

2001

Marc Smith v. Grand Canyon Expeditions Co., martin mathis, Michael Denoyer, Ronald R. Smith, Donald Saunders : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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

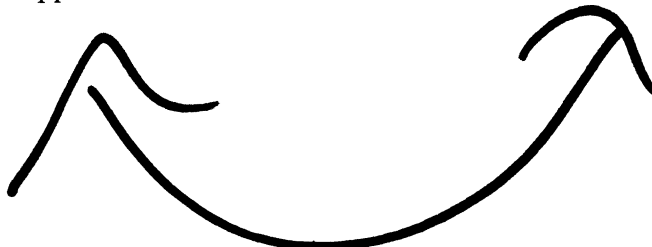
BRIEF OF APPELLANT

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

The Honorable K. L. McKiff, Presiding

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FILED
UTAH SUPREME COURT

APR 26 2002

PAT BARTHOLOMEW
CLERK OF THE COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
Cases	iii
Rules	v
Statutes	v
Other	v
PARTIES TO THE PROCEEDINGS	vii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	1
STANDARD OF REVIEW	3
DETERMINATIVE STATUTES AND CASES	4
STATEMENT OF THE CASE	6
PRESERVATION OF ISSUES BELOW	12
SUMMARY OF THE ARGUMENT	14
ARGUMENT	17
I. SMITH’S TERMINATION FROM GRAND CANYON EXPEDITIONS’ EMPLOY AND AS AN OFFICER, DIRECTOR AND CO-OWNER OF THE COMPANY WAS WRONGFUL AND CONSTITUTED A BREACH OF CONTRACT AND OF APPELLEES’ OBLIGATION OF GOOD FAITH AND FAIR DEALING.	18
A. No accord was reached between Smith and Appellees at the termination of Smith’s participation in GCE Enterprise nor were any potential claims waived or released.	18
B. Issues of Material fact exist whether Appellees’ termination and buy-out of Smith constituted a breach of contract and	

covenant of good faith and fair dealing.	28
II. APPELLEES BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING WHEN IT MISCALCULATED THE NET BOOK VALUE.	29
A. No accord was reached of Smith’s claims related to GCE’s net book value calculation.	29
B. GCE’s failure to adjust its historic accounting breached its covenant of good faith and fair dealing.	30
C. Calculation of the Net Book Value.	33
III. APPELLANT IS ENTITLED TO AN AWARD OF ANY DAMAGES PROVED AT TRIAL.	39
VI. A REASONABLE EXTENSION OF UTAH CASE LAW JUSTIFIES RECOVERY OF ATTORNEYS’ FEES FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN THIS CASE. ...	41
VII. SMITH IS ENTITLED TO AMEND HIS COMPLAINT TO INCLUDE AN ALTERNATIVE THEORY OF UNJUST ENRICHMENT. ...	45
CONCLUSION	48
CERTIFICATE OF SERVICE	50
SUPPLEMENTAL ADDENDUM	51

TABLE OF AUTHORITIES

Cases

<i>American Towers Owners' Ass'n v. CCI Mech., Inc.</i> 930 P.2d 1182 (Utah 1996)	6, 45, 46
<i>Andalex Resources, Inc. v. Myers</i> 871 P.2d 1041 (Utah Ct. App. 1994)	31
<i>Aquagen Int'l, Inc. v. Calrae Trust</i> 972 P.2d 411 (Utah 1998)	4
<i>Baldwin v. Burton</i> 850 P.2d 1188 (Utah 1993)	42
<i>Barnes v. Wood</i> 750 P.2d 1226 (Utah App. 1988)	26
<i>Behrens v. Raleigh Hills Hosp., Inc.</i> 675 P.2d 1175 (Utah 1983)	6, 41
<i>Berube v. Fashion Centre Ltd.</i> 771 P.2d 1033 (Utah 1989)	28, 43
<i>Canyon Country Store v. Bracey</i> 781 P.2d 414 (Utah 1989)	6, 41-43
<i>Collier v. Heinz</i> 827 P.2d 982 (Utah App. 1992)	6
<i>Commerce Financial v. Markwest Corp.</i> 806 P.2d 200 (Utah App. 1990)	42
<i>Cook Associates, Inc. v. Warnick</i> 664 P.2d 1161 (Utah 1983)	5, 39
<i>Cook v. Zions First Nat'l Bank</i> 919 P.2d 56 (Utah Ct. App. 1996)	31, 32

<i>Dishinger v. Potter</i> 2001 WL 726259 *5 (Utah App. 2001)	24
<i>Estate Landscaping and Snow Removal Specialists, Inc. v. Mountain States Telephone and Telegraph Co.</i> 844 P.2d 322, (Utah 1992)	4, 24
<i>Gagon v. State Farm Mutual Automobile Insurance Co.</i> 771 P.2d 325 (Utah 1988)	39
<i>Hall v. Wal-Mart Stores, Inc.</i> 959 P.2d 109 (Utah 1998)	40
<i>Harper v. Summit County</i> 963 P.2d 768 (Utah Ct. App. 1998)	4
<i>Heslop v. Bank of Utah</i> 839 P.2d 828 (Utah 1992)	6, 42, 44
<i>Higgins v. Salt Lake County</i> 855 P.2d 231 (Utah 1993)	4
<i>Marton Remodeling v. Jensen</i> 706 P.2d 607 (Utah 1985)	4, 20, 21
<i>Neiderhauser Bldrs. & Dev. Corp. v. Campbell</i> 824 P.2d 1193 (Utah Ct. App. 1992)	4
<i>Olympus Hills Shopping Center, Ltd. v. Smiths Food King and Drug Centers, Inc.</i> 889 P.2d 445 (Utah App. 1994)	26, 30, 32
<i>Phoenix, Inc. v. Heath</i> 61 P.2d 308 (Utah 1936)	26
<i>ProMax Dev. Corp. v. Raile</i> 998 P.2d 254 (Utah 2000)	5, 20, 22
<i>Reese v. Intermountain Healthcare, Inc.</i> 808 P.2d 1069 (Utah 1991)	25, 26
<i>Soters, Inc. v. Deseret Federal Savings and Loan Assn.</i> 857 P.2d 935 (Utah 1993)	5, 25, 26

<i>St. Benedict's Development Co. v. St. Benedict's Hosp.</i> 811 P.2d 194 (Utah 1991)	5, 31
<i>Valley Bank & Trust Co. v. Wilkin</i> 668 P.2d 493 (Utah 1983)	20

Rules

Utah R.Civ. P. 8(c)	12, 20
Utah R.Civ. P. 15(b)	45
Utah R.Civ. P. 54(b)	1, 14
Utah R.Civ. P. 54(c)(1)	5, 40

Statutes

UTAH CODE ANN. § 78-2-2(3)(j)	1
-------------------------------------	---

Other

<i>Moore's Federal Practice</i> , ¶ 54.60 at 1212 (2d Ed. 1983)	41
RESTATEMENT (SECOND) OF CONTRACTS, § 205 cmt.a (1979)	30-32

PARTIES TO THE PROCEEDINGS

This is the Appeal of Plaintiff Marc Smith, "Smith", of the orders of the Sixth Judicial District Court on three motions for summary judgment of Defendants Grand Canyon Expeditions Company, "GCE"; Martin Mathis, "Mathis"; Michael Denoyer, "Denoyer"; and Donald Saunders, "Saunders", sometimes collectively referred to as "combined Appellees". The Defendant Ronald R. Smith has been dismissed from this suit and is not a part of this Appeal.

Since the filing of this suit, Appellee Donald Saunders has died. His estate has been notified and become substituted as a party, pursuant to Utah R.Civ. P. 25(a) and by order of the court below dated March 13, 2001, See Addendum 2028-2029. Otherwise, the caption of this case on appeal contains the names of all parties.

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction to hear this appeal pursuant to UTAH CODE ANN. § 78-2-2(3)(j). The Supreme Court granted the parties' Joint Petition for Permission to Appeal Interlocutory Order, by order dated September 26, 2001, see Supplemental Addendum 2058-2057, and shall as well hear issues determined by the Sixth Judicial District Court to be final under Utah R.Civ. P. 54(b), by order dated August 23, 2001. See Addendum, 2041-2040.

STATEMENT OF THE ISSUES

This appeal raises the following issues:

1. Whether the court below erred in granting the combined Appellees' Motion for Summary Judgment on Smith's breach of contract and breach of covenant of good faith and fair dealing claims arising from the termination of Smith's employment with GCE? Smith alleged GCE and the individual Appellees breached GCE's employment agreement with him and the inherent covenant of good faith and fair dealing by terminating him without cause. The court concluded that, while material issues of fact existed as to implied terms and

conditions of employment and whether Smith had overcome the presumption of at will employment, the termination documents executed by the parties at Smith's separation constituted an accord, effectively waiving and releasing all Appellees from any claim Smith may have had arising from his employment agreement with Grand Canyon Expedition Company.

2. Whether the court below erred in granting the combined Appellees' Motion for Summary Judgment on Smith's claim that the combined Appellees breached a stock buy-sell agreement between the parties, along with the inherent covenant of good faith and fair dealing, by reason of their failure to adjust historic accounting practices when they calculated the net book value at the time of their forced buy out of Smith? Smith claims that GCE's historic accounting of the value of its assets, acquisitions and income were kept artificially low for tax purposes and should have been adjusted at the time of the combined Appellees' forced buy out of Smith to accurately reflect the real net book value of GCE as of the date of the buy out. The court reasoned, in essence, that there were not facts sufficient to support a

conclusion that the accounting practices employed at Smith's departure were influenced by his forced exit and therefore the accord reached between the parties upon Smith's departure bars any claim arising from the historic accounting practices.

3. Whether the court below erred in granting the combined Appellees' Motion for Summary Judgment on the question of whether or not Smith is entitled to punitive damages?

4. Whether the court below erred in granting the combined Appellees' Motion for Summary Judgment on Smith's claim for attorneys' fees as consequential damages?

5. Whether the court below erred in denying Smith's motion for leave to amend its complaint to add a claim for unjust enrichment?

STANDARD OF REVIEW

The trial court's rulings of Smith's motions for summary judgment will be reviewed under the same standard as that applied by the trial court. In other words, the appellate court will view the facts and all reasonable inferences to be drawn therefrom in the light most favorable to the party

opposing the motion. The trial court's conclusions of law are reviewed for correctness. *E.g. Neiderhauser Bldrs. & Dev. Corp. v. Campbell*, 824 P.2d 1193, 1196 (Utah Ct. App. 1992). Issues of contractual interpretation are also reviewed for correctness, affording the district court no deference. *Aquagen Int'l, Inc. v. Calrae Trust*, 972 P.2d 411, 413 (Utah 1998) [citations omitted]. The reviewing court may affirm on any ground available to the trial court regardless of whether it was relied upon in reaching the decision from which an appeal is sought. *Higgins v. Salt Lake County*, 855 P.2d 231, 241 (Utah 1993). The trial court's denial of Smith's motion for leave to amend will be reviewed on an abuse of discretion standard. *E.g. Harper v. Summit County*, 963 P.2d 768, 779 (Utah Ct. App. 1998).

DETERMINATIVE STATUTES AND CASES

1. Utah law articulating the elements and appropriate analysis in the area of accord and satisfaction is articulated in *Marton Remodeling v. Jensen*, 706 P.2d 607 (Utah 1985); *Estate Landscaping and Snow Removal Specialists, Inc. v. Mountain States Telephone and Telegraph Co.*, 844 P.2d 322,

(Utah 1992) and revisited in *ProMax Dev. Corp. v. Raile*, 998 P.2d 254 (Utah 2000).

2. Utah law of waiver as it relates to Appellant's execution of documents surround the termination of his employment and stock buyout is addressed in *Soters, Inc. v. Deseret Federal Savings and Loan Assn.*, 857 P.2d 935 (Utah 1993).

3. Utah law generally as it relates to breach of an implied covenant of good faith and fair dealing as articulated in *St. Benedict's Development Co. v. St. Benedict's Hosp.*, 811 P.2d 194 (Utah 1991) and its progeny. There do not appear to be any Utah Cases specifically addressing breach of such a covenant inherent in a stock buy-sell agreement.

4. Utah law regarding recovery of punitive damages for claims predicated on breach of the implied covenant of good faith and fair dealing and the opportunity to plead and prove punitive damages is included in *Cook Associates, Inc. v. Warnick*, 664 P.2d 1161 (Utah 1983); *St. Benedict's Development Co. v. St. Benedict's Hosp.*, 811 P.2d 199 (Utah 1991); Utah

R.Civ. P. 54(c)(1); *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1175 (Utah 1983).

5. Utah law as it relates to recovery of attorney's fees as consequential damages, including recovery of such fees for breach of the covenant of good faith and fair dealing in an employment agreement and stock buy-sell agreement is addressed in *Canyon Country Store v. Bracey*, 781 P.2d 414 (Utah 1989); *Collier v. Heinz*, 827 P.2d 982 (Utah App. 1992); and, *Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992).

5. The law of Utah as it relates to unjust enrichment, including whether unjust enrichment is an appropriate remedy is found in *E.g. American Towers Owners' Ass'n v. CCI Mech., Inc.*, 930 P.2d 1182 (Utah 1996).

STATEMENT OF THE CASE

Appellant, Marc Smith, had made his life's career running river rafting trips through the Grand Canyon. He worked full time for Grand Canyon Expeditions, Inc. a corporation owned by his older brother, Ronald R. Smith, beginning in about 1968, for 18 years as a river guide, chief river guide and manager. In 1986, when Ronald R. Smith sold Grand Canyon Expeditions,

Inc. to a group of individuals led by Appellee Donald Saunders, Smith became an owner, director and officer, along with Denoyer, Mathis, Saunders and, his brother Ron, of the newly incorporated company known as Grand Canyon Expeditions Company, "GCE".

Smith's two working partners, Denoyer, and Mathis, had previously worked together at a competitor of Grand Canyon Expeditions, Inc., White Water River Expeditions. Denoyer was a manager for White Water River Expeditions and Mathis was a seasonal employee, working as a boatman for White Water running a couple river trips a year. Denoyer and Mathis were both involved from the beginning with Saunders, who financed the purchase of Grand Canyon Expeditions, Inc. from Ron Smith, and the organization of GCE. Saunders wanted to retain both the owner of Grand Canyon Expeditions, Inc. and Smith, who had been running the warehouse, equipment and crew for Grand Canyon Expeditions, Inc., to assure that the new Corporation, GCE, would continue to operate as it had been until then. However, although Denoyer and Mathis were happy with their

positions in the new company, they were not happy that they were being forced to work with a "third" partner.

