

2008

Young Living Essential Oils LC, a Utah limited liability company v. Carlos Marin : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

YOUNG LIVING ESSENTIAL OILS,
LC, a Utah limited liability company,

Plaintiff and Appellee,

v.

CARLOS MARIN,

Defendant and Appellant.

BRIEF OF APPELLEE

Case No. 20080624-CA

BRIEF OF APPELLEE

**DEFENDANT'S APPEAL FROM FINAL ORDERS OF THE FOURTH
DISTRICT COURT, UTAH COUNTY, PROVO DEPARTMENT, THE
HONORABLE SAMUEL MCVEY PRESIDING.**

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**FILED
UTAH APPELLATE COURTS**

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BRIEF OF APPELLEE

Case No. 20080624-CA

BRIEF OF APPELLEE

I. JURISDICTION AND NATURE OF THE CASE

This is an appeal from a 26 March 2008 Order of the Fourth District Court (Judge Samuel McVey) granting Appellee Young Living Essential Oils, LC's motion for partial summary judgment and denying Appellant Carlos Marin's motion for partial summary judgment (R. 451-462), and the 12 June 2008 Final Judgment of the same lower court in favor of Young Living awarding damages, pre- and post-judgment interest, and attorney's fees and costs, including the costs and fees expending collecting the judgment and the costs of appeal (R. 500-505, 563-565).

Appellee Young Living Essential Oils, LC will be referred to herein as "Young Living" and Appellant Carlos Marin as "Marin".

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This Court has jurisdiction pursuant to Utah Code Annotated § 78A-4-103(2)(j), and to the Utah Supreme Court's Order effective 17 August 2008 transferring the case to this Court.

II. STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Did the trial court correctly conclude that the implied covenant of good faith and fair dealing cannot circumvent the parol evidence rule to impose new, independent duties in an expressly integrated written agreement? This Court reviews questions of law for correctness, giving no deference to the trial court. *State v. Pena*, 869 P.2d 932, 935 (Utah 1994). This Court reviews the determination that an agreement is integrated under a clearly erroneous standard. *Bennett v. Huish*, 155 P.3d 917, 925 (Utah App. 2007), *citing Spears v. Warr*, 2002 UT 24, ¶18, 44 P.3d 742 (Utah 2002).

Marin's Response to Motion for Partial Summary Judgment and Counter-Motion for Partial Summary Judgment preserved this issue for review. (R. 119).

2. - 3. Did Marin preserve the attorney's fees and costs issues for review?

"To preserve an issue for appeal, the appellant must have raised 'a *timely* and specific objection' before the trial court. We will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review." *H.U.F. v. W.P.W.* __ P.3d __, 2009, WL 304711 (Utah 2009) (*quoting State v. Low*, 192 P.3d 867 (Utah 2008) (emphasis added) (Copy at Addendum 1).

"The standard of review on appeal of [the amount of] a trial court's award of attorney fees is patent error or clear abuse of discretion." *Kendall Insurance, Inc. v. R &*

R Group, Inc., 189 P.3d 114 (Utah App. 2008) (citing *Jensen v. Sawyers*, 2005 UT 81, ¶ 127, 130 P.3d 325 (Utah 2005) (alteration in original) (quoting *Valcarce v. Fitzgerald*, 961 P.2d 305, 316 (Utah 1998))).

“A trial court's decision to award the prevailing party its costs will be reviewed under an abuse of discretion standard.” *Jensen v. Sawyers*, 2005 UT 81, ¶ 140, 130 P.3d 325, 351 (Utah 2005), quoting *Young v. State*, 2000 UT 91, ¶ 4, 16 P.3d 549.

Marin did not preserve these issues for review. His Objection to Plaintiff's Proposed Final Judgment and Fee Affidavit (R. 499) was untimely filed. Rule 7(f)(2), Utah R. Civ. P.

III. CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Summary Judgment - Rule 56(c), Utah Rules of Civil Procedure:

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

IV. STATEMENT OF THE CASE

On 26 July 2006, Plaintiff/Appellee Young Living Essential Oils, LC, a Utah limited liability company (“Young Living”), filed its complaint against Defendant/Appellant Carlos Marin (“Marin”), for breach of contract, unjust enrichment, quantum meruit, fraud, breach of implied covenant of good faith and fair dealing, and negligent misrepresentation in the Fourth District Court. (R. 1-23).

On 18 December 2006, Marin filed his Amended Answer. (R. 52-63).

On 21 March 2007, Young Living filed its Motion for Partial Summary Judgment (Breach of Contract Claim) (R. 74) with a supporting Memorandum and accompanying affidavits (R. 69-72, 75-105). On 4 April 2007, Marin filed his Response to Motion for Partial Summary Judgment and Counter-Motion for Partial Summary Judgment (R. 110-119), with a supporting affidavit (R. 120-127). On 13 August 2007, Young Living filed its Reply and Opposition to Defendant's Counter-Motion for Partial Summary Judgment (R. 130-170; see also Errata at R. 308-311), with supporting affidavits and declarations (R. 171-287). On 27 August 2007, Marin filed his Reply (R. 293-295).

At a 1 October 2007 hearing on the motions, the trial court (Judge Samuel McVey) granted Young Living's motion for partial summary judgment on its contract claim and denied Marin's cross-motion for partial summary judgment. (R. 312). On 26 March 2008, the trial court signed the Order granting Young Living's motion for partial summary judgment and denying Marin's cross-motion for partial summary judgment (R. 451-462).

On 27 May 2008, Young Living filed a motion to voluntarily dismiss its remaining claims against Marin, filed its affidavit of attorney's fees and costs (R. 463-495), and submitted a proposed Final Judgment (R. 503-505).

On 11 June 2008, Marin filed an Objection to Plaintiff's Proposed Final Judgment and Fee Affidavit (R. 496-499).

On 12 June 2008, the trial court entered the Order dismissing Young Living's remaining claims (R. 500-502) and entered its Final Judgment (R. 503-505).

On 14 July 2008, Marin filed his Notice of Appeal (R. 513-514).

On 4 November 2008, Young Living filed a Motion to Amend Final Judgment Nunc Pro Tunc (to correct Young Living's correct name and corporate status from "Young Living Essential Oils, Inc., a Utah Corporation" to "Young Living Essential Oils, LC, a Utah limited liability company" on the caption of the Final Judgment to conform to the caption on the Complaint) (R. 556-558). On 14 November 2008, the trial court granted Young Living's motion (R. 561-562) and entered a Final Judgment Amended Nunc Pro Tunc (R. 563-565).

V. STATEMENT OF FACTS

The following undisputed facts are taken verbatim from the Court's 26 March 2008 Order (R. 462-458) except that, pursuant to Rule 24(d), Utah Rules of Appellate Procedure, "Young Living" replaces "Plaintiff," and "Marin" replaces "Defendant" here:

A. Valid Contract

1. After negotiations, Plaintiff Young Living Essential Oils, LC ("Young Living") a Utah corporation, ultimately executed a written agreement ("Agreement") with Defendant Carlos Marin ("Marin") on 12 January 2005.

2. In their Agreement, Marin expressly represented and warranted that he had "significant experience as a Distributor/Leader", had "numerous contacts with potential Distributor/Leaders" whom he could "bring to the Company and sign as new distributors with the Company", and had "successful, favorable experience in providing Services such as the duties as contemplated herein."

3. Paragraph 18, the last paragraph of their Agreement directly above the

signature blocks, is labeled “Entire Agreement” (underline in original) and states in part: “there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein.”

B. Young Living’s Obligations

4. Under paragraph 4 of their Agreement, Young Living agreed to pay Marin advance payments of

\$25,000 on execution of the Agreement (12 January 2005);

\$25,000 on 15 February 2005;

\$25,000 on 15 March 2005, and

\$25,000 on 15 April 2005.

5. According to their Agreement, these advances and other specified performance bonuses were to help Marin devote “all his time and attention into [sic] recruiting additional distributors underneath him and training them” and were expressly intended “to entice [Marin] to quickly build an organization by devoting the necessary time to it. Also, [they] will provide him with a quick resource of cash to build the business.”

6. Under paragraphs 4 and 4.1, these advanced amounts were to be offset by any payments due Marin for commissions and “Fast Cash” bonuses.

7. Under paragraph 4.3, Young Living gave Marin a product credit of \$5,000 for January 2005, and \$5,000 for February 2005 “to be used for samples in attracting new Distributor/Leaders.”

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C. Marin's Obligations

8. Under paragraph 3.3 of their Agreement, Marin agreed to “devote his full time and attention to recruiting new Distributor/Leaders” to sell Young Living’s products.

9. Under paragraph 3.4 of their Agreement, Marin agreed that he would meet the following performance guarantees of cumulative “auto ship” sales volume by the specified dates:

\$5,000 by 15 February 2005;

\$30,000 by 15 March 2005;

\$100,000 by 15 April 2005;

\$300,000 by 15 May 2005;

\$600,000 by 15 June 2005, and

\$900,000 by 15 July 2005.

10. Paragraph 6.1 of their Agreement provides for Marin’s payment of Young Living’s “loss and damage” and “legal fees” arising from “contravention . . . of any of the terms and conditions imposed on [Marin] pursuant to this Agreement.”

D. Young Living’s Performance and Marin’s Breach

11. On 12 January 2005, in connection with the execution of their Agreement, Young Living paid Marin a \$25,000 advance.

12. On 15 February 2005, Marin met his \$5,000 cumulative “auto ship” sales volume performance guarantee under paragraph 3.4 of his Agreement.

13. Accordingly, on 15 February 2005, Young Living paid Marin another \$25,000 advance.

ship” sales volume performance guarantee under paragraph 3.4 of his Agreement.

15. On 15 March 2005, Young Living paid Marin another \$15,000 advance based on Marin’s representation that he would meet his 15 March 2005 performance guarantee of \$30,000 in cumulative sales volume by 15 April 2005.

16. On 15 April 2005, Marin had failed to meet his 15 March 2005 \$30,000 (let alone his 15 April 2005 \$100,000) cumulative “auto ship” sales volume performance guarantee under paragraph 3.4 of his Agreement.

17. Through June 2006, Marin had generated a grand total of less than \$36,000 in cumulative “auto ship” sales volume.

E. Damages

18. Young Living paid Marin \$65,000.00 in advances.

19. In 2005 and 2006, Marin earned a total of \$3,637.57 in commissions from Young Living.

20. Marin never earned “Fast Cash” bonus payments.

21. Paragraph 4 of the Agreement states that the “monies advanced to [Marin] will be offset by any payments due [Marin] under the Fast Cash Program as calculated below. Also, these payments will be offset by any commission payments due [Marin] each month as calculated by the standard commission payout plan. . . . If any of the advanced amounts are not repaid by the commission payouts or Fast Cash at the end of the guaranteed payments, these amounts will be deducted from any future commission payout”

VI. SUMMARY OF ARGUMENT

Marin argues that his admitted failure to meet agreed-upon performance guarantees was excused because of Young Living's prior breach of the implied covenant of good faith and fair dealing by failing to provide "marketing tools" by a purported deadline. As a result, Marin argues, this Court should reverse the trial court's order granting Young Living's motion for summary judgment on its breach of contract claim.

Marin makes three supporting arguments:

(1) He claims his affidavit raised a genuine issue of material fact about whether there was an additional central oral term connected with the parties' written agreement;

(2) He claims the course of dealing between the parties should have been considered in connection with whether Young Living breached the covenant of good faith and fair dealing; and

(3) He claims the parol evidence rule is not implicated by his affidavit since the implied covenant of good faith and fair dealing is a part of every contract, and his affidavit related to breach of that covenant and not to adding an oral term.

Marin's arguments are without merit based on a single dispositive undisputed material fact, and a bright-line rule of law. The dispositive undisputed material fact: the parties' contract contained a clear integration clause.

After the trial court ruled in this matter, the Utah Supreme Court announced a bright-line dispositive rule that applies here: "[I]n the face of a clear integration clause, extrinsic evidence of a separate oral agreement is not admissible on the question of

integration.” *Tangren Family Trust v. Tangren*, 2008 UT 20 ¶ 17, 182 P.3d 326, 332 (Utah 2008).

Marin failed to preserve the attorney’s fees and costs issues for appeal.

VII. ARGUMENT

A. THE TRIAL COURT CORRECTLY CONCLUDED THAT, UNDER EITHER THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING OR THE PAROL EVIDENCE RULE, MARIN’S AFFIDAVIT WAS NOT ADMISSIBLE TO ADD A TERM TO THE PARTIES’ EXPRESSLY INTEGRATED WRITTEN AGREEMENT

Marin claims this Court should reverse the trial court’s order granting Young Living’s motion for summary judgment for Marin’s breach of contract because his affidavit raised a genuine issue of material fact. Marin claims the disputed issue of fact is whether Young Living orally agreed to supply Marin with the “marketing tools” necessary for him to satisfy his performance guarantees. Marin asserts that Young Living’s failure to supply such “marketing tools” by a purported deadline constituted “a prior material breach of its obligation of good faith and fair dealing which excused Mr. Marin from further performance under the Agreement, and specifically excused him from his performance guarantees.” (App. Br. 14-19).

