

2008

# Kim Fisher and Michael Fisher v. Brent Fisher : Appellant's Reply Brief and Answer to Appellee/ Cross Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

<b>IN THE MATTER OF THE GEORGE FISHER, JR. FAMILY INTER VIVOS REVOCABLE TRUST,</b>  <b>An Irrevocable Trust.</b>	<b>Appellate Case No. 20080389-CA</b>  <b>Trial Court Case No. 043800019</b>  <b>Judge A. Lynn Payne</b>
<b>KIM FISHER AND MICHAEL FISHER,</b> <b>Appellants,</b>  <b>vs.</b>  <b>BRENT FISHER,</b> <b>Appellee.</b>	

**APPELLANT'S REPLY BRIEF  
AND ANSWER TO APPELLEE/CROSS APPELLANT**

**APPEAL FROM THE JUDGMENT  
OF THE EIGHTH JUDICIAL DISTRICT COURT**

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**FILED  
UTAH APPELLATE COURTS  
MAR 18 2009**

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## ARGUMENT

### 1. **At a Minimum, the Court of Appeals Should Hold That Brent Fisher Converted 50 Head of Cattle at a Value of \$42,000 on April 18, 1992.**

The trial court originally found that Brent Fisher converted 50 head of cattle on May 8, 1995, but it later changed its ruling and found there was no evidence of when the cows were converted. R.537, 725. Both rulings are clearly erroneous. In his Brief, Brent admitted that the May 8, 1995 Trust Allocation (T.Exh. 15) established that the Trust owned 50 head of cattle on April 18, 1992 (George Fisher, Jr.'s date of death):

It may be true . . . that the legal effect of the 1995 Trustee's Allocation was to identify that the Trust owned 50 [head of] cattle on the date of George Fisher's death in April 1992.

Brief of Appellee and Cross Appellant ("Appellee's Brief") at 17. Brent did not account for any cattle in his "accounting" (T.Exh. 1), thus establishing April 18, 1992 as the date of conversion. Brent repeatedly testified that the Trust owned no cattle at the time of his father's death, further establishing April 18, 1992 as the conversion date. The May 8, 1995 Trust Allocation established that the Trust owned 50 head of cattle on April 18, 1992 at a value of \$42,000. T.Exh. 15, at 1, 4; *see* Appellant's Brief at 15-18.

Thus, the trial court's clearly erred in holding there was "no evidence" of the conversion date.<sup>1</sup> The Court of Appeals should reverse that ruling, and at a minimum, it

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<sup>1</sup> As to the date of conversion only, the Fishers agree that they identified the wrong standard of review. Appellee's Brief at 2. However, the Fishers could not have marshaled the evidence in favor of the trial court's finding on this point, since it held *there was no evidence establishing the date of conversion*. R. 725. Instead, the Fishers have properly established that there was evidence of the date of conversion and that evidence was un rebutted.

should find that Brent converted 50 head of cattle on April 18, 1992 at a value of \$42,000.00.<sup>2</sup>

**2. The Trial Court's Finding that 50 Head of Cattle were Converted is Clearly Erroneous.**

When a party challenges a finding of fact as clearly erroneous:

[T]he appellate court may examine all of the evidence in the record. It will presume that the trial court relied only on evidence properly admissible in making its finding in the absence of a clear showing to the contrary. It must give great weight to the findings made and the inferences drawn by the trial judge, but it must reject his findings if it considers them to be clearly erroneous. . . .

[I]f the findings . . . are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings . . . will be set aside.

*State v. Walker*, 743 P.2d 191, 193 (Utah 1987).

Brent claims that the Fishers failed to marshal the evidence in support of the finding that Brent converted 50 head of cattle. Appellee's Brief at 11-14. The Fishers discussed the May 8, 1995 Trust Allocation at length (Appellant's Brief at 15-18) and acknowledged that it supported a finding of 50 head of cattle. Appellant's Brief at 17. With one exception, neither Exhibit 16 nor any of Brent's citations to his testimony support the trial court's finding regarding the number of cattle converted. Appellee's

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<sup>2</sup> The Fishers correctly identified the valuation of the cattle as a question of law. Appellant's Brief at 24. When a party converts an asset, the fair market value on the date of conversion is the normal measure of damages. *Broadwater v. Old Republic Sur.*, 854 P.2d 527, 531 (Utah 1993). The trial court used a valuation done in February 1997.

