

1978

# Melinda Rudd, Administratrix of The Estate of Hy Rudd v. Mel Parks : Reply Brief of Defendant- Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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MELINDA RUDD, Administratrix of	)	
the Estate of Hy Rudd,	)	
	)	
Plaintiff and Respondent,	)	
	)	Case No. 15491
vs.	)	
	)	
MEL PARKS,	)	
	)	
Defendant and Appellant.	)	

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REPLY BRIEF OF DEFENDANT-APPELLANT

\* \* \* \* \*

Appeal from the Judgment of the Third  
Judicial District Court in and for  
Salt Lake County, Utah  
Honorable Maurice Harding, Judge

\* \* \* \* \*

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Respondent

FILED

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Clerk, Supreme Court, Utah

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## TABLE OF CONTENTS

	Page
ARGUMENT	
1. PAROL EVIDENCE ADMITTED BY TRIAL COURT OVER DEFENDANT'S OBJECTION SHOULD NOT HAVE BEEN CONSIDERED. . . . .	1
2. PLAINTIFF-RESPONDENT HAS NOT SHOWN THAT THE ALLOCATION STATED IN THE AGREEMENTS IS UNREASONABLE, NO EVIDENCE OF VALUATION HAVING BEEN GIVEN. . . . .	1
3. HEIRS ARE NOT PRIVY TO COVENANT NOT TO COMPETE, ESPECIALLY WHERE SUCH COVENANT TERMINATES AT DEATH. . . . .	3
4. PAYMENT UNDER THE COVENANT NOT TO COMPETE WAS COORDINATED WITH THE PERIOD OF NONCOMPETITION, SHOWING THE DEPENDENCE OF PAYMENT ON PERFORMANCE. . . . .	4
5. THE ULMAN CASE DOES NOT INVOLVE A COVENANT NOT TO COMPETE IN CONNECTION WITH THE SALE OF A BUSINESS, AND IS THEREFORE NOT ON POINT. . . . .	4

## REPLY ARGUMENT

### POINT I

PAROL EVIDENCE ADMITTED BY TRIAL COURT  
OVER DEFENDANT'S OBJECTION SHOULD NOT  
HAVE BEEN CONSIDERED.

Plaintiff-Respondent's apparent reliance on letters exchanged between the parties prior to the execution of the Agreements is improper in view of the Parol Evidence Rule. Respondent refers to the subject three Agreements as an "integrated contract to buy and sell a business". (Respondent's Brief, page 1). Defendant-Appellant argued at trial that the subject three Agreements were complete on their face and that each should be considered as an integrated Agreement. Whether the Agreements were integrated individually or as a body, such integration precludes consideration of prior parol evidence. Furthermore the letters do not add clarification as to the intent of the parties regarding survivability of a payment obligation, and therefore should not be admissible as parol evidence. The trial court should therefore have confined itself to the provision's expressly stated in the documents constituting the three Agreements.

### POINT II

PLAINTIFF-RESPONDENT HAS NOT SHOWN THAT  
THE ALLOCATION STATED IN THE AGREEMENTS IS  
UNREASONABLE, NO EVIDENCE OF VALUATION  
HAVING BEEN GIVEN.

The first letter of Plaintiff's Exhibit 4 states that Parks offered to purchase the business based on three allocations totalling \$180,000. From the very beginning, the Covenant Not to Compete was considered essential, being valued at \$60,000. Its appearance as part of the whole transaction is merely a reflection of the practical reality that such sales transactions always occur

as a package. Furthermore, such restrictive covenants must be incident to a sale to be valid. Plaintiff-Respondent has presented no evidence to show that the initial \$60,000 allocation was "merely formal". To the contrary, the independent significance of this covenant is apparent from the overall record.

The second letter shows a new set of figures which apparently result from Rudd's rejection of the first offer. No evidence is presented as to when the changes occurred, except that they were prompted by Rudd to obtain a higher total value of \$192,000. Speculation is not a proper method of divining the meaning of such modifications. The only facts are (1) that Parks and Rudd negotiated after the first offer and (2) the allocation was reduced for equipment and increased for the Covenant Not to Compete.