Notwithstanding his assertions to the contrary, Marin offered his affidavit not as evidence of the parties’ course of dealing in connection with Young Living’s covenant of good faith and fair dealing, but as evidence of an additional term not included in the parties’ expressly integrated written agreement. The trial court correctly concluded that Marin’s affidavit was not admissible for that purpose under either the implied covenant of good faith and fair dealing or the parol evidence rule.

1. This Court Can Summarily Affirm Based on a Single Undisputed Material Fact and a Recent Dispositive Holding by the Utah Supreme Court. Since the trial court ruled, the Utah Supreme Court announced a bright-line rule that is dispositive here. Thus, Marin’s appeal can be summarily disposed of based on a single undisputed material fact and a single dispositive rule of law.

a. The Dispositive Undisputed Material Fact: The Parties’ Contract Contained a Clear Integration Provision. This is the last paragraph of the parties’ 9-page Agreement directly over Marin’s signature:

Entire Agreement.

This Agreement constitutes the entire agreement between the Parties hereto pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings of the Parties, and there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein. No supplement, modification, amendment, waiver or termination of this Agreement shall be binding unless executed in writing and signed by the Parties hereto. . . .

(R. 6, copy at Addendum 2). As the trial court noted, Marin has failed to address, explain, or dispute this or any other provision in his Agreement. Indeed, Marin acknowledged in the court below that this integration clause was part of a “valid” Agreement and that the terms “are what they are”.¹

In short, this is a clear integration provision.

¹ See R. 63 ¶ 2 and 62 ¶ 5; see also R. 118-119 ¶¶ 1-2; Rule 7(c)(3)(A) and (B), Utah R. Civ. P. (R. 6 ¶ 18 (emphasis added); R. 101 ¶ 3; R. 118-119 ¶¶ 1-2; Rule 7(c)(3)(B), Utah R. Civ. P.; cf. R. 21 ¶¶ 10-11, 14; R. 63 ¶ 2 and 62 ¶ 5).

b. The Dispositive Rule of Law: Where There Is A Clear Integration Provision, No Extrinsic Evidence of a Separate Oral Agreement Is Admissible. In May 2008, the Utah Supreme Court expressly held: “[I]n the face of a clear integration clause, extrinsic evidence of a separate oral agreement is not admissible on the question of integration.” *Tangren Family Trust v. Tangren*, 2008 UT 20 ¶ 17, 182 P.3d 326, 332 (Utah 2008).²

The Utah Supreme Court’s holding is dispositive here. Since the parties’ Agreement contained a clear integration clause, Marin’s affidavit is not admissible to add an oral term to the parties’ written agreement.

This Court should summarily affirm and award Young Living its fees and costs of appeal.

2. Even Under Prior Law, the Trial Court Was Correct in Excluding Marin’s Affidavit as Evidence to Add an Oral Term to the Parties’ Expressly Integrated Written Agreement.

a. The Proper Legal Framework for Analysis. To determine whether the trial court’s conclusion was correct under the prior law, it is important to understand the proper legal framework for analysis:

(1) Contract interpretation is a question of law: “[I]nterpretation of a contract is a question of law.” *Dennis Dillon Oldsmobile, GMC v. Zdunich*, 668 P.2d 557, 561

² *Tangren* applies retroactively: “The general rule from time immemorial is that the ruling of a court is deemed to state the true nature of the law both retrospectively and prospectively.” *Malan v. Lewis*, 693 P.2d 661, 676 (Utah 1984). Marin cannot argue that

(Utah 1983), *citing Morris v. Mountain States Tel. & Tel. Co.*, 658 P.2d 1199 (Utah 1983).

(2) Threshold question: Is the agreement integrated? As a preliminary matter, before a trial court can consider evidence of terms outside a parties' written agreement, it must consider whether that agreement is integrated. *Hall v. Process Instruments & Control*, 890 P.2d 1024, 1026-27 (Utah 1995) (Utah Supreme Court affirmed where trial judge excluded parol evidence offered to add terms to a written agreement that was complete on its face), *citing Union Bank v. Swenson*, 707 P.2d 663, 665 (Utah 1985).

"An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement." *Smith v. Osguthorpe*, 2002 UT App 361, ¶17, 58 P.3d 854 (Utah App. 2002)(quotations and citation omitted).

(3) Whether a contract is completely integrated is a preliminary question that may be resolved in summary judgment: *AGI v. First Affiliated Securities*, 912 F.2d 1238, 1245 (10th Cir. 1990) (summary judgment affirmed where, under Utah law, trial judge refused to consider parol evidence of purported additional oral terms of expressly integrated written agreement).

(4) Admissibility and integration are questions of law: "Whether evidence is admissible is a question of law, which we review for correctness, incorporating a clearly erroneous standard of review for the subsidiary factual determination of whether the parties adopted a writing as a complete integration of their agreement." *Bennett v. Huish*,

he justifiably relied on prior decisions such as *Hall* since Marin argues that the parol evidence rule does not even apply here. *Id.*; App. Br. at 23.

155 P.3d 917, 925 ¶ 18 (Utah App. 2007), *citing Spears v. Warr*, 2002 UT 24, ¶18, 44 P.3d 742 (Utah 2002).

(5) The trial court considers all relevant evidence including the parties' course of dealing to determine whether an agreement is integrated: Before *Tangren*, a trial court was required to consider all relevant evidence, including the parties' course of dealing, in determining whether an agreement was integrated. *Hall v. Process Instruments & Control*, 890 P.2d 1024, 1026-27 (Utah 1995). If there is a clear integration clause, the parties' course of dealing may not be used to add implied terms.

Indeed, the three “course of dealing” cases cited by Marin about implied terms (App. Br. 19-23) are distinguishable: none of the contracts involved in those cases contained an integration clause. *See Brown v. Moore*, 973 P.2d 950, 954 (Utah 1998); *St. Benedicts Dev. v. St. Benedicts Hosp.*, 811 P.2d 194, 200 (Utah 2001); *Andalex Resources, Inc. v Myers*, 871 P.2d 1041, 1048 (Utah App. 1994).

As the supreme court pointed out in *Tangren*, *Hall* did not contain an integration clause either: “Thus, we were not presented with the issue we face in this case: whether extrinsic evidence of a separate oral agreement regarding the contract is admissible in the face of a clear integration clause.” *Tangren*, 182 P.2d at 331 n.19. The supreme court concluded: “To the extent our statements in *Bullfrog Marina, Inc.*, *Eie*, *Spears*, and *Hall* suggest that extrinsic evidence of a separate oral agreement *is* admissible where the contract contains a clear integration clause, we disavow them.” *Id.*

(6) Is there ambiguity or fraud? If an agreement is integrated, and if the defendant fails to claim ambiguity or fraud, extrinsic evidence is not admissible to add a term to an integrated written contract. *Hall*, 890 P.2d at 1026-27.

(7) The covenant of good faith and fair dealing cannot be construed to add new terms to a parties' agreement: “[T]he covenant of good faith and fair dealing cannot be construed to establish new, independent rights or duties not agreed upon by the parties.” *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1048 (Utah App. 1994), citing *Brehany v. Nordstrom, Inc.*, 812 P.2d 48, 55 (Utah 1991); accord *Brown*, 973 P.2d at 955 (“a contrary holding would ‘establish new, independent rights or duties not agreed upon by the parties’”).

b. The Trial Court's Application of the Law: Review of All Relevant Evidence. In applying this legal analysis, the trial court stated: “Based on all the relevant evidence submitted by the parties, the Court concludes as a preliminary matter that the parties intended their Agreement to be a complete integration and the final expression of their agreement.” (R. 455). The trial court's conclusion was correct.

(1) The Parties' Contract Contains An Express Integration Provision. The trial court first noted that its determination was

based in part on the express integration provision direction over [Marin's] signature in the Agreement itself which [Marin] has neither disputed nor explained. Although not conclusive³, the Court finds this express provision particularly persuasive.

³ As discussed above, the *Tangren* case now makes a clear integration clause conclusive: “[I]n the face of a clear integration clause, extrinsic evidence of a separate oral agreement is not admissible on the question of integration.” *Tangren Family Trust v. Tangren*, 2008

Id. The trial court was referring to the last paragraph of the parties' 9-page Agreement:

Entire Agreement.

This Agreement constitutes the entire agreement between the Parties hereto pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings of the Parties, and there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein. No supplement, modification, amendment, waiver or termination of this Agreement shall be binding unless executed in writing and signed by the Parties hereto. . . .

(R. 6, copy at Addendum 2). As the trial court noted, Marin has failed to address, explain, or dispute this or any other provision in his Agreement. Indeed, Marin acknowledged in the court below that this integration clause was part of a "valid" Agreement and that the terms "are what they are".⁴ As discussed above, since *Tangren* the existence of this clear integration clause is now dispositive and would end the analysis: no extrinsic evidence of a separate oral agreement would be admissible. *Tangren*, 2008 UT 20 ¶ 17, 182 P.3d 326, 332 (Utah 2008).

(2) It Is Unreasonable That Such A Crucial Term Would Be Omitted. The trial court also noted that

the Agreement itself sets out in detail the rights and obligations of the parties, including various deadlines for their performance. It therefore begs the question: if, as [Marin] contends, the purported term that [Young

UT 20 ¶ 17, 182 P.3d 326, 332 (Utah 2008). But *Tangren* was decided after the trial court's ruling.

⁴ See R. 63 ¶ 2 and 62 ¶ 5; see also R. 118-119 ¶¶ 1-2; Rule 7(c)(3)(A) and (B), Utah R. Civ. P. (R. 6 ¶ 18 (emphasis added); R. 101 ¶ 3; R. 118-119 ¶¶ 1-2; Rule 7(c)(3)(B), Utah R. Civ. P.; cf. R. 21 ¶¶ 10-11, 14; R. 63 ¶ 2 and 62 ¶ 5).

Living] breached was so critical to [Marin's] performance, why was it not included in the parties' Agreement?

(R. 455.)

(3) The Parties' Course of Dealing Belies Marin's Current Assertions and Confirms that Young Living Acted in Good Faith. As for the parties' course of dealing, the trial court noted that

the email communications between [Marin] and [Young Living] submitted to the Court are devoid of any reference by [Marin] to [Young Living's] breach of this purported critical term. The Court finds particularly persuasive an email exchange between [Marin] and [Young Living's] general counsel on February 3, 2005, two days after the deadline [Marin] contends that Plaintiff was to provide promised "marketing tools". Instead of complaining about how [Young Living's] recent breach would prevent his further performance, [Marin] represented that he could expand [Young Living's] business into several foreign markets. Indeed, in the submissions before the Court, there is no written notice of the purported breach to give [Young Living] the contractually-required 10-day opportunity to cure.

(R. 455-454). The trial court added:

The Court notes that oral representations of additional terms have been accepted by other courts notwithstanding an integration clause in a written agreement. But those cases are most often in the context of a construction contract where the performance of the parties manifests their agreement or consent to "extras" beyond a written agreement. Therefore, those cases are distinguishable.

(R. 454). In addition, the undisputed facts disclose that, in compliance with its obligation of good faith and fair dealing, and based on Marin's assertion that he would make up for his admitted breach of a performance guarantee, Young Living paid an advance to Marin after Marin's breach (§§14. and 15., *supra* at 7-8).

(4) Marin's Assertions About A Purported Oral Agreement Are Indefinite and Unclear. The trial court also identified that Marin's "assertions of [Young Living's]

representations lack foundation as to the circumstances including who made the purported representation or representations and when such representations were made.”

Id. Marin’s assertions were also directly contradicted by the affidavits of the Young Living executives who would have made the claimed representations. (R. 173, 179-180.)

The trial court concluded:

In sum, based on all the relevant evidence submitted by the parties, the Court rejects [Marin’s] assertions that the parties intended to be bound by terms not found in their written Agreement and concludes as a threshold matter that the parties’ Agreement was integrated.

Id.

(5) Marin’s Reliance on The Covenant of Good Faith and Fair Dealing is Misplaced. Finally, the trial court concluded that Marin’s claim of Young Living’s breach of the implied covenant of good faith and fair dealing “is misplaced” since “[i]t is well settled that the implied covenant of good faith and fair dealing cannot be used to impose new, independent duties in a written agreement.” (R. 456). In this regard, the trial court quoted *Slicex, Inc. v. Aeroflex Colorado Springs, Inc.*, 2006 WL 2927768 (D.Utah) n.1:

The implied covenant of good faith and fair dealing is “implied in contracts ‘to protect the express covenants or promises of the contract’” ... “[T]he doctrine of good faith and fair dealing does not serve to import new obligations into a contract. It merely controls how the obligations stated within the contract are to be performed.”