Brief at 11-14 (identifying Brent's false testimony that the Trust owned no cattle at George's date of death). As to the exception, Brent testified the first appraisal valued 52 head of cattle and then changed that to "50-something 52 or 57." T. 134. But when questioned thereafter by the trial court, Brent testified:

Q. And did you also say the initial appraisal listed cattle on it?

A. I didn't. They said there was.

Q. Do you know whether or not the initial appraisal had cattle on it?

A. No.

T.207. In his case in chief, Brent then changed that testimony and stated that there were 50 head of cattle in the first appraisal. T.282. Of course, there were multiple times he testified the Trust owned no cattle when George died. *See* Appellant's Brief at 20. Where the trial court relied only upon the May 8, 1995 Trust Allocation (R. 537), the Fishers believe they properly marshaled the evidence that supported the trial court's finding on the number of cattle.

The issue presented is whether the trial court's reliance on the 50 head of cattle identified in the May 8, 1995 Trust Allocation was clearly erroneous. The fact that Brent repeatedly disclaimed the accuracy of the Allocation is important. While it is the province of the trial court to weigh conflicting evidence, under Utah law, "ordinarily a person will be bound by his own testimony against his interests." *De Vas v. Noble*, 13 Utah 2d 133, 139, 369 P.2d 290, 294 (Utah 1962) (identifying an exception to the rule when the party has diminished mental capacity). Similarly, "[o]rdinarily the court will hold a party responsible for the unfavorable aspects of the testimony he presents." *Ray v.*



*Consolidated Freightways*, 4 Utah 2d 137, 144, 289 P.2d 196, 201 (Utah 1955). Given these rules, Brent's testimony, his duty to account, the Court of Appeals should carefully examine the trial court's finding regarding the number of cows to determine if it is "against the clear weight of the evidence" or if the Court "otherwise reaches a definite and firm conviction that a mistake has been made." *State v. Walker*, *supra* at 193.

The evidence in support of the trial court's finding is the May 8, 1995 Allocation and Brent's testimony (T. 282) that the first appraisal appraised 50 head of cattle. Both have questionable probity given:

- (i) Brent's testimony in response to the Court's questioning that he did not know if the first appraisal included cattle ( T.207);
- (ii) Brent's execution of the Amended Allocation in 2004 (T.Exh. 16), 9 years after the initial Allocation in 1995, claiming it "has now come to the collective attention" of the trustees<sup>3</sup> that the May 8, 1995 Trust Allocation was in error;<sup>4</sup> and
- (iii) Brent's repeated testimony that the Trust owned no cattle at George's date of death. Appellee's Brief at 11-14; Appellant's Brief at 20.

The Fishers claim there were 100 head of cattle based on the following evidence:

- a. The updated appraisal letter dated February 22, 1997 (T.Exh 17), and the fact:
  - i. It was addressed to Brent;
  - ii. It was sent to Brent "at his request;"

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<sup>3</sup> LaRue was not entitled to act as a co-Trustee of either the Marital Trust or the Family Trust. *See* T.Exh. 18 at 9, Article VIII, Paragraph A; T.142-43.

<sup>4</sup> *See also* Brent's testimony regarding "it has come to the collective attention" of the trustees. T.164.

- iii. It identified the assets of “the George Fisher, Jr. Family Trust, Consisting of . . . Fisher Livestock – 100 Bred Beef Cows;”<sup>5</sup>
  - iv. It provided “updated values” of the assets listed in the initial appraisal done on November 12, 1992;
  - v. The initial appraisal contained detailed descriptions of the property; and
  - vi. The purpose of an appraisal is to identify the property to be appraised and its fair market value.
- b. It was Brent’s duty as trustee to keep the records of the Trust, including that initial appraisal.
- c. After first admitting he received the February 22, 1997 letter, Brent denied any recollection of the letter. *Compare* T.124 *with* T. 125-26.
- d. The family held a meeting in Paul Barton’s office (T.219-222) where:
- i. Brent was there with LaRue, each of his siblings, and Brent’s attorney Paul Barton;
  - ii. Each participant had a copy of the February 22, 1997 letter;
  - iii. The purpose of the meeting was to discuss the division of the trust’s assets among its beneficiaries;
  - iv. The participants used the February 22, 1997 letter in the course of the meeting; and
  - v. Brent never objected to the letter’s identification that there were 100 head of beef bred cows at the time of George Fisher Jr.’s death.