As part of the acquisition, Smith, Denoyer and Mathis were each required to sign an employment agreement, promissory notes and a stock agreement dated as of November 29, 1986. These agreements, along with conversations at the time of the organization of the purchasing entity, and continuing thereafter in meetings and exchanges among the investors, along with the parties' course of dealing with each other, comprehend the business relationship between the parties. The employment agreement provided for an initial term of one year. The initial promissory note called for repayment in January of 1992. The buy-sell agreement provided the mechanism for the acquisition of an outgoing party's stock in the corporation with an accelerated schedule to be used in the calculation of the outgoing shareholders purchase price. Pursuant to the buy-sell agreement, Smith became obligated upon termination of his employment at GCE, either voluntarily or involuntarily, to sell to GCE, and GCE was obligated to buy from Smith, all of his shares of stock in GCE. The price for the shares was to

be based upon a percentage of net book value of such shares as determined in the sole and conclusive discretion of GCE's accountant. Under the agreement, the buyout price escalated over time from 100 percent to 140 percent of net book value.

Smith brought his experience, knowledge and expertise to GCE. He shared that experience, knowledge and expertise with his partners Denoyer and Mathis. In 1991, GCE acquired a competing river running company known as Whitewater/Sobek. With this acquisition the officers of GCE increased their shares of stock; however, the acquisition also greatly diluted the stock value. In conjunction with the Whitewater/Sobek acquisition and the increase of percentage ownership in the company, the parties executed a second promissory note payable December 1998.

In July 1992, almost six years into the enterprise, after Denoyer and Mathis had had the opportunity to learn the intricacies of running and managing a river running operation, Denoyer, the president of the company, fired Smith, which termination contractually obligated Smith to sell his shares in GCE back to the Corporation. He was given no reason or

explanation for his termination. He was given no notice, either formal or otherwise; nor was any other shareholder, officer, or director of GCE provided with written notice of the impending unilateral decision, or any opportunity to inquire or investigate the matter, prior to ousting Smith, their partner and co-owner from his position with GCE. The value of the stock was substantially lower than it had been in the past when Smith was terminated from GCE. The reasons for and basis of Smith's termination and subsequent liquidation of his stock position in GCE are the subject of his breach of contract and breach of implied covenant of good faith and fair dealing claims. The claims arise from his employment agreement with GCE as well as from his buy-sell agreement with combined Appellees.

Upon his departure, Smith and GCE negotiated termination documents whereby Smith resigned his position as director and officer and acknowledged the calculation of his buy out.

Smith subsequently discovered that, due to historic accounting practices, the calculation of the net book value of his stock as of July 1992, which was performed in the sole and

conclusive discretion of GCE, did not accurately and fairly reflect the real net book value of the corporation at that time and realized that he had been deprived of that substantial benefit of his bargain with Appellees. This suit based on his wrongful termination and loss of benefit of his bargain under the buy-sell agreement followed.

Well after the suit was filed and the parties were engaged in substantial discovery and motions, Smith became aware that GCE received a refund of an Arizona state amusement tax in the amount of \$907,916.94 for taxes assessed Grand Canyon from 1986 through 1992. On March 31, 1999, Smith motioned the court for leave to amend its complaint to add a claim for unjust enrichment based on the amusement tax refund of taxes collected and paid to the state of Arizona during the time he owned a percentage of GCE. In its March 20, 2000 Memorandum Decision, the court below elected to avoid the quagmire of getting into an unjust enrichment analysis and determined instead to allow Smith to pursue his claim for a portion of the Arizona amusement tax refund under his theory

of breach of covenant of good faith and fair dealing. The court below denied Smith's motion for leave to amend.

PRESERVATION OF ISSUES BELOW

On about June 29, 1998, Smith filed a second amended complaint asserting two causes of action, the first for breach of contract and the second for breach of covenant of good faith and fair dealing against all of the Appellees. Smith's breach of contract and covenant of good faith and fair dealing claims are based on the performances and conduct of the parties under the subject employment agreement and the stockholders buy-sell agreement. See Addendum 181-213.

On March 31, 1999, Smith moved to amend his second amended complaint to add a claim for unjust enrichment based on the receipt by GCE of the Arizona amusement tax refund. All Appellees filed a motion for summary judgment on about October 30, 1998, a second motion for summary judgment on March 22, 1999 and a third motion for summary judgment on October 5, 2000. By memorandum decisions dated January 15, 1999, Addendum 807-815; March 20, 2000, Addendum 1713-1721; and January 27, 2001, Addendum 2011-2022; and Order dated July

31, 2001, Addendum 2030-2033, the court granted Appellees' motion for summary judgment on Smith's breach of contract and covenant of good faith and fair dealing claims as it relates to Smith's employment, GCE's historic accounting practices and failure to make adjustment at time of Smith's buy out, but denied the combined Appellees' motion as to Smith's claim for breach of covenant of good faith and fair dealing as it relates to the Arizona amusement tax refund question. As the court concluded that the issue related to Smith's entitlement to a portion of the Arizona tax refund question fell within the ambit of his covenant of good faith and fair dealing claim, it denied his motion for leave to amend his complaint to add the unjust enrichment claim. See Addendum 1713-1721. The parties jointly petitioned the Supreme Court for permission to appeal the trial court's July 31, 2001 order on the Appellees' motions for summary judgment, Smith's motion for leave to amend the complaint, and other rulings which Appellees will raise on cross appeal. That petition was granted by order dated September 26, 2001, see Supplemental Addendum 2058-2057. The parties also jointly petitioned the

trial court pursuant to Utah R.Civ. P. 54(b) for certification of the trial court's prior order regarding Smith's breach claims as they arose from his allegations of wrongful termination and otherwise out of the employment relationship. See Addendum 2039-2034. That order was granted by the trial court on September 7, 2001. See Addendum 2041-2040.

SUMMARY OF THE ARGUMENT

The trial court's dismissal of Smith's wrongful termination claim against Appellees was in error. The documents, discussions and course of dealings between the parties over the six years of the enterprise evidence a clear intention of an implied term of the employment contract that Smith could not be terminated without cause. The record shows that Smith was not an at-will employee, but a corporate officer, a stock owner, and active in the day to day operations of the business, and that all parties intended this to be a long term business commitment. Appellees needed to show cause in order to fire Smith, which they failed to do. The record shows a material dispute of fact surrounding the terms of Smith's employment that should have overcome

Appellees' motions for summary judgment. The court below recognized these issues of fact but then retreated to the documents executed in conjunction with Smith's termination and buy out to conclude that he had reached an accord, effectively waiving and releasing Appellees from all such claims.

The trial court erred in dismissing Smith's claim based on Appellees' breach of contract and their covenant of good faith and fair dealing as it related to the calculation of GCE's net book value at the time of Appellees' buyout of Smith. Smith argued that the Appellees breached their contractual obligations and covenant of good faith and fair dealing by relying on historic corporate accounting procedures used for tax purposes, the net effect of which was to establish a net book value artificially low at the time of his forced buy-out and substantially lower than the real net book value of the business. This calculus included inappropriate amortization of several large assets, as well as the booking of, the depreciation of, and the general accounting treatment of the purchased assets of the acquired company Whitewater/Sobek. As issues of material fact exist as to the

nature of the historic accounting methods and the proper calculation of "net book value", summary judgment was inappropriate. The court below avoided any analysis of the facts but simply relied, in its ruling on Appellees' third summary judgment motion, on its accord analysis in its ruling on Appellees' first motion and dismissed Smith's claim.

The trial court's dismissal of Smith's claim for punitive damages and attorneys' fees was premature and in error. Punitive damages are an appropriate remedy if Smith can establish at trial evidence of intentional conduct, willfulness, malice or reckless disregard of rights on the part of the Appellees, by reason of conduct arising to the level of an independent tort. In this case, Appellees' intentionally, willfully or recklessly sought out to learn the operation of the business and then to terminate Smith; and then willfully, intentionally and recklessly deprived Smith of the real value of his interest in GCE when he was forced to sell his stock for a price which was based on an artificially low valuation of GCE. Smith was never given the chance to establish the elements of these torts before the trier of

fact, and dismissal by summary judgment was premature and in error.

Further, attorney's fees are recoverable for a breach of good faith and fair dealing under a reasonable extension of existing Utah case law, and the trial court's dismissal of Smith's claim was premature and in error.

Finally, the court abused its discretion in denying Smith's motion for leave to amend his complaint to add a claim for unjust enrichment. The court below simply dispensed with the motion without evaluating the allegations of plaintiff's complaint and the legal theories by concluding that any recovery of the Arizona amusement tax refund fits within Smith's theory of breach of the covenant of good and fair dealing under the stock buy-sell agreement. In so doing, the court deprived Smith of the alternative equitable theory of unjust enrichment should the court at trial conclude that Smith's claim falls without the ambit of his contract with Appellees.

ARGUMENT

I. SMITH'S TERMINATION FROM GRAND CANYON EXPEDITIONS' EMPLOY AND AS AN OFFICER, DIRECTOR AND CO-OWNER OF THE COMPANY WAS WRONGFUL AND CONSTITUTED A BREACH OF CONTRACT AND OF APPELLEES' OBLIGATION OF GOOD FAITH AND FAIR DEALING.

A. No accord was reached between Smith and Appellees at the termination of Smith's participation in GCE Enterprise nor were any potential claims waived or released.

The court below erred in granting summary judgment on Smith's employment-related claims. It dispensed with all issues and potential issues related to Smith's employment with GCE and his participation in the GCE enterprise with the individual Appellees by concluding that an accord was reached between the parties, "between July 15 and July 25, 1992 as reflected in the termination documents." See the Trial Court's January 15, 1999 Memorandum Decision at p. 6, included as Addendum 807-815. To this end, the court reasoned

Plaintiff's resignation is short and simple and is signed and notarized. The accompanying agreement provides for the purchase of Plaintiff's stock at 140 percent of value, consistent with the Buy-Sell Agreement, and affords him two other forms of relief to which he does not appear to have been previously entitled. These two benefits are respectively a severance payment equivalent to one year's salary and

the second, a relaxation of a non-competition covenant.

Under paragraph 6 of the termination agreement, the severance pay was "In addition to the payments provided above [for stock purchases], and in lieu of any other amounts or benefits which may be due from the corporation as provided in the Employment Agreement or otherwise" This is strong language.

Id. The court continues to point out the facts it considered important as a basis of its "accord" holding. Those were that it was Smith who suggested the possibility of a severance payment and Saunders agreed; that Smith stopped short of claiming fraud in the inducement of his signature on the severance payments; that Smith was aware of the existence of a non-compete obligation; that GCE agreed to waive the right to enforce its non-competition agreement; and, that Smith accepted payments contemporaneously as well as those made after execution of the agreements. See Addendum 807-815.

Under Utah law, "[a]n accord and satisfaction arises when the parties to a contract agree that a different performance, to be made in substitution of the performance originally agreed upon, will discharge the obligation created under the

original agreement." *ProMax Dev. Corp. v. Raile*, 998 P.2d 254, 259 (Utah 2000) (citations omitted). To prevail on the claim of the existence of an accord, the moving party must show "(1) an unliquidated claim or a bona fide dispute over the amount due; (2) the payment offered as full settlement of the entire dispute; and, (3) an acceptance of the payment as full settlement of the dispute." *Id. citing Marton Remodeling v. Jensen*, 706 P.2d 607, 609-10 (Utah 1985).

As a preliminary matter, accord of satisfaction is an affirmative defense under Utah Rule of Civil Procedure 8(c) which must be raised in an answer or it is waived. See generally *Valley Bank & Trust Co. v. Wilkin*, 668 P.2d 493 (Utah 1983). As accord and satisfaction has not been included as an affirmative defense in this action, nor ever squarely raised in a motion or argument in support of summary judgment, the court further erred in injecting its accord analysis in dismissing Smith's employment and buy-sell agreement claims.

The facts before the court below do not support a finding that an unliquidated claim or bona fide dispute over an amount

existed at the time the so-called "termination documents" were executed. Between July 15 and July 25, 1992, after Smith was terminated and before he executed the "termination documents", he surely was aware that there may be concerns related to the termination of his employment. However, at that time he had no reason to believe, nor was any evidence produced that Smith had the documents or knowledge sufficient to evaluate GCE's unilateral and conclusive determination of the net book value of GCE in calculating what it was to pay under its forced buy-out of Smith's shares. Further, no evidence was produced, nor does any exist that a dispute as to the buy-out amount existed at that point. The court was silent in the application of any particular facts to the law of accord in evaluating the three required elements of *Marton*. *Id.* As no real unliquidated claim for a bona fide dispute as to GCE's calculation of the buy out amount was known at the time of the execution of the "termination documents" to exist, Appellees failed in showing the first element of their claim of accord.

Second, even if Smith fully appreciated his employment and buy-sell agreement claims at the time of his precipitous

termination from employment and resulting forced buy out of his position in the GCE enterprise, the evidence presented in support of Appellees' motions for summary judgment does not support its finding that the payments made to Smith by GCE were final or offered, accepted, and agreed upon by the parties as full resolution and satisfaction of the disputed claim. See *ProMax* at 260.

The "termination documents" referred to by the court below consist of a document styled "Agreement" dated July 25, 1992 and a second document styled "Resignation" dated July 25, 1992. See Addendum 1498-1495 and 217. The January 25, 1992 Agreement sets forth all of the obligations of Smith as follows:

Smith hereby sells, assigns and transfers all of his right, title and interest in and to the Shares owned by him for a total purchase price of One Hundred Eighty Six Thousand Thirty Nine and 37/100 Dollars. (\$186,039.37). The purchase price has been determined in accordance with the terms of the Buy-Sell Agreement based upon One Hundred Forty Percent (140%) of the Corporation's net book value as of June 30, 1992.

. . .

Upon receipt of the above check, Smith shall endorse it to Donald A. Saunders which shall constitute payment in full of all amounts owed by Smith to Donald A. Saunders . . . Said note shall be canceled.

. . .

Smith shall resign as an officer and employee of the Corporation effective July 15, 1992 and shall execute a resignation letter. . .

. . .

Deliver Certificate No. 4 for 4,250 shares . . . and Certificate No. 9 for 2,348 shares of Corporation stock . . . endorsed on the back by Marc Smith.

. . .

Marc Smith shall not disclose confidential information regarding the business of the Corporation acquired during his employment including but not limited to . . .

