

2009

Kenneth E. Winward v. Geraldine W. Goodliffe : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KENNETH E. WINWARD,

Plaintiff/Appellant,

v.

GERALDINE W. GOODLIFFE,

Defendant/Appellee.

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**REPLY BRIEF OF
APPELLANT**

Case No. 20090972-CA

REPLY BRIEF OF APPELLANT KENNETH E. WINWARD

Appeal from a Judgment and Orders Entered by the Second Judicial District Court,
Weber County, Utah, Honorable W. Brent West, District Judge, Presiding

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UTAH APPELLATE COURTS

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INTRODUCTION

Before responding to the merits of Ms. Goodliffe's brief, it is important to note that she failed to comply with the Utah Rules of Appellate Procedure governing the requirements for briefs on appeal. *See* Utah R. App. P. 24(b) (stating that the appellee's brief must comply with all requirements for the appellant's brief except for the statement of issues and the addendum). Specifically, she failed to cite to the record for all factual assertions made. Utah R. App. P. 24(a)(7), (e). She also failed to include a statement of jurisdiction or a statement of determinative law. Utah R. App. P. 24(a)(4), (a)(6). Moreover, her "summary of the argument" is insufficient in that it constitutes "a mere repetition of the heading under which the argument is arranged" and is not suitably paragraphed. Utah R. App. P. 24(a)(8). Though not a *per se* violation of the appellate rules, Ms. Goodliffe's table of authorities cites only six cases, two of which bear incorrect page number references.

Instead of responding to Mr. Winward's legal arguments in the order in which they were presented, Ms. Goodliffe introduces a completely different structure that obscures the four discrete issues presented. She brings up facts that are uncontested and irrelevant to the appeal such as the division of personal property, trust administrative fees, limitations periods, and the value of the real property held in trust. *See e.g.*, Brief of Appellee 7, 14. Ironically, Ms. Goodliffe devoted an entire section of argument to a point that was neither raised nor discussed by Mr. Winward. *See* Brief of Appellee 24.

Ms. Goodliffe also ignores pertinent dates as evidenced by her statement that "Winward owed a fiduciary duty to Myrtle Winward and to Goodliffe and was required

to act for the benefit of Goodliffe in his handling with [sic] the assets of his father and mother. This he failed to do.” Brief of Appellee 3. Winward was not a trustee at the time of the transactions at issue. By Ms. Goodliffe’s own admission, “Richard E. Winward and Myrtle Winward were the trustees of the Richard E. Winward trust and also the trustees of the Myrtle Winward Trust during the time that the trustors were alive.” Brief of Appellee 13. Thus, any improper transfers of trust assets made before August 1, 1992 would be on the heads of Richard and Myrtle Winward, the sole trustees up to their respective deaths. *City of Fairview Okla. v. Norris*, 234 F.2d 199, 203 (10th Cir. 1956) (“The law is without exception that a trustee is not liable to a beneficiary for a breach of trust committed by a predecessor trustee.”).

For clarity and because the Court has been asked to review only four issues, Mr. Winward will reply to Ms. Goodliffe’s argument within the context of the issues actually presented. Section I answers the matters set forth in Points One, Four, Six, and Eight of Ms. Goodliffe’s brief; Section II answers the matters set forth in Points Two and Three; Section III answers the matters set forth in Point Seven; and Section IV seeks to answer any arguments which Ms. Goodliffe raised pertaining to the issue of whether the trial court abused its discretion in denying Mr. Winward’s motions for a new trial or for post-judgment relief. Mr. Winward does not respond to Point Five of Ms. Goodliffe’s brief because it is undisputed and irrelevant to the present appeal. Mr. Winward did not raise, dispute, or discuss the division of personal property in his brief or elsewhere in his appeal.

ARGUMENT

I. THE TRIAL COURT’S FINDING THAT MR WINWARD RECEIVED MORE THAN \$630,000 IN ADVANCEMENTS MUST BE REVERSED BECAUSE THE UNDISPUTED FACTS SHOW THAT THE STATUTORY REQUIREMENTS FOR AN ADVANCEMENT WERE NOT MET.