(Case cites omitted) (Copy at Addendum 3).

(6) Marin’s Claims Necessarily Implicated the Parol Evidence Rule. The trial court also concluded that Marin’s claim that Young Living “breached a purported oral

term necessarily implicates the parol evidence rule.” *Id.* The trial court then quoted *Hall*, 890 P.2d at 1026-1027, noting “[i]t is well settled that”

the [parol evidence] rule operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an *integrated* contract.

Id. (italics in original; citing inter alia *Eie v. St. Benedict's Hosp.*, 638 P.2d 1190, 1192 (Utah 1981); *Restatement (Second) of Contracts* §§ 213-14 (1981)). (R. 456).

(7) **Marin Made No Claim of Fraud or Ambiguity.** Since Marin did not claim either fraud or ambiguity, the trial court correctly concluded that his “assertions offered for the purpose of adding to the terms of the parties’ integrated Agreement must be excluded. *Hall*, 890 P.2d at 1026-27.” (R. 454).

In sum, the trial court correctly concluded under both the implied covenant of good faith and fair dealing and the parol evidence rule that, based on all of the relevant evidence in the record, Marin’s affidavit was not admissible to add a term to the parties’ integrated Agreement. Since the trial court’s conclusion was correct, and its finding that the parties’ Agreement was integrated was not clearly erroneous, this Court should affirm the award of summary judgment against Marin on Young Living’s breach of contract claim and the final judgment.

B. MARIN FAILED TO PRESERVE THE ISSUE OF ATTORNEYS’ FEES FOR APPEAL

The Utah Supreme Court recently instructed

[t]o preserve an issue for appeal, the appellant must have raised “a *timely* and specific objection” before the trial court. We will not address an issue

if it is not preserved or if the appellant has not established other grounds for seeking review.

H.U.F. v. W.P.W. ___ P.3d ___, 2009, WL 304711 (Utah 2009) (*quoting State v. Low*, 192 P.3d 867 (Utah 2008) (emphasis added) (Copy at Addendum 1).

In this case, Marin did not raise a timely objection to Young Living's Proposed Judgment or to Young Living's Affidavit of Attorneys' Fees and Costs. Pursuant to Utah Rules of Civil Procedure, Rule 7(f)(2), "[o]bjections to the proposed order⁵ shall be filed within five days after service." Here, Young Living filed and served its Proposed Final Judgment and Affidavit of Attorneys' Fees on 27 May 2008. (R. 505, 492). Following this Marin was allowed five (5) days, plus three (3) days for service by mail (Rule 6(e)), by which to file any objection to the Proposed Final Judgment including the Affidavit of Attorneys' Fees and Costs, making any objection due on 6 June 2008. Marin did not file his objection with the trial court until 11 June 2008. (R. 499).

Thus, Marin did not timely object to Young Living's Proposed Final Judgment and Affidavit of Attorney's Fees and Costs. By failing to do so, Marin failed to preserve the issue of the reasonableness of Young Living's attorney's fees for appeal.

C. MARIN FAILED TO PRESERVE THE ISSUE OF COSTS FOR APPEAL

As detailed above, Marin did not timely file an objection to Plaintiff's Proposed Final Judgment or Affidavit of Attorney Fees and Costs and therefore did not preserve the issue of costs for appeal.

Moreover, even under the more expansive Rule 54 d(2) of the Utah Rules of Civil

⁵ Utah Rules of Civil Procedure, Rule 54 defines "Judgment" as used in the rules as a

Procedure, Marin failed to timely object to the itemized bill of costs. Under Rule 54 d(2), “[a] party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court.”

As noted above, Marin did not file his objection to the Proposed Final Judgment or Affidavit of Attorney Fees and Costs until 11 June 2008, some 15 days after being served with Plaintiff’s Affidavit of Attorney Fees and Costs. (R. 499).

Based on Rules 6(a) and 6(e), Utah Rules of Civil Procedure, any objection to the costs bill was required to be filed by 9 June 2008. Because Marin did not timely file his objection to costs, the issue of costs has not been preserved for appeal.

In any event, even if the Court finds Marin did preserve this issue, the Agreement between the parties provided for the recovery of all costs, charges and expenses. Paragraph 6.1 of the Agreement reads as follows:

MARIN hereby agrees to indemnify and save Company and hold harmless Company in respect to *all* causes of action, liabilities, costs, charges and expenses, loss and damage (including consequential loss) suffered or incurred by Company (including legal fees) arising from any willful or grossly negligent act or omission of MARIN or his employees, servants and agents or arising from contravention by MARIN of any of its employees servants and agents of any of the terms and conditions imposed on MARIN pursuant to this Agreement.

(R. 9; emphasis added). Thus, even if Marin preserved this issue for appeal, the trial court did not abuse its discretion in awarding as costs Young Living’s expenditures for photocopies, overnight mail, courier, postage, and online research. Based on the language of the Agreement, Plaintiff is entitled to collect *all* costs, charges and expenses

decree and any order from which an appeal lies.

related to Marin's contravention of the terms and conditions imposed on Marin pursuant to the Agreement.

VIII. CONCLUSION

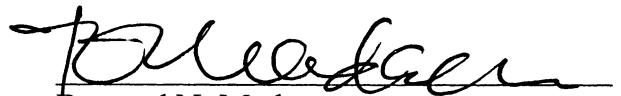
Under both *Tangren* and the controlling law at the time it ruled, the trial court properly ruled that Marin's affidavit was could not be admitted to add an oral term to the parties' expressly integrated written agreement.

Marin did not preserve the attorney's fees and costs issues for appeal.

The trial court should be affirmed, and Young Living should be awarded its costs and fees, including on appeal.

Respectfully submitted this 6th day of April 2009.

FILLMORE SPENCER LLL

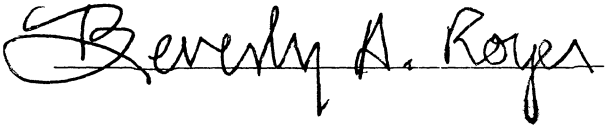
A handwritten signature in black ink, appearing to read "Barnard N. Madsen", written over a horizontal line.

Barnard N. Madsen
Attorneys for Appellee Young Living
Essential Oils, LC

CERTIFICATE OF SERVICE

I certify that on the 6th day of April, 2009, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE** to be sent by first-class mail, prepaid, to the following:

Scott B. Mitchell
SCOTT B. MITCHELL, PC
2469 East 7000 South, Suite 204
Salt Lake City, UT 84121
:Attorney for Appellant Carlos Marin

A handwritten signature in black ink, reading "Beverly A. Royer". The signature is written in a cursive style with a horizontal line underneath the text.

ADDENDA

ADDENDUM 1

Supreme Court of Utah
H.U.F and G F , Petitioners and Appellees,
 v
 W P W , Respondent and Appellant
No. 20070610.

Feb 10, 2009

Background: Putative father filed motion to intervene in adoption proceeding Following a hearing, the Fourth District, Provo Department, Lynn W Davis, J , granted adoptive parent's motions to dismiss and strike putative father's motion to intervene, and putative father appealed The Court of Appeals certified the case for immediate transfer

Holdings: The Supreme Court, Durrant, Associate C J , held that

- (1) putative father's arguments on appeal were not moot,
- (2) putative father did not comply with Arizona requirements to preserve his parental rights, as required in order to qualify for exception to Utah statute that denied putative fathers who did not register with Office of Vital Statistics the right to contest adoptions,
- (3) evidence was sufficient to establish that putative father had reason to believe that mother had moved to Utah and thus was required to register with Office of Vital Statistics in order to preserve his parental rights and intervene in the adoption proceeding,
- (4) Arizona paternity order was entitled to full faith and credit, but
- (5) error of trial court in concluding that Arizona order was not entitled to full faith and credit was harmless, as such order had no bearing on putative father's right to challenge adoption,
- (6) trial court could make findings of fact without providing putative father with an evidentiary hearing, and
- (7) putative father's appeal was not frivolous

Affirmed

West Headnotes

[1] Appeal and Error 30 ⚔842(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(1) k In General Most Cited Cases

Supreme Court review a district court's interpretation of a statute for correctness

[2] Appeal and Error 30 ⚔1008.1(5)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)3 Findings of Court

30k1008 Conclusiveness in General

30k1008 1 In General

30k1008 1(5) k Clearly Erroneous Findings Most Cited Cases

Supreme Court reviews a district court's findings of fact under a clearly erroneous standard

[3] Appeal and Error 30 ⚔842(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(1) k In General Most Cited Cases

Supreme Court reviews a district court's ruling regarding a statute's constitutionality for correctness

--- P.3d ----, 2009 WL 304711 (Utah), 623 Utah Adv. Rep. 14, 2009 UT 10
(Cite as: 2009 WL 304711 (Utah))

[4] Appeal and Error 30 ⚡843(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k843 Matters Not Necessary to Decision on Review

30k843(1) k. In General. Most

Cited Cases

An argument is moot on appeal if the requested judicial relief cannot affect the rights of the litigants.

[5] Adoption 17 ⚡15

17 Adoption

17k9 Judicial Proceedings

17k15 k. Review. Most Cited Cases

Putative father's arguments on appeal of trial court orders regarding his attempt to intervene in adoption proceeding were not moot on the ground that he only addressed trial court's order granting adoptive parents' motion to dismiss putative father's motion to intervene and did not address trial court's order granting adoptive parent's motion to strike motion to intervene based on putative father's false assertions, where putative father in his opening brief challenged trial court's finding that putative father had knowledge that birth mother was in Utah, and, though putative father did not explicitly state he was challenging the motion to strike, the challenge was substantially briefed.

[6] Adoption 17 ⚡15

17 Adoption

17k9 Judicial Proceedings

17k15 k. Review. Most Cited Cases

Putative father did not preserve for appeal a due process challenge and equal protection challenge, in his appeal of trial court order dismissing and striking his motion to intervene in adoption proceeding, where putative father's motion to intervene in the trial court did not raise a due process or equal protection challenge, and trial court's rulings did not

consider a due process or equal protection challenge. U.S.C.A. Const.Amend. 14; Rules App.Proc.. Rule 24(a).

[7] Appeal and Error 30 ⚡169

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k169 k. Necessity of Presentation in General. Most Cited Cases

Supreme Court will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review. Rules App.Proc., Rule 24(a).

[8] Adoption 17 ⚡7.2(3)

17 Adoption

17k7 Consent of Parties

17k7.2 Natural Parents, Necessity of Consent in General

17k7.2(3) k. Illegitimate Children. Most Cited Cases

Putative father, who resided in Arizona where mother also resided and failed to register with Utah Office of Vital Statistics, failed to comply with the most stringent and complete Arizona statutory requirements to preserve his parental rights, as required in order to qualify for exception to Utah statute that denied putative fathers who did not register with Office of Vital Statistics the right to contest adoptions; Arizona statute required a putative father to initiate a paternity action within 30 days of receiving notice that a birth mother intended to give a child up for adoption, birth mother served putative father with notice stating that if he wished to assert his parental rights he "must" start a paternity action within 30 days, notice putative father received was not ambiguous, and putative father did not start his paternity action in Arizona within 30 days of receipt of the notice. U.C.A.1953, 78-30-4.14 (Repealed); A.R.S. § 8-106(G).

