

2008

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

Utah Court of Appeals

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Charles M. Bennett; Blackburn & Stoll; Attorneys for Petitioners.

Benson L. Hathaway, Jr.; Thomas A. Mecham; Christopher S. Hill; Kirton & McConkie; Attorneys for Respondent .

Charles M. Bennett BLACKBURN & STOLL LC 257 East 200 South, Suite 800 Salt Lake City, UT 84111 -2048 Attorneys for Petitioners-Appellants

BENSON L. HATHAWAY, JR. (Bar No. 4219) THOMAS A. MECHAM (Bar No. 6612)

CHRISTOPHER S. HILL (Bar No. 9931) KIRTON & McCONKIE 1800 Eagle Gate Tower 60 East South Temple P.O. Box 45120 Salt Lake City, UT 84145-0120 Attorneys for Respondant-Appellee

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FISHER,

Petitioners, Appellants, and
Cross-Appellees,

vs.

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**BRIEF OF APPELLEE AND
CROSS-APPELLANT**

No. 20080389-CA

Oral Argument Requested

ON APPEAL FROM THE JUDGMENT OF THE EIGHTH JUDICIAL DISTRICT
COURT, DUCHESNE COUNTY

The Honorable A. Lynn Payne, District Court Judge, Presiding
District Court Case Civil No. 043800019

Charles M. Bennett
BLACKBURN & STOLL LC
257 East 200 South, Suite 800
Salt Lake City, UT 84111-2048

Attorneys for Petitioners-Appellants

BENSON L. HATHAWAY, JR. (Bar No. 4219)
THOMAS A. MECHAM (Bar No. 6612)
CHRISTOPHER S. HILL (Bar No. 9931)
KIRTON & McCONKIE
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, UT 84145-0120

Attorneys for Respondant-Appellee

UTAH

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THOMAS A. MECHAM (Bar No. 6612)
CHRISTOPHER S. HILL (Bar No. 9931)
KIRTON & McCONKIE
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, UT 84145-0120

Attorneys for Respondant-Appellee

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INTRODUCTION

These cross appeals were initiated by the petitioners and appellants Kim and Michael Fisher (“Kim” and “Michael” respectively), two of the beneficiaries under the George Fisher, Jr. Family Inter Vivos Revocable Trust (the “Trust”). Kim and Michael are brothers, and sons of the trustor, George Fisher (“George”). Kim and Michael seek recovery against their brother, Brent Fisher (“Brent”), the successor trustee of the Trust upon George’s death in 1992.

After the hearing on Kim and Michael’s petition, the trial court found that Brent was required to reimburse the Trust approximately \$54,000.00, plus prejudgment interest, for actions taken by him while he was trustee. This was far less than the \$788,982.98 sought by Kim and Michael (approximately \$390,000.00 principal and \$400,000.00 prejudgment interest). By this appeal, Kim and Michael seek to overturn certain of the court’s rulings to increase the damages awarded against Brent. By his cross appeal, Brent seeks to reduce the prejudgment interest award against him and recover his attorneys’ fees for defending the action.

JURISDICTION

As properly indicated by Kim and Michael, the Utah Supreme Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j). This Court has jurisdiction pursuant to the Supreme Court Order dated June 4, 2008 under Utah Code Ann. § 78A-4-103(2)(j).

ISSUES PRESENTED FOR REVIEW AND CORRECT STANDARDS OF REVIEW

Kim and Michael have designated three issues for review. While Brent does not challenge their right to designate these issues for review, Kim and Michael have articulated the wrong standard of review for each issue.

Kim and Michael's Issue for Review No. 1.

The first designated issue, regarding conversion of cattle, Kim and Michael question whether the trial court correctly determined “the date of the conversion, the number of cattle converted, and the value of the cattle converted.” Appellant’s [sic] Brief (“AB”) at p.1. These three determinations are facts that the trial court found based upon the weighing of evidence presented at the hearing. Trial Court Record (“R.”) 535, ¶ 7; R.600-602, R.725-726. The proper standard of review for reversing the trial court on factual findings is a clearly erroneous standard. *Mule-Hide Products Co., Inc. v. White*, 2002 UT App 1, ¶ 11; 40 P.3d 1155. This is not a question of whether applying undisputed facts to the law of conversion mandates a ruling as a matter of law, as in the authorities cited by Kim and Michael. Instead, the trial court made findings on the facts underlying the elements of the conversion claim, which findings are challenged by Kim and Michael. That the evidence of these facts was contained in written materials does not convert the standard of review to correction of error. *See* Utah R. Civ. P. 52(a) (“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses”) (emphasis added).

Kim and Michael's Issue for Review No. 2.

The second designated issue, regarding credit for direct payments made by Brent on behalf of the Trust, is, as correctly stated by Kim and Michael, also a question of fact reversible only for clear error. AB at p.2, citing *Christensen & Jensen, P.C. v. Barrett & Daines*, 2008 UT 64, ¶ 20, 194 P.3d 931. However, Kim and Michael err in arguing for reduced deference on the basis of *State v. Levine*, 2006 UT 50, ¶ 25, 144 P.3d 1096. First, they offer no authority supporting the bald assertion that a trustee under order to produce supporting documents inserts a legal issue making this “a mixed question of fact and law.” AB at p.2. While *Levine* articulates the varied standards for deference under mixed questions, Kim and Michael fail to meet the threshold of converting this review from a challenged factual finding to a mixed question of fact and law. Therefore, the default standard of clear error applies.

Kim and Michael's Issue for Review No. 3.

Third, Kim and Michael argue the trial court erred in refusing to award their attorneys' fees and expenses against Brent personally under the inherent power of the court. *Hughes v. Cafferty*, 2004 UT 22, ¶ 20, 89 P.3d 148. Again, they correctly identify this decision is reviewed under an abuse of discretion standard (AB at p.2), but then argue for a modified standard based upon a perceived failure by the trial court to factor certain discretionary considerations. First, there is no basis to revise the standard of review from abuse of discretion as claimed – moreover the trial court did factor the considerations claimed to be missed by Kim and Michael. The proper standard for reviewing the denial of a discretionary fee award request is abuse of discretion. *Hughes*,

2004 UT 22, ¶ 20. Under this standard, the decision should not be reversed unless it “exceeds the limits of reasonability.” *Neztsosie v. Meyer*, 883 P.2d 920, 922 (Utah 1994).

State v. Levine, 2006 UT 50, 144 P.3d 1096, is not applicable, in that the standards articulated for a modified deference presuppose the existence of a mixed question of law and fact, which does not exist in a discretionary award of attorneys’ fees.

Brent’s Issue for Review No. 1.

Did the trial court err in awarding prejudgment interest in light of (i) a limitation of liability clause in the Trust; and (ii) trial court findings that no evidence supported fixing a date of loss and that damage calculations were speculative. Preserved at Closing Argument Hearing Transcript (“Cl.”) (located at R.904), 71:11-74:7; R.733-739.

Standard of Review. Whether the language of the Trust expressly excludes the award of a class of damages is an interpretation of the meaning of the instrument, which is a question of law to be reviewed for correctness. *Lakeside Lumber Products, Inc. v. Evans*, 2005 UT App 87, ¶ 8, 110 P.3d 154. Additionally, the question of the application of prejudgment interest is also a question of law, also reviewed for correctness. *Lefavi v. Bertoch*, 2000 UT App 5, ¶ 23, 994 P.2d 817. Accordingly, no deference is afforded the trial court decision. *Id.*

Brent’s Issue for Review No. 2.

Did the trial court properly refuse to award attorneys’ fees to Brent. Preserved at Cl.74:8-75:7; R.614-15.

Standard of Review. Brent’s claim to attorneys’ fees derives from the Utah Uniform Trust Code, Utah Code Ann. § 75-7-1004. Whether the trial court erred in

application of statute entitling party to attorneys' fees "presents a question of law that we review for correctness, giving no deference to the district court." *State v. One Lot of Personal Property*, 2004 UT 36, ¶ 8, 90 P.3d 639.

