

2008

Veronica Jacobsen v. Guenther Jacobsen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VERONICA JACOBSEN,

Appellant,

v.

GUENTHER JACOBSEN,

Appellee.

Appeal No. 20080802-CA

REPLY BRIEF OF APPELLANT

THIS IS A DIRECT APPEAL FROM A FINAL DECREE OF DIVORCE
ENTERED IN THE THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE DENISE P. LINBERG, JUDGE, PRESIDING.

-----o/o-----

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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

FILED
UTAH APPELLATE COURTS

AUG 20 2010

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In his *Brief of Appellee*, Guenther argues “several areas” of Veronica’s Opening Brief are not in compliance with UT. R. APP. P. 24 and 27. *Brief of Appellee* at p. 11-12. Guenther is mistaken in this argument. Guenther argues that the Statement of the Case and Fact sections, cover, and typeface in the Opening Brief fail to comply with UT. R. APP. P. 24 and 27. *Id.* at p. 12. Guenther argues Veronica was allowed five (5) days to correct these errors pursuant to UT. R. APP. P. 27(e), but did not do so. *Id.* Guenther, however, indicates he has no objection to this Court’s discretion in accepting the Opening Brief to avoid any further delay, although the heading of his argument reads, “[t]he clerical errors in the brief of appellant may be so egregious as to warrant sanctions.” *Id.* at pp. 11-12. Since the Opening

Brief has been accepted by this Court, Guenther's contention on this issue is incorrect and, given his concession, is moot.

A. Guenther Failed to Adequately Brief His Request for Sanctions.

UT. R. APP. P. 33 governs recoupment for damages and costs associated with either delay or a frivolous appeal, indicating as follows:

- (a) Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorneys fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.
- (b) Definitions. For the purpose of these rules, a frivolous appeal, motion, brief or other paper 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. An appeal, motion, brief or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.
- (c) Procedures.
 - (1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.
 - (2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.
 - (3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

The Advisory Committee Notes to Rule 33 set forth that this rule is in keeping with UT. R. CIV. P. 11, with the rule making express "the authority of the court to impose sanctions upon the party or upon counsel for the party." *Ibid.*

As mentioned, Guenther's brief contains an argument heading that reads, "[t]he clerical errors in the brief of appellant may be so egregious as to warrant sanctions." *Id.* at pp. 11-12. Guenther cites only to what he perceives to be as clerical errors in Veronica's opening brief, failing to cite to Rule 33 altogether, and failing to further explain how clerical errors would support a finding of sanctions on appeal. Rule 33 clearly indicates that sanctions on appeal are found only upon the filing of a frivolous appeal, which is specifically defined as "not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." UT. R. APP. P. 33(b). While these grounds can be raised as part of the appellee brief under Rule 33(c)(1), Guenther did not argue any of these grounds in his appellee brief and, in fact, could not. Veronica's brief is clearly grounded in fact, warranted by the slew of existing case law cited therein, and contains several arguments brought in good faith to extend, modify or reverse existing law. Guenther's argument is without merit and inadequately briefed. *See, Ball v. Pub. Serv. Comm'n (In re Questar Gas Co.)*, 2007 UT 79, ¶ 40, 175 P.3d 545 ("We have consistently declined to review issues that are not adequately briefed.")

The Opening Brief complies with UT. R. APP. P. 24 and 27. Veronica reserved the Statement of Fact section so as to avoid repetition of the facts throughout the brief, particularly given the marshaling of the evidence required for some of the issues. Veronica's brief is also in garamond font size 13, which is in compliance with UT. R. APP. P. 27(b). Furthermore, UT. R. APP. P. 27(e) rule states as follows:

The clerk shall examine all briefs before filing. If they are not prepared in accordance with these rules, they will not be filed but shall be returned to be properly prepared. The clerk shall retain one copy of the non-complying brief and the party shall file a brief prepared in compliance with these rules within 5 days. The party whose brief has been rejected under this provision shall immediately notify the opposing party in

writing of the lodging. The clerk may grant additional time for bringing a brief into compliance only under extraordinary circumstances. This rule is not intended to permit significant substantive changes in briefs.

Guenther cannot rely upon Rule 27(e) since whether to accept or reject the brief under such rule is at the discretion of this Court and its clerks. When the five (5) day correction period is implemented under Rule 27(e), an appellant is immediately notified and this Court lodges the brief. In the instant case, the clerk examined the Opening Brief filed *in person*, determined it to be prepared in accordance with the rules of appellate procedure, and stamped it as properly filed. The Opening Brief has never been returned to Veronica by this Court based on non-compliance with UT. R. APP. P. 27(b), and it is not an appropriate issue to be raised by an appellee during briefing since it is procedural in nature and discretionary with this Court.

Furthermore, Guenther did not object to the filing of the brief after having received his copies of it, thus waiving any argument based on these alleged errors. Since he concedes to such challenge in his brief, it is clearly without merit and appears only to serve as a distraction for this Court from the meritorious issues.

II. VERONICA HAS CHALLENGED THE TRIAL COURT'S CONCLUSION OF LAW PERTAINING TO THE ENFORCEABILITY OF THE DIVORCE AGREEMENT, WHICH CHALLENGE DOES NOT REQUIRE MARSHALING OF THE EVIDENCE; ALTERNATIVELY, VERONICA PROPERLY MARSHALED THE EVIDENCE.