Ms. Goodliffe incorrectly suggests that “it is not relevant whether the written requirements for advancements were met in this case.” Brief of Appellee 29. In reality, whether the trial court applied the statutory standard for charging Mr. Winward with receipt of hundreds of thousands of dollars in advancements is not only relevant but is a critical issue on which this appeal turns.

A. The Terms of the Winwards’ Trusts Speak for Themselves and Do Not Remedy the Fact that Mr. Winward Has Been Improperly Charged with Advancements.

In her brief, Ms. Goodliffe devotes nearly six pages to laying out the terms of the Myrtle Winward Trust and the Richard E. Winward Trust. She spends a substantial part of her argument interpreting the meaning of the word “assets,” which appears in both trust documents. She claims that all assets received by Mr. Winward from his parents must be accounted for to make an equal distribution of trust property. *See* Brief of Appellee 12-13 (“[I]t would make no difference whether the asset was in the form of a loan, a gift or any other designation of the asset.”).

Interestingly, Mr. Winward does not dispute the language appearing in the trust agreements. In fact, the statement of facts in his opening brief closely mirrors the detailed description in Ms. Goodliffe’s brief. And regardless whether the parties disagree on the interpretation of the trusts’ terms, one fact is undisputed: The court erroneously found—

on two occasions—that Mr. Winward received \$630,443 in advancements, which finding resulted in a judgment against Mr. Winward. Charging one with advancements requires strict adherence to the statutory requirements as stated in *Young v. Young*. See 1999 UT 38, ¶ 24, 979 P.2d 338 (“[T]o qualify as an advancement, the property given must have been owned by the decedent and *there must be a writing declaring that the property given was an advancement.*”) (emphasis added). The trial court did not apply the statutory standard in this case. Thus, a reversal of the judgment entered against Mr. Winward is not only warranted, it is mandated.

Ms. Goodliffe asserts that “[a]fter the trusts were created on September 12, 1980, both Richard E. Winward and Myrtle Winward held their assets and the trust assets jointly.” Brief of Appellee 14. She gives no citation for this statement. Moreover, she makes the illogical conclusion that because Richard and Myrtle Winward maintained *some* joint accounts that *all* their personal assets were necessarily trust assets. This conclusion is inaccurate and inconsistent with both the evidence presented and the trial court’s findings. See e.g., Exhibit 13: Tabs 4, 7, Appellant’s Addendum J (revealing checks made from personal accounts). Judge West found that Richard and Myrtle Winward made some payments from their trust accounts, but he in no way found that the trust assets and individual assets belonging to the Winwards were one and the same. See R. 361:110 (stating that “some of these monies were taken out of some sort of an account that was listed as trustees”). Regardless whether the Winwards held joint accounts, it does not follow that all assets Mr. Winward received from Richard and Myrtle Winward

are necessarily assets received from the trusts, which, under the terms of the trusts, are to be taken into account in dividing the Myrtle Winward Trust.

B. Ms. Goodliffe Does Not Refute the Lack of Any Writing Establishing an Advancement to Mr. Winward.

Ms. Goodliffe incorrectly states that “Winward’s entire argument relating to advancements is based on his conclusion that the Richard E. Winward and Myrtle Winward Trust each included a provision allowing for express advancements to be taken into account when dividing the assets among the beneficiaries.” While it is true that the Myrtle Winward Trust specifically mentions “advancements,” Mr. Winward’s appeal is not about interpreting the trust language; his appeal is of the trial court’s findings that charged him with advancements without any writing establishing them as such.

In her brief, Ms. Goodliffe takes completely contradictory positions. In one breath she admits that the trial court used the term advancement in its ruling and findings. *See* Brief of Appellee 26 (“Judge West did use the word ‘advancements’ in his Findings and Ruling.”). In the next breath, she maintains that “[t]he trial court did not make a finding that Winward had received an advancement on his inheritance.” Brief of Appellee 28. Even a cursory review of the record establishes that the trial court found, not once but twice, that Mr. Winward had received advancements in the absence of any legally recognized writing in support. R. 216, 218-19, 339-40.

It cannot be denied that the sums of money charged to Mr. Winward were called “advancements.” First, the trial court’s findings clearly state that “Kenneth E. Winward received an advancement of trust monies.” R. 215, ¶ 9, Appellant’s Addendum D.

