment on January 5, 1973. (R. 188). The trial court entered its order granting summary judgment and ruled that the signed, written agreement between the parties, (Deposition of Thurman David Heaberlin, Exhibit 1) was and is the partnership agreement between the parties on January 18, 1973. (R. 187). This eliminated the need for the "first phase" of the two part trial.

Thereafter plaintiffs-appellants filed a Motion to Alter and Amend Order and Judgment and a Motion for New Trial on Order and Summary Judgment dated the 26th day of January, 1973. (R. 185). Shortly thereafter, defendant-respondent filed a second Motion for Summary Judgment on the issue of dissolution and accounting. (R. 138). Plaintiffs-Appellants Motion to alter and amend the judgment and for a New Trial and Defendant-Respondent's Motion for Summary Judgment came on for oral argument together on the 13th day of April, 1973, at which time both Motions were denied. (R. 940).

On the 6th day of February, 1974, this matter came on for what was to be the trial on the issue of accounting. (R. 43). The court decided, at that time, however, that a master would be appointed to take evidence and to determine the accounting and the dissolution of the partnership. (R. 43). Thereafter on the 1st day of March, 1977, defendant-respondent renewed its Motion for Summary Judgment on the issue of the accounting. Oral arguments on the renewed Motion were had on April 8, 1977. (R. 24). On April 15, 1977, the court entered its Order and Judgment granting defendant's Motion for Summary Judgment in all respects and granting defendants a judgment. It is from that Order and Judgment that plaintiff-appellant appeals. (R. 16).

RELIEF SOUGHT ON APPEAL

The respondents request this Court to affirm the judgments of the trial court.

STATEMENT OF FACTS

Respondents disagree with the statement of facts as set forth by appellant in certain matters. Before respondents set out the facts of the dealings of the parties with each other, there is one statement of fact in appellants' brief to which respondents believe they should first respond. Appellants state on page 9 of their brief that Judge Joseph E. Nelson signed a Restraining Order which was to restrain the defendants from certain types of conduct. Counsel for appellants did in fact prepare and file a motion for such a restraining order and did prepare a proposed restraining order. (R. 252-256). However, contrary to the statement in appellants' brief on page 9, Judge Nelson did not sign the restraining order (R. 253) nor is there any return of service in the record indicating that the defendants have ever been served with any order, nor were the defendants ever in fact served with any restraining order in this matter. The minute entry of the hearing on the Motion for the restraining order which was held February 5, 1971, indicates that his motion was denied. (R. p. 252).

Respondents make the following additions or corrections to appellants statement regarding the dealings of the parties with each other. While, as appellants state, appellants and respondents began working together in the spring of 1964, t

did not immediately enter into a specific oral partnership agreement. (Deposition of Lou Melendez, p. 18-24). In fact, as late as July of 1965, Mr. Heaberlin indicated in a letter to Mr. Melendez that their arrangement was with "no strings attached". (Deposition of Lou Melendez, p. 26 Line 12 to p. 27 Line 10).

Thereafter appellants and respondents began working on a written agreement which appellants read and worked on several times over a long period of time and which was signed by all parties on April 18, 1967. (Exhibit 1, Deposition of Thurman David Heaberlin, p. 9-11, p. 28 Line 4-13; Deposition of Lou Melendez p. 25-30; Deposition of Margie Heaberlin, p. 14, Line 19). The agreement is set out in full in appellants brief on Pages 5-8.

The partnership agreement entered into between appellants (David and Margie Heaberlin) and respondent (Louis Melendez) provides as follows regarding dissolution:

10. Dave, if he elects to leave the firm will never be allowed to leave with any piece of property except for the inventory he filed at beginning of agreement and any added to list by Lou bought personally by Dave - all additions are to be signed for by Lou.

12. As carnival is efficient only in size at no time will the unit ever be divided for disolvment of partnership.

13. Dave will be paid, in case if disolve-ment, price agreed upon or by amount of stock paid into corporation by him and in no case more than the \$25,000.00 agreed purchase price and in same time period as paid for unless otherwise agreed upon.

(Deposition of Thurman David Heaberlin, Exhibit 1)

The partnership agreement provides that upon dissolution, appellants will get (1) Inventory of equipment brought into partnership, (2) Amount paid into partnership but not more than \$25,000.00. When appellant left, he took with him all of his personal property, the items in No. 1 above, a 1967 station wagon, a house trailer, and \$1,100.00 which was paid to him by respondents at the meeting between respondents and appellants and their respective attorneys. (Deposition of Thurman David Heaberlin, p. 18-21).