In his *Brief of Appellee*, Guenther argues Veronica has failed to marshal the evidence as it pertains to the Divorce Agreement. *Brief of Appellee* at pp. 13-17. Veronica was not required to marshal the evidence with respect to her challenges on appeal. Those challenges were based in the trial court's application of the law to the facts, or a challenge to the

conclusions of law rendered by the trial court. Alternatively, if there exists an “extremely fact-sensitive” or “fact-dependent” conclusion that warrants application of the marshaling doctrine, Veronica met such burden by recitation of all pertinent facts and evidence pertaining thereto.

UT. R. APP. P. 24(a)(9) states in pertinent part that, “[a] party challenging a **fact finding** must first marshal all record evidence that supports the challenged finding.” (Emphasis added). “We determine the existence of a contract . . .by resorting to principles of law; therefore, we grant no deference to the trial court that originally decided the matter.” Carter v. Sorenson, 2004 UT 33, &6, 90 P.3d 637; *see*, Nunley v. Westates Casing Servs., Inc., 1999 UT 100, &17, 989 P.2d 1077. “Whether a contract exists between parties **is a question of law**; therefore, we review the trial court’s **conclusion of law** under a correction of error standard.” Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah App. 1992)(emphasis added), *citing* Bailey v. Call, 767 P.2d 138, 139 (Utah App), *cert denied*, 773 P.2d 45 (Utah 1989); *accord*, Scarf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

In Kimball v. Kimball, this Court recently revisited the marshaling requirement and determined the following concerning its prior holdings on the subject:

...[T]he marshaling doctrine, now recognized in our rules, *see* UTAH R.APP. P. 24(a)(9) (“A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.”), requires that counsel identify which particular findings are challenged as lacking adequate evidentiary support and then show the court why that is so. This can only logically be done by summarizing, or “marshaling,” whatever evidence there is that supports each challenged finding. We emphasize that only the supportive evidence is legally relevant and is all that counsel should call our attention to. *See Neely v. Bennett*, 2002 UT App 189, ¶12, 51 P.3d 724 (“[A]n exhaustive or voluminous recitation of all the facts presented at trial, even if this recitation includes within its body the facts that support the challenged ruling, is not what is expected.”), *cert. denied*, 59 P.3d 603 (Utah 2002).

Ibid., 2009 UT App. 233, fn. 5, 217 P.3d 733. Hence, this Court clarified that, “[i]f there is some supportive evidence, once that evidence is marshaled it is the challenger’s burden to show the ‘fatal flaw’ in that supportive evidence... and explain why the evidence is legally insufficient to support the finding.” *Id. citing West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991). This Court has referred to the marshaling doctrine as playing the “devil’s advocate,” which requires an appellant to “present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to their case.” *Burton Lumber & Hardware Co. v. Graham*, 2008 UT App. 207, ¶12, 186 P.3d 1012, *citing Chen v. Stewart*, 2004 UT 82, ¶78, 100 P.3d 1177. Furthermore, an attack of a finding on appeal bars a party from merely rearguing the evidence supporting their position below. *Kimball* at ¶22.

A very narrow exception exists in applying the marshaling requirement when a “legal standard is extremely fact-sensitive.” *See, Traco Steel Erectors, Inc. v. Control, Inc.*, 2007 UT App ¶44, 175 P.3d 572 (conclusions were reliant on trial court’s specific findings of fact related to the actual language in subcontract agreements, hence challenge to conclusions of law required marshaling), *citing Chen v. Stewart*, 2004 UT 82, ¶ 76, 100 P.3d 1177 (“Where a trial court’s rulings on highly fact-dependent issues are challenged, this court grants a broader than normal discretion to the trial court” and “appellant has a duty to marshal”).

Veronica’s challenge pertains to the trial court’s determination of the enforceability of the Divorce Agreement, as to whether it existed as a contract between the parties to this appeal. This challenge is clearly a conclusion of law and therefore does not require marshaling of the evidence. *See, Chase v. Scott*, 2001 UT App. 404, 38 P.3d 1001 (“We accord the trial court’s legal conclusions regarding the contract no deference and review

them for correctness.”). Guenther has neither challenged Veronica’s issues as meeting the narrow exception to the marshaling requirement implicated in conclusions of law challenges, nor has he adequately briefed his position that such challenge is fact-dependent or fact-sensitive. *See, Traco and Chen, supra.* Guenther’s failure to brief such issue is likely based on the fact that this matter does not meet such exception, as evidenced by the standard of review governing this Court on whether a contract exists. *Herm Hughes & Sons, Inc., supra.*

When determining whether a contract exists between the parties, this Court “resorts to principles of law” and “grant[s] ***no deference*** to the trial court that originally decided the matter.” Carter at ¶6, *supra.* “Whether a contract exists between parties is a question of law; therefore, we review the trial court’s conclusion of law under a correction of error standard.” *Herm Hughes & Sons, Inc.* at 583 (additional citations omitted). Cases in which the courts have applied the “some discretion” standard of review of fact-dependent challenges include breach of fiduciary duty (*C&Y Corp v. General Biometrics, Inc.*, 896 P.2d 47, fn. 7 (Utah App. 1995)); waiver (*State v. Pena*, 869 P.2d 932, 937 (Utah 1994)); materiality determination (*In re Estate of Beesley*, 883 P.2d 1343, 1347-48 (Utah 1994)); entrapment (*State v. J.D.W.*, 259 Utah Adv.Rep. 22, 23, -- P.2d – (Utah App 1995)); effect of incorrect testimony (*State v. Gordon*, 886 P.2d 112, 115 (Utah App. 1994)); equitable estoppels (*Trolley Square Assocs. V. Nielson*, 886 P.2d 61, 65 (Utah App. 1994)); custody (*State v. Teuscher*, 883 P.2d 922, 929 (Utah App. 1994)); and good faith and fair dealing (*Republic Group, Inc. v. Won-Door Corp.*, 993 P.2d 285, 291 (Utah App. 1994)). While this Court has previously determined that a question of meeting of the minds on a contract creates a factual issue, such issue must be specifically addressed below to enable review by this Court; otherwise, remand is

appropriate for an evidentiary hearing on the issue. *See, Migliore v. Migliore*, 2008 UT App 208, ¶22, 186 P.3d 973.

