

2009

Wasatch Oil and Gas, LLC. v. Edward A. Reott : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS	
WASATCH OIL & GAS, L.L.C., Plaintiff and Appellee, v. EDWARD A. REOTT, et al., Defendant and Appellant.	REPLY BRIEF Appellate Case No. 20090749
GOAL, LLC and REGOAL INC., Counterclaim, Third Party and Crossclaim Plaintiffs and Appellants, v. WASATCH OIL & GAS, L.L.C., et al., Counterclaim, Third Party and Crossclaim Defendants and Appellees.	
Appeal from the Seventh Judicial District Court, Carbon County, State of Utah The Honorable George M. Harmond	

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ARGUMENT

I. Reott Is Not Foreclosed From Contesting Equitable Title.

At trial, Reott, without complaint or objection from Wasatch,¹ contested Wasatch's claims to legal and equitable title under all theories Reott had pleaded. These theories included, *inter alia*, constructive fraud under U.C.A. § 25-6-6 (1989) and Sutton's lack of authority to execute the June Letter Agreement and Mineral Lease Assignments (MLAs). Now, for the very first time, Wasatch contends that these theories extensively contested at trial are somehow foreclosed due to this Court's reversal of summary judgment for Reott in *Wasatch Oil & Gas, L.L.C. v. Reott*, 2007 UT App. 223, 163 P.3d 713 ("*Wasatch I*"). (See Appellees Br., at 28, 32.)

Wasatch's arguments, when reviewed in the procedural context of the case, evidence a fundamental misunderstanding of summary judgment and remand after summary judgment has been reversed. While "[t]he moving party determines the scope of a motion for summary judgment," see *Timm v. Dewsnup*, 851 P.2d, 1178, (Utah 1993), neither the chosen scope of a motion for summary judgment nor the chosen scope of an appeal therefrom circumscribes the merits of the case or issues that may be raised upon denial of summary judgment or on remand after reversal of the trial court's grant of summary judgment. "The denial of a motion for summary judgment on an issue is not a final decision on the merits of that issue." *LeVanger v. Highland Estates*, 2003 UT App. 377, ¶ 13, 80 P.3d 569. Rather, "[t]he denial of a motion for a summary judgment . . . is strictly a pretrial order that decides only one thing—that the case should go to trial." *Id.*

¹ For ease of reference, Wasatch and BBC are jointly referred to herein as "Wasatch."

(quoting *Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966)).

Arguments not raised in a motion for summary judgment are not waived or foreclosed should summary judgment be denied or reversed on appeal. *See, e.g., Dunlap v. Stichting Mayflower Mountain Fonds*, 2005 UT App. 279, ¶ 8, 119 P.3d 302 (on remand after reversal of summary judgment, plaintiffs were not foreclosed from raising other available arguments (adverse possession or lack of good faith purchaser) to defeat defendants' superior title, even if the arguments were not raised on appeal or on summary judgment)); *Levanger*, 2003 UT App. 377, ¶ 15 (holding that defendants never waived the issue of standing although standing was not addressed on appeal). *Accord Timm v. Dewsnap*, 851 P.2d 1178, 1182 (Utah 1993); *Lane v. Messer*, 689 P.2d 1333, 1334 (Utah 1984).

Wasatch I, which reviewed the trial court's order granting summary judgment to Reott, determined that Sutton's authority under the statute of frauds and Mission's actual intent to defraud should be remanded for trial because there were material issues of fact. 2007 UT App. 223, ¶¶ 30, 36. As to authority, this Court held that "Sutton, acting alone, did not have the requisite written authority to assign the Section 32 [Leases]" and that Sutton therefore did not satisfy the statute of frauds' written authorization requirement absent a legally effective oral authorization or ratification, which would have to be proved at trial. *See id.* ¶¶ 29–30. Except as to this single issue, neither the scope of summary judgment nor this Court's prior opinion "circumscribe[d] the scope of the court's inquiry into the merits of the case" or permanently fixed the "ledger" of arguments that Reott could raise on remand. (*See Appellees Br.*, at 32, 41.)

II. The Trial Court Exceeded The Scope Of This Court's Mandate.

Even more, Wasatch underestimates the force of this Court's mandate on remand. Explicit in this Court's remand is that Sutton did not have actual authority, acting alone, to transfer Mission's Section 32 Leases to Wasatch, and that there were only two other avenues by which Sutton's actions could be made effective. *See Wasatch I*, 2007 UT App. 223, ¶¶ 29, 30. This Court's mandate was clear and precise:

We therefore reverse the trial court's grant of summary judgment as to the issue of legal title and remand to the trial court to determine whether Mission gave Sutton *oral authorization* to execute the Assignments or whether Mission subsequently *ratified* the Assignments; and, if so, the effect thereof.

Id. ¶ 30 (emphasis added). The trial court, however, exceeded this Court's mandate by concluding that "[i]f Sutton had *actual authority* to execute the lease assignment documents, Wasatch held legal title and was a successor in interest." (*See* CR 4 (R. 8118, ¶4) (emphasis added).)² Even more, this Court already held that Sutton did not have "actual authority" (what this Court called "general power") to alone convey Mission's interests in the Section 32 Leases:

Thus, although the MOA gives Sutton the general power to act on behalf of and under the authorization of Mission in the assignment of its property, the MOA limits this power in that it explicitly requires two Mission managers to execute instruments conveying Mission's title to real property, such as the Assignments.

Wasatch I, 2007 UT App. 223, ¶ 29.