The only amount appellant had paid into the partnership pursuant to paragraph 8 and 13 was a credit of \$776.50 as 1/2 of a check retained by Lou Melendez in the amount of \$1,553.00. (Deposition of Thurman David Heaberlin p. 13); Deposition of Lou Melendez, p. 38 Lines 24-40, Line 22, Affidavit of Lou Melendez, R. 37). The cash paid appellant just prior to his leaving, therefore, represented a payment of the amount due to appellant under paragraphs 8 and 13, plus an additional \$323.50.

Respondents deny that appellants left the partnership pursuant to a mutual termination as asserted in their brief on Page 9. The circumstances around appellants leaving are as follows:

In May of 1970, appellant David Heaberlin had an argument with Lou Melendez, which Mr. Heaberlin describes as "mostly my fault." (Deposition of Thurman David Heaberlin, p. 17, Line 7). A couple of weeks later Mr. Heaberlin met

with his counsel, Mr. Taylor; the respondent, Mr. Melendez; and respondents' counsel, Mr. Lewis. It was agreed at that meeting that Mr. Heaberlin would stay with the carnival and some talk was had of a possible re-negotiation of the existing partnership agreement. (Deposition of Thurman David Heaberlin, p. 17 Line 19-22). At that meeting Mr. Heaberlin was paid \$1,100.00. (Deposition of Thurman David Heaberlin p. 18, Lines 7-14). After the meeting, Mr. Heaberlin said he "changed his mind and decided not to stay in the company." (Deposition of Thurman David Heaberlin, p. 18, Lines 17-18). Mr. Heaberlin then took his own personal belongings, his shop truck, a house trailer and a station wagon and, without contacting Mr. Melendez, voluntarily left the business and went to California. (Deposition of Thurman David Heaberlin, p. 18-21).

POINT I

APPELLANTS ARE PRECLUDED FROM CONTESTING THE TRIAL COURT'S ORDER OF SUMMARY JUDGMENT DATED JANUARY 17, 1973, BECAUSE OF THEIR FAILURE TO FILE A NOTICE OF INTENT TO APPEAL PURSUANT TO RULE 72(a).

The trial court bifurcated this matter for trial. (R. 195). The first trial was to have determined "What was the Partnership Agreement?" and the second trial was to have determined an accounting of the dissolution of the partnership. (R. 195). Prior to the first trial, however, the court granted summary judgment ruling that the written agreement between the parties (Deposition of Thurman David

Haberlin, Exhibit 1) was the partnership agreement. (R. 187). Plaintiffs, recognizing that this was a final judgment as to the issues of the first scheduled trial, filed a "Motion to Alter or Amend Order and Judgment and a Motion for a New Trial on Order and Summary Judgment" and stated therein that they were doing so pursuant to Rule 59 Utah Rules of Civil Procedure. The trial court denied plaintiffs motions on April 18, 1975. No notice of appeal was filed pursuant to Rule 72(a) until April 28, 1977, more than two years after the court entered its order denying plaintiffs' motion to alter or amend the judgment or for a new trial.

Rule 72(a) Utah Rules of Civil Procedure, provides that:

An appeal may be taken to the Supreme Court from all final orders and judgments in accordance with these rules; provided, that when other claims remain to be determined in the proceedings, a party may preserve his right to appeal on the decided issue until a final determination of the other claims by filing with the trial court and serving on the adverse parties within the time provided in Rule 73(a), a notice of his intention to do so.

Rule 73(a) provides that the time within which an appeal may be taken is one month from the entry of the judgment. Therefore, if plaintiffs had desired to preserve their right to appeal on the judgment issued by the court on January 17, 1973, they would have had to have filed their Notice of Intention to Appeal within one month from April 18, 1975.

No notice of intent to appeal was filed within that one

month period, and, therefore, this Court does not have jurisdiction to review the trial court's Summary Judgment of January 17, 1973.

There are no cases interpreting this rule as it now stands. The cases presented herein all interpret the rule prior to the last amendment by the Supreme Court. The rule was significantly amended on June 23, 1971, which was more than six months prior to the court's entry of summary judgment herein and was approximately two years prior to the court's denial of the plaintiffs' motion for a new trial. The amendment added final "Orders" to final "Judgments" from which on appeal could be taken and inserted the provision for preserving the right to appeal on a "decided issue". (See compiler's notes to Rule 72(a) 1975 Pocket Supplement to Volume 9 Utah Code Annotated 1953).

