

2002

Marc Smith v. Grand Canyon Expeditions CO,
Martin Mathis, Michael Denoyer, Ronald R. Smith,
Donald Saunders, John Does, Jane Does : Brief of
Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MARC SMITH,

Plaintiff/
Appellant,

vs.

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

Defendant/
Appellees.

Subject to Assignment to
the Court of Appeals

Case No. 20010667-SC

BRIEF OF APPELLEE
(Filed Under Seal)

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

The Honorable K. L. McIff, Presiding

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UTAH SUPREME COURT

AUG 23 2002

PAT BARTHOLOMEW

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) (Michie 2001). This Court has granted the parties' Joint Petition for Permission to Appeal Interlocutory Order, dated September 26, 2001, and will also hear the issues determined to be final by the Sixth Judicial District Court in its Order dated August 23, 2001. See Errata Addendum and Supplemental Addendum (hereinafter "Add.") at 2040-2041, 2057-2058.

II. STATEMENT OF THE ISSUES

The issues raised in this appeal and cross-appeal are stated below. Each of those issues was preserved for appeal in the Parties Joint Motion for Rule 54(b) Certification and joint petition for interlocutory appeal. (Record on Appeal (hereinafter "Rec." at 2070-2075.)

Appeal

1. Whether the trial court properly concluded that Appellant's claim for breach of contract and breach of the implied covenant of good faith and fair dealing arising from Appellant's voluntary resignation from GCE failed as a matter of law.
2. Whether the trial court properly concluded that Appellant's claim for breach of the implied covenant of good faith and fair dealing arising out of the stock repurchase agreement between Appellant and Grand Canyon Expedition Co. ("GCE") failed as a matter of law.
3. Whether the trial court properly concluded that Appellant may not state a claim for punitive damages under his contract cause of action.

4. Whether the trial court properly concluded as a matter of law that Appellant was not entitled to attorneys' fees as consequential damages.

5. Whether the trial court properly denied as futile Appellant's motion to amend his complaint for a third time to add a cause of action for unjust enrichment.

Cross-Appeal

6. Whether the trial court improperly denied the motion for summary judgment on Appellant's claim for breach of the implied covenant of good faith and fair dealing based upon a refund of taxes paid to GCE years after Appellant's separation from GCE.

7. Whether the trial court improperly failed to strike the affidavit and exclude from evidence the testimony of Appellant's accounting expert because his testimony could not be helpful to the trier of fact.

8. Whether the trial court improperly failed to dismiss the individual Appellees because they are not parties to any contract with Appellant.

III. STANDARD OF REVIEW

Appellees/Cross-Appellants agree with the standards of review as articulated in Appellant's brief for issues raised on appeal. For issues raised on Cross-appeal, Appellees identify the following standards of review:

- Whether the trial court improperly denied GCE's Motion for Summary Judgment on Appellant's claim for breach of the implied covenant of good faith and fair dealing based upon a refund of taxes paid to GCE years after Appellant's separation from GCE.

Standard of Review: In examining a trial court's disposition of a summary judgment motion, the trial court's legal conclusions are reviewed for correctness, without any deference to the trial court. See Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co., 844 P.2d 322, 325 (Utah 1992); Marton Remodeling v. Jensen, 706 P.2d 607, 609 (Utah 1985). "This nondeferential standard of review also applies to the threshold issue of whether there are no material issues of fact such that summary judgment is proper." Brown v. Weis, 871 P.2d 552, 558 (Utah Ct. App. 1994).

- Whether the trial court improperly failed to strike the affidavit and exclude from evidence the testimony of Appellant's accounting expert because his testimony could not be helpful to the trier of fact.

Standard of Review: A trial court's decision to admit or to exclude expert testimony is reviewed for an abuse of discretion. See Patey v. Lainhart, ¶ 33, 977 P.2d 1193 (Utah 1999); Steffensen v. Smith's Mgmt. Corp., 862 P.2d 1342, 1347 (Utah 1993).

- Whether the trial court improperly failed to dismiss the individual Appellees because they are not parties to any contract with Appellant.

Standard of Review: Because the trial court was dealing with undisputed facts, its failure to dismiss the individual Appellees amounted to a ruling of law, which should be reviewed for correctness, without any deference to the trial court. See Estate Landscape & Snow Removal Specialists, 844 P.2d at 325; Marton Remodeling, 706 P.2d at 609.

IV. DETERMINATIVE STATUTES, ETC.

None.

V. STATEMENT OF UNDISPUTED FACTS

In order to assist the Court in understanding the legal issues relevant to this appeal, Appellants provide the following statements of facts:

A. Parties and Background

1. Appellee Grand Canyon Expedition Co. ("GCE") is a Utah corporation engaged in the business of running river rafting trips in the Grand Canyon. (Rec. at 403, 427.)

2. Appellant Marc Smith is a former officer, director and shareholder of GCE. (Rec. at 427.)

3. The Individual Appellees are or were shareholders in GCE.¹ Michael Denoyer ("Denoyer") and Martin Mathis ("Mathis") are also officers and directors of GCE. (Rec. at 426-427.)

4. GCE was formed in late 1986 to purchase some of the assets of a similarly named company, Grand Canyon Expeditions, Inc. ("Grand Canyon") and Ronald R. Smith Co. Grand Canyon was owned by Appellant's brother, Ronald R. Smith ("Ron Smith"). (Rec. at 402-403, 426.)

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

B. Appellant's Employment with GCE

1. The Employment Agreement

5. Appellant became the vice president of operations for GCE and signed an employment agreement (the "Employment Agreement") with the Company. (Rec. at 324-331, 425.) Denoyer and Mathis executed identical agreements. (Rec. at 425.)

6. The Employment Agreement provided that Appellant was to remain in the employ of GCE from January 1, 1987 to December 31, 1987. The employment term could be renewed at the request of GCE and mutual consent of the parties. (Rec. at 330, 425.)

7. The Employment Agreement provided that GCE could terminate Appellant's employment "at any time, with or without cause." (Rec. at 329, 424.)

8. The Employment Agreement also contained a noncompetition clause under which Appellant agreed not to own or participate in any company that ran river trips in the Grand Canyon for a period of two years after the termination of his employment with the company. (Rec. at 327-328, 424.)