The Fishers believe this analysis leads to the conclusion that the trial court’s finding is against the clear weight of the evidence and that a mistake has been made.

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<sup>5</sup> Given the letter had already identified the exact number of cows as “100 Bred Beef Cows,” the reference to “some 100 mixed breed, bred cows” (emphasis in original) refers not to the number of cows but to their newly identified “mixed breed[s].”

They ask the Court of Appeals to hold that the Trust owned 100 head of cattle valued at \$840.00 per head at George's date of death.

**3. Brent Should Not Receive a Credit for Property Taxes and Water Assessments.**

Brent argues that the Fishers did not marshal the evidence in support of this claimed error. Appellee's Brief at 23-25. The Fishers, however, argued two legal issues. First, they argued that giving Brent a credit for property taxes and water assessments, when he had converted and used the land for his own benefit, was erroneous as a matter of law. Appellant's Brief at 26; *see c.f. Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶28, 96 P.3d 893 (acknowledging alternative damage methodologies may be appropriate in cases of conversion). Whether Brent paid for the property taxes and water assessments is irrelevant. He is not entitled to a credit for payments that he made for his personal benefit in running the Trust's converted cattle and his own cattle (T.260) on the Trust's ranch and farm land.

If the Court of Appeals does not reverse on that ground, then the Fishers challenge the trial court's refusal to consider Brent's duty to account, to obey its order to produce all supporting documents, and Brent's verification that he had done so. The trial court erroneously held that the Fishers had not raised the issue. Appellant's Brief at 32-35. The Fishers acknowledge there is evidence to support the trial court's findings that these payments were made, but they claim the trial court improperly put the burden of

persuasion on the Fishers. Thus, at a minimum, the Court of Appeals should remand for reconsideration in light of Brent's duties to account and obey the trial court's order.

#### **4. The Trial Court Abused Its Discretion in Not Awarding Attorney Fees.**

After acknowledging that "the legal effect of the 1995 Trustee's Allocation was to identify that the Trust owned 50 [head of ] cattle on [April 12, 1992]," Brent admits:

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.

Appellee's Brief at 17. It is "indeed damning" because it establishes, at a minimum, that Brent converted 50 head of cattle on April 18, 1992 worth \$42,000.00. Moreover, this is not his only violation of the duty of loyalty, the prohibition against self dealing, and the taking of trust assets. He did much the same with the Trust's ranch and farm land.

R.537. As a result, the trial court's finding that Brent acted in good faith under the mistaken belief as to his rights and obligations is an abuse of discretion. Neither the trial court nor Brent identified any misunderstanding that would have authorized him to convert 50 head of cattle that belonged to the Trust. In fact, Brent acknowledged that a trustee did not have the right to take trust assets for his own benefit *and* that he knew he had to account and keep accurate records. T. 153.

The trial court's view of the equities in this case is disheartening. On the one hand, it finds that "[Brent] has not acted or engaged in any conduct which approaches malicious or intentional conduct" (R.537), apparently believing (i) his violation of his

duty of loyalty, (ii) his violation of his duty not to self deal, (iii) his conversion of valuable trust assets, and (iv) his failure to account for the assets he converted, were unintentional. Conversion results only from intentional conduct, although in certain limited circumstances the converter may not be a conscious wrongdoer. *Allred v. Hinkley*, 8 Utah 2d 73, 76-78, 328 P.2d 726, 728 (Utah 1958) (noting a bona fide purchaser of stolen property would still be a converter). Here, Brent's execution of Exhibit 16 in 2004 denying the Trust owned any cattle at George's date of death, his statement in Exhibit 16 that the alleged mistake had just come to the trustees' attention, and Brent's execution nine years earlier of the May 15, 1995 Trust Allocation affirming that the Trust owned 50 head of cattle at George's date of death establish both a consciousness of guilt and an attempt to rewrite history to hide his conversion of the Trust's cattle.