[9] Statutes 361 ⚡188

--- P 3d ----, 2009 WL 304711 (Utah), 623 Utah Adv Rep 14, 2009 UT 10
(Cite as: 2009 WL 304711 (Utah))

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k In General Most Cited

Cases

When interpreting a statute, courts look first to the statute's plain language to determine its meaning

[10] Statutes 361 ⚡205

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic

Aids to Construction

361k205 k In General Most Cited

Cases

Statutes 361 ⚡208

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic

Aids to Construction

361k208 k Context and Related

Clauses Most Cited Cases

Statutes 361 ⚡223.2(.5)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to

Other Statutes

361k223 2 Statutes Relating to the

Same Subject Matter in General

361k223 2(5) k In General Most

Cited Cases

When interpreting a statute, courts read the plain language of a statute as a whole and interpret its provisions in harmony with other provisions in the same statute and with other statutes under the same and related chapters

[11] Statutes 361 ⚡181(2)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(2) k Effect and Con-

sequences Most Cited Cases

Statutes 361 ⚡206

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k206 k Giving Effect to Entire Statute Most Cited Cases

When interpreting a statute, courts seek an interpretation that renders all parts of a statute relevant and meaningful, and interpretations are to be avoided which render some part of a provision nonsensical or absurd

[12] Appeal and Error 30 ⚡1008.1(5)

30 Appeal and Error

30XVI Review

30XVI(1) Questions of Fact, Verdicts, and Findings

30XVI(1)3 Findings of Court

30k1008 Conclusiveness in General

30k1008 1 In General

30k1008 1(5) k Clearly Erroneous Findings Most Cited Cases

Supreme Court will overturn a district court's findings of fact only if they are clearly erroneous

[13] Adoption 17 ⚡7.8(4)

17 Adoption

17k7 Consent of Parties

17k7 8 Evidence

17k7 8(3) Weight and Sufficiency

17k7 8(4) k Necessity of Consent in General Most Cited Cases

Adoption 17 ⚡11

--- P 3d ---, 2009 WL 304711 (Utah), 623 Utah Adv Rep 14, 2009 UT 10
(Cite as: 2009 WL 304711 (Utah))

17 Adoption

17k9 Judicial Proceedings

17k11 k Petition and Parties Most Cited Cases

Evidence was sufficient to establish, at hearing on adoptive parents' motions to dismiss and strike putative father's motion to intervene in Utah adoption proceeding, that putative father, who resided in Arizona where birth mother also resided, had reason to know that mother moved to Utah, and thus that putative father was required to register with Utah Office of Vital Statistics in order to preserve his parental rights and intervene in the adoption proceeding, though mother sent e-mail to putative father one week after she obtained protective order against him in Arizona denying that she moved to Utah, father in open court at hearing on mother's request for protective order testified that she told him she moved to Utah U C A 1953, 78-30-4 14 (Repealed)

[14] Children Out-Of-Wedlock 76H ⚔64

76H Children Out-Of-Wedlock

76HV Paternity Proceedings

76Hk63 Judgment or Order

76Hk64 k In General Most Cited Cases

Children Out-Of-Wedlock 76H ⚔68

76H Children Out-Of-Wedlock

76HV Paternity Proceedings

76Hk63 Judgment or Order

76Hk68 k Operation and Effect Most Cited Cases

Arizona paternity order, finding that putative father was the biological father, complied with Arizona requirements for a judgment, for purposes of determining whether the order was entitled to full faith and credit when putative father sought to intervene in Utah adoption proceeding, though order was not executed by a judge and copy provided to Utah court was not certified, Arizona law only required that the judgment be in writing and signed by a judge or a court commissioner duly authorized to do so, and paternity order was in writing and

signed by a deputy clerk U S C A Const Art 4, § 1, 16 A R S Rules Civ Proc , Rule 58(a)

[15] Judgment 228 ⚔815

228 Judgment

228XVII Foreign Judgments

228k814 Judgments of State Courts

228k815 k Adjudications Operative in Other States Most Cited Cases

As to matters of jurisdiction, a judgment is entitled to full faith and credit if the same issue as to jurisdiction was raised in the foreign court and adjudicated therein U S C A Const Art 4, § 1

[16] Children Out-Of-Wedlock 76H ⚔68

76H Children Out-Of-Wedlock

76HV Paternity Proceedings

76Hk63 Judgment or Order

76Hk68 k Operation and Effect Most Cited Cases

Arizona order of paternity regarding putative father was entitled to full faith and credit, when putative father sought to intervene in Utah adoption proceeding, though the Arizona court determined that it lacked jurisdiction to determine custody as the child did not reside in Arizona and had not resided in Arizona in the previous six months, as a lack of jurisdiction over custody did not equate to a lack of jurisdiction over a paternity determination, and the Arizona court took testimony, considered its jurisdiction regarding paternity and determined that the putative father was the biological father U S C A Const Art 4, § 1, A R S §§ 8-106(G), 25-1002(3)(a), 25-1031

[17] Adoption 17 ⚔15

17 Adoption

17k9 Judicial Proceedings

17k15 k Review Most Cited Cases

Error of Utah court, when it granted adoptive parents' motions to dismiss and strike putative father's motion to intervene in adoption proceeding, in concluding that Arizona paternity order was not en-

titled to full faith and credit, was harmless error, as the Arizona paternity order had not bearing on putative father's right to contest the adoption, under Arizona the law the right to contest paternity was a separate and distinct right from the right to contest an adoption, and the Arizona court concluded that it did not have jurisdiction to determine custody U S C A Const Art 4, § 1, A R S § 8-106(G)

[18] Appeal and Error 30 ⚡1026

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)1 In General

30k1025 Prejudice to Rights of Party as Ground of Review

30k1026 k In General Most Cited

Cases

Harmless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings

[19] Adoption 17 ⚡7.2(3)

17 Adoption

17k7 Consent of Parties

17k7 2 Natural Parents, Necessity of Consent in General

17k7 2(3) k Illegitimate Children Most Cited Cases

Under Arizona law, the right to contest paternity is distinct from the right to contest an adoption, as a putative father may establish paternity at any time, but he may only establish the right to contest an adoption if (1) he initiates a paternity action within 30 days of receiving notice of a planned adoption, and (2) that action results in a paternity order A R S § 8-106(G)

[20] Adoption 17 ⚡11

17 Adoption

17k9 Judicial Proceedings

17k11 k Petition and Parties Most Cited Cases

Trial court could make findings of fact, in hearing on adoptive parents' motion to dismiss and strike putative father's motion to intervene in adoption proceeding, without holding an evidentiary hearing, where the trial court provided the parties the opportunity to present evidence, counsel for putative father requested that the matter be argued only on the law and objected to an evidentiary argument, the parties did not present any evidence, and the trial court relied on facts in the record to make its findings Rules Civ Proc , Rule 43(b)

[21] Costs 102 ⚡260(5)

102 Costs

102X On Appeal or Error

102k259 Damages and Penalties for Frivolous Appeal and Delay

102k260 Right and Grounds

102k260(5) k Nature and Form of Judgment, Action, or Proceedings for Review Most Cited Cases

Putative father's appeal of trial court order granting adoptive parents' motions to dismiss and strike putative father's motion to intervene in adoption proceeding was not frivolous, and thus adoptive parents were not entitled to their attorney fees on appeal, though putative father did not prevail, Supreme Court found that putative father's appeal was not moot as argued by adoptive parents, though putative father failed to preserve two issues he raised on appeal he raised other issues that were properly before the Supreme Court, putative father's argument that had no reason to know that mother was in Utah was not made in bad faith, and putative father's challenge to the lack of an evidentiary hearing was made in good faith Rules App Proc , Rule 33(b)

Hutch U Falc, Provo, Nathan E Burdsal, Salt Lake City, for petitioners

H Miffllin Williams, III, Salt Lake City, Claudia McGee Henry, Los Angeles, CA, for respondent

On Certification from the Utah Court of Appeals

DURRANT, Associate Chief Justice:

INTRODUCTION

*1 ¶ 1 In this case, W.P.W. ("Putative Father") challenges the adoption of Baby Girl Stine ("B.G.S."), arguing that the district court erred in ordering the adoption of B.G.S. without his consent. H.U.F. and G.F. ("Adoptive Parents") defend the district court's order by arguing that the Putative Father's consent to the adoption was not necessary because he failed to comply with the statutory requirements that give a putative father the right to contest an adoption.

¶ 2 Specifically, the parties raise the following issues on appeal:

- (1) Whether the Putative Father's appeal is moot because he appealed only one of two dispositive orders;
- (2) Whether Utah's statutory scheme for adoptions violated the Putative Father's due process and equal protection rights, and whether these constitutional challenges were preserved;
- (3) Whether the Putative Father complied with Utah Code section 78-30-4.14, which establishes the requirements a putative father must meet before he may contest an adoption;
- (4) Whether the district court should have granted full faith and credit to Arizona's Paternity Order;
- (5) Whether the district court should have held an evidentiary hearing; and
- (6) Whether the Putative Father's appeal is frivolous, warranting the award of attorney fees to the Adoptive Parents.

¶ 3 We affirm the district court's decision.

BACKGROUND

¶ 4 On or about September 22, 2005, while the Birth Mother was pregnant with B.G.S., she served two men with notice that she intended to place her baby for adoption through LDS Family Services in Mesa, Arizona. The notice stated that if its recipient wished to assert parental rights to the baby, he was required to initiate a paternity action pursuant to Arizona Revised Statute section 8-106 within thirty days of receipt of the notice. The notice also included the full text of Arizona Revised Statute section 8-106. In addition, the Birth Mother published public notices in Arizona newspapers four times over a period of four weeks between September and October 2005. The public notices were addressed to, "William Patrick Wilks or Nathaniel Davis or John Doe."

¶ 5 In response, the Putative Father filed a Notice of Claim of Paternity with the Arizona Office of Vital Records on September 29, 2005. This filing placed the Putative Father's name on the Putative Father Registry in Arizona. As a registrant, the Putative Father had the right to be identified by the vital statistics office if the office were to receive a search letter regarding the child whom the Putative Father claimed he fathered. Thereafter, the entity assisting in the placement of the child for adoption would be responsible for notifying the Putative Father of any legal proceedings regarding the child. The vital statistics office indicated in a letter to the Putative Father that he must follow the provisions of Arizona Revised Statute section 8-106 to establish paternity.

¶ 6 In February 2006, the Birth Mother filed a petition with an Arizona justice court seeking a protective order against the Putative Father. A hearing was held on the matter on February 7. At the hearing, counsel representing the Birth Mother stated that the Birth Mother "went to Utah to get away from [the Putative Father], and to be up there, and that's where she is, and there's no need for [the Putative Father] to be allowed to harass her." The Putative Father responded, "Yes, um [the Birth Mother] told

me when she moved to Utah ”

*2 ¶ 7 The Putative Father never registered with the Utah Office of Vital Statistics as a putative father

¶ 8 On February 15, 2006, one hundred and forty-five days after being served with notice that the Birth Mother intended to place her baby for adoption, the Putative Father filed a petition for paternity with the Superior Court of Arizona, Maricopa County. Because the Putative Father failed to properly serve the Birth Mother, the petition was not granted

¶ 9 B G S was born in Utah on March 4, 2006. Two days later, in the Fourth Judicial District Court of Utah, the Birth Mother willingly relinquished all of her parental rights and responsibilities to the Adoptive Parents. The Birth Mother also stated to the district court that she was not, nor had she ever been, married to the natural father of B G S and that the identity of the father was unknown. Further, she stated that the natural father had not initiated a paternity action in Utah, despite having actual notice that the Birth Mother had moved to Utah and planned to give birth to the baby in Utah.^{FNI}

¶ 10 On March 15, 2006, the Adoptive Parents filed a petition for temporary custody and guardianship and a verified petition for adoption, wherein they indicated that “[p]ursuant to Utah Code Ann. § 78-30-4 14, the consent of the natural mother is the only consent required in order for the Court to grant the instant petition.” They further stated that the presumed natural father had actual notice and knowledge that the Birth Mother resided in Utah and that she intended to give birth in Utah. They also stated that the presumed natural father had not registered with the Office of Vital Statistics in the Utah Department of Health, nor had he begun a paternity proceeding in the State of Utah. On March 17, 2006, the district court granted the Adoptive Parents “full and complete custody and guardianship of [B G S] until such time when the Court issues a final order concerning Petitioner’s Petition for Adoption.”

¶ 11 On April 11, 2006, the Putative Father again petitioned the Superior Court of Arizona, Maricopa County for a declaration of paternity. Again, he failed to properly serve the Birth Mother.

¶ 12 On July 25, 2006, in the Superior Court of Arizona, the Putative Father filed a Voluntary Petition for Order of Paternity signed by the Birth Mother. In an order dated August 2, 2006, the Arizona court “note[d]” that this voluntary petition “resolv[ed] the paternity issue.” The court also noted that it lacked jurisdiction to determine custody or child support and ordered that the matter be transferred to Utah for further proceedings.

¶ 13 On July 27, 2006, the Putative Father requested that the Utah court open the sealed Utah file regarding the adoption proceedings. Then, in the Utah court on September 1, 2006, the Putative Father filed an intervenor’s response to the petition for adoption. In an affidavit filed with the court, the Putative Father stated that the Birth Mother told him “verbally and by e-mail that she would not give affiant’s baby up for adoption and that she would always keep in touch with affiant.” Further, the Putative Father stated in the affidavit that he “had no knowledge whatsoever, and received no notice whatsoever that [the Birth Mother] resided in Utah and intended to give birth to [B G S] in Utah.”

*3 ¶ 14 On August 31, 2006, and again on November 27, 2006, the Birth Mother submitted an affidavit stating to the Utah court that she never gave the Putative Father notice that she had moved to Utah or planned to give birth in Utah. With the second affidavit, the Birth Mother included an e-mail that she had sent to the Putative Father on February 14, 2006, one week following the protective order hearing. The e-mail stated, “[my parents] made me tell all my friends and some family that I moved to Utah when I really didn’t, nor do I have any intentions of moving to Utah.”