STATUTE DETERMINATIVE OF THE APPEAL

Brent's claim to reversal of the denial of his attorneys' fees in this case is governed by Utah Code Ann. § 75-7-1004, which states: "[i]f a trustee defends or prosecutes any proceeding in good faith, whether successful or not, the trustee is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorneys' fees incurred."

STATEMENT OF THE CASE

Nature of the Case.

This matter was tried on Kim and Michael's petition against Brent for his conduct as the trustee of the family trust. Brent was named as a successor trustee under the Trust upon the death of his father, George, in 1992. *See*, Trust, Exh. 18, p.9; Evidentiary Hearing Transcript ("T.") (located at R.903), 114:6-9. The Trust property consisted of certain real and personal property in Duchesne County used for ranching operations. Trust, Exh. 18, at Schedule A; Trustee's Allocation of the Properties Held Under the George Fisher, Jr. Family Revocable Trust ("Trustee's Allocation"), Exh. 15. For approximately nine years, Brent administered the ranch in the capacity as co-trustee of the Trust with his mother, LaRue Fisher, until other heirs and beneficiaries sought a more active role in managing the Trust. T.142:10-13. As of February 21, 2001, all of the Trust beneficiaries stipulated to the appointment of each beneficiary as a co-trustee. Exh. 21.

Course of Proceedings.

Kim and Michael, as beneficiaries of the Trust, filed a petition against Brent wherein they claimed damages and sought recovery against Brent for his administration of the Trust during the time prior to their role as trustees.¹ R.1-6.

A one-day evidentiary hearing on the petition was held on March 16, 2006. After the close of evidence, closing argument was scheduled for April 25, 2006.² Before closing argument, at the request of the trial court, Kim and Michael submitted a damage calculation, wherein they sought approximately \$390,000.00 in damages, plus \$400,000.00 in prejudgment interest, plus attorneys' fees. R.453-63.

Disposition in the Court Below.

On July 13, 2006, the trial court issued its initial Ruling ("Ruling No. 1"). R.534. In this initial ruling, the court determined that Brent could not account for fifty cattle that he had included in the Trustee's Allocation and that Brent had used the Trust ranch and farmland without paying full rental value for that use. The court concluded that Brent's conduct was "born of a good faith, albeit mistaken belief as to his rights and obligations with respect to the Trusts." R.537, ¶ 10. The court found that Brent was to reimburse the Trust \$27,500 for the value of misappropriated cattle and \$26,498.28 for uncompensated use of the Trust's real property. R.536, ¶ 8, R.539, ¶ 14. The court also awarded unspecified prejudgment interest and declined to award attorneys' fees. R.540, ¶¶ 16-17.

¹ A third petitioner, Susan Thacker (sister to the parties and also a beneficiary under the Trust) joined in the initial petition, but declined to participate in the proceedings.

² Prior to closing argument, additional evidence was delivered to Brent, who moved to reopen evidence. R.391. The Court granted that motion (Cl.101), and the parties stipulated to the introduction of additional documents and affidavit testimony. R.506.

Kim and Michael filed a motion under Rule 59, URCP, to amend Ruling No. 1. R.543. On October 2, 2006, the trial court issued a second Ruling (“Ruling No. 2”), denying Kim and Michael’s motion and articulating reasons for reaffirming Ruling No. 1. R.600.

Kim and Michael prepared proposed findings of fact and conclusions of law and a proposed judgment, which Brent objected to. R.604. On May 1, 2007, the court issued a Ruling on Brent’s objections (“Ruling No. 3”), and clarified its position with regard to the calculation of damages. R.722. The trial court also raised the question of whether the standard for prejudgment interest had been met, and invited briefing on that issue. R.724-26.

After receiving the requested briefing, on November 16, 2007, the court issued a Ruling and Order (“Ruling No. 4”), wherein it reaffirmed its prior award of prejudgment interest, adopted the four written rulings as findings and conclusions, and directed the preparation of a judgment. R.748. Judgment was entered on April 10, 2008. R.787.

Statement of Facts.

Brent is in general agreement with Kim and Michael’s factual statements regarding the formation and content of the Trust set forth on pages 10 and 11 of Appellant’s Brief. Although Kim and Michael assert that the Trust included 480 acres of real property (AB at p.12), much of that property was owned jointly. Exh. 15, pp.3-4; T.185:9-187:13.

At some point prior to George’s death on April 18, 1992, George had owned a number of cattle. T.260:17-19. As George aged, in or about 1974 he requested help from

Brent to manage the ranch and cattle operations. T.257:23-258:9. Over many years, George and Brent agreed that Brent would operate both George's ranch and Brent's own cattle operations on the Trust's property in exchange for payment by Brent of the ranch expenses, including the amount of the property tax and water assessments. T.180:15-22; 258:21-259:24; 261:21-264:16. George also sold off cattle over time. T.166:3-7; 260:14-25; 262:12-263:2. The parties dispute whether any cattle remained at the time of George's death. Under the Trust, Brent and his brother Max were named as successor trustees. Exh.18, p.9. LaRue was the current beneficiary under the Trust. Trust, Exh.18, pp.2-6. Brent continued to operate the ranch as he had before his father's death, based upon discussions with LaRue and an attorney.³ T.182:5-11; 266:7-267:11. As such, he continued to pay for the Trust property taxes and water assessments and continued to operate his cattle on the property. T.265:4-12; 267:14-268:17. Brent also made a \$10,000.00 payment into the Trust account as additional payment of rent. T.182:18-183:8; Exh.1.

The Trust required that property owned by the Trust was to be allocated between a marital trust and a family trust. Trust, Exh.18, p.2. After consulting with an attorney, Brent hired an appraiser to value the Trust property. T.119:4-120:3. Thereafter, Brent had prepared the Trustee's Allocation of the Trust property. Trustee's Allocation, Exh.

³ Kim and Michael assert that continued use of the farm resulted from Brent's request for permission from LaRue. AB at p.12. This is inconsistent with the court record, which indicates Brent wanted to sell the property but kept it at LaRue's request. T.267:6-11.

15. This allocation included an itemized list and valuation of the property owned by the Trust. Brent included 50 head of cattle on this allocation.⁴ *Id.* at p.4.

Over time, the various beneficiaries became discontent with the administration of the Trust, and on February 21, 2001, each of LaRue, Brent, Kim, Michael, and Susan executed a designation of trustees, naming each of them as co-trustees of the Trust. Exh. 21. On May 26, 2001, the parties agreed on a distribution of the real property under the Trust. T.133:22-134:6.

SUMMARY OF ARGUMENT

The trial court's decision regarding Trust cattle was not clearly erroneous, in that the date of loss, the number of cattle lost and the value were all supported by evidence. This decision represented a weighing of indirect evidence and reaching conclusions based upon the evidence the trial court found most convincing. The cattle ruling was proper and ought not be overturned.

There was no clear error in the trial court crediting Brent for the value of payments that he made for property taxes and water assessments. The court properly found that these expenses were obligations of the Trust, and Brent, as trustee, having personally paid those expenses, was entitled to reimbursement for those payments, given in the form of a credit offset against his rent obligations.

⁴ Brent has maintained throughout this proceeding that there were no cattle owned by the Trust as of George's death, and that he listed an arbitrary number of cattle in the Trustee's Allocation to appease Kim and Michael. *See infra* pp. 13-14. The trial court relied on the Trustee's Allocation to find that 50 cattle belonged to the Trust.

The trial court was correct in denying Kim and Michael's claim for attorneys' fees, as they did not establish any entitlement to recover attorneys' fees in this case at all, much less a claim against Brent personally. Their claim to fees was discretionary in the trial court, and the indicia for a proper award of fees to trust beneficiaries were contrary to the trial court's findings in this case.