Recognizing the difficulty in proving oral authorization or ratification, (*see* Appeal Br., at 14–15), Wasatch successfully urged the trial court to expand and reframe the issue

² Findings of Fact and Conclusions of Law on redemption and quiet title are denoted "FR" and "CR," respectively, and on damages are denoted "FD" and "CD," respectively.

despite this Court's mandate. (*See Appellees Br.*, at 34, 41–43.) Rather than prove oral authorization or ratification, Wasatch resorted to the decided and foreclosed concept of general power, relabeling it as “actual authority.” Wasatch argues 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.” (*Id.* at 43.) Despite this Court's clear mandate, Wasatch also contends that the issue remanded to the trial court for consideration was not oral authorization or ratification, but rather the general “underlying concepts of governance and control.” (*Id.*) Wasatch further attempts to circumvent the mandate rule by arguing that this Court's mandate offered only “words of prediction, not direction.” (*Id.* at 42.)

Despite Wasatch's efforts to reframe the issue, this Court's mandate arose not out of a discussion of Sutton's authority generally, but whether the act of Sutton disposing of Mission's assets satisfied the statute of frauds' written authorization requirement. *See Wasatch I*, 2007 UT App. 223, ¶¶ 28–30. Holding that “Sutton, acting alone, did not have the requisite written authority to assign the Section 32 [Leases],” this Court then explained that there were two possible exceptions to the statute of frauds' written authorization requirement: oral authorization and ratification. *See id.* ¶ 30. This Court's remand could not have been clearer or more specific. The trial court violated this Court's mandate by instead resorting to the foreclosed concept of general power relabeled as “actual authority.”³

³ Utah courts have “consistently refused to uphold the power of a corporate president to act in behalf of his corporation without authorization from its board of directors.” *Lloydona Peters Enters., Inc. v. Dorius*, 658 P.2d 1209, 1211 (Utah 1983). “Individual directors, or any number of them less than a quorum, have no authority as directors to

III. Sutton's Lack Of Authority To Assign The Section 32 Leases Also Defeats Wasatch's Equitable Interest In The Leases.

Not surprisingly, in light of its tenuous claim to legal title, Wasatch devotes much of its brief to arguing equitable title. The trial court's conclusion that Wasatch obtained equitable title to the Section 32 Leases by the June Letter Agreement (*see* CR 9 (R. 8119)) is error because Sutton lacked authority to execute the June Letter Agreement. The Utah statute of frauds provides that "[e]very contract . . . for the sale[] of . . . *any interest in lands[]* shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the . . . sale is to be made, *or by his lawful agent thereunto authorized in writing.*" U.C.A. § 25-5-3 (1953) (emphasis added).⁴

This Court already held that the MOA gives written authority to Mission's managers, but "the MOA limits this power in that it explicitly requires two Mission managers to execute instruments conveying Mission's title to real property, such as the Assignments." *Wasatch I*, 2007 UT App. 223, ¶ 29. This holding is equally binding where the instrument—the June Letter Agreement—conveys Mission's equitable title to real property.

Again circumscribing Reott's arguments on appeal, Wasatch mistakenly argues that the issue of Sutton's "[a]uthority to execute the [June] Letter Agreement is an issue long

bind the corporation." *Id.* (citation omitted). "No officer or agent of a corporation has any authority to make a contract to sell its real estate without . . . action [by the Board of Directors]." *Foster v. Blake Heights Corp.*, 530 P.2d 815, 818 (Utah 1974).

⁴ *See also Williams v. Singleton*, 723 P.2d 421, 423–24 (Utah 1986); *Cutwright v. Union Savings & Inv. Co.*, 94 P. 984, 985 (Utah 1908) ("No doubt the transfer of any interest in real property, whether equitable or legal, is within the statute of frauds."). *Accord Coulter & Smith, Ltd. v. Russell*, 1999 UT App. 55, ¶ 12, 976 P.2d 1218 ("[A]n option to purchase real estate is an interest in land within the statute of frauds.").

resolved in this litigation” and therefore “is no longer available to Reott.” (See Appellees Br., at 32–33.) Wasatch relies on the trial court’s prior ruling on summary judgment and this Court’s opinion in *Wasatch I*, arguing that both held that “the [June] Letter Agreement conveyed equitable title but for the alleged fraud.” (*Id.* at 32.) This is simply not true. Wasatch does not and cannot cite any language in either opinion. Instead, Wasatch apparently divines some implicit emanations from the orders to make this claim, but in doing so it misconstrues the trial court’s and this Court’s prior holdings.

Reott advanced two grounds for summary judgment: (1) the MLAs conveyed no legal title because they failed to disclose Sutton’s representative capacity as agent for Mission, and (2) Mission’s actual intent to defraud its creditors defeated any equitable interest claimed by Wasatch by virtue of the June Letter Agreement. (R. 4812–4815.)

In granting summary judgment, the trial court held that Sutton’s failure to disclose his representative capacity was fatal to the conveyance of legal title, (R. 4813–4814), but this Court reversed and held that failure to disclose the agent’s capacity did not defeat legal title. See *Wasatch I*, 2007 UT App. 223, ¶ 27. Neither court held that Sutton had the requisite authority from Mission to comply with the statute of frauds and the MOA.⁵

The trial court also ruled on summary judgment that, although Wasatch “claim[ed]” an equitable interest in the Section 32 Leases by virtue of the June Letter Agreement, the

⁵ Whether a technical defect in an instrument itself defeats a conveyance is a far different issue from whether an unauthorized agent can bind his principal by the instrument, defect or not. Wasatch misses this distinction, arguing that “[t]here was no defect in Sutton’s execution of the [June] Letter Agreement” because it “identified Mission as the party obligating itself to transfer title to the leases, with Sutton signing in a representative capacity as ‘Manager.’” (See Appellees Br., at 33.)

fraudulent transfer under section 25-6-5 (1988) defeated any such claim to an equitable interest. (R. 4815.) This Court reversed, holding that whether the transfer was fraudulent could only be determined by trial. *See Wasatch I*, 2007 UT App. 223, ¶ 31. Again, neither court held that the “[June] Letter Agreement conveyed equitable title but for the alleged fraud,” as Wasatch contends. (*See Appellees Br.*, at 32.) In fact, the trial court expressly concluded in its memorandum decision that the June Letter Agreement conveyed *no* equitable title not only because of the fraudulent transfer, but also because the transfer was void for lack of consideration. (R. 4815.) The trial court *never held* that the June Letter Agreement conveyed equitable title, and neither has this Court.