Smith represents and warrants that there are no liens or other encumbrances against any of the Corporation stock certificates owned by him except for the lien in favor of Donald A. Saunders

See Addendum 1498-1495. There is no other language in the Contract obligating Smith to do anything. Nor is there any language of an expression of GCE's intention that the payments

made under that agreement are intended to constitute payment in full of a disputed claim or unliquidated amount. In cases where the courts have recognized a valid accord, they rely on language like that found on a check which states that the payment constitutes "full settlement, payment in full", see *Dishinger v. Potter*, 2001 WL 726259 *5 (Utah App. 2001), Supplemental Addendum 2069-2059; or, a letter written and forwarded with payment which states

Based on the above identified billing discrepancies [sic] we have enclosed a check for \$8,613, which is payment in full for satisfaction of contracted services. If you are not willing to accept that sum, \$8,613 in full satisfaction of the sums due DO NOT negotiate the check, for upon your negotiation of that check, we will treat the matter as fully paid.

See *Estate Landscape and Snow Removal Specialists, Inc. v. Mountain States Telephone and Telegraph Co.*, 844 P.2d 322, 324-325 (Utah 1992). While the court may look beyond the express contract terms in determining the intention of the party making payment, the evidence presented to the trial court in this case was merely the contract language along with the parties' respective interpretations of the negotiation of

the severance payment and waiver of the covenant not to compete. See Addendum 807-815. The evidence presented to the trial court in the course of the motions for summary judgment is an inadequate manifestation on the part of GCE and the individual Appellees that the payments made as outlined in the July 25, 1992 Agreement were intended as a full compromise of disputed claims or unliquidated amounts. The evidence does not support the conclusion that Smith accepted payments as a discharge of his original agreement with Appellees.

Nor is the language of the July 25, 1992 Agreement and Resignation adequate to provide as a matter of law a waiver or release of any claims that Smith may have had at the time.

Waiver is the intentional relinquishment of a known right. *Soters, Inc. v. Deseret Federal Savings & Loan Assn.*, 857 P.2d 935, 939-940 (Utah 1993); citing *Reese v. Intermountain Healthcare, Inc.*, 808 P.2d 1069, 1073 (Utah 1991). Proving waiver requires three elements: "(1) an existing right, benefit or advantage; (2) knowledge of its existence; and (3) an intention to relinquish that right." *Id.* Any waiver "must be distinctly made, although it may be

express or implied." *Id.* citing *Phoenix, Inc. v. Heath*, 61 P.2d 308, 311 (Utah 1936). The court's reiteration of the *Phoenix* statement was to insure "that waiver would not be found from any particular set of facts unless it was clearly intended." *Soters, Inc.* at 940. Whether or not a party has waived a right is a highly fact-dependent question. *Olympus Hills Shopping Center, Ltd. v. Smiths Food King and Drug Centers, Inc.*, 889 P.2d 445, 461 (Utah App. 1994), citing *Barnes v. Wood*, 750 P.2d 1226, 1230 (Utah App. 1988).

The termination documents referred to by the court in its Memorandum Decision include a document simply styled "Agreement" executed by Smith and GCE by Denoyer on July 25, 1992, and a second document styled "Resignation" signed July 25, 1992. Both of those documents are included in the Addendum at pages 1498-1495 and 217. Neither of those documents contain language manifesting a distinctly made waiver by Smith of any rights, much less the description of an existing right, benefit or advantage, an acknowledgment by Smith of its existence and an expression of his intention to relinquish those rights. *Cf. Soter* at 940. First, as cited

above, the "Agreement" is perhaps best characterized as a statement of all of the terms of Smith's separation from GCE's employ and enterprise. The second document, "Resignation" merely acknowledges Smith's resignation as the Vice President/Director of Grand Canyon Expeditions Company. See Addendum 217. In fact, the Appellees, who prepared the "Agreement", apparently knew what was required to articulate a waiver. In paragraph 9 on page 3 of the "Agreement" Appellees state "[t]he corporation hereby waives any right to enforce the provisions of the covenant not to compete set out in paragraph II.2 'Non-Competition' of the Employment Agreement executed by Smith on November 29, 1986 in favor of the corporation" See Addendum 331-324. No such language exists in either agreement distinctly manifesting Smith's waiver of any claims arising from his employment by GCE, or of any nature. The trial court's dismissal of Smith's claims based on the "termination documents" was therefore in error.

B. Issues of Material fact exist whether Appellees' termination and buy-out of Smith constituted a

breach of contract and covenant of good faith and fair dealing.

The trial court in its January 15, 1999 Memorandum Decision recognized, in evaluating whether or not an issue of material fact existed regarding Smith's employment status, that ". . . the full airing of the evidence may establish that the relationship evolved into something which contemplated greater job security and permanency." See Addendum 815-807. In its ruling below, the court in addressing the Appellees' argument that Smith had not met his burden under *Berube v. Fashion Centre Ltd.*, 771 P.2d 1033 (Utah 1989), of establishing sufficient indicia of an implied in fact promise, concluded that "[t]he facts in this case have not been developed sufficiently for the Court to conclude as a matter of law that Plaintiff could not meet this burden." Finally, the trial court acknowledged that issues of material fact existed regarding whether or not the Appellees had cause to terminate Smith in July 1992. See Addendum 815-807.

The evidence below did not show sufficient facts that an accord was reached between the parties, or that Smith waived

and released any of the claims he had as of July 25, 1992. Since, as the court below noted, issues of fact exist as to whether or not cause was required under the employment agreement to terminate Smith, whether cause existed to terminate Smith in July of 1992, the order of the court below dismissing Smith's claims under his employment agreement should be reversed and the case remanded for trial.

II. APPELLEES BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING WHEN IT MISCALCULATED THE NET BOOK VALUE.

A. No accord was reached of Smith's claims related to GCE's net book value calculation.

The court below in its January 26, 2001 Memorandum Decision on the Appellees' third motion for summary judgment, finally dispensed with Smith's claim of breach arising from historic accounting practices by lumping it along with Smith's employment claim, and concluded that any claim under the stock buy-sell agreement related to the historic calculation is barred by the accord reached July 25, 1992. See Addendum 2022-2011. For the reasons set forth in Section I.A. above of this brief, no accord was reached nor claim waived relating to

the historic accounting and failure to make that correction at the time of GCE and the individual Appellees' buy out of Smith in July 1992. At the very least, a question of fact exists as to whether or not an accord was reached or claim waived and Smith respectfully therefore requests that this matter be remanded to the trial court so that these matters can be considered by the jury.

B. GCE's failure to adjust its historic accounting breached its covenant of good faith and fair dealing.

Utah law governing the implied covenant of good faith and fair dealing is consistent with the Restatement (Second) of Contracts:

Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.

RESTATEMENT (SECOND) OF CONTRACTS, § 205 cmt.a (1979). See also *Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc.*, 889 P.2d 445, 451 (Utah Ct. App. 1994) (citing

Restatement (Second) of Contracts, § 205 cmt. a (1979)), cert. denied, 899 P.2d 1231 (Utah 1995).

The covenant is a necessary part of most, if not all, contracts in Utah. See *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1047 (Utah Ct. App. 1994). Whether there has been compliance with the covenant or duty depends upon the agreed common purpose and justified expectations of the parties, which is necessarily determined by the contract language, the conduct of the parties, and the course of dealings between them. See *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 199 (Utah 1991). "[G]ood faith and fair dealing are fact sensitive concepts, and whether there has been a breach of good faith and fair dealing is a factual issue, generally inappropriate for decision as a matter of law." 883 P.2d 285, 291 (Utah Ct. App. 1994). Accord *Cook v. Zions First Nat'l Bank*, 919 P.2d 56, 60 (Utah Ct. App. 1996).

To prevail on a claim of breach of the implied covenant of good faith and fair dealing, a litigant need not show evidence, or in this case, Smith had no requirement of raising a genuine factual dispute, that the breaching party acted

unreasonable or in bad faith. Nor does a litigant have to show that the discretion afforded under a contract to one entity over the other was exercised unreasonably or in bad faith. The Utah Supreme Court has determined that the covenant of good faith and fair dealing requires parties, particularly those vested with discretion over the other under terms of a contract, to exercise that discretion reasonably and in good faith. See *Cook v. Zions First Nat'l Bank*, 919 P.2d 56, 60 (Utah 1996), citing *Olympus Hills Shopping Center v. Smiths Food and Drug Centers*, 889 P.2d 445, 450 (Utah Ct. App. 1994). This distinction, though subtle is significant. The covenant of good faith and fair dealing requires that the party exercising discretion under a contract do so "for any purpose-including ordinary business purposes-reasonably within the contemplation of the parties." *Olympus Hills* at 451. The *Olympus Hills* court continues, "[a] contract thus would be breached by a failure to perform in good faith if a party uses its discretion for a reason outside the contemplated range-a reason beyond the risks assumed by the party claiming a breach." *Id.* citing RESTATEMENT [2D] OF CONTRACTS, § 205 cmt.a

(1979). ("[g]ood faith performance of enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with justified expectations of the other party").

C. Calculation of the Net Book Value.

In exercising the discretion to fire Smith and to buy back his stock under the November 29, 1986 Buy Sell Agreement, GCE and the individual Appellees abused their discretion. Contrary to their obligation to exercise their discretion in favor of preserving the common purpose of maximizing value in a business in which they all owned stock, they purposely undervalued GCE by relying on its historic accounting practices used for tax purposes in order to deprive Smith of his legitimate share of the value of his stock.

The Buy Sell Agreement grants GCE the "conclusive" discretion in determining the net book value of the corporation for purposes of determining the purchase price, limited only by generally accepted accounting principles. See Addendum 292. The sale of a shareholder's stock to GCE is mandated upon the termination of employment. See Addendum 293

¶ 1 and 291¶ 4. As Smith's stock represents his entire participation in the GCE enterprise, his expectation that GCE and the other participating Appellees in the Buy Sell Agreement not take any action which might artificially decrease the net book value is reasonable and justified.

From its inception, GCE, through the auspices of its officers and directors and its accountant Mr. Willis, employed an accounting mechanism, the design of which was apparently to keep its net book value artificially low for tax purposes. See Addendum 1554:7-21. This commenced with the booking of \$1 million of the original \$2.147 million purchase price as payment for the covenant not to compete of Ron Smith, and then by amortizing the covenant not to compete at \$250,000 per year over the first four years of the existence of the corporation. See Derk Rasmussen's Affidavit, Addendum 1009 and 1007. GCE, from its inception, failed to recognize any value in the concession contracts purchased from Ron Smith in the 1986 acquisition. See Addendum 1007-1006. Indeed, there has been no reflection in its financial statements of the value of the concession contracts, wherein lie the real value of the

corporation. See Addendum 1007-1005. The concession contracts are issued to an intentionally limited number of outfitters authorized to take commercial river trips through the Grand Canyon. Such contracts are required by law and limit the number of user days any outfitter may be on the river. Without the concession contracts, no river runners, including GCE, can take commercial trips. In other words, without the contracts, GCE would have no business.¹

Generally accepted accounting principles allow for the capitalization of expenses incurred by GCE defending and renewing its National Park Service concession contracts. However, consistent with GCE's refusal to recognize any value in the contracts, no such capitalization of GCE's substantial attorneys' fees and other expenses paid to Mr. Skeen and others in the renewal and defending of its U.S. Forest Service contracts were never capitalized. See Addendum 1003-1002.

¹Remarkably, when GCE acquired the assets of Whitewater/Sobek, it booked an asset value of the concession contracts in the amount of \$500,000.00. See Addendum 1558:22-1557:1.

When GCE acquired the assets of Whitewater/Sobek and booked them in its consolidated financial statement for December 31, 1991, it, without justification, deleted \$30,000 from the booked asset value, entered an amount of \$59,304 for depreciation, included a negative cash balance of \$26,382 and included as a liability \$113,618 for 1992 trip deposits without including a corresponding increase in the cash account. This conduct by GCE cut another \$229,000 from the net book value as of the January of 1992. See Addendum 1005-1004.

GCE wrote off another \$90,000 of the intangible assets of Whitewater/Sobek from November 1991 when they were acquired through June 30, 1992. Not only does this not comply with generally accepted accounting principles, but it further depletes the real net book value of GCE by about \$88,750. See Addendum 1004-1003.

As of the time Appellant was terminated in July of 1992, there was approximately \$1,107,059.45 in prepaid 1992 trip deposits held by GCE in its liability account. Virtually none of those deposits had been recognized as income of GCE as of

July 1992, even though GCE was well into its 1992 season and even though GCE had paid \$542,000 to retire its long-term note payable to Don Saunders in June of 1992. See Addendum 1001 ¶ 8. GCE's failure to recognize these substantial receipts, or at least a portion thereof to the extent of the business and expenses incurred, directly and negatively affected the net book value as of July 1992.

Appellees argued in their second motion for summary judgment that Denoyer and Mathis are completely unsophisticated in financial and accounting matters and that they relied upon the accounting expertise of the corporate accountant Mr. Willis. Defendant's memorandum in support of their second motion for summary judgment was not included in the court's file prepared for this appeal. Relevant portions of the memorandum are included in the Supplement Addendum at 2072-2070. Don Saunders, on the other hand, was educated in accounting and spent his entire professional career either running his own accounting and bookkeeping firm or as the Chief Financial Officer of Bayliner Marine and several other innumerable entities affiliated with that 7,000-employee

enterprise. See Supplemental Addendum 2077-2073. GCE's accountant Mr. Willis swore in an affidavit below that "at no time has any officer, director, or shareholder of GCE engaged in acts or omissions to manipulate the financial status of GCE, nor have they made any attempt to reduce [Smith's] proportionate share of the company or reduced the purchase price of his stock at the time GCE purchased it." See Addendum 1641-1640. Aside from being saturated with hearsay, Mr. Willis' statement is not borne out by GCE's own financial documents.

The November 29, 1986 Buy Sell Agreement not only gives GCE discretion but provides that GCE's discretion is "conclusive" in the determination of the price to be paid for the shares of stock of the terminated employee. Given this unfettered final discretion, the principles of good faith and fair dealing are of critical application. Smith, as any terminated shareholder, may justifiably expect to be compensated for his share of the real value of GCE. The record below, including GCE's financial records, creates several issues of fact directly related to GCE's history

accounting practices and the substantial negative impact they had on the calculation of net book value as of July 1992, as well as the question of whether the conduct of GCE and the individual Appellees comported with their obligations of good faith and fair dealing under the buy-sell agreement. The evidence supports Smith's claim that Appellees breached the covenant of good faith and fair dealing inherent in the buy-sell agreement when they failed to correct historic accounting practices so the calculation actually reflected GCE's value as of July 1992.