2. The Buy-Sell Agreement

9. Appellant also signed an agreement (the "Buy-Sell Agreement") requiring him to sell and GCE to buy his stock upon the termination of his employment with the Company. (Rec. at 288-293, 424.) Denoyer and Mathis signed identical agreements. (Rec. at 425.)

10. The Buy-Sell Agreement provided that if GCE bought the stock more than four years after the date of execution of the Buy-Sell Agreement, GCE would pay Appellant 140 percent of the net book value of Appellant's stock. (Rec. at 292, 424.)

11. The Buy-Sell Agreement further provided that the departing shareholder's repurchase payment was to be calculated "conclusively" by the Company's accountant based upon generally accepted accounting principles ("GAAP"). (Rec. at 292.)

C. Separation of Appellant's Employment at GCE

12. Due to numerous deficiencies in Appellant's performance, his relationship with the other officers and shareholders of GCE became strained. (Rec. at 418-423.)

13. In June 1992, Appellant met with Denoyer and Mathis to discuss these problems. (Id.)

14. At this meeting, Mathis and Denoyer expressed to Appellant their frustrations and told him that the relationship was not working as it should. Appellant's conduct, however, did not improve. (Id.)

15. About this time, Denoyer determined that Appellant would have to leave the Company. Denoyer wanted to wait until the end of the season to address the matter rather than disrupt the Company during the season. (Id.)

16. Appellant, however, continued to raise the issue and demanded a resolution of the conflict. (Id.)

17. Consequently, in July 1992, Denoyer told Appellant that he would have to leave the Company. (Id.)

18. After learning of Denoyer's decision, Appellant called Don Saunders in an attempt to reverse that decision. (Id.)

19. Because it was clear to Appellant that Saunders would support Denoyer's decision, Appellant negotiated a severance payment in addition to the sale of his stock in GCE, as mandated by the Buy-Sell Agreement. (Rec. at 417.)

20. Appellant also negotiated a waiver of the noncompetition clause in the Employment Agreement. (Id.)

21. Appellant also negotiated to have the termination of his employment treated as a resignation, rather than an involuntary termination. (Rec. at 217, 417.)

22. Appellant's agreement with GCE was memorialized in a writing (the "Separation Agreement") signed by Denoyer on behalf of GCE and by Appellant. (Add. at 1495-98.)

23. Appellant received the severance payment and a down payment for the purchase price of his stock in GCE, which he negotiated, and tendered his stock certificates to the Company. (Rec. at 417.)

24. Appellant also received and accepted periodic payments for the balance of the purchase price of his GCE stock. Appellant continued to be paid and accepted payments for years after this lawsuit was filed. (Id.)

D. Accounting Issues and the Net Book Value of GCE

1. Background

25. GCE's accountant from the company's inception in 1986 to and including the time of Appellant's separation of employment in July 1992 was Nyle Willis. Willis is

a certified public accountant who resides and practices in Kanab, Utah. (Rec. at 1737.85-1737.86, 1737.120.)

26. Willis was responsible, among other things, for preparing GCE's periodic and annual balance sheets, its income tax returns, and the financial reports required by the National Park Service ("NPS") in connection with GCE's river-running operation. (Rec. at 1737.85.)

2. Covenant Not-to-Compete

27. In connection with its acquisition of certain assets from the old Grand Canyon, GCE required the owner of the old company, Ron Smith, to execute a covenant not-to-compete. (Rec. at 1182-1183, 1418-1419.)

28. In consideration for his covenant not-to-compete, GCE agreed to pay Ron Smith \$1 million over a period of four years. Mr. Willis booked this covenant not-to-compete and amortized it over its four-year term. (Rec. at 1182, 1423.)

29. Appellant benefited from a reduction of his personal tax liability each year as a result of the amortization of this covenant. (Rec. at 1871.)

30. The arms-length transaction between GCE and Grand Canyon did not assign a value to the river running permit that was to be assigned to GCE. (Rec. at 1363.) This was a function of the fact that National Park Service regulations in effect at that time did not permit a transfer of river running permits for substantial consideration. (Rec. at 1165, ¶4.) In any event, this permit was set to expire in a few years. (Rec. at 1176-1179.)

3. Sobek/ White Water Transaction

31. GCE began negotiations in 1990 for the acquisition of certain assets of another river running company, Sobek/White Water ("Sobek"). An agreement was reached in 1990 that was closed in September 1991. (Rec. at 1825-1839, 1872.)

32. This transaction involved a number of accounting entries made by Willis in 1991 which are disputed by Appellant. These entries are described in great detail in the record below. (Rec. at 1805-1811, 1870-1872.)

33. The 1991 year-end accounting records of GCE were prepared by Willis months before Appellant's separation of employment. Willis had no knowledge of any potential separation of employment or stock purchase by Appellant at the time he prepared those records. (Rec. at 1737.114.)

34. Appellant's accountant, Derk Rasmussen, admitted that the treatment of these assets did not necessarily violate GAAP. He also stated that Appellant benefited from a reduction in tax liability in this Subchapter S corporation at the end of 1991 as a direct result of the amortization of certain of those assets. (Rec. at 1871.)

35. The Sobek transaction resulted in additional stock that was distributed among GCE's shareholders, including Appellant. (Rec. at 1870-1871.)

36. The remaining accounting issues raised on appeal are also described in detail in the record below. (Rec. at 1737.114-1737.119, 1870-1872.)

4. Arizona Tax Refund

37. From its inception in 1986 to and including the time of Appellant's departure in July 1992, GCE paid an admissions tax (the "Admissions Tax") to the State

of Arizona for river trips in Arizona. This tax was passed on to the customers of GCE through an addition to their trip fare. (Rec. at 1737.50, 1737.114.)

38. The Admissions Tax was challenged by another river rafting company, Moki Mac River Expeditions, Inc. (“Moki Mac”). See Department of Revenue v. Moki Mac River Expeditions, Inc., 773 P.2d 474 (Ariz. App. 1989). After a series of administrative hearings and decisions, in January 1989, the Arizona Court of Appeals upheld the Admissions Tax. The Arizona Supreme Court denied certification.

