

2009

Wasatch Oil and Gas LLC. v. Edward A. Reott : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WASATCH OIL & GAS, L.L.C.,

Plaintiff-Appellee,

vs.

EDWARD A. REOTT, et al.

Defendants-Appellants.

Case No. 20090749-CA

Priority No. 15

GOAL, L.L.C. and REGOAL, INC.,

Counterclaim, Third Party and

Crossclaim Plaintiffs-Appellants,

vs.

WASATCH OIL & GAS, L.L.C. and BILL
BARRETT CORPORATION,

Third party, Counterclaim and
Crossclaim Defendants-Appellees.

CONSOLIDATED BRIEF OF APPELLEES

Appeal from the Seventh Judicial District Court in and for Carbon County
The Honorable George M. Harmond, Jr., Presiding

ORAL ARGUMENT REQUESTED

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PARTIES TO PROCEEDING

The following is a list of parties named in the proceedings before the district court:

Plaintiff:

- WASATCH OIL & GAS, L.L.C., a Utah limited liability company.

Defendants:

- EDWARD A. REOTT, an individual;
- KEY ENERGY SERVICES, INC., a Maryland corporation d/b/a Key Energy Services, Inc. Four Corners Division;
- J-WEST OILFIELD SERVICES, INC., a Utah corporation;
- MISSION ENERGY, L.L.C., a Colorado limited liability company.

Counterclaim, Third Party and Cross-Claim Plaintiffs:

- GOAL, L.L.C., a Utah limited liability company;
- REGOAL, INC., a Pennsylvania corporation.

Third Party, Counterclaim and Cross-Claim Defendants:

- WASATCH OIL & GAS, L.L.C.;
- MISSION ENERGY, L.L.C.;
- WASATCH OIL & GAS PRODUCTION CORPORATION, a Utah corporation;
- WASATCH GAS GATHERING, L.L.C., a Utah limited liability company;
- BILL BARRETT CORPORATION, a Delaware corporation.

As used herein, "Reott" refers collectively to Edward A. Reott and related parties Goal, LLC and Regoal Inc. "Wasatch" refers collectively to Wasatch Oil & Gas, LLC, Wasatch Oil & Gas Production Company and Wasatch Gas Gathering, LLC. "BBC" refers to Bill Barrett Corporation. For simplicity of reference to legal positions and in non-factual contexts, "Wasatch" may also refer to both the Wasatch entities and BBC.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction by transfer of this appeal from the Utah Supreme Court pursuant to Utah Code Ann. § 78A-4-103(2)(j). The Utah Supreme Court had original jurisdiction over the appeal pursuant to Utah Code Ann. § 78A-4-102(3)(j).

APPELLEES' STATEMENT OF ISSUES PRESENTED

1. Does Reott's failure to marshal the evidence supporting the district court's findings on Reott's claims and defense of fraudulent conveyance preclude any relief on appeal with respect to the lower court's disposition of the quiet title claim?

Standard of Review: "A trial court's findings of fact will not be set aside unless clearly erroneous." R. Civ. P. 52(a); *Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177, 1184.

To establish that a finding of fact is erroneous, the appellant

must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence. If the evidence is inadequately marshaled, this court assumes that all findings are adequately supported by the evidence.

Id. (citation omitted). "Even where the [appellants] purport to challenge only the legal ruling ..., if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the [appellants] also have a duty to marshal." *Id.* ¶ 20. *See also United Park City Mines Co. v. Stitching Mayflower Mountain Fonds*, 2006 UT 35, ¶ 24, 140 P.3d 1200, 1206 ("To pass this threshold, parties protesting findings of fact must marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." (quotation omitted)).

2. Is constructive fraud a defense to a claim of equitable title?

Standard of Review: Whether constructive fraud may be asserted as a defense to a claim of equitable title is a question of law reviewed for correctness. *See Gillmor v. Family Link, LLC*, 2010 UT App 2, ¶ 9, __ P.3d ____.

3. Is lack of authority to execute the Letter Agreement a defense to Wasatch's claim of an equitable interest in the Section 32 leases sufficient to support successor-in-interest status under Rule 69(j)?

Standard of Review: Whether lack of authority to sign a contract to convey property can defeat an equitable interest in the property to be transferred is a question of law reviewed for correctness. *See Gillmor*, 2010 UT App at ¶ 9, __ P.3d ____.

4. Did this Court's opinion in the first appeal limit the evidence that the district court could hear in resolving the issue of J.C. Sutton's authority to act on behalf of Mission Energy in transferring the leases subject to the Letter Agreement?

Standard of Review: Whether the trial court complied with the mandate of the Court of Appeals is a question of law reviewed for correctness. *See Utah Dep't of Transp. v. Ivers*, 2009 UT 56, ¶ 8, 218 P.3d 583, 586.

5. Did the district court commit clear error in finding that Reott failed to prove damages with respect to his claims of trespass to chattels and breach of common carrier obligations?

Standard of Review: A trial court is given "considerable discretion" in deciding whether to award damages. *Shar's Cars, L.L.C. v. Elder*, 97 P.3d 724, 728 (Utah App. 2004). That decision will not be disturbed absent an abuse of discretion. *Id.* "Furthermore,

because the adequacy of a damage award is a factual question,” the trial court’s decision is reviewed for clear error. *Lysenko v. Sawaya*, 973 P.2d 445, 447 (Utah App. 1999).

DETERMINATIVE RULES OF CIVIL PROCEDURE

Utah Rules of Civil Procedure, Rule 69(j)(1)¹:

Who may redeem. Real property sold subject to redemption, or any part sold separately, may be redeemed by the following persons or their successors in interest: (A) the judgment debtor; (B) a creditor having a lien by judgment, mortgage, or other lien on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

Utah Rules of Appellate Procedure, Rule 24(a)(9) (in part):

A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is the second time this case has come to this Court on appeal. See *Wasatch Oil & Gas, L.L.C. v. Reott*, 2007 UT App 223, 163 P.2d 713 (hereinafter “*Wasatch I*”). It is an action to quiet title to mineral lease rights on state-owned land located in Carbon County, Utah, specifically Section 32 in Township 12 South, Range 16 East (hereinafter “Section 32”). Mission Energy, LLC (“Mission”) was the owner of the mineral lease rights. Reott was a judgment creditor of Mission who executed on the mineral lease rights and thereafter, at a sheriff’s sale, acquired the rights in Section 32 (along with federal lease rights in three

¹ The language quoted is from the rule as it read at the time of the Sheriff’s Sale and notice of redemption in 2001 and 2002. In November 1, 2004, the pertinent part of Rule 69(j)(1) was renumbered as Rule 69C(b) and amended.

other sections) for a credit bid of \$1.00.² Wasatch sought to redeem these leases as a successor in interest to Mission. When that effort to redeem was rejected by the Carbon County sheriff, Wasatch commenced this quiet title action. Reott, in turn, brought a counterclaim seeking damages against Wasatch and the Bill Barrett Corporation (“BBC”) for trespass to chattels and breach of common carrier obligations. Reott also sought to recover against other assets acquired by Wasatch from Mission on a theory of fraudulent transfer. This is an appeal from a Final Judgment in favor of Wasatch and BBC, following a bench trial in the district court. That trial followed the first appeal to this Court, in which the Court reversed a partial summary judgment in favor of Reott and remanded the case for trial.

II. COURSE OF PROCEEDINGS

The Basic Pleadings

This action commenced on December 24, 2001. Through this quiet title action, Wasatch sought to establish that it was a successor in interest entitled to redeem certain mineral leases Reott had acquired at a sheriff’s sale (the “Mission leases”). Reott responded to Wasatch’s complaint with counterclaims as well as third-party claims against BBC, purchaser of Wasatch’s interests in the subject leases.

Cross-Motions for Partial Summary Judgment

As set forth in this Court’s opinion in *Wasatch I*, 2007 UT App 223 ¶¶ 12-16, 163 P.2d at 717-18 (included in the Addendum to Reott’s Appeal Brief at tab E), in 2004 Wasatch filed a motion for partial summary judgment on the issue of whether it was a

² The two leases on Section 32 that Mission transferred to Wasatch are referred to hereinafter as the “Section 32 leases” or the “Section 32 interests.” These include ML 43541-A and ML 43798 but *do not include* lease ML 43541, which includes the Lavinia 1-32 well. Reott acquired the well and ML 43541 at the sheriff’s sale and retains them today.

successor in interest entitled to redeem the Mission leases. Reott opposed the Wasatch motion on two grounds. Reott argued that:

Wasatch could not exercise a right of redemption because (1) Wasatch did not have legal title on grounds that the Assignments failed to identify Sutton as an agent for Mission and Wasatch did not pay sufficient consideration and (2) Wasatch did not have “equitable title on the basis of fraudulent conveyance.”

Id. at ¶ 13. Reott also brought his own motions for partial summary judgment on the issues of quiet title, fraudulent conveyance, trespass, conversion, and trespass to chattels.

Each party placed before the district court by affidavit and citation to the discovery record those facts believed to be (a) undisputed and (b) material to the theories or defenses implicated by their respective motions. (R. 2496-3382) By way of response to the issues and supporting facts presented, the parties supplemented the record with further affidavits and citations to discovery in an attempt to establish issues of fact fatal to relief under Utah R. Civ. P. 56. (R. 3388-3592, 4073-4107, 4204-4251)

Although lengthy, these submissions did not purport to be comprehensive statements of all facts that might bear on the limited issues before the district court on the cross-motions for partial summary judgment. Nor did the parties purport to place before the district court all claims and defenses that they might raise at the trial of this action. In short, what was before both the district court and this Court in *Wasatch I* were cross-motions for *partial* summary judgment based on selected pieces of the factual record.