Prior to this amendment, the Supreme Court had been extremely reluctant to find many types of orders and judgments to be final orders from which an appeal would lie. With this amendment, however, the court broadened the application of Rule 72 to not only final judgments disposing of the entire case but also to orders and judgments which finally decide a particular issue while not determining all claims set forth in a particular case.

The Supreme Court, by its amendment, established the procedure by which a party could preserve his right to appeal on any such decided issue until the final determination of all the other issues and claims. Such a procedure

seems to specifically cover the situation involved herein. In this matter, the trial court bifurcated the issues and scheduled two separate trials. The granting of the summary judgment disposed of the issues of the first trial and left only the issue of an accounting of the dissolution of the partnership. Such an order of summary judgment fits clearly within the definition of "final orders and judgment" as contemplated by Rule 72(a) as amended. Therefore, by their failure to preserve their right to appeal that judgment, they are precluded from appealing that decision at this time.

Even prior to the 1971 amendment expanding the types of orders from which one must file a notice of appeal in order to preserve his right to appeal, this Court has held that a judgment which leaves only the matter of an accounting to be determined is a final order from which an appeal lies. Wheelright v. Roman, 50 Utah 10, 165 P. 513 (1917). While respondents concede that the facts of that case are not identical with the instant case, respondents cite the case for the proposition that the fact that an accounting remained to be made did not stop a judgment from being considered final.

One case which was decided prior to the amendment of the rule which clearly states the spirit of the rule and the position which respondents take herein, is the case of Hayward v. Voorhees, 12 Utah 2d 361, 366 P.2d 977 (1961). The court therein stated:

Respondents raise an issue as to the timeliness of the appeal from the decree of October 2, 1959. It must be conceded that if the decree was appealable at the time of its entry, no appeal was taken within the one month allowed by Rule 73(a), U.R.C.P. The appellants assert that it was not then final and therefore, not appealable because of the proviso that the court retained jurisdiction "for the purpose of adjudicating any matter which may arise under the memorandum pending the final creation of the trust". They point to the fact that there has been no formal setting up of the trust. It is appreciated that because of the factor just mentioned and that the two proceedings, the probate and the civil suit, were involved, there may be some justification for uncertainty as to the status of that judgment. However, cutting through the brush of the attempted procedural forensics, it will be seen that the real issue between the parties and before the court was whether the mountain ground belonged to Mrs. Voorhees or to the estate. Upon preliminary hearing thereon, the issue was resolved against her. The fact that the court retained jurisdiction as mentioned above to adjudicate further matters, did not leave open for reconsideration the question as to who owned that property. There was nothing further to be decided on that particular issue and she was ordered to transfer it to the estate. At being so, the decree entered thereon was final and therefore appealable. Since she took no appeal within the time allowed by law, that decree is conclusive. (12 Utah 2d at 366). (Emphasis added).

In the instant matter, the primary determination was the terms of the partnership. After the determination of the terms of the partnership it is essentially a mechanical process to account for the dissolution of the partnership under whatever terms are determined. Once the court had granted summary judgment establishing that the written

agreement between the parties was in fact the partnership agreement, there was nothing further to be decided on that central issue. Now that the rule has been expanded to include orders and judgments which dispose of one issue rather than all issues, certainly a summary judgment which left only an accounting and determined the terms of the partnership is an order or judgment within the contemplation of this rule. The order and judgment entered January 18, 1973, was therefore a final order or judgment within the meaning of Rule 72(a) and because appellants failed to preserve their right to appeal by failing to file a notice of intent to appeal within the time allowed by law, that order is conclusive on the matter of the terms of the partnership.

POINT II

EVEN IF THIS COURT HOLDS THAT THE TRIAL COURT'S FIRST MOTION FOR SUMMARY JUDGMENT IS PROPERLY BEFORE THIS COURT FOR REVIEW, THE TRIAL COURT'S SUMMARY JUDGMENT WAS PROPER AND SHOULD BE SUSTAINED.

The partnership, the terms of which are in dispute herein, was entered into sometime after the Spring of 1964, nearly 14 years ago, and was dissolved in 1970, nearly eight years ago. This is the very type of situation contemplated by the development of the concepts behind the Statute of Frauds, the parol evidence rule and the best evidence rule. Men's memories go dim or fail completely or are influenced by their prejudices and desires. In such a situation where

there is a writing which both parties admit having read and

signed, it is the wise policy of the courts to use the written agreement to measure the rights and liabilities of the parties. 59 Am.Jur.2d, Partnership, Section 33.