Further, the trial court's decision unmistakably finds that "Plaintiff received \$630,443.00 in advanced trust monies." R. 192, Appellant's Addendum C. Finally, when given the chance to correct a legal error, the trial court expressed that it was "satisfied that its initial Ruling on 'advancements' was correct." R. 340, Appellant's Addendum E. If, as Ms. Goodliffe stated in her brief, "Judge West also stated that the evidence was clear to him that the money given to Winward was not an express advance," then there is an additional reason the trial court's judgment must be reversed. Brief of Appellee 26.

Because Ms. Goodliffe cannot circumvent the trial court's findings and decisions, she attempts to re-write them in order to avoid the legal error which clearly exists. *See* Brief of Appellee 9 ("Judge West's comments clearly demonstrate that he was not talking about an advancement in the legal sense, but merely referring to assets that had been received by Winward from the trust."). Again, she notes "he was not talking about an advancement in the legal sense, but merely referring to assets that had been received by Winward prior to distribution of the Trusts." *Id.* at 26; *see also id.* at 29 ("'Advancement' was not used as a term of art, but merely as another way of saying that Winward had received assets which were not gifts."). Her creative interpretation of what the trial court judge "really meant" cannot supplant the clear and unambiguous language that appears in the orders and judgment. Ms. Goodliffe's suggestion that a state court judge would use a word, while disregarding the legal implications associated with that word, is absurd.

Ms. Goodliffe asserts that the trial court found the money allegedly received by Mr. Winward to be a loan. *See* Brief of Appellee 28-29 ("The Court specifically found that the monies that he received were loans, not gifts or advancements."); *Id.* at 29

(“Judge West concluded that Winward did not receive any gifts or advancements and that all of the monies he received were loans”). Significantly, she provides no record citation for this fact. A review of the trial court’s findings reveals that there is no reference to a loan; however, the term advancement is used. Moreover, whether the money was a loan is immaterial. Ms. Goodliffe’s statement that “any assets received by either one of the children must be accounted for” does not change the trial court’s error in finding that Mr. Winward received hundreds of thousands of dollars in advancements and only serves to confuse the issues. Simply characterizing the money given to Mr. Winward as a loan instead of an advancement does not eradicate the clear and unmistakable error.

In her brief, Ms. Goodliffe attacks as incorrect Mr. Winward’s position regarding the requirements for proving an advancement; yet, she cites absolutely no case law or authority allowing any exception to the statutory requirements. *See* Brief of Appellee 26. *Young v. Young*, 1999 UT 38, 979 P.2d 338, remains the controlling Utah case on the issue of advancements and prescribes only three avenues for establishing an advancement. Although Ms. Goodliffe supplied a nice summary of the case, she completely ignores its holding and the requirements stated in *Young*. The facts in that case are nearly identical to the facts at issue here, and there is no basis on which to disregard its statement of the law. Specifically, it constitutes legal error for a trial court to find that money received by trust beneficiaries is an advancement against their inheritance if the statutory criteria for advancements is not applied or analyzed in the findings. *See Young*, 1999 UT 38, ¶ 25.

Ms. Goodliffe cannot deny that the statutory requirements for charging one with receipt of an advancement are unsatisfied in this case. First, she admits that the trust document fails to provide for specific deductions from Mr. Winward's share as a beneficiary:

There was no evidence, nor any claim during the course of the trial that Winward or Goodliffe received any assets by the express condition of the instrument (trust). The only express condition of the trusts is under Article 4, relating to policies of insurances. There was no testimony by either party that insurance proceeds existed or were at issue in this case.

Brief of Appellee 25. Second, Ms. Goodliffe fails to put forth any evidence of a contemporaneous writing from Myrtle Winward. That failure is understandable because there was no such evidence. The closest thing she references is a statement of the trial court, referring to money allegedly given to Mr. Winward, that "the [Richard and Myrtle Winward] never wrote it off." Brief of Appellee 26. Nonetheless, it is impossible to prove a positive with a negative. Finally, Ms. Goodliffe identifies no written acknowledgement from Mr. Winward that would support the finding of advancements charged against him. The lack of dispute between the parties on the above three elements, which remains the law in Utah, provides sufficient grounds for reversing the trial court's judgment.