Rulings on Cross-Motions for Partial Summary Judgment

The district court made three key rulings on partial summary judgment that are of consequence to this appeal. First, Judge Bryner found that Wasatch was a successor in

interest with respect to certain BLM leases sold at the sheriff's sale. In transferring these BLM leases to Wasatch, Mission's manager J. C. Sutton ("Sutton") had executed the lease assignment forms noting that he was acting for Mission as its "manager." Reott *did not contest* that documents so executed conferred legal title on Wasatch sufficient to exercise a right of redemption. R. 4812, 5384-5386. Accordingly, it is undisputed that Wasatch held legal title to the BLM leases. (Conversely, Judge Bryner found that Sutton's "failure to identify [himself] on the [SITLA] assignment forms as a person authorized to execute the assignments on behalf of Mission results in no title passing from Mission to Wasatch." (R. 4814, 5384-5385))

Second, Judge Bryner ruled that "an equitable interest in property sold at a Sheriff's Sale would be sufficient to confer successor-in-interest status on Wasatch. . . ." (R. 4815) The court then noted that Wasatch claimed equitable title in Section 32 based largely on the June 21, 2000 Letter Agreement, which included Mission's promise to assign the Section 32 interests. The Letter Agreement, in contrast to the Section 32 lease assignment forms themselves, was executed in the same manner as the BLM lease assignment forms, with Sutton noting that he was acting for Mission as its "manager." (R. 4815; Appeal Brief, Addendum C at 2)

Reott opposed Wasatch's motion by claiming that Sutton had no authority to sign the lease assignments for Section 32 and that Wasatch, by executing the Letter Agreement, was party to a "fraudulent conveyance" because it had acted with fraudulent intent. Reott cited evidence of certain "badges of fraud" that he claimed was not in dispute. Reott also claimed that "no consideration was ever paid" under the Letter Agreement. Concluding that there

were no genuine issues of material fact as to these defenses, the district court found for Reott with respect to the Section 32 interests as a matter of law. (R. 4815)

Third, Judge Bryner ruled that BBC and Wasatch had breached their obligation as a common carrier. (R. 4822-4823) The court reasoned that Wasatch and BBC failed to timely provide pipeline access, or a reasonable gas gathering agreement, constituting breach under the Mineral Leasing Act. (R. 4822-4823) The court, however, reserved the question of damages for trial. (R. 4823)

Wasatch and BBC appealed the partial summary judgment on their claim of successor-in-interest status relating to Section 32 based on the legal and equitable title claims. Reott did not appeal the partial summary judgment on the BLM leases.³ No one appealed the district court's determination that the Letter Agreement conferred equitable title to Section 32 on Wasatch or that the properly executed BLM lease assignment documents transferred title to those leases. Thus, it is law of this case that a properly executed document purporting to convey title or containing a promise to convey title is effective to bind Mission and, absent more, a sufficient basis for successor-in-interest status.

The 2007 Appeal — *Wasatch I*

In *Wasatch I*, this Court reviewed the partial summary judgment entered by the district court in favor of Reott with respect to Wasatch's attempted redemption of the Section 32 interests. *Wasatch I*, 2007 UT App 223, ¶ 1. This Court addressed two broad issues on appeal: (a) whether Reott had standing to challenge Wasatch's claimed status as a successor

³ Because the district court granted Wasatch's motion for partial summary judgment with respect to the BLM lease assignments, Wasatch was able to redeem those interests. Reott did not appeal that ruling. *Wasatch I*, 2007 UT App 223, ¶ 14, n. 10.

in interest, and (b) whether issues of fact precluded the entry of partial summary judgment on Wasatch's claim to be a successor in interest by reason of Mission's transfer of either legal title or equitable title to the Section 32 interests.

This Court held that Reott did have standing to challenge Wasatch's claim of successor-in-interest status to redeem the Section 32 interests, but that genuine issues of material fact precluded the entry of partial summary judgment with respect to Wasatch's claims of legal title and/or equitable title sufficient to support successor-in-interest status with respect to the Section 32 interests. The case was remanded to the district court for a trial on the merits. Because the Court reviewed the granting of a *partial* summary judgment, there still remained for resolution at trial other issues not subject to the appeal in *Wasatch I*.⁴

Pretrial Proceedings on Remand

In advance of trial, Reott filed new motions for partial summary judgment with respect to two issues – authority and equitable title – addressed by this Court in *Wasatch I*. For the first time in the action, Reott argued that Colorado law applied to the issue of authority. On the basis of Colorado law, he challenged Wasatch's legal title by asserting that Wasatch could not prove oral authorization or ratification of the lease assignments. Reott also attacked equitable title by arguing that Sutton lacked authority to execute the Letter Agreement. (R. 5655-5664) The district court denied the motion as to equitable title, concluding that Judge Bryner had already determined that the Letter Agreement conveyed equitable title in the Section 32 leases to Wasatch and that this Court had directed the district

⁴ The Court also noted, “[a]lthough BBC does not expressly appeal the rulings regarding trespass, conversion, and trespass to chattels, these rulings were based on the trial court’s determination that Reott had title to the Section 32 Leasehold Interests.” *Wasatch I* at ¶ 34, fn.14.

court to hold a trial on the merits only with respect to claims that Wasatch had acted in a fraudulent manner. (R. 8289 at 64-67) The district court also denied the motion as to oral authorization of the transfer of legal title pursuant to the lease assignments. The district court ruled that this Court had directed it to try that issue and that the facts bearing on the issue were in dispute. The court specifically rejected Reott's assertion that nothing done by Sutton as Mission's sole operating manager would be an act done with Mission's actual authority. *Id.*

At the time, the district court did grant the motion for partial summary judgment with respect to ratification. The facts appeared not to be in dispute (contentions by Wasatch to the contrary notwithstanding) and Judge Harmond read the governing law as mandating entry of judgment in favor of Reott on this point.

The Trial

From October 27 through 31, 2008, the district court held a trial of all remaining issues in the case. These included the two issues bearing on Wasatch's claim of successor-in-interest status and right to redeem the Section 32 leases: (a) whether Sutton had authority to assign Mission's legal interest in Section 32 to Wasatch, and (b) whether actual fraud had occurred, affording Reott a defense to the transfer of equitable title to Wasatch. The district court also heard Reott's evidence regarding his claim of damages arising from the conduct of Wasatch and/or BBC.

Because the status of the Section 32 interests impacted the scope of any damages Reott might claim, the district court first heard evidence relating to authority and fraud. Then, on the morning of the fourth day of trial, in anticipation of hearing evidence of

damages, the district court provided extensive oral findings of fact on the Section 32 issues to guide the remainder of the trial proceedings. (R. 8294 at 899-916) *Sua sponte* vacating its partial summary judgment on the issue of ratification, the district court found that Wasatch was a successor in interest to Mission and was entitled to redeem the Section 32 interests. (R. 8294 at 901, 914) With that threshold issue resolved on the evidence, the district court proceeded to hear Reott's further evidence in support of those claims for damages still remaining after resolution of the right of redemption and related issues of authority and fraud.

On February 27, 2009, the district court entered written Findings of Fact and Conclusions of Law re: Quiet Title and Fraudulent Transfer Claims based on the oral findings read into the record on October 30, 2008. On August 19, 2009, the district court entered its Findings of Fact and Conclusions of Law re: Damages. That same day, the district court entered its Final Judgment, quieting title to the Section 32 interests and the pipeline and meter shack serving Reott's well on Section 32 in BBC and dismissing all other claims and counterclaims, including Reott's claims of fraudulent conveyance and claims for damages. On September 10, 2009, Reott filed a notice of appeal.

III. STATEMENT OF FACTS

The district court's Findings of Fact included 163 findings covering 21 pages with respect to the redemption issues (Addendum F to Appeal Brief: findings on redemption are noted below as "FR ___") and an additional 69 findings covering nearly nine pages on the damages issues (Addendum G to Appeal Brief: findings on damages are noted below as

“FD__”). These findings are summarized below with citations noting the specific numbered finding taken from the portions of the record on appeal cited above.

Mission Energy LLC

Mission was a start-up company, formed to acquire mineral leases and then market those leases to third parties as part of a drilling program. (FR 1) The Mission Operating Agreement identified three members/owners, with Intermarket Trading Company, LLC (“Intermarket”) owning the majority interest in Mission. (FR 2, 3) The Operating Agreement also identified four individuals as “initial managers.” (FR 4) One of these was Sutton, the sole manager of Intermarket. (FR 5) Another person identified as one of the initial managers was Fred Jager (“Jager”). (FR 4)

The Mission Operating Agreement gave the “Manager . . . power and authority” to “execute on behalf of the LLC without obligation on third party’s part for inquiry as to actual authority or as to disposition of funds, all contracts, leases, notes, mortgages, deeds” and to “lease, liquidate and sell the properties of the LLC upon such terms, conditions and prices as the Managers deem acceptable. . . .” (FR 7) At the same time, the Operating Agreement provided that “[a]ny . . . assignment . . . , which is intended to bind the LLC or convey . . . , title to its real . . . property shall be valid and binding for all purposes if executed by any two of the Managers.” (FR 8)

Mission expended cash to acquire leases and was always in search of a better-capitalized partner to realize the potential value of the leases it acquired. (FR 14, 16) In May 1998, two of the four Mission managers (also holding a combined minority ownership interest in Mission) terminated their relationship with Mission and ceased to be managers.

(FR 21) Mission did not replace these managers. (FR 22) With Jager uncertain regarding his status with Mission (FR 6, 13), Sutton became and remained the sole functioning manager of Mission from May 1998 to October 21, 2000, when he resigned. (FR 23)

Reott's Dealings with Mission

Reott twice invested in Mission: \$150,000 as part of a private placement Utah lease acquisition program and \$160,000 as an unsecured loan. (FR 9) With respect to the private placement investment, Sutton was the sole signatory to the subscription documents on behalf of Mission without any statement noting his authority to do so. (FR 10) Jager, in turn, wrote to Reott to confirm the \$160,000 loan without noting his authority but indicating at the top of the communication that he was "chairman." (FR 13) In the wake of the resignations of the two other Mission managers, Sutton advised Reott no later than August 1998, that he (Sutton) had taken over the operations of Mission as of May 1, 1998. (FR 24)

Mission's Operations

Mission engaged in an extensive oil and gas lease acquisition program in various units and areas located in Carbon County and Duchesne County, Utah. (FR 17-19) Among the numerous leases acquired by Mission were those SITLA leases – ML 43541 and ML 43798 – covering Section 32.⁵ (FR 18, 19) This Section and these leases were the principal subject matter of the trial before the district court and are the primary subject matter of this appeal.