The trial court erred as a matter of law in assessing prejudgment interest against Brent, as the Trust contained a limitation of liability clause limiting trustee liability to principal and income. Moreover, the evidence supporting the date of conversion and valuation of cattle was insufficiently definite to support an award of prejudgment interest.

The court erred in not granting Brent his attorneys' fees, as he was statutorily entitled to recover his fees for defending the lawsuit against him in good faith.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN MAKING ITS THREE FINDINGS REGARDING THE NUMBER, TIMING, AND VALUE OF CATTLE CONVERTED.

Kim and Michael challenge three findings of fact by the trial court regarding cattle belonging to the Trust: (i) the Trust owned 50 cattle during Brent's administration of the Trust (Ruling No. 1, R.535, ¶ 7); (ii) the cattle were unaccounted for after May 8, 1995 (Ruling No. 3, R.725-26); and (iii) the value of the cattle at that time was \$27,500.00 (Ruling No. 1, R.536, ¶ 7). These findings were made after a full analysis of the evidence and based upon weighing competing evidence. These findings required the trial court to draw inferences from circumstantial evidence, as there was no direct evidence on any of these points. While Brent disagrees with the court's findings, he does not attribute any

reversible error to these determinations. However, there is no basis for Kim and Michael to obtain a reversal of these findings.

A. The Court did not Err in Rejecting the Claim for 100 Cattle.

The trial court was faced with the challenging task of determining how many cattle were owned by the Trust during Brent's administration. The court received evidence of three competing numbers of cattle in the Trust under Brent's care. Brent's testimony, along with the First Amendment to Trustee's Allocation of the Properties Held Under the George Fisher, Jr. Family Revocable Trust Dated October 10, 1975 (the "Amended Allocation") at Exhibit 16, stated that the Trust did not own any cattle on the date of George's death in 1992. T.159:2-5; 172:11-13. The original Trustee's Allocation, at Exhibit 15, listed 50 cattle. Testimony established that this number derived from an appraisal conducted in 1992. T.134:12-17. The sole evidence supporting Kim and Michael's claim to 100 cattle was a letter update to the appraisal, performed in 1997. Exh. 17. This Court weighed the evidence, and found that the Trust owned 50 cattle. Ruling, ¶ 7.

In light of the competing evidence, and based upon the weight and credibility given to each by the trial court, the court was well within its discretion to reject Kim and Michael's claim for 100 cattle and find that the Trust owned 50 cattle.

First, Brent notes that Kim and Michael have declined to marshal the evidence in support of the challenged findings. Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires a party challenging a fact finding to "first marshal all record evidence

that supports the challenged finding.” As the Court well knows, the requirement to marshal is articulated as follows:

[t]he marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

Of course, the consequence for failing to comply with the marshaling requirement is for the appellate court to assume that the findings are correct. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998); *Johnson v. Higley*, 1999 UT App 278, ¶ 37, 989 P.2d 61.⁵

Kim and Michael identify two findings they challenge in this context – that 50 cattle were owned by the Trust, and that the Trust did not own 100 cattle. For each finding, Kim and Michael aver that “[t]here is no evidence to marshal in support of the trial court’s finding....” AB at p.20; *see also* AB at p.22. As shown below, this is not true, and by failing to marshal the evidence, Kim and Michael have improperly shifted to

⁵ Recently the Utah Supreme Court has stepped back from these mandatory consequences articulated in *Valcarce*. *See Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶¶ 16-21, 164 P.3d 384. Failure to marshal does not impose strict limitations on the reviewing court. It retains discretion to independently review the basis behind a trial court’s findings, though the party failing to marshal bears the risk that the reviewing court will decline to review the challenged findings. *Id.* at ¶ 19.

Brent the burden of identifying all of the evidence on which the trial court's findings may rest.

Two separate exhibits support one or both of these trial court findings. Exhibit 15, the Trustees Allocation, dated May 8, 1995, and signed by both Brent and LaRue acting in the capacity as trustees of the Trust, lists 50 head of cattle as an asset allocated to the marital and family trusts.⁶ Exhibit 16 is an amendment to the Exhibit 15 Trustee's Allocation, also signed by each of Brent and LaRue in their capacities as trustees of the Trust, whereby Brent and LaRue purport to amend the initial allocation by removing all cattle as property of the Trust.

In addition, the following testimony by Brent Fisher all stands in further support of one or both of the court findings:

- A. Well, I can't remember this hundred head of cows that's in this – in this letter was ever sent. (T.122:13-15).
- Q. Mr. Fisher, do you recall how many head of cattle were on the initial appraisal done by Cloward back in 1992 or 1993?
 - A. 52 head.
 - Q. 52, did you say?
 - A. 50 something, 52, 57. (T.134:12-17).
- Q. Is it your position, Mr. Fisher, that – in fact the Trust did not own 50 head of cattle at the time of your father's death?
 - A. No, they didn't.
 - Q. So, it is your position that the Trust didn't own any cattle at the time of your father's death?

⁶ Kim and Michael discredit this evidence based on Brent's testimony that there were never any cattle, making the Trustee's Allocation a "misrepresentation." AB at p.20. This would go to the weight, not the existence, of the supporting evidence. Kim and Michael fail to note that the trial court did not accept Brent's testimony discrediting the Trustee's Allocation. Moreover, the Trustee's Allocation was the most contemporaneous evidence and was also subscribed by then-current beneficiary and acting co-trustee, LaRue Fisher. Challenging the credibility of this evidence does not erase its existence for purposes of marshaling.

- A. Yes. (T.158:23 – 159:5).
- A. If those cows are there, I never sold none of the cows. The cows would still be there, if there's cows. I never sold none of the cows.
- Q. You are answering a slightly different question. You are basically saying there were no cows at the time of your father's death?
- A. Yes. (T.161:12-18).
- Q. Were there 50 head of cattle that existed at the time of your father's death, that had at some point in time been owned by him? Either you owned it now or somebody else owned it?
- A. No.
- Q. So what happened to the cattle that he had before his death?
- A. He sold them.
- Q. So he had sold all of that cattle, is that correct?
- A. Correct. (T.165:23 – 166:8).
- Q. Now, at the time that your father died, were there any cattle that had his brand on them?
- A. No. (T.172:11-13).
- Q. And you say that there never was 50 head of cattle, but you put it in there. For what reason did you put it in, why did you put it in?
- A. I don't – well, I thought there might be some cows that he had left there, he took all the culled cows and stuff, and the last few years he hadn't had any cows and I just – I just made a mistake. I never sold none of them cows with his brand on it. He'd taken his culled cows and he sold it. (T.208:8-17).
- Q. How many cattle did he [George] have when you started working on the ranch?
- A. About 150.
- Q. Did you see cattle sold from George's allotment?
- A. Yes.
- Q. Did you personally take cattle to the auction while George was alive to sell his cattle?
- A. Yes. (T.260:17-25).
- Q. What were the arrangements of your use of the [property], the ranch property, while your dad was still alive?
- A. I run it like he wanted me to run it, and I run it and I took all – like the calve crops. He never had no new – like you are saying, the cows that he had, there was no new cows on it because he never had no heifers, he never did calve out. (T.261:21 – 262:3).

Each of these nine lines of questioning either directly supports the trial court finding of 50 cattle or calls into question the existence of any cattle at all, including Kim

and Michael's challenge to the finding that there was not 100 cattle in the Trust. Moreover, LaRue's execution of the amended allocation, changing the number of allocated cattle to zero, would have been directly contrary to her own interest as the current beneficiary of the Trust. Certainly the evidence existed to call into question Kim and Michael's claim to 100 Trust cattle.

Even the sole evidence claimed by Kim and Michael in support of their 100 cattle argument was equivocal. The 1997 appraisal update refers to the livestock, "consisting of some 100 mixed breed, bred cows...." Exh. 17, p.2, (emphasis refocused). In other words, 100 was an approximation made in 1997 by the appraiser who never counted the actual cows owned by the Trust.