C. Regardless of Any Involvement Mr. Winward May Have Had with the Club Manhattan, Expenses Attributable to the Club Cannot Be Deemed Advancements to Mr. Winward.

Ms. Goodliffe's argument about the Club Manhattan is cryptic and vague as far as who received money from Richard and Myrtle Winward and who had the responsibility to repay it. *See* Brief of Appellee 22. The only definitive amount she claims was

transferred to Mr. Winward in relation to the club is \$69,000 from the sale of the club:

“The evidence clearly shows that Winward had an ownership interest in the club and received \$69,000 from the sale of the club.” Brief of Appellee 23. In support of her statement, she points to the trial testimony of Mr. Winward’s ex-wife and an Offer to Purchase the Club Manhattan.

Neither of these references contradicts the undisputed fact that Mr. Winward never had an ownership interest in the club. R. 361:56, 85, 87, 91; 267. Interestingly, Mr. Winward was never asked whether he had an ownership interest in the Club Manhattan—in all probability because Beth Winward was listed in every official instrument as the owner. R. 361:54-56, 85, 87, 91. Mr. Winward’s signature on a document as “Seller” of the club is irrelevant. Furthermore, Beth Winward could not with certainty testify where the \$69,000 from the sale ultimately went. *See* R. 361:90 (stating that “[i]t was given to Ken—or to Dick”). Ultimately, the trial court properly excluded the \$69,000 from the amount charged to Mr. Winward. R. 192, Appellant’s Addendum C; R. 365:11 (“I took out the \$69,000 that was attributable to the Club Manhattan.”).

Likewise, the additional transfers of money associated with the Club Manhattan cannot and should not be charged to Mr. Winward. Although Ms. Goodliffe identified numerous checks during trial which Richard and Myrtle Winward paid to various vendors associated with the Club Manhattan, the evidence does not indicate that Mr. Winward personally received any of the money. R. 361:165-66 (denying that Mr. Winward ever told her that he received any money from his parents to run the Club Manhattan). Among the amounts charged to Mr. Winward is \$25,000 that Richard and Myrtle Winward

loaned to Jerry Gatto so Mr. Gatto could purchase the Club Manhattan. *See* R. 192-198; 361:176. During trial, Ms. Goodliffe was questioned about the transaction with Jerry Gatto:

Q. This is a loan not to you or your brother, but to somebody else?

A. Jerry Gatto.

Q. Did it have anything to do with the Club Manhattan?

A. Yes.

Q. What did it have to do with the Club Manhattan?

A. Jerry Gatto borrowed \$25,000 from Richard and Myrtle to—what he did with it, I don’t know, but it was towards whatever he initially was going to do with the Club Manhattan, in purchasing the club.

361:176. Beth Winward also testified that \$25,000 was loaned to Jerry Gatto, not Mr. Winward— in spite of counsel’s efforts to lead her to identify Mr. Winward as the recipient. *See* R. 361:65-66. When asked if Mr. Winward ever received the \$25,000, Beth Winward stated “No. No.”). R. 361:67-68. The trial court struggled to find why Mr. Winward was responsible for a loan to another person. *See* 361:178 (“I’m having a hard time understanding why Jerry Gatto borrowed \$25,000 from your parents that has anything to do with this estate.”). That is because that transaction is one of many that cannot under the law be charged to Mr. Winward as advancements.

In attempting to establish that Mr. Winward held an ownership interest in the Club Manhattan, Ms. Goodliffe overlooks the reality that an entity such as a club is its own legal person, capable of incurring liability or debt separate from its managers. Specifically, Ms. Goodliffe does not respond to the case law put forth that “no organizer, member, manager, or employee of a company is personally liable . . . for a debt, obligation, or liability of the company.” *Daines v. Vincent*, 2008 UT 51, ¶ 40, 190 P.3d

1269 (quoting Utah Code Ann. § 48-2c-601 (2007)) (finding no evidence that defendant acted “in anything other than a representative capacity”). Even assuming *arguendo* that the monies which Richard and Myrtle Winward applied to the Club Manhattan or for its benefit were loans that had to be paid back and that Mr. Winward had an ownership interest, any such loan would have been to the Club Manhattan and not to Mr. Winward individually.