Almost from its formation, Mission lacked capital and revenue and was not able to pay its debts as they became due. (FR 20) This continued to be true between May 1 and

⁵ Section 32 is owned by the State of Utah. The Utah School and Institutional Trust Lands Administration ("SITLA") issued leases ML 43541 and ML 43798 on Section 32 on behalf of the State of Utah. *Wasatch I* at ¶ 3. It is in Section 32 that Mission drilled the Lavinia 1-32 well, which Reott owns to this day. (FR 19)

June 21, 2000. *Id.* Nonetheless, Mission acquired mineral leases for the purpose of marketing these as a package to third parties. (FR 1, 11)

Mission/Wasatch

In the late 1990s, Wasatch began acquiring leases in the same vicinity where Mission owned or had acquired an interest in various mineral leases. (FR 25-32) This led Wasatch to have dealings with Mission. (FR 32) Wasatch also invested considerable funds in clearing up legal issues surrounding the leases owned by it and by Mission. (FR 26-28) Reott was made aware of these efforts. (FR 29)

Reott's Judgment

Mission failed to repay the \$160,000 unsecured loan from Reott. (FR 33 and *Wasatch I* at ¶ 4) Reott obtained a \$204,000 judgment against Mission in December 1999 (the "Reott Judgment"). (FR 34 and *Wasatch I* at ¶ 4) His efforts to enforce the Reott Judgment are detailed in *Wasatch I* at ¶¶ 11 and 12. This litigation was filed in response to those efforts.

The May 2000 Lease Acquisition

On May 1, 2000, pursuant to a letter agreement, Mission transferred eight mineral leases – two SITLA leases and six BLM leases – to Wasatch for a payment of \$27,443.30. (FR 36) These leases involved non-contiguous parcels that had no existing wells or any oil and gas production. (FR 36-37) Wasatch negotiated the purchase price for this May 2000 acquisition based upon the average price it had recently paid for two federal and two state leases located on property contiguous to some of the leases subject to the May 2000 acquisition. (FR 38-39, 41-47) The ultimate price was the result of negotiations between

Wasatch and Mission and represented the amount a willing buyer was prepared to pay a willing seller for the Mission leases. (FR 40, 48, 63-65)

The June 2000 Lease Acquisition

On June 21, 2000, Mission and Wasatch entered into a letter agreement for a second sale of leases from Mission to Wasatch (referred to herein as the “Letter Agreement”). (FR 84) The Letter Agreement was executed in a form that reflected Sutton was acting on behalf of Mission as its “manager.”⁶ (Trial Ex. 9 – Appeal Brief, Addendum C.)

The June 2000 transaction involved ten mineral leases, none with existing wells or oil and gas production. (FR 67-68) The leases included two on Section 32. (FR 70) Because liens had been recorded on Section 32 with respect to work done on the Lavinia 1-32 well, Wasatch sought to avoid entanglement in any potential legal problems by acquiring an interest in 600 acres of Section 32 that excluded the 40 acres surrounding the Lavinia 1-32 well to the depth of the well at 3,398 feet. (FR 71-73) The ten leases subject to the Letter Agreement had several problems:

1. Mission owned only a 50% interest in two leases, which were also very remote and in suspension. (FR 69, 78-79)
2. The production unit in which five leases were located was expiring and the five leases, with one exception, were either expired or in suspension. (FR 75-76)

Notwithstanding these deficiencies, Wasatch initially offered Mission the same average price per acre negotiated in the May 2000 acquisition. (FR 80) Mission countered this offer with a proposal that Wasatch promise to do four things (FR 82):

1. Reimburse Mission for payment of past rentals under the leases.

⁶ This is in contrast to the signature on the lease assignment forms effecting the transfer memorialized in the June 2000 Letter Agreement. Therein, Sutton did not identify either Mission or his authority. *Wasatch I* at ¶ 7.

2. Obtain reinstatement of any expired leases.
3. Maintain the leases as lessee and unit operator (in place of Mission).
4. Include Mission at a specified percentage in any drilling deal Wasatch or Mission might negotiate in the future with respect to development of the leases.

Both Sutton and Jager believed that, given Mission's financial condition, the promise of a percentage of a future drilling deal had more value than payment of the fixed amount offered by Wasatch for the leases and previously paid for similar leases. (FR 83, 85-87)

Execution of the SITLA Lease Assignment Forms

Each of the eight BLM lease assignment forms correctly identified Mission as assignor and Sutton as manager; but the two SITLA lease forms, reflecting limitations in the form itself, failed to identify Mission or Sutton as manager. (FR 92-97, 104-106) This was an oversight on the part of the person preparing the forms for Wasatch and not an indication of intent of either Mission or Sutton not to transfer all interests identified in the June 2000 Letter Agreement. (FR 98)

Wasatch sent the forms as prepared for execution by Mission and, on June 23, 2000, Sutton signed each as prepared. (FR 99-100) It was the clear intent of both Mission and Wasatch that the lease assignment forms transfer Mission's interest in the ten leases to Wasatch. (FR 101) Both the May and June 2000 transaction were extensively negotiated and there was no evidence that, in executing the SITLA forms, Sutton acted in haste or with an intent to act for some entity other than Mission, or that the omission was anything other than an oversight. (FR 102-103)

Sutton's Authority to Act for Mission as of June 2001

By May 2000, Sutton had been acting as the sole manager of Mission for two years. (FR 28, 107) This was no coincidence — Sutton was also the sole manager of Mission's controlling shareholder. (FR 3, 5) Given the facts regarding Mission's shareholders and managers as of May 2000, Sutton had actual authority to execute the SITLA lease forms on behalf of Mission, consistent with the terms of the Letter Agreement. (FR 109) Furthermore, Sutton discussed the transaction with Jager, who was listed as a manager in the Mission Operating Agreement, and Jager did not express any opposition to the sale of the leases or the terms of the sale; rather, Jager manifested consistent support for the actions taken by Sutton on behalf of Mission, including in a letter to Reott after Sutton resigned and Jager acceded to the role of "chairman." (FR 108, 138-41)

Wasatch Performance under the Letter Agreement

As required by the terms of the Letter Agreement, Wasatch did the following:

1. Wasatch reimbursed Mission \$3,629.40 for rentals paid by Mission. (FR 115)
2. Wasatch paid to SITLA over \$4,000 for assignment of the lease and subsequent rentals to maintain the lease current. (FR 116)
3. Wasatch met with the BLM and reinstated the operating unit. (FR 117).
4. Both Wasatch and Mission actively sought other parties to develop and drill on the lease property, and Wasatch made periodic reports through 2000 to Mission regarding its attempts to commence drilling. (FR 118)

Mission Assets after the June 2000 Transaction

Despite the transfer of ten leases to Wasatch pursuant to the Letter Agreement, Mission retained the following assets (FR 119):

1. The Lavinia 1-32 well, which both Reott and Sutton valued at an amount in excess of all outstanding Mission liabilities.

2. Cash in the bank of at least \$27,236.27.
3. A bond with the State of Utah in the amount of \$19,943.15.
4. Certain leases referred to as the “Gusher leases,” as to which no precise value was established at trial but which both Sutton and the Lease Acquisition Memorandum identified as having value.

Mission did not convey to Wasatch by the Letter Agreement all of Mission’s remaining assets. (FR 120) The fair value of the assets still owned by Mission exceeded its debts, notwithstanding Mission’s inability as a start-up company to pay those debts as they came due. (FR 121)

Mission’s Demise

Reott took aggressive action to enforce his Judgment. He garnished Mission’s bank accounts. (FR 132) Reott docketed the Colorado Judgment in the Carbon County district court. (FR 133, 134; *Wasatch I* at ¶ 11) He contacted Wasatch and received documents regarding the May and June 2000 transfers. (FR 126, 135) He also contacted Jager, who provided him with information regarding Mission and the transactions. (FR 130, 133, 136, 139-140) Reott deposed both Sutton and Jager. (FR 143) Reott acquired two judgments and associated lien interests recorded against Mission and Section 32. (FR 146; *Wasatch I* at ¶ 11)

On October 1, 2000, Sutton resigned as Mission’s manager. (FR 133) No later than March 1, 2001, Mission ceased to function by reason of Reott’s collection efforts. (FR 152) After that point in time, there was no one with whom Wasatch could deal regarding its promise to include Mission in any drilling deal. (FR 153-154)

Reott's Sheriff Sale in Carbon County

On August 9, 2001, the Sheriff of Carbon County held a sale of Mission's Section 32 interests. (FR 156; *Wasatch I* at ¶ 12) There being no other bidders at the sale, Reott credit bid \$1.00 for all Mission interests sold on that day including the Section 32 interests. (FR 157-158; *Wasatch I* at ¶ 12) Wasatch twice attempted to redeem the Section 32 interests, but the Carbon County sheriff either rejected Wasatch's notices of redemption or simply ignored them. (FR 159-160; *Wasatch I* at ¶ 12) On February 9, 2002, the Carbon County sheriff issued a sheriff's deed to Reott for the Section 32 interests.⁷ (FR 161; *Wasatch I* at ¶ 12)

BBC Acquires and Repairs the Gas Gathering System

Effective April 1, 2002, Wasatch sold to BBC its Section 32 interests, along with a gas gathering system and other properties never owned by Mission, and BBC assumed operations. (FR 162; *Wasatch I* at ¶ 12 [noting the date of the agreement to be April 30, 2001]) BBC thereafter determined to replace the old, 2" and 4" pipe of the gas gathering system with a 10" collection pipe. (FR 23, 26) The old pipe leaked and was so inadequate, and the pressures produced by other wells so high, that the Lavinia well would have been unable to move gas into the gathering system without a compressor. (FD 26, 27) Repairs began in October of 2003. (FD 28)

Damage to the Meter Shack and Pipelines; Reott's Oil Leak

On October 30, 2003, a BBC crew accidentally damaged the gas gathering pipeline connected to the Lavinia well while installing the new, larger pipe. (FD 29, 31) The crew

⁷ The district court earlier ruled that Wasatch could redeem the BLM interests sold at the Sheriff's sale and, in the absence of any appeal to this Court of that ruling, Wasatch has done so. (R. 163; *Wasatch I* at ¶ 12, n. 7 and 8)

pulled the pipeline, not realizing it was connected to the meter shack, which damaged the shack and the pipes connecting the shack to the lateral line and the storage tank. (FD 30, 32) BBC promptly repaired the damages, but did not reconnect the Lavinia lateral line to the main pipeline. (FD 38, 47) On November 10, 2003, while inspecting the damages and repairs, BBC's foreman, Jeff Adley, and maintenance supervisor, Fred Goodrich, observed that the storage tank was fiberglass (not metal), oil temperature in the tank had reached 138 degrees Fahrenheit, and because the well was co-producing oil and gas directly into the tank strong vibrations shook the oil inlet pipe connected to the tank. (FD 36, 39, 40)

On December 1, 2003, Reott discovered that oil had leaked from the storage tank. (FD 43) There was no oil leaking on November 10, when Goodrich last visited the site. (FR 41) Reott discovered that the coupling between the tank and the oil line had come loose, and he stopped the leak by tightening the coupling. (FD 44)

Access to the Gas Gathering Line

Reott first requested access to the gas gathering system from Wasatch a day after the Sheriff's Sale, but did not obtain access until BBC and Reott entered a gas gathering agreement on July 7, 2005. (FD 14, 52) The delay in Reott's access to the gas gathering system actually benefited him: First, the reservoir contains a finite amount of commercially recoverable gas and production inevitably declines over time. (FD 57, 59, 60) Second, a period of rest allowed the reservoir to recover, which temporarily boosted production when Reott began production in 2005. (FD 53, 59, 61) And third, the price of gas significantly increased between 2002 and 2005. (FD 63) Thus, Reott achieved higher profits than he could have realized earlier. (FD 63, 64) This benefit to Reott is further demonstrated by an

increase in the commercial value of the Lavinia well, which was effectively zero in 2002 because of low gas prices but by 2008, based on projected production over the life of the well and increased gas prices, had attained a value of \$99,000. (FD 65, 66)

SUMMARY OF THE ARGUMENT

Reott has abandoned his long-argued defense that actual intent to defraud defeats Wasatch's equitable title in the Section 32 interests (an interest sufficient to permit redemption under Utah R. Civ. P. 69(j) (repealed 2004)).⁸ *See generally Wasatch I* at ¶¶ 31-36. Reott now argues that either lack of actual authority or *constructive* fraud destroy Wasatch's equitable title. These defenses were not proved at trial nor, if proven, would they suffice as a matter of law.