On the other hand, while giving the converter a pass, the trial court penalized the innocent beneficiaries who sought damages in excess of what the trial court thought was appropriate. R.540. The trial court refused to consider the importance of Brent's failure to account, to keep accurate records, and produce records pursuant to the trial court's order because it erroneously held the issue had not been raised. *Compare* R.600 with Appellant's Brief at 32-34. Thus, by not accounting, keeping records, and producing records the trial court ordered him to produce, Brent was able to keep the true damages secret *and actually to benefit* from his failure to account, keep records, and obey the trial

court's order when the beneficiaries sought damages based on the records he actually produced and the state of the record at the close of the trial. R.438-52. The trial court's moral compass pointed south when it should have pointed north.

Finally, the Fishers were not seeking attorney fees and damages for themselves. They were acting for the Trust. T.12. The Trust is not made whole when it pays attorney fees to recover property from a converting trustee.<sup>6</sup>

Accordingly, the Fishers believe the Court should hold Brent acted intentionally, acted in bad faith, and should be required to pay the Fishers' reasonable attorney fees and expenses.

### **ANSWER TO CROSS APPEAL**

#### **5. The Fishers are Entitled to Prejudgment Interest on the Converted Cattle.**

First, based on the fact that there was evidence establishing the date of conversion as George's date of death and the value of the cattle on the date of conversion, the Fishers are entitled to prejudgment interest under the precedents cited by Brent. Appellee's Brief at 32-37. Moreover, even were that not the case, the trial court acknowledged that the normal rules regarding prejudgment interest did not allow it to award prejudgment interest under these circumstances. R.748-49. Even so, it proceeded to award

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<sup>6</sup> Contrary to Brent's claim, Appellee's Brief at 27-28, the trial court should have exercised its discretion in the context of the relevant legal principles. *Utahns For Better Dental Health-Davis, Inc. v. Davis County Clerk*, 2007 UT 97, ¶7, 175 P.3d 1036; see also *City of Sacramento v. Drew*, 207 Cal.App.3d 1287, 255 Cal.Rptr. 704, 710 (1989).

prejudgment interest from May 8, 1995 forward on equitable principles. R.749-50.

Sitting as a court of equity, the trial court was entitled to do so. *Hughes v. Cafferty*, 2004 UT 22, ¶24, 89 P.3d 148.

Second, Brent's reliance on Article IX, ¶D in the Fisher Trust agreement is misplaced. T.Exh. 18 at 13. In relevant part that paragraph provides: "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." *Id.* This simply means that the total amount of damages cannot exceed the value of the principal and income of the trust. According to the May 8, 1995 Trust Allocation, the date of death principal value of the Trust's assets was \$632,321.00. Brent has not begun to show that the damages he must pay have exceeded or will exceed this amount.

Brent asks the Court of Appeals to interpret Article IX, ¶D. to limit damages to the recovery of "principal" and the recovery of "income." Appellee's Brief at 31. Thus, the trustee who converts the trust's assets is only liable for the principal value of those assets since the trust thereafter received no income. His interpretation is both illogical and unreasonable.

Moreover, even if this were a reasonable interpretation, the Court of Appeals should not enforce it. As the Supreme Court has ruled in a slightly different context:

A provision in a document which would have the effect of preventing one from being required to account in circumstances where he could take property which rightfully belongs to another is inconsistent with that purpose. It is therefore against public policy and will not be enforced.

*In re Wallich's Estate*, 18 Utah 2d 240, 245, 420 P.2d 40, 43 (Utah 1966). Similarly, a provision that allows a trustee to convert trust assets and then prevent the trust from obtaining all damages to which the trust would be entitled should not be enforced.

Finally:

A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.