¶ 15 On December 12, 2006, the Adoptive Parents moved to dismiss the Putative Father’s objection to the adoption and motion to intervene. On February

2, 2007, the district court held a hearing on the matter. Counsel for the Putative Father requested that the matter be argued only on the law and objected to an evidentiary argument. The court declined to determine the type of hearing and, instead, left the matter up to counsel. At the hearing, the parties did not present any evidence. The Putative Father was present, but his counsel did not call him to testify.

¶ 16 On April 17, 2007, the district court issued one ruling that granted the Motion to Strike and the Motion to Dismiss. In the ruling, the district court barred the affidavits submitted by the Birth Mother, finding that they contradicted “the law of the case” and were obtained unethically. Next, the court declined to give full faith and credit to the Arizona court’s statement regarding the Putative Father’s paternity, finding that the Arizona court lacked jurisdiction to issue an order of paternity, the court also highlighted additional problems with the order itself. Finally, the court ruled that the Putative Father failed to comply with the Utah statutory requirements for out-of-state putative fathers. Accordingly, the court ruled that the Putative Father “lack[ed] standing to challenge this adoption,” and “Petitioners’ Motion to Strike the Objection and to Dismiss the Motion to Intervene is hereby granted.”

¶ 17 The Putative Father appealed, and the court of appeals heard oral argument in the case. After oral argument, but before any decision issued in this case, the court of appeals issued a split decision in *In re K C J*.^{FN2} Concerned that its decision in this case might conflict with its decision in *K C J*, the court of appeals certified this case for immediate transfer to us, pursuant to Utah Rule of Appellate Procedure 43(a). In *K C J*, the court of appeals held that where the district court becomes aware of a putative father’s interest and desire to participate in the adoption proceeding, the court should allow the father to participate, at least to the extent of litigating the legitimacy of his right to contest the adoption.^{FN3} We need not reach the issue presented in *K C J*, however, because the Adoptive Parents have not challenged the Putative Father’s right to

adjudicate whether he may contest the adoption of B G S. Rather, the Adoptive Parents make substantive arguments regarding whether the Putative Father has the right to contest the adoption.

*4 ¶ 18 We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(b) (2008).

STANDARDS OF REVIEW

[1][2][3] ¶ 19 The Putative Father challenges the district court’s interpretation of Utah and Arizona statutes, the district court’s finding that the Putative Father failed to comply with Utah and Arizona statutes, and the constitutionality of Utah’s statutory requirements for putative fathers to establish parental rights. We review a district court’s interpretation of a statute for correctness.^{FN4} We review a district court’s findings of fact under a clearly erroneous standard.^{FN5} And we review a district court’s ruling regarding a statute’s constitutionality for correctness.^{FN6}

ANALYSIS

¶ 20 As threshold issues, we first address (1) whether the Putative Father’s appeal is moot, and (2) whether the Putative Father preserved a due process and an equal protection challenge. Holding that the appeal is not moot but that the Putative Father failed to preserve a due process and an equal protection challenge, we then address (3) whether the Putative Father complied with Utah Code section 78-30-4.15 (2005),^{FN7} and (4) whether the district court should have given full faith and credit to the Arizona court’s paternity order. Finally, we turn to (5) whether the district court should have held an evidentiary hearing, and (6) whether the Putative Father’s appeal is frivolous, warranting attorney fees.

I THE PUTATIVE FATHER’S CLAIMS ARE NOT MOOT BECAUSE HE CHALLENGED THE SUBSTANCE OF THE DISTRICT COURT’S

ONLY RULING

[4]¶ 21 An argument is moot “[i]f the requested judicial relief cannot affect the rights of the litigants.”^{FN8}

[5]¶ 22 The Adoptive Parents argue that the Putative Father's arguments on appeal are moot because they only address one of two dispositive orders by the district court. Particularly, the Adoptive Parents argue that the Putative Father only contests the district court's order granting the Motion to Dismiss Alleged Biological Father's Objection and Motion to Intervene (“Motion to Dismiss”), without contesting the district court's order granting the Motion to Strike the Objection and Motion to Intervene (“Motion to Strike”). The Adoptive Parents state that these motions served different purposes. The Motion to Dismiss asserted that the Putative Father failed to establish “that he is entitled to any interest or right to intervene.” The Motion to Strike asserted that the Putative Father's attempt to intervene was based upon a false assertion of a material fact^{FN9} and should therefore be stricken.

¶ 23 The Putative Father argues in his reply brief that in his opening brief he did challenge the court's order granting the Motion to Strike. In his opening brief, the Putative Father challenged the district court's finding that the Putative Father had knowledge that the Birth Mother was in Utah. Although this challenge to the Motion to Strike is not explicit-nowhere does the Putative Father state that he is challenging the Motion to Strike-the challenge is nonetheless substantively briefed. Accordingly, we hold that the Putative Father challenged the Motion to Strike, therefore, the Putative Father's arguments on appeal are not moot.

II THE PUTATIVE FATHER FAILED TO PRESERVE HIS DUE PROCESS AND EQUAL PROTECTION CHALLENGES

*5 [6]¶ 24 The Adoptive Parents contend that the Putative Father failed to preserve a due process

challenge and an equal protection challenge in the district court. They are correct.

[7]¶ 25 The preservation requirement is found in rule 24(a) of the Utah Rules of Appellate Procedure, which provides, in relevant part, that for each issue raised on appeal, an appellant's brief must include a “citation to the record showing that the issue was preserved in the trial court, or a statement of grounds for seeking review of an issue not preserved in the trial court.”^{FN10} To preserve an issue for appeal, the appellant must have raised “a timely and specific objection” before the trial court.^{FN11} We will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review.^{FN12}

¶ 26 Rather than advancing grounds upon which we may review an unpreserved issue, the Putative Father argues that he preserved in the trial court all of the issues that he raises on appeal. The Putative Father's brief makes the following statement regarding preservation: “The issues raised in this brief were preserved by appellant's documents filed in the district court, including his Petition and Motion to Intervene, and by the issues discussed by the district court in its Ruling on Motion to Intervene and Motion to Dismiss, dated April 17, 2007.” While the brief does not match record citations with specific issues raised,^{FN13} it does at least reference documents wherein the issues should be found.

¶ 27 Reviewing the documents cited by the Putative Father, we conclude that the Putative Father did not preserve a due process challenge or an equal protection challenge. The Natural Father's Objection and Motion to Intervene as Respondent raises the following arguments: (1) the Putative Father complied with Utah's statute that sets guidelines for out-of-state putative fathers to establish their parental rights, and (2) he complied with the Arizona requirements for putative fathers to establish their parental rights. In its ruling, the district court addressed the following issues: (1) whether the Birth Mother's affidavits should be barred, (2) whether

full faith and credit should be given to Arizona's statement of paternity, and (3) whether the Putative Father complied with the Utah requirements for out-of-state putative fathers to establish paternity rights. It is clear from our review that neither the Putative Father's challenges nor the district court's rulings consider a due process or equal protection challenge. Accordingly, we will not address these issues on appeal.

III THE PUTATIVE FATHER DID NOT COMPLY WITH THE REQUIREMENTS OF UTAH CODE SECTION 78-30-4 14

¶ 28 Before a putative father may establish the right to contest an adoption in Utah, he must meet the requirements outlined in Utah Code section 78-30-4 14 (Supp 2005). One such requirement is that the putative father register with the Utah Office of Vital Statistics.^{FN14} The statute includes an exception to this requirement, however, if the following circumstances are satisfied: (1) the putative father "resides and has resided in another state where the unmarried mother was also located or resided," (2) "the mother left that state without notifying or informing the unmarried biological father that she could be located in the state of Utah," (3) the putative father "through every reasonable means, attempted to locate the mother but does not know or have reason to know that the mother is residing in the state of Utah," and (4) the putative father "has complied with the most stringent and complete requirements of the state where the mother previously resided or was located, in order to protect and preserve his parental interest and right in the child in cases of adoption."^{FN15}

*6 ¶ 29 The Putative Father admits that he did not comply with the statute's general requirements, but he contends that he qualified for the exception. The district court ruled that the Putative Father did not qualify for the exception because he (1) did not comply " 'with the most stringent and complete' " Arizona requirements " 'in order to protect and preserve his parental interest and right in the child in

cases of adoption,' " and (2) he knew or had reason to know that the Birth Mother could be located in Utah. We address both of the district court's findings in turn.

A The Putative Father Failed to Comply with the Most Stringent and Complete Arizona Requirements

[8]¶ 30 The district court reasoned that the Putative Father did not comply with the most stringent and complete Arizona requirements established in Arizona Revised Statute section 8-106(G) because he did not initiate a paternity action within thirty days of receiving notice that the Birth Mother intended to give B G S up for adoption.^{FN16} Arizona Revised Statute section 8-106(G) provides, in relevant part, that each potential father shall be served notice of the planned adoption, and the notice shall inform the potential father that his "failure to file a paternity action pursuant to title 25, chapter 6, article 1,"^{FN17} "within thirty days of completion of service"^{FN18} of the notice prescribed by this section, "bars the potential father from bringing or maintaining any action to assert any interest in the child."^{FN19}

¶ 31 The Putative Father argues that this language does not actually impose any time limits on putative fathers because the language is couched in terms of a requirement that the birth mother include the language in her notice to the putative father. He further contends that, for policy reasons, the statute cannot possibly bar a putative father from establishing paternity at any time, otherwise if the birth mother decided not to place the baby for adoption, the putative father would be "off the hook for child support." Finally, he argues that the notice he received was ambiguous and therefore did not actually put him on notice of a mandatory thirty-day limit to initiate a paternity action.

[9][10][11]¶ 32 The Putative Father's interpretation of the statute is unpersuasive because it produces an absurd result and contradicts the plain language of the statute. When we interpret a statute, " 'we look

first to the statute's plain language to determine its meaning',^{FN20} We read the plain language of a statute as a whole and interpret its provisions in harmony with other provisions in the same statute and with other statutes under the same and related chapters.^{FN21} We seek an interpretation that renders all parts of a statute "relevant and meaningful, and interpretations are to be avoided which render some part of a provision nonsensical or absurd."^{FN22}

¶ 33 Contrary to the Putative Father's contention, it would be absurd for the Arizona legislature to require a birth mother to give a putative father notice that he had only thirty days to initiate a paternity action but then give the putative father unlimited time to initiate the action. Such a result would render meaningless the provision in the required notice section. Further, the language of section 8-106 is plain and unambiguously requires a putative father to initiate a paternity action within thirty days of receiving notice of a planned adoption, otherwise, he has no right to contest the adoption. This interpretation is not refuted by policy, as the Putative Father contends. Limiting the time in which a putative father may establish the right to contest an adoption does not limit the putative father's financial obligations with respect to that child if the birth mother chooses not to place the child for adoption. Section 8-106 regards only the right to contest an adoption, not any other rights or obligations that a putative father may have regarding his child.^{FN23}

*7 ¶ 34 The Putative Father's final argument, that the notice he received was ambiguous, is incorrect and irrelevant. He argues that two paragraphs in the notice "contradict each other about whether the [Putative Father] *must* or *may* initiate a paternity proceeding in order to establish interest in the child." We hold that the text of the notice was unambiguous. In one place the notice did read that the Putative Father "may" initiate a paternity action, and, in another place, it stated that the Putative Father "must" initiate the action within thirty days in order to retain a right to contest the adoption.

This language is not ambiguous, it simply clarifies that it is not necessary for the Putative Father to initiate a paternity action if he does not desire to do so. However, if he does desire to, then he must do so within thirty days. Even if the notice were ambiguous, the notice included the text of the statute, which indicated that the father *must* initiate a paternity action within thirty days of receipt of the notice in order to establish the right to contest the adoption. Further, when the Putative Father registered with the Arizona vital statistics office, he again received the text of the statute. Therefore, the Putative Father had sufficient notice of the requirement to initiate a paternity action within thirty days of receipt of the notice of a planned adoption.

¶ 35 We uphold the district court's finding that the Putative Father failed to comply with the most stringent and complete Arizona requirements. The Putative Father failed to initiate a paternity action within thirty days of receiving notice of a planned adoption, as required by section 8-106.

B The Putative Father Knew or Had Reason to Know That the Birth Mother was in Utah

[12] ¶ 36 The district court reasoned that the Putative Father knew or had reason to know that the Birth Mother was in Utah because, at a protective order hearing that was held less than thirty days before B G S was born, the Birth Mother's attorney stated that the Birth Mother "went to Utah to get away from [the Putative Father], and be up there, and that's where she is." The Putative Father responded, "Yes, um [the Birth Mother] told me when she moved to Utah." We will overturn a district court's findings of fact only if they are "clearly erroneous."^{FN24}

[13] ¶ 37 The Putative Father argues that he did not know that the Birth Mother was in Utah because he received an e-mail from the Birth Mother one week following the protective order hearing stating that she had not moved to Utah. To discredit the attorney's statement made at the protective order hear-

ing, the Putative Father argues, “no reasonable unmarried father, seeking to vindicate his paternity rights, would base his actions on the representations of the attorney for a woman who has obtained an order of protection against him.” He also argues that he did not know where the Birth Mother was living because the protective order prevented him from contacting her.