In the instant matter, the trial court did not specifically address the question of a “meeting of the minds” with respect to the Divorce Agreement. Instead the court determined the issue based upon Veronica having drafted it, the parties having signed it, and the partial performance of some of its provisions. Veronica challenged the application of these facts to the trial court’s conclusion that the Divorce Agreement was a valid and binding contract between the parties, arguing that neither of the parties intended to be bound by its contents. The trial court presumptively made the determination of a “meeting of the minds” without entering findings specific to such matter. Hence, remand would be requisite should this Court find that it was a fact-dependent challenge since the facts are lacking on the record to render an adequate determination. *Migliore, supra*.

Should this Court determine Veronica was required to marshal the evidence presented on the issue, it is clear by mere review of the opening brief in this matter that Veronica did meet the requirement. Guenther argues Veronica was required to “present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.” *Appellee Brief* at p. 13. However, Guenther makes only broad blanket assertions that Veronica has failed to do so, failing entirely to adequately set forth evidence Veronica “ignored” in her challenge to the conclusions of law.

“The Utah Supreme Court has ruled that an appellate court is not required to address the merits ... if [a] ... brief contains unfounded accusations impugning the integrity of the court.” *See Peters v. Pine Meadow Ranch Home Ass’n*, 2007 UT 2, ¶1, 151 P.3d 962. In

these situations, the brief may be stricken and the appellate court may decline to consider the appeal as a sanction for violations of rule 24(k) of the Utah Rules of Appellate Procedure.” Bryner v. Bryner 2008 WL 2544897.

In the instant case, Guenther lists a myriad of evidence he argues Veronica failed to marshal. *Appellee Brief* at pp. 14-17. However, the sparse bits of evidence he claims were overlooked were actually marshaled and set forth in Veronica’s Opening Brief.¹ *See, Brief of Appellant* at pp. 16-20. The Opening Brief argues that the fatal flaw in the trial court’s determination of the enforceability of the Divorce Agreement lies in the bad faith negotiation of the contract and the unreasonable constraint upon the trial court’s equitable and statutory duties. *Brief of Appellant* at p. 20. Furthermore, as the parties held themselves out to be husband and wife after the Divorce Agreement was signed, it seems that such agreement would be rendered moot. *See Brief of Appellant* at p. 17.

Guenther argues that Veronica did not marshal the evidence pertaining to the ambiguity of the Divorce Agreement. *Brief of Appellee* at pp. 15-17. Guenther mistakenly views Veronica’s challenge to this issue as a challenge to the sufficiency of the evidence; however, Veronica’s challenge is clearly to the trial court’s applications of law. Guenther’s confusion on this issue is obvious, as he states, “Guenther is unsure as to why Veronica included this as judicial error requiring correction by this Court.” *Id.* at p. 16. Veronica has plainly argued the Divorce Agreement was ambiguous since the trial court concluded any ambiguities would be construed against Veronica as the drafter, as argued more particularly *supra*. Marshaling on this issue was not required; however, if it is determined by this Court

¹ Among other claims, this Court should particularly note Guenther claims Veronica failed to cite to her testimony the Divorce Agreement was to keep Guenther from “taking off,” but such citation is in fact included in her Opening Brief. *See, Brief of Appellant* at pp. 15-16.

that Veronica was required to and sufficiently marshaled the evidence and further demonstrated the trial court's error in its failure to apply the law correctly.

Guenther also fails to accurately cite to the evidence. Guenther claims Veronica failed to indicate that she drafted the Divorce Agreement and that it was her idea; however, such citation is mentioned in her opening brief. *See, Brief of Appellee* at p. 15; *Brief of Appellant* at pp. 15-18, and 24. In fact, Guenther's review of the record supports Veronica's version of events concerning the ambiguity of the Divorce Agreement: Veronica drafted the Divorce Agreement and changes were made by the parties mutually. *Brief of Appellee* at pp. 15-16. While Guenther is correct that the trial court did not find the Divorce Agreement to be ambiguous, he neglects the trial court's determination to construe any ambiguity against Veronica as the drafter. *See, Brief of Appellant* at p. 23; Exhibit "A" at p. 2.

Summarily, Guenther has failed in his challenge that Veronica has failed to marshal the evidence. The Opening Brief sufficiently marshals the evidence, and Veronica's claims are valid and meritorious. The Opening Brief more than adequately summarizes and sets forth the supportive evidence, demonstrating the fatal flaws in the trial court's factual application to the law. Furthermore, unlike Guenther's assertion, Veronica is not required to make an exhaustive or voluminous recitation of all the facts presented at trial. *Id.* Veronica met the marshaling requirement rather than merely rearguing her position below to this Court. Burton at ¶12 and Kimball at ¶22. Accordingly, Guenther's multiple claims that Veronica has failed to marshal the evidence fall short.

