

2001

Marc Smith v. Grand Canyon Expeditions Co.,  
Martin Mathis, Michael Denoyer, Ronald R. Smith,  
Donald Saunders : Reply Brief

Utah Supreme Court

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MARC SMITH,	)	
	)	
	)	
Plaintiff/	)	
Appellant,	)	
	)	
vs.	)	
	)	
GRAND CANYON EXPEDITIONS	)	Subject to Assignment to
CO., MARTIN MATHIS, MICHAEL	)	the Court of Appeals
DENOYER, RONALD R. SMITH,	)	
DONALD SAUNDERS, JOHN DOES	)	Case No. 20010667-SC
1 through 5 and JANE DOES 1	)	
through 5,	)	
	)	
Defendant/	)	
Appellees.	)	

**PAT BARTHOLOMEW**

**IN THE UTAH SUPREME COURT**

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MARC SMITH,

Plaintiff/  
Appellant,

vs.

GRAND CANYON EXPEDITIONS  
CO., MARTIN MATHIS, MICHAEL  
DENOYER, RONALD R. SMITH,  
DONALD SAUNDERS, JOHN DOES  
1 through 5 and JANE DOES 1  
through 5,

Defendant/  
Appellees.

Subject to Assignment to  
the Court of Appeals

Case No. 20010667-SC

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**REPLY BRIEF OF APPELLEE/CROSS-APPELLANT**  
**(Filed Under Seal)**

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**Appeal from Judgment of the Sixth Judicial District Court**  
**Kane County, State of Utah**

**The Honorable K. L. McIff, Presiding**

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Pursuant to Rule 24(c) of the Utah Rules of Appellate Procedure, Appellees and Cross-Appellants Grand Canyon Expeditions Co. (“GCE” or the “Company”), Martin Mathis, Michael Denoyer and Don Saunders<sup>1</sup> (collectively “Appellees”) hereby submit this reply brief in connection with the matter captioned above.

## **I. REPLY ARGUMENT**

### **A. INTRODUCTION**

Appellees and Cross-Appellants have made three arguments on cross-appeal: First, Appellees were entitled to summary judgment on Appellants’ claim for breach of the implied covenant of good faith and fair dealing in connection with the refund of certain tax revenues paid to the state of Arizona (the “Arizona Tax Refund”). Second, the expert testimony of Appellant’s accounting expert, Derk Rasmussen, should have been stricken as unhelpful to the trier of fact. Finally, the trial court should have dismissed all claims as to the individual defendants, who are merely shareholders of GCE. Appellees will reply to Appellant’s arguments on these issues in the order identified.<sup>2</sup>

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<sup>1</sup> Donald Saunders was originally a defendant in this action. Mr. Saunders died on December 29, 2000. On March 15, 2001, the Court granted Appellant’s Motion for Substitution of Parties, and ordered that Glen Perez, the personal representative of the Estate of Donald Saunders, and the Estate of Donald Saunders, be substituted as defendants in the stead of defendant Donald Saunders. (Rec. at 2062-2065.)

<sup>2</sup> Given the nature of this brief as a reply on Appellees’ cross-appeal, they respond only to Appellant’s arguments to the issues raised by Appellees on cross-appeal. While Appellees take issue with much of Appellant’s reply on the issues he has raised on appeal, Appellees reserve comment upon those issues until oral argument.

**B. THE TRIAL COURT SHOULD HAVE DISMISSED APPELLANT'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN CONNECTION WITH THE ARIZONA TAX REFUND ON SEVERAL GROUNDS.**