39. In 1990, GCE became embroiled in a dispute with ADOR over payment of a sales tax for food purchased outside Arizona, but consumed in Arizona (the “Sales Tax”). GCE retained Arizona tax counsel, Ann Dumenil, who prepared a protest regarding this Sales Tax issue. Dumenil also included a request for a refund of overpaid admissions taxes as other taxpayers were still challenging the validity of this tax on river running companies. GCE's tax counsel advised the company, however, that it likely would lose the Admissions Tax issue and, in any event, any refund probably would have to be returned to customers who had been billed for the tax as part of their trip payments. The record below includes correspondence between Dumenil and GCE concerning this issue. (Rec. at 1737.107-1737.114, 1868-1870.)

40. Appellant was aware long before the termination of his employment that GCE had applied for a refund of the Admissions Tax. In fact, Appellant was kept apprised throughout his tenure at GCE of the status of this appeal. (Rec. at 1794, 1870.)

41. Significantly, GCE's accountant, Willis, was very familiar with the Admissions Tax issue long before Appellant's separation and buyout. Despite his

knowledge of the refund request, it was not identified as an asset on the books of GCE in 1990 when the protest was filed, at any time between then and the time of Appellant's separation from employment in July 1992 or at any time until the refund was made in 1995 and 1996. Willis did not consider the tax protest to be a GAAP asset that should have been included in Appellant's buyout regardless of its status at that time. (Rec. at 1807-1809, 1868.)

42. At the time of Appellant's departure from GCE in July 1992, GCE was continuing to collect and pay the Admissions Tax to the State of Arizona and expected to continue paying the tax without abatement or refund. (Rec. at 1737.48, 1737.109.)

43. On August 21, 1991, Denoyer called Dumenil to advise her that he did not want to continue litigating the issue of a refund of the Admissions Tax. This call is confirmed by Dumenil, as well as by a handwritten note on GCE's copy of Dumenil's correspondence of July 15, 1991, which states: "Mike (Denoyer) called her Aug 21, and we will not request refund." (Rec. at 1737.12-1737.13, 1737.111.)

44. Dumenil did not formally withdraw the protest nor did she advise GCE that she had not withdrawn it. Shortly after Appellant's separation from GCE, Denoyer received a letter from Dumenil dated August 20, 1992 advising him that a hearing had been scheduled. (Rec. at 1737.9-1737.10, 1737.21-1737.22, 1737.48, 1737.110-1737.111.)

45. Dumenil's letter noted and confirmed the earlier discussions between Denoyer and herself wherein Denoyer stated that GCE had no wish to continue to pursue a possible refund claim. She then indicated that she had not formally withdrawn the

protest in the event another river-running company won that legal issue. (Rec. at 1737.9-1737.10, 1737.21-1737.22, 1737.48, 1737.110.)

46. Dumenil concluded by reiterating the significant problems confronting GCE in obtaining a refund. She asked Denoyer to reconfirm that GCE did not want to pursue a refund and his instruction to withdraw the refund claim. (Rec. at 1737.9-1737.10, 1737.21, 1737.48, 1737.110.)

47. Denoyer telephoned Dumenil to confirm that he did not wish to continue to pursue any possible refund claim, and he again requested withdrawal of the protest. This communication is confirmed both in a handwritten note attached to GCE's copy of the letter as well as by a memorandum prepared by Dumenil. (Rec. at 1737.7, 1737.9-1737.10, 1737.21, 1737.110.)

48. Dumenil evidently did not follow Denoyer's instructions. Instead, she recalled canceling the scheduled hearing without formally withdrawing the claim for a refund of overpaid taxes. This is reflected in her handwritten note of September 13, 1995 appearing at the bottom of her August 25, 1992 memorandum. (Rec. at 1737.7, 1737.20-1737.21, 1737.47-1737.48, 1737.109-1737.110.)

49. Dumenil did not advise GCE that she had decided on this course of action. (Rec. at 1737.21, 1737.47-1737.48, 1737.109.)

50. At or about this same time, a challenge to the Admissions Tax was raised by yet another river-running company, Wilderness World, Inc. ("Wilderness World"). This case eventually was reported as Wilderness World, Inc. v. Department of Revenue, 895 P.2d 108 (Ariz. 1995).

51. Wilderness World's appeal of a deficiency assessment was denied by the Arizona Board of Tax Appeals. Wilderness World then filed a complaint for a refund in the Arizona Tax Court. The tax court granted the Department of Revenue's motion for summary judgment on October 13, 1992. The tax court relied upon the precedent established in DOR v. Moki Mac River Expeditions, Inc., 773 P.2d 474 (Ariz. App. 1989). Ms. Dumenil had earlier advised GCE of this pending result in her letter of August 20, 1992. (Rec. at 1737.9-1737.10, 1737.109.)

52. The October 13, 1992 decision of the Arizona Tax Court simply confirmed GCE's obligation to pay the Admissions Tax to the State of Arizona. (Rec. at 1737.109.)

53. Wilderness World, however, appealed the Arizona Tax Court's judgment to the Arizona Court of Appeals, Division One. The Arizona Court of Appeals reversed the tax court, finding that the Admissions Tax did not apply to Wilderness World. Wilderness World v. Department of Revenue, 882 P.2d 1281, 1283-84 (Ariz. Ct. App. 1993).

54. The Arizona Supreme Court then heard the appeal of ADOR. In its opinion, filed on April 18, 1995, the Arizona Supreme Court found that Wilderness World did not meet the statutory prerequisites for application of the Admissions Tax. Wilderness World, 895 P.2d at 111-12 (Ariz. 1995).

55. The appeals of the initial rulings in the Wilderness World case did not arise until well after Appellant's departure from GCE. (Id. at 110; Rec. at 1737.108.)

56. GCE continued to pay the Admissions Tax to the State of Arizona until at or about the time it was notified it was entitled to a refund. This notification did not occur until September 1995. (Rec. at 1737.20-1737.21, 1737.47-1737.48, 1737.108.)

57. GCE received its first refund check from the State of Arizona from its counsel by letter dated November 1, 1995. Three other checks were subsequently received through counsel or through the State of Arizona on November 9, 1995, January 16, 1996, and May 29, 1996. (Rec. at 1737.47, 1737.107-1737.108.)