By its own terms, the 1997 appraisal update is "invalid" unless accompanied by the original November 12, 1992 appraisal. *Id.* at p.1. The trial court stated that it had "no confidence that the 1997 appraisal accurately reported the existence of 100 cows in the Trust." Ruling No. 1, R.535, ¶ 7. This was in part because there was "no evidence that the appraiser, who lived in Colorado, ever came to Utah and observed or counted cows." *Id.*; T.123:11-25. Kim and Michael argue error, pointing to testimony where the appraiser did visit the ranch in 1992 when conducting his original appraisal. AB at p.22. However, while the appraiser "could" have counted cows in 1992 as speculated by Kim and Michael (*Id.*), the court was correct that there was no evidence whatsoever that "some 100" cows were ever physically observed or counted by the appraiser. Any valuation made by the appraiser, whether in 1992 or 1997, was not based on any independent determination of the existence of enumerated cattle owned by the trust,

much less counting “some 100” cattle. Therefore, it was proper, and entirely within the trial court’s role as fact finder, to determine that there was no credibility to the claim of 100 cattle owned by the Trust, and to instead attribute 50 cattle to Trust ownership.

Kim and Michael overreach when they state that “[t]he original appraisal appraised 100 head of mixed breed, bred cows....” AB at p.23. We do not have the original appraisal. No one knows what was contained therein. Kim and Michael state as fact the very assumption they argue, being the only assumption favorable to their position. The only testimony on this point was Brent’s, who stated that the original appraisal only contained “50 something” cattle (T.134:12-17), and that was the basis for the information he included in the original Trustee’s Allocation in 1995, which also designated 50 cattle.

The evidence supporting the trial court’s finding that there were 50 cattle in the trust comes primarily from Exhibit 15, where 50 cattle are listed and valued in the Trustee’s Allocation. Of course, the evidence indicated that this value came from the first appraisal that was never offered into evidence. T.162:3-23. It is certainly a reasonable inference to draw that had the initial appraisal in 1992 valued 100 cattle as claimed by Kim and Michael, the original Trustee’s Allocation would have maintained consistency with that appraisal, as did the other values for the assets listed. The trial court’s cattle determination was certainly not clearly erroneous given the weak evidence supporting any contrary findings.

B. The Court did not Err in Finding that the Cows were Owned as of May 8, 1995.

As already indicated, on May 8, 1995, Brent and LaRue executed the Trustee's Allocation, wherein they reported that the Trust owned 50 head of cattle. The Court relied on this representation in part for its determination that Brent was responsible for any losses resulting being unable to account for those cattle now. However, the court did not set May 8, 1995, or any other date, as the date of conversion, as argued by Kim and Michael. What the trial court did find was that the Trust owned 50 cattle on May 8, 1995. Ruling No. 1, R. 535 ¶ 7. Further, the trial court found:

there was no evidence presented to support May 8, 1995, as a date which any cattle were converted. As stated above, there was no evidence to establish a specific date for the conversion of cattle or for any single cow. The Court would have to speculate to fix a date for the actual conversion of cattle. The cows may have been converted or the proceeds converted on May 8, 1995, or at any time after May 8, 1995. Moreover, as the Court noted in the October 2, 2006 ruling, it is likely that the cows were disposed of over a period of years.

Ruling No. 3, R.726 (emphasis added). This is the finding that Kim and Michael attempt to reverse, and there is no clear error in this finding.

It may be true, as argued by Kim and Michael, that the legal effect of the 1995 Trustee's Allocation was to identify that the Trust owned 50 cattle on the date of George Fisher's death in April 1992. However, there is a factual implication as well. If, as Kim and Michael have postulated, the cattle went missing as of George's death in 1992, it would be unusual—indeed damning— for Brent to list this asset on the Trustee's Allocation dated May 8, 1995. Regardless of the legal distinctions drawn in the appellants' opening

brief, the trial court, as fact finder, was well within its discretion to determine that as of May 1995 the cattle were still owned by the Trust. Otherwise, this allocation would not have included the cattle when prepared three years later. If the Court finds the 1995 Trustee's Allocation reporting as credible, it makes sense to find that the cattle existed in the Trust as of the date of the allocation. Therefore, there was no basis to set the date of conversion prior to May 1995.

Of course, there is no evidence of when the cattle actually went missing (aside from Brent's own testimony that they were all conveyed by George prior to his death and prior to Brent's administration of the Trust). Ruling No. 3, R.726. Therefore, the court used the May 1995 date as the last date on which it had a factual basis for believing that the cattle were still owned by the Trust. *Id.* Petitioners have not offered any evidence that Brent acted improperly respecting the cattle prior to the May 8, 1995 allocation. Therefore, it would be an error to find that the misappropriation occurred prior to that date. This is a proper and reasonable finding given the evidence, and again not clear error on the part of the trial court. Kim and Michael are not permitted to reverse this finding on appeal.

C. The Court did not Err in Setting the Value of the Cows.

Again, the trial court made a factual determination of the value of the cattle that were lost for purposes of setting the damages the Brent was required to reimburse the Trust. The court's finding was that the value of the 50 lost cattle was \$27,500. There was no direct evidence of the value of these cattle – the court's finding was based upon inferences drawn from indirect evidence. The trial court called out this difficulty in its

Ruling No. 1, stating that it “must express some frustration with the fact that there was no direct evidence as to valuation in 1995.” Ruling No. 1, R.536, ¶ 7. Nevertheless, it reached its value determination, and stated that “based upon the evidence before the Court, I am comfortable that this is the most accurate figure available to the Court.” *Id.* The court balanced competing evidence to reach its best determination of the value of the lost cattle. This weighing of the evidence was within the court’s role as fact-finder and should not be disturbed on appeal.

Based upon the court’s determination that the conversion occurred on or after May 8, 1995, the court then had two pieces of circumstantial evidence from which to calculate damages. First, the Trustee’s Allocation of May 8, 1995, included a statement that on April 18, 1992, the Trust owned 50 cattle valued at \$42,000. Exh. 15, p.4. This value came from an appraisal that occurred in 1992. T.162;3-23. Second, on February 22, 1997, the appraiser calculated cattle values at \$650 per head for five to seven year old cows, \$550 per head for seven to eight year old cows, and \$450 per head for nine to ten year old cows, “with a running average for the herd as a whole of \$550.00 per head.” Exhibit 17, p.2.

As between these two valuations, the court relied upon and adopted the second source, valuing the cattle at an average of \$550 per head. R.536, ¶ 8. This was a reasonable exercise of the court’s discretion. First, the appraisal relied upon was closest in proximity to the time the court set as the date of conversion. Second, the 1997 appraisal supported its valuation average based upon stated assumptions applicable to the herd in general regarding the aging of the herd by 1995.

The 1992 valuation was merely Brent's adoption in the 1995 Trustee's Allocation of some unknown statement made by the appraiser. Moreover, no one can be certain what exactly the 1992 values were. Brent asserted in the allocation that the value was \$42,000 for 50 cattle. Kim and Michael argue that the original appraisal must have included 100 cattle, since the 1997 update refers to 100 cattle. If in fact the 1992 appraisal applied a \$42,000 value to 100 cattle instead of 50, this variance would have a dramatic effect on the per-head value of the cattle in 1992. Ultimately, the 1997 updated valuations do not suffer from the uncertainties surrounding the 1992 appraisal which is not available for examination. Therefore, it was not error for the court to rely on Exhibit 17 for to reach its finding that the cattle were worth \$550 per head.

Even if Kim and Michael were correct in setting the date of conversion all the way back to George's death in 1992, the 1992 valuation evidence still suffers from the same deficiencies. Without the original appraisal, the trial court cannot know the methodology by which the appraiser calculated his values. Did he value 50 cattle for a total of \$42,000, as stated in the 1995 Trustee's Allocation? Perhaps, as suggested by Kim and Michael, he assumed 100 cattle in his \$42,000 total, resulting in a per head average of \$420 per cow. There is simply no way to know how the values reported in the Trustee's Allocation were reached. The most reliable evidence available to the court was the actual values presented in the letter from the appraiser in 1997, and the court did rely upon that evidence in reaching its value determination. There is no error in that process or result.