1. The Implied Covenant of Good Faith and Fair Dealing Under Utah Law.

The parties have fully expounded Utah law on the implied covenant of good faith and fair dealing in their briefs on appeal, and Appellees will not revisit that law at length here. Suffice it to say that the implied covenant of good faith and fair dealing inheres in all contracts and requires that the parties to the contract do nothing intentionally or purposely to injure or destroy the other party's right to receive the benefits of the contract. Andalex Resources, Inc. v. Myers, 871 P.2d 1041, 1047 (Utah Ct. App. 1994). Depriving a party of its contractual rights for a legitimate or good faith reason does not violate the covenant of good faith and fair dealing. Brown v. Weiss, 871 P.2d 552, 564 n.18 (Utah Ct. App. 1994). So long as a party acts reasonably and in good faith and in a manner consistent with the purpose of the contract and the justified expectations of the other party, the implied covenant is not violated.<sup>3</sup> Olympus Hills Shopping Ctr., Ltd. V. Smith's Food & Drug Centers, Inc., 889 P.2d 445, 457-58 (Utah Ct. App. 1994) Summary judgment is properly granted when no rational trier of fact could reasonably conclude that a party to a contract acted unreasonably or in bad faith to deny the other party the benefits justifiably expected under the contract. See, e.g., Dubois v. Grand Central, 872 P.2d

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<sup>3</sup> Appellant continues to argue that to satisfy the implied covenant of good faith and fair dealing, a party must not only not act unreasonably or in bad faith, it must also act reasonably and in good faith. He claims that there is a "subtle distinction" between acting in good faith and not acting in bad faith, but offers no legal authority for this proposition. In fact, the Restatement (2d) of Contracts uses the concepts of good faith and bad faith as exclusive opposites, not allowing for an interpretation of some gray area in between. See Restatement (2d) of Contracts, §205 cmt. a (good faith excludes conduct described as "bad faith"), cmt.c (discussing good faith versus bad faith negotiation), and cmt. d (discussing good faith versus bad faith performance).

1073, 1078-79 (Utah Ct. App. 1994) (affirming grant of summary judgment on implied covenant claim); Heslop v. Bank of Utah, 839 P.2d 828, 840 (Utah 1992) (same).

Appellant's claim under the implied covenant of good faith and fair dealing fails because no rational fact finder could conclude that Appellees intentionally or purposely did or failed to do anything that unreasonably interfered with Appellant's justified expectations with respect to the Arizona Tax Refund. Without resorting to another recitation of the facts described in Appellees' brief on appeal, certain factual highlights are summarized below.

## 2. Controlling Undisputed Material Facts

Appellant signed the Buy-Sell Agreement in 1986. (Rec. at 288–93.) The Buy-Sell Agreement provided that, upon the termination of Appellant's employment with GCE, his stock therein would be purchased by the Company. (Rec. at 293.) GCE would pay a percentage of the net book value of the stock **at the time of termination.**<sup>4</sup> (Rec. at 292.) The net book value of the company was to be determined by GCE's outside CPA according to generally accepted accounting principles ("GAAP"). The determination by the accountant was to be **conclusive** of the net book value of GCE. (Id.)

From the inception of Appellant's employment with GCE, the Company had paid certain taxes to the state of Arizona, including an admissions tax, which GCE passed on to its customers. In 1990, while Appellant was still an officer and director of the company, GCE protested or appealed certain of its tax payments to the state of Arizona, including the payment of the admissions tax. (Rec. at 1737.112–1737.114.)

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<sup>4</sup> In fact, when GCE actually bought the stock, the purchase price, as set by the Buy-Sell Agreement, was 140% of net book value.



Appellant knew of the appeal and was kept informed as to its status.<sup>5</sup> (Rec. at 1794, 1870.) Similarly, GCE's accountant, Nyle Willis, knew of the appeal. (Rec. at 1807–09, 1868.) While there may be some confusion as to when GCE withdrew its appeal of the admissions tax, if ever, certain critical facts are undisputed. For example, Willis did not identify the appeal as an asset on GCE's books at any time prior to the termination of Appellant's employment<sup>6</sup> because any benefit to GCE of the appeal was simply too uncertain. (Rec. at 1808, 1868.) Additionally, at the time Appellant's employment was terminated, GCE was still paying, and expected to continue paying, the admissions tax. (Rec. at 1737.48, 1737.109.)