The district court found the evidence established no fraudulent transfer. Reott also failed at trial to meet his burden of proving, as a creditor, any fraudulent transfer under the Letter Agreement of other lease interests from Mission to Wasatch. On appeal, he fails to marshal the evidence supporting any of the district court's findings, including findings that Wasatch paid "reasonably equivalent value" for the Section 32 interests and that Mission was not insolvent.

The issue of Sutton's authority to act for Mission is relevant only to legal title. It is law of the case that Sutton properly executed the Letter Agreement that conveyed equitable title to Wasatch. And because either "legal or equitable title" is sufficient for Wasatch to redeem under Rule 69(j) (*Wasatch I* ¶¶ 25, 37), the Court need not address the issue of Sutton's authority to execute the Section 32 lease assignment forms unless the Court first

⁸ *See Wasatch I* at ¶ 20, n. 12 regarding the Rule of Civil Procedure applicable in this action.

reverses the district court's finding of equitable title. Nonetheless, ample evidence supports the district court's finding that Sutton had authority to transfer legal title, and Reott fails either to marshal the evidence or demonstrate clear error in this finding. The district court's consideration of the evidence faithfully complied with the Court's mandate in *Wasatch I*.

The district court's Final Judgment quieting title in Wasatch and BBC on alternative grounds of equitable title and legal title should be affirmed, and Reott cannot enforce his deficiency judgment against any lease interest Mission conveyed to Wasatch.

Finally, Reott attacks the district court's findings on damages but again simply argues his case in favor of damages instead of marshaling the evidence supporting the findings. Reott reasserts that BBC's removal of an old pipeline that, unbeknownst to BBC was connected to the Lavinia well meter shack, caused damage to Reott's oil tank and an oil spill. The district court found otherwise (FD 12) and there is no clear error to warrant disturbing this Finding. Reott mischaracterizes his challenge to the district court's damages calculation as a legal question of the proper measure of damages. Yet, the district court correctly applied a lost profits measure of damages. Reott cannot create a legal issue to avoid marshaling the evidence. Reott's dispute is factual, to which the clear error standard applies. Reott's appeal of the Final Judgment with no award of damages must also fail.

ARGUMENT

I. REOTT HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S ADVERSE FINDINGS OF FACT.

Utah R. App. P. 24(a)(9) requires Reott to marshal the evidence supporting each finding of fact by the district court that he challenges on appeal. Reott fails to marshal the evidence as to virtually all of his claims and defenses; yet, his failure with respect to

fraudulent transfer is most striking and is fatal to his appeal. In Section III of his brief (pp. 31-44), Reott challenges the district court's Conclusion of Law 13 that Reott failed to meet his burden to prove either element of a claim under *Utah Code Ann. § 25-6-6*.⁹ That conclusion rests on numerous findings of fact. While Reott purports to marshal the evidence in support of the findings underlying Conclusion 13 in his discussion at page 40, he has failed to do so in the manner required under controlling case authority and his attack on the district court's findings must fail.¹⁰

The sole remaining fraudulent transfer issue — a theory of “constructive fraud” — potentially impacts Wasatch and BBC in two separate ways. First, Reott as purchaser of the Section 32 interests at the sheriff's sale now seeks to establish a fraudulent transfer based on constructive fraud as a defense to equitable title. This is a shift from the main thrust of what Reott argued in *Wasatch I*, both in the district court and before this Court. Second, Reott as Mission's creditor seeks to enforce his deficiency judgment against all non-Section 32 leases

⁹ Footnote 14 (p. 31) of the “Appeal Brief” concedes: “Reott does not challenge the trial court's conclusion that ‘Reott has failed to prove actual intent to defraud’” The further reference in that sentence to “Utah Code Ann. § 25-6-5(1)(a)” as a qualifier to the language quoted in fn. 14, however, is completely absent from the actual language of Conclusion of Law 12 (R. 8119-20). Consequently, this reference misstates the district court's findings and conclusions on the defense of fraud. The viability of this defense as a matter of law is addressed in Section IV.

¹⁰ As noted previously, the district court's findings are extensive. One set of findings relates to whether or not Wasatch was a successor to Mission's Section 32 lease interests. Appeal Brief, Addendum F. A second set of findings relates to damages claimed by Reott as the result of actions taken by BBC on Section 32. Appeal Brief, Addendum G.

now owned by BBC but originally assigned by Mission to Wasatch pursuant to the terms of the Letter Agreement. This latter claim was not the subject of *Wasatch I*.¹¹

Few areas of Utah law are more developed or precisely articulated than the “marshaling requirement” under Rule 24(a)(9). The Supreme Court has recently stated:

To adequately fulfill the marshaling requirement, the appellant must temporarily assume the role of his adversary, presenting us, “in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.” *Chen v. Stewart*, 2004 UT 82, ¶ 77, 100 P.3d 1177 (quoting *Neely v. Bennett*, 2002 UT App 189, ¶ 11, 51 P.3d 724). . . . [T]he appellant must educate the court as to exactly how the trial court arrived at each of the challenged findings. This requires “a precisely focused summary of all the evidence supporting the findings,” correlated to the location of that evidence in the record. *Id.*

Friends of Maple Mountain, Inc. v. Mapleton City, 2010 UT 11, ___ P.3d ___. This Court has characterized the “marshaling process” as “arduous and painstaking,” an undertaking that requires appellant’s counsel to become “the devil’s advocate” for the adversary’s position. *Kimball v. Kimball*, 2009 UT App 233, ¶ 21, 217 P.3d 733 (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)).

With regard to the fraudulent transfer claim, Reott has failed to provide a “precisely focused summary” or “comprehensive and fastidious” presentation of “every scrap of competent evidence” supporting the district court’s findings. Indeed, Reott does not take the time to identify which of the 163 quiet title findings he attacks. Rather, his opposition

¹¹ In Conclusion of Law 18 (Appeal Brief, Addendum F), the district court directed Reott to remove all *lis pendens* “filed against any property of BBC.” At page 10 of the Appeal Brief, Reott misstates what the district court ordered, attempting to limit the reach of the lower court’s order to “the June Leases.” Reott has failed to remove all *lis pendens*.

simply challenges the district court's conclusion that he failed to meet his burden of proof on the claim of fraudulent transfer.

A. The Facts Support the District Court's Finding of "Reasonably Equivalent Value."

With respect to the "reasonably equivalent value" prong of the Section 25-6-6 analysis, Reott seeks to avoid altogether the "arduous and painstaking" process of marshaling by first proposing that the adequacy of amounts paid for the lease interests constitutes a question of law and not fact. (Appeal Brief at 33) For this, Reott cites this Court's opinion in *Territorial Savings & Loan Association v. Baird*, 781 P.2d 452, 461 (Utah Ct. App. 1989). The sole reference in *Territorial Savings* to potential absence of an issue of fact is "where it is clear that a fair equivalent *was* exchanged," the precise opposite of the contention Reott sought to establish below. *Id.* at 461, n. 14 (emphasis added). When the amount exchanged is alleged to be inadequate (as Reott alleges), *Territorial Savings* disclaims any "bright-line test" or threshold for "fair equivalent," concluding that any analysis requires "subjective interpretation of all of the surrounding circumstances." *Id.* at 461.¹² This language requires the district court to find facts and does not absolve Reott of his obligation to marshal the evidence.

Reott devotes nearly his entire discussion of the value issue arguing *against* the district court's findings on fraudulent transfer and constructive fraud rather than in support of them. This turns the marshaling requirement on its head. It is not "marshaling" to invest, as Reott does, nearly 13 pages (pp. 32-44) in attempting to tear down the district court's findings and

¹² *Territorial Savings* was decided under the Fraudulent Conveyances Act, predecessor to the Utah Fraudulent Transfer Act. *Id.* at 454, n. 1. Hence, some terminology has changed but basic concepts of "fair equivalent" and "reasonably equivalent value" remain the same.

then devote less than a single page (p. 40) to what purports to be “marshaling.” As it stands, neither this Court nor these appellees can form more than the most general idea of which specific findings Reott contends on appeal were not supported by the evidence.

Judge Harmond heard evidence of and made extensive findings regarding “all surrounding circumstances” affecting the value of the transaction documented in the June 2000 Letter Agreement. *Territorial Savings*, 781 P.2d at 461. First, the district court detailed the size, location, and nature of each of the ten leases conveyed. (FR 67, 69-70, 77) Second, the court noted that none of the leases included any existing wells or oil or gas production. (FR 68) Third, the court found that some of the ten leases had expired or were on the verge of expiration and that some were in suspension. (FR 75, 79) Fourth, the court identified third-party liens encumbering some or all of Section 32. (FR 70-73) Finally, the court found that the production unit in which the seven most accessible leases were located was on the verge of expiration. (FR 67, 75) In short, Wasatch was walking into a situation fraught with substantial practical limitations and legal disarray — circumstances with inevitable impact on the value of the leases transferred.