Indeed, it is incongruous to suggest, as Wasatch does (*see Appellees Br.*, at 33), that Sutton had no authority to convey legal title yet had authority to convey equitable title when neither the statute of frauds nor the MOA make any distinction between legal title and equitable title. Because Mission did not orally authorize or subsequently ratify Sutton’s execution of the June Letter Agreement, as explained below, Wasatch did not obtain equitable title to the Section 32 Leases. Nothing in the remand order foreclosed Reott from making that argument at trial or her on appeal.

IV. Jager Did Not Orally Authorize Or Ratify the June Transfer.

The trial court erroneously concluded that the Jager Letter dated January 17, 2001, established that “Jager either gave oral authorization to Sutton of the . . . June 21, 2000 transaction[] at the time [it] took place or, after receiving full knowledge of the transaction[], ratified [it] at a later date[.]” (FR 141 (R. 8116); CR 7 (R. 8118).) Sutton’s execution of the June Letter Agreement and MLAs was not orally authorized or ratified

by Mission, and thus Wasatch did not receive equitable or legal title to the Section 32 Leases sufficient for redemption.

A. Jager did not have authority to orally authorize the June transaction.

Any oral authorization by Jager at the time of the June 2000 transfer was ineffective as a matter of law because the trial court found that Jager was not a manager at that time and thus had no authority to act for or bind Mission. The trial court expressly found that “at the time of . . . the June 2000 transaction[], Sutton was the sole manager of Mission.” (See FR 107.) Accordingly, the trial court erroneously concluded that Jager “gave oral authorization to Sutton of the . . . June 21, 2000 transaction[] at the time [it] took place[.]” (See FR 141 (R. 8116).) Wasatch’s recitation of facts allegedly evidencing Jager’s oral authorization is therefore irrelevant.

Additionally, under Colorado law an oral authorization is ineffective as a matter of law. See, e.g., *Simpson v. Nelson*, 208 P. 455, 456 (Colo. 1922).⁶ Again revealing Wasatch’s misunderstanding of summary judgment, Wasatch argues that the law of the case doctrine requires that Utah law, not Colorado law, govern the question of Sutton’s authority from Mission because the choice-of-law question regarding authority was allegedly decided implicitly in the first appeal. (See Appellees Br., at 35–36.) While this

⁶ Wasatch’s citation to *Brammer v. Ellison*, 257 P.2d 430 (Colo. 1953) for the proposition that Colorado recognizes oral authorization is not helpful because the opinion does not disclose the basis for the husband’s authorization, i.e. whether it was written or oral. Subsequent cases have reinforced the principle that Colorado law gives no legal effect to oral authorization. See, e.g., *Nunnally v. Hilderman*, 373 P.2d 940, 941 (Colo. 1962) (holding that the parol evidence “as a matter of law do[es] not constitute specific authorization in writing empowering the Bank to enter into a contract with [purchaser] which would be binding on [sellers]”).

Court relied on Utah law regarding the statute of frauds in *Wasatch I*, it did not decide, expressly or implicitly, the choice-of-law issue regarding authority, which this Court recognized when it directed the trial court “to determine whether Mission gave Sutton oral authorization . . . or whether Mission subsequently ratified the Assignment, *and, if so, the effect thereof.*” 2007 UT App. 223, ¶ 30 (emphasis added). The legal effect thereof is determined according to Colorado law, the state of Mission’s incorporation.⁷

Wasatch also incorrectly argues that Reott failed to marshal the evidence in support of the trial court’s factual findings on oral authorization and ratification and instead simply “reargue[d] the facts.” (See Appellees Br., at 37.) Contrary to Wasatch’s assertions, Reott does not challenge any of the trial court’s factual findings with respect to oral authorization, but rather accepts the trial court’s factual findings and argues that the trial court’s legal conclusions drawn from these facts are erroneous. “[I]n cases where a party raises a legal issue—not dependent on factual findings but instead challenging whether the trial court properly applied the law to the facts as found below—there is no need to marshal.” *Ostermiller v. Ostermiller*, 2008 UT App. 249, ¶ 2, n.1, *aff’d in part and rev’d in part on other grounds*, 2010 UT 43. Furthermore, the trial court’s conclusions on both oral authorization and ratification were based solely on the January 17, 2001 Jager letter, from which this Court may draw its own independent conclusions. See *Harris v. IES Assocs., Inc.*, 2003 UT App. 112, ¶ 27, 69 P.3d 297 (“[T]he trial court’s interpretation of written documents . . . presents a question of law[.]”). Nothing in the Jager Letter even

⁷ Even under Utah law, oral authorization has no legal effect because Utah no longer recognizes an oral authorization exception. (See Appeal Br. at 23 and cases cited therein.)

faintly supports a finding of a grant of oral authority by Jager. (See Appeal Br., Add. H.)