When Appellant left GCE's employ, he personally negotiated the terms of his separation. He received an initial estimate of the purchase price of his stock, which was higher than the price ultimately agreed upon. He also received severance pay to which he was not entitled, and negotiated a waiver by GCE of the non-compete provisions of the Employment Agreement. (Rec. at 417.) In exchange, Appellant signed an agreement (the "Separation Agreement") which provided that Appellant was receiving these benefits "in lieu of any other amounts or benefits which [may have been] due from [GCE] as provided in the Employment Agreement **or otherwise . . .**" (Appellant's Addendum at 1497 [hereinafter Add.](emphasis added).)

For reasons unrelated to any action by GCE, the Arizona Supreme Court in 1995 ruled that the admissions tax was improperly levied and collected. Consequently, almost three years after the termination of Appellant's employment, GCE learned that it would actually receive the Arizona Tax Refund.

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<sup>5</sup> Which Appellant denies that he was "actively" involved in the appeal and was not "regularly" advised of its status, he does not categorically deny knowing of the appeal. (Rec. at 1905.)

<sup>6</sup> In fact, Willis never recorded the Arizona tax refund as an asset on GCE's books until GCE actually received the money in 1995 and 1996.

3. No Rational Finder of Fact Could Conclude that Appellant had a Reasonable Expectation to Participate in the Arizona Tax Refund.

The trial court should have granted Appellees' motion for summary judgment on Appellant's claim for breach of the implied covenant of good faith and fair dealing with respect to the Arizona Tax Refund, because Appellant lacks any evidence to support his claim. Under the undisputed facts, Appellant simply could not have had a reasonable and justifiable expectation that the company's accountant would artificially increase net book value in 1992 by characterizing the refund claim as an asset when plainly it was not. Moreover, Appellant could not have had a reasonable and justifiable expectation that he would share in the refund when it became an asset years after his termination.

The best evidence that GCE acted in good faith ( or did not act in bad faith) is the undisputed fact that it did not make the decision about whether to characterize the tax appeal as an asset; rather, its outside CPA, Nyle Willis, did under the terms of the Buy-Sell Agreement. Moreover, Mr. Willis made the decision not to characterize the admissions tax appeal as an asset well before Appellant's termination.

The Buy-Sell Agreement was very clear in describing how the purchase price for Appellant's stock would be determined: GCE's outside CPA, Nyle Willis, would establish the net book value of the company based upon GAAP at the time his employment was terminated. (Rec. at 292-93.) This is precisely what happened. Significantly, when Willis was calculating the net book value for purposes of purchasing Appellant's stock, he knew that GCE had protested taxes paid to the state of Arizona. He did not, however, consider that protest or the possibility of a refund as a bookable asset of the company because GCE's actual receipt of any

money from the refund was a remote contingency. (Rec. at 1737.111-1737.113, 1807-08, 1868.)<sup>7</sup>

Such a refund would have required a change in the then-existing law. Additionally, even if the law changed, GCE might have been required to refund the taxes to customers rather than retain the funds itself. For those reasons, Willis did not consider the possibility of a refund an asset and did not include an estimation of the refund in the net book value of GCE. Consequently, it did not affect the purchase price of the Appellant's stock under the Buy-Sell Agreement when he left GCE in 1992.

Appellant has no evidence that GCE's accountant failed to follow GAAP in his treatment of the Arizona Tax Refund prior to his separation from GCE.<sup>8</sup> Additionally, Appellant himself acknowledged his awareness of the refund claim. Although he stated that he was not "actively involved" in the claim and was not "regularly" advised of its status, he never denied knowledge of the claim or occasional advice about its status. (Rec. at 1794, 1905.) Significantly, Appellant did not state, even in conclusory terms, that it was his expectation that the refund should have been included in the calculation of his buyout. (Rec. at 1904-06.) Consequently, there is no evidence of breach of the implied covenant of good faith and fair dealing by GCE in connection with the Buy-Sell Agreement, and on this ground, GCE was entitled to summary judgment dismissing Appellant's claims.