As further context, the district court found that Wasatch had significant experience in the area where the leases were located. (FR 25-28, 30-32, 41) Moreover, the court determined that Wasatch had previously conducted an extensive review of lease values in anticipation of making an offer on separate leases owned by Mission in the same area. (FR 36-40, 42-47) The court then found that Wasatch’s initial offer for the lease interests covered in the June 2000 Letter Agreement mirrored the amount agreed to a month earlier

for the previous package of Mission leases, an amount the court found to constitute “reasonably equivalent value.” (FR 80, 81)

Mission countered Wasatch’s fair value offer with one Mission viewed as more advantageous to it. Accepting that counteroffer, Wasatch ultimately agreed to reimburse Mission for past rentals, to obtain reinstatement of any expired lease, to maintain the leases as lessee and unit operator and to give Mission a specified percentage of any drilling deal, whether negotiated by Mission or Wasatch. (FR 82) Mission’s principals viewed this deal as having greater potential value than the hard dollar amount Wasatch had initially offered and it was consistent with the lease acquisition program pursued by Mission from the outset. (FR 83, 85-87) The district court found that this counteroffer as accepted by Wasatch constituted “reasonably equivalent value” as of the date the leases were sold. (FR 88)

Wasatch performed under the Letter Agreement. It reimbursed Mission \$3,629.40 for past rentals paid. (FR 115) It paid SITLA over \$4,000 for assignment of the leases and for rentals between June 21, 2000 and August 9, 2001. (FR 116) Wasatch successfully reinstated the expired and suspended leases and avoided deunitization of the production unit. (FR 117) Finally, both Wasatch and Mission actively sought third parties to drill on the lease properties. (FR. 118) In the end, Reott succeeded in driving Mission out of business before any success in establishing a third-party drilling program. (FR 132-134, 146, 152-153) These findings fully support the district court’s conclusion that Wasatch gave reasonably equivalent value for the ten lease interests transferred pursuant to the Letter Agreement.¹³

¹³ The district court’s finding that Wasatch performed under the Letter Agreement renders inapposite Reott’s citation to the Uniform Fraudulent Transfer Act’s definition of

B. Reott Also Failed to Establish That Mission Was Insolvent.

Throughout this action, Reott has taken for granted that Mission was insolvent. However, at trial and faced with the actual evidence of Mission's assets (as valued by Sutton and by Reott himself) and course of dealings, Reott was unable to offer evidence sufficient to persuade the district court of this essential element of a constructive fraud claim.

The district court's analysis of the insolvency issue commenced with the acknowledgement that Mission was an undercapitalized start-up company, formed for the express purpose of acquiring mineral leases and soliciting others to fund the development of those leases. (FR 1, 15 and 16) This context explained why, from the outset, Mission was unable to pay its debts as they came due. (FR 20) Under Utah Code Ann. § 25-6-3(2), as the court recognized, this fact raised a presumption that Mission was insolvent but it does not resolve the issue.

The district court made findings that Mission held substantial assets at the time it entered into the Letter Agreement including:

1. The Lavinia 1-32 well
2. Cash of \$27,236.27
3. A cash bond of \$19,943.15
4. The Gusher leases

(FR 119) Significantly, both Reott and Sutton valued the Lavinia 1-32 well at an amount in excess of the total of all outstanding Mission liabilities. (FR 119 and 121) This was the evidence before the district court as to the balance of assets and liabilities.

“value” as excluding “an unperformed promise.” Appeal Brief at 33 (citing Utah Code Ann. § 25-6-4(1)).

Mission's problem in 2000 was one of cash flow and timing, not ultimate value of its assets. In enforcing the Judgment, Reott exploited this weakness to obtain first Mission's bank accounts, then its bond and finally its gas well. However, this did not mean that Mission was "insolvent"; it meant simply that Mission was vulnerable to a demand for immediate payment because, by reason of adherence to its fully disclosed business plan to purchase lease interests and seek funding for development, the company lacked liquidity. Thus, the district court concluded that Wasatch had rebutted any presumption of insolvency with undisputed testimony regarding the "fair value" of Mission's assets in May and June 2000. (Conclusion of Law 13(a) – R. 8121)

As with the "reasonably equivalent value" analysis, Reott has failed to marshal the evidence in support of this series of findings on insolvency. Rather, he attacks those findings, making the same arguments he previously made without success to the district court. This does not meet his burden on appeal. The district court's findings are supported by evidence in the record and are not clear error. Utah R. Civ. P. 52(a).

II. CONSTRUCTIVE FRAUD IN THE TRANSFER OF THE SECTION 32 INTERESTS IS NOT A DEFENSE TO EQUITABLE TITLE

This case was before the Court in *Wasatch I* on the premise, accepted by both the district court and this Court, that if Wasatch participated in an *intentional* fraud, this would defeat any claim of equitable title. *Wasatch I* at ¶ 32. This proposition flows from the basic concept of equity and equitable title: one cannot claim the benefit of equity — the rights arising from a contract to sell property¹⁴ — when the transaction was procured or conducted

¹⁴ "Equitable title" is the "present right to legal title." 28 Am. Jur. 2d 75, Estate § 10 (2000). Such title "indicates a beneficial interest in property . . . that gives the holder the

in a dishonest manner (as Reott alleged).¹⁵ It was this theory of “fraudulent intent” that the Court addressed in *Wasatch I*, remanding the case to the district court for a trial on the merits. *Wasatch I* at ¶¶ 32 and 36.

Now, having abandoned any appeal of the district court’s adverse findings on his strident allegations throughout this litigation of actual fraud (Reott failed to show there was ever an intent to defraud), Reott attempts to reframe his attack on equitable title, for the first time on appeal, by asserting a purported defense of fraudulent transfer under Utah Code Ann. § 25-6-6, the Uniform Fraudulent Transfer Act. Appeal Brief at 31. As already noted above, Reott failed to prove this theory. Moreover, because it involves no dishonesty, the theory is not a defense to equitable title.

Section 25-6-6 affords creditors a statutory remedy to recover against property transferred by an insolvent debtor for something less than fair value, what this Court has referred to as “constructive fraud.” See *Territorial Savings & Loan Association v. Baird*, 781 P.2d 452, 461 (Utah Ct. App. 1989) (“genuine issues of material fact as to whether the conveyance was constructively fraudulent under [predecessor to Section 25-6-6]”). As this Court has

right to acquire formal legal title.” *Black’s Law Dictionary* (9th Ed. 2009) at 1622. “Equitable title” passes to a purchaser “when the contract [is] signed.” *Hall v. Fitzgerald*, 671 P.2d 224,227 (Utah 1983).

¹⁵ As Reott contended pre-*Wasatch I* (R. 2696), equitable title cannot be enforced when the “conveyance is made for some *illegal or fraudulent purpose*” such as to “hinder, delay, or defeat creditors” and this is because “the rules of law cannot be used, controlled or avoided by parties with a fraudulent *intent* to do that indirectly which they cannot do directly.” *Olsen v. Bank of Ephraim*, 68 P.2d 195, 199-200 (Utah 1937) (quotation omitted, emphasis added); see also *Hone v. Hone*, 95 P.3d 1221, 1223 (Utah App. 2004) (“a plaintiff who has engaged in fraud or deceit in the business under consideration will be denied equitable relief when fairness and good conscience so demand”) (internal quotations omitted).

observed: “Under section 25-6-6, the debtor’s actual intent is irrelevant. . . .” *Tolle v. Fenley*, 2006 UT App 78 ¶ 20, 132 P.3d 63

Constructive fraud is a theory to facilitate creditor recovery, not a defense to equitable title or a basis for rejecting Wasatch’s successor-in-interest status. As a right based in contract, equitable title is always vulnerable to conventional contract defenses, including actual intent to defraud as codified in Utah Code Ann. § 25-6-5. This is a far cry from calling title into question because of debtor insolvency and inadequate value paid. “When ‘fraud’ is alleged solely because a debtor transferred property while it was insolvent, the transferee is not accused of an act of fraud or deception; indeed, other than receiving the transfer, the conduct or mental state of the transferee is irrelevant. . . . Fraudulent transfer actions alleging ‘constructive fraud’ often seek to recover transfers from innocent third parties.” *Wing v. Horn*, 2009 WL 2843342 (D. Utah, Aug. 28, 2009). Close examination of Reott’s brief — the sentence commencing at the bottom of page 31 and ending at the top of page 32 — shows that he offers no authority for the proposition that fraudulent transfer under Section 25-6-6 “defeats Wasatch’s equitable title. . . .”

Arguing for a “liberal construction” of constructive fraud (Appeal Brief at 31) does not change the analysis. Reott is not a Mission creditor but a purchaser who acquired title to the leases at a sheriff’s sale, subject to a right of redemption. In *Wasatch I*, this Court stated: “Reott relinquished his judgment creditor status respecting the Section 32 Leasehold Interests when he purchased those interests. . . .” *Wasatch I* at ¶¶ 12 and 21 (“[a] purchaser at an execution sale stands in no sort of legal privity of contract with the creditor upon whose claim the judgment was obtained” *Currier v. Elliot*, 141 Ind. 394, 39 N.E. 554, 557-58

(1895)). Thus, Reott cannot seek “liberal construction” for the simple reason that, as to Section 32, he is not a creditor under the Act. *Tolle, supra*, at ¶ 13 citing *Bradford v. Bradford*, 1999 UT App 373, ¶ 14, 993 P.2d 887 (“[f]or the [Act] to apply, the statute requires a ‘creditor-debtor relationship’”).¹⁶

The Appeal Brief at page 31 incorrectly cites to *Tolle, supra*, 2006 UT App 78, ¶ 13, 132 P.3d 63, as support for the proposition that “a fraudulent transfer conveys no legal or equitable interest to the transferee, but is ‘void as to the creditors.’” The interior quotes indeed come from *Tolle*, but the gloss or paraphrase predicate is Reott’s invention. The *Tolle* case actually sets forth the unremarkable principle, applicable to the Act generally and not Section 25-6-6 specifically, that the statute requires a “creditor-debtor relationship” and that only transfers “designed to place a debtor’s asset beyond the reach of the debtor’s creditors” are “void as to creditors.” *Id.* (citing *National Loan Investors, L.P. v. Givens*, 952 P.2d 1067, 1069 (Utah 1998)). Again, the emphasis is on intent (“designed”) and the beneficiary of any remedies under the Act must be a “creditor.” *See also Butler v. Wilkinson*, 740 P.2d 1244, 1261 (Utah 1987) (“To make a conveyance fraudulent . . . the defendant must have an actual fraudulent intent, unlike § 25-1-4 [the predecessor to § 25-6-6], which deals with transfers of insolvent debtors and requires no actual intent.” (internal citation omitted)).