58. The total refund received by GCE from the State of Arizona was approximately \$1 million. Of this amount, pursuant to ADOR's interpretation of Arizona law in effect at the time of the refunds, GCE attempted to refund approximately \$280,000 to its customers. Some of these refunds were returned to GCE as undeliverable to the recipient and the money has been retained on GCE's books as a liability until these customers can be located. (Rec. at 1737.47, 1737.107.)

E. Procedural Status and Proceedings Below

59. In 1994, Appellant initiated this action against the Appellees, as well as his brother and his brother's children. Among other causes of action, Appellant claimed that his brother had breached a contract to give him an interest in the old Grand Canyon. Appellant later dismissed his claims against his niece and nephew, and still later his claims against his brother. In 1998, he amended his complaint to allege breach of contract and breach of the implied covenant of good faith and fair dealing against the present Appellees. (Rec. at 1-15, 25-59.)

60. Appellees moved for summary judgment on Appellant's employment claim in late 1998. By Memorandum Decision dated January 15, 1999 (Rec. at 830-838), the trial court dismissed all of Appellant's claims except to the extent that he stated a claim for breach of the implied covenant as it related to the Buy-Sell Agreement. During the pendency of that motion, Appellant raised, for the first time, his theory that Appellees breached the implied covenant of good faith and fair dealing through accounting for certain assets in the Sobek transaction and for the refund of taxes paid to the state of Arizona (the "Arizona Tax Refund"). (Rec. at 831-832.)

61. Appellees subsequently moved for summary judgment on the implied covenant claims relating to the Buy-Sell Agreement in early 1999. During the pendency of this second motion, Appellant claimed that Appellees were unjustly enriched by the Arizona Tax Refund, and moved the trial court for leave to amend his complaint a third time to attempt to state such claim. (Rec. at 1055-1057.)

62. Appellant based his accounting claims entirely upon the testimony of a so-called accounting expert, Derk Rasmussen. Appellees moved to strike Mr. Rasmussen's testimony as irrelevant and unhelpful. (Rec. at 1156-1196.)

63. By Memorandum Decision dated March 20, 2000, the trial court dismissed all of Appellant's claims save his claims for breach of the implied covenant of good faith and fair dealing in connection with the Sobek accounting matters and with respect to the Arizona Tax Refund.² (Rec. at 1747-1755.)

² The trial court denied Appellees' motion to strike the testimony of Mr. Rasmussen.

64. Appellees then filed their third and final motion for summary judgment seeking dismissal of Appellant's remaining claim for breach of the implied covenant based upon the Sobek disputes and the Arizona Tax Refund, as well as his claims for attorneys' fees and punitive damages. The trial court granted Appellees' motion with respect to implied covenant claims arising from the accounting for the Sobek transaction and with respect to attorneys' fees and punitive damages. The trial court denied the motion as to Appellant's claim for breach of the implied covenant in connection with the Arizona Tax refund. This appeal ensued.

VI. SUMMARY OF ARGUMENT

A. Appeal

The trial court properly granted summary judgment on Appellant's claims for breach of contract and breach of the implied covenant of good faith and fair dealing as they relate to his employment because the undisputed facts showed that Appellant reached an accord and satisfaction with Appellees as to those claims. Alternatively, Appellant waived or released those claims. In addition, the undisputed facts showed that Appellant was an at-will employee by reason of either the Employment Agreement or the common law.³ Appellant adduced no relevant evidence to rebut the common law presumption of at-will employment.

³ Appellees also argued below that ample cause existed for the decision to terminate Appellant's employment with GCE. The trial court found that factual issues existed regarding termination for cause and that issue is not being pursued in this appeal.

The trial court properly granted summary judgment on Appellant's claims for breach of the implied covenant of good faith and fair dealing with regard to the calculation of the net book value of GCE, including the Sobek accounting, because the undisputed facts show that Appellant waived any claim or is estopped from asserting any claim he had for alleged miscalculation based upon GCE's accounting practices. Moreover, the undisputed facts show that the net book value of the GCE stock was determined by GCE's independent accountant, as provided for in the Buy-Sell Agreement, and in accordance with GAAP.

The trial court properly dismissed Appellant's claims for punitive damages and attorneys' fees because, as a matter of law, Appellant is not entitled to such relief. Plaintiff's claims, sounding in contract, do not give rise to punitive damages and Appellant has never articulated a tort theory of relief. Similarly, under the facts of this case, attorneys' fees are not appropriate. The trial court also properly denied Appellant leave to amend his complaint to add a claim for unjust enrichment based upon GCE's receipt of and accounting for the Arizona Tax Refund because that cause of action would have been immediately subject to dismissal as a matter of law.

B. Cross-Appeal

The trial court improperly failed to grant summary judgment against Appellant on his claim for breach of the implied covenant of good faith and fair dealing as it relates to the Arizona Tax Refund. Appellant reached an accord with GCE on this matter just as he did on all other accounting matters. Additionally, this refund request was a remote contingency and not a GAAP asset at the time of Appellant's separation from GCE in

July 1992. Moreover, GCE's officers believed that the refund request had been dismissed. Therefore, Appellant could not possibly have had a reasonable expectation in July 1992 that the refund request would have been included in his buyout. He also could not have had a justified expectation of sharing in the refund request if it became an asset at some future time because the Buy-Sell Agreement was terminated. As a result of the termination of the Buy-Sell Agreement, Appellees had no continuing contractual or other obligation to Appellant that can form the basis for his claim of breach of the implied covenant of good faith and fair dealing based on post-termination events.

The trial court also improperly failed to exclude the expert testimony of Appellant's accountant, Derk Rasmussen. Mr. Rasmussen's testimony did not meet the threshold standards for admission of the Utah Rules of Evidence. Finally, the trial court should have dismissed the individual Appellees because they are not parties to any contract with Appellant.

VII. ARGUMENT

A. THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S BREACH OF CONTRACT CLAIM BECAUSE THE PARTIES REACHED AN AGREEMENT TO TERMINATE HIS EMPLOYMENT RELATIONSHIP WITH GCE.

1. Appellant has Relinquished Any Rights Under the Employment Agreement or Otherwise.

In its January 15, 1999 Memorandum Decision, the trial court dismissed Appellant's breach of contract claim, concluding that Appellant reached an accord with GCE terminating his employment relationship. Appellant appeals this decision,

contending that the trial court improperly found that accord and satisfaction had been pleaded or proved.⁴

a. Appellant's Claims are Barred by the Doctrine of Accord and Satisfaction.