III. UNDER GUENTHER'S THEORY OF THE CASE PERTAINING TO STIPULATIONS, VERONICA HAS EVIDENCED THAT A "MANIFEST INJUSTICE" OCCURRED WARRANTING NONRELIANCE BY THE TRIAL COURT ON THE DIVORCE AGREEMENT FOR ITS DETERMINATION.

In the little legal authority cited to by Guenther, he argues that the facts of this case are similar to that of Jensen v. Jensen, wherein this Court determined the trial court did not abuse its discretion to set aside *a stipulation* made on the record by the parties concerning the sale of their Murray home. *Ibid.*, 2008 UT App. 392, ¶24, 197 P.3d 117. However, such case is easily differentiated, since Veronica and Guenther entered into the Divorce Agreement independent of the trial court, at a distance from any legal proceedings, and without the intent that it be utilized in legal proceedings. Furthermore, the law applicable to stipulations versus that applicable to contracts differs greatly.² However, since Guenther believes the matter to be more analogous to stipulations, then Veronica must simply meet the standard of “manifest injustice” to show that the trial court should not have relied upon the Divorce Agreement in its determination in this matter. *See, Morrison*, at fn. 2 *supra*.

The Utah Supreme Court has previously defined the term “manifest injustice” by stating that it “is synonymous with the ‘plain error’ standard expressly provided in Utah Rule of Evidence 103(d) and elaborated upon in [State v. Eldredge, 773 P.2d 29 (Utah 1989)].”

² “Stipulations are entered into in order to dispense with proof over matters not in issue, thereby promoting judicial economy at the convenience of the parties.” United States v. McGregor, 529 F.2d 928, 931 (9th Cir. 1976), *citing* 9 J. Wigmore, Evidence §§ 2588-2597 (3d ed. 1940). Our Tenth Circuit Court of Appeals has stated that, “[s]tipulations cannot be disregarded or set aside at will, but are *not* absolute and will be set aside to prevent manifest injustice.” Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc., 532 F. 3d 1063 (10th Cir. 2008)(emphasis added).

Conversely, the Utah Supreme Court has stated, “[c]ontracts define the legal obligations of the parties, and thus, when enforceable, set the boundaries *within which the district court’s equitable discretion must operate*.” Ashby v. Ashby, 2010 UT 7, ¶ 34, --- P.3d ---- (emphasis added). In contract law, the general rule is that “the law favors the right of men of full age and competent understanding to contract freely.” Ockey v. Lehmer, 2008 UT 37, ¶21, 189 P.3d 51 *citing* Frailey v. McGarry, 116 Utah 504, 211 P.2d 840, 847 (1949); *see also* Phone Directories Co. v. Henderson, 2000 UT 64, ¶15, 8 P.3d 256 (“[P]eople are generally free to bind themselves pursuant to any contract, barring such things as illegality of subject matter or legal incapacity.”). The Utah Supreme Court has held, “[a] contract functions in part to apportion risk of future events between the contracting parties. Moreover, parties are free to allocate the risk of future events between them however they wish.” Deep Creek Ranch, LLC v. Utah State Armory Bd., 2008 UT 3, ¶19, 178 P.3d 886. This Court has held, “[t]he law even permits parties to enter into unreasonable contracts or contracts leading to a hardship on one party.” Glacier Land Co., L.L.C. v. Claudia Klawe & Associates, L.L.C., 2006 UT App. 516, ¶21, 154 P.3d 852 *citing* Ryan v. Dan’s Food Stores, Inc., 972 P.2d 395, 402 (Utah 1998).

State v. Casey, 2003 UT 55, ¶40, 82 P.3d 1106, *citing* State v. Verde, 770 P.2d 116, 121-122 (Utah 1989)(*citing* Eldredge). The two-pronged “plain error” test requires that the error be “plain” or “manifest,” which is sometimes termed the “obviousness requirement.” *Id.*, *citing* Verde. The second prong is that “the error be of sufficient magnitude that it affects the substantial rights of a party.” *Id.* *citing* Verde at 122.

“Where a court has felt it necessary to prevent an injustice, particularly where facts contrary to the stipulation are established by evidence, the court may relieve a party from a stipulation.” U.S. v. Kulp, 365 F. Supp. 747 (E.D. Pa. 1973). In the matter of Sinnock v. Young 142 P.2d 85 (Cal. App. 4th Dist. 1943), the court indicated that, where the trial evidence was introduced conclusively showing that certain facts set forth therein were incorrect and untrue, there arose a duty upon the court to relieve the party adversely affected from the stipulation.

In order successfully to attack a stipulation designed to settle the facts of a case and submitted for the purpose of enabling the court to determine the controversy, it is necessary that the party should show the particulars of a claim that it has omitted material facts, and the reasons therefor, as well as to substantiate through other methods than alleging a mere conclusion the position that it was signed upon inadequate information, or that some misrepresentation was made whereby a false or incomplete representation of the case was incorporated into the stipulation.