To the extent that Appellant bases his implied covenant claim on facts arising after his separation in 1992, it is even less tenable. When he left GCE, Appellant signed the Separation Agreement. By its terms, the Separation Agreement replaced the Buy-Sell Agreement and

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<sup>7</sup> As discussed below, Appellant himself was aware of the tax protest made by GCE. See sections I.B.4 and I.B.5., infra.

<sup>8</sup> As discussed in section C.2, infra, Appellant also lacks any evidence that GCE was required to recalculate the net book value or restate its income for prior years when it learned of the Arizona Tax Refund in 1995.

“embodie[d] the entire agreement between the [GCE and Appellant] with respect to” Appellant’s separation from GCE and the company’s purchase of his stock. (Add. at 1495.) In other words, under no theory could Appellant raise a claim for breach of the implied covenant of good faith and fair dealing based upon the Buy-Sell Agreement after the execution of the Separation Agreement. See Republic Group v. Won-Door Corp., 883 P. 2d 285, 289–90 (Utah Ct. App. 1994).

Moreover, Appellant cannot argue that he was entitled to any portion of the Arizona Tax Refund under the Separation Agreement, which specifically identified the purchase price of the stock and further provided that Appellant accepted that amount “in lieu of any other amounts” owed him by GCE. (Add. at 1497.) Indeed, the undisputed facts show that Appellant negotiated an agreement for the purchase price for his stock, along with other consideration, and that GCE has fully complied with that agreement.<sup>9</sup> When the Separation Agreement was negotiated, Appellant knew of the potential Arizona Tax Refund and of the company’s accounting treatment of the refund. (Rec. at 1737.101, 1737.114, 1807-09, 1868-70; *see also* Rec. at 1904 ¶6 (Appellant not “actively” but somewhat involved.)) Further, it is undisputed that when GCE finally did receive the Arizona Tax Refund, approximately three years after execution of the Separation Agreement, nothing in GAAP required GCE to recalculate the net book value of the company in 1992 or the purchase price of Appellant’s stock. (Rec. at 1183-84, 1480 (depo. Transcript at p.215-16, 236-37.)) Consequently, Appellant at no time had any reasonable expectation that he would receive a portion of the Arizona Tax Refund, and his claim for breach of the implied covenant of good faith and fair dealing should have been dismissed by the trial court.

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<sup>9</sup> Appellant continued to accept payments made pursuant to the Separation Agreement even after commencing this lawsuit.

4. Appellant Relinquished Any Right he had to the Arizona Tax Refund by Entering into the Separation Agreement.

Upon undisputed facts, any reasonable fact finder would also have to conclude that Appellant waived or otherwise relinquished any claim to the Arizona Tax Refund. Appellant knew that the purchase price was subject to some debate, because the price he ultimately agreed to accept was less than the price originally presented him. (Rec. at 299–301, 417.) Moreover, Appellant knew, constructively as an officer and director of GCE and by reason of his actual knowledge, about GCE’s appeal of the admissions tax, and had been advised of the status of the appeal. (Rec. at 1794, 1870; *see also* Rec. at 1904 ¶6 (Appellant not “actively” but somewhat involved.)) There is absolutely no reason that Appellant could not have raised the issue of the valuation of the Arizona Tax Refund as a function of the purchase price at the time of his termination, but he did not do so. Rather, he negotiated the Separation Agreement and accepted the purchase price of his stock and other valuable consideration “in lieu of any other amounts or benefits which [may have been] due from [GCE] as provided in the Employment Agreement **or otherwise . . .**” (Add. at 1497. (emphasis added).)