III. APPELLANT IS ENTITLED TO AN AWARD OF ANY DAMAGES PROVED AT TRIAL.

A claim for breach of the implied covenant of good faith and fair dealing sounds in contract rather than tort and in and of itself will not entitle a claimant to punitive damages. *E.g. Cook Associates, Inc. v. Warnick*, 664 P.2d 1161, 1167 (Utah 1983). However, punitive damages can be awarded in a contract action where the elements of a separate tort are established. *Gagon v. State Farm Mutual Automobile Insurance Co.*, 771 P.2d 325 (Utah 1988). In the instant case, Smith has

plead and produced evidence that Denoyer and Mathis intentionally, wilfully, if not recklessly undertook to learn the operation of the business from Smith and then terminate his involvement as an employee and shareholder. See Supplemental Addendum 2079-2078. Further, Smith was wrongfully deprived of the economic value of his interest in GCE when he was forced by Appellees in concert to sell his stock for a price which was based on an artificially low valuation of GCE. See Addendum 293-291. The purpose of punitive damages is to punish and deter intentional acts of misconduct such as those alleged to have been engaged in by Appellees in this case. See *Hall v. Wal-Mart Stores, Inc.*, 959 P.2d 109, 114 (Utah 1998) (Justice Russon, dissenting). Viewed against the backdrop of Utah R.Civ. P. 54(c)(1), which provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings," the Utah Supreme Court has gone so far as to state that an award of punitive damages may obtain even when not plead and without a formal amendment of pleadings. "If the

plaintiff were able to adduce the necessary foundational evidence at trial, she could claim punitive damages under Rule 54(c)" *Behrens v. Raleigh Hills Hosp. Inc.*, 675 P.2d 1175, 1181-82 (Utah 1983) (quoting 6 J. Moore, W. Taggart and J. Wicker, *Moore's Federal Practice*, ¶ 54.60 at 1212-14 (2d Ed. 1983)). Smith should therefore not be precluded by a ruling of summary judgment from presenting evidence, and if such evidence supports such an award, from recovering punitive damages at trial. The court therefore erred in granting Appellees' motion in regard to Smith's claim for punitive damages.

VI. A REASONABLE EXTENSION OF UTAH CASE LAW JUSTIFIES RECOVERY OF ATTORNEYS' FEES FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN THIS CASE.

Under certain circumstances, the Utah Supreme Court has permitted recovery of attorneys' fees as consequential damages in claims of breach of implied covenant of good faith and fair dealing. See *Canyon Country Store v. Bracey*, 781 P.2d 414, 420 (Utah 1989). The Court states, "Canyon Country's claim for recovery of fees was predicated on the theory that attorney fees were an item of consequential damages flowing

from the insurers' breach of contract. This is a legitimate theory of damages, as the trial court recognized." *Id.* The language of the court did not expressly limit its decision only to actions based on an insurer's breach of contract. But the court, in fact, disregarded such a limitation when it extended the "broad range of recoverable damages for breach of the covenant of good faith and fair dealing" to include attorneys' fees in employment claims. *See Heslop v. Bank of Utah*, 839 P.2d 828, 840-41 (Utah 1992).

The award of attorneys' fees is within the discretion of the trial court and determined based on evidence presented at trial. *See, e.g. Baldwin v. Burton*, 850 P.2d 1188, 1199 (Utah 1993) (attorneys' fees are in the discretion of the trial court); *Commerce Financial v. Markwest Corp.*, 806 P.2d 200, 204 (Utah App. 1990) (failure to present evidence at trial results in no award of attorneys' fees). The evidence below is that Smith, as an employee and participant in the GCE venture with Denoyer, Mathis and Saunders was subject to termination from employment and exclusion from participation in GCE upon the decision of any two of the participating

owners/employees/directors. Further, his stock was subject to immediate liquidation, with the determination of the purchase price to be made in the sole and conclusive discretion of GCE and its accountant. See Addendum 293-291. Not unlike the circumstances in *Canyon Country v. Bracey*, where the Supreme Court recognized that attorneys' fees as a type of consequential damages was a legitimate theory of damages, the nature of the relationship between Smith, GCE and the individual Appellees in light of the latter's discretion and control over his employment, their discretion and control over the forced acquisition of his shares of stock and their discretion and control over the determination of the value of the purchase price of such stock is analogous to the relationship between an insurer and an insured where the insurer has little or no ability to negotiate provisions of its terms of insurance or over the handling and paying of claims. See *Canyon Country Store* at 419-420. Similarly, in *Heslop*, where the court, citing *Berube v. Fashion Centre Ltd.*, 771 P.2d 1033 (Utah 1989) for the proposition that "consequential damages are 'those reasonably within the

contemplation of, or reasonably foreseeable by, the parties at the time the contract was made'", *Heslop* at 840, noted where a party to an employment agreement finds itself in a "particularly vulnerable position once the employer breaches the employment agreement . . . " consequential damages including attorneys' fees could be reasonably foreseeable by the employer under the circumstances of the employer's wrongful termination. *Id.* at 840-841. Like *Heslop*, Smith upon his precipitous termination and concomitant forced buy out of his stock in the enterprise, was left with no option but to file suit to enforce his employment contract as well as the buy-sell agreement and consequently would foreseeably be required to incur attorneys' fees. *Cf. Heslop* at 841. The evidence submitted during the summary judgment proceedings in this case to the court below therefore justified allowing Smith's claim for attorneys' fees as consequential damages. The court below erred, therefore, in granting Appellees' motion for summary judgment on the question of Smith's claim for attorneys' fees.

VII. SMITH IS ENTITLED TO AMEND HIS COMPLAINT TO INCLUDE
AN ALTERNATIVE THEORY OF UNJUST ENRICHMENT.

The trial court is granted the discretion to determine whether or not to allow leave to a party litigant to amend the pleadings to conform with the evidence. See Utah R.Civ. P. 15(b). An alternative theory of recovery in light of Smith's contract claims includes unjust enrichment if Smith can show (1) a benefit is conferred on one person by another; (2) the conferree appreciates or has knowledge of the benefit; and, (3) the acceptance or retention by the conferred is under such circumstances as to make it inequitable for the conferree to retain the benefit without payment of its value. See *American Towers Ass'n, Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1192 (Utah 1996). In *American Towers*, the court continued, "[i]n other words, the remedy is one of restitution designed to restore a plaintiff a benefit unjustly enjoyed by a defendant." *Id.* "The doctrine is designed to provide an equitable remedy where one does not exist at law. In other words, if a legal remedy is available, such as a breach of an express contract, the law will not imply the equitable remedy

of unjust enrichment." [citations omitted] *Id.* at 1192. Smith sought the alternative equitable theory of unjust enrichment if the court below were to have concluded that there was no legal basis to seek recovery of a portion of the refund by GCE of the Arizona amusement tax under the November 29, 1986 buy-sell agreement.

In response to Smith's second set of interrogatories on about March 1, 1999, the Appellees first disclosed that GCE received a "refund of \$907,916.94 in three payments in late 1995 or early 1996" of an Arizona amusement tax assessed GCE from 1986 through 1992. See Addendum 918-917, Interrogatory No. 6. On about March 18, 1999, Smith first had the opportunity to inspect some of GCE's records related to the refund. GCE disclosed that it refunded to its customers a small percentage of the refund, and treated the balance, "as corporate income during the quarter it was received." See Addendum 917-915, Interrogatory Nos. 6 and 11.

The Arizona amusement tax was collected from GCE as a concessionaire running trips through the Grand Canyon from 1986 through 1992. A portion of all revenue generated by GCE

during that period was paid to the state of Arizona. GCE retained counsel who pursued the claim with the state of Arizona until finally recovering the full refund by 1996. The Affidavit of Ann M. Dumenil, counsel for GCE is included in the Addendum at pages 1756-1751. It is undisputed that GCE received a refund from approximately \$907,916.94 by early 1996. It is also undisputed that the refund was of an amusement tax collected during the period of Smith's ownership from 1986 through 1992. It is also undisputed that at the time of the Appellees' forced buy out of Smith's stock, the net book value of the corporation was determined to be approximately \$750,000.00. It is undisputed that GCE treated the refund as corporate income. See Addendum 917-916, Interrogatory No. 9. The refund constitutes an asset developed during Smith's ownership of GCE. That value was not included in the determination of his net book value in July 1992. When it was paid and realized by GCE in 1995 and 1996 it constituted a benefit bestowed on GCE and the other Appellees at Smith's expense. Finally, it is undisputed that GCE appreciates and has knowledge of the Arizona amusement tax

refund. If GCE and the other Appellees were allowed to keep the refund of the tax collected and taken from GCE during Smith's ownership, without paying him for his pro rated share, a substantial inequity would occur. The inequity would exceed in value the total amount paid Smith during his forced buy out for his shares of GCE in 1992.

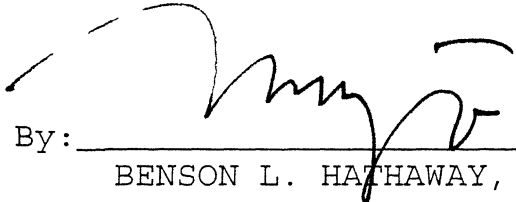
The undisputed facts support a basis for allowing Smith leave to amend his complaint to assert an alternative unjust enrichment claim. The court below erred in denying Smith's motion for leave to amend.

CONCLUSION

Based on the foregoing facts and law, Smith respectfully requests that this Court reverse the trial court's dismissal of his claims arising from his employment with GCE, reverse its dismissal of Smith's good faith and fair dealing claim based on Appellees' failure to make generally acceptable accounting adjustments in their determination of net book value at the time of the buy out, and reverse the trial court's dismissal of Smith's claim for punitive damages and attorneys' fees.

DATED this 25 day of April, 2002.

STIRBA & HATHAWAY

By: 
BENSON L. HATHAWAY, JR.
CORBIN B. GORDON
Attorneys for Appellant
and Cross/Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of April, 2002, I caused to be served a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO APPELLEES' MOTION FOR SUMMARY JUDGMENT to the following, using the method indicated below:

John A. Anderson
Matthew M. Durham
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile



SUPPLEMENTAL ADDENDUM

Deposition of Linda Rae Kollander	2079-2078
Deposition of Don Saunders	2077-2073
Memorandum of Points and Authorities in Support of Motion for Summary Judgment	2072-2070
<i>Dishinger v. Potter</i> 2001 WL 726259 (Utah App. 2001)	2069-2059
September 26, 2001 Order	2058-2057

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF KANE, STATE OF UTAH

MARC SMITH,)	
)	
Plaintiff,)	
)	
vs.)	Civil No. 940600003
)	
GRAND CANYON EXPEDITIONS CO.;)	
MARTIN MATHIS; MICHAEL DENOYER;)	
RONALD R. SMITH; DONALD)	
SAUNDERS, JOHN DOES 1 through)	
5 and JANE DOES 1 through 5,)	
)	
<u>Defendants.</u>)	

(Condensed Transcript)

* * *

DEPOSITION OF: LINDA RAE KOLLANDER

TAKEN ON: May 21, 1997

PAUL G. McMULLIN
CERTIFIED SHORTHAND REPORTER

P.O. BOX 1534
ST. GEORGE, UTAH 84771
(801) 674-1283

26

1 A. Yes.
2 Q. Did that also decrease over time? That is, her
3 visits to the office?
4 A. Yes.
5 Q. Did the tension between Marc and Ron continue
6 after the sale?
7 A. Yes.
8 Q. Would you characterize it as getting worse,
9 better or about the same?
10 A. I would say probably a little worse.
11 Q. Okay. And how was it that this worsening of the
12 tension manifested itself to you? What things did you
13 notice --
14 A. Ron started coming into the office less. When
15 he did come in, Ron -- Marc would either -- he would get up
16 and leave.
17 Q. Did it manifest itself in any other ways to you?
18 A. Not that I'm aware of.
19 Q. Okay. Did you attribute Ron coming into the
20 office less to this poor relationship he had with his
21 brother?
22 A. Yes.
23 Q. Between 1986 and 1992, when Marc left the employ
24 of Grand Canyon, did you ever discuss with Marc his
25 relationship with Ron?

27

1 A. Pardon?
2 Q. Between 1986 and mid 1992 -- July, 1992, when
3 Marc was separated from the company, did you ever discuss
4 with Marc the -- this tension between himself and Ron?
5 A. I don't recall discussing it with Marc. I may
6 have. I don't recall it right -- I may have. I don't
7 really recall it.
8 Q. Do you recall discussing it with Ron during that
9 same time frame?
10 A. Very -- yes.
11 Q. Okay. And what do you recall discussing with
12 Ron in that connection?
13 A. He still really didn't know why Marc was so
14 upset with him. I think he felt like he had tried to talk
15 to -- to Marc and was unable to talk with him.
16 Q. Was this something that Ron communicated to you
17 in a personal conversation face-to-face?
18 A. Yes.
19 Q. Do you recall having more than one conversation
20 with Mr. Smith about that?
21 A. I think so.
22 Q. Could you, as you sit here today, assign any
23 time period to one or more of those conversations? In
24 other words, it occurred in this year or that year?
25 A. I can't say specifically what year. It was

28

1 after the sale of the company, probably in -- in probably
2 the first or second year.
3 Q. Do you remember anything else about the
4 substance of those conversations with Mr. Smith about the
5 poor relationship he had with Marc Smith?
6 A. It also caused a very poor relationship with the
7 other -- with his family, of course -- with his brothers
8 and sisters. It -- it destroyed his family relationship
9 with the rest of his family.
10 Q. And why do you feel that way?
11 A. It was because they felt that Ron had not
12 treated Marc fairly, I guess, in the sale of the company.
13 Q. Did you feel that Ron had not treated Marc
14 fairly in -- in terms of the sale of the company?
15 A. I -- he let everyone know he was selling the
16 company. I can't say that -- and I don't -- and as far as
17 I knew, there was no agreement between the two brothers
18 as -- that he would have part -- you know, other than that
19 he tried to make a place for him in the company when the
20 company sold.
21 Q. Okay. Was it your understanding that Ron Smith
22 had tried to make a place for Marc in the new company?
23 A. Yes.
24 Q. On what basis did you understand that?
25 A. That he was going to be one of the partners in

29

1 the company.
2 Q. All right. What understanding did you have as
3 to Ron Smith's role in -- in securing a place in the new
4 company for Marc Smith?
5 A. If it hadn't have been for Ron Smith doing it,
6 it wouldn't have happened.
7 Q. How do you know that?
8 A. Because the other two members of it didn't
9 really -- really want a third member or a third partner.
10 Q. And the other two members you're referring to
11 would be Mr. DeNoyer and Mr. Mathis?
12 A. That's correct.
13 Q. And you said that the other two did not want a
14 third partner, is that right?
15 A. That's right.
16 Q. Did you have any conversation with Mr. DeNoyer
17 or Mr. Mathis when they indicated as much to you?
18 A. I was sitting in the room when they discussed it
19 right after the sale of the business. Marty was very
20 disappointed. He did not want to have a third partner.
21 And Michael just said, "We'll deal with it."
22 Q. And this was in -- at the end of 1986, after the
23 business sold?
24 A. Yes. Shortly thereafter. Just when the papers
25 were being finalized.