161 A.L.R. 1161 *citing* Robinson v. Oregon City Sand & Gravel Co. (1933) 143 Or 177, 20 P2d 1073.

Veronica clearly met the criteria for setting aside the Divorce Agreement should this Court determine that such law pertaining to stipulations is applicable, as Guenther has indicated in his responsive brief. The Divorce Agreement was either negotiated in bad faith

or unreasonably constrained the trial court's equitable and statutory duties. Sweet v. Sweet, 2006 UT App. 216, ¶3, 138 P.3d 63. The parties, particularly Guenther, did not exercise good faith, honesty, and candor in negotiating the Divorce Agreement. Neither party was actually contemplating divorce when the Divorce Agreement was signed, which is evidenced by the record. Veronica did not see a divorce lawyer after signing the Divorce Agreement and was unaware whether Guenther had seen a lawyer. R0393 at p. 31. Veronica did not intend to divorce Guenther at the time she signed the Divorce Agreement. *Id.* Upon signing the Divorce Agreement, Guenther was not contemplating divorce and did not move in that direction. R0393 at p. 198. In fact, Veronica's testimony was that her underlying reason for the Divorce Agreement was to simply threaten divorce and, after doing so, Guenther treated her better. *See*, R0393 at p. 32. Since the parties, upon signing the Divorce Agreement, did not intend to divorce, the parties did not mutually assent their intent to be bound by the terms of the Divorce Agreement. Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597, 600 (Utah 1962).

Clearly, "some misrepresentation was made whereby a false or incomplete representation of the case was incorporated into the stipulation" in this matter. *See*, 161 A.L.R. 1161, *citing Robinson*, 20 P.2d 1073. Additionally, as indicated *supra*, facts contrary to the stipulation were established by evidence at trial in this matter. Kulp, *supra*. It was plain error for the trial court to have relied upon the contents of an agreement that the parties never intended to enforce. Thus, the trial court should have relieved the parties from the Divorce Agreement, and its reliance thereon has worked a manifest injustice against Veronica in this matter.

**IV. SHOULD THE EXISTENCE OF THE DIVORCE AGREEMENT
BE AFFIRMED, THE TRIAL COURT'S INTERPRETATION OF
THE PLAIN LANGUAGE WAS IN ERROR.**

Guenther challenges the preservation of the issue concerning Veronica's claim that she bartered away her alimony for equity interest in the Terra Vista Home. *Brief of Appellee* p.17. Guenther further alludes that Veronica may have breached the Divorce Agreement because she did not make required payments towards the Terra Vista mortgage after August of 2004. *Brief of Appellee* at p. 22. However, Guenther has again failed to comprehend Veronica's position on this issue, which is plainly set forth by the Opening Brief. *See, Brief of Appellant* at pp. 24-29.

This Court has held, "[i]t is [a] court's duty to enforce the intentions of the parties as expressed in the plain language of the covenants." Holladay Duplex Management Co., L.L.C. v. Howells, 2002 UT App 125, ¶7, 47 P.3d 104, *citing* Swenson v. Erickson, 2000 UT 16, ¶11, 998 P.2d 807. Furthermore, [s]uch language is to be taken in its ordinary and generally understood and popular sense, and is not to be subjected to technical refinement nor the words torn from their association and their separate meanings sought in a lexicon." *Id.*, *citing* Freeman v. Gee, 18 Utah 2d 339, 423 P.2d 155, 163 (1967). This Court has found, "[i]f the language within the four corners of the contract is unambiguous, then a court does not resort to extrinsic evidence of the contract's meaning, and a court determines the parties' intentions from the plain meaning of the contractual language as a matter of law." Young v. Wardley Corp., 2008 UT App. 104, ¶9, 182 P.3d *citing* Bakowski v. Mountain States Steel, Inc., 2002 UT 62, ¶16, 52 P.3d 1179. The parties' intentions are controlling. State v. Ison, 2006 UT 26, ¶46, 135 P.3d 864 *citing* Bakowski at ¶16. Thus, "[t]he trial court is to consider

“[e]ach contract provision ... in relation to all of the others, with a view to giving effect to all and ignoring none.” Young at ¶10 *citing* Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990). This Court has previously determined, “[t]he rule is well settled that a person cannot recover back money which he has voluntarily paid with full knowledge of all of the facts, without fraud, duress, or extortion in some form.” Southern Title Guar. Co., Inc. v. Bethers, 761 P.2d 951, 955 (Utah App 1988), *citing* 66 AmJur.2d *Restitution and Implied Contracts* ' 93 (1973). The Utah Supreme Court has found as follows:

We have previously held that a trial court must consider many factors in making a property settlement in a divorce proceeding, but that the purpose of the settlement should not be to impose punishment on either party. Although the court ruled that “marital misconduct . . . should be considered in making an equitable division of property,” it does not necessarily follow that the defendant was in fact in any way punished by the ultimate division made of the property.

Jespersion v. Jespersen, 610 P.2d 326, 328 (Utah, 1980), *citing* Read v. Read, 594 P.2d 871 (1979).

Contract law is clear that a party cannot expect to be placed in a better position than it agreed to be under the contract. *See*, Tolman v. Winchester Hills Water Co., Inc., 912 P.2d 457, 462 (Utah App. 1996). This Court has held the following:

It is fundamental that every contract imposes a duty on the parties to exercise their contractual rights and perform their contractual obligations reasonably and in good faith. *See Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 311 (Utah 1982); *Rio Algom Corp.*, 618 P.2d at 505. Nonetheless, ***a court may not make a better contract for the parties than they have made for themselves; furthermore, a court may not enforce asserted rights not supported by the contract itself.*** *See Rio Algom Corp.*, 618 P.2d at 505. “[I]t

cannot be adopted as a general precept of contract law that, whenever one party to a contract can show injury flowing from the exercise of a contract right by the other, a basis for relief will be somehow devised by the courts.” *Mann*, 586 P.2d at 464.

Ted R. Brown and Associates, Inc. v. Carnes Corp., 753 P.2d 964, 970-971 (Utah App. 1988)(emphasis added).