Whether characterized as an accord and satisfaction, a waiver, or settlement, Appellant gave up his right to question the valuation of GCE and the purchase price of the stock when he entered into the Separation Agreement. The analysis applied by the trial court with respect to Appellant’s claims under the Employment Agreement or other accounting issues relating to the purchase price of the stock applies with equal force to the Arizona Tax Refund because Appellant had constructive knowledge, if not actual knowledge, of the all the facts necessary to challenge the determination of the net book value of GCE. He did not do so in 1992, and should not be allowed to do so now.

5. “Imputation” of Knowledge of GCE’s Tax Counsel to its Officers and Directors Does Not Save Appellant’s Claim.

Appellant’s argument on the issue of imputation is both irrelevant and misses the point. Imputation is a red herring because even if everyone knew the tax appeal was extant, that knowledge clearly would not have changed the calculation of Appellant’s buyout. (i.e. knowledge of the appeal would not have made it an asset). Indeed, Willis believed the appeal was still active when he calculated the buyout. (Rec. at 1808, 1868.) Furthermore, the issue is not only what information was available to Appellees at or after the termination of Appellant’s employment. The issue is what Appellant knew or constructively knew at the time his employment at GCE ended, and the effect of that knowledge on his knowing relinquishment of his rights under the Buy-Sell Agreement.<sup>10</sup>

As an officer and director of GCE, Appellant had actual knowledge from the inception of the company that GCE was paying the admissions tax. (Rec. at 1737.114, 1870.) He also had actual or constructive knowledge in 1990 that the company had protested and appealed the admissions tax. (Rec. at 1794, 1869–70.) He was advised along with other GCE officers and directors, of developments relating to the appeal of the admissions tax also until the time of the separation of his employment. Consequently, even assuming a deterioration in Appellant’s relationship with the other directors of GCE in the period just prior to his separation from the company, Appellant had at least the same constructive knowledge of the Arizona Tax Refund as the other officers and directors of GCE. In other words, when he signed the Separation

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<sup>10</sup> The issue of imputed knowledge was raised sua sponte by the trial court to support the possibility that the officers and directors had constructive knowledge of the potential Arizona Tax Refund and, therefore, could conceivably have acted in bad faith. Imputed knowledge, however, is a two-edged sword because knowledge imputed to the officers and directors of GCE would necessarily have been imputed to Appellant, at least until early 1992, before the events that led to the separation of his employment.

Agreement, he knew of the admissions tax and of GCE's appeal of the admissions tax.

Accordingly, if knowledge of GCE's tax counsel is imputed to the individual defendants, it must also be imputed to Appellant, which supports GCE defenses of accord and satisfaction and waiver.

6. The Implied Covenant of Good Faith and Fair Dealing with Respect to the Buy-Sell Agreement Terminated When that Agreement Terminated.

To find a breach of the implied covenant of good faith and fair dealing, there must be an underlying contract. Republic Group, 883 P.2d at 289. It is undisputed that the Buy-Sell Agreement, the contract upon which Appellant relies on in stating his claim for breach of the implied covenant, terminated in 1992. Indeed, the Separation Agreement specifically provides that it replaced the Buy-Sell Agreement and “embodie[d] the entire agreement between [GCE and Appellant] with respect to the subject matter” of , among other things, the purchase price of the stock. (Add. at 1495.) Consequently, any obligations or covenants, including constructive or implied obligations or covenants, associated with the Buy-Sell Agreement were also terminated. While it is true that there was an implied covenant of good faith and fair dealing between Appellant and Appellees in 1995, that covenant arose from the Separation Agreement, not the Buy-Sell Agreement. There can be no dispute that Appellant received everything he could have reasonably expected to receive under the Separation Agreement.<sup>11</sup>

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<sup>11</sup> In other words, the Arizona Tax Refund was “beyond the fixing of values” in connection with the determination of net book value for purposes of the Buy-Sell Agreement in 1992. By 1995, when GCE actually began receiving the Arizona Tax Refund, the Separation Agreement, not the Buy-Sell Agreement was the operative contract, and Appellant's reasonable expectations as to the stock purchase price were clear.