Significantly, both changes present adverse tax consequences of which Rudd was undoubtedly aware. Nevertheless, it was his decision to require these changes from the original offer made by Parks. Defendant-Appellant submits that it is not proper for Plaintiff-Respondent to speculate on the "arbitrary" nature of changes, when such changes were apparently caused by Rudd himself. Justification for the actual allocation might have been developed at trial if Plaintiff-Respondent had placed the allocations in issue by evidence showing that the equipment and good will valuations were grossly unreasonable. Since the initial offer and bargaining started with a \$60,000 Covenant Not to Compete, and since it was the action of Rudd which caused the increase to \$95,000, such a change should not be a detriment to Parks' position. This is especially true where no evidence is given to explain the change other than Rudd's desire for more money.

POINT III  
HEIRS ARE NOT PRIVY TO COVENANT NOT TO  
COMPETE, ESPECIALLY WHERE SUCH COVENANT  
TERMINATES AT DEATH.

The fact that the heirs have not competed is irrelevant. Their age and lack of involvement in creating the good will of the business clearly show that their forbearance from competition was neither bargained for, nor considered significant. Neither is there significance in a promise to forbear where no legal basis for such promise exists.

Referring to the quoted authority for contract survival under Point II of Plaintiff-Respondent's Brief, Defendant-Appellant suggests the opposite interpretation. The CJS reference Vol. 17A, p. 626 states, "...a contract will be construed as subject to a condition of survivorship only when the continued existence of a party is assumed as the basis of the agreement." Had Rudd not been living at the time the Agreements were negotiated, there would have been no Covenant Not to Compete. It is therefore obvious that his existence was in fact "the basis of the agreement". Likewise, the Am Jm reference states,

"The test for determining whether a particular contract is discharged by death has been said to be whether it is of such character that it may be performed by the promisor's personal representative..."  
17 AM Jur. 2d 865

The law with regard to this issue is well settled. Specifically, the personal representative of Hyman Rudd does not have the capacity to perform under the covenant, since she had no involvement with the creation of good will. The character of performance is unique to only Hyman Rudd. Plaintiff-Respondent has cited no authority to the contrary.

POINT IV  
PAYMENT UNDER THE COVENANT NOT TO COMPETE  
WAS COORDINATED WITH THE PERIOD OF NON-  
COMPETITION, SHOWING THE DEPENDENCE OF  
PAYMENT ON PERFORMANCE.

Plaintiff-Respondent suggests that the court should read the obligation of promisor and promisee as separate agreements to (1) pay a total sum of \$95,000, independent of (2) forbearance by Rudd from competition. Plaintiff further states that the time period of performance for each party "are not identical date intervals and show them to be totally independent and severed of each other". To the contrary, the payment period was precisely five years as was the period for noncompetition. In fact, there was an initial balloon payment of \$6,500 so that the \$1,500 monthly payments would terminate at the end of the fifth year. The only difference in performance periods was a shift of the date for commencement of payments until after January 1st. Undoubtedly, this was for the purpose of splitting the large payments of \$11,000 and \$6,500 into separate tax years for Rudd. Therefore, it is apparent that the payment obligation was integrally connected to performance by Rudd.

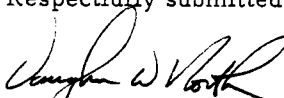
POINT V  
THE ULMAN CASE DOES NOT INVOLVE A COVENANT  
NOT TO COMPETE IN CONNECTION WITH THE SALE  
OF A BUSINESS, AND IS THEREFORE NOT ON POINT.

Plaintiff-Respondent relies on the case of Ulmann vs. Sunset-McKee as its only authority in favor of survivorship of a covenant not to compete. This case is clearly distinguishable, however, since it is not a covenant incidental to the sale of a business. To the contrary, the covenant was in reality a pension plan for a 23 year employee of Sunset-McKee Co. who

retired with the expectation of receiving \$150 a month for three years as pension payments. The instant case does not deal with employee/employer obligations, nor is it based on a vested interest developed by a long record of service. The subject Covenant Not to Compete stands on its own consideration and merits, and should be subject to termination at death on the same premises as the only case exactly on point - Keller vs. California Liquid Gas Corp.

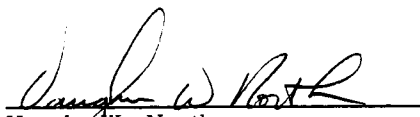
Dated this 10th of November, 1978.

Respectfully submitted,

  
Vaughn W. North

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a copy of the Reply Brief of Defendant- and Appellant on Appeal from the Judgment of the Third Judicial District Court, Case No. 15491 to the Attorneys for the Plaintiff and Respondent by hand delivering the same on this 13th day of November, 1978, to Bernard L. Rose and Irving H. Biele, 920 Boston Building, Salt Lake City, Utah 84111.

  
Vaughn W. North