

1977

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs and :
Appellants, :

vs. :

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

Case No. 15,214

Defendants and :
Respondents, :

vs. :

LOIS MELENDEZ, :

Third Party :
Defendant and :
Respondent. :

BRIEF OF APPELLANTS

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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TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATE OF FACTS	2
ARGUMENT	12
POINT I: THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS ON TERMS OF PARTNERSHIP AGREEMENT, THERE BEING THE FOLLOWING CONTROVERTED GENUINE ISSUES OF MATERIAL FACTS:	13
A. WAS THERE AN ORAL PARTNERSHIP AGREEMENT BETWEEN THE PARTIES?	13
B. DID A PURPORTED PRE-INCORPORATION AGREEMENT MODIFY THE ORAL PARTNER- SHIP AGREEMENT?	14
(a) WAS THERE ADEQUATE CONSIDERATION FOR THE PURPORTED AGREEMENT?	14
(b) WAS THE DOCUMENT UNCONSCIONABLE AND THEREFORE UNENFORCEABLE?	15
(c) WAS IT EVER PUT INTO FORCE AND ACTED UPON BY THE PARTIES?	16
C. WHAT WERE THE TERMS OF THE PARTNERSHIP AGREEMENT?	17
POINT II: TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION TO ALTER THE JUDGMENT ENTERED AND FOR NEW TRIAL	17
POINT III: TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ISSUES OF REQUEST FOR ACCOUNTING; THERE BEING GENUINE ISSUES OF MATERIAL FACTS ON:	
A. THE LOWER COURT RULED THAT THERE WAS A PARTNERSHIP AND ORDERED AN ACCOUNT-	

B. WHAT WAS THE VALUE OF THE PARTNERSHIP	18
C. WHAT WERE THE TERMS OF THE DISSOLUTION?	18
POINT IV: TRIAL COURT'S ORIGINAL DENIAL OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT DETERMINING CONCLUSIVE FACTS THAT MADE SUBSEQUENT MOTIONS FOR SUMMARY JUDGMENT BY RESPONDENTS MUTE	19
CONCLUSION	19

AUTHORITIES CITED

17 Am Jur 2d, Contracts §460	14
Utah Rules of Civil Procedure, 56(c)	13
Utah Rules of Civil Procedure, 56(d)	19

CASES CITED

Green v. Garn, 11 Utah 2d 375, 359 P2d 1050	16
King v. Firm, 3 Utah 2d 419, 285 P2d 1114	16
P.L.C. Landscape Construction v. Piccadilly Fish N' Chips, Inc., 28 Utah 2d 350, 502 P2d 562 (1972)	14
Rich v. McGovern, 551 P2d 1266 (Utah, 1976)	13

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partnership and LOUIS :
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Defendants and :
Respondents, :

vs. :

LOIS MELENDEZ, :

Third Party :
Defendant and :
Respondent. :

BRIEF OF APPELLANTS

NATURE OF THE CASE

The determination of the terms of partnership agreement, an accounting between the partners and the dissolution and winding up of the affairs of the partnership.

DISPOSITION IN THE LOWER COURT

A brief trial was held after the court's denial of Respondents' two Motions for Summary Judgment. At the trial, the lower court ruled there was a partnership, denied

respondents' counterclaim for money judgment on alleged promissory notes due respondents from appellants, ordered an accounting be made between the partners and that a referee be selected for this purpose; that the court would issue a specific order for the referee to act within. This was not done. Appellant prepared and submitted a proposed order for this purpose. Respondents then filed a Motion for Summary Judgment for the third time. Lower court then reversed itself and granted respondents' Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

The appellants pray this court reverse the judgments of the trial court; to determine terms of the partnership agreement of the parties and to order an accounting and the winding up of the affairs of the partnership on the basis of the partnership agreement.