**C. THE TESTIMONY OF DERK RASMUSSEN WAS SO UNRELIABLE AS TO BE UNHELPFUL TO THE TRIER OF FACT AND, THEREFORE, SHOULD HAVE BEEN STRICKEN.**

While it is certainly true that a trial court has wide latitude and discretion in admitting expert testimony, that discretion is not wholly unfettered. Rather, a trial court abuses its discretion when it neglects its role as a “gatekeeper to carefully scrutinize proffered evidence.” Franklin v. Stevenson, 987 P.2d 22, 26 (Utah 1999) (quoting State v. Ramirez, 817 P.2d 774, 778 (Utah 1991)). As a gatekeeper, it is the trial court’s responsibility to ensure that expert testimony offered by a party meets the standard for admissibility. Id. The standard is that, at a minimum, the evidence must “assist the trier of fact to understand the evidence or to determine a fact in issue.” Utah R. Evid. 702. A trial court abuses its discretion when it allows evidence that is not helpful to the trier of fact or if it would confuse the issues or mislead the jury. See, e.g., Campbell v. State Farm Mut. Ins. Co., \_\_\_ P.3d \_\_\_, 2001 UT 89, 86, cert. denied, 122 S.Ct. 2326 (2002); State v. Rimmasch, 775 P.2d 388, 396 (Utah 1989). If the term “helpful” is to have any meaning at all, it must at least mean that the expert evidence is relevant and minimally reliable.<sup>12</sup> See, e.g., Campbell, 2001 UT 89, 86. Similarly, if the evidence is inaccurate, misleading or confusing, it cannot be helpful. Id.

The trial court in this case abused its discretion by failing to strike the testimony of Appellant’s accounting expert, Derk Rasmussen. Mr. Rasmussen’s testimony relied upon superseded and obsolete accounting principles, misapplied black letter accounting principles and was irrelevant to the issues in controversy. As such, his testimony did not meet the helpfulness standard of Rule 702 and should have been stricken.

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<sup>12</sup> In fact, if the evidence is not relevant, it is not admissible at all. Utah R. Evid. 402.



In his brief, Appellant does not address Appellees' specific arguments about Mr. Rasmussen's opinion testimony. Rather, he makes the general and cursory statement that Appellees' arguments go to the issue of credibility, not admissibility. In reality, Appellees argue that Mr. Rasmussen's testimony is so unreliable and irrelevant that it cannot overcome the hurdle of admissibility and should have been stricken by the trial court. In this reply, Appellees focus on Mr. Rasmussen's testimony with respect to the Arizona Tax Refund, although the arguments made on that issue apply with equal force to the other accounting issues upon which Mr. Rasmussen opined.

1. Mr. Rasmussen Relied Upon Outdated Accounting Principles and Misapplied Black Letter Accounting Standards.

Mr. Rasmussen relied upon a superseded accounting standard when he stated that the Arizona Tax Refund should have been treated as a "prior period adjustment." He identified Accounting Principles Board Opinion ("APB Op.") No. 9 for this proposition. (Rec. at 1480 (depo. transcript at 216).) Upon cross-examination<sup>13</sup>, however, Mr. Rasmussen subsequently admitted that APB Op. No. 9 had been superseded nearly twenty five years earlier by Statement of Financial Accounting Standard ("FAS") No. 16. (Rec. at 1480 (depo. transcript at 216, 219).) By relying upon such an outdated accounting principle, Mr. Rasmussen's testimony was likely only to confuse and mislead the fact finder, not to assist it in understanding the issues.

Additionally, in discussing FAS No. 16 at his deposition, Mr. Rasmussen also conceded that no relevant exception applied to the rule that items of profit or loss recognized during a period are to be included in the determination of income for that period. (Rec. at 1478 (depo.