Finally, Brent notes that Kim and Michael have challenged an "implicit" finding by the court that an agreement between Brent and George "continued beyond George's

death.” AB at p.18. There is no such finding articulated in or inferred from any ruling of the court. Nor did the court make a determination on an issue outside of this case, as argued by Kim and Michael. *Id.* at p.19.

The statement that Kim and Michael challenge is the court’s finding that because of an agreement between Brent and George during his lifetime, the cattle that remained in the Trust by 1995 would have been older cows. *Id.* at p.18. This finding lays the foundation for determining which category of cattle ages to use in calculating their value, and is clearly within the scope of the issues the court was asked to address. Moreover, this finding does not hinge on any implicit determination that the agreement between Brent and George continued beyond George’s death. All the court has done is assess that based upon the evidence of Brent and George’s treatment of the herd during George’s lifetime, “the Court believe[d] that many, if not all, of the cows remaining in the Trust in 1995 were older cows.” Ruling No. 1, R.536, ¶ 7. Any value assessment should properly account for the aging of the cattle by the date of conversion, which the court considered in making its findings. This was reasonable and supportable by the evidence before the court.

Ultimately, each issue that the trial court determined when assessing liability and damages for the Trust’s cattle was a factual finding based upon the consideration and weighing of competing, often circumstantial evidence, including the testimony and demeanor of witnesses. There is sound justification for each of these findings. Certainly, the findings are not so lacking in evidentiary support as to be clearly erroneous.

Therefore, Kim and Michael are not entitled to reversal of the trial court's rulings regarding the cattle damages.

II. THE TRIAL COURT PROPERLY GAVE BRENT CREDIT FOR CERTAIN EXPENSES PAID ON BEHALF OF THE TRUST.

In their petition, Kim and Michael claimed that Brent used the Trust's ranch- and farm-land for the purpose of running his own cattle operation without paying value for that use. The parties agree that Brent was required to pay a fair rental value for his use of the Trust property. The court determined what that amount should be (\$56,452.56), credited Brent for value actually received (\$29,954.28), resulting in an outstanding balance owed by Brent to the Trust for his use of the property (\$26,498.28). Ruling No. 1, R.538-39. There was nothing improper regarding the trial court's ruling in this regard.

The court made findings as to the fair rental value of the Trust real property that Brent used – being \$6,200 per year. Ruling No. 1, R.538-39, ¶¶ 11, 13. This amount was applied across a period of approximately 9 years that Brent used the Trust property after George's death. In total, the court ruled that Brent was obligated to pay to the Trust \$56,452.56 for his use of the Trust's ranch and farm land. R.539, ¶ 14.

The trial court found that the Trust received a cash payment from Brent in the amount of \$10,000, and applied that amount as an offset to Brent's rent obligation for the property. R.537, ¶ 9. The court also gave Brent credit for certain direct payments made by Brent to third parties on behalf of the Trust in the total amount of \$19,954.28. R.537, 539, ¶¶ 9, 14. These payments consisted of water assessments and property taxes.

The court properly found that these payments were obligations of the Trust, but that Brent paid for them out of his own pocket for the benefit of the Trust. R.539, ¶ 14. These credits are no different than had Brent paid additional rent in cash to the Trust in the amount of \$19,954.28, leaving the Trust to pay that same amount directly to the vendors for water and property taxes. Under Utah law, Brent is entitled to credits for amounts paid on behalf of the Trust. In *Sundquist v. Sundquist*, 639 P.2d 181 (Utah 1981), the Utah Supreme Court stated that “a trustee is entitled to reimbursement for all expenses properly incurred in discharging the responsibilities of his trust.” *Id.* at 188. There is no reason to disturb this finding by the trial court and reduce the credit granted to Brent for these third-party payments.

Kim and Michael claim this finding is erroneous as a matter of law, citing only to the Restatement (Second) of Trusts (“Restatement 2d”). However, the authority they cite does not prevent the credit granted by the court. Section 205 of the Restatement 2d addresses liabilities imposed on trustees for breaches of trust. Comment (i), cited by Kim and Michael, permits claims against a trustee to recover any profit that the trust would have obtained but for the conduct of the trustee. This section does not prohibit crediting payments of property taxes and water paid by Brent on behalf of the Trust in this instance. Moreover, contrary to the argument of Kim and Michael, the trial court expressly found that these payments were expenses of the Trust. R.539, ¶ 14. The Restatement is not applicable to this finding by the trial court.

Finally, once again, Kim and Michael attempt to reverse a factual finding without marshaling the evidence supporting that finding. The support for these credits was set

forth in Exhibit 1. The testimony of the accountant that prepared Exhibit 1 was that the figures set forth for taxes and water would have been supported by documentation. T.51:5-52:7. Brent testified that Exhibit 1 was prepared based upon materials he delivered to the accountant. T.191:7-25. Brent testified that for other properties leased in the immediate vicinity, the landlords paid for the property taxes and water assessments. T.100:20-101:6; 102:12-15; 105:17-106:3; 113:5-113; 270:13-19. These payments were not paid by the tenant, or added as an increase to the rental amount paid by Brent. In addition, historically, Brent's "rent" for the Trust property as negotiated with George and in place for almost 18 years was for Brent to pay the cost of taxes and water assessments. T.263:6-264:16. While Brent had been paying this directly before George's death, this payment constituted the entirety of rent owed by Brent and was paid as an in-kind value constituting rent.

Kim and Michael would dictate to the trial court the form of evidence satisfactory to defend this claim, limiting it to "the check or voucher" for any payments made by Brent. AB at p.27. The trial court received evidence of a cash flow statement, derived from written documentation, confirmed by the testimony of the accountant and the trustee. The evidence presented was sufficient for the trial court to determine that Brent's payment of taxes and water assessments during the period of his administration of the Trust was in satisfaction of a Trust obligation, for which Brent was entitled to offsetting credit against his rental obligation. While fact-finders may differ as to the credibility given to the evidence relied upon by the trial court, deference must be given to the facts

found in this case and there is no justification to disturb these findings that are supported by clear evidence.

III. THE COURT DID NOT ABUSE ITS DISCRETION AND PROPERLY DENIED KIM AND MICHAEL AN ATTORNEYS' FEES AWARD.

Kim and Michael berate the trial court for its failure to award discretionary attorneys' fees, calling the decision "truly amazing" (in a pejorative context) and "excus[ing] the inexcusable." AB at pp. 30-31. They argue vehemently for "absolute" duties and "strictly" applied prohibitions (AB at pp.27, 30-31), yet they miss the crucial point – the trial court did hold Brent strictly liable for losses attributable to the loss of cattle and his use of the trust property. In this the trial court did not err; Brent was found liable for his conduct. However, these standards apply to liability determinations, not to discretionary awards of attorneys' fees. If the standards articulated for attorneys' fees were the same as those cited by Kim and Michael for underlying liability, it would turn fees awards upside down and remove all discretion from the trial court. Such is not the law of attorneys' fees generally (absent statutory or contractual authority), nor is it the law of attorneys' fees awards under trust administration.

There is no statute authorizing recovery of fees by a trust beneficiary.⁷ Nor are fees permitted under the Trust itself. Indeed, the Trust excludes fees from being assessed against Brent. Article 9D of the Trust limits trustee liability: "[a]ny liability whatsoever, of any trustee, whether prior or present, shall be limited and confined to the principal and income of the Trust Estate itself." Exh. 18, p.13.

⁷ Kim and Michael's claims were pursued in their capacity as Trust beneficiaries. T.12:1-6.