STATEMENT OF FACTS

In the Spring of 1964, appellants entered into an oral partnership agreement with respondent Lou Melendez who operated a traveling carnival known as the City of Fun Carnival. (Dave Heaberlin Deposition, Page 8, Lines 4-12; Margie Heaberlin Deposition, Page 9, Lines 1-9) Pursuant to said agreement, appellants were to have 50% share of the profits and losses of the business and were to have the

primary responsibility of maintenance, repair, set-up, take-down, clean up and moving all of the carnival equipment and supplies. Respondent Lou Melendez was responsible for the "paper work", receipts, disbursements and the handling of the money. (Dayd Heaberlin Deposition, Page 12, Lines 17-18, Lines 24-25; Page 13, Line 1; Page 44, Line 8 to Page 45, Line 10; Page 47, Lines 5-16; Page 57, Lines 9-21) Pursuant to this oral agreement, the business was operated by the partners on a 50-50 basis, both partners performing their primary responsibilities as agreed upon and as above described. The facts are uncontroverted that respondent Lou Melendez prepared and filed U. S. Partnership Income Tax Returns for the years 1966, 1967, 1968 and 1969; said Federal Partnership Income Tax Returns reflected equal ownership between appellant David Heaberlin and respondent Lou Melendez and reflected a financial statement and balance sheet of the partnership illustrating capital accounts and net worth of both partners; and further illustrating equal division of the profits of the partnership. (Deposition Louis Melendez, Jr., Page 32, Line 7 to Page 33, Line 10; Plaintiff's Memorandum June 16, 1972, Point VI, Page 3, Lines 21-28) Appellant Dave Heaberlin and respondent Lou Melendez both signed and executed installment contracts, doing business as City of Fun Carnival. (Dave Heaberlin Deposition, Page 49, Lines 21 to Page 53, Line 20; Page 54, Lines 12-25) One parcel of land located in Pleasant Grove, Utah County, State of Utah, was taken into the name

of appellant Dave Heaberlin and respondent Lou Melendez and the title to said land is still held in both names as partners. Several vehicles, trailers and tractors were taken into the names of appellant Dave Heaberlin and respondent Lou Melendez. Copies of these registration documents were attached to appellants' pleadings in opposition to respondents' several motions for summary judgment and are a part of the pleadings. Respondent Lou Melendez retained a majority of the earnings of the partnership in the business for the purpose of increasing the assets of the partnership and just minimal salaries were distributed on an equal basis to appellants and respondents. The financial statements of the partnership reflect a substantial accumulation of net worth in the partnership business and the capital accounts of the partners. In January, 1965, respondent Lou Melendez contemplated incorporating the partnership business known as City of Fun Carnival. On about February 1, 1965, respondents prepared and presented to appellants for their signature a pre-incorporation agreement. Appellants did not understand the proposed pre-incorporation agreement and refused to sign. (Dave Heaberlin Deposition, Page 10, Lines 12-23; Page 40, Lines 10-24; Respondent Lou Melendez Deposition, Exhibit 1) Respondents continued to urge appellants to sign the document and represented to them that it was to facilitate business dealings with third parties and would not effect the existing or future rights of appellants. Based upon this representation,

appellants signed said proposed pre-incorporation agreement on about April 18, 1967. (Dave Heaberlin Deposition, Page 10, Line 12 to Page 11, Line 6; Page 25, Line 21 to Page 28, Line 30; Page 61, Lines 3-19; Exhibit 1) Exhibit 1 of Lou Melendez's Deposition provided as follows:

"This agreement interred into on the 1st of February 1965 and to be retroactive to January 2, 1965 is for sale of 45% of stock of City of Fun Carnival by Lou Melendez to Dave Heaberlin for the sum of \$25,000.00 plus \$5,000.00 to cover outstanding personal loans aquired by Lou Melendez for the business. The sale is for the operating corporation, City of Fun Carnival Inc., and to purchase 45% of the Lou Melendez Inc. holding Corporation. The sale is for portable carnival equipment only and for no other Lou Melendez interests or investments unless agreed to in writing. The sale is mainly for help in operating the carnival unit as no additional new cash is involved. Therefore if conditions become where this is impossible the sale is of no value and may be terminated.

1. Dave is to work at least 11 months every year in helping to operate and maintain carnival equipment.
2. Purchasing of shares is for portable carnival equipment only and in no other of Lou's property or interest unless in writing.
3. Complete inventory is to be taken of all Dave's equipment and credit given to him as to cost value. He must declare his personal inventory.
4. Daves salary is to be from a "one" ball game, his wife is to operate unless changed by agreement of mutual consent. Ball game is to be operated when approved by Lou in

accordance to fair contracts and
privilage paid.