B. Jager could not ratify the June transaction on behalf of Mission.

The trial court also erroneously concluded that Jager ratified the June transaction “based on the contents of Jager’s letter dated January 17, 2001.” (See CLR 7 (R. 8118, ¶ 7)). Wasatch stretches this conclusion, arguing that not only did Jager expressly ratify the June transaction by the Jager Letter, but also ratified the June transaction “impliedly through knowing acquiescence,” i.e. by Mission’s failure to timely repudiate or disaffirm the June transaction. (See Appellees Br., at 38–40.)⁸

As with oral authority, the trial court’s findings establish that any ratification by Jager of the June transaction would be ineffective as a matter of law because Jager was not a manager and had no authority to ratify, expressly or impliedly, the June transaction.⁹

Wasatch also erroneously contends that implied ratification dispenses with the need to comply with corporate formalities in the ratification. (See Appellees Br., at 39, 40.) *Bradshaw v. McBride*, 649 P.2d 74 (Utah 1982) is dispositive on this point. In *Bradshaw*, one of eight tenants in common entered into an oral agreement with certain buyers to purchase the tenants’ property. When two of the tenants refused to execute the deeds, the buyers brought suit for specific performance of the oral agreement, arguing that the tenants impliedly ratified the agreement by their failure to repudiate or disaffirm

⁸ The trial court’s conclusion that Mission ratified the June transaction was not based on “implied ratification,” but rather was solely “based on the contents of Jager’s letter dated January 17, 2001.” (See CLR 7 (R. 8118, ¶ 7).)

⁹ Even if Jager was a manager, there was no express ratification based on the Jager Letter. As detailed in Reott’s opening brief, the contents of the Jager Letter establish that Jager did not have full knowledge of all terms of the June Letter Agreement or the full details of the June transfer. (See June Letter Agreement (Appeal Br., Addendum C).)

the oral agreement. *Id.* at 78. The Utah Supreme Court rejected that argument:

[T]here was no ratification as a matter of law because the Utah statute of frauds requires that any agent executing an agreement conveying an interest in land on behalf of his principal must be authorized in writing. . . . In order to enforce an oral agreement, the same kind of authorization that is required to clothe an agent initially with authority to contract must be given by the principal to constitute a ratification of an unauthorized act. *Where the law requires the authority to be given in writing, the ratification must also generally be in writing.* . . . There was, therefore, no ratification in this case.

649 P.2d at 78–79 (citations omitted) (emphasis added).

In the instant case, because the statute of frauds required Sutton’s authority to be in writing, *see Wasatch I*, 2007 UT App. 223, ¶ 28, Mission’s ratification must also be in writing, *see Bradshaw*, 649 P.2d at 79. As a matter of law, there can therefore be no implied ratification by Mission of Sutton’s unauthorized execution of the June Letter Agreement or MLAs. Furthermore, because “the same kind of authorization that is required to clothe an agent initially with authority to contract must be given by the principal to constitute a ratification,” *see id.*, there can be no express ratification by the Jager Letter because it was not signed by two Mission managers.

Wasatch did not obtain equitable or legal title to the Section 32 Leases and had no right to redeem the Section 32 Leases because the trial court’s factual findings simply do not support its conclusion that Mission orally authorized or ratified Sutton’s execution of the June Letter Agreement or the MLAs.

V. Fraudulent Transfer Under U.C.A. § 25-6-6 Defeats Wasatch’s Equitable Interest In The June Leases.

Even more, a fraudulent transfer under section 25-6-6 defeats both the transfer of legal title as well as the transfer of equitable title. UFTA specifically defines “transfer”

as “every mode, direct or *indirect*, absolute or conditional, or voluntary or involuntary, of disposing of or parting with an asset *or an interest in an asset*,” U.C.A. § 25-6-2(12) (1992) (emphasis added). In fact, by defining when “[a] transfer is made . . . with respect to an asset that is real property other than a fixture, *but including the interest of a seller or purchaser under a contract for the sale of the asset*,” see U.C.A. § 25-6-7(1)(a) (1988) (emphasis added), UFTA establishes that “an interest in an asset” includes an equitable interest under a purchase contract. Therefore, any transfer of Mission’s equitable interest in the June Leases to Wasatch is governed by and can be set aside by UFTA.¹⁰

In spite of the plain language of UFTA, Wasatch argues that constructive fraud cannot defeat equitable title because constructive fraud “involves no dishonesty.” (Appellees Br., at 29.) Wasatch argues that only inequitable conduct can defeat rights arising from equity—i.e. equitable title—and therefore only an actual intent to defraud can defeat equitable title. (*Id.* at 28–29.) But as Reott has explained throughout this action, it is not Wasatch that must be found to have acted with fraud (whether actual or constructive), but rather Mission. Fraud under UFTA is determined not by the actions of the transferee (Wasatch), but rather by the actions of the debtor (Mission). See U.C.A. § 25-6-6(1).

¹⁰ Under the identical Florida Uniform Fraudulent Transfer Act provision, “[t]he definition of the term ‘transfer’ as used in this Statute . . . is intended to cover any transaction whereby a transferor divested himself or herself, directly or indirectly, of any cognizable interest, legal *or equitable*, in the property of the transferor.” *Crawford v. Crawford*, 172 B.R. 365, 367 (Bankr. Fl. 1994) (citing FLA. STAT. ch. 726.102(12) (1987)).