Hughes v. Cafferty, 2004 UT 22, 89 P.3d 148, does hold that fees may be awarded, even absent a contract or statute, when in the interest of justice and equity. *Id.* at ¶ 21. *Hughes* is replete with references to deference to trial court discretion and consideration of the overall facts and circumstances. *Id.* at ¶¶ 22, 23, 24, 25, 26, 27, and 29. While fees may be awarded where a beneficiary obtains a recovery against a trustee, meeting enumerated criteria does not entitle any litigant to equitable fees. *Id.* at ¶ 22, n.1. Indeed, charging fees against Brent personally, as requested by Petitioners, would contradict *Hughes*, which states that in most cases, “equity will require that a trustee possess a degree of culpability greater than mere negligence before the trustee is held personally liable for attorney fees.” *Id.* at ¶ 29, n.5.

Kim and Michael acknowledge that fee awards are discretionary, as shown by the following dialogue between counsel and the court in closing argument:

Mr. Bennett: ...when a trustee is found guilty of misconduct, the Court has the discretion to award damages [sic] either against the trustee personally, against the trust estate – on the attorney’s fees, I should say – or not to award attorney’s fees....

The Court: So, it’s just discretionary as an equitable principle?

Mr. Bennett: That’s correct....

Cl.34:13–35:3. Moreover, after arguing that good or bad faith does not factor into determining liability on their claims, Kim and Michael acknowledge that the trial court’s decision on fees should turn on the “central focus” of “culpability.” AB at p.37.

Here, the court’s fee determination did focus on Brent’s culpability, and the court exercised its discretion with a reasoned analysis for its determination. The court made an

express finding that Brent's conduct "was born of a good faith, albeit mistaken belief as to his rights and obligations with respect to the Trusts."⁸ Ruling No. 1, R.537 ¶ 10. The court also articulated a half-page justification for its decision not to award attorneys' fees. This reasoning included identifying Brent as prevailing on one claim for conversion of \$170,000 in cash, reducing a second claim for cattle damages by more than two-thirds, and reducing a third claim for rental recovery by more than one-half. R.540, ¶ 17. As concluded by the court, "where claims are grossly overstated, it is reasonable that a defense be made." *Id.* Denying Kim and Michael's request for fees was clearly supported by a reasonable analysis, and cannot be said to be an abuse of the court's discretion.

Kim and Michael offer two main grounds constituting abuse. First, they claim the court "fail[ed] to understand" the standards of self-dealing and loyalty. AB at p.31. In other words, they argue that because Brent's breach of these duties is so patently

⁸ Kim and Michael also challenge this finding (AB at p.31), though not expressly identified as an Issue for Review. The evidence reflects, though Petitioners ignore, that Brent sought legal advice from Paul Barton in "lots of meetings" for several years after becoming trustee. T.114:6-16; 117:25-118:25; 148:21-149:10. Thereafter, Brent engaged at least three more attorneys to assist in the trust administration and disputes with Max Fisher and Petitioners. T.114:23-115:10; 187:14-189:4. Additionally, Brent engaged the services of an appraiser to value the property at the recommendation of counsel, including an updated valuation. T.119:4-120:3. Finally, at the recommendation of counsel, Brent hired Rodney Aycock, a licensed CPA, to provide a financial statement to the beneficiaries as arranged between Mr. Aycock and Brent's attorney. Exh. 1, T.18:14-25; 54:10-19; 57:12-24; 195:9-13. This is not the conduct of a person disregarding the obligations owed as a trustee. Moreover, Brent's entire testimony included evidence of Brent's best efforts to do what was expected of him as trustee. Brent is not a professional trustee nor probate attorney by trade. He relied on the advice of professionals, as Brent was entitled to do without independent investigation into their recommendations. Utah Code Ann. § 75-7-402(y) (1992).

egregious as to rise to a strict liability standard, the court had no choice but to award these fees. However, this argument would remove all discretion from a fees award in this context. Kim and Michael's paradigm would mandate that trustees be liable for fees for any breach of these sacred duties. Discretion would be stripped, and this is contrary to the holdings of *Hughes*.

Second, Kim and Michael argue that Brent's production of documents, deficient in their minds, also mandated that the court award their attorneys' fees. AB at pp. 32-35. Again, Kim and Michael miss the fact that the court imposed upon Brent consequences for the content of the records that he kept and produced. Brent claimed significantly greater in-kind payment credits made on behalf of the Trust, and set forth in the Exhibit 1 financial statement, which the trial court refused to consider. Ruling No. 1, R.536-37 ¶ 9. The court "lacked confidence" in the accuracy of the amounts listed (*Id.*), and limited the benefit claimed by Brent far below that which he would otherwise have been entitled if he had more reliable evidence to produce. The court drew distinctions based on the reliability of various financial transactions testified to at the hearing.

However, penalizing Brent for the quality of records maintained and produced does not rise to a level mandating Kim and Michael's reimbursement of attorneys' fees. The scope of Brent's duty to keep records is subjective. "Given the diversity of trusts and trustees, the law recognizes that the duty under this Comment [to keep records] may be satisfactorily discharged by simple, orderly forms of bookkeeping and record maintenance, disclosing information in an understandable manner that will enable beneficiaries to determine whether the trust is being properly administered." Restatement

(Third) Trusts, (“Restatement 3d”) §83, comment a. Here, we have perhaps the simplest form of trusts – the family ranch administered by the ranch-hand son upon the father’s passing. Brent was a rancher by trade, and had never acted as trustee of a trust, or even known a trustee, before. T.97:3-7; 148:18-20; 194:16-18. Upon the advice of counsel, Brent took his financial records to an accountant to prepare a schedule for the express purpose of identifying information to determine what moneys were coming into and leaving the Trust. T.26:20-27:11; 57:12-24. Brent’s financial statement at Exhibit 1 accomplished that purpose – it put the beneficiaries on notice that they were not happy with the administration and believed they had claims against Brent which they were able to pursue. Brent did not breach his duties to maintain sufficient records under the circumstances.⁹

Moreover, even if he did, the consequences argued by Kim and Michael are not required. Kim and Michael would have this conduct impose a shifting burden of proof to Brent to further prove support for every entry on the accounting. AB at p.35. The Restatement sets forth consequences for failing to keep records, including liability for actual losses. Optional remedies include presumptions against the trustee, reducing or denying compensation, removal, or corrective actions. Restatement 3d, §83, comment a(1). The court did impose some of these optional remedies in refusing to credit Brent for the full amount of reimbursements which he claimed. This decision was reached based upon an analysis of the totality of the circumstances in this case, and an analysis of

⁹ Moreover, the trial court was very clear that this was not an issue before it at trial. Ruling No. 2, R.600-01. “The Court was never asked to make a finding that Brent Fisher violated his duties as a trustees [sic] to keep records, and did not do so.”

which evidence the trial court deemed more reliable. However, nothing in the authorities cited by Kim and Michael make it an abuse of discretion for the court to accept the Exhibit 1 accounting and apply such portions as it deemed reliable and credible. Most importantly for this argument, it is a further untenable stretch to impose culpability to such a degree as to mandate the trial court assess Kim and Michael's attorneys' fees to Brent, or that failure to do so would be an abuse of discretion.

Petitioners sought nearly \$390,000 in damages before interest on three issues, and recovered less than \$54,000 before interest on two issues - less than 15% of the damages sought. Based on that comparison, for the Court to determine that Petitioners were not the prevailing party, and therefore not entitled to an equitable award of attorneys' fees, was entirely within the court's proper exercise of discretion and should not be reversed.

IV. THE COURT DID ERR AS A MATTER OF LAW WHEN IT APPLIED PREJUDGMENT INTEREST TO THE DAMAGES AWARD.

The trial court faced two questions regarding the propriety of prejudgment interest. First, does the Trust's limitation of liability against a trustee preclude an award of any prejudgment interest? Second, because the evidence regarding the date of cattle conversion and cattle valuations was imprecise, should the court deny prejudgment interest on the cattle damages? The trial court included interest as applicable to all damages awarded, thereby answering each of these questions in the negative. Ruling No. 1, R.540 ¶ 16; R.750. These conclusions were errors which this Court reviews for correctness, and which should be reversed.