IN THE SIXTH JUDICIAL DISTRICT COURT
IN AND FOR KANE COUNTY, STATE OF UTAH

MARC SMITH,

PLAINTIFF,

VS.

CASE NO. 940600003

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

DEFENDANTS.

DEPOSITION OF DON SAUNDERS

TAKEN: APRIL 18, 1997

CONDENSED TRANSCRIPT/INDEX

INTERMOUNTAIN COURT REPORTERS
5980 South Fashion Blvd.
Murray, Utah 84107
263-1396

File No. 41897

Reported By:

KELLY SOMMERVILLE CDR. 000

COPY

Page 2

1 Deposition of DONALD A. SAUNDERS, taken on behalf of
2 Plaintiff, at 920 Hildebrand Ln. N.E., Bainbridge
3 Island, Washington, on April 18, 1997, commencing at
4 8:00 a.m., before KELLY SOMMERVILLE, Registered
5 Professional Reporter and Notary Public in and for the
6 State of Utah, pursuant to Notice.
7
8
9
10 APPEARANCES:
11
12 FOR THE PLAINTIFF: STIRBA & HATHAWAY
13 BY: BENSON L. HATHAWAY, JR.
14 215 So. State St., Suite 1150
15 Salt Lake City, Utah 84111
16
17 FOR THE DEFENDANT: VAN COTT, BAGLEY,
18 CORNWALL & MCCARTHY
19 BY: JOHN ANDERSON
20 50 So. Main St., Suite 1600
21 Salt Lake City, Utah 84144
22 ALSO PRESENT: MARC SMITH
23
24
25

Page 3

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4 I N D E X
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6 WITNESS EXAMINATION BY PAGE
7 Don Saunders Mr. Hathaway 4
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11 EXHIBITS: REFERRED TO:
12 No. 14 - Letter Page 79
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Page 4

1 Salt Lake City, Utah, April 18, 1997, 8:00 a.m.
2 DONALD A. SAUNDERS,
3 was duly sworn, was examined and
4 testified as follows:
5 BY MR. HATHAWAY:
6 Q. Don, would you state and spell your full name
7 for the record for us?
8 A. Donald, D-o-n-a-l-d, Arthur, A-r-t-h-u-r
9 Saunders, S-a-u-n-d-e-r-s.
10 Q. What's your address?
11 A. 5261 Battle Point Drive NE, Bainbridge Island,
12 Washington 98110.
13 Q. How long now have you lived on Bainbridge
14 Island?
15 A. Year and-a-half.
16 Q. Do you still have a residence in Arlington,
17 Washington?
18 A. No.
19 Q. Sold that place?
20 A. Yes.
21 Q. What is your birth date?
22 A. 7/25/34.
23 Q. Give me an idea if you would, Don, as to your
24 educational background.
25 A. I graduated from Lake Washington High School

Page 5

1 and then I did about 200 credit hours at University of
2 Washington but I didn't technically graduate in
3 accounting. I took a lot of accounting courses and
4 various other courses that I felt would further my
5 accounting background. I was in public accounting
6 business at the time, but I didn't need a certificate
7 because I was in business with my father.
8 Q. What did your father do?
9 A. He was a public accountant.
10 Q. So you were working with him doing those types
11 of things?
12 A. Yes.
13 Q. When was it that you finished any formal
14 education at University of Washington?
15 A. Probably the last regular course, see, I've
16 taken courses there. I guess I don't know what you mean
17 by formal. I kept taking courses off and on for, you
18 know, where they had seminars and different things like
19 that for years.
20 Q. Did you?
21 A. 20 years, yeah.
22 Q. Yeah.
23 A. And other places, you know, that I did some.
24 Q. Have you ever received any certificates?
25 A. No.

Page 6	Page 8
<p>1 Q. No graduation diploma?</p> <p>2 A. From the university?</p> <p>3 Q. Right.</p> <p>4 A. No.</p> <p>5 Q. And you're not a C.P.A.?</p> <p>6 A. No.</p> <p>7 Q. Were you born in Washington?</p> <p>8 A. Yes.</p> <p>9 Q. Whereabouts?</p> <p>10 A. Seattle.</p> <p>11 Q. Lived here all your life?</p> <p>12 A. Yes, uh-huh, lived in the state of Washington</p> <p>13 all my life.</p> <p>14 Q. Tell me if you would, Don, briefly about your</p> <p>15 employment background starting from this point in time</p> <p>16 when you were employed with your father.</p> <p>17 A. I worked for my father for a few years, then as</p> <p>18 a partner with my father for a few years, and then my</p> <p>19 father retired and I ran the practice for a couple</p> <p>20 years, and then I sold the practice and became the</p> <p>21 financial officer for a boat building company.</p> <p>22 Q. That was Bayliner Boats as I understand it?</p> <p>23 A. Yes, uh-huh.</p> <p>24 Q. When did you sell the practice?</p> <p>25 A. In about September of '72.</p>	<p>1 Q. How many employees were there at Saunders</p> <p>2 Accounting and Bookkeeping at the time you sold it?</p> <p>3 A. Five.</p> <p>4 Q. Why don't you describe for us what you did</p> <p>5 after going to work for Bayliner as the chief financial</p> <p>6 officer.</p> <p>7 A. When I went to work for Bayliner, I handled all</p> <p>8 of the financial matters, the trucking department, the</p> <p>9 -- all the computer operations, the health, accident,</p> <p>10 all those types of things, all the employee benefit</p> <p>11 programs. All of the hiring policies and hiring of all</p> <p>12 the people were in my departments. I used to say it was</p> <p>13 everything the other guys didn't want to do actually</p> <p>14 there, but anyway, those types of things. I got</p> <p>15 involved in manufacturing from time to time and in</p> <p>16 the -- somewhat in the design of the boats, pretty much</p> <p>17 the whole thing.</p> <p>18 Eventually, by 1976 there was the five people who</p> <p>19 eventually were the owners of the company, myself and</p> <p>20 three other guys. We had lunch together every day and</p> <p>21 we, between the four of us, we pretty much basically ran</p> <p>22 the company under us because we were -- if everybody was</p> <p>23 in town eating lunch together every day, we got involved</p> <p>24 in each other's parts of the business. So I was</p> <p>25 involved in everything, but primarily the parts I named.</p>
Page 7	Page 9
<p>1 Q. What was the practice known as at the time you</p> <p>2 sold it?</p> <p>3 A. Saunders Accounting and Bookkeeping.</p> <p>4 Q. During your work with Saunders Accounting and</p> <p>5 Bookkeeping, was Bayliner one of your customers,</p> <p>6 clients?</p> <p>7 A. Well, maybe we better distinguish on Bayliner.</p> <p>8 It started out as Puget Advanced Outboard Marine,</p> <p>9 Advanced Outboard went to Advanced Outboard Marine, went</p> <p>10 to Puget Plastics, went to some different names but</p> <p>11 for -- we could just for simplicity purposes say</p> <p>12 Bayliner. Bayliner was the name of the boats the</p> <p>13 company built.</p> <p>14 Q. I understand.</p> <p>15 A. And so it's commonly known as that. The</p> <p>16 corporate names were different things as well through</p> <p>17 the years.</p> <p>18 Q. What was the corporate name at the time you</p> <p>19 became involved as the chief financial officer?</p> <p>20 A. By then it was Bayliner Marine.</p> <p>21 Q. And that was about in 1972?</p> <p>22 A. '72, yes. I had for a number of years before</p> <p>23 that done all our accounting and our office had done all</p> <p>24 the payrolls and payables and everything for what was to</p> <p>25 become eventually Bayliner Marine.</p>	<p>1 Q. When did you become an owner in this entity</p> <p>2 that became Bayliner Boats?</p> <p>3 A. When I sold my accounting practice. The owner,</p> <p>4 the person at that time that basically owned the whole</p> <p>5 thing, Orin Edson, said he was going to have to get a</p> <p>6 financial officer to come in and work in the company if</p> <p>7 I wouldn't sell my accounting practice and go to work</p> <p>8 for him. And so I made him a deal where he'd sell me</p> <p>9 part of the company if I sold the accounting practice</p> <p>10 and go to work for him simply because I was a little</p> <p>11 bored with the accounting. It's the same old thing</p> <p>12 every day. Bayliner was exciting and it was growing.. I</p> <p>13 knew I was taking a pretty good risk, but I just was</p> <p>14 really impressed with it because my accounting practice,</p> <p>15 the year I sold it, which brought it to a head was I had</p> <p>16 taken two months off my practice. I had about a hundred</p> <p>17 clients and it ran so smooth and was so good I'd just</p> <p>18 take the summer off and tour around the country with my</p> <p>19 kids. And while I was gone the two months they'd got in</p> <p>20 some problems with personnel and everything at Bayliner,</p> <p>21 so when I got back Orin says, Don, God, I've got to have</p> <p>22 you do that. That was one of my very wise decisions and</p> <p>23 I got rid of it.</p> <p>24 Q. What percentage did you buy?</p> <p>25 A. It varied and I bought more later. You know, I</p>

1 can't remember what percentage that was. Eventually I
2 owned about four percent of Bayliner.

3 Q. Was Bayliner a publicly traded corporation?

4 A. No. When we sold the company in 1986, there
5 were four stockholders, two other people with the same
6 stock as me and then a majority. Orin owned the
7 majority.

8 Q. Who were the four shareholders with you?

9 A. Vinton Sommerville, David Livingston, and J.
10 Orin Edson.

11 Q. J. Orin Edson, and I take it from your prior
12 statements that he was the primary --

13 A. Yes.

14 Q. -- shareholder?

15 A. Yes. He'd started the original company which
16 sold used outboards in Seattle.

17 Q. And he sold to the Brunswick Corporation,
18 correct?

19 A. We sold to the Brunswick.

20 Q. I'm sorry, you sold.

21 A. Uh-huh.

22 Q. Brunswick, they still own Bayliner, don't they?

23 A. Yes. And there was a number of names. It
24 wasn't just Bayliner. Bayliner was the biggest
25 product. We had other companies within it. We had

1 bought Chrysler Marine Corporation. You know, we had
2 other boat companies that were -- Blue Fin Aluminum
3 Boats, things like that, but Bayliner basically, yes,
4 that's what we sold.

5 Q. Can you tell me what the other entities were
6 that was part of that deal?

7 A. I can't remember. There's lots of them. I'd
8 have to go through the records and look.

9 Q. But they were all included in your four percent
10 ownership of the stock in this entity?

11 A. Yes. They were all part of it. Originally
12 there was, you know, back in the early '70s, the common
13 thing was you keep a bunch of different corporations and
14 eventually we'd put them all together because you didn't
15 have any tax advantage and it got messy and everything
16 was one corporation. So finally as we bought any other
17 boat company we just took the assets and we didn't do
18 the corporations and stuff.

19 Q. Of the four shareholders of the company, who
20 was most involved in these acquisitions and handling --
21 at least the way these other business entities or
22 enterprises you described were handled and incorporated
23 into the business?

24 A. Orin Edson and I. If it was a large one, we'd
25 generally negotiate it together because we'd play ping

1 pong with the purchasers, you know. And then if it was,
2 you know, not a major deal, you know, we're buying a
3 200,000 square foot plant or something in Mississippi, I
4 might go negotiate it myself or whatever.

5 Q. Once you made the determination in this prior
6 entity to acquire an asset or to acquire an enterprise,
7 who was it that set up the actual structure, by the
8 Bayliner group or Bayliner company for lack of a better
9 name, to handle that new enterprise?

10 A. I don't understand your question.

11 Q. Well, you testified that in the '70s
12 everybody -- you used to set up the subsidiaries --

13 A. Uh-huh, right.

14 Q. -- for other corporations that were involved
15 and ultimately there was no tax advantage to doing that
16 so you brought all the businesses in?

17 A. Sure, yep.

18 Q. As these acquisitions were subsequently made,
19 were they just purchased in the name of this Bayliner
20 company?

21 A. Yep, uh-huh.

22 Q. Were any of the four or the three remaining
23 shareholders involved at all with you directly in the
24 aspects of the business you described, you were involved
25 in primarily the accounting business?

1 A. To some extent. Again, we ate lunch together
2 every day.

3 Q. It was an oversight kind of function?

4 A. Yeah. We'd talk about that and then we --
5 every Monday night we had a meeting for three or four
6 hours and that also included -- and the lunch included
7 maybe three other key personalities. It would vary from
8 one to four as time went on, but it involved other
9 people. We were just together. I mean, we -- and our
10 offices were all in a row in the offices, you know, so
11 we saw each other lots.

12 Q. You talked on a regular basis?

13 A. Yeah.

14 Q. When you sold Baylienr in 1986, how many
15 employees did Bayliner have?

16 A. About 7,000.

17 Q. How many employees would you consider at least
18 as of 1986 when you sold the business to have been in a
19 management sort of a position?

20 A. In some type of management, do you consider a
21 leadman, is he a management person?

22 Q. That's a broad question.

23 A. Yeah.

24 Q. Were there other employees of the entity
25 besides the four of you which you considered to be key

1 personnel involved in the operation of the business?

2 A. Many.

3 Q. Many?

4 A. We had 7,000 employees. There was many, many,
5 many.

6 Q. Was there a core group of decision makers for
7 the company besides the four of you?

8 A. Yes. The other people that went to like lunch
9 with us and met in our Monday night meeting were part of
10 that core group. The guy that ran our marketing or I
11 mean, actually our advertising department,

12 communications we called it, the guy that was the
13 bruntman as far as all the manufacturing operations.

14 Oh, various other people. There was probably 30 key
15 people. There was probably 30 people say in 1986 that
16 earned more than 100,000 a year and those are fairly --
17 at that time that would be like a quarter of a million
18 today. Those were fairly key management people who
19 worked with us.

20 Q. Was there ever a point in time that the four of
21 you that owned and ultimately controlled the company had
22 disagreements about how to handle certain aspects of the
23 business?

24 A. Yeah, occasionally, uh-huh.

25 Q. Is it fair to say that that wasn't something

1 two times that we had over 18 years we really had any,
2 you know, really dispute that I had to kind of mediate
3 in the middle of you might say over that many years. So
4 there wasn't a lot. We were -- our business was making
5 money and we concentrated on that. We didn't have a lot
6 of infighting in the company. We didn't have -- we were
7 very untypical of a very large company, you know, or
8 large company because we didn't have a bunch of
9 politicking going on, and that's where you get all of
10 this infighting, you know. We didn't have it. I mean,
11 we paid our people well and we kept them real busy and
12 it's like I always said, just run the office short of
13 people so they don't have time to get their little
14 political groups together. So we didn't have it. It
15 was a really rare incidence.