- 4A. Daves salary is at all times
paid in full by "one" ball
game receipts. At no time will
wages be in arrears.
- 4B. Dividends may be given when Lou
feels necessary and appropriate
by surplus. Dividends are to
be paid according to stock
holdings.
5. Dave is to at all time conform with
the policies set up by Lou, especially
of no fighting, drinking or unbusiness
like conduct. He is to reveal to no
one the business transactions between
Lou and Dave.
6. The assets are at all times to be in
the name of Lou and the show will at
all times do business through Lou
and by him. Lou's decisions at all
times will be final.
7. The home of business will be in
Pleasant Grove, Utah, and as directed
by Lou. Winter quarters will be in
Utah unless directed otherwise by
Lou.
8. The sale of 45% of show stock to
Dave is to be \$25,000.00 plus
\$5,000.00 for additional bills made
personally by Lou to personal friends
and to be repaid by him, namely
Robert Melendez, Sam Soccoli, and
immediate family in-laws, etc,
amount not to be more than \$5,000.00
no interest attached.
9. In case Dave ever wants to leave
or is bought out, it may be done by
giving one months notice and he
agrees to never work or have dealings
in the area this carnival has ever
showed with him, for 5 years to come.

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.
11. All equipment bought will be with company funds for the company.
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 of 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.
14. This partnership can be dissolved by Lou in case of Dave's failure to live up to Lou's policies and in case of disagreements between parties by using #13 as basis.
15. Each party is to help form an efficient portable carnival to the best of their abilities. Dave is to have no other interest except in the fulfillment of this contract.
16. Upon Dave's payment of \$25,000.00 for 45% of City of Fun Inc. for \$1.00 he may exercise the option to buy 45% of Lou Melendez Inc. holding corpora-tion of the carnival equipment.
17. Dave is to pay \$1,250.00 per year to Lou from summer earnings given from declared dividend, if business is financially able to and by majority stockholders vote. Five thousand dollars is to be paid as quickly as possible but never faster than sound judgement by Lou. Interest of 8% on

stock payments are to be made only if in arrears. Payments and all accounting is to be as of January 1, 1965 for all practical purposes. If more than \$1,250.00 yearly dividend is declared at least 75% of Dave's share must be applied towards stock payments until full amount is paid.

18. This contract becomes void and collectable as to recourse in case of Dave's absence of longer than two months or for 1 week in time of operations.
19. At no time will Dave be able to sell his interest to any party outside of Lou unless by inheritance to his wife only, and then no further unless approved by Lou in exercise of #13 by Lou to Dave and his wife's estate by their death.
20. The main point in selling the 45% to Dave is for his assistance in maintaining good quality maintenance on show and moving the unit efficiently.
21. A \$50,000.00 Life Insurance policy will be carried as of January 1, 1967 on Lou Melendez and paid for by the City of Fun. Holder is to be company for the sole purpose of buying out Lou's share of portable carnival equipment and to sell to Dave Heaberlin. Equipment includes everything portable except personal items. Truck, car, trailer house, etc. Upon transfer of shares the balance due of Dave Heaberlin's original 45% purchase become a first mortgage on show. After five years from date of corporation agreement this clause may be re-negotiated January 1, 1966."

Exhibit 1 above was further evidenced by six stock subscription promissory notes in the amount of \$5,000.00 each. Respondent Melendez was to control the payment of the said

stock subscription notes out of proceeds of the business as respondent Melendez, in his judgment, would determine that the withdrawal of said money would not hurt the business. (Dave Heaberlin Deposition, Page 12, Line 19 to Page 13, Line 2; Page 27, Line 21 to Page 30, Line 15; See Exhibit 1, paragraphs 4B and paragraph 17)

After Exhibit 1 was signed, the business continued to operate as it had originally on a 50% division of profits and losses and the same responsibilities as prior to said pre-incorporation agreement; respondents divided minimal salaries equally after said date and reinvested to excess profits back into the business. (Dave Heaberlin Deposition, Page 34, Line 24 to Page 36, Line 11) This created capital accounts of the partners in excess of \$200,000.00 each for appellants and respondents.