After Mr. Heaberlin and Mr. Melendez began working together, a partnership agreement was drafted to state the rights and obligations of each in preparation to forming a corporation. This was negotiated and prepared over a long period of time and was finally signed April 18, 1967. (Exhibit 1, Deposition of Thurman David Heaberlin p. 9, 10, 11, 28 L. 4-13; Louis Melendez deposition p. 25-30). The document was read by Mr. Heaberlin several times over a long period of time and several corrections were made at his insistence. (Deposition of Thurman David Heaberlin, p. 11, Deposition of Louis Melendez, p. 26-29, Deposition of Margie Heaberlin, Exhibits 1 and 2). Finally on April 18, 1967, the agreement was signed by Thurman David Heaberlin (Deposition of Thurman David Heaberlin p. 11, Line 4, 20), Louis Melendez. (Deposition of Louis Melendez, p. 28 Line 20), and Margie Heaberlin. (Deposition of Margie Heaberlin p. 14 Line 19).

There is no contention that any other writing was ever entered into that modified the written agreement of April 18, 1967, nor is there any contention that it was cancelled, rescinded or revoked prior to its dissolution by plaintiffs' voluntary leaving the business in 1970.

59 Am.Jur.2d Partnership Section 33 states "while a written agreement is not necessary, where it does exist it

constitutes the measure of the partners rights and liabilities". Section 76 of the same article states that, as to proof of the terms of the partnership, "the best evidence consists of the agreement or contract between the parties". Section 76 further states that only when no writing is available does one turn to the transactions, conduct and declarations of the parties. Section 37 also adds:

The general principle that when the parties to a contract have reduced the terms to writing in unambiguous terms, parol evidence will not be received to substitute a new contract, applies to partnership agreements.

Appellants contentions that there are material facts which are still in issue ignore the law and the facts herein. The material facts appellant contends are still in issue are:

A. Was there an oral partnership agreement between the parties?

B. Did the pre-incorporation agreement modify the oral partnership agreement?

C. What were the terms of the partnership agreement?

Questions A and B, are answered by the Parol Evidence Rule. The rule and its rationale are set out in 30 Am.Jur.2d Evidence, Section 1016:

The well established general rule is that where the parties to a contract have deliberately put their engagement in writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engage-

ment, it is conclusively presumed that the entire engagement of the parties, and the extent and manner of their undertaking, have been reduced to writing, and all parol evidence of prior or contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced by the writing is incompetent. Stated otherwise, the intention of the parties as evidenced by the legal import of the language of a valid written contract cannot ordinarily be varied by parol proof of a different intention. . . .

The parol evidence rule is founded upon the principle that when the parties have discussed and agreed upon their obligations to each other and reduced those terms to writing, the writing, if clear and unambiguous, furnishes better and more definite evidence of what was undertaken by each party than the memory of man, and applies to exclude extrinsic utterances when it is sought to use those utterances for the purpose for which the writing was made, such writing superseding them as the legal act. The instrument itself is regarded as the best evidence of what the parties intended, and the writing still remains the best evidence of the understanding of the parties, even though, through a defect of form or by reason of some positive provision of law, it cannot have the effect intended for it. No other language is admissible to show what the parties meant or intended, for the reason that each has made the instrument the agreed test of his meaning and intention. The rule rests upon a rationale foundation of experience and policy and is essential to the certainty and stability of written obligations. It is designed to permit a party to a written contract to protect himself against perjury, infirmity of memory, or the death of witnesses. (Emphasis added).

See also Stanley v. Deseret Foods Corp., 93 Utah 577, 74

P.2d 1221 (1938) and Andrus v. Blazzard, 23 Utah 233, 63 P.

The very things appellant says are issues of fact- i.e. the prior oral arrangements and their terms - are the very things the rule is designed to exclude.

The third issue of fact the appellants point to, i.e. "what are the terms of the partnership agreement?" is answered: The written document speaks for itself. The Court's first summary judgment simply said the terms of the partnership was the written agreement. The interpretation and application of those terms was left to the balance of the determination in the second summary judgment and are discussed in Point III hereof, and was not material to that motion for summary judgment.

The trial court properly entered judgment that the written agreement entered into by appellants and respondent which set out the terms for operating and dissolving the partnership would be the measure of the rights and liabilities of these parties. Such action is clearly supported by the law as set out above.