16 Q. What have you done professionally since 1986
17 when you sold the business?

18 A. Professionally, nothing.

19 Q. Nothing.

20 A. I have businesses that other people -- I mean,
21 it's like this, I don't get involved in them. I'm very
22 careful to stay kind of distanced from anything because
23 I don't want any involvement in my company.

24 Q. Tell me if you would, Don, what businesses
25 you've got going besides the Grand Canyon Expeditions?

1 that necessarily was uncommon?

2 MR. ANDERSON: I'll object to the question. That's
3 overbroad.

4 THE WITNESS: Well, actually it was -- it was very
5 uncommon in our company.

6 BY MR. HATHAWAY:

7 Q. How about within this group of 30 core people,
8 was it -- I take it that some of those may have been
9 involved in generally the same aspect of the business?

10 A. Yes, uh-huh.

11 Q. In your experience with Bayliner Corporation,
12 isn't it true that on occasion disputes arise as to how
13 to handle the operation of the business?

14 A. Not that I can really call disputes. We paid
15 our help extremely well. Probably our key people were
16 getting twice as much as anybody else in the industry.
17 We never had anybody stolen from us because everybody
18 would think I can't pay this guy that kind of money, so
19 we didn't have that kind of problem, so we had the very
20 best. So we, I mean, it was rare that I can ever
21 remember any disputes among the people. I mean, we had
22 the best and they worked it out and they were
23 reasonable. We didn't have that kind of problem.

24 It's like you ask the question about Orin, Slim, and
25 Dave and I getting at each other. I don't remember but

1 A. Let's see, right now, I believe I don't have
2 any except a land development company and GCE. I have
3 another corporation I guess it's got some land in it but
4 it's not very active. My land development company has
5 quite a bit. I have a son-in-law that runs that.

6 Q. What's the name of that company?

7 A. It's SK Enterprises Company or it's Donald --
8 Don Saunders DBA. It's not a corporation.

9 Q. And I take it you're not in any way involved in
10 the management or operation of the business of the
11 entity?

12 A. I've been one time in the last few years just
13 on one piece of property where they were having some
14 problems selling it, and I got in with the guys that
15 were buying it and negotiated the sale price.

16 Q. What sort of development do they do?

17 A. Vacant lands, 300 acre lots, 1000 acre lots,
18 5000 acre lots, that kind of property.

19 Q. Is this recreational property?

20 A. Residential.

21 Q. Residential, so estate-type lots?

22 A. Yeah, uh-huh.

23 Q. Whereabouts are they operating?

24 A. Snohomish County in the state of Washington.

25 Q. Maybe you better spell Snohomish.

Stirba and Hathaway

attorney, Mr. Skeen, that Plaintiff's stock was being purchased and he would need to prepare a buy-out amount consistent with the Buy/Sell Agreement. Id.

Denoyer and Mathis were completely unsophisticated in financial and accounting matters. They relied upon the accounting expertise of the Company's accountant Mr. Willis. Mr. Willis has attested that there was no manipulation of the books and records of Grand Canyon to create an artificially low buy-out amount for Plaintiff. Id. ¶ 22. Moreover, this theory is seriously undermined by the fact that Plaintiff, in essence, dictated the timing of his departure.⁴

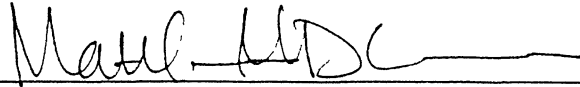
Plaintiff's counsel also appears to be under the mistaken impression that Grand Canyon's investment in White Water mysteriously disappeared in the consolidated financial statement prepared by Mr. Willis. In fact, the investment appears in the asset column of White Water that is added to Grand Canyon's assets. See Exs. "F", "G", and "H". Counsel's libelous suggestion that Grand Canyon engaged in income tax fraud through erasure is unsupported by any factual evidence and simply indicates the depths to which counsel will sink to manufacture an illusory issue of fact. See Plaintiff's counsel's letter to Court dated January 18, 1999 (attached hereto as Exhibit "R").

Plaintiff's counsel has also misrepresented to the Court previously that Grand Canyon's financial condition was worse in July 1992 than at any point in the history of the Company. As noted at the last hearing, and confirmed through Mr. Willis' Affidavit and the data available to Plaintiff's counsel, Grand Canyon's position was significantly better in July 1992

⁴ The undisputed facts demonstrate that Plaintiff demanded that his employment difficulties with Grand Canyon be resolved during the 1992 rafting season, rather than thereafter as Denoyer and Grand Canyon would have preferred. See Memorandum in Support of Motion for Summary Judgment, filed October 30, 1998 (citing deposition testimony).

DATED this 22^d day of March, 1999.

STOEL RIVES LLP

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

John A. Anderson
Matthew M. Durham
Attorney for Defendants

***726259** 2001 UT App 209

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Utah.

**James DISHINGER and Nancy Dishinger dba
TCBY Yogurt,
Plaintiffs, Appellants, and Cross-appellees,**
v.
**Jana POTTER dba Silver Queen Hotel, Defendant,
Appellee, and
Cross-appellant.**
No. 20000081-CA.
June 28, 2001.

Commercial tenants filed declaratory judgment action asking court to interpret lease provision regarding monthly rental rate. Landlord counterclaimed for breach of lease and unlawful detainer. After jury trial, the Third District Court, Coalville Department, Robert K. Hilder and Pat B. Brian, JJ., entered judgment for landlord in amount of \$8,730. Tenants appealed, and landlord cross-appealed. The Court of Appeals, Billings, J., held that: (1) jury's special verdict was not advisory, and thus trial court was bound by jury's findings; (2) accord and satisfaction precluded finding of unlawful detainer; (3) waiver provision in lease did not preclude finding of accord and satisfaction; (4) landlord was entitled to administrative fees; (5) landlord was not entitled to late fees; and (6) remand was necessary to determine prevailing party for purposes of attorney fees.

Reversed and remanded.

Orme, J., dissented and filed opinion.

[1] Appeal and Error ☞ 1078(1)

30 ----

30XVI Review

30XVI(K) Error Waived in Appellate Court

30k1078 Failure to Urge Objections

30k1078(1) In General.

Tenants could raise issue of accord and satisfaction on appeal, even though issue was not raised in pleadings, as record showed that evidence regarding existence of accord and satisfaction was presented at

trial, jury was instructed on and made findings of fact that supported accord and satisfaction, and landlord had opportunity to prepare and meet issue. Rules Civ.Proc., Rule 15(b).

[2] Pleading ☞ 427

302 ----

302XVIII Waiver or Cure of Defects and Objections

302k427 Objections to Evidence as Not Within Issues.

If an issue is fully tried, a court may decide the issue and deem the pleadings amended even if the issue was not originally pleaded, and whether the pleadings may be deemed amended depends on whether the opposing party had a fair opportunity to prepare and meet the issue.

[3] Appeal and Error ☞ 498.1

30 ----

30X Record

30X(A) Matters to Be Shown

30k498 Presentation and Reservation of Grounds of Review

30k498.1 In General.

Commercial tenants who appealed from jury's special verdict were not required to provide transcript of proceedings below or marshal evidence, as tenants were not challenging findings of fact but trial court's application of law to jury's special verdict findings.

[4] Declaratory Judgment ☞ 369

118A ----

118AIII Proceedings

118AIII(F) Hearing and Determination

118Ak369 Verdict and Findings.

Jury's special verdict in declaratory judgment action brought by tenants against landlord was not advisory, and thus trial court was bound by jury's findings, as both parties pursued legal, not equitable claims, tenants demanded jury trial on claims, and trial court did not inform parties or jury that jury was merely advisory. Rules Civ.Proc., Rule 49(a).

[5] Trial ☞ 347

388 ----

388IX Verdict

388IX(B) Special Interrogatories and Findings

388k346 Power of Jury to Find Specially

388k347 Special Verdict.

In the case of a special verdict, the jury only finds the facts, and the court applies the law thereto and renders the verdict.

[6] Accord and Satisfaction ☞ 10(1)

8 ----

8k6 Part Payment

8k10 Disputed or Unliquidated Claims

8k10(1) In General.

[See headnote text below]

[6] Accord and Satisfaction ☞ 11(2)

8 ----

8k6 Part Payment

8k11 Conditioned on Acceptance as Payment in Full

8k11(2) Remittances on Condition.

Accord and satisfaction was established in dispute between commercial tenant and landlord as to rental rate, and thus tenants were not in unlawful detainer, where jury found a good faith agreement over amount due under lease, payments tendered were made in full satisfaction of disputed rent, and landlord negotiated check, which contained notation that amount was for new base rent.

[7] Accord and Satisfaction ☞ 1

8 ----

8k1 Nature and Requisites in General.

To establish an accord and satisfaction, three elements must be present: (1) an unliquidated claim or a bona fide dispute over the amount due, (2) a payment offered as full settlement of the entire dispute, and (3) an acceptance of the payment as full settlement of the dispute.

[8] Accord and Satisfaction ☞ 10(1)

8 ----

8k6 Part Payment

8k10 Disputed or Unliquidated Claims

8k10(1) In General.

To satisfy the requirement that there be a good-faith disagreement over the amount due under the contract, as required to establish an accord and satisfaction, the disagreement need not be well-founded, so long as it is in good faith.

[9] Contracts ☞ 15

95 ----

95I Requisites and Validity

95I(B) Parties, Proposals, and Acceptance

95k15 Necessity of Assent.

A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or implicitly, with sufficient definiteness to be enforced.

[10] Trial ☞ 358

388 ----

388IX Verdict

388IX(B) Special Interrogatories and Findings

388k358 Inconsistent Findings.

Where a jury's special verdict findings support inconsistent legal claims, a court is not precluded from applying the law to those findings and entering judgment for a party on one theory, as a matter of law, which precludes judgment on another inconsistent legal theory. Rules Civ.Proc., Rule 49(a).

[11] Accord and Satisfaction ☞ 10(1)

8 ----

8k6 Part Payment

8k10 Disputed or Unliquidated Claims

8k10(1) In General.

[See headnote text below]

[11] Accord and Satisfaction ☞ 11(2)

8 ----

8k6 Part Payment

8k11 Conditioned on Acceptance as Payment in Full

8k11(2) Remittances on Condition.

Waiver provision in commercial lease providing that acceptance of rent did not constitute waiver did not preclude finding of accord and satisfaction based on tenants' tender of check for disputed rent amount, as lease provision did not provide that acceptance of partial rent did not constitute accord and satisfaction, and landlord could not claim that check tendered by tenants was partial rent, as there was no agreement as to amount of rent upon expiration of lease.

[12] Landlord and Tenant ☞ 238

233 ----

233 VIII Rent and Advances

233 VIII(B) Actions

233k238 Costs.

Landlord was entitled to administrative fees *726259 in dispute with commercial tenant, despite jury's finding of accord and satisfaction with respect to rent due, where lease unambiguously provided that tenants would pay for all costs and fees association with supervising and administering common areas.

[13] Landlord and Tenant ☞ 216

233 ----

233 VIII Rent and Advances

233VIII(A) Rights and Liabilities

233k216 Penalties or Double Rent

Landlord was not entitled to late fees under lease provision based on tenant's alleged failure to pay rent, as there was accord and satisfaction as to rent due, and thus tenants were current on rent payments

[14] Appeal and Error  1177(5)

30 ----

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1177 Necessity of New Trial

30k1177(5) Errors in Rulings and Instructions at Trial

Remand was necessary in dispute between landlord and commercial tenants to determine which party was entitled to attorney fees as prevailing party, where trial court's finding of unlawful detainer was reversed on appeal

Third District, Coalville Department

The Honorable Robert K. Hilder

The Honorable Pat B. Brian

Dwayne A. Vance and David B. Thompson, Park City, for Appellants

Robert M. Felton, Salt Lake City, for Appellee

Before Judges BILLINGS, ORME, and THORNE

OPINION

BILLINGS, Judge

****1** ¶ 1 Plaintiffs James and Nancy Dishinger dba TCBY Yogurt (the Dishingers) appeal the trial court's judgment finding them in unlawful detainer. Defendant Jana Potter dba Silver Queen Hotel (Potter) cross-appeals the trial court's refusal to instruct the jury on the meaning of "prevailing rate" and its failure to award her administrative, late, and attorney fees. We reverse and remand.

BACKGROUND

¶ 2 In May of 1990, Erik Ziskend entered into a commercial lease with Potter for premises located on Main Street in Park City, Utah. On May 31, 1994, Ziskend assigned the lease to the Dishingers. Potter consented to the assignment. The Dishingers operated

a frozen yogurt shop on the premises.

¶ 3 The lease provided for continuous three year options after expiration of the initial three year lease term. Under the terms of the lease, the Dishingers, as tenants, were required to notify Potter in writing of their desire to exercise the option 120 days prior to the expiration of the current lease term. The lease specified that the rental rate for an option period would be "adjusted upward, but not less than the current Minimum Monthly Rent being paid, to the then prevailing rental rate of similar buildings in the Main Street area of Park City, Utah." (FN1)

¶ 4 On February 1, 1996, the Dishingers notified Potter in writing of their desire to exercise the lease renewal option. Thereafter, the following correspondence took place. On April 4, 1996, Potter advised the Dishingers that the prevailing rental rate of similar buildings on Main Street in Park City was \$30 per square foot and thus, pursuant to the lease, \$30 per square foot (\$2,425.00/month) would constitute the new base monthly rent. The Dishingers responded that, based on the appraisal they had performed, the prevailing rental rate of similar buildings was \$19 per square foot (\$1,535.83/month).

¶ 5 At the commencement of the July 1, 1996 renewal period, without an agreement as to what would constitute the base monthly rent, the Dishingers began paying rent in an amount reflecting their appraisal of \$19 per square foot. They sent Potter a check for \$1,976.92, clearly noting it was for "New Base Rent." On July 8, 1996, Potter sent the Dishingers a notice of default on the grounds that the Dishingers were \$889.17 delinquent in their July rental payment. On July 13, 1996, Potter served the Dishingers with a notice to pay the remaining rent or quit. On July 15, 1996, Potter negotiated the Dishinger's July 1 rent check. On the first of every month, from July 1996 through June 1997, the Dishingers sent Potter a check for \$2,137.11 (FN2) reflecting \$19 per square foot in base monthly rent. Potter negotiated each of those checks.

¶ 6 On August 8, 1996, the Dishingers filed a declaratory judgment action asking the trial court to interpret the lease provision regarding the monthly rental rate. Potter counter-claimed for breach of lease and unlawful detainer.