Ms. Goodliffe’s depiction of Mr. Winward as a criminal is utterly false. Mr. Winward has no such criminal record as suggested by Ms. Goodliffe on page 28 of her brief. *See* Brief of Appellee 28 (“He also found, that The Club Manhattan was a sham and that the reason they put the license in Beth Winward’s name was because of Ken Winward’s bankruptcy or criminal record.”). A review of the citation given for this defamatory statement reveals that Judge West made no conclusion about a bankruptcy or criminal record. *See* R. 365:12-13 (expressing in uncertain terms that there was some reason the license was not put into Mr. Winward’s name). The only reason for including that slanderous remark is to disparage and humiliate Mr. Winward. That reference should be stricken and ignored.

D. Mr. Winward Has Met His Burden of Marshaling the Evidence in Support of the Court’s Erroneous Findings on Advancements.

Mr. Winward has challenged the trial court’s finding that he received \$630,433 as an advancement of trust monies. In so doing, Mr. Winward marshaled the evidence in support of the court’s finding as required. *See* Appellant’s Brief 20; *Young*, 1999 UT 38, ¶ 15 (explaining appellant’s burden).

The basis for the trial court's finding is that Mr. Winward' parents kept some financial records of transactions involving or remotely related to Mr. Winward. R. 362:342. The trial court also noted that Richard and Myrtle Winward "went to great lengths to record the monies that were given to Mr. Winward" and the lack of "written forgiveness of all of these debts and obligations." *Id.* Additionally, the trial court found "anticipation that these [transactions] were either a loan or that they were going to be accounted for eventually." *Id.* Regarding advancements associated with the Club Manhattan specifically, there was testimony that Mr. Winward had some involvement in operating the club, but not as an owner or officer. R. 267; 361:56, 85, 87, 91. Beth Winward was at all times the registered owner of the club "on behalf of Myrt and Dick" as evidenced by her own testimony. R. 361:85, 87, 91. Beth Winward also acted as the president of the Club Manhattan. R. 267. Part of the amount charged to Mr. Winward as advancements was \$228,494.79 received from the sale of Myrtle Winward's home. Mr. Winward admitted owing this debt to the Myrtle Winward Trust in his Complaint and by way of stipulation. R. 3, 193. In spite of the above-mentioned facts, the trial court's finding on advancements is incorrect and in conflict with longstanding Utah case law.

II. THE TRIAL COURT ABUSED ITS DISCRETION THROUGH THE ADMISSION OF AND RELIANCE ON EVIDENCE TO WHICH MR. WINWARD CONTINUALLY OBJECTED.

A. Mr. Winward's Specific Objections and Continuing Objections Identified and Preserved the Evidentiary Issues for Appeal.

Ms. Goodliffe inaccurately states that "[t]he only objections made by Winward as to any of the evidence presented during the trial was [sic] that it was not material or

relevant.” Brief of Appellee 15-16. She also denies that there were any objections to testimony about Exhibit 3 or to portions of Exhibit 13. Brief of Appellee 17-18. To the contrary, Mr. Winward made multiple objections and continuing objections, which the trial court acknowledged and referenced. *See e.g.*, R. 361:92 (continuing objection to evidence and testimony concerning financial transactions that were “in gifts or loans that were not documented in the trust”); R. 361:106-07 (objection to Exhibit 3); R. 361:121-22 (recognition of continuing objection); R. 361:58, 152 (continuing objection to Exhibit 13).

A continuing objection to a witness’ testimony lodged during trial proceedings is enough to apprise the trial court judge of problems in the testimony and preserves the objection for appeal. *State v. Wareham*, 772 P.2d 960, 962-63 (Utah 1989) (analyzing the requirements of *State v. Lesley*, 672 P.2d 79 (Utah 1983), and finding them fulfilled). Here, Mr. Winward’s counsel made and was granted a continuing objection to the admissibility of and testimony about Exhibit 13 (also referred to as Book No. 2). R. 361:57-58, 152. Although Ms. Goodliffe’s counsel and the trial court call the objection a relevancy objection, Mr. Winward never identified it as that or limited it to that ground. R. 57-58, 152. Mr. Winward’s counsel also made a second continuing objection “as to any money that was in gifts or loans that were not documented in the trust,” which objection the trial court also allowed and acknowledged. R. 361:92. Ms. Goodliffe claims that this second continuing objection “does not constitute an objection to the foundation for or the authentication of documents introduced as evidence.” Brief of Appellee 18.