Accord and satisfaction is proven when the facts show that the parties to a contract agree to a different performance in substitution for the performance required by the original contract. ProMax Dev. V. Raile, 998 P.2d 254, 259 (Utah 2000). To successfully raise the defense of accord and satisfaction, Appellees must show: 1) an unliquidated claim or a bona fide dispute over the amount due; 2) a payment offered in full settlement of the entire dispute; and, 3) acceptance of the payment as full settlement of the disputed amount. Id. (citing Marton Remodeling v. Jensen, 706 P.2d 607, 609 (Utah 1985)).

Even taking the facts in the light most favorable to Appellant, the trial court properly found an accord and satisfaction as to Appellant's employment claims. Appellant signed the Separation Agreement seven to ten days after his discussion with Denoyer about separation of his employment and after his subsequent discussions with

⁴ Appellant argues that Appellees waived accord and satisfaction as an affirmative defense because it was not formally pleaded in their answer. Appellant has overlooked the fact that Appellees had not yet served their answer to the second complaint pursuant to an agreement between counsel. Thus, Appellees may still plead accord and satisfaction as an affirmative defense. Moreover, Appellees clearly raised this defense in connection with their motion for summary judgment. Because Appellant consented to the consideration of this defense on summary judgment, technical amendment of Appellees' answer is not required to include the defense of accord and satisfaction. See, e.g., Poulsen v. Poulsen, 672 P.2d 97, 98 (Utah 1983). See also, Jones v. Dutra Constr. Co., 67 Cal. Rptr. 2d. 411, 414 (Cal. Ct. App. 1997); Lancaster v. C.F. & I Steel Corp., 548 P.2d. 914, 916 (Colo. 1976).

Saunders in which he attempted to retain his employment. Among other things, the Separation Agreement provided that,

“in lieu of any other amounts or benefits which may be due from [GCE] as provided in the Employment Agreement or otherwise, including but not limited to bonus, additional salary, commissions and health benefits, [GCE] shall pay [Appellant] the sum of Thirty-Seven Thousand Nine Hundred Forty Dollars and Eighty Eight Cents (\$37,940.88) which represents severance pay.”

Add. at 1497 (emphasis added). The Separation Agreement also provided that GCE would waive its right to enforce the non-competition provisions of the Employment Agreement, and that Appellant would resign as both an officer and an employee of GCE. Id. There is no dispute that Appellant signed the Separation Agreement and accepted the severance payment and other benefits of the agreement.

The Separation Agreement is devastating to Appellant’s claim that there was no accord and satisfaction of his employment claims.⁵ The language of the Separation Agreement clearly shows a dispute as to the amount owed, since it refers to amounts and benefits that “may be due” under the Employment Agreement “or otherwise.” It further shows the offer and acceptance of the severance payment⁶ in “in lieu of any other amount or benefits which may be due.” Id. Because the Separation Agreement demonstrates all

⁵ As discussed below, it is also fatal to his claims arising from the Buy-Sell Agreement. See Section VII.B.1., infra.

⁶ Appellant also received other valuable consideration in the form of GCE’s agreement to waive the non-competition clause in the Employment Agreement and the characterization of his discharge as a voluntary resignation. See Add. at 1496-97.

three elements of accord and satisfaction, the trial court's dismissal of Appellant's contract claim should be affirmed.

Appellant argues that because he did not know facts sufficient to alert him as to how the net book value of GCE was calculated to establish the purchase price of his stock, there could not have been an unliquidated claim, and there could not have been an accord and satisfaction. Appellant's argument fails for several reasons. First, it misses the point of Judge McIff's ruling on accord and satisfaction in the context of Appellant's employment claims. The calculation of Appellant's buyout under the Buy-Sell Agreement is irrelevant to whether there is an accord and satisfaction of his employment claims. Appellant believed that he had been wrongfully terminated by the company; indeed, the undisputed evidence is that he attempted to keep his job, arguing that the company had no right to terminate his employment. The amount of his employment claim, whether arising out of the Employment Agreement or common law, was an unliquidated claim. Nevertheless, Appellant accepted the severance pay "in lieu of any other amounts . . . due . . . as provided in the Employment Agreement or otherwise." In addition it is well recognized that accord and satisfaction can and often does arise in connection with a claim the amount of which is unknown or uncertain. See, e.g., Sugarhouse Fin. Co. v. Anderson, 610 P.2d 1369, 1372 (Utah 1980) (where underlying claim is uncertain, assent to definite payment gives rise to accord and satisfaction); In re Grimm, 784 P.2d 1238, 1244-1245 (Utah Ct. App. 1989) (accord found where payment made for uncertain claims), cert. denied, 795 P.2d 1138 (Utah 1990). Consequently, the

fact that Appellant did not fully appreciate the alleged value of his claim does not allow him to avoid an accord defense.

Appellant also argues that the Separation Agreement cannot evidence an accord and satisfaction because it does not contain language indicating that it was made in full satisfaction of all claims. Appellant is, of course, simply wrong on the facts. The Separation Agreement expressly states that GCE's payment of the severance pay was in lieu of all other amounts owed under the Employment Agreement or otherwise. Moreover, as a matter of law, no written agreement or specific language is required to show an accord and satisfaction. Golden Key Realty v. Mantas, 699 P.2d 730, 732 (Utah 1985). Comparison to a recent Utah case is instructive.

In Dishinger v. Potter, 47 P.3d 76 (Utah Ct. App. 2001), cert. denied, 40 P.3d 1135 (2001), tenants made payment of a disputed rental amount with a notation of "new base rent" on the check. The landlord negotiated the check after sending the tenant a notice of default and a notice to pay the remaining rent due or quit the premises. The landlord then continued to negotiate checks for the lower rental amount during the following year. Id. at 77-78. At trial, the jury found that the landlord, by cashing the checks for the disputed amount, had entered into an accord and satisfaction with the tenant. The landlord appealed this decision, asserting that the mere cashing of the checks did not demonstrate a subjective intent on her part to accept the lower rental amount in full satisfaction of the disputed rent. Id. at 78-79. The Utah Court of Appeals held that, even without the tenant's express statement that the checks were paid in full satisfaction of the rental debt, the tenant had established the elements of accord and satisfaction. Id. at 82.