Reott has already realized on the Section 32 interests through a sheriff’s sale. They are now beyond his reach as a creditor. Further, having conceded in this appeal that neither

¹⁶ Indeed, the equities flow the other way. Under this Court’s holdings in *Brockbank v. Brockbank*, 2001 UT App 251, ¶ 12, n. 3, 32 P.3d 990 and *Tech-Fluid Services, Inc. v. Gavilan Operating, Inc.*, 737 P.2d 1328, 1333 (Utah Ct. App. 1990), it is Wasatch as successor to the debtor and one with money invested to preserve the Section 32 interests that should benefit from the “remedial . . . nature” and “liberal construction” of the redemption remedy.

Wasatch nor Mission had actual intent to defraud in transferring equitable title (there was no “design”), Reott cannot object to Wasatch’s status as a successor in interest based on fraudulent transfer. *See* Appeal Brief at 31, n. 14. While Reott “has the right to ensure that redemption is only exercised by those entitled to it under the rules” (*Wasatch I* at ¶ 23), he has no defense of constructive fraud. Nor does Reott have any further right to enforce his deficiency judgment and must remove all *lis pendens* as directed by the district court.

III. REOTT CANNOT CHALLENGE WASATCH’S EQUITABLE TITLE BY ATTACKING SUTTON’S AUTHORITY TO EXECUTE THE LETTER AGREEMENT

Reott employs another new tactic in this appeal: He seeks to move the issue of Sutton’s authority to act for Mission from the legal title side of the ledger to the equitable title side. Compare *Wasatch I* at ¶¶ 26-30 with ¶¶ 31-36.

This argument is no longer available to Reott. The district court ruled in 2005 and 2006, consistent with *Clawson v. Moesser*, 535 P.2d 77, 78 (Utah 1975), that Mission properly executed the Letter Agreement and, absent a defense such as fraud, this would support Wasatch’s successor-in-interest status and right to redeem. R. 4812-4815, 5384-5386. In *Wasatch I*, this Court reversed the district court’s determination that “Wasatch did not have equitable title to the Section 32 Leasehold Interests because Mission fraudulently transferred those interests,” but did not question the underlying conclusion that the Letter Agreement conveyed equitable title but for the alleged fraud. *Wasatch I* at ¶ 31. Thus, the law of the case establishes that the Letter Agreement represents an equitable interest in Wasatch sufficient to support successor-in-interest status. Because actual fraud is no longer an issue in this appeal, there should be no objection to quieting title in Wasatch.

On remand, Wasatch again rested its claim of equitable title on the fully executed June 21, 2000 Letter Agreement. (Appeal Brief, Addendum F, Conclusion of Law 9)¹⁷ There was no defect in Sutton’s execution of the Letter Agreement. As with the BLM lease assignment forms, the Letter Agreement identified Mission as the party obligating itself to transfer title to the leases, with Sutton signing in a representative capacity as “Manager.” Appeal Brief, Addendum C at 2 and R. 4814-4815.

Most recently, in 2008, Reott asked the district court to go behind the executed Letter Agreement to examine Sutton’s actual authority to execute that document. As that court observed, this proposed course ignored what the district court ruled in 2005 and what this Court did in *Wasatch I*. (R. 8289 at 65) Wasatch was entitled to rely upon Sutton’s apparent authority, as sole manager for Mission, to act on behalf of Mission. *Posner v. Equity Title Insurance Agency, Inc.*, 2009 UT App 347, ¶ 18, 222 P.3d 775, 781. This authority was not illusory but absolutely consistent with the facts as found by the district court. (FR 21-24, 101, 107-109) Authority to execute the Letter Agreement is an issue long resolved in this litigation; it is not open to further dispute on appeal. The only surviving issue of Sutton’s authority relates to his execution of the Section 32 lease assignment forms — an issue of legal title. *Compare Wasatch I* at ¶¶ 26-30 with ¶¶ 31-36.

Wasatch was a lawful successor in interest of Mission capable of exercising a right of redemption if it acquired *either* “legal or equitable title” to the Section 32 lease. *Wasatch I* ¶¶

¹⁷ Wasatch also claimed an equitable interest in the Section 32 leases based on its payments to SITLA to preserve the leases. (FR 116; Appeal Brief, Addendum F, Conclusion of Law 9 – R. 8119) As the district court properly held, this investment in the leases independently established Wasatch’s right to redeem pursuant to Rule 69(j)(1). *See Clawson*, 535 P.2d at 78 (a party with a financial stake in the proceeding has a “sufficient interest in the property” to enable it to redeem).

25, 37 (emphasis added). Thus, this Court need not address the issue of Sutton's authority unless it reverses the district court's finding of equitable title. In any event, there is no basis for reversal, as Reott has failed to marshal the evidence of "reasonably equivalent value" and "insolvency," failed to show clear error in the district court's fact findings on those issues, failed to prove that constructive fraud is a defense to equitable title, and failed to timely challenge Sutton's authority to sign the Letter Agreement. For all these reasons, title to the Section 32 leases should be quieted in BBC, Wasatch's successor in interest.

IV. THE DISTRICT COURT FULFILLED THE COURT'S MANDATE AND CORRECTLY HEARD ALL EVIDENCE OF SUTTON'S AUTHORITY.

Even were Reott to prevail on the issue of equitable title, he cannot succeed on the issue of legal title. The district court found on multiple bases that Sutton had authority to transfer legal title to the Section 32 interests by executing the lease assignment forms on behalf of Mission. Now, Reott insists that the district court could not reach the full scope of this issue but was somehow constrained by *Wasatch I* in the conduct of the 2008 trial. To the contrary, this Court remanded to the district court an issue that had to be tried (Sutton's authority) with direction regarding two aspects of that issue. The district court fulfilled that mandate: first, by specifically addressing oral authorization and ratification, finding in Wasatch's favor, and then, as an alternative basis, also finding facts supporting Sutton's authority as a function of his unique role as both "sole operating manager" of Mission and "sole manager" of Mission's majority shareholder, Intermarket.

A. As Manager and Chairman of Mission, Jager Both Orally Authorized and Then Ratified the Section 32 Lease Assignments.

Specific to the two aspects of authority highlighted by this Court in 2007 in reversing the partial summary judgment, Wasatch proved oral authorization and ratification and Reott has failed to marshal the evidence or demonstrate clear error as to these findings.

Reott first attempts to evade the “arduous and painstaking” duty of marshalling the evidence by challenging the legal basis of *Wasatch I*. He argues that Colorado law applies to the question of Sutton’s authority or alternatively that the principal case cited by this Court in 2007 (*Mathis v. Madsen*, 261 P.2d 952 (Utah 1953)) had previously been overturned. (Appeal Brief at 20-23). However, this case is governed by what the Court declared the law to be in *Wasatch I*. *Wasatch I* ¶¶ 28-30.

The current action is nearly a decade old. The general issue of Sutton’s authority and the legal effect of the lease assignment forms were the subject of lengthy summary judgment proceedings, followed by a Rule 54(b) certification, an appeal to this Court, and the denial of *certiorari* by the Supreme Court. Not until remand did Reott assert for the first time that Colorado law applies. In *Wasatch I*, this Court discussed the issue of Sutton’s authority exclusively in the context of Utah law and held that Utah law grants an exception to the statute of frauds when a general agent of a company acts under an oral authorization or the company later ratifies an agent’s otherwise unauthorized acts. *Wasatch I* ¶¶ 28, 30. The issue is one of property law, not Mission’s “internal affairs” as Reott asserts in claiming that Colorado law applies (Appeal Brief at 21).

The adoption of Utah law — and specifically the *Mathis* case — as the set of rules to resolve the property transfer and subsidiary authority issue is the law of the case:

Under the law of the case doctrine, issues resolved by this court on appeal bind the trial court on remand, and generally bind this court should the case return on appeal after remand. The doctrine was developed to promote the obedience of inferior courts as well as to avoid the delays and difficulties involved in repetitious contentions and reconsideration of rulings on matters previously decided in the same case. The effect of abandoning the doctrine in the context of a postremand appeal to the appellate court would not be inconsequential, because considerable inefficiencies would result if parties were free to relitigate after remand issues decided in an earlier ruling of this court.

Gildea v. Guardian Title Co. of Utah, 2001 UT 75 ¶9, 31 P.3d 543, 546 (internal quotations and citations omitted).

The law-of-the-case doctrine applies to implicit as well as explicit holdings. *See Otteson v. State*, 945 P.2d 170, 172 (Utah App. 1997) (implicit holding that court order was final and appealable was law of the case); *Gladdis Investment Co. v. Morrison*, 289 P.2d 730 (Utah 1955). Furthermore, courts considering this issue have concluded that when an appeal is resolved by applying the law of one state, that law governs the rest of the case. *See Maldonado v. Creative Woodworking Concepts, Inc.*, 796 N.E.2d 662, 665 (Ill. App. 2003); *Valsecchi v. Proprietors Ins. Co.*, 502 So. 2d 1310, 1311 (Fla. App. 1987). Thus, Reott should not be heard to challenge the legal basis of this Court's 2007 ruling either on the grounds that Colorado law applies or that this Court improvidently relied on *Mathis*.¹⁸

¹⁸ Moreover, Reott is incorrect that Colorado law forecloses oral authorization or ratification. *See Brammer v. Ellison*, 257 P.2d 430 (Colo. 1953). In *Brammer*, property was titled in name of a husband and wife, but only the husband executed a lease of the property. The court upheld the husband's authority because the wife knew of the transaction and spoke with plaintiff about it without denying husband's authority or attempting to repudiate: "The evidence overwhelmingly supports the conclusion of the trial court that the husband was acting as his wife's agent in fact; that he was authorized so to act; that she subsequently ratified such agency and, even if not originally bound, is estopped thereby." *Id.* at 432.

Second, instead of marshalling the evidence in support of the district court's findings, Reott attempts simply to reargue the facts. He challenges the district court's findings as to what Jager knew, Jager's role within Mission, and the details of the June 2000 Section 32 lease assignment. (Appeal Brief at 24-25, 28-30).