The specific ground for an objection can be inferred from context. *See State v. Johnson*, 2006 UT App 3, ¶ 13, 129 P.3d 282 (noting that the reliability of a report could not be raised on appeal because there was no specific objection *and* the ground for the objection was unclear from its context). Moreover, an objection to a document or exhibit, even if not specific, constitutes an objection “to the essential foundation necessary under the circumstances for admission.” *State v. Abel*, 600 P.2d 994, 1000 n.1 (Utah 1979) (holding that defendant’s failure to object to the admission of certain test results did “not preclude defendant from raising the issue of admissibility” on appeal).

In this case, two of Mr. Winward’s objections at trial were continuing objections that the context shows pertained to the authenticity and foundation of certain documents. R. 361:57-58, 92. One continuing objection was made at the time Ms. Goodliffe’s counsel introduced Exhibit 13, a binder full of handwritten notes and documents which were not properly authenticated and lacked foundation. Mr. Winward’s counsel made a second continuing objection at the time Ms. Goodliffe took the witness stand to follow up on Beth Winward’s testimony about expenses related to the Club Manhattan. R. 361:92. Thus, Mr. Winward properly preserved evidentiary issues for appeal through his continuing objections.

Ms. Goodliffe takes the position that a motion in limine does not constitute an objection if appropriate objections are not made “when evidence is presented at the time of trial.” Brief of Appellee 19. However, a motion in limine can act “as a continuing objection to the admission of the evidence at issue” if the trial court does not rule on the motion during the party’s case. *See Franklin v. Stevenson*, 1999 UT 61, ¶ 23, 987 P.2d 22

(treating motion in limine as requisite objection). Here, Mr. Winward filed a motion in limine that sought to exclude any evidence of “gifts made to either party that were not designated in writing signed by the Trustor [Myrtle Winward] as express advancements or insurance or joint tenancies in accordance with the terms of the trust[.]” Appellant’s Addendum A. As noted by Ms. Goodliffe, this motion was not heard or decided before or during trial. Brief of Appellee 19. Therefore, the motion acted as a continuing objection—in addition to the others which were made during trial.

B. The Statute of Frauds Applies to This Case Because By Charging Mr. Winward with Advancements Made to the Club Manhattan, the Trial Court Requires Mr. Winward to Answer for the Debts of Another.

Surprisingly, Ms. Goodliffe spends more than two pages in her brief discussing the inapplicability of the statute of frauds, but she is missing the point. Although the statute of frauds is most commonly used to bar claims from being brought on the basis of a contract that is not reduced to writing, the doctrine was introduced in this case simply to illustrate that some of the evidence admitted and relied on by the trial court is within the statute frauds and, therefore, unreliable and inadmissible. In other words, Mr. Winward asserted the statute of frauds as an evidentiary argument rather than a dispositive argument.

Nevertheless, the statute of frauds is directly applicable to this case because, by allocating certain payments to Mr. Winward, the Court has required him to answer for the debts of another—in this case, the Club Manhattan, which is a completely separate legal entity. *See* R. 361:85 (testimony of Beth Winward that the club was a separate

organization from Mr. Winward personally). Ms. Goodliffe claims that “[t]he issues in this case did not deal with the assumption of a debt of another.” Brief of Appellee 20. One wonders, then, how she can insist that Mr. Winward is liable for hundreds of thousands of dollars put into the Club Manhattan, a club which he neither owned nor represented. *See* R. 198 (chart prepared and introduced by Ms. Goodliffe). Ms. Goodliffe points to no evidence that Mr. Winward agreed to personally guarantee or assume any debts of the Club Manhattan to the Myrtle Winward Trust or anyone else.