But under Wasatch's new argument, even an actual intent to defraud on the part of Mission (the debtor) could not defeat Wasatch's equitable title absent a showing of "dishonesty" on the part of Wasatch. Such is not the law or the effect of UFTA. The plain language of UFTA clearly provides that fraud on the part of Mission, whether actual or constructive, defeats Wasatch's legal and equitable interests in the June Leases.

VI. Reott Properly Challenged All Legal Conclusions And Factual Findings Regarding Fraudulent Transfer.

Wasatch spends much of its brief arguing that Reott has failed to marshal the evidence in support of the trial court's factual findings with respect to reasonably equivalent value and insolvency. Wasatch misapplies the marshaling requirement. "[T]he marshaling requirement applies only to challenges of factual findings, not to conclusions of law." *See Peirce v. Peirce*, 2000 UT 7, ¶ 17, 994 P.2d 193 (Utah 2000) (citations omitted). "[W]here [Reott] raises a legal issue—not dependent on factual findings but instead challenging whether the trial court properly applied the law to the facts as found below—there is no need to marshal." *Ostermiller*, 2008 UT App. 249, ¶ 2, n.1. *Accord Jensen v. Jensen*, 2009 UT App. 1, 203 P.3d 1020; *Dishinger v. Potter*, 2001 UT App. 209, ¶ 14, 47 P.3d 76.

In determining whether an issue challenged is a legal conclusion or factual issue subject to the marshaling requirement, Utah's appellate courts "disregard the labels attached to findings and conclusions and look to the substance." *Gillmor v. Wright*, 850 P.2d 431, (Utah 1993) (citations omitted). "Therefore, that which a trial court labels a 'finding of fact' may be in actuality a conclusion of law, which we review for

correctness.” *Id.* (citation omitted). As in the instant case, conclusions of law are often implicit or inherent in the factual findings, and vice versa. *See, e.g., In re Sam Oil*, 817 P.2d 299, 305 (Utah 1991) (finding of fact was implicit in trial court’s conclusion of law).

Where Reott does have a duty to marshal, “only the *supportive evidence* is legally relevant and is all that counsel should call [the appellate court’s] attention to.” *Kimball v. Kimball*, 2009 UT App. 233, ¶ 20, n.5, 217 P.3d 733 (emphasis in original). This Court has stated that it “do[es] not want an exhaustive review of all of the evidence presented at trial,” but only “a *precisely focused summary* of all the evidence that supports any finding that is challenged on the ground that it is clearly erroneous.” *Neely v. Bennett*, 2002 UT App. 189, ¶ 12, n.1, 51 P.3d 724 (emphasis added). “If there simply is no supportive evidence, counsel need only say so and the challenge will be well-taken—counsel is not expected to marshal the nonexistent.” *Kimball*, 2009 UT App. 233, ¶ 20.

Wasatch complains that Reott’s marshaling is inadequate because “Reott devotes nearly his entire discussion of the value issue arguing against the district court’s finding on fraudulent transfer and constructive fraud rather than in support of them.” (Appellees Br., at 24.) Yet Wasatch fails to cite any authority for the proposition that proper marshaling requires “*arguing . . . in support*” of the trial court’s factual findings. Although the marshaling requirement requires that the appellant “play the ‘devil’s advocate,’” *see Chen v. Stewart*, 2004 UT 82, ¶ 78, 100 P.3d 1177 (citation omitted), doing so only requires that appellant “present,” not argue or explain, all facts supporting the trial court’s finding, *see id.* ¶ 77. In other words, marshaling “requires ‘a *precisely focused summary* of all the evidence supporting the findings,’ correlated to the location

of that evidence in the record.” *Friends of Maple Mountain, Inc. v. Mapleton City*, 2010 UT 11, ¶ 10, —P.3d— (emphasis added) (citation omitted). Once that is done, it is not inappropriate, as Wasatch suggests it is, to “argu[e] against the district court’s findings on fraudulent transfer and constructive fraud rather than in support of them.” (See Appellees Br., at 24.) Indeed, once the focused summary has been presented as required, “[t]hen, appellants must ‘explain why those findings contradict the clear weight of the evidence.’” *Id.* ¶ 12. And that is all that appellants must “explain.” See *Chen*, 2004 UT 82, ¶ 78.

As Reott has explained, Mission’s transfer of legal and equitable title in the June Leases to Wasatch was fraudulent under UFTA because Mission was insolvent when it transferred the June Leases to Wasatch and did not receive a reasonably equivalent value in exchange for the June Leases. See U.C.A. § 25-6-6(1). Reott has adequately marshaled with respect to insolvency, but Reott has no duty to marshal with respect to reasonably equivalent value because Reott only challenges the trial court’s implicit legal conclusions and application of UFTA to the facts as found by the trial court.

A. Mission was insolvent when it transferred the June Leases to Wasatch.

As concluded by the trial court, (*see* CR 13.a. (R. 8121)), Mission’s inability to pay its debts as they came due established the presumption that Mission was insolvent. See U.C.A. § 25-6-3(2) (1988). Thus, the burden shifted to Wasatch to prove that Mission was solvent, *i.e.* the sum of Mission’s assets exceeded the sum of its debts. But the trial court and Wasatch ignored this shift in the burden, and Wasatch continues to argue that “Reott was unable to offer evidence sufficient to persuade the district court of this essential element of a constructive fraud claim [*i.e.* insolvency].” (Appellees Br., at 27.)