****2** ¶ 7 After a jury trial, the jury returned a special verdict answering a number of factual

questions. In the special verdict the jury found there was a legitimate dispute as to the "then prevailing rental rate," that the Dishingers tendered payment to Potter in full satisfaction of the disputed amount based on their appraisal of \$19, and that Potter accepted the rent payments after the July 13 notice to quit. The jury also found the "then prevailing rental rate" to be \$25 per square foot, and as such, Potter was entitled to recover the balance of base rent, totaling \$8,730.

¶ 8 The Dishingers filed a motion for entry of judgment based on the special verdict, arguing that the jury's special verdict established an accord and satisfaction, which fixed the base rental rate at \$19 per square foot, and thus, they were current in monthly payments and Potter's unlawful detainer claim should be dismissed. The Dishingers also argued that a determination that they were in unlawful detainer of the premises was precluded because Potter accepted rental payments after serving the notice to quit, thus waiving forfeiture of the lease.

¶ 9 The trial court, first Judge Brian, then Judge Hilder in an amended judgment, entered judgment for Potter. The trial court concluded that, based on the findings of the jury in its special verdict, it was "clear" that while Potter accepted payments after the notice to quit, the amount received "did not represent a full payment of base rent," and thus did not constitute an accord and satisfaction. Thus, the trial court concluded the Dishingers were in unlawful detainer and entered judgment in favor of Potter for \$8,730, which was trebled to \$26,190 pursuant to Utah Code § 11-78-36-10 (1996). This appeal followed.

¶ 10 On appeal, the Dishingers argue the trial court was precluded from determining they were in unlawful detainer because the jury's special verdict established an accord and satisfaction as a matter of law. Alternatively, the Dishingers argue that Potter affirmed the lease by accepting rent payments, thereby waiving forfeiture of the lease, and thus precluding a finding of unlawful detainer.

¶ 11 Potter cross-appeals, arguing the trial court should have instructed the jury that the "then prevailing rental rate" meant market rate. Potter also argues the trial court erred by failing to award her administrative fees, late fees, and attorney fees as required by the lease.

ANALYSIS

I. Preliminary Issues

¶ 12 In addition to the claims raised in her cross-appeal, Potter asserts that the Dishingers failed to preserve their claims below, failed to provide a transcript of the proceedings and marshal the evidence, and cannot rely on the jury's special verdict because it was merely advisory. Before addressing the main substantive issues on appeal, we first address these threshold arguments.

A. Preservation of Claims

[1][2] ¶ 13 Potter first argues the Dishingers failed to preserve their claim of accord and satisfaction in accordance with Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure. Rule 24(a)(5)(A) provides that "[t]he brief of the appellant shall contain ... citation to the record showing that the issue was preserved in the trial court." Utah R.App. P. 24(a)(5)(A). The Dishingers reference several places in the record to show that the issue of accord and satisfaction was preserved in the trial court. (FN3) Thus, Potter's argument that the Dishingers did not preserve the issue of accord and satisfaction is without merit. (FN4)

B. Marshaling the Evidence

**3 [3] ¶ 14 Potter next argues the Dishingers needed to provide a transcript of the proceedings to allow meaningful review of the evidence, and have also failed to marshal the evidence. A transcript of the proceedings is not required because the Dishingers are relying on the jury's special verdict on appeal, not the evidence presented at trial. See, e.g. *Pugh v. North Am. Warranty Servs., Inc.* 2000 UT App 121 ¶ 11, 1 P.3d 570. Moreover, the marshaling requirement applies only when challenging findings of fact. See *Moon v. Moon*, 1999 UT App 12 ¶ 24, 973 P.2d 431. Clearly, the Dishingers are not challenging findings of fact. Rather, they are challenging the trial court's application of the law to the jury's special verdict findings and thus the Dishingers do not have the burden of marshaling the evidence.

C. Advisory Jury Verdict

[4] ¶ 15 Relying on *Peirce v. Peirce* 2000 UT 7, 994 P.2d 193, Potter next argues that the jury's special verdict was merely advisory, and therefore the trial court was not bound by the jury's findings in the special verdict. Potter's reliance on *Peirce* is misplaced. In

Peirce, the issue before the court was "whether the jury served in an advisory capacity or whether [the] case was tried by a jury as a matter of right." *Id.* at ¶ 12. However, the plaintiff *Peirce* was seeking an equitable remedy. *See id.* "When a jury is used in an equity case, it acts in an advisory capacity," (quoting *Romrell v. Zions First Nat'l Ban* 611 P.2d 392, 394 (Utah 1980) (quotation and citation omitted)), " 'unless both parties have clearly consented to accept a jury verdict.' " *Id.* at ¶ 13 (quoting *Romrell*, 611 P.2d at 394 *see also* Utah R. Civ. P. 39(c)). Because the parties did not clearly consent to accept a jury verdict, and the record indicated that the trial court treated the jury as advisory, the court held that the jury served only in an advisory capacity and thus afforded no deference to its findings. *See id.* at ¶ 15.

¶ 16 In the instant case, we are not dealing with an action in equity. Both the Dishingers and Potter pursued legal claims, the Dishingers specifically demanded a jury trial on those claims, and at no time did the trial court inform the parties or the jury that the jury was merely advisory. (*Goldberg v. Jay Timmons & Assoc.* 896 P.2d 1241, 1244 (Utah Ct.App. 1995) (stating, "if the trial court had intended ... to use an advisory jury, it should have notified the parties before the trial began"). Where, as here, the case is tried to a jury as a matter of right, Rule 49(a) of the Utah Rules of Civil Procedure permits the trial court to "require a jury to return only a special verdict in the form of a special written finding upon each issue of fact." Utah R. Civ. P. 49(a). "The [trial] court then applies the law to the facts as found and renders a verdict." *Brigham v. Moon Lake Elec. Ass'n* 24 Utah 2d 292, 298, 470 P.2d 393, 397 (1970) (Ellett, J., further opinion) (commenting on Rule 49(a)).

**4 ¶ 17 As Justice Ellett explained in *Brigham*:

The special verdict was devised to relieve the jury of attempting to apply the law in a complicated case to the facts in arriving at a verdict. Instructions to the jury are thus simplified, and the jurors may, therefore, concentrate upon the functions which belong to them, viz., to find the facts in the case.

Id. Thus, "[i]n [the] case of a special verdict, the jury only finds the facts, and the court applies the law thereto and renders the verdict. This is what occurred in the instant case. The trial court instructed the jury. "[I]t is your exclusive duty to determine the

facts in this case, and to consider and weigh the evidence for that purpose"; "You are exclusive judges of the facts and the evidence" (Emphasis added.) The trial court then entered judgment, *Based upon the evidence and the special verdict.* (Emphasis added.) Thus, the jury was not merely advisory. Rather, the jury found the facts as set forth in its special verdict and the trial court entered judgment applying the law to those facts.

II. Accord and Satisfaction

[6] ¶ 18 The Dishingers argue that an accord and satisfaction occurred prior to trial which set the rental rate at \$19 per square foot thus precluding a finding of unlawful detainer. They claim the jury's special verdict answers require a legal determination of accord and satisfaction. Whether the special verdict established an accord and satisfaction is a question of law which we review for correctness without any deference to the trial court. *See ProMax Dev. Corp. v. Raile* 2000 UT 4 ¶ 17, 998 P.2d 254.

A. Elements of Accord and Satisfaction

[7] ¶ 19 To establish an accord and satisfaction, three elements must be present: "(1) an unliquidated claim or a bona fide dispute over the amount due; (2) a payment offered as full settlement of the entire dispute; and (3) an acceptance of the payment as full settlement of the dispute." *Id.* at ¶ 20 (citing *Marton Remodeling v. Jensen*, 706 P.2d 607, 609-10 (Utah 1985)).

1. Bona Fide Dispute Over Amount Due

[8][9] ¶ 20 To satisfy the first element, "There must be a good-faith disagreement over the amount due under the contract. The disagreement need not be well-founded, so long as it is in good faith." *Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co.* 844 P.2d 322, 326 (Utah 1992) (citing *Golden Key Realty, Inc. v. Mantas*, 699 P.2d 730, 733 (Utah 1985) *Ashton v. Skeen* 85 Utah 489, 496, 39 P.2d 1073, 1076 (1935)). The jury clearly found that there was a good faith disagreement over the amount due under the lease. (FN5) The jury was asked:

Considering all of the evidence in this case, do you find by a preponderance of the evidence that a legitimate dispute existed as to the "then prevailing rental rate of similar buildings in the Main Street

area of Park City" at the time the [Dishingers] made monthly rental payments based on \$19 per square foot as satisfaction in full?

****5** To this question the jury answered, "Yes." Thus, the first element of accord and satisfaction was established by the jury's special verdict.

2. Payment Tendered in Full Satisfaction of Dispute

¶ 21 The jury found that the payments tendered by the Dishingers were made in full satisfaction of the disputed rent. The jury was asked: "Considering all the evidence in this case, do you find by a preponderance of the evidence that the [Dishingers] notified [Potter] that these payments were made in full satisfaction of the disputed rent amount?" The jury answered, "Yes." Thus, the second element of accord and satisfaction was established by the jury's special verdict.

3. Acceptance of Payment as Full Settlement of Dispute

¶ 22 In *Estate Landscape*, the Utah Supreme Court reasoned that the third element of accord and satisfaction may be satisfied by the creditor's subjective intent to discharge an obligation by assenting to the accord, or conduct which gives rise to a reasonable inference that acceptance of payment discharged the obligation. See *Estate Landscape*, 844 P.2d at 330.

¶ 23 In the instant case, the jury found that Potter accepted the monthly payments made by the Dishingers. The jury was asked: "Considering all of the evidence in this case, do you find by a preponderance of the evidence that [Potter] accepted the monthly rent payments made by the [Dishingers] which are calculated at a rate of \$19 per square foot?" The jury answered, "Yes." However, the jury did not make a finding that Potter subjectively intended to assent to the accord. The fact that Potter counter-claimed for breach of the lease and unlawful detainer shows she did not subjectively intend to assent to the accord. Thus, to find an accord and satisfaction, we must determine whether Potter's conduct established the accord and satisfaction as a matter of law.

¶ 24 In *Estate Landscape* the defendant sent the plaintiff a check for \$8,613, and followed it with a letter stating that the check was "payment in full for satisfaction of contracted services. If you are not willing to accept that sum, . . . in full satisfaction of the

sums due, DO NOT negotiate the check, for upon your negotiation of that check, we will treat the matter as fully paid.' *Id.* at 324-25 (emphasis omitted). The plaintiff filed suit to recover the \$30,162.50 it thought it was owed by the defendant, then negotiated the \$8,613 check, and amended its complaint to recover the difference. See *id.* at 325.

¶ 25 The trial court ruled that negotiation of the check did not constitute an accord and satisfaction. See *id.* This court affirmed, over Judge Jackson's dissent, reasoning that the defendant's letter was "entirely unilateral," and that the plaintiff's

signature on the check is not an assent to an accord not found on the face of the check as a restrictive endorsement, where the party to whom the accord is offered has expressly rejected the proposed accord, continued the dispute, and filed litigation to resolve it adversarially in court.

****6** *Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co.*, 793 P.2d 415, 419-20 (Utah Ct.App.1990) (footnote omitted), *rev'd*, 844 P.2d 322 (Utah 1992).

¶ 26 The Utah Supreme Court disagreed and reversed, holding, "Where, as here, the check is tendered under the condition that negotiation will constitute full settlement, mere negotiation of the check constitutes the accord, regardless of the payee's efforts or intent to negate the condition *Estate Landscape*, 844 P.2d at 330. Thus, "[w]hat is said is overridden by what is done, and assent is imputed as an inference of law." *Id.* (quoting *Hudson v. Yonkers Fruit Co.*, 258 N.Y. 168, 179 N.E. 373, 374 (1932) *see also Marton Remodeling v. Jense* 706 P.2d 607, 609 (Utah 1985) (holding negotiation of check with restrictive condition is an accord and satisfaction even though creditor wrote "not full payment" beneath condition prior to negotiation) *Cove View Excavating & Constr. Co. v. Fly*, 758 P.2d 474, 478 (Utah Ct.App.1988) (finding an accord and satisfaction even though creditor crossed out restrictive condition on check before negotiation).

¶ 27 In the instant case, the Dishinger's first check noted the amount thereof was for "New Base Rent." Therefore, because Potter negotiated the check, which was tendered by the Dishingers in full satisfaction of the disputed amount of the base monthly rent, the fact that Potter at the same time brought an action for

breach of lease and unlawful detainer is of no legal consequence. (FN6) The third and final element of accord and satisfaction was established by Potter's conduct.

B. Special Verdict

¶ 28 In its special verdict, the jury found: (1) "that a legitimate dispute existed as to the 'then prevailing rental rate of similar buildings in the Main Street area of Park City' at the time the [Dishingers] made monthly rental payments based on \$19 per square foot as satisfaction in full;" (2) the Dishingers "notified [Potter] that [the] payments were made in full satisfaction of the disputed amount;" and (3) Potter "accepted the monthly rent payments made by the [Dishingers] ... at a rate of \$19 per square foot."

¶ 29 However, the jury also found that the prevailing rental rate was \$25 per square foot, and that Potter was entitled to recover the "balance of base rent" from the Dishingers, totaling \$8,730. Based on these findings, the trial court entered judgment for Potter, concluding that no accord and satisfaction existed and that the Dishingers were in unlawful detainer because the amount Potter received and accepted each month was less than what the jury subsequently determined to be the rental rate.

[10] ¶ 30 Although it could be argued that the special verdict supports inconsistent legal theories (accord and satisfaction and unlawful detainer), the inconsistency is not fatal. The jury was instructed to answer all factual questions on all legal theories presented in the special verdict. While the jury's findings support inconsistent legal claims, a court is not precluded, under Rule 49(a), from applying the law to those findings and entering judgment for a party on one theory, as a matter of law, which precludes judgment on another inconsistent legal theory. *See Milligan v. Capitol Furniture Co.* 8 Utah 2d 383, 387, 335 P.2d 619, 622 (1959) (holding inconsistent special verdict answers immaterial under Utah R. Civ. P. 49(a) *see also Tsudek v. Target Stores, Inc* 414 N.W.2d 466, 469-70 (Minn.Ct.App.1987) (finding inconsistent special verdict answers reconcilable where jury was simply answering all questions submitted based on the evidence) Thus, as was the case here, if the special verdict findings support, as a matter of law, an accord and satisfaction then there cannot be an unlawful detainer.