Ms. Goodliffe apparently misread Mr. Winward’s brief as evidenced by her statement that “Winward cites the case of *Finlayson v. Finlayson* to support his argument of the application of the Statute of Frauds.” Brief of Appellee 20 (citation omitted). That is incorrect. Rather, *Finlayson* was put forth only for the proposition that enforcement or recognition of a personal loan requires documentation. *See Finlayson v. Finlayson*, 874 P.2d 843, 848 (Utah Ct. App. 1994) (stating that trial court’s conclusion that certain money represented a loan was based on the existence of a signed and dated note as well as testimony from the debtor).

As a response to the argument that the statute of frauds is applicable to protect Mr. Winward from liability for the Club Manhattan, Ms. Goodliffe identifies the case of *Haws v. Jensen*, 209 P.2d 229 (Utah 1949). Interestingly, that case has absolutely no relevancy to the facts or issues in this case. *Haws* involved the imposition of a constructive trust where a mother delivered a warranty deed to her daughter. There was no actual trust and no fiduciary relationship. In this case, it is undisputed that an actual *inter vivos* trust was created. Thus, there is no indication of or need to establish a

constructive trust. At no time has Ms. Goodliffe claimed that Mr. Winward received funds as a constructive trustee. She attempts to extend the holding in *Haws* to the present case even though the facts are entirely incongruent.

Likewise, the Utah Code sections cited by Ms. Goodliffe concerning the fiduciary duties of a trustee are inapplicable to the transactions at issue in this case. Mr. Winward was not a trustee of any trust until 1993. All the transactions which Ms. Goodliffe claims show a breach of Mr. Winward's duties as trustee occurred *before* he assumed the role of trustee.

III. THE UTAH STATUTE GOVERNING PREJUDGMENT INTEREST IS INAPPLICABLE IN THIS CASE BECAUSE THE TRIAL COURT FOUND MR. WINWARD RECEIVED AN ADVANCEMENT, NOT A LOAN, AND THE LOSS CALCULATIONS ARE LEGALLY UNSUPPORTABLE.

While prejudgment interest may be properly imposed on a loan, such is not the case where one receives an advancement on his inheritance. *See* Utah Code Ann. § 15-1-1 (2010) (mentioning the default legal interest rate of 10 percent applies “for the loan or forbearance of money” without mentioning the situation of an advancement). That is because the term advancement is mutually inconsistent with the term loan. *See Godfrey v. Godfrey*, 854 P.2d 585, 589 n.1 (Utah Ct. App. 1993) (clarifying that a party cannot claim an advancement is also a loan). Prejudgment interest is likewise inappropriate when it is based on unreliable and conflicting evidence presented in support of a damages claim. *AE, Inc. v. Goodyear Tire & Rubber Co.*, 576 F.3d 1050, 1059 (10th Cir. 2009) (denying prejudgment interest under Utah's standard for prejudgment interest, which focuses on measurability and calculability).

In this case, it is clear that the trial court charged Mr. Winward with advancements of trust monies in the total amount of \$630,443. R. 216, 218-19. The trial court did not award prejudgment interest on the full amount which it determined had been advanced to Mr. Winward. Rather, interest was imposed only on the amount of \$216,201 which the trial court concluded Mr. Winward owed the Myrtle Winward Trust because it exceeded what the court determined “[Mr. Winward] would have received under the trust.” R. 196; *see also* R. 195, 222-23. Implicit in the court’s actions is the fact that prejudgment interest is inappropriate where there has been an advancement of monies. *See* R. 195 (refusing to punish Mr. Winward “for using his own money”). The trial court erred in awarding prejudgment interest at all on sums which were found to be advancements to Mr. Winward.

In any event, charging prejudgment interest against Mr. Winward is improper and inappropriate in this case because there were no legal bases for charging him with the receipt of money from the Myrtle Winward Trust in the first place. Had the trial court adhered to the legal requirements for finding advancements, the sum charged to Mr. Winward as an advancement would have been greatly reduced.