*8 ¶ 38 Again, the Putative Father's arguments are unpersuasive. Utah Code section 78-30-4.14 requires only that a putative father “have reason to know” that a birth mother was residing in Utah, not that he have actual knowledge. In open court, the Putative Father testified that the Birth Mother told him that she had moved to Utah. This statement is sufficient for the district court to find that the Putative Father had reason to know that the Birth Mother was in Utah. Although the Birth Mother stated a week later in an e-mail to the Putative Father that she had not moved to Utah, the Putative Father still had reason to believe she was in Utah because she had previously told him that she was there, her attorney told him that she was there, and the Birth Mother's statement that she had not “moved” to Utah did not necessarily mean that she was not staying in Utah until the baby was born and placed for adoption. For these reasons, the district court's finding that the Putative Father had reason to know that the Birth Mother was in Utah is not clearly erroneous.

IV. THE ARIZONA PATERNITY ORDER DOES NOT IMPACT THIS CASE BECAUSE IT WAS UNTIMELY TO ESTABLISH THE PUTATIVE FATHER'S RIGHT TO CONTEST THE ADOPTION

¶ 39 The Putative Father argues that “the Arizona Order of Paternity prevents the adoption of B.G.S. without the [Putative Father's] permission” and that the district court erred in not giving full faith and credit to the paternity order. We hold that the district court did err, but the error was harmless because the Arizona paternity order has no impact on

the Putative Father's unestablished right to contest the adoption.

A. The District Court Committed Harmless Error When It Failed to Give Full Faith and Credit to the Arizona Paternity Order

¶ 40 “Pursuant to the United States Constitution, ‘Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.’”^{FN25} Specifically, we “give full faith and credit to a declaration of paternity or denial of paternity effective in another state if the declaration or denial has been signed and is otherwise in compliance with the law of the other state.”^{FN26}

[14] ¶ 41 The district court declined to give full faith and credit to the Arizona paternity order because the district court found that “the Arizona Court now recognizes that it lacked jurisdiction,” and “[t]his Court, not the State of Arizona, has exclusive jurisdiction regarding custody of [B.G.S.].”^{FN27}

[15][16] ¶ 42 As to matters of jurisdiction, a judgment is entitled to full faith and credit “if the same issue as to jurisdiction was raised in the foreign court and adjudicated therein.”^{FN28} In this case, the Arizona court did take testimony and consider its jurisdiction. The Arizona court stated as follows in its order:

After discussion with the parties present, the Court elicits testimony under oath on the record in open court that the minor child ... does not reside in the state of Arizona and has not resided in the state of Arizona for the past six (6) months.

*9 Pursuant to A.R.S. § 25-1031, this Court does not have jurisdiction to determine *custody* at this time.

(Emphasis added.)

¶ 43 However, the Arizona court did not find that it

lacked jurisdiction to issue a paternity order, rather the court stated that the Voluntary Petition for Order of Paternity “resolv[es] the paternity issue” The court then ordered the matter transferred to Utah “for all further proceedings” A lack of jurisdiction as to a custody determination does not equate to a lack of jurisdiction as to a paternity determination A “child custody determination” is “any judgment, decree or other order of a court, including a permanent, temporary, initial and modification order, for legal custody, physical custody or visitation with respect to a child”^{FN29} A determination that an individual is the biological father of a child is not a determination that the biological father has custody or visitation rights with respect to that child Accordingly, the Arizona court concluded that it lacked jurisdiction to determine custody but not to determine paternity

[17][18]¶ 44 Being aware that the Arizona court had itself concluded that it had jurisdiction, the Utah district court erred in addressing the question of whether the Arizona court, in fact, had jurisdiction However, the error was harmless “ ‘[H]armless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings ’ ”^{FN30} In this case, the district court’s error in declining to grant the Arizona paternity order full faith and credit was harmless because the order has no bearing on the Putative Father’s right to contest the adoption of B G S

B The Arizona Paternity Order Has No Impact on the Putative Father’s Right to Contest the Adoption of B G S

¶ 45 We hold that a declaration of paternity from Arizona does not necessarily establish the right to contest an adoption in Arizona Rather, the right to contest an adoption is a more narrow right that must be established through specified means

¶ 46 In Arizona, a putative father must initiate a paternity action within thirty days of receiving notice

of the planned adoption in order to establish the right to contest an adoption^{FN31} If the putative father fails to initiate a paternity action within the time specified, then he is barred “from bringing or maintaining any action to assert any interest in the child”^{FN32} This language is found within the statute entitled, “Consent to adoption, who shall consent, waiver, consent to the release of information, notification to potential fathers”^{FN33}

[19]¶ 47 The Putative Father argues that because the Arizona court, having jurisdiction to do so, issued an order declaring him to be B G S’s father, he need not meet the thirty-day requirement This is not the case This interpretation of Arizona law would render the thirty-day requirement meaningless Under Arizona law, the right to contest paternity is distinct from the right to contest an adoption A putative father may establish paternity at any time, but he may only establish the right to contest an adoption if (1) he initiates a paternity action within thirty days of receiving notice of a planned adoption and (2) that action results in a paternity order

*10 ¶ 48 Accordingly, we can consistently give full faith and credit to the Arizona paternity order, but nevertheless hold that the Putative Father did not establish the right to contest the adoption of B G S^{FN34} In failing to give the paternity order full faith and credit, the district court committed error But that error was harmless because the paternity order alone is insufficient to establish the right to contest the adoption

V THE DISTRICT COURT DID NOT ERR IN FAILING TO HOLD AN EVIDENTIARY HEARING

[20]¶ 49 The Putative Father contends that the district court erred in finding facts without holding an evidentiary hearing

¶ 50 Pursuant to rule 43(b) of the Utah Rules of Civil Procedure, “[w]hen a motion is based on facts

not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions ”

¶ 51 In this case, the court provided the parties the opportunity to present evidence. On February 2, 2007, the district court held a hearing on the matter. Counsel for the Putative Father requested that the matter be argued only on the law and objected to an evidentiary argument. The court declined to determine what type of hearing would be held and left the matter up to counsel. At the hearing, the parties did not present any evidence. The Putative Father was present, but his counsel did not call him to testify. Subsequently, the court relied on facts in the record to make its findings.

¶ 52 We hold that the district court did not err in failing to hold an evidentiary hearing. The court provided the parties an opportunity to present evidence, but counsel for the Putative Father declined. Further, the court relied only on facts in the record to make its findings.

VI THE PUTATIVE FATHER'S APPEAL IS NOT FRIVOLOUS

¶ 53 The Adoptive Parents argue that the Putative Father's “appeal is frivolous as it is not grounded.” The Adoptive Parents base their argument on the following claims: (1) the Putative Father's claim is moot because he only challenged one of two dispositive orders, (2) the Putative Father makes arguments on appeal that he failed to preserve, (3) the Putative Father challenges findings of fact without fully marshaling the evidence that supports those findings, (4) the Putative Father ignores the essential fact he admitted to the court at the protective order hearing—that he knew the Birth Mother went to Utah, and (5) the Putative Father challenges the lack of an evidentiary hearing when it was counsel for the Putative Father who declined an evidentiary hearing.

[21]¶ 54 The Adoptive Parents' arguments fail to establish that the Putative Father filed a frivolous claim. A frivolous claim under rule 33(b) of the Utah Rules of Appellate Procedure “is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.” We address each of the Adoptive Parents' arguments in turn.

*11 ¶ 55 First, the Putative Father did challenge the substance of both the Motion to Strike and the Motion to Dismiss, therefore his claim is not moot. Second, although the Putative Father failed to preserve two of the issues that he raises on appeal, he still raises other issues that are properly before us for consideration. Third, the Adoptive Parents have not developed a marshaling argument, and failure to marshal is not included in rule 33(b)'s definition of a frivolous appeal. Fourth, the Putative Father has admitted that he stated at the protective order hearing that he knew, at the time, that the Birth Mother was in Utah. He contends, however, that he did not know or have reason to know the Birth Mother was actually in Utah because following the protective order hearing the Birth Mother sent him an e-mail wherein she stated that she had not moved to Utah. While this may not be a strong argument, it does not appear to be a bad faith argument, especially in light of the fact that the Putative Father has submitted the e-mail for the court's review.

¶ 56 Finally, the Putative Father's challenge to the lack of an evidentiary hearing does not appear to be made in bad faith. The Putative Father contends that the district court ruled on facts that the Putative Father did not know were in dispute. Particularly, the district court found that the copy of the Arizona Paternity Order submitted by the Putative Father was not properly certified. The Putative Father argues on appeal that the district court should have provided him an opportunity to submit evidence regarding the validity of the Order before the court ruled on the Order. This appears to be a good faith argument, although it is irrelevant because, as we

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have stated earlier, the validity of the order has no bearing on the outcome of the case.

¶ 57 Accordingly, we hold that the Putative Father's appeal is not frivolous, even though we uphold the district court's decision.

CONCLUSION

¶ 58 We affirm the district court's decision. Specifically, we hold that (1) the appeal is not moot because the Putative Father challenged the substance of the two motions; (2) the due process issue and the equal protection issue are not properly before us because the Putative Father failed to preserve them; (3) the Putative Father failed to comply with Utah Code section 78-30-4.14; (4) the district court committed harmless error when it declined to give the Arizona Paternity Order full faith and credit; (5) the district court provided the opportunity for an evidentiary hearing; and, finally, (6) the Putative Father's appeal is not frivolous.

¶ 59 Affirmed.

¶ 60 Chief Justice DURHAM, Justice WILKINS, Justice PARRISH, and Justice NEHRING concur in Associate Chief Justice DURRANT's opinion.

FN1. At first blush, these statements appear contradictory-the natural father is unknown, yet he received actual notice of the Birth Mother's move to Utah. They are reconcilable, however. Because the Birth Mother was having sexual relations with two different men around the time she became pregnant, she was unsure which man was the natural father. Because she gave both men actual notice of her move to Utah, it is accurate to state that the "unknown" father received "actual" notice of the Birth Mother's move to Utah.

FN2. 2008 UT App 152, 184 P.3d 1239.

FN3. *Id.* ¶ 10.

FN4. *Peck v. State*, 2008 UT 39, ¶ 7, 191 P.3d 4.

FN5. *Glew v. Ohio Sav. Bank*, 2007 UT 56, ¶ 18, 181 P.3d 791.

FN6. *In re Adoption of S.L.F.*, 2001 UT App 183, ¶ 9, 27 P.3d 583.

FN7. This statute has been renumbered and revised since the proceedings of this case. Throughout this opinion, we apply the 2005 version of the statute.

FN8. *Black v. Alpha Fin. Corp.*, 656 P.2d 409, 410 (Utah 1982) (citations and internal quotation marks omitted).

FN9. The Adoptive Parents claim that the Putative Father falsely asserted that he did not know that the Birth Mother was in Utah when in fact he did know she was in Utah.

FN10. Utah R.App. P. 24(a)(5)(A)-(B) (2008).

FN11. *State v. Low*, 2008 UT 58, ¶ 17, 192 P.3d 867 (emphasis omitted) (citations and internal quotation marks omitted).

FN12. *Id.* ¶ 19 ("When a party fails to preserve an issue for appeal, we will address the issue only if (1) the appellant establishes that the district court committed plain error, (2) exceptional circumstances exist, or (3) in some situations, if the appellant raises a claim of ineffective assistance of counsel in failing to preserve the issue." (citation and internal quotation marks omitted)).

FN13. The record citation is not at all helpful because it encompasses the entire record.

FN14. Utah Code Ann. § 78-30-4.14

FN15 *Id* § 78-30-4 15(4)(a)-(d)

FN16 Ariz Rev Stat § 8-106(G) (2005)

FN17 *Id* § 8-106(G)(7)

FN18 *Id* § 8-106(G)(3) (emphasis added)

FN19 *Id* § 8-106(G)(7), *see also id* § 8-106(I)(8) (suggesting that the birth mother include the following language in the notice to the putative father “If you do not file a paternity action under title 25, chapter 6, article 1, Arizona Revised Statutes, and do not serve the mother within thirty days after completion of the service of this notice and pursue the action to judgment, you cannot bring or maintain any action to assert any interest in the child”)

FN20 *Oman v Davis Sch Dist*, 2008 UT 70, ¶ 35, 194 P 3d 956 (quoting *State v Gallegos*, 2007 UT 81, ¶ 12, 171 P 3d 426)

FN21 *Id*

FN22 *Robinson v Mount Logan Clinic, LLC*, 2008 UT 21, ¶ 9, 182 P 3d 333 (citation and internal quotation marks omitted)

FN23 Section 8-106 is entitled, “Consent to adoption, who shall consent, waiver, consent to the release of information, notification to potential fathers”

FN24 *Glew v Ohio Sav Bank*, 2007 UT 56, ¶ 18, 181 P 3d 791

FN25 *Mori v Mori*, 931 P 2d 854, 856 (Utah 1997) (quoting U S Const art IV, § 1).