The proposed corporation was never formed, no stock was issued, the stock subscription notes were never cancelled by the respondents and respondents never made any demands for payment on said stock subscription notes until appellants commenced this action. Parties mutually terminated the partnership and appellants left the City of Fun Carnival on or about May 24, 1970, after an argument provoked by and with respondents herein. (Dave Heaberlin Deposition, Page 16, Line 9 to Page 17, Line 25)

On February 9, 1971, Judge Joseph E. Nelson, the original trial judge, signed an Order which states as follows:

"It is hereby ordered that the defendant Louis Melendez, Jr. be and the same is hereby enjoined and restrained from incurring any debts or obligations against the assets of the City of Fun Carnival during the pendency of this action and until further hearing and order of this court. The court denies Plaintiffs' Motion for the appointment of a receiver at this time and directs that this matter be placed on the trial calendar to be tried on its merits at the earliest convenient trial setting. The court denied the balance of plaintiffs' Motion except for the injunction concerning the incurring of additional indebtedness as hereinabove stated."

Contrary to this Order and without any subsequent order modifying the same, respondents encumbered the partnership assets with an SBA loan.

At the time of the mutual termination of the business by the partners, respondents had in their possession an automobile for their partnership transportation and a housetrailer in which they lived. The automobile and the housetrailer was later repossessed at the instance of the respondents herein.

Appellants commenced this action to compel respondents to account for the assets of the partnership, to distribute the same and wind up the affairs of the partnership; all after respondents refused to do so on request.

On April 28, 1972, respondents filed a Motion for Summary Judgment regarding partnership agreement of the parties. On July 29, 1972, the above entitled court denied

respondents' Motion for Summary Judgment. On November 3, 1972, trial court issued a Pre-Trial Order bifarcating the issues for trial; first trial relating to the partnership agreement and its effects of dissolution; the second issue referred to trial for an accounting between the former partners. On January 17, 1973, the trial court reversed itself and ruled that Exhibit 1 herein, the pre-incorporated agreement was the partnership agreement of the parties and that the only remaining issue was that of accounting among the former partners. Appellants' Motion for reconsideration and new trial on said issue was denied. On July 12, 1973, the trial court granted respondents' motion for protective order denying appellants the opportunity to discover the details of the SBA loan made by respondents upon the property of the partnership and contrary to Judge Nelson's previous order. Again on April 18, 1973, the trial court denied respondents' Motion for Summary Judgment for the second time. On February 6, 1974, the above entitled court made and entered a minute entry which provided in part as follows:

"It is the order of the court that an accountant must be appointed to decide this matter or as an alternative the court will arrange to have Judge Harding hear the matter on its merits, with the losing party to bear the costs. The attorneys to make their own arrangements for a reporter."

"....Upon request of both counsel and their clients the court hereby appoints Mr. Verlan Anderson to act as an accountant on the above

matter. The court to make a detailed order and submit same to Mr. Taylor and Mr. Lewis."

The trial court did not prepare such a detailed order before the referee. Counsel for appellants prepared and submitted to the court a proposed detailed order for this purpose. Upon a third motion for summary judgment made by respondents, the trial court on April 15, 1977, entered an Order and Judgment granting respondents' motion for summary judgment in all respects and ordering that all of the property of the partnership belonged to respondents. The same genuine issues of controverted facts existed all through the motions and orders of the trial court, without the facts changing in any respect.

The pleadings with respect to the above motion reflects the controverted facts of genuine issues to be tried.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS ON TERMS OF PARTNERSHIP AGREEMENT, THERE BEING THE FOLLOWING CONTROVERTED GENUINE ISSUES OF MATERIAL FACTS:

A. WAS THERE AN ORAL PARTNERSHIP AGREEMENT BETWEEN THE PARTIES.

B. DID A PURPORTED PRE-INCORPORATION AGREEMENT MODIFY THE ORAL PARTNERSHIP AGREEMENT?

(a) WAS THERE ADEQUATE CONSIDERATION FOR THE PURPORTED AGREEMENT?

(b) WAS THE DOCUMENT UNCONSCIONABLE AND THEREFORE UNENFORCEABLE?

(c) WAS IT EVER PUT INTO FORCE AND ACTED UPON BY THE PARTIES?

C. WHAT WERE THE TERMS OF THE PARTNERSHIP AGREEMENT?

Rule 56(c) of the Utah Rules of Civil Procedure provide that summary judgment may be granted only if there is no genuine issue as to any material fact. In Rich vs. McGovern, Utah, 1976, 551 P2d 1266, this court rules as follows:

"Inasmuch as the party moved against is being defeated without the privilege of a trial, the court should carefully scrutinize the 'submissions' and contentions he makes thereon to see if his contentions and proposals as to proof of material facts, if resolved in his favor, would entitle him to prevail; and it so appears, the motion for summary judgment should be denied and a trial should be had.....,"

In the case now pending before this court there is and was several controverted genuine issues of fact.