Notwithstanding Ms. Goodliffe’s assertions, the testimony and evidence supporting the trial court’s ruling on advancements is far from precise. Even though the unreliable chart prepared by Ms. Goodliffe displays certain dollar figures, these figures were speculative at best and do not meet the standard for advancements from the Myrtle Winward Trust. For example, Ms. Goodliffe could not with accuracy testify whether Mr. Winward personally received the \$69,000 from the sale of the Club Manhattan. R.

361:90. Additionally, the trial court acknowledged that only some of the check copies on which it based its ruling were even tied to the trust at all. R. 361:110. There cannot be any mathematical accuracy in calculating a loss to the trust where the amounts charged to Mr. Winward were legally and factually improper. Because the amount charged to Mr. Winward is grossly overstated and legally inaccurate as argued above, no prejudgment interest award to Ms. Goodliffe is appropriate in this case, and the trial court's award of prejudgment interest constitutes error.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MR. WINWARD'S MOTIONS FOR POST-JUDGMENT RELIEF AND A NEW TRIAL.

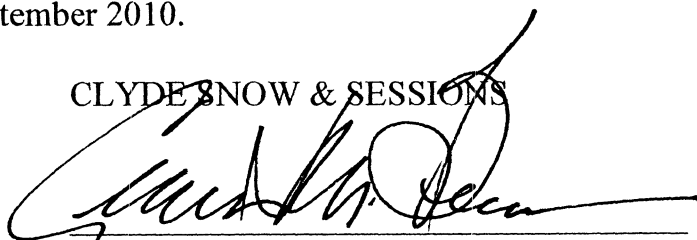
The trial court, of its own accord, admitted from the bench multiple times its own error in entering a judgment against Mr. Winward. *See* R. 365:72 (“[N]owhere in my ruling did I award a judgment.”); 365:72-73 (“[N]owhere in my ruling do I award a judgment because I struggled a little bit with how I could because it’s a suit by one individual against another individual, and nothing was brought on the basis of the trust.”); 365:73 (“How does she get a judgment on behalf of the trust when the trust is not a party before me.”); 365:75-76 (“I specifically did not award a judgment because I struggled with the point that the trust wasn’t involved.”). As this case now sits, Mr. Winward has a judgment of record against him for \$560,756 plus interest and attorney’s fees. Amazingly, Ms. Goodliffe does not respond to or address Judge West’s statement that he did not intend to issue a judgment. On that ground alone, this case should be reversed.

CONCLUSION

In spite of Ms. Goodliffe's attempt to muddy the issues, this Court must reverse and vacate in every respect the judgment and orders of the trial court because of the legal errors which exist. Judge West charged Mr. Winward with more than \$630,000 in advancements. No matter how they are characterized, the trial court's findings on advancements are not supported by the evidence and do not meet the specific statutory and legal requirements for an advancement. Mr. Winward's counsel made appropriate and timely objections to unreliable evidence introduced during the trial such that the trial court had notice and an opportunity to correct its errors. Additionally, the trial court was asked to reverse its judgment and grant Mr. Winward a new trial, which it refused to do. Because the prejudicial errors committed by the trial court cannot be "fixed," the case should be remanded for a new trial pursuant to the specific statutory and legal requirements hereinabove discussed and reviewed.

Dated this 15th day of September 2010.

CLYDE SNOW & SESSIONS

A handwritten signature in black ink, appearing to read "Clark W. Sessions", is written over a horizontal line.

CLARK W. SESSIONS

SARAH L. CAMPBELL

Attorneys for Plaintiff/Appellant

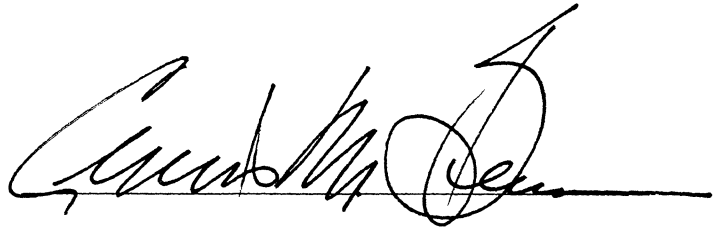
Kenneth E. Winward

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September 2010, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** were mailed via first-class U.S. mail, postage prepaid to:

Robert A. Echard
2650 Washington Blvd., Suite 201
Ogden, UT 84401

Attorney for Defendant/Appellee

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