Utah Code Ann. §75-7-1008; *see also* §75-7-105(2)(g). Even if Brent acted in “good faith,” in converting trust assets for his own benefit, he at least acted “with reckless indifference to the purposes of the trust or the interests of the beneficiaries.” Thus, if the Trust’s provision limits Brent’s liability, it does not apply under these circumstances.

#### **6. Brent is Not Entitled to Attorney Fees.**

Brent’s claim for payment of his attorney fees illustrates how wrong the trial court was in finding that Brent acted in “good faith.” R.537. If the Court of Appeals holds the trial court did not abuse its discretion, then Utah could stand alone in having an appellate court decision that granted attorney fees from the trust estate to the trustee who unlawfully converted valuable trust estate’s assets for his personal benefit. Rather than this incongruous result, the Fishers believe the Court of Appeals should rule:

It has long been held that “[t]he law is well settled that trustees cannot reimburse themselves from the trust estate for their attorney fees, unless those fees were incurred in the management and preservation of the trust



estate. . . . The record before us sufficiently supports the trial court's finding (a finding defendant does not appeal) that *the defendant converted \$38,592 of trust assets for personal use*. Therefore, *as a matter of well settled law, he was not entitled to have attorney fees incurred during a suit to recover those funds reimbursed from the trust estate. The trustee did not incur the attorney fees while protecting the trust's assets*. We find, therefore, that the trial court erred in awarding the half of the trustee's attorney fees paid for from the corpus of the trust.

*Grate v. Grzetich*, 867 N.E.2d 577, 579-80 (Ill. App.2007) (citations omitted; emphasis added).

In any event, Brent mistakenly relies upon Section 75-7-1004(2) in support of his claim to attorney fees. That section requires that the Trustee act in “good faith” and for the benefit of the trust. Utah Code Ann. §75-7-1004(2) (2004). This statute does not apply to Brent. “An act done before July 1, 2004 is not affected by this chapter.” Utah Code Ann. § 75-7-1103(3). Brent was defending his actions and his individual interests, all of which were done before July 1, 2004. He was not defending the trust.<sup>7</sup>

Accordingly, the Court of Appeals should hold that Brent is not entitled to the payment of his attorney fees and expenses from the Trust.

## CONCLUSION

The Fishers ask the Court of Appeals to reverse the trial court's decision as follows:

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<sup>7</sup> The Fishers as Trustees are entitled to rely upon Utah Code §75-7-1004(2) for the payment of their fees from the Trust. R. 898-99. However, that does not make the Trust whole, and they believe the trial court’s refusal to make Brent pay the fees they incurred abused its discretion.

1. Order the trial court to compute the damages for Brent Fisher's conversion of the cattle by holding that Brent converted 100 head of cattle with a value of \$84,000.00 on April 18, 1992;
2. In the alternative, order the trial court to compute the damages for Brent Fisher's conversion of the cattle by holding that Brent converted 50 head of cattle with a value of \$42,000.00 on April 18, 1992;
3. Order the trial court to compute the damages for Brent Fisher's use of the ranch and farm land by disallowing the credits for property taxes and water assessments;
4. In the alternative, remand to the trial court with directions to reconsider the grant of these credits after placing the burden of persuasion on Brent;
5. Order the trial court to award the Fishers all of their reasonable attorney fees and expenses and order Brent to pay such fees personally; and
6. Remand for the recalculation of damages and the determination of reasonable attorney fees and expenses.

Dated this 18 day of March, 2009.

**BLACKBURN & STOLL, LC**

A handwritten signature in black ink, appearing to read "A. H. Blackburn", written over a horizontal line.

Attorneys for Appellants, Michael and Kim Fisher

## CERTIFICATE OF SERVICE

On the 18 day of March, 2009, I mailed two copies of the foregoing

### **APPELLANT'S REPLY BRIEF AND ANSWER TO APPELLEE/CROSS**

**APPELLANT** to the following persons at the addresses shown:

Christopher S. Hill  
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I also emailed a searchable PDF file of this document to Mr. Hill at [chill@kmclaw.com](mailto:chill@kmclaw.com).

Finally I sent a CD with a searchable PDF file of this document to:

Clerk of the Court of Appeals  
450 South State St.  
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "Ch. Hill", written over a horizontal line.