A. Was There An Oral Partnership Agreement Between The Parties? - The depositions of witnesses and the parties clearly disclose that an oral partnership was formed, assets were acquired in the partnership names of appellants and respondents, U. S. Tax Returns filed and prepared by respondents disclosing a partnership between the parties, their equal interest therein and balance sheet disclosing some of the assets of the partnership. The court originally ruled there was a partnership and ordered an accounting.

B. Did A Purported Pre-Incorporation Agreement Modify The Oral Partnership Agreement? -

(a) Was There Adequate Consideration For The Purported Agreement? - The depositions of appellants and respondents fully disclose that the proposed pre-incorporation agreement was without any new or additional consideration. There is no evidence before the court in the form of motions or otherwise disclosing consideration for this pre-incorporation agreement which was never acted upon between the parties. At the time the parties signed the pre-incorporation agreement they already had a partnership providing for equal rights in the business. (Dave Heaberlin Deposition, Page 8, Line 13 to Page 9, Line 24) Although entirely oral, this agreement was contracted in the presence of witnesses and was supported by more than adequate consideration, both parties furnishing equipment and promising to perform services. (Deposition Dave Heaberlin, Page 30, Line 10 to Page 33, Line 25; Page 45, Lines 11 to Page 47, Line 4)

To be a valid modification of the prior agreement, the new agreement must have been supported by new consideration. See 17 Am Jur. 2nd, Contracts Section 460. See also P.L.C. Landscape Construction vs. Piccadilly Fish and Chips Inc., 28 Utah 2d 350, 502 P2d 562 (1972). A close examination of the pre-incorporation agreement reveals there is no new consideration whatsoever. (See respondent Melendez deposition, Exhibit 1) The document itself recites that "no additional

new cash is involved". The corporation was never formed and stock never issued. Appellants' only course of income during the period of the partnership was the profits of the business, which were disbursed solely by respondent Lou Melendez.

(Deposition Dave Heaberlin, Page 44, Line 8 to Page 45, Line 10; Page 47, Line 5 to Page 48, Line 24) It was entirely with respondents' power to withhold profits and not credit appellant with his share and thus deprive appellant of the ability to pay for any such proposed stock.

The respondents' only unconditionally promise was to "help form an efficient, portable carnival to the best of (his) abilities" which was an implied covenant under the original oral partnership agreement and thus is not due consideration.

(b) Was The Document Unconscionable and Therefore Unenforceable? - The facts clearly disclose that the respondents herein retained the power to withhold profits from appellants herein, and not enable the appellants herein to pay for any stock in the proposed corporation that was never formed. This is expressly provided in the document itself. (See paragraphs 4B and 17 of Exhibit 1 to Respondent Melendez's Deposition) The intent of the parties is confirmed by the deposition of Dave Heaberlin (page 45, Lines 17-25) and respondents' conduct confirms it. (Deposition Dave Heaberlin, Page 12, Line 19 to Page 12, Line 2; Page 28, Lines 21 to Page 29, Line 2)

(c) Was It Ever Put Into Force And Acted Upon By The Parties? - The facts fully disclose that the corporation was never formed and no stock was ever sold or delivered. (Deposition Dave Heaberlin, Page 42, Lines 23; Page 53, Line 21 to Page 54, Line 3) Both parties drew substantially equal amounts for living expenses of general receipts and the balance of the profits of the business was retained by the respondent in the business of the parties. (Deposition Margie Heaberlin, Page 22, Line 17 to Page 24, Line 6; Page 44, Line 11 to Page 45, Line 17; Deposition Dave Heaberlin, Page 34, Line 22 to Page 35, Line 13; Page 48, Lines 5-24) In addition the respondent prepared and filed U.S. Partnership Returns for the years 1966, 1967, 1968 and 1969, reporting the income as divided equally between the parties and said returns being filed after the purported pre-incorporation agreement. (Deposition Lou Melendez, Jr., Page 32, Line 7 to Page 33, Line 12)

When parties make a contract and subsequently act in a manner inconsistent with its continued existence, this raises a question of fact as to whether they have abandoned it or rescinded it. King vs. Firm, 3 Utah 2d 419, 285 P2d 114; Green vs. Garn, 11 Utah 2d 375, 359 P2d 1050. The facts disclose that the parties at all times acted in a manner inconsistent with the purported pre-incorporation agreement and continued to conform their conduct to the terms of their original oral agreement.