POINT III

THE TERMS OF THE WRITTEN PARTNERSHIP ARE CLEAR AS TO DISSOLUTION. THE COURT PROPERLY GRANTED SUMMARY JUDGMENT IN ACCORDANCE WITH THOSE TERMS.

In May of 1970, appellant David Heaberlin had an argument with Lou Melendez, which Mr. Heaberlin describes as "mostly my fault." (Deposition of Thurman David Heaberlin, p. 17 Line 7). A couple of weeks later Mr. Heaberlin met with his counsel, Mr. Taylor; the respondent, Mr. Melendez;

and respondents' counsel, Mr. Lewis. It was agreed at that meeting that Mr. Heaberlin would stay with the carnival and some talk was had of a possible re-negotiation of the existing partnership agreement. (Deposition of Thurman David Heaberlin, p. 17 Line 19-22). At that meeting Mr. Heaberlin was paid \$1,100.00. (Deposition of Thurman David Heaberlin p. 18, Lines 7-14). After the meeting, Mr. Heaberlin said he "changed his mind and decided not to stay in the company." (Deposition of Thurman David Heaberlin, p. 18, Lines 17-18). Mr. Heaberlin then took his own personal belongings, his shop truck, a house trailer and a station wagon and, without contacting Mr. Melendez, voluntarily left the business and went to California. (Deposition of Thurman David Heaberlin, p. 18-21). Mr. Heaberlin was not forced out of the business, nor was there any mutual agreement made as to termination as claimed in appellants brief. Appellants own testimony indicates that appellants, after a meeting where he agreed to stay with the carnival, changed his mind and voluntarily left of his own accord.

The partnership agreement entered into between appellants (David and Margie Heaberlin) and respondent (Louis Melendez) provides as follows regarding dissolution:

10. Dave, if he elects to leave the firm will never be allowed to leave with any piece of property except for the inventory he filed at beginning of agreement and any added to list by Lou bought personally by Dave - all additions are to be signed for by Lou.

12. As carnival is efficient only in size at no time will the unit ever be divided for dislvement of partnership.

13. Dave will be paid, in case if disolve-ment, price agreed upon or by amount of stock paid into corporation by him and in no case more than the \$25,000.00 agreed purchase price and in same time period as paid for unless otherwise agreed upon.
(Deposition of Thurman David Heaberlin, Exhibit 1).

The partnership agreement provides that upon dissolution, appellants will get (1) Inventory of equipment brought into partnership; (2) Amount paid into partnership but not more than \$25,000.00. When appellant left, he took with him all of his personal property, the items in No. 1 and 2 above, a 1967 station wagon, a house trailer, and \$1,100.00 which was paid to him by respondents at the meeting between respondents and appellants and their respective attorneys. (Deposition of Thurman David Heaberlin, p. 18-21).

The only amount appellant had paid into the partnership pursuant to paragraph 8 and 13 was a credit of \$776.50 as 1/2 of a check retained by Lou Melendez in the amount of \$1,553.00. (Deposition of Thurman David Heaberlin p. 13; Deposition of Lou Melendez, p. 38 Lines 24-40, Line 22, Affidabit of Lou Melendez, R. 37). The cash paid appellant just prior to his leaving, therefore, represented a payment of the amount due to appellant under paragraphs 8 and 13, plus an additional \$323.50.

When the court held the hearing on this matter February 6, 1974, after it had granted summary judgment on the issue of the partnership agreement, these facts were not yet clearly in the mind of the Court. (See transcript of the hearing, R. 270-298). As the nature of appellants claim at that point was dissolution and accounting according to the terms of the partnership agreement, the court decided not to go into the facts of the matter at that time. (R. 292). The court decided instead to appoint a master. When the name of a master suitable to both parties was agreed upon, the court indicated it would prepare an order for the master and then refer the matter to the master. (R. 292-294).

Thereafter, on March 1, 1977, respondents prepared a motion for summary judgment on the issue of the accounting and dissolution and supported it with the affidavit of Lou Melendez. (R. 31-42). Respondent's affidavit stated with particularity the items and monies that were due and that had been distributed and that all that was due had been distributed. In responding to respondent's motion for summary judgment, appellants filed no counter affidavit contesting the facts set forth in respondents affidavit. Appellants merely attached copies of earlier affidavits dated January 24, 1973, which dealt with the issue of the terms of the partnership agreement and which had been submitted in opposition to respondent's earlier motion for summary judgment on the issue of the partnership. (R. 31).