Wasatch, not Reott, had this burden, but failed to meet it and prove Mission's solvency. Reott has thus challenged FR 121 that "[t]he sole evidence before the Court was that the fair value of Mission's assets as of June 21, 2000, exceeded its debts, notwithstanding Mission's inability as a start-up company to pay its debts as they became due." (*See* Appeal Br., at 38–39 (citing R. 8113).) FR 121 was based on FR 119 that:

.... [M]ission retained the following assets:

- a. The Lavinia 1-32 well (valued by Reott and Sutton at an amount in excess of the total of all outstanding Mission liabilities).
- b. Cash in the bank of at least \$27, 236.27.
- c. Amounts held by the State of Utah as a bond of \$19,943.15.
- d. The Gusher leases (the precise value of which was not addressed at trial but which Sutton testified had value and the Lease Acquisition Memorandum identified as having value).

Taking as correct FR 119(b) and (c), Reott has properly challenged FR 119(a) and (d) regarding the value of the Gusher Leases and the Lavinia Well. First, the trial court and Wasatch conceded that Wasatch did not present any evidence of the value of the Gusher leases. (*See* FR 119 (R. 8113); (R. 827:8–9)). "If there simply is no supportive evidence, counsel need only say so and the challenge will be well-taken—counsel is not expected to marshal the nonexistent." *Kimball*, 2009 UT App. 233, ¶ 20. Second, Reott presented a "precisely focused summary" of all evidence that could support the trial court's finding with respect to the value of the Lavinia Well, comprising testimony by BBC's witness Heggie Wilson, Sutton, and Reott. (*See* Appeal Br., at 40.) That the summary comprises only one page is not a failure to marshal, as Wasatch argues (*see* Appellees Br., at 24–25), but rather highlights the paucity of evidence supporting FR 119(a). Indeed, Wasatch

did not present or cite to any other evidence in the record beyond what Reott presented and cited regarding the value of the Lavinia Well. (*See* Appellees Br., at 27–28.)

Having presented a “precisely focused summary” of all the evidence supporting FR 119(a), Reott has “ferreted out” “fatal flaws” in the evidence, *see Utah County v. Butler*, 2008 UT 12, ¶ 11, 179 P.3d 775, and “explain[ed] why [FR 119(a)] contradict[s] the clear weight of the evidence,” *see Chen*, 2004 UT 82, ¶ 78. (*See* Appeal Br., at 40–43.) In light of these fatal flaws, the evidence regarding the value of the Lavinia Well and the Gusher Leases¹¹ cannot support the trial court’s factual finding that “[t]he sole evidence before the Court was that the fair value of Mission’s assets as of June 21, 2000, exceeded its debts, notwithstanding Mission’s inability as a start-up company to pay its debts as they became due.” (*See* FR 121 (R. 8113)). This Court should therefore hold that Wasatch failed to rebut the presumption that Mission was insolvent for failing to pay its debts as they came due.

B. Mission did not receive reasonably equivalent value for the June Leases.

With regard to reasonably equivalent value, Reott accepts the trial court’s factual findings and only challenges the implicit legal conclusions in FR 88, which states that “the consideration set forth in the June 2000 Letter Agreement and the amounts subsequently paid by Wasatch to preserve the leases and the Jack Canyon Unit constituted reasonably equivalent value for the sale of the leases.” (*See* Appeal Br., at 36 (citing R. 8109).) Implicit in FR 88 is the legal conclusion that “the consideration set

¹¹ The cash on hand and bond, as the trial court found them, totaled \$47,179.42; the value of the Gusher leases was never established; and the value of the Lavinia Well was, at most, \$20,000. These amounts total far less than Mission’s over \$1 million of debt.

forth in the June 2000 Letter Agreement” constituted “value” as a matter of law within the meaning of UFTA. *See* U.C.A. § 25-6-4(1) (1988) (defining “value”).¹² Reott does not challenge the trial court’s findings regarding the consideration in the June Letter Agreement or given by Wasatch, but only challenges the implicit legal conclusion that such consideration for the June transfer constituted “value” within the meaning of UFTA.

Examining FR 88, it is clear that the trial court implicitly determined that the following cash and non-cash consideration, taken together, constituted “reasonably equivalent value” for the June Leases: (1) “Wasatch reimbursed Mission \$3,629.40 for rentals paid by Mission on leases purchased by Wasatch”; (2) Wasatch promised to “give Mission a specified percentage of any drilling deal Wasatch or Mission might negotiate in the future with respect to the leases purchased”; (3) Wasatch reinstated expired leases; (4) Wasatch assumed responsibility to “maintain the leases as lessee and unit operator”; and (5) “Wasatch paid to SITLA over \$4,000 for assignment of the leases and for rentals between June 21, 2000 and August 9, 2001.” (FR 82, 115–118 (R. 8108, 8112–8113)). Reott does not challenge these factual findings, and therefore has no duty to marshal the evidence to challenge the implicit conclusions of law underlying FR 88.

As Reott has explained, as a matter of law, the June Letter Agreement’s non-cash consideration (items (2)–(5) above) was not “value” within the definition of the UFTA. (*See* Appeal Br., at 34–36.) Taking the trial court’s facts regarding the consideration

¹² Additionally, “comment 2 to the Uniform Fraudulent Transfer Act states that value is to be determined in light of the act’s purpose, in order to protect the creditors. Any consideration not involving utility for the creditors does not comport with the statutory definition.” *In re Agricultural Research & Tech. Group, Inc.*, 916 F.2d 528, 540 (9th Cir. 1990) (citation omitted).

under the June Letter Agreement, the trial court erred as a matter of law in concluding, although implicitly, that the non-cash consideration constituted “value.” Because Reott has “challeng[ed] whether the trial court properly applied [UFTA] to the facts as found below—there is no need to marshal.” *Ostermiller*, 2008 UT App. 249, ¶ 2, n.1.