Through its reliance upon the Divorce Agreement due to what it perceived to be partial performance, the trial court has in essence created provisions outside the plain language contained within that contract. By doing so, it has created a contract that favors Guenther in the divorce rather than focusing on the equitable nature of the case. The trial court’s enforcement of the contract exceeded the terms contained therein to Veronica’s detriment.

The Divorce Agreement provided at its core that Veronica’s name was to be taken off the loans for the Terra Vista property, but that her name would remain on the title. Then at some point in the future (after August 31, 2004), the property would be sold and Veronica would receive the equity “divided equally,” or in any event no less than \$70,000.00. (Exhibit B, Trial Exhibit P-4). Under this contract, any payments made by Guenther to the loans on the property prior to its sale involved making payments to Veronica without regard to offset. Any other interpretation renders the Veronica’s benefits under the contract illusory—she bargained for a situation where she would have no responsibility for any debt payments on the property, but she would still have full ownership in the property. Under 3.1 of the Divorce Agreement, it says “Equity will be divided **equally** . . .” (Exhibit B, emphasis added). She waived her right to alimony under the Divorce Agreement for an

equal share of any equity which accrued in the Terra Vista property, including an equal share of any payments Guenther made to the Terra Vista property. She is entitled to the benefit of her bargain.

As to Guenther's position that Veronica breached the Divorce Agreement, such issue is either not properly before this Court or not properly briefed by Guenther. "One cannot prove a breach of contract claim without proving the actual existence of a contract..." Moss v. Parr Waddoups Brown Gee & Loveless, 2008 UT App 405, ¶17, 197 P.3d 659. "The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages." Bair v. Axiom Design, LLC, 2001 UT 20, ¶14, 20 P.3d 388. Guenther neither sets forth the factors for breach of the Divorce Agreement nor adequately briefs such issue under UT. R. APP. P. 24. Regardless, Guenther did not raise a cross-appeal in this matter on grounds of breach and is thus barred from raising them in his appellee's brief herein. UT. R. APP. P. 4(d).

Guenther erroneously attempts to do that which this Court has previously indicated as inappropriate. "[I]t cannot be adopted as a general precept of contract law that, whenever one party to a contract can show injury flowing from the exercise of a contract right by the other, a basis for relief will be somehow devised by the courts." Ted R. Brown at 970-971, *citing* Mann, 586 P.2d at 464. It was not within the trial court's authority to devise relief in favor of Guenther under the Divorce Agreement if it determined that such agreement was binding on the parties, since to do so is contrary to an individual's right to rely on the provisions under which they contract. Veronica relied on the provisions of the Divorce

Agreement and her equitable share of the proceeds from sale of the Terra Vista home to waive her right to alimony. The trial court gave her neither, then erroneously created contractual provisions placing Guenther in a better position than that which he contracted, all to Veronica's detriment. Veronica is not barred from raising issues that could not have reasonably been foreseen in the trial court's conclusions respecting interpretation of the Divorce Agreement. Additionally, Guenther's challenge that Veronica's breach supports the trial court's decision was not properly briefed nor is it properly before this Court in this matter.

V. THE TRIAL COURT IS BOUND BY THE EVIDENCE PRESENTED BY THE PARTIES.

In his *Brief of Appellee*, Guenther argues Veronica lacks supportive caselaw for her issue that the trial court abused its discretion in valuing property at a price not submitted to it by the evidence. *Brief of Appellee* at p. 24. However, it is basic knowledge that a court cannot affix a value to property without some basis for its determination of value or make findings as to its arrival to its determination.

This Court has determined a party must provide evidence for a trial court to assess valuation. Sather v. Pitcher, 748 P.2d 191, 193-194 (Utah App.,1987). In the case of Newmeyer v. Newmeyer, the Utah Supreme Court reviewed a trial court's division of equity in the marital home. *Ibid.*, 745 P.2d 1276 (Utah,1987). The wife in that matter had invested money from her inheritances in the marital home and was awarded the amount she invested, which was affirmed by the Utah Supreme Court. *Id.* at 1278. The husband also claimed error in the trial court's determination of the current market value of the marital home, which the

trial court determined to be the middle ground between the two (2) experts that testified at trial. *Id.* The Utah Supreme Court determined the trial court did not abuse its discretion, as the determination was supported by findings.

In the matter of Berger v. Berger, the Utah Supreme Court determined a trial court erred by relying on the valuation of a company that was valued a year before trial. *Ibid.*, 713 P.2d 695, 697-698 (Utah, 1985). Berger determined that, as a result of the party's failure to evidence valuation of the company at the time of trial, the trial court was left with no admissible evidence as to the value of the company at the time of the divorce decree. *Id.* Hence, Berger determined to remand the matter back to the trial court for a new trial to determine the company's value at the time of the divorce decree. *Id.* at 698.

Guenther ignores the basic tenets of Veronica's argument, which is that a trial court cannot affix a valuation date if it is too remote in time to accurately reflect the actual value of the property. The trial court was provided with evidence concerning the valuation of property in the marital estate; however, the trial court's error lies in the remoteness in time to which it affixed the valuation of the items. *See, Sather* at 193-194. Due to the remoteness of the valuations Guenther submitted to the trial court, the trial court was left with no admissible evidence to affix valuation to the property at the date of the decree. *See, Berger* at 697-698. Accordingly, Guenther's argument fails.