In this case, the facts weigh even more heavily in favor of accord and satisfaction. Upon the termination of his employment, Appellant approached GCE, through the primary investor, to reverse the discharge decision. Unable to do so, Appellant negotiated the termination of his employment on far more favorable terms, apparently believing he was entitled to more than GCE believed he was entitled to. Appellant received severance pay, a benefit to which he was not otherwise entitled, of over \$37,000. In addition, GCE also agreed to waive its right to enforce the non-competition provisions of the Employment Agreement and to allow Appellant to resign as an employee of GCE, rather than be involuntarily discharged. All of this was done “in lieu” of any other payment Appellant was entitled to under the Employment Agreement, or any other agreement or theory. Appellant executed the Separation Agreement and accepted all payments thereunder.

These facts clearly show a disputed or uncertain amount that Appellant claimed GCE owed him. They further show a payment and other consideration tendered in full settlement of the entire dispute and acceptance by Appellant of that payment. Having demonstrated all the elements of accord and satisfaction, the trial court’s grant of summary judgment on this basis should be affirmed.

b. Appellant Waived His Rights

For similar reasons, the Separation Agreement conclusively demonstrates that Appellant waived any rights under the Employment Agreement or at common law. As stated in Appellant’s brief, waiver is the intentional relinquishment of a known right. Soters, Inc. v. Deseret Federal Sav. & Loan Ass’n, 857 P.2d 935, 939-40 (Utah 1993).

Waiver is made up of the following three elements: 1) an existing right; 2) knowledge of its existence; and, 3) and intention to relinquish the right. Id. The intent to relinquish a right can be implied from conduct if the parties conduct “unequivocally evince[s] an intent to waive or [is] at least . . . inconsistent with any other intent.” Beckstead v. Deseret Roofing Co., 831 P.2d 130, 133 (Utah Ct. App. 1992).

Appellant was aware of a number of rights he could have enforced in 1992, including the right to seek enforcement of his claimed rights under the Employment Agreement or "otherwise." Nevertheless, he did not seek to enforce those rights; rather, he agreed with GCE that he would accept the severance payment and other benefits. In fact, he memorialized his intention to relinquish these rights by signing the Separation Agreement in which he received this consideration in lieu of any other payment due under the Employment Agreement or otherwise. (Rec. at 1495-1498.) However described, the substance of what Appellant did was to give up his rights under the Employment Agreement or otherwise in exchange for valuable consideration. As a result, the trial court's grant of summary judgment should be upheld on this basis as well.

2. Appellant Cannot Show Breach of the Employment Agreement.

The trial court relied upon a theory of accord and satisfaction to dispose of Appellant's employment claims. Although the trial court declined to grant summary judgment to Appellees on any other grounds, the trial court could and clearly should have granted summary judgment as well as on the basis that plaintiff was an at-will employee whose employment could be terminated with or without cause.

Appellant signed an employment agreement that expressly stated that he was an at-will employee. (Rec. at 324-331.) The continuing validity of this Employment Agreement was demonstrated by, among other things, the Separation Agreement. In any event, the result is the same regardless of whether the Employment Agreement was still valid or not at the time of Appellant's separation of employment. Assuming that the employment agreement had expired of its own terms and had not been renewed by GCE, Appellant would then have become an at-will employee. Hodgson v. Bunzl Utah, Inc., 844 P.2d 331, 333 (Utah 1992) (at-will employment presumed at law). There was not a scintilla of relevant evidence adduced by Appellant to rebut the common law presumption that he was an at-will employee.⁷ Appellant has never produced a single document or attested to a single conversation that a jury could find changed the nature of his employment relationship with GCE. In short, the only evidence supporting Appellant's common law theory of breach of contract is his subjective belief that he could be terminated only for cause. An employee's subjective belief is insufficient as a matter of law to raise a genuine issue of fact as to at-will employment status. Hodgson at 844 P.2d 333-34 (summary judgment properly granted despite plaintiff's subjective belief that she was not an at-will employee). Judge McIff did not err below because he found the

⁷ Judge McIff suggests in his Order that Appellant may have been able at trial to present evidence rebutting the at-will presumption. (Rec. at 835). The fact remains, however, that Appellant presented no evidence sufficient to rebut the presumption, and summary judgment should have been granted on that basis.

claim had been subject to accord and satisfaction, but his dictum regarding the employment agreement and Appellant's at-will status is unsupported by the evidence. If this Court is unpersuaded by accord and satisfaction or waiver, Appellant's continuing status as an at-will employee provides an independent and sufficient basis to justify dismissal of his employment claims as a matter of law.

3. The Termination of Appellant's Employment Was Not in Bad Faith, Nor Did It Frustrate His Justified Expectations.

Finally, Appellant argues that Appellees breached the implied covenant of good faith and fair dealing in terminating the Employment Agreement. Appellant simply lacks any evidence to succeed on the merits of this claim.

The obligation imposed by the implied covenant of good faith is that the parties to a contract will exercise their contractual rights reasonably and in good faith. Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc., 889 P.2d 445, 450 (Utah Ct. App. 1994), cert. denied, 899 P.2d 1231 (1995). The covenant essentially provides that each party to a contract will adhere to the "agreed upon common purpose" of the contract and will not do anything to frustrate the "justified expectations" of the other party. Id. at 889 P.2d 451 (citing Restatement (Second) of Contracts § 205 cmt a. (1979)). The implied covenant of good faith and fair dealing cannot, however, be invoked to alter the express terms of a contract. Nor can it be used to establish new, independent rights or duties not agreed upon by the parties. Sanderson v. First Sec. Leasing Co., 844 P.2d 303, 308 (Utah 1991) (quoted in Seare v. University of Utah Sch. of Medicine, 882 P.2d 673, 678 (Utah Ct. App. 1994), cert. denied, 892 P.2d 13 (1995)). For example, the implied

covenant does not operate to require cause to terminate an employee when the employment agreement is at will. Hodgson, 844 P.2d 331, 335 (Utah 1992); Brehany v. Nordstrom, Inc., 812 P.2d 49, 55 (Utah 1991).