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<sup>13</sup> It is unclear why Appellant argues that the unreliable nature of Mr. Rasmussen's testimony was revealed primarily upon cross-examination. He cites no authority for the idea that cross-examination at a deposition is an improper way of demonstrating unhelpfulness or unreliability.

transcript at 233-34).) This concession eviscerated his own testimony that the Arizona Tax Refund should have been treated as a prior period adjustment. More significantly, however, it demonstrates a glaring unfamiliarity with basic accounting principles. The proffer of so-called “expert” accounting testimony so out of conformity with recognized accounting standards could only serve to confuse and mislead and should have been stricken by the trial court.

2. Mr. Rasmussen Offered Testimony that was Wholly Irrelevant and Therefore Confusing to the Finder of Fact.

Despite going on at length in his expert affidavit and at his deposition regarding the vagaries of “prior period adjustment,” Mr. Rasmussen then admitted that no accounting principle or standard would have required GCE to recalculate the purchase price of his stock in connection with the Buy-Sell Agreement.<sup>14</sup> (See Rec. at 1478 (depo. transcript at 236-37).) In other words, Mr. Rasmussen expounded upon on number of accounting principles, albeit outdated and inappropriate for the facts at hand, none of which had any bearing upon the ultimate issue - - should the purchase price GCE paid for Appellant’s stock have been adjusted in 1995 when GCE received the Arizona Tax Refund. This fact alone clearly demonstrates the confusing, misleading and unhelpful nature of Mr. Rasmussen’s testimony and shows why the trial court should have stricken his opinion testimony.<sup>15</sup>

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<sup>14</sup> Mr. Rasmussen also expressed his (essentially personal) opinion as to other accounting issues, while conceding that no recognized accounting standard required the recalculation of the purchase price of Appellant’s stock in GCE. See Br. of Appellees at 59 (regarding accounting treatment of a covenant not to compete obtained by GCE).

<sup>15</sup> This argument applies with equal force to Mr. Rasmussen’s testimony regarding the accounting treatment of a covenant not to compete GCE obtained from Ron Smith when the company was joined. Since the accounting treatment given the covenant, whatever it was, did not affect the purchase price paid to Appellant for his stock, Mr. Rasmussen’s testimony on this point is irrelevant, unhelpful and misleading.

**D. THE TRIAL COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT DISMISSING APPELLANT'S CONTRACT CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS BECAUSE THERE IS NO LEGAL BASIS FOR THOSE CLAIMS.**

The trial court declined to grant Appellees' motion for summary judgment on Appellant's contract claims against the individual defendants. In so doing, the trial court ignored black letter Utah law that shareholders are not liable for the contractual obligations of a corporation. Reedeker v. Salisbury, 952 P.2d 577, 582 (Utah Ct. App. 1998). The trial court offered no meaningful explanation for its decision, stating only that GCE was a Subchapter S corporation and that the funds received by GCE in connection with the Arizona Tax Refund were all distributed to the individual defendants as shareholders. (Rec. at 1748.)

Out of this vague statement, Appellant argues that what the trial court must have meant is that GCE was the alter ego of the individual defendants. This argument, which was never made by Appellant below or considered by the trial court, is simply no basis for denying Appellees' motion to dismiss the claims against the individual defendants.

Appellant properly states the legal standard for disregarding the corporate form and finding that a corporation is actually the alter ego of one or more defendants. To disregard a corporate entity as an alter ego, two circumstances must be shown. First, there must be such a unity of interest and ownership that the separate personalities of the corporation and the individual(s) no longer exist. Second, if observed, the corporate form would sanction a fraud, promote injustice, or result in inequity. Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 46 (Utah 1988); Envirotech Corp. v. Callahan, 872 P.2 487, 499 (Utah Ct. App. 1994). Appellant failed, however, to point out that courts must only reluctantly and cautiously pierce the corporate veil under an alter ego theory. James Constructors, 761 P.2d at 46 (citing Colman v. Colman, 743 P.2d 782, 786 (Utah Ct. App. 1987)).