Jager was a manager of Mission according to the Operating Agreement as cited by this Court in *Wasatch I*. *Wasatch I* ¶ 2.¹⁹ In addition, on remand the district court found all of the following facts respecting oral authorization and ratification:

- Although not aware of the Operating Agreement, Jager acted for Mission as its "chairman" on at least two occasions, including in 1997 memorializing Reott's loan of money to Mission. (FR, 6, 9, 13)
- In May 1998, Charles Willard and William Muller sold their membership interests and ceased to be managers, leaving only Sutton and Jager as managers. Instead of replacing Muller and Willard, Sutton advised Reott that he (Sutton) had taken over the operations of Mission as of May 1, 1998. (FR 21, 22, 24)
- Mission was a closely held corporation with only two or three members/owners at any one time, and Sutton was the sole manager of Intermarket, which owned 480 of 800 shares of Mission. (FR 3, 5; Conclusion of Law 8(a))
- From May 1998 to October 2001 when he resigned, Sutton acted as sole manager of Mission. (FR 23)
- Jager acquiesced in Sutton's assuming operational control, including informing Reott that he was "on the sidelines"; nonetheless, Sutton discussed both the May and June 2000 lease assignments with Jager. (FR 108, 130)
- Jager "did not at the time or subsequently express any opposition to the sale of the leases or the terms of the sale and, at all times, manifested support for the actions taken by Sutton." (FR 108)
- Following Sutton's resignation, Reott corresponded directly with Jager. On January 10, 2001, he wrote Jager "acknowledging (a) Sutton's resignation as

¹⁹ Reott's contention on appeal that Jager was not a manager of Mission (Appeal Brief at 25) not only contradicts this Court's opinion in *Wasatch I* but his own contentions on remand below. For example, in a post-remand colloquy with the district court about oral authorization, Reott's counsel argued that Jager alone could have orally authorized Sutton: "it had to be a second manager, it had to be Jager because, otherwise, Sutton said he already approved it. And he was the manager." (R. 8289 at 35)

manager, (b) the transfer of leases from Mission to Wasatch pursuant to the May 1, 2000 and June 21, 2000 letter agreements, and (c) Mission's continuing lease interest in the 40 acres surrounding the Lavinia 1-32 well." (FR 136)

- Jager responded in a January 17, 2001 letter on Mission letterhead, signing the letter as Mission's chairman. (FR 137-138)
- Far from contradicting Sutton's authority, Jager "confirmed his knowledge of the May 1, 2000 and June 21, 2000, transactions between Wasatch and Mission and his support of the transactions and the reasoning behind them." (FR 139-40)
- Relying on both Jager's letter and Sutton's testimony at trial, the district court expressly found that Jager had "full knowledge of the transactions" and either orally authorized Sutton to execute the lease assignments or later ratified the assignments. (FR 141).²⁰

Jager's acquiescence to Sutton's operational control, contemporaneous approval of the transactions, and subsequent correspondence with Reott were sufficient to establish both oral authorization and ratification. Under *Mathis* no "formal action" is required for oral authorization; a course of conduct evidencing the handing over of all keys to a general manager suffices. 261 P.2d at 955. Here as in *Mathis*, no one associated with Mission ever questioned or limited in any regard Sutton's authority to act for Mission during his tenure as sole operating manager. *Id.* at 955-56; *see also* 2 Fletcher Cyclopedia of the Law of Corporations §§ 434, 437.20, 437.70 (2010 Supp.). To the contrary, as the district court found, Jager knew of Sutton's dealings with Wasatch and assented to the lease assignments.

Moreover, even if Sutton was not orally authorized, the transaction was ratified both expressly through Jager as chairman and impliedly through knowing acquiescence. *Lowe v. April Industries, Inc.*, 531 P.2d 1297, 1299 (Utah 1974) ("Ratification is expressed or

²⁰ The district court vacated its summary judgment on the issue of ratification. (FR 141) A trial court "is free to change a ruling until a final decision is formally rendered." *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1310 (Utah Ct. App. 1994); Utah R. Civ. Proc. 54(b).

implied.”). Implied ratification closely relates to the doctrine of estoppel. The failure to repudiate known, unauthorized conduct within a reasonable time gives rise to a presumption that the transaction was ratified. *See Lowe*, 531 P.2d at 1299; *Carlquist v. Quayle*, 62 Utah 266, 218 P. 729 (1923); *Buxton v. Diversified Resources Corp.*, 634 F.2d 1313, 1316 (10th Cir. 1980) (under *Carlquist*, company president had authority to affirm debt of company because board was aware and acquiesced and conduct was consistent with customs and dealings); 2 Fletcher Cyclopedia of the Law of Corporations §466.

Any conduct which indicates assent by the purported principal to become a party to the transaction or which is justifiable only if there is ratification is sufficient. Even silence with full knowledge of the facts may manifest affirmance and thus operate as a ratification.

Bradshaw v. McBride, 649 P.2d 74, 78 (Utah 1982) (quotations omitted; emphasis added).

The facts in *Carlquist* are strikingly similar. An agent of a company negotiated a contract for the sale of property. The company’s president (one of two named directors retaining any interest in the company) was aware of the negotiations and the resulting contract and did not object. The only other interested director acquiesced in the president’s operating the company without consulting him. Thus, “it was the duty of the corporation, if the agent was without authority to make the contract in the first place, to repudiate the contract within a reasonable time, and, upon failure so to do, the presumption is that the unauthorized contract has been ratified.” 218 P. at 731. Notably, *Carlquist* rejected the argument that corporate formalities are required for implied ratification. *See id.*

Here, Mission not only failed to repudiate Sutton’s assignment of the Section 32 interests to Wasatch, but expressly endorsed the transaction in writing through its chairman, Jager. Having “full knowledge of the transaction,” Jager added a second management voice

to affirm Sutton's execution of the lease assignment forms — an act that was fully consistent with the May and June 2000 transfers of BLM leases (FR 36, 104) and Mission's declared purpose to acquire and market mineral leases as part of a drilling program (FR 1). *See Lowe*, 531 P.2d at 1299 (for purposes of ratification, "knowledge of the entity is imputed to it from the knowledge possessed by its officers and agents").

Further, Jager's letter clearly satisfies any applicable requirements of the statute of frauds (a writing) or Mission Operating Agreement (two managers).²¹ But any failure of formalities is immaterial because the evidence also indisputably establishes implied ratification. Again, no one associated with Mission ever challenged the transaction, even after SITLA approved the assignments and issued a new lease to Wasatch (FR 113, 114). And Mission accepted all the benefits from Wasatch, including Wasatch's payments and maintenance of the leases. (FR 115-117). *See Baker v. Glenwood Min. Co.*, 82 Utah 100, 21 P. 889 (1933) (company receiving benefits of contract is estopped to deny power to contract).

In short, the district court faithfully followed even the strictest interpretation of this Court's mandate and properly held against Reott. His attempts to reargue the law and facts without marshalling the evidence or demonstrating clear error must fail.

²¹ *See Bradshaw*, 649 P.2d at 79; Utah Code Ann. § 25-5-1. *But see Garland v. Fleischmann*, 831 P.2d 107, 109 (Utah 1992) (purchaser at sheriff's sale "is not entitled to raise the defense of the statute of frauds" to avoid a transaction to which she was not a party nor in privity: "If the parties to the contract as in this case are willing to waive the requirements of the statute, a stranger to the contract cannot object." (internal quotations and alterations omitted)). This Court cited to both *Bradshaw* and *Garland* in *Wasatch I*. *Wasatch I* at ¶¶ 27, 30. The inability of a third party to raise the statute of frauds or corporate informalities as a defense is well established. *See Livingston v. Thurley*, 280 P.1042, 1045 (Utah 1929); *Murray Hill Min. & Mill. Co. v. Havenor*, 66 P. 762, 765 (Utah 1901); 10 Williston on Contracts § 27.12 (4th ed.); 2 Fletcher Cyclopedia of the Law of Corporations §§ 428.

B. Sutton Was Authorized to Act for Mission Because, as Representative of the Controlling Shareholder, He Had Assumed Control of Mission.

The district court found alternatively that Sutton's unique position as both "sole manager" of Mission's majority owner (FR 3, 5) and the "sole operating manager" of Mission (FR 23), coupled with the "general power" already conferred on him by the Operating Agreement (*Wasatch I* at ¶ 29), presented a sufficient nexus of governance and control to demonstrate his authority irrespective of Jager's assent. It was evident at trial that the formalities of 1997, as set forth in the Operating Agreement, had yielded by June 2000 to the practicalities of a reduced roster of owners and managers. (FR 7-8, 21-24, 107-109, 130, 133, and 136-142; Apeall Brief, Addendum F, Conclusion of Law 8)²²

Wasatch I was before this Court because the district court granted Reott's motion for *partial* summary judgment. The rules for such motions do not require exhaustive treatment of factual or legal issues. Parties to summary judgment motions need only advance evidence sufficient to show the existence or absence of a genuine dispute of material fact. Utah R. Civ. P. 7(c)(3)(A) and 56(c). In turn, the scope of a motion circumscribes the scope of the court's inquiry into the merits of the case and, as here, any Rule 54(b) appeal that follows.

This Court remanded *Wasatch I* with direction that the district court hold a trial of two issues: intent to defraud and Sutton's authority. Reott contends that, because this

²² The law recognizes the practicalities. "[W]ant of the required officers does not dissolve the corporate entity." *Buhler v. Maddison*, 105 Utah 39, 47, 140 P.2d 933 (1943); *see also Rowland v. Rowland*, 633 P.2d 599, 540 (Idaho 1981) ("[C]ourts have consistently held that the directors of a closely held corporation may transact the corporation's business affairs informally, especially where informality has been customary. Underlying these decisions is the view that the general rule against informal corporate action exists solely for the protection of the shareholders; if they do not want or need the protection, a waiver may be inferred from their acquiescence in or knowing silence to a corporate decision arrived at through informal procedure."); 2 Fletcher Cyclopedic Corporations, §§ 437.20, 437.70.

Court made no mention of any other factual bases for establishing Sutton's authority than oral authorization or ratification the district court could not hear evidence otherwise competent and admissible on that issue. Both in pretrial proceedings and at trial, Judge Harmond rejected this narrow interpretation of the Court's mandate and heard all evidence on the issue. (R. 8289 at 66-67; 8291 at 15-32, 37-38)

The mandate rule does not prevent the trial court from finding facts pertaining to an issue that the appellate court has remanded, particularly upon reversal of partial summary judgment. Rather, recognizing the special province of trial courts to develop the facts at trial (*see State v. Cravens*, 2000 UT App 344 ¶18, 15 P.3d 635, 639), the mandate rule dictates that "pronouncements of an appellate court *on legal issues* . . . become the law of the case and must be followed in subsequent proceedings of that case," and "any change *with respect to the legal issues* governed by the mandate must be made by the appellate court that established it or by a court to which it, in turn, owes obedience." *Thurston v. Box Elder County*, 892 P.2d 1034, 1037-38 (Utah 1995) (emphasis added).