VI. THE TRIAL COURT WAS REQUIRED TO VALUE THE MARITAL ESTATE AT THE TIME OF THE DIVORCE DECREE.

In his *Brief of Appellee*, Guenther challenges a failure to marshal the evidence that the trial court abused its discretion in the valuation of the marital property and therefore the trial

court should be affirmed on this issue. *Brief of Appellee* at pp. 23-24. In support of his contention, Guenther cites to Parker v. Parker, which held a trial court may value marital assets at some other time than the time the divorce decree is entered. *Ibid.*, 2000 UT App. 30, 996 P.2d 565.³ However, in citing to Parker, Guenther ignores holdings in Parker and other caselaw that conflict with his argument.

This Court has held, “[t]he marital estate, and this includes retirement accounts, should be valued as of the time of the divorce decree.” Dunn v. Dunn, 802 P.2d 1314, 1320 (Utah App.,1990), *citing* Morgan v. Morgan, 795 P.2d 684, 687 (Utah Ct.App.1990). However, a trial court’s determination to affix a different valuation date must be supported by adequate evidence to support a differing equitable division. *See, id.* Furthermore, this Court held as follows:

It is well settled that the present value, as well as any deferred earnings of retirement accounts accrued during the marriage, are marital assets and, whenever possible, should be valued as of the time of the divorce and should be equitably divided. *Morgan v. Morgan*, 795 P.2d 684, 687 (Utah Ct.App.1990); *Berger v. Berger*, 713 P.2d 695, 697 (Utah 1985); *Woodward*, 656 P.2d at 432-33. The timing of distribution of these benefits depends on the particular circumstances, including whether there is particular animosity between the parties favoring an immediate disbursal or whether an immediate distribution would create a hardship or penalty. *Gardner*, 748 P.2d at 1079; *Motes v. Motes*, 786 P.2d 232 (Utah Ct.App.1989) *cert. denied*, 795 P.2d 1138 (Utah 1990); *Bailey v. Bailey*, 745 P.2d 830, 832 (Utah Ct.App.1987).

³ This Court should note Guenther’s muddled arguments and lack of legal authority throughout the *Brief of Appellee*. According to UT. R. APP. P. 24(a)(9), “[t]he argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.” As Appellee, Guenther is bound by UT. R. APP. P. 24(a)(9) and has failed to provide this Court with concise and well-thought arguments and relevant legal authority for his positions in this appeal. Moreover, Guenther failed to correctly cite to Parker in the *Brief of Appellee*. *See, Brief of Appellee* at p. 24.

Id. at 1319. Therefore, this Court has held, “any deviation from the general rule must be supported by sufficiently detailed findings of fact that explain the trial court’s basis for such deviation.” Rappleye v. Rappleye, 855 P.2d 260, 262 (Utah App.,1993) *citing* Morgan v. Morgan, 795 P.2d 684, 688 (Utah App.1990). Rappleye continued to hold the following:

There is no fixed formula upon which to determine a division of assets in a divorce action. *Watson v. Watson*, 837 P.2d 1, 5 (Utah App.1992); *accord Morgan v. Morgan*, 854 P.2d 559, 562-63 (Utah App.1993) (*Morgan II*). “Determining and assigning values to marital property is a matter for the trial court, and this Court will not disturb those determinations absent a showing of clear abuse of discretion.” *Morgan II*, 854 P.2d at 563 (*quoting Talley v. Talley*, 739 P.2d 83, 84 (Utah App.1987)). “In making such orders, the trial court is permitted broad latitude, and its judgment is not to be lightly disturbed, so long as it exercises its discretion in accordance with the standards set by this court.” *Id.* (*quoting Newmeyer v. Newmeyer*, 745 P.2d 1276, 1277 (Utah 1987)). However, there must be adequate factual findings to reveal how the court reached its conclusions. *Lee v. Lee*, 744 P.2d 1378, 1380 (Utah App.1987); *accord Dunn v. Dunn*, 802 P.2d 1314, 1317 (Utah App.1990).

Id. at 263.

In Parker, the trial court valued the marital estate at the time of decree and awarded the nine (9) bank accounts to their holders rather than placing a value on the marital portion and dividing it equitably. *Ibid.* at ¶6. Parker held as follows:

While marital assets are generally valued as of the date of the divorce decree, “ ‘where one party has dissipated an asset, hidden its value or otherwise acted obstructively,’ the trial court may, in the exercise of its equitable powers, value a marital asset at some time other than the time the decree is entered,” such as at separation. *Thomas v. Thomas*, 987 P.2d 603, 609 (Utah Ct.App.1999) (*quoting Andersen v. Andersen*, 757 P.2d 476, 479 (Utah Ct.App.1988)). *See Marshall v. Marshall*, 915 P.2d 508, 516 n. 14 (Utah Ct.App.1996). Here, Mr. Parker presented the trial court with evidence tending to show that Ms. Parker had dissipated marital assets. The evidence showed that Ms. Parker's regular monthly income exceeded her expenses by about \$2,000. Yet, in the few months following the parties' separation, Ms. Parker wrote checks to herself totaling nearly \$100,000. This showing necessarily shifted the burden to Ms. Parker to show that the funds were not dissipated, but were used for some

legitimate marital purpose. *Cf. Morgan v. Morgan*, 795 P.2d 684, 688 (Utah Ct.App.1990) (equal division of pretrial bank balances was improper when amount was incorrectly presumed dissipated; evidence of dissipation must first be shown, then burden would shift to show otherwise).

Id. at ¶13. Therefore, this Court determined Ms. Parker did not justify her actions below according to her burden in showing she had not dissipated assets from the bank accounts and therefore concluded Mr. Parker was entitled to one-half the sum of the bank accounts on the date of the parties' separation. *Id.* at ¶19.