A. The Trust Excludes Interest as Permissible Damages.

As indicated previously, the Trust contains a clause limiting the liability of trustees to the principal and income of the Trust. “Any liability whatsoever, of any trustee, whether prior or present, shall be limited and confined to the principal and income of the Trust Estate itself.” Trust, Exh. 18, p.13.

It is the role of the court to implement the policy of the Uniform Trust Code to carry out the intent of the trustor. *In re Gerber*, 652 P.2d 937, 939 (Utah 1982) (intent of trustor is “primary object” of the court in construing the provisions of the trust.) Here, George and LaRue acted as the initial trustees under the Trust. Trust, Exh. 18, p.9. The Trust specified that upon George’s death, two of his children would act as successor trustees. *Id.* In this instance, the limitation of liability clause evidences a clear intent of the trustor to hold those family members acting as trustee accountable for any actual damages to principal and income of the Trust, and no more. Had George, as trustor, intended to extend trustee liability to interest on the principal and income, it would be expected that the carveouts to liability exclusion would have said “principal and interest”, or “income and interest.” The plain reading of a limiting clause would be subverted by implying an additional exception not expressly provided by George. This clause should be interpreted as written, and not expanded to include any implied damages comprised of interest on those damages expressly permitted.

B. The Cattle Damages are Too Indefinite to Impose Prejudgment Interest.

Even if prejudgment interest is permitted under the Trust language, based upon the express findings of the trial court it was improper to award prejudgment interest for the cattle damages. Without sufficient certainty as to the amount or onset of damages, prejudgment interest on those damages is not available.

Utah law requires a heightened level of certainty and definiteness as to prejudgment interest damages. “[W]here damages are incomplete or cannot be calculated with mathematical accuracy...the amount of the damages must be ascertained and assessed by the trier of the fact at the trial, and in such cases prejudgment interest is not allowed.” *Cornia v. Wilcox*, 898 P.2d 1379, 1387 (1995) (quoting *Canyon Country Store v. Bracey*, 781 P.2d 414 (Utah 1989)).

1. The Value Calculation for the Cattle Damages is Insufficiently Definite.

In *Cornia*, the court also faced the issue of awarding prejudgment interest on cattle damages. Actual damages were awarded to the plaintiff based upon an expert’s value calculation. The jury received “conflicting testimony from experts” regarding the cattle’s and calves’ expected pregnancy rates, gender, weight range, loss rates, mortality rates, and market prices. The jury was free to use its best judgment in relying upon the plaintiff’s expert witness, whose estimate was “a reliable enough basis for awarding damages.” *Cornia*, 898 P.2d at 1387. However, it was not sufficiently definite as “measured by facts and figures” in order to calculate those damages “with mathematical certainty.” *Id.* (internal quotations omitted). Therefore, a prejudgment interest award on those damages was properly denied.

In this case, the Court did not even have evidence on the matters in conflict before the *Cornia* court. There was no evidence regarding the cattle's weight, health, condition, or any other factor that might bear on the issue of value. The only valuation evidence was an overall herd valuation as of 1992 in the amount of \$42,000.00, and a general list of various cattle prices in 1997 broken down by overlapping age ranges. There was no effort to correlate the 1992 total herd valuation to existing cattle prices at that time, nor was there any effort to correlate the generic 1997 prices to the physical realities of the Trust herd in 1997. In fact, there was no indication in the testimony at trial that the appraiser providing values in 1992 and 1997 ever physically counted or inspected the condition of the cattle he appraised. The court took this spotty evidence and made its best effort to estimate the amount of the actual damages. However, this process is far too uncertain and immeasurable to form the basis of a prejudgment interest award.

In *Canyon Country Store*, the court denied prejudgment interest on lost profit damages. That court used the same standard applied by the *Cornia* court, requiring damages "measured by facts and figures" and "calculated with mathematical accuracy" before assessing prejudgment interest on the damage award. *Canyon Country Store*, 781 p.2d at 422. The court found that while a formula to determine lost profits may be sufficient for a damages verdict, it was too speculative to form the basis of a prejudgment interest award, and such an award would be "inappropriate." *Id.*

In this case, the trial court's ruling as to the value of the cattle is the very definition of speculative. The court stated its "frustration" over the lack of any direct evidence on this point. Ruling No. 1, R.536 ¶ 7. It took what evidence existed as to the

value of cattle generally in 1997, figured that most of the cattle herd would have been older due to the passage of time since George Fisher's death, used the middle age range of 7-8 years for valuing the entire 50-cattle herd, and multiplied \$550.00 per head times 50 cattle for total damages of \$27,500.00. *Id.* The court acknowledged that this was the best it could do given the scarcity of evidence placed before it. Ruling No. 2, R.602. However, this calculation is far from mathematically certain. Utah law precludes award of prejudgment interest in "best judgment" cases, where the fact-finder must determine a loss by its best judgment, rather than fixed valuation. *Shoreline Dev., Inc. v. Utah County*, 835 P.2d 207, 211 (Utah App. 1992). Given the trial court's acknowledgement of the imprecise damage calculation, it was error to allow prejudgment interest to be awarded.

2. The Date of Loss for the Cattle is Insufficiently Definite.

In addition, a prerequisite to the award of prejudgment interest is the finding of a date certain on which the loss occurred, from and after which prejudgment interest can attach. Prejudgment interest is allowed "[w]here the damage is complete and the amount of the loss is fixed as of a particular time...." *Cornia*, 898 P.2d at 1387 (quoting *Canyon Country Store*, 781 P.2d at 422). As previously explained, the trial court made no finding as to a particular time at which the loss of cattle to the Trust was fixed – indeed the court said it was unable to make any such finding. Ruling No. 3, R.725-26. The court received no evidence fixing the date of any such loss. The only finding relating to the cattle that is tied to any particular time is that as of May 8, 1995, the Trust still owned 50 head of cattle, and as of the date of trial, the cattle were no longer part of the Trust. *Id.* All the

court could and did determine was that sometime between May 8, 1995, and March 16, 2006, the Trust incurred a loss of 50 cattle with a best estimate of value of \$27,500. There can be no fixing of a particular time when the loss occurred, from and after which prejudgment interest should be assessed. It would be improper to assess prejudgment interest for any period during which the Trust did not suffer any loss. Because there is no evidence of when that time was, this Court cannot assess interest from any fixed date.

Every finding by the trial court supports this outcome. In its Ruling No. 1, the court “express[ed] some frustration with the fact that there was no direct evidence as to valuation in 1995.” In its Ruling No. 2, the court stated that because there was no direct evidence as to when the conversion occurred, determining the date of conversion was difficult. R.601. In its Ruling No. 3, the court ruled that it could not fix a date on which the damage occurred. R.725-26. Again restating the difficulties the court faced regarding the time when damages were sustained, the court stated that “the Court does not believe that it has received evidence which the Court can rely upon to establish a specific date of conversion.” R.725. There was no evidence offered to establish a date of conversion for the herd generally or any specific cow from the herd. R.726. As noted, “it is likely that the cows were disposed of over a period of years.” *Id.* Accordingly, the trial court determined that “it appears that the Court would be prohibited from awarding pre-judgment interest for damages associated with the conversion of the cattle.” *Id.*

After allowing briefing on this issue, the trial court reversed course. In its Ruling No. 4, the trial court reaffirmed that “the date in which [Brent] converted the cows is unknown.” Ruling No. 4, R.749. None of the factual findings regarding cattle

prejudgment interest changed. Nevertheless, the trial court determined that policy reasons supported assigning the burden of establishing the time of conversion on Brent. Relying on a case out of the Second Circuit Court of Appeals, the court felt that the party most likely to ascertain the actual date of loss should have the burden of establishing that date. On that basis, the court reinstated the prejudgment interest award against Brent.