The only consideration that constituted “value” received by Mission was the \$3,629.40 cash reimbursement.¹³ But the trial court did not determine that the \$3,629.40 cash reimbursement *alone* was reasonably equivalent to the value of the June Leases. (See FR 88 (R. 8109)). Reott has no obligation to marshal the evidence in support of a finding that the trial court did not make.¹⁴

The trial court found that Wasatch’s offer of \$5.00 per net acre for a cash-only exchange “constituted reasonably equivalent value” for the June Leases. (See FR 80–81 (R. 8108)). Wasatch and Mission ultimately agreed to \$3,629.40 cash and other non-cash consideration as set forth in the June Letter Agreement. (See FR 82 (R. 8108)). Reott accepts these factual findings. But because the non-cash consideration cannot be considered “value” under UFTA, the only “value” Mission ultimately received was \$3,629.40 cash, a mere fifty-two cents (\$0.52) per net acre for the June Leases. In light of the trial court’s determination that reasonably equivalent value for a cash-only

¹³ In spite of UFTA’s clear focus on the “value” *received* by the *debtor*, see U.C.A. § 25-6-6(1)(a), Wasatch still argues that the trial court’s factual findings fully support its “conclusion that *Wasatch* gave reasonably equivalent value for the ten leases interests pursuant to the Letter Agreement.” (See Appellees Br., at 26 (emphasis added).)

¹⁴ To the extent Reott is obligated to marshal, where “there simply is no supportive evidence, . . . counsel is not expected to marshal the nonexistent.” *Kimball*, 2009 UT App. 233, ¶ 20. Under the trial court’s findings, evidence that the \$3,629.40 cash alone was reasonably equivalent to the value of the June Leases is “nonexistent.”

exchange was \$5.00 per net acre, fifty-two cents (\$0.52) per net acre does not, as a matter of law, constitute reasonably equivalent value.

Wasatch presents an irrelevant summary of “‘all surrounding circumstances’ affecting the value of the transaction documented in the June 2000 Letter Agreement,” (*see* Appellees Br., at 25), which Reott does not and need not challenge. The fact remains that when all of the UFTA qualifying consideration is considered, Mission only received 11% of what the trial court determined to be the reasonably equivalent value of the June Leases. In sum, Reott established Mission’s insolvency and failure to receive reasonably equivalent value for the June Leases. The trial court therefore erred in concluding that Mission did not fraudulently transfer the June Leases under section 25-6-6.

VII. The Trial Court Applied The Wrong Measure Of Damages.

The trial court applied the wrong measure of damages for Wasatch’s and BBC’s breach of their common carrier obligations to Reott. “Whether the district court applied the correct rule for measuring damages is a question of law” reviewed for correctness. *See Mahana v. Onyx*, 2004 UT 59, ¶ 25, 96 P.3d 893 (citing *Lysenko v. Sawaya*, 2000 UT 58, ¶¶ 16, 23, 7 P.3d 786). Wasatch incorrectly attempts to circumvent Reott’s challenge of the measure of damages by recharacterizing the challenge as going to the adequacy of evidence. (*See* Appellees Br., at 46.) In *Traco Steel Erectors, Inc., v. Control, Inc.*, 2009 UT 81, 222 P.3d 1164, the Utah Supreme Court explained that the measure of damages is at issue when there are “two or more alternative formulae advanced as candidates to properly calculate damages.” *Id.* ¶ 20. In contrast, the adequacy of evidence is at issue when one formula applies and a party “challenges the types of

evidence the court considered in using the formula to calculate damages.” *Id.* ¶ 21.

In *Mahana*, the defendant’s challenge was to the measure of damages where the damages could be measured by either the market value of the property at the time of conversion, or the value of the plaintiff’s lost use of the converted property. 2004 UT 59, ¶¶ 25–29. In *Lysenko*, the issue was whether damages for the lessor’s conversion of a tenant’s property was the market value of the converted property if left in-place (“in-place” value), or the market value of the converted property if removed (“salvage value”). 2000 UT 58, ¶ 16. With two competing measures of market value, the supreme court held that “the trial court’s determination of the appropriate measure of damages in this case involved a legal determination, not a factual determination[.]” *Id.* ¶ 23.

As in *Mahana* and *Lysenko*, the present case involves a determination of the correct measure of damages between two competing formulae. First, the trial court adopted BBC’s theory of damages, concluding that the measure of damages for Wasatch’s and BBC’s breach of their common carrier obligations was the difference between Reott’s profits that would have been generated during the lost-production period (April 2002 to July 2005) and Reott’s profits generated during the subsequent in-production period (i.e. after July 2005). (FD 63–67 (R. 8210–8211); CD 1–2, 4 (R. 8211–8212).) Or, the trial court measured damages based on the difference in the market value of the Lavinia Well in 2002 (which, due to the market value of gas, the trial court found to be “effectively zero”) and the market value of the Lavinia Well in 2008 (which the trial court found to be \$99,000). (*See* FD 65–66 (R. 8210–8211)). On the other hand, Reott has explained that the appropriate measure of damages for the three years of lost production is determined

solely by the profits that would have been generated during the lost-production period, without considering the market value of gas or profits generated during the subsequent in-production period. Which of these two measures of damages is appropriate for Wasatch's and BBC's breach of their common carrier obligations is a purely legal question for which Reott has no duty to marshal. *See, e.g., Mahana*, 2004 UT 59, ¶ 25.