The Employment Agreement provided that Appellant would be an at-will employee of GCE for a period of one year, and that the relationship could continue at GCE's request and the mutual covenant of those parties. It also provided, however, that Appellant's employment could be terminated at any time by either party. (Rec. at 329, 424.) Thus, Appellant's only justified expectation was that he was an at-will employee who could be terminated at any time, but who was guaranteed a premium price for his stock in the company, as determined by a third party accountant, upon termination of his employment. Appellant received all of these benefits, along with additional compensation above and beyond what he was entitled to under the Employment Agreement and the Buy-Sell Agreement. (Rec. at 417.)

Appellant received everything to which he was entitled under the Employment Agreement or at common law, and then some. He has produced no evidence that his relationship with GCE was anything other than at-will employment. The implied covenant of good faith and fair dealing cannot add to Appellant's rights as an at-will employee. Sanderson, 844 P.2d at 308. Consequently, Appellant has no evidence to support a breach of the implied covenant of good faith and fair dealing in connection with the termination of his employment, and the trial court's grant of summary judgment should be affirmed.

B. THE TRIAL COURT PROPERLY GRANTED APPELLEES' MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN CONNECTION WITH THE CALCULATION OF GCE'S NET BOOK VALUE.

The Buy-Sell Agreement provided that upon termination of Appellant's employment, whether voluntarily or involuntarily, GCE would repurchase his stock. The amount to be repaid to Appellant was also set forth in the agreement and escalated during the term of his employment at GCE to a maximum of 140%. The net book value of GCE was to be determined conclusively by the company's accountant, Nyle Willis. (Rec. at 292.)

Appellant's only claim is that GCE breached the implied covenant of good faith and fair dealing when it applied Willis' calculation of net book value to determine the amount to pay Appellant as his buyout. Appellant rehearses a litany of perceived accounting flaws that he claims led to the "purposeful" undervaluation of GCE.

Appellant's claims fail for several independent reasons. First, Appellant waived in the Separation Agreement any claim he had to miscalculation of his buyout. Second, Appellant is estopped as an officer and director from complaining about historical accounting practices that he ratified in that capacity. Moreover, as the beneficiary of an escalator clause giving him 140% of his net book value in GCE at his buyout and as the prior recipient of several years of aggressive amortization that sheltered substantial income for him, Appellant should not now be heard to complain that the accounting records of GCE should have been completely unwound and recalculated to provide him with yet additional benefits from less aggressive amortization. In short, Appellant failed

to raise any issue of fact that any Appellee acted in bad faith or in such a manner as to deprive him of his "justified expectations" in the calculation of his buyout.⁸

1. Appellant Relinquished any Claim He Had for Alleged Miscalculation of His Buyout.

After hearing two motions for summary judgment, Judge McIff concluded that Appellant could not prevail on his claim for breach of the implied covenant of good faith and fair dealing in connection with the Buy-Sell Agreement.⁹ In his decision on the Appellees' second motion, Judge McIff concluded that Appellant had essentially acquiesced to and benefited from GCE's accounting practices prior to the time of his separation from GCE, but left open the possibility of a claim for accounting discrepancies at or near his separation. (Rec. at 1752-1754.) In his decision on Appellees' third motion for summary judgment, Judge McIff concluded that the undisputed facts showed that all accounting issues, save those relating to the Arizona Tax Refund, were acquiesced to by Appellant, and that he had reached an accord with Appellees as to any claim, except the Arizona Tax Refund, arising from the Buy-Sell Agreement. (Rec. at 2050-2052.)

⁸ In his brief on this appeal, Appellant argues that he was not required to raise a genuine issue of material fact that Appellees acted unreasonably or in bad faith; rather, he asserts he need only raise a fact issue that Appellees failed to act reasonably or in good faith. This appears to be a distinction without a difference. Appellant certainly offers no authority for the alleged "gray area" between reasonableness and unreasonableness, between good faith and bad faith. Moreover, Utah case law clearly requires intent to breach the implied covenant of good faith and fair dealing. St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991).

⁹ As discussed below, Judge McIff allowed Appellant to proceed only on his claim that GCE breached the implied covenant by improperly accounting for the contingency of a possible refund of taxes paid to the State of Arizona. The ruling on the tax refund portion of Appellant's claim is the subject of Appellees' cross-appeal. See Section VIII.A., *infra*.

As the trial court properly concluded, it cannot be disputed that Appellant knowingly accepted the purchase price for the stock and other consideration upon signing the Separation Agreement. Appellant, therefore, reached an accord and satisfaction or has waived any claim he had under the Buy-Sell Agreement. The Buy-Sell Agreement provided that Appellant's buyout was to be calculated by Willis, GCE's independent accountant, and that Willis' determination was to be **conclusive**. (Rec. at 292, 1737.92, 1737.120.) Willis did, indeed, calculate Appellant's buyout. In advance of doing so, however, Appellant was given an estimate of his buyout by Don Saunders. (Rec. at 300.) Several days later, on July 25, 1992, Appellant signed the Separation Agreement which recited the consideration that was to be given to Appellant in connection with his resignation and the buyout of his GCE stock. The amount of consideration Appellant was to be given in exchange for his stock was less than the amount earlier estimated by Saunders. (Rec. at 299-300.) Appellant acknowledged the accuracy of this amount and agreed to it by executing the Separation Agreement. It is undisputed that he thereafter accepted GCE's promissory note in that amount together with periodic payments over a period of six years, several payments of which were tendered and accepted after the lawsuit was filed. (Rec. at 296-297, 832-833, 2051-2052, 2056.) These acts alone constitute an accord and satisfaction or waiver of any claim Appellant might have had that the buyout was miscalculated.

Moreover, Appellant also was given a severance payment and GCE waived the non-competition provisions of the Employment Agreement. These benefits were in addition to any amounts to which Appellant might have claimed he was entitled. As a

result of this additional consideration, Appellant agreed that the amounts received by him were in lieu of any other amounts he would be entitled to from GCE. (Add. at 1497, ¶6.) This provision constitutes further evidence of Appellant's waiver of any claim for miscalculation of his buyout. Appellant acknowledged that he negotiated the check for additional consideration. (Rec. at 297.)