This equitable attempt by the court was not supported by any Utah law. Indeed, it circumvents the legal principles articulated above regarding the definiteness required for awarding prejudgment interest. Moreover, it put Brent in the untenable position of adducing evidence contrary to his testimony and which he claims does not exist. It remains Brent's position as stated in his testimony at trial that cattle never existed as part of the Trust from and after the death of George Fisher. *See supra* pp. 13-14. In addition, this approach fails to address the insufficient specificity of the court's ruling regarding the value of the cattle to support a prejudgment interest award. The evidence was sufficient to reach a "best guess" regarding the actual damages incurred. It is not sufficient to support a prejudgment interest award. It was legal error for the court to shift the burden of establishing these elements to Brent, particularly in the face of his position denying liability in the first instance.

The court should have followed *Cornia* and *Canyon Country Store* and denied prejudgment interest on the cattle as an element of damages in this case. This court should reverse that prejudgment interest award.

V. THE COURT DID ERR AS A MATTER OF LAW IN DENYING BRENT'S CLAIM FOR ATTORNEYS' FEES.

The court's Judgment contains the following denial of attorneys' fees: "Petitioners' claim for attorneys' fees to be assessed in favor of the Trust and against Respondent personally is denied. The Court awards no attorney fees." R.791. While this judgment is proper as to the discretionary fees sought by Kim and Michael, it is improper as to the statutory fees requested by Brent. Brent requested reimbursement of his fees from the Trust in this action, and the trial court failed to grant this request. This Court should reverse that language and direct an award reimbursing Brent his fees.

As previously addressed, in its Ruling No. 1 the trial court carefully addressed the grounds on which it denied fees requested by Kim and Michael. R.540. That ruling was silent as to any analysis of Brent's fee request. Nevertheless, the Ruling included the language that "[g]iven all the circumstances in this case, no attorney fee will be awarded." *Id.*

This issue was first challenged in Brent's objection to Kim and Michael's proposed findings of fact and conclusions of law. That proposed language mirrored Ruling No. 1, stating "The Court should deny Petitioner's claim that Respondent personally pay the fees incurred in their bringing this action, and it should award no attorney fees in this matter." In hopes of preserving his statutory claim for an award of attorneys' fees for the position which he took in good faith in the litigation, Brent filed an objection to this proposed language:

Brent agrees that the Court ruled it would deny Petitioners' claim for attorneys' fees. The Ruling did not address all fees in this

matter, and this conclusion of law would cut off Brent's statutory right to reimbursement of fees incurred in a good faith defense of claims asserted against him as Trustee of the Trust.

Attorneys' fees are addressed in paragraph 17 of the Ruling. The Court is expressly addressing Petitioners' claim, as asserted in the Petition, for a fees assessment against Brent personally. Paragraph 17 of the Ruling sets forth 12 lines of justification why Petitioners are not entitled to an award of fees as requested. Paragraph 17 of the Ruling does not address Brent's statutory entitlement to fees. Indeed, the Ruling states that it is not apparent that Petitioners were the prevailing parties on any issue, that the claims against Brent were "grossly overstated," and that it was reasonable that Brent defend those claims. Those findings lay the predicate for Brent's statutory entitlement to fees under Utah Code Ann. § 75-7-1004(2). The Ruling makes no statement as to a denial of fees to which Brent is entitled. Therefore, Paragraph 8 of the Conclusions of Law should read that the Court should award no attorneys' fees to Petitioners under the Petition.

R.614.

Notwithstanding Brent's objection, the Court issued its Ruling No. 3 approving Michael and Kim's proposed language for the conclusions of law, arguably an effective denial of Brent's objection. R.727. The Court further stated that it would approve such language in a proposed judgment that had yet to be prepared. *Id.* That language is contained in the final Judgment entered by the Court. R.791.

Brent is statutorily entitled to recover his fees in this matter. Section 75-7-1004 of the Utah Uniform Trust Code states:

If a trustee defends or prosecutes any proceeding in good faith, whether successful or not, the trustee is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorney's fees, incurred.

Based upon the trial court's findings and conclusions, there can be no doubt that Brent defended this proceeding in good faith. *See* Ruling No. 1, R.537 (Brent's conduct "was

born of a good faith, albeit mistaken belief as to his rights and obligations to the Trusts”); R.540 (Brent prevailed on one issue, reduced the requested recovery by two-thirds on another issue, and by more than one-half on a third issue; “where claims are grossly overstated, it is reasonable that a defense be made”). Those findings in place, Brent was entitled by statute to recover his reasonable attorneys’ fees as requested in the proceeding.

Indeed, the trial court later clarified its own intent with regard to Brent’s attorneys’ fees. Brent had brought a motion for contempt against Kim and Michael on the basis that after the Judgment was entered, they used Trust funds to pay their attorneys’ fees incurred in this action. R.811. On September 18, 2008, the trial court entered a Ruling and Order, denying Brent’s motion. As grounds for this denial, the court stated that its prior rulings indicated that “none of the parties were entitled to attorney fees as the prevailing party.” R.898. However, the court noted that its rulings “did not decide the issue of whether it was appropriate for the Trust to reimburse Kim Fisher and Michael Fisher for Attorney [sic] fees expended to obtain the judgment in this matter.” R.898-99. The trial court stated that issue “was not presented to the Court.”¹⁰ According to the trial court, all it intended from its judgment was a denial of fees against Brent personally and a denial of fees against Kim and Michael personally. R.899. The court believed that “there is not an order in place which prevented the trust from paying attorney fees.” *Id.*

¹⁰ Brent disagrees that the issue of Trust reimbursement of fees was not presented to the trial court. In closing argument, Kim and Michael argued for an award of their fees under a standard permitting discretion in awarding fees from either the trustee or the Trust. Cl.34:13-20. Brent also argued for an award of his fees from the Trust under U.C.A. § 75-7-1004. Cl.74:8-75:7.


Brent agrees that there should not be an order preventing the Trust from paying his attorneys' fees. However, the language of the Judgment, denying any attorneys' fees, in light of Brent's express request for an award reimbursing his fees from the Trust, can be used to prevent Brent's recovery. Brent is entitled to a ruling that does not deny his attorneys' fees. Moreover, based upon the language of the Utah Probate Code and the trial court findings regarding Brent's defense of this action, Brent is entitled to an affirmative award of his fees from the Trust in this proceeding as requested of the trial court. This Court should reverse and remand with instructions on this point.

CONCLUSION

For the foregoing reasons, Brent respectfully requests that the Court *affirm* the District Court's findings regarding cattle damages and credits offsetting rental obligations, as well as the District Court's denial of Kim and Michael's attorneys' fees request. In addition, Brent requests that the Court *reverse* the trial court's conclusions regarding the application of prejudgment interest and the failure to award attorneys' fees to Brent.

DATED this 19th day of February, 2009.

KIRTON & McCONKIE

By 

Benson L. Hathaway, Jr.

Thomas A. Mecham

Christopher S. Hill

Attorneys for Respondent, Appellee and
Cross-Appellant Brent Fisher

CERTIFICATE OF SERVICE

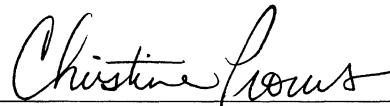
I HEREBY CERTIFY that on this 19th day of February, 2009, I caused to be served two copies of the foregoing **BRIEF OF APPELLEE AND CROSS-APPELLANT**, by the method indicated below, to the following:

Charles M. Bennett
BLACKBURN & STOLL LC
257 East 200 South, Suite 800
Salt Lake City, UT 84111-2048

☒ (X) U.S. Mail, Postage Prepaid
☐ () Hand Delivered
☐ () Overnight Mail
☐ () Facsimile

Susan Thacker
P.O. Box 281
Jensen, UT 84035

☒ (X) U.S. Mail, Postage Prepaid
☐ () Hand Delivered
☐ () Overnight Mail
☐ () Facsimile



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