While both measures of damages involve to some extent a calculation of profits, they are fundamentally different formulae.¹⁵ *See, e.g., Lysenko*, 2000 UT 58, ¶ 10 (comparing two different methods for measuring the fair market value of converted property and concluding that the issue was a question of law). BBC's measure adopts the market-based approach of *American Jurisprudence 2d*, which compares the market value of goods when sold after a short production delay with the market value of goods when they would have been sold but for the delay. (*See Appellees Br.*, at 46–47.) Reott's measure, however, adopts the lost-profits/lost-production approach of *Acculog, Inc. v. Peterson*, 692 P.2d 728 (Utah 1984) and *United Electric Coal Co. v. Rice*, 22 F. Supp. 221 (E.D. Ill. 1938), which does not consider the market value of goods after the production delay.

The trial court erred as a matter of law in not adopting Reott's lost profits measure of damages. The lost profits approach advocated by Reott is the more accurate measure of damages due to the severe disruption and length of delay in production caused by Wasatch and BBC. While the trial court's market based approach "usually" works for

¹⁵ The trial court acknowledged that it was selecting between two different measures of damages: "[B]ecause the Court has adopted [BBC's] theory relative to damages, it would not matter if the Court had heard testimony from Dr. Stinson for the [remainder of the lost-production period]." (FD 67 (R. 8212)).

short delays, such as when “items that were not produced and sold the *day* of disruption could have been produced and sold the next *day*,” (see Appellees Br., at 47 (quoting *Am. Jur. 2d*, Damages § 458) (emphasis added)), it does not work when the disruption continues unabated for over three years, as in this case. In situations such as Reott’s involving unnecessarily prolonged disruption, the risk and injury to the disrupted party is more than merely delayed revenue from selling goods one day later. Rather, the injury to the business is its inability to operate and survive as a viable, going concern without a source of revenue to meet obligations, pay creditors, and take advantage of business opportunities. Delayed profits cannot compensate for those injuries.

Even more, the trial court erred in adopting BBC’s market theory as the measure of damages because the trial court could not base its compensatory award on the facts it found. To compare the profits generated during the in-production period (after July 2005) with profits that would have been generated during the lost-production period, the trial court looked at the price of gas for only three months (January–March 2002) of the three-year lost-production period. (FD 63 (R. 8210)). The trial court entered no factual findings for the price of gas from April 2002 through July 2005, the remainder of the lost-production period. Even more, the trial court only had one year of gas price data for April 2005 through April 2006 (*id.*), but did not enter any factual findings regarding the market price of gas after April 2006 even though Reott continued to produce after April 2006. Accordingly, the trial court erred in adopting a measure of damages for which no evidence was presented. See *Mahana*, 2004 UT 59, ¶ 29 (holding that “the district court correctly concluded that” the appropriate measure of damages was “the value of

Mahana's lost use of the truck" given that "[t]he district court could not base its compensatory award on the market value of the truck at the time of conversion because the parties presented no evidence as to that value").

VIII. The Trial Court Had No Reasonable Basis To Reopen Causation And Vacate Summary Judgment Granted On Reott's Trespass To Chattels Claim.

The trial court abused its discretion when on the first day of trial it vacated, *sua sponte* and without prior notice, its prior ruling on summary judgment that BBC damaged the Lavinia Well and pipeline and caused the oil spill. (R. 5386.) "Under this [abuse of discretion] standard, the trial court's ruling may be overturned only 'if there is no reasonable basis for the decision.'" *See Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, 163 P.3d 615. The trial court did not articulate any reasonable basis to reopen the issue of causation, let alone on the first day of trial without prior warning.

Wasatch argues that, under Utah Rule of Civil Procedure 54(b), the trial court had discretion to reconsider its non-final decision because "evidence brought to light at trial showed the earlier ruling to be in error." (*See Appellees Br.*, at 45.) Wasatch places the cart before the horse. The trial court's vacation of its ruling on causation occurred before it heard any evidence at trial. The trial court had no reasonable basis to reverse its prior ruling on causation and require Reott, without any opportunity to prepare, to "prove that the actions of BBC's crew caused the oil spill." (CD 7 (R. 8212)).

Incredulously, Wasatch argues that Reott was not prejudiced by the trial court

reopening the issue of causation on the first day of trial.¹⁶ Reott was highly prejudiced by not knowing well in advance of trial that he must prove causation and that his counsel would need to prepare and present witnesses and other evidence showing BBC damaged his well. The fact that Reott did scramble under impossible circumstances to present some evidence and testimony with regard to causation does not concede a lack of prejudice, but rather merely reflects Reott's forced, last-minute attempt to adapt to the surprise ruling. The abuse of discretion under these facts is self evident.

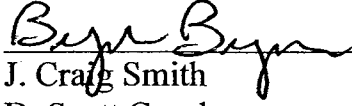
CONCLUSION

Wasatch has failed to establish that it was a successor in interest to Mission and entitled to redeem the Section 32 Leases. Wasatch did not have legal or equitable title in the Section 32 Leases because Mission did not orally authorize or ratify Sutton's unauthorized execution of the June Letter Agreement or Mineral Lease Assignments. Furthermore, Mission's fraudulent transfer under section 25-6-6 defeats Wasatch's legal and equitable title to the Section 32 Leases. Reott therefore requests that this Court quiet title to the Section 32 Leases in Reott, set aside the June 2000 transfer as fraudulent and void, and remand to the trial court for a proper determination of Reott's damages.

¹⁶ *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306 (Utah Ct. App. 1994) and *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, 48 P.3d 968, cited by Wasatch as support for the trial court's vacatur, are distinguishable from the present case because the motions for reconsideration in those cases were not brought on the eve of or during trial.

Respectfully submitted this 9th day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2010, I caused a true and correct copy of the **REPLY BRIEF** to be served to opposing counsel at the following address:

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