With no counter affidavits contesting the facts regarding dissolution and distribution as set forth in respondents affidavits, the facts as stated therein are uncontroverted facts. The purpose of a motion for summary judgment is to go beyond the pleadings or the mere allegations of the parties to determine what evidence is available and which issues are in fact contested. Mere allegations will not withstand a motion for summary judgment. See Menlove v. Salt Lake County, 18 Utah 2d 203, 418 P.2d 227, (1966); Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624 (1960).

On the basis of these facts now clearly presented to the Court, the Court could rightly conclude the following: 1) No master was necessary; 2) the terms of the partnership agreement specifically stated that the assets of the partnership were not to be divided but were to remain with the City of Fun Carnival and that appellant was to take his personal property only and was to be paid what ever he had actually paid in pursuant to the agreement; 3) that appellants had paid in \$776.50; 4) that appellant had been paid \$1,100.00 and had taken the property to which he had been entitled, all as outlined in the uncontroverted affidavit of respondents. (R. 31-42). Summary judgment was, therefore, the appropriate remedy for respondent.

Appellant, in Point III of his brief, argues that there were three genuine issues of fact which should have prevented the court from granting summary judgment. They are:

A. THE LOWER COURT RULED THAT THERE WAS A PARTNERSHIP AND ORDERED AN ACCOUNTING.

B. WHAT WAS THE VALUE OF THE PARTNERSHIP?

C. WHAT WERE THE TERMS OF THE DISSOLUTION?

None of these three presents a genuine issue of fact.

A. - The lower court did rule on the issue of the partnership pursuant to Rule 56(d) which left the question of the accounting to be determined. The court, as explained above, was going to appoint a master to take evidence and report back to the court. When the facts of the case relating to the accounting were presented upon respondents motion for summary judgment, however, the court rightly concluded that a master would not be necessary. Appellants cite no authority because there is no authority stating that once the court has granted summary judgment on one issue, that it cannot later grant summary judgment on some or all other issues if the facts and the law warrant it.

B. - The value of the partnership assets does not enter into the dissolution of the partnership according to the terms of the partnership agreement entered into by appellants and respondents. The terms of the partnership agreement state that Heaberlin will not take any of the assets with him but that he will be paid what he has actually paid in. The uncontroverted facts in respondent's affidavit and according to the depositions of appellant as set forth above, is that the only amount paid in by appellants was more than paid back to him on dissolution. The value of the partnerships,

therefore, was not material to the dissolution under the terms of the agreement.

C. - The terms of the dissolution were set forth in the partnership agreement and the actions of the parties upon dissolution were set out in respondents affidavit and uncontested by appellant.

The trial court was therefore correct in granting summary judgment on the sole remaining issue of the accounting, dissolution and distribution and respondent urges this Court to affirm that judgment.

In responding to Point V which also goes to the issue of the second summary judgment entered by the court, respondent asserts that appellant is misreading the rule. The only facts "established" by a partial summary judgments are those facts the court finds at that time to be without substantial controversy. All remaining issues are to be the subject of further proceeding. In his first motion for summary judgment (R. 216) respondent specifically asked that the issue of the written partnership agreement be decided. This is all that the court considered and all that the court decided. Certainly, this cannot be said to preclude the court from later deciding any other issue properly presented to the court.

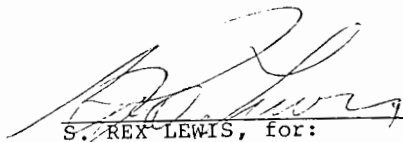
CONCLUSION

By the nature of the proceedings in the lower court, this matter is divided into two issues: 1) the terms of the partnership as determined in the trial court's first summary judgment, and 2) the dissolution and distribution according to those terms in the trial court's second summary judgment.

As to the first summary judgment, appellants failed to preserve their right to appeal and have waived any objections they now attempt to assert. Even if this Court concludes, however, that the first summary judgment is reviewable at this time, the trial court's action is fully supported by the law and the facts and should be sustained.

As to the second summary judgment, the law, as outlined herein, and the uncontroverted facts as outlined in respondents affidavit fully support the trial court's judgment. This litigation which has been in the courts for nearly eight years should now properly be brought to a close by affirming the trial court's actions herein.

Respectfully submitted this 6th day of October, 1977.


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MAILING CERTIFICATE

I hereby certify that on the 6th day of October, 1977, I personally mailed two (2) copies of the foregoing brief of respondent to Mr. Thomas S. Taylor, Attorney for Appellants, 55 East Center Street, Provo, Utah 84601.

Marianne Peterson
SECRETARY