Appellant has submitted absolutely no evidence with respect to the first prong of the alter ego test. To establish a “unity of interest and ownership,” courts examine numerous factors such as under-capitalization of a one-person corporation, failure to follow corporate formalities, nonpayment of dividends, siphoning of corporate funds by the dominant shareholder, nonfunctioning officers and directors and an absence of corporate records. See Colman, 743 P.2d at 786. Appellant has offered no evidence with respect to any of these factors. To the contrary, any facts in the record with respect to GCE’s corporate form suggest that GCE was a corporation with several shareholders with varying interests in a corporation with functioning and informed officers and directors. (See Rec. at 425–27, 558, 1310-11.) Appellant’s one thin reed is the trial court’s passing observation that GCE is a small Subchapter S corporation that paid out the Arizona Tax Refund to its shareholders. This is hardly sufficient to find GCE an alter ego of the individual defendants.

In addition to the foregoing, Appellant is estopped from asserting an alter ego theory against GCE or the individual Defendants. The alter ego doctrine is designed to allow recovery for fraudulent or inequitable conduct by shareholders who themselves ignore the form of a corporation they use for improper purposes. It cannot be used by a former shareholder, officer and director who complains of conduct by a corporation that he helped manage. In fact, such a shareholder is estopped from asserting a claim as an alter ego theory. See Communist Party of the United States v. 522 Valencia, Inc., 41 Cal. Rptr. 618, 625-26 (Cal. Ct. App. 1995). (those who have expressly or impliedly recognized existence of corporation estopped from asserting alter ego theory.)

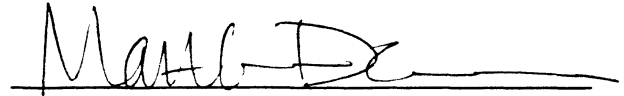
After three motions for summary judgment, Appellant has failed to offer any evidence of a contractual relationship between himself and any of the individual defendants. He has also failed to offer any evidence of a unity of interest and ownership such that GCE should be considered the later ego of the individual defendants. Moreover, he should be estopped from denying the existence of a corporation he helped manage. Consequently, the trial courts denial of Appellees' motion for summary judgment dismissing claims against the individual defendants should be reversed and judgment granted in favor of the individuals.

## **II. CONCLUSION**

Appellees were entitled to summary judgment on Appellant's claim for breach of the implied covenant of good faith and fair dealing with respect to the Arizona Tax Refund. Appellant had no reasonable and justifiable expectation that the refund would affect the purchase price of this GCE stock when he left the company in 1992, and even less when the Arizona Tax Refund became a reality in 1995 and 1996. Moreover, under the Separation Agreement, he waived whatever right he had to the Arizona Tax Refund. The trial court also should have stricken the "expert" testimony of Derk Rasmussen as unhelpful and irrelevant. Mr. Rasmussen relied upon outdated and inappropriate accounting principles to arrive at opinions irrelevant to the ultimate issues in this case. As such, his testimony was misleading and confusing and could not be helpful to the trier of fact. Finally, because Appellant lacks any evidence of a contract between himself and the individual Defendants, or any evidence to show that GCE is the alter ego of the individual Defendants, any claims against the individual Defendants must be dismissed.

DATED: January 31, 2003.

STOEL RIVES LLP

A handwritten signature in black ink, appearing to read "Matt Durham", written over a horizontal line.

John A. Anderson

Matthew M. Durham

Attorneys for Defendant Grand Canyon  
Expeditions Co.

## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Reply Brief of Appellee/Cross-Appellant**  
**(Filed Under Seal)** on the following named person(s) on the date indicated below by

- ☒ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☐ overnight delivery

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s)  
at their last-known address(es) indicated below.

Peter Stirba  
Brady L. Rasmussen  
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215 South State Street, Suite 1150  
Salt Lake City, Utah 84111

DATED: January 31, 2003.



A handwritten signature, likely "Matthew De...", is written over a horizontal line.