C. Effect of Lease Provision

**7 [11] ¶ 31 Potter responds that even if the jury's special verdict findings support an accord and satisfaction, the lease itself precludes an accord and satisfaction. Potter relies on the "Waiver" provision of the lease which states:

The waiver by Landlord of any term, covenant or condition herein contained shall not be deemed to be a waiver of such terms, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. *The subsequent acceptance of rent hereunder by Landlord shall not be deemed to be a waiver of any preceding default by Tenant of any term, covenant or condition of this Lease, other than the failure of Tenant to pay particular rent also accepted,* regardless of Landlord's knowledge of such preceding default at the time of the acceptance of such rent.

(Emphasis added.) Potter asserts that under this lease provision, "acceptance of partial rent could not constitute an accord and satisfaction."

¶ 32 Though not perfectly drafted, the boilerplate language of this "Waiver" provision is not ambiguous. The relevant portion, emphasized above, provides that if the Dishingers default on any term, covenant, or condition of the lease, and thereafter tender a rental payment to Potter, and Potter accepts, by accepting, Potter has not waived the prior defaults. For example, if the Dishingers install exterior lighting as prohibited by the lease, the installation, if not cured within thirty days of notice, is a default. If, thereafter, the Dishingers send Potter a rent check which Potter accepts, Potter has not waived the Dishinger's default for the installation. However, if the Dishinger's default for failure to pay rent, and thereafter tender a rental payment to Potter, which Potter accepts, Potter thereby waives the Dishinger's default for failure to pay rent.

¶ 33 What the lease provision does not provide, is that acceptance of partial rent does not constitute an accord and satisfaction. In fact, the term "accord and satisfaction" is conspicuously absent from the face of the lease, and beyond the "Waiver" provision, Potter fails to point to any language in the lease that would support her strained construction. Additionally, and perhaps more importantly, Potter cannot claim that the initial check tendered by the Dishingers was "partial

rent," when there was never an agreement as to what would actually be the rental rate. While hindsight suggests that Potter should have provided for such a situation in the lease, we cannot write such a provision into the lease for h *Se Jones v. ERA Brokers Consol.*, 2000 UT 61 ¶ 18, 6 P.3d 1129 *see also Rio Algom Corp. v. Jimco Ltd* 618 P.2d 497, 505 (Utah 1980); *Provo City Corp. v. Nielsen Scott Co.*, 603 P.2d 803, 806 (Utah 1979). Thus, Potter's argument that the lease prohibits an accord and satisfaction is not supported by the lease itself.

¶ 34 In sum, the jury's special verdict established as a matter of law an accord and satisfaction. The trial court erred in not entering a judgment on the rental rate for the option period in favor of the Dishingers. We therefore reverse the trial court's judgment of unlawful detainer and remand for the entry of a judgment for the Dishingers based on the legal theory of accord and satisfaction setting the rental rate at \$19 per square foot. (FN7)

III. Administrative, Late, and Attorney Fees

****8** [12] ¶ 35 Potter argues that the lease provides that the Dishingers shall pay administrative, late, and attorney fees. Potter submitted her claims for administrative and late fees to the jury. In its special verdict, the jury found that, in addition to what the Dishingers had already paid to Potter, Potter was only entitled to the "Balance of base rent." Based on this finding, the trial court determined that Potter was not entitled to administrative and late fees. However, this was properly a legal not a factual determination. The lease is clear and unambiguous that Potter was entitled to administrative fees. The lease states in no uncertain terms that the tenant shall pay for all costs and fees associated with supervising and administering to the common areas. (FN8)

¶ 36 The Dishingers respond that Potter's argument for administrative fees was not presented below. However, the trial court clearly ruled on the issue based on the jury's special verdict findings. Thus, Potter's claim for administrative fees was presented below. Therefore, we reverse and remand to the trial court for an award of Potter's administrative fees.

[13] ¶ 37 The lease further provides

Tenant shall pay to Landlord *late charge* of ten (\$10.00) dollars per day until the amount due is

paid in full. Tenant further agrees to pay any attorney's fees [sic] incurred by Landlord by reason of Tenant's failure to pay rent and/or other charges when due hereunder.

(Emphasis added.) Thus, Potter was only entitled to late fees and attorney fees under this provision if the Dishingers failed to pay rent. Because we conclude there was an accord and satisfaction, the Dishingers were current on their rent payments and therefore Potter was not entitled to late fees. (FN9)

[14] ¶ 38 The trial court determined that Potter was not entitled to attorney fees because the lease provided that the "prevailing party shall be entitled to recover" its attorney fees, and while Potter prevailed on her counter-claim, the Dishingers prevailed on their claims for an accounting and credit for overcharges of common area expenses. Thus, the trial court determined neither party should be awarded attorney fees because both prevailed.

¶ 39 Because we conclude that there was an accord and satisfaction and thus no unlawful detainer, the "prevailing party" issue as to attorney fees should be reconsidered by the trial court on remand. Therefore, pursuant to the terms of the lease, Potter is entitled to her administrative fees, and we remand to have the trial court determine if either party should be awarded attorney fees as the "prevailing party" under the lease.

CONCLUSION

¶ 40 We conclude, based on the jury's special verdict, an accord and satisfaction occurred as a matter of law fixing the "then prevailing rental rate" for the option period of the lease at \$19 per square foot in base monthly rent. Therefore, because the Dishingers were in lawful possession of the premises, we reverse the trial court's legal determination of unlawful detainer and its award of treble damages. We further conclude that under the terms of the lease, Potter was entitled to her administrative fees and remand for the trial court to determine if either party is entitled to attorney fees as the "prevailing party" under the lease.

¶ 41 I CONCUR: WILLIAM A. THORNE, Jr., Judge.

ORME, Judge (dissenting):

****9** ¶ 42 I cannot agree there was an accord and satisfaction in this case. While there was a bona fide

dispute over the new rental rate and the Dishingers may well have tendered their payments with the thought it was in full satisfaction of what was due, there is no finding that Potter *accepted* the payments in full satisfaction nor any basis in the evidence to conclude that she did so. On the contrary, the Dishingers and Potter had exchanged letters indicating very different views of what constituted the "then prevailing rental rate." Nothing suggests either side thereafter acceded to the view of the other or that they reached a compromise. On the contrary, within days of accepting the Dishingers' check, Potter sent the Dishingers a default notice stating what she believed the shortfall to be. A couple of weeks later, the Dishingers filed their declaratory judgment action acknowledging there was a dispute between the parties and asking the court to resolve it-not claiming there had been a dispute between the parties that had been resolved by accord and satisfaction and asking the court to enforce the accord.

¶ 43 Applicable law does not require anything inconsistent with the expectations of the parties, as shown by their conduct. The "New Base Rent" notation, apparently made in the "For _____" space on the front of the check, clearly does not satisfy the UCC's requirement that "the instrument or an accompanying written communication contain[] a conspicuous statement to the effect that the instrument was tendered a *full satisfaction* of the claim." Utah Code Ann § 70A-3-311(2) (1997) (emphasis added). In addition, cases relied on by the majority are inapposite. In both *Marton Remodeling v. Jensen*, 706 P.2d 607 (Utah 1985), an *Cove View Excavating & Construction Co. v. Fly*, 758 P.2d 474 (Utah Ct.App.1988), unlike in this case, the checks evidencing the accord and satisfaction contained actual restrictive endorsement provision. *Marton Remodeling*, 706 P.2d at 608 ("Endorsement hereof constitutes full and final satisfaction of any and all claims...."); *Cove Vie* 758 P.2d at 476 (check contained "pmt. in full" language on front of check and this restrictive endorsement language on back of check: "payment in full for all labor and materials to 6/26/84"). In *Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Telephone & Telegraph Co.*, 844 P.2d 322 (Utah 1992), a detailed letter made it clear that the check could be accepted only as full payment. See *id.* at 324-25.

¶ 44 As a matter of law, the facts in this case do not establish an accord and satisfaction. The jury

recognized this and went on to find that the prevailing rental rate was \$25 per square foot and that the Dishingers owed this to Potter under their contract. Does this mean the Dishingers unlawfully detained the premises, subjecting them to treble damages? It does not. Potter, in her "notice to pay rent or quit," demanded payment of a sum well in excess of what she was entitled to contractually. The jury found the prevailing rate was \$25, but she had demanded payment of \$30. The invalid demand renders the notice completely ineffective to place the Dishingers in a state of unlawful detainer.

****10.** ¶ 45 When the dust settles in this case, the proper result emerges with reasonable clarity. The Dishingers did not owe as much as Potter thought they did, but they owed more than they thought they did. There was no accord and satisfaction, so they are liable for the shortage. On the other hand, Potter had no right to demand payment of an amount to which she was not entitled, so she may not have the lesser amount to which she was actually entitled trebled, nor is she entitled to any other relief specially available under the unlawful detainer statute. Clearly, then, there is no prevailing party here-each side won a little and lost a little-so neither side is entitled to an award of attorney fees.

¶ 46 On remand, I would simply have the trial court amend its judgment to reflect the foregoing.

(FN1.) From a review of the record it appears that the Dishingers were paying \$18.48 per square foot in minimum monthly rent at the time they notified Potter of their desire to exercise the option.

(FN2.) The Dishingers subtracted \$160.19 from the July 1, 1996 rental payment for remaining credits and premature Consumer Price Index increases occurring in 1994 and 1995.

(FN3.) The Dishinger's citations to the record reference the jury's special verdict; the Dishinger's motion for entry of judgment based on special verdict; the Dishinger's memorandum in support of motion for relief from judgment; and the Dishinger's supplemental memorandum in support of motion for relief from judgment. In all these instances the issue of accord and satisfaction was raised in the trial court.

(FN4.) We note the issue of accord and satisfaction was not raised in the pleadings. However, Rule 15(b) of the Utah Rules of Civil Procedure provides

that issues not raised in the pleadings may be tried by express or implied consent. *See* Utah R. Civ. P. 15(b). "If an issue is fully tried, a court may decide the issue and deem the pleadings amended even if the issue was not originally pleaded." *Shinkoskey v. Shinkoskey*, 2001 UT App 4¶ 6 n. 2, 19 P.3d 1005 (citing *Fisher v. Fisher*, 907 P.2d 1172, 1176 (Utah Ct.App.1995) (citation omitted)). "Whether the pleadings may be deemed amended depends on whether the opposing party had a fair opportunity to [prepare and meet the issue]. *Id.* (citing *Colman v. Colman*, 743 P.2d 782, 785 (Utah Ct.App.1987)). It must be evident from the record that the issue has been tried. *See id.* (citing *Fisher*, 907 P.2d at 1176).

A review of the record reveals that evidence regarding the existence of an accord and satisfaction was presented at trial, and the jury was instructed on and made findings of fact that would support an accord and satisfaction. Additionally, the Dishingers argued accord and satisfaction in their motion for entry of judgment based on special verdict, which Potter had the opportunity to rebut, and the trial court entered judgment finding there was no accord and satisfaction. Thus, because Potter had the opportunity to prepare and meet the issue, we conclude that the issue of an accord and satisfaction was tried by implication.

(FN5.) Although neither party has addressed this issue in their briefs, we note at the outset that the option provision in the lease is most likely unenforceable in Utah. It is a well-recognized principle that, "A condition precedent to the enforcement of any contract is that there be *meeting of the mind* of the parties, which must be spelled out, either expressly or implicitly, with sufficient definiteness to be enforced." *Pingree v. Continental Group of Utah, Inc.* 558 P.2d 1317, 1321 (Utah 1976) (emphasis added) (citation omitted). *Pingree*, the Utah Supreme Court stated,

"a provision for the extension or renewal of a lease must specify the time the lease is to extend and the rate to be paid with such a degree of certainty and definiteness that nothing is left to future determination. If it falls short of this requirement, it is not enforceable."

Id. at 1321 (quoting *Slayter v. Pasley*, 199 Or. 616, 264 P.2d 444, 446 (Or.1953)).

In the instant case, the lease provided that the rental rate for the renewal period would be "the then prevailing rental rate of similar buildings in the Main Street area of Park City." On July 1, 1996, the commencement of the renewal period, the parties had yet to agree on what constituted "the then prevailing rental rate of similar buildings in the Main Street area of Park City." Both parties had communicated to the other a vastly different rate and interpretation, and the Dishingers filed a declaratory judgment action asking the trial court to interpret the provision. Thus, it cannot be said that the rate provided for in the option provision of the lease possesses the certainty and definiteness required to be enforced. In sum, there was no meeting of the minds, and as a result, no agreement. Therefore, the lease terminated by its own terms as of July 1, 1996. However, because we conclude that an accord and satisfaction occurred, the unenforceability of the option provision does not affect our analysis.

****10_** (FN6.) In response, Potter attempts to rely on language from *Tates, Inc. v. Little America Refining Co.*, 535 P.2d 1228 (Utah 1975), wherein our supreme court stated, "Ordinarily, the payment of part of a debt does not discharge it.... The reason for this is that in making the part payment, the debtor is doing nothing more than he is legally obligated to do" at 1229. This general statement is true, to the extent that there is no "dispute or uncertainty as to the amount due." *Id.* at 1229-30. In the instant case it is well established that there is a dispute as to the amount due.

(FN7.) Because we conclude there was an accord and satisfaction and thereby reverse the trial court's legal conclusion that the Dishingers were in unlawful detainer, we do not address the Dishinger's alternative argument of waiver and Potter's cross-appeal regarding the definition of the term "prevailing rate."

(FN8.) Specifically, the lease states that the tenant shall pay

All costs to supervise and administer said common areas, used in common by the tenants or occupants of the building. [S]aid costs shall include such fees as may be paid to a third party in connection with same and shall in any event include a fee to

Landlord to supervise and administer same in an amount equal to ten (10%) of the total costs of (i) above.

(FN9.) Potter does not argue she was entitled to attorney fees under this provision.

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FILED
UTAH SUPREME COURT

STIRBA & HATHAWAY
IN THE SUPREME COURT OF THE STATE OF UTAH

SEP 26 2001

PAT BARTHOLOMEW
CLERK OF THE COURT

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Marc Smith,
Plaintiff and Petitioner,
v.
Grand Canyon Expeditions Co.,
Martin Mathis; Michael Denoyer;
Donald Saunders; John Does 1
through 5; and Jane Does 1
through 5,
Defendants and Petitioners.

Case No. 20010667-SC

ORDER

This matter is before the Court upon a Petition for Permission to Appeal an Interlocutory Order, filed pursuant to Rule 5 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the Petition for Permission to Appeal an Interlocutory Order filed on August 17, 2001 is granted.

For The Court:

Sept. 26, 2001

Date

Richard C. Howe

Richard C. Howe
Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on September 27, 2001, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the party(ies) listed below:

BENSON L. HATHAWAY
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and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

SIXTH DISTRICT, RICHFIELD DEPT
ATTN: MARILYN
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RICHFIELD UT 84701

By 
Deputy Clerk

Case No. 20010667-SC
SIXTH DISTRICT, RICHFIELD DEPT , 940600003