C. What Were The Terms Of The Partnership Agreement? - There is and was a genuine issue of material controverted fact as to the terms of the partnership agreement. Depositions of witnesses and parties raised the issues as to what the terms of the partnership agreement were and the conduct of the parties disclosed what the terms of the partnership was. The evidence disclosed a 50-50 partnership.

POINT II

TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION TO ALTER THE JUDGMENT ENTERED AND FOR NEW TRIAL.

The record is repleat with genuine issues of controverted facts which the court summarily dismissed on as inconsistent basis and reversing itself in the process; all of the facts being the same through all presentations and at a time when the court had heard no evidence from the witnesses involved and permitting the same issues to be relitigated in the forms of motions for summary judgment, genuine controverted facts remaining the same at all times. The court expressly provided in its minute entry of February 6, 1974, that the trial court would make a detailed order and submit the same to counsel; this was not done and counsel for appellants submitted such an order for the court in conformance with the court's previous ruling, which the trial court refused.

POINT III

TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ISSUES OF REQUEST FOR ACCOUNTING; THERE BEING GENUINE ISSUES OF MATERIAL FACTS ON:

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?

A. The Lower Court Ruled That There Was A Partnership and ordered an accounting. - The trial court expressly ruled that there was an issue of an accounting and ordered an accounting made on February 6, 1974. The court failed to provide a detailed order, counsel for appellants did so but the court refused the same and granted respondents summary judgment on the issue.

B. What Was The Value Of The Partnership? - There are financial statements indicating what the equity of the partners are in the business and show a substantial increase in value of the assets, that all of the assets are not disclosed in the financial statement and that at this point in time respondents are wrongfully being allowed to retain all of the retained earnings that he held in the company after forcing appellants out.

C. What Were The Terms Of The Dissolution? - The law has specific remedy for dissolution where the parties do not agree as to the terms and conditions of a dissolution. The

purported pre-incorporation agreement that was never acted upon did not replace the original oral partnership agreement; the laws of the State of Utah expressly provide for the terms and conditions for dissolution of the partnership and the accounting and distribution of assets. This is the relief that this appellant has been seeking since the case was originally commenced.

POINT IV

TRIAL COURT'S ORIGINAL DENIAL OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT DETERMINING CONCLUSIVE FACTS THAT MADE SUBSEQUENT MOTIONS FOR SUMMARY JUDGMENT BY RESPONDENTS MUTE.


Rule 56(d) Utah Rules of Civil Procedure, Summary Judgment, expressly provides that where a case is not fully adjudicated on motion, that facts specified in the order shall be deemed established and the trial shall be conducted accordingly. The trial court's establishment of the fact that there was a partnership and ordered an accounting established those facts and that respondents last Motion for Summary Judgment, erroneously granted by the lower court, had no effect as a matter of law.

CONCLUSION

Parties herein formed a partnership under an oral agreement in which both parties shared on an equal basis.

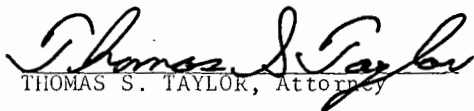
They worked under this oral agreement for 6 years during which time substantial capital was earned and retained in the partners capital accounts. The Pre-Incorporation Agreement in 1967 was never put into force by the parties, there was no consideration for it and its enforcement is unconscionable. These parties mutually terminated the partnership in 1970. There are multiple genuine issues of material facts that prohibit the granting of Summary Judgment as was done by the lower court. The effect of the trial court's ruling is to create an unconscionable forfeiture of capital accounts of appellants of a sum in excess of \$200,000.00. The lower court erred in granting Summary Judgment and in reversing itself on several occasions.

Respectfully submitted,


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CERTIFICATE OF MAILING

This is to certify that two true and exact copies of the foregoing Brief of Appellants were mailed to S. Rex Lewis, 120 East 300 North, Provo, Utah, 84601, this 8th day of August, 1977.


THOMAS S. TAYLOR, Attorney