FN26 Utah Code Ann § 78B-15-310

(2008)

FN27 The district court also found two more problems with the order

First, the court found that the order was a “nullity” because it was issued after the Birth Mother relinquished her rights to B G S , and, accordingly the Putative Father lost any right to contest the adoption We agree The paternity order was a “nullity” as it pertains to whether the Putative Father may contest the adoption of B G S However, that determination does not mean that we decline to give the order full faith and credit As our analysis indicates, the right to establish paternity is a separate and distinct right from the right to contest an adoption The establishment of paternity is only one of many requirements that a putative father must satisfy before he establishes the right to contest an adoption In this case, the Putative Father failed to meet the additional requirements, therefore it is irrelevant whether he was able to establish paternity

Second, the district court stated that the order does not “solicit [] judicial confidence” for a myriad of technical reasons Specifically, the court was concerned that the order was not executed by a judge, the copy provided to the Utah court was not certified, the copy was handwritten by the Birth Mother, and the order was amended by the Arizona court, but the Putative Father failed to present the amended order to the district court None of the reasons stated by the district court is supported by evidence that the order failed to comply with Arizona law, which is the only requirement we must consider in a full faith and credit analysis Rule 58(a) of the Arizona Rules of Civil Procedure requires only that, “all

judgments shall be in writing and signed by a judge or a court commissioner duly authorized to do so "The Paternity Order in this case was in writing and signed by the deputy clerk No one has argued that a deputy clerk is not authorized to sign an order Further, no other Arizona requirements have been brought before us Accordingly, we conclude that the Arizona requirements have been met

FN28 *In re Complaint Against Smith* 925 P 2d 169, 172 (Utah 1996) (citation and internal quotation marks omitted)

FN29 Ariz Rev Stat § 25-1002(3)(a) (Supp 2008)

The Adoptive Parents look to Arizona Revised Statute sections 25-1031 and 25-1002 to argue that the Arizona court lacked jurisdiction to issue the paternity order Section 25-1031(A)(1)-(2) states that Arizona does not have jurisdiction to "make an initial child custody determination" unless Arizona is the child's home state, and a court of another state does not have jurisdiction over the child Section 25-1002(4) defines "child custody proceeding" as "a proceeding, including a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, *paternity*, termination of parental rights and protection from domestic violence, in which legal custody, physical custody or visitation with respect to a child is an issue or in which that issue may appear "(Emphasis added) Thus, the adoptive parents argue that when the Arizona court stated that it lacked jurisdiction to determine custody, it was also stating that it lacked jurisdiction to adjudicate paternity because a custody proceeding is statutorily equivalent to a paternity proceeding However, the jurisdictional statute regards a "child custody

determination," not a proceeding Ariz Rev Stat § 25-1031(A) Further, the definition of a "child custody determination" does not incorporate a paternity determination a child custody determination is "any judgment, decree or other order of a court, including a permanent, temporary, initial and modification order, for legal custody, physical custody or visitation with respect to a child "Id § 25-1002(3)(a) Therefore, a lack of jurisdiction over a custody determination does not equate to a lack of jurisdiction over a paternity determination

FN30 *State v Spillers* 2007 UT 13, ¶ 24, 152 P 3d 315 (alteration in original) (quoting *State v Evans* 2001 UT 22, ¶ 20, 20 P 3d 888)

FN31 Ariz Rev Stat § 8-106(G)(3) (2005)

FN32 *Id* § 8-106(G)(6)

FN33 *Id* § 8-106

FN34 This situation should not arise in Utah because here, "a declaration of paternity may not be signed or filed after consent to or relinquishment for adoption has been signed "Utah Code Ann § 78B-15-302(8) (2008)

Utah,2009

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--- P 3d ---, 2009 WL 304711 (Utah), 623 Utah Adv Rep 14, 2009 UT 10

END OF DOCUMENT

ADDENDUM 2

Any portion of this Agreement which may be prohibited or unenforceable in any applicable jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability, but shall not invalidate the remaining portions of such provisions or the other provisions hereof or affect any such provisions or portion thereof in any other jurisdiction.

15. Captions.

The headings of the sections in this Agreement are intended solely for convenience of reference and are not intended and shall not be deemed for any purpose whatsoever to modify or explain or place constriction upon any of the provisions of this Agreement.

16. Governing Law.

The Parties hereto agree that this Agreement shall be governed by the laws of the State of Utah without regard to the conflicts of law principles. The Parties further agree that exclusive jurisdiction and venue to enforce this Agreement shall be in a state or federal court of appropriate jurisdiction in Utah.

17. Counterparts.

This Agreement may be executed in one or more counterparts, each of which will be deemed an original but all of which together will constitute one and the same document.

18. Entire Agreement.

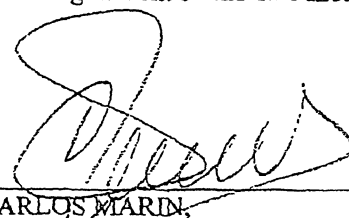
This Agreement constitutes the entire agreement between the Parties hereto pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings of the Parties, and there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein. No supplement, modification, amendment, waiver or termination of this Agreement shall be binding unless executed in writing and signed by the Parties hereto. This Agreement does not supersede, modify or affect the Distributor Agreement or the Policies and Procedures and MARIN will be bound separately by those agreements.

IN WITNESS WHEREOF, the Parties have duly executed this Agreement on the date first written above.

Young Living Essential Oils, Inc.

By:
Its:


Chief Executive Officer


CARLOS WARDEN

ADDENDUM 3

H

Only the Westlaw citation is currently available

United States District Court,
D Utah,
Central Division
SLICEX, INC , Plaintiff,
v
AEROFLEX COLORADO SPRINGS, INC , f/k/a
Aeroflex UTMIC Microelectronic Systems, Inc ,
Defendant
Civil No. 2:04 CV 00615TS.

Oct 11, 2006

Jerome Romero, Timothy C Houpt, Ryan M Harris, Jones Waldo Holbrook & McDonough, Salt Lake City, UT, for Plaintiff

David J Jordan, Aaron T Brogdon, David L Mortensen, Stoel Rives, Salt Lake City, UT, Lonnie Coleman, Kramer Coleman Wactlar & Lieberman, Jericho, NY, Raymond M Deeny, N Dawn Webber, Sherman & Howard, Colorado Springs, CO, for Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH REGARD TO PLAINTIFF'S SECOND CLAIM FOR RELIEF

TED STEWART, District Judge

*1 This matter was tried before the Court on July 18 through 21, 2006, the Honorable Ted Stewart presiding. With regard to plaintiff SliceX, Inc's ("SliceX") second claim for relief, the Court, having reviewed the evidence, listened to the testimony, and heard the arguments presented by the parties, and being fully advised in this matter, hereby enters the following findings of fact and conclusions of law

I. FINDINGS OF FACT

A. Background

1 SliceX is a Utah corporation that has at all times relevant to this dispute been in the business of providing analog and mixed-signal design services (Trial Transcript ("Transcript") at 91 7-11)

2 Defendant Aeroflex Colorado Springs, Inc ("Aeroflex") is a Colorado-based corporation in the business of designing and developing mixed-signal integrated circuits (*Id* at 270 1-23)

3 Aeroflex contracts with various customers for the design and fabrication of mixed signal circuits (*See* Transcript at 271 16-272 7)

4 Aeroflex at times contracts with outside engineering firms to secure engineering services (*Id* at 272 8-12)Aeroflex relies on a combination of those outside contract engineers and its own in-house engineering resources to meet the contractual deadlines set by its customers (*Id* at 273 3-18)Relying on outside contract engineers is often necessary to avoid overstaffing during non-peak periods but carries with it certain disadvantages, such as higher cost and diminished control over the pace and progress of the work (*See id*)

B. The Parties' Duties and Performance under the Agreements

5 In order to meet contractual obligations to customers, Aeroflex engaged SliceX to provide certain engineering services under three consulting agreements dated (a) November 1, 2002, (b) February 12, 2003, and (c) October 23, 2003, (collectively, the "Agreements") (*See* Trial Exs 1, 3, 5)

6 In the Agreements, SliceX agreed to provide specified engineering services, and Aeroflex agreed to pay SliceX for the services provided in accordance with the rates set forth in the Agreements (*See id*)Specifically, the Agreements described the parties' agreed-upon performances as follows

a In the November 1, 2002 Agreement

1) *Services and Compensation*

a) SliceX, Inc agrees to perform for UPMC the services described in Attachment I ("Services")

b) The UPMC agrees to pay SliceX, Inc the compensation set forth in Attachment I for the performance of the Services

b In the February 12, 2003 Agreement

1) *Services and Compensation*

a) SliceX, Inc agrees to perform for AEROFLEX UPMC the services described in Attachment I ("Development Work")

b) The AEROFLEX UPMC agrees to pay SliceX, Inc the compensation set forth in Attachment I for the performance of the Development Work

c In the October 23, 2003 Agreement

1) *Services and Compensation*

a) SliceX, Inc agrees to perform for AEROFLEX the services described in Attachment I ("Development Work")

*2 AEROFLEX agrees to pay SliceX, Inc the compensation set forth in Attachment I for the performance of the Development Work

(Trial Exs 1, 3, 5 at ¶ 1)

7 The Agreements also contained express terms governing Aeroflex's conduct with regard to the hiring of individuals working for SliceX

a The November 1, 2002 Agreement provided as follows

UTMC agrees that UPMC shall not, for a period of three years immediately following the termination of this agreement, whether directly or indirectly (b) solicit or take away, or attempt to solicit or take away, any employee of SliceX, Inc , either for UT-

MC's own benefit or for the benefit of any other person or entity

b The February 12, 2003 Agreement provided as follows

AEROFLEX UPMC agrees that AEROFLEX UPMC shall not, for a period of three years immediately following the termination of this agreement, whether directly or indirectly (b) solicit or take away, or attempt to solicit or take away, any employee of SliceX, Inc , either for AEROFLEX UPMC's own benefit or for the benefit of any other person or entity

c Finally, the October 23, 2003 Agreement provided as follows

AEROFLEX agrees not to solicit or entice (other than normal employment discussions not initiated by AEROFLEX) for employment any of the current employees of SliceX for purposes of hiring such employee during the period of this Agreement and for a period of one year thereafter, without the prior written consent of SliceX

(Trial Ex 1 at ¶ 4, Trial Ex 3 at ¶ 5, Trial Ex 5 at ¶ 4)

2 Each of the Agreements also provided that Aeroflex was permitted to terminate the respective agreement for any or no reason upon giving notice to SliceX (See Trial Ex 1 at ¶ 6(b), Trial Ex 3 at ¶ 7(b), Trial Ex 5 at ¶ 6(b))

3 Aeroflex fully performed under the Agreements, it paid for all of the services provided by SliceX (See, e g , Transcript at 200 5-201 9)

C. Aeroflex's Decision to Open a Grass Valley Facility

4 In 2003, Aeroflex learned that SliceX was experiencing significant financial difficulties and losing many of its employees (Id at 285 13-20, see also Memorandum Decision and Order Granting De

fendant's Rule 52(c) Motion (the "Order") at 11.) SliceX had furloughed several Grass Valley employees, had placed the rest on 50% salary, and was adjusting some employees' salaried/hourly status to reduce its payroll expenses. (Transcript at 155:24-156:1, 387-88, 413:20-414:2, 415:19-416:8, 448:16-18, 452:14-20, 469:12-19; Trial Exs. B, E.) From time to time, SliceX missed its payroll and failed to reimburse its employees in a timely fashion for work-related expenses. (*Id.* at 391:10-22, 413:24-414:2, 415:8-15, 471:4-472:8.) As a result, the majority of SliceX's Grass Valley engineers left for other employment between the summer of 2003 and early spring of 2004. (*Id.* at 157-159, 390-91; *see also id.* at 180:6-9.)

*3 5. Upon learning of SliceX's problems, Aeroflex grew concerned that SliceX might become unable to complete the services it had agreed to perform, potentially causing Aeroflex to miss its own contractual deadlines. (*See* Transcript at 285:13-20; Order at 11.)

6. As a result, Aeroflex was forced to consider alternative means of satisfying its contractual obligations with regard to the contracts for which it had retained SliceX's services. (*See* Transcript at 286:5-23; Trial Ex. 15 at 1; Order at 11.) Specifically, Aeroflex began exploring the possibility of opening its own design facility in Grass Valley, California, either by acquisition or by assembling its own design team. (*See* Transcript at 286:5-23; Trial Ex. 15 at 1; Order at 11.)