Nor does the mandate rule reduce appellate decisions to rigid task lists nor elevate all statements to the status of a holding. *Campbell v. State Farm Mut. Automobile Ins. Co.*, 2004 UT 34, ¶¶ 6, 7, 98 P.3d 409 (remand from United States Supreme Court did not impede Utah Supreme Court's discretion to determine amount of punitive damages). A remand necessarily vests some discretion in the lower court. *Id.* at ¶ 8. And remand instructions are often "words of prediction, not direction," so that the lower court can be wholly faithful to the appellate court's mandate while also developing the record and exercising independent judgment within the framework of the legal rules handed down. *Id.* at ¶ 12. In contrast, the

trial court erred in *Ivers* because it addressed a *legal* issue (liability) far afield of the only open issue on remand in that case (damages). *Ivers*, 2009 UT 56, ¶¶ 14-15.

In this case, the district court's comprehensive findings and conclusions on authority fit squarely within the framework of *Wasatch I*, which held that any form of authorization that complies with, or is excepted from, the statute of frauds is sufficient to quiet title in favor of Wasatch. *Wasatch I* at ¶ 28. Moreover, the various methods of determining authority are all interrelated as different measurements of the same, underlying concepts of governance and control. No evidence of Sutton's control of Mission was ever challenged. Rather, by his course on remand, Reott sought simply to force the district court to ignore the truth. (R. 8291 at 15-23) That the court chose not to do so was not error but compliance with this Court's mandate to try, once and for all, the factual issues of authority within the legal framework of *Wasatch I*.

V. THE TRIAL COURT CORRECTLY DETERMINED THAT BBC CAUSED REOTT NO DAMAGES.

A. The District Court Properly Exercised its Discretion in Reconsidering Its Prior Ruling on Reott's Trespass to Chattels Claim.

The district court previously granted summary judgment to Reott on the issue of liability for Reott's trespass to chattels claim (R. 5386), but vacated that ruling at trial because it found that, "[a]s a matter of law, the evidence at trial did not establish that BBC caused the oil leak or that it is liable for any damages arising from the oil leak." (FD 10, 11) The district court also properly reexamined other rulings related to Section 32 ownership because, "[a]lthough BBC does not expressly appeal the trial court rulings regarding trespass, conversion, and trespass to chattels, these rulings were based on the trial court's

determination that Reott had title to the Section 32 Leasehold Interests.” *Wasatch I* at 223, n.14.

Vacatur also complied with established rules. Any non-final order that adjudicates fewer than all of the claims “is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” Utah R. Civ. P. 54(b). Under Rule 54(b), a court may reconsider and revise a prior decision at any time “until a final decision is formally rendered” (*Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1311 (Utah App. 1994)) and “may do so *sua sponte* or at the suggestion of one of the parties.” *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 196 P.3d 588, 596 (Utah 2008). The trial court’s decision to revise a previous judgment should not be disturbed on appeal absent a showing of abuse of discretion. *Trembly*, 884 P.2d at 1312.

A number of non-exclusive factors support reconsideration under 54(b), including whether “(1) the matter is presented in a ‘different light’ or under ‘different circumstances;’ (2) there has been a change in the governing law; (3) a party offers new evidence; (4) ‘manifest injustice’ will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.” *Id.* at 1311 (citations omitted). Thus, in *Brookside Mobile Home Park, LTD v. Peebles*, 48 P.3d 968 (Utah 2002), the Utah Supreme Court upheld a trial court’s vacating of a previous summary judgment when new facts were presented. When new evidence presents a question of material fact, there is “no abuse of discretion in the trial court’s acknowledgment that its previous ruling was in error.” *Id.* at 973.

Here, as in *Brookside*, the court did not abuse its discretion by vacating summary judgment: evidence brought to light at trial showed the earlier ruling to be in error. Based on trial testimony of BBC's maintenance supervisor, Reott and others, the district court found that "[t]he greater weight of the evidence establishes that the oil spill resulted from a loose connection at the oil inlet coupling between the oil pipe and tank; consequently, BBC is not responsible for any damages caused by the leak." (FD 12)

Reott baldly alleges that the district court's reconsideration prejudiced him, but does not explain how he was prejudiced. Appeal Brief at 45. In fact, Reott was not prejudiced. Like BBC, Reott put on testimony at trial regarding causation and fault for damages to the tank and the resulting oil spill. (R. 8294 at 1046-1075 (testimony by Edward Reott)) And Reott does not indicate what other evidence he would have put on at trial or how he would have proceeded any differently. *See, e.g., Forbes v. Goldenhersh*, 899 P.2d 246, 250 (Colo. Ct. App. 1994) (under identical rule 54(b), finding no prejudice to plaintiff when trial court vacated non-final grant of summary judgment). Absent prejudice, what Reott really challenges on appeal is not the fact that the district court reopened the issue or heard evidence (which Rule 54(b) clearly permits "at any time" before final judgment) but the weight the district court accorded the evidence, which, of course, is a routine challenge to the sufficiency of evidence reviewed for clear error. Utah R. Civ. P. 52(a); *Chen v. Stewart*, *supra*, 2004 UT 82, ¶ 19, 100 P.3d at 1184.

B. The Trial Court Applied the Proper Measure of Damages with Respect to Reott's Claim for Breach of Common Carrier Obligations.

Reott argues that the trial court applied an improper measure of damages. This argument was not raised before the trial court, however, and may not be raised for the first

time here. See *Doug Jessop Const., Inc. v. Anderson*, 2008 UT App 348, ¶ 18, 195 P.3d 493, 497 (holding that to preserve an issue for appeal it “must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue” (citations omitted)). Further, Reott attempts to camouflage his disagreement with the damage calculation in terms of the measure of damages, a legal determination, in order to obtain a *de novo* review for correctness. But again, what Reott actually challenges is the court’s determination that he suffered no damages, a finding reviewed only for clear error. Utah R. Civ. P. 52(a); *Chen*, 2004 UT 82, ¶ 19, 100 P.3d at 1184.

Reott mischaracterizes the measure of damages applied by the court below as a “market value test,” but the trial court clearly applied a “lost profits” measure of damages — the identical measure advocated by Reott on appeal and at trial by Reott’s expert²³ — and determined that Reott suffered no lost profits due to any breach of common carrier obligations. The court explicitly found that “[t]he increase in gas prices during the time the well was shut in resulted in *higher profits* for Reott than could have been realized had he been given access prior to 2005.” (FD 64; emphasis added). Hence, the court reasoned, “Reott suffered no damages as a result of any breach by Wasatch or BBC of their common carrier obligations.” (FD 69)

Reott characterizes the district court’s test as a “market value” test because the court considered the market value of gas in its damage calculations. However, the court simply estimated profits (lost or gained) based upon the price of gas and the approximate volume

²³ Reott’s expert calculated lost profits “by estimating the amount of gas production during the shut-in period . . . multiplied the net gas by the estimated price of gas . . . then subtracted from the gross revenue the estimated state and county taxes, state royalties . . . lease operating expenses and Wasatch’s gas gathering costs.” Appeal Brief at 49.

that would have been produced, minus the cost of operations. (FD 64, 66) This is entirely appropriate for calculating lost profits. *See* Am. Jur. 2d Damages § 458 (“‘[N]et profit’ is the gross amount that would have been received, less the cost of running the business.”). The trial court determined that Reott’s profits actually *increased* due to the delay in production.

(FD 64) Since the reservoir contains finite reserves of gas, Reott essentially sold the *same* gas post-shut in that he would have sold during the shut in period, and sold it at a higher price.

(FD 57, 59, 60) *See* Am. Jur. 2d, Damages § 458 (“The profit that might have been earned during a period a manufacturing business was shut down as a result of the defendant’s negligence usually will not be compensable, because of the difficulty of demonstrating that a profit has been lost; there is a possibility that the items that were not produced and sold the day of the disruption could have been produced and sold the next day.”). Reott’s expert applied the same measure of damages (lost profits), but simply reached a different conclusion regarding Reott’s losses. *See* Appeal Brief at 49.

C. Reott Fails to Marshal the Evidence with Respect to Causation and Damages, and the District Court Did Not Commit Clear Error.

As noted above in Section II, “[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding.” Utah R. App. P. 24(a)(9). Reott fails to undertake this arduous and painstaking effort with respect to causation (trespass to chattels claim) or damages (common carrier claim). Instead, he merely reasserts his own evidence and expert’s testimony, which the district court weighed and rejected in favor of the expert testimony and other evidence offered by Wasatch and BBC. *See* Appeal Brief, p. 49-50. Accordingly, this Court must affirm the district court’s findings on that basis alone.

See, e.g., Boyer v. Boyer, 2008 UT App 138, ¶ 21, 183 P.3d 1068 (rejecting challenge to damage calculation because plaintiff failed to marshal evidence).

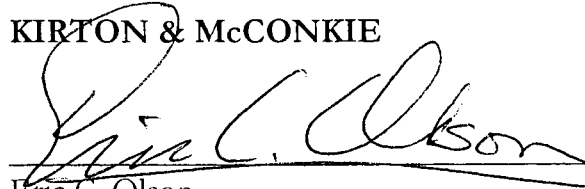
“Trial courts are afforded wide latitude in determining factual matters.” *Valcarce v. Fitzgerald*, 961 P.2d 305, 314 (Utah 1998). Where two witnesses offer contradictory testimony, the fact finder may weigh the evidence and “draw its own conclusions.” *Id.* Reott has presented no evidence that the district court clearly erred in finding the testimony of Wasatch’s and BBC’s expert more credible than that of Reott’s expert, who assumed, contrary to scientific and historical evidence (FD 61, 62), that a well can produce an infinite amount of gas or oil. (R. 8294 at 947) The district court’s findings on causation and damages are supported by evidence in the record and are not clear error. Utah R. Civ. P. 52(a).

CONCLUSION

For all of the foregoing reason, this Court should affirm the district court's Final Judgment below in its entirety.

DATED this 21st day of May 2010.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **CONSOLIDATED BRIEF OF APPELLEES** was served this 21st day of May 2010, by mailing on said date two copies thereof by United States mail, first class postage prepaid, addressed to:

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A handwritten signature in black ink, appearing to read "Eric C. O'Connell", is written over a horizontal line.

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