In the instant case, Guenther argues Veronica failed to demonstrate that the trial court abused its discretion in valuing certain major household items. *Brief of Appellee* at p. 23. However, Guenther's reliance upon Parker does not support Guenther's position that the trial court was justified in valuing marital property at a time other than the date of the Decree.

Trial courts are generally bound in valuing a marital estate at the time of the divorce decree, indicating that it should be equitably divided. Dunn at 1320. Should a trial court determine it would be equitable to value the marital estate at a time other than the date of decree, the trial court must support its determination by sufficiently detailed findings of fact that explain its basis for deviation. Rappleye at 262. The trial court in this matter did not equitably divide the marital estate in this matter. Furthermore, the trial court's determination to affix a date of valuation other than the date of decree was not supported by sufficiently detailed findings explaining its basis for deviation. *Id.* The Findings of Fact and Conclusions of Law do not indicate circumstances where a party had dissipated an asset, hidden its value, or otherwise acted obstructively for its deviation. Parker at ¶13. The circumstances of this

case did not warrant the trial court's determination to value certain property in the marital estate at a time other than the date of decree. Therefore, Guenther's reliance upon Parker is misplaced and this Court should remand this matter to the trial court.

VII. VERONICA HAS APPROPRIATELY REQUESTED ATTORNEY'S FEES ON APPEAL.

Guenther argues Veronica has failed to adequately brief her request for a review of attorney's fees or marshal the evidence that the trial court abused its discretion in limiting the amount of fees awarded to her. *Brief of Appellee* at pp. 24-25.

UTAH CODE ANN. §30-3-3 authorizes a court to award attorneys fees in a divorce action, placing the decision "within the trial court's sound discretion." Stonehocker v. Stonehocker, 2008 UT App 11, ¶49, 176 P.3d 476. An award of fees requires detailed findings of fact supporting such determination. *See, Connell v. Connell*, 2010 UT App 139, ¶27, 233 P.3d 836. Under UTAH CODE ANN. §30-3-3(1), "[t]ypically, the trial court must base its fee award on (1) the receiving spouse's financial need, (2) the payor spouse's ability to pay, and (3) the reasonableness of the requested fees." *Id.*, *citing* Oliekan v. Oliekan, 2006 UT App 405, ¶30, 147 P.3d 464. However, UTAH CODE ANN. §30-3-3(2) differentiates those cases pertaining to enforcement of orders, with the underlying focus on the party that prevailed. This Court has previously applied subsection (2) to situations where an individual prevails on appeal by stating that, "[b]ecause wife prevailed on the main issues on appeal in divorce action, she was entitled to attorneys fees on appeal ..." Elman v. Elman, 2002 UT App 83, 45 P.3d 176.

The standard for attorneys' fees on appeal appears to fall squarely under the theory contained in UTAH CODE ANN. §30-3-3(2), since such award is based upon whether the appeal prevailed rather than the financial needs or reasonableness of fees. Under subsection (1), the intent is that a spouse who cannot afford to defend oneself will have their fees paid by the spouse who is more appropriately situated to pay for such fees. *See, Connell, supra.* Under subsection (2), the purpose is to not require the entire amounts sought by a party to be eaten up by the attorneys fees and thus become pointless in pursuing, even if they maintain a right to do so. *Id.* “[F]ee awards under subsection (2) serve no equalizing function but allow the moving party to collect fees unnecessarily incurred due to the other party’s recalcitrance” where “the other party is compelled to bring proceedings against the offending party” *Id.* at ¶30 (internal quotations omitted). This is so that “he or she is not forced to fritter away in costs and counsel fees the amounts received under the order ...” *Id.* (internal quotations omitted).

Veronica was clearly prejudiced by Guenther’s actions in the trial court when analysis is made of the varying errors occurring below. Veronica was compelled to bring this appeal to enforce her rights either under statute or under the Divorce Agreement, which was vigorously opposed by Guenther. While the award of attorneys fees below may have fallen squarely under UTAH CODE ANN. §30-3-3(1) at that time, revisiting such award may be necessary should Veronica prevail on appeal. The trial court’s determination to erroneously fashion both statutory law and nonexistent provisions of the Divorce Agreement in Guenther’s favor prejudiced Veronica. She was compelled to enforce her rights in this appeal against Guenther’s vigorous attempts to foreclose them.

Regardless of whether a re-visiting of the award of attorneys fees by the trial court is ordered to occur by this Court, Veronica is entitled to attorney's fees on appeal if she prevails. Veronica is entitled to appellate attorneys' fees and costs associated with defending her statutory rights and/or rights under the Divorce Agreement. *See, Burt v. Burt*, 799 P.2d 1166, 1171 (Utah Ct. App. 1990) ("Ordinarily, when fees in a divorce were awarded below to the party who then prevails on appeal, fees will also be awarded to that party on appeal.").

CONCLUSION

WHEREFORE, based upon the foregoing, Appellant respectfully requests this Court reverse the trial court in this matter, remand for further findings consistent with this opinion, enter orders for property division where the evidence is uncontroverted, and award attorney fees and costs on appeal.

DATED this 20th day of August, 2010.

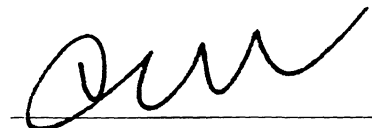


David S. Pace
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies, postage pre-paid, of the foregoing *Reply Brief of Appellant* on this 20th day of August, 2010 to the following:

Mr. Terry R. Spencer
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