7. After considering its options, Aeroflex concluded that continuing to depend on SliceX was too risky and would not give Aeroflex an acceptable level of control over the pace of the work. (*See* Transcript at 285:8-20, 286:24-287:7, 290:19-23; Trial Ex. 15.) Aeroflex decided that its best course of action was to establish its own design facility to ensure that it could meet its contractual deadlines. (*Id.* at 287:1-7, 290:14-18, 291:1-4; Order at 12.)

D. Aeroflex's Hiring of Former SliceX Employ-

ees

8. Thereafter, Aeroflex ran a series of job postings on Monster.com beginning in late 2003 and running through the spring of 2004. (Transcript at 300-301; Order at 12.)

9. Among other applicants, four individuals who were then working for SliceX, Jackie Snyder ("Snyder"), Steve Levy ("Levy"), David Rosky ("Rosky"), and Tom Grundy ("Grundy"), responded to Aeroflex's Monster.com posting and/or inquired about positions with Aeroflex. (Transcript at 305:13-306:17, 392:11-19, 424:8-11, 473:19-24; Order at 12.)

10. SliceX's financial problems had led Snyder to look for new employment, and she found and responded to Aeroflex's February 2004 Monster.com advertisement in the course of her job search. (Transcript at 392:5-16.) No one directed her to Aeroflex's job posting. (*Id.* at 392:17-19.) Aeroflex did not inform her of the posting or solicit her application, and no one at Aeroflex asked her to recruit others to work at Aeroflex. (*Id.* at 394:1-3, 395:25-396:2.) After reviewing her application, Aeroflex interviewed Snyder, but she withdrew from consideration after deciding to accept employment at Intel. (*Id.* at 395:6-24.)

11. Levy had also decided to look for alternative employment due to SliceX's financial struggles. (Transcript at 421:15-422:10.) He conducted his search by talking to friends in the industry, and as part of his search, he went to Monster.com to explore possible opportunities in his area. (*Id.* at 422-24.) While prospecting on Monster.com, Levy found Aeroflex's posting and submitted an electronic application. (*Id.* at 424:8-11; Trial Ex. U1.) Levy interviewed with Aeroflex and eventually accepted a position. (*Id.* at 425:20-23.) Levy found Aeroflex's Monster.com job posting on his own; no one at Aeroflex informed him of or directed him to the posting. (*Id.* at 306:2-9, 428:7-12.) Aeroflex did not solicit Levy to apply and did not request that he recruit or inform others of the opportunity after he

had applied (*Id* at 428 7-14, 429 6-12)

*4 12 SliceX's financial struggles also led Rosky, Levy's longtime personal friend, to seek new employment in early 2004 (Transcript at 452 21-453 7, 16-17) Over the course of several months, Levy and Rosky discussed their respective job searches, and upon learning that Levy had applied for a position at Aeroflex, Rosky contacted David Kerwin ("Kerwin"), Aeroflex's Director of Mixed-Signal Products, to inquire about the possibility of working for Aeroflex as an independent consultant (*Id* at 453 16-454 6)Rosky initiated this inquiry (*Id* at 454 9-15)No one at Aeroflex contacted him to solicit him (*Id*)

13 Finally, Grundy also decided to leave SliceX due for compensation-related reasons (Transcript at 473 15-18) Grundy's job search, like Snyder's and Levy's, included searching Monster.com for job postings (*Id* at 473 20-24)He also found Aeroflex's posting and submitted a resume electronically (*Id* at 473 25-474 4)Grundy found Aeroflex's posting with no prompting from anyone at Aeroflex, and no one at Aeroflex solicited him to seek employment at Aeroflex prior to his submission of a résumé (*Id* at 473 20-474 2, 477 4-8)Like Rosky, Grundy eventually contracted with Aeroflex as an independent consultant (*Id* at 478 6-8)

14 Based on the evidence presented and testimony heard, the Court finds that no one at Aeroflex told Snyder, Levy, Rosky, or Grundy about Aeroflex's Monster.com posting, and no one at Aeroflex solicited these individuals for employment (See Transcript at 392 17-19, 394 1-3, 306 2-9, 428 7-12, 428 7-14, 429 6-12, 454 9-15, 473 20-474 2, 477 4-8, see also Order at 12) Rather, the Court finds that each of these former SliceX employees initiated employment discussions with Aeroflex by either responding to the Monster.com job posting or contacting Aeroflex on his or her own, without assistance or prompting from anyone at Aeroflex (See Transcript at 342 3-17, 392 17-19, 394 1-3, 428 7-14, 429 6-12, 477 4-8, see also Order at 12)

15 Based on the evidence presented and testimony heard, the Court finds that each of these four engineers initiated contact with Aeroflex and that Aeroflex took no steps to solicit any of these former SliceX employees (See Transcript at 342 3-17, 392 17-19, 394 1-3, 428 7-14, 429 6-12, 477 4-8, Order at 12-13)

II. CONCLUSIONS OF LAW

A. Utah Law Imposes an Implied Covenant of Good Faith and Fair Dealing.

1 Under Utah law, every contract is deemed to include an implied covenant of good faith and fair dealing, which prevents each party to the contract from " 'intentionally or purposely do[ing] anything, which will destroy or injure the other party's right to receive the fruits of [the] contract ' " *St Benedict's Dev Co v St Benedict's Hosp* 811 P 2d 194, 199 (Utah 1991)

2 To succeed on a claim for breach of the implied covenant, a plaintiff must show that the defendant "intentionally or purposefully defeat[ed] the [the plaintiffs] expectations " *Rawson v Conover*, 20 P 3d 876, 885 (Utah 2001)

B. The Implied Covenant of Good Faith and Fair Dealing Cannot Be Used to Impose New, Independent Duties upon Aeroflex.

*5 3 "While a covenant of good faith and fair dealing inheres in almost every contract, some general principles limit the scope of the covenant " *Oakwood Village LLC v Albertsons, Inc*, 2004 UT 101, ¶ 45, 104 P 2d 1226 These include, but are not limited to, the following

a "First, this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante " *Id* (citing *Brehany v Nordstrom, Inc*, 812 P 2d 49, 55 (Utah 1991), see also *Seare v Univ of Utah Sch of Med*, 882 P 2d 673, 678 (Utah 1994), *Sanderson v First Sec Leas-*

ing Co 844 P 2d 303, 308 (Utah 1992)

b “Second, this covenant cannot create rights and duties inconsistent with express contractual terms” *Oakwood Village* 2004 UT 101 ¶ 45, 104 P 2d 1226 (citing *Brehany* 812 P 2d at 55, *Rio Algom Corp v Jimco Ltd* 618 P 2d 497, 505 (Utah 1980))

c “Finally, [courts] will not use this covenant to achieve an outcome in harmony with the court’s sense of justice but inconsistent with the express terms of the applicable contract” *Id* (citing *Dalton v Jerico Const Co* 642 P 2d 748, 750 (Utah 1982), *see also Ernie Haue Ford Inc v Ford Motor Co* 260 F 3d 1285, 1291 (11th Cir 2001) (The implied covenant of good faith and fair dealing “cannot override an express contractual term”))

4 In short, courts “will not interpret the implied covenant of good faith and fair dealing to make a better contract for the parties than they made for themselves. Nor will [courts] construe the covenant to establish new, independent rights or duties not agreed upon by the parties” *Malibu Inv Co v Sparks* 2000 UT 30, ¶ 19, 996 P 2d 1043 (quoting *Brown v Moore* 973 P 2d 950, 954 (Utah 1998)) (other citations omitted) ^{FN1}

FN1 *See also Seave* 882 P 2d at 678 (citations omitted) (The implied covenant of good faith and fair dealing is “implied in contracts ‘to protect the express covenants or promises of the contract’”), *Rubin v Laser* 703 NE 2d 453, 459 (Ill Ct App 1998) (“[T]he doctrine of good faith and fair dealing does not serve to import new obligations into a contract. It merely controls how the obligations stated within the contract are to be performed”), *First v Allstate Ins Co* 222 F Supp 2d 1165, 1172 (C D Cal 2002) (“Absent a contractual right the implied covenant has nothing upon which to act as a supplement, and should not be endowed with an existence independent of its contractual

underpinnings”), *Menpeco USA Inc v Swiss Bank Corp* 237 B R 12, 26 (S D N Y 1997) (“The implied covenant of good faith and fair dealing does not provide a court *carte blanche* to rewrite the parties’ agreement. Thus, a court cannot imply a covenant inconsistent with the terms expressly set forth in the contract.”)

5 The Court notes that courts in other jurisdictions have also held that “a party which acts in accordance with rights expressly provided in a contract cannot be held liable for breaching an implied covenant of good faith” *Menpeco* 237 B R at 26, *see also Ari and Co Inc v Regent Int l Corp* 273 F Supp 2d 518, 522 (S D N Y 2003) (A claim for breach of the implied covenant of good faith and fair dealing is “redundant where the conduct allegedly violating the implied covenant is also the predicate for breach of an express provision of the underlying contract”) (citations omitted), *Harris v Provident Life & Accident Ins Co* 310 F 3d 73, 81 (2d Cir 2002), *Alter v Bogoricin* 1997 WL 691332 at *7 (S D N Y 1997). The Court notes that SliceX has failed to articulate any implied duty owed by Aeroflex other than those expressly imposed under the parties’ agreement. Indeed, SliceX’s claim for breach of the implied covenant is predicated on the same factual averments that form the basis of its breach of contract claim that Aeroflex improperly solicited SliceX employees (*See Complaint* ¶ 20 (constituting SliceX’s entire Second Cause of Action “The conduct of Aeroflex as outlined above [in support of SliceX’s breach of contract claim] has breached the Covenant of Good Faith and Fair Dealing implied in the Agreements”)).

*6 6 Here, the parties’ contractual rights and obligations were clearly defined in the Agreements

a The Agreements described the work to be done by SliceX and specified the rate of compensation due from Aeroflex (*See Fact* ¶ 2, Trial Exs 1, 3, 5)

b. The Agreements contained express provisions governing the hiring of SliceX's employees by Aeroflex. (See Order at 4-7; Trial Ex. 1 at ¶ 4; Trial Ex. 3 at ¶ 5; Trial Ex. 5 at ¶ 4.)

c. Aeroflex had the right to terminate the Agreements at any time upon giving notice to SliceX. (See Fact ¶ 4; Trial Ex. 1 at ¶ 6(b); Trial Ex. 3 at ¶ 7(b); Trial Ex. 5 at ¶ 6(b).)

d. Aeroflex had no contractual obligation under the Agreements to not open a competing design facility. (See Trial Exs. 1, 3, 5.)

e. Aeroflex had no duty to leave its design work with SliceX beyond the terms of the Agreements or to the derogation of its express right to terminate. (See Trial Exs. 1, 3, 5.)

7. The Court may not impose duties on Aeroflex in addition to those expressly provided in the Agreements.

C. Aeroflex Did Not Breach the Implied Covenant of Good Faith and Fair Dealing.

8. Based on the evidence presented and testimony heard at trial, the Court therefore finds that:

a. Aeroflex's retention of SliceX was "at will" under the Agreements, and SliceX's legal expectation was to receive compensation for whatever design services it performed.

b. Aeroflex fully performed its obligations under the Agreements by paying SliceX in full for all services rendered and took no other actions to interfere with SliceX's performance under the Agreements.

c. Because Aeroflex had the unfettered right to terminate the Agreements at will by giving notice, SliceX understood that it might not be retained to perform all of the work set forth in the Agreements. (See Fact ¶ 4; Trial Ex. 1 at ¶ 6(b); Trial Ex. 3 at ¶ 7(b); Trial Ex. 5 at ¶ 6(b).)

d. SliceX's failure to generate sufficient business to

pay and/or retain its employees justifiably generated concern on the part of Aeroflex.

e. SliceX had no legal expectation of additional work from Aeroflex beyond the terms of the Agreements.

f. SliceX received its bargained-for consideration and enjoyed the fruits of the Agreements. (See Fact ¶ 5.)

g. Aeroflex's posting of openings on Monster.com did not breach the non-solicitation clauses of the Agreements.

9. Based upon the foregoing, the Court concludes that Aeroflex did not breach the implied covenant of good faith and fair dealing and that SliceX cannot prevail on its second claim for relief, which is premised on the assertion that Aeroflex improperly solicited individuals employed by SliceX.

10. Thus, judgment is hereby entered in Aeroflex's favor on SliceX's claim for breach of the implied covenant of good faith and fair dealing, and that claim is hereby dismissed with prejudice.

D.Utah,2006.

Slicex, Inc. v. Aeroflex Colorado Springs, Inc.
Slip Copy, 2006 WL 2927768 (D.Utah)

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