Having signed the Separation Agreement while recognizing that the buyout was less than he expected to receive, having accepted the payment of the buyout over a period of six years even after he filed this lawsuit, and after having received the benefit of further consideration in lieu of any other claim he might have for additional money, Appellant clearly is precluded from asserting that he now is entitled to more money because Willis miscalculated his buyout in 1992 based upon information then available. Appellant's conduct clearly meets the requirements for accord and satisfaction and/or waiver as outlined above. See supra, Section VII.A.

2. Appellant is Estopped from Attacking GCE's Accounting Practices.

Appellant's argument that GCE's practices violated the implied covenant of good faith and fair dealing also fails because Appellant was aware of the accounting treatment and, in fact, benefited from the accounting practices of GCE from 1986 to his resignation in July 1992. Accordingly, Appellant is estopped from claiming that the accounting treatment was improper. See, e.g., Claire v. Rue de Paris, Inc., 236 S.E.2d 272, 274 (Ga. 1977) (noting a firmly established rule that shareholder is estopped from complaining of act in which he participates or acquiesces, or which he ratifies); Fincher v. Calibourne Butane Co., 349 So.2d 1014, 1017 (La. Ct. App. 1977) (plaintiff estopped

from complaining of corporate mismanagement where he participated in management of corporation as officer, director and employee); Wolf v. Globe Liquor Co., 103 A.2d 774, 777 (Del. 1954) (plaintiff's participation in corporate decisions estops him from complaining of them).

Appellant's own expert's testimony completely undermines his claim of bad faith. This expert opined on several occasions that not only did the company's accountant violate GAAP, but that the officers and directors were complicit in this breach. (Rec. at 1510-1522.) Since there is no dispute that Appellant at all relevant times was both an officer and director of GCE, his own expert's testimony defeats his claim of bad faith. His expert admits that the officers and directors either knew of these accounting practices or should have known of these accounting practices. (Rec. at 1515-1520.) In fact, the facts demonstrate that Appellant was aware of GCE's accounting practices. (Rec. at 1310-1311.) Accordingly, this is a clear case where Appellant's own knowledge of or access to relevant knowledge estops him from asserting his claim of bad faith.

Appellant was also the beneficiary of the accounting entries about which he now complains. For example, amortization of the covenant not-to-compete over a four-year term rather than recharacterizing it as payment for the river running permit and amortizing it over a substantially longer term sheltered Appellant's proportionate share of

\$250,000 in annual income.¹⁰ (Rec. at 1871.) The same is true of the other accounting entries about which Appellant complains. In short, Appellant should not now be permitted to base a breach of implied covenant claim on accounting entries in which he acquiesced and from which he clearly benefited. For the reasons discussed below, his active or passive participation in these entries, and his active benefit from these entries completely undermine any claim that he was deprived of his justifiable expectations upon calculation of his buyout.

3. **Mr. Rasmussen's Testimony Regarding GCE's Valuation of Assets is Inadmissible.**

Appellant relied entirely on the testimony of Derk Rasmussen to support his assertion that Mr. Willis violated GAAP and the covenant of good faith and fair dealing that GCE breached. As discussed below, Mr. Rasmussen's opinions about violation of GAAP by the company's accountant are inadmissible and should not have been considered by the trial court on summary judgment. See Section VIII.B., infra. Appellant's claim clearly fails as a matter of law without the benefit of those opinions.

¹⁰ As discussed below, Appellant's argument about recharacterization of this particular payment is unavailing. The result is the same whether \$1 million is attributed as payment for a covenant not-to-compete or for a river running permit. See Section VIII.B.2.b., infra. In either event, amortization over the four-year term would clearly have been allowed by GAAP even though Appellant's expert would have amortized it over a longer term.

4. Even With Mr. Rasmussen's Testimony, Appellant's Evidence of Accounting Irregularities Does Not Defeat Appellees' Motion for Summary Judgment.

Even with Rasmussen's inadmissible testimony, Appellant lacks any evidence of intent or bad faith by Appellees. In the absence of such evidence, there was simply no factual basis for Appellant's claim and, therefore, the trial court properly dismissed Appellant's claim based upon the net book value calculation.

Under the implied covenant, the parties to a contract impliedly agree that they will not intentionally or purposely do anything that will injure or destroy the other party's right to receive the benefits of the contract. St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991); Andalex Resources, Inc. v. Myers, 871 P.2d 1041, 1047 (Utah Ct. App. 1994). To comply with the obligation to perform a contract in good faith, the party's actions must be consistent with the agreed common purpose and justified expectations of the other party. Id. Depriving a party of its contractual rights for a legitimate or good faith reason does not violate the covenant of good faith and fair dealing. Brown v. Weis, 871 P.2d 552, 564 n.18 (Utah Ct. App. 1994). Rather, to show that a party to a contract breached the implied covenant by exercising its discretion under the contract, that discretion must be exercised unreasonably and in bad faith. Cook v. Zion's First Nat'l Bank, 919 P.2d 56, 60 (Utah Ct. App.), cert. denied, 925 P.2d 963 (1996).

Appellant's argument appears to be that he has stated a claim for breach of the covenant of good faith and fair dealing because his accountant disagrees with GCE's accounting practices, largely because GCE's accountant did not amortize certain assets

for the longest periods allowed by GAAP even though GAAP did allow the amortization periods Willis did apply.¹¹ In support of this theory, Appellant relies upon case law where one party to a contract having discretion has exercised that discretion in bad faith, thereby depriving the injured party of the benefit of his or her reasonably expected bargain. Appellant's reliance on this case authority is unpersuasive for several reasons.

First, the cases relied upon by Appellant are inapposite. In each of these cases, the breach was predicated on the acts or omissions of one party to the contract. See, e.g., Olympus Hills, 889 P.2d at 451. In this case, in contrast, the calculation of Appellant's buyout was entrusted to the accountant servicing the corporation rather than to GCE itself. Appellant has identified no legal authority for the proposition that one party to the contract breaches the covenant of good faith and fair dealing where an independent, third party reaches a decision allegedly contrary to the other party's interest in the contract. In the absence of evidence that GCE improperly influenced the decision of this third party, there is no tenable basis upon which to assert breach of the constructive covenant of good faith and fair dealing.¹²

¹¹ Appellant's brief focuses on the minutia of many of these accounting entries. Appellant's expert, unfortunately, simply did not understand many of the entries and based most of his testimony on the fact that GAAP might have allowed a longer amortization period than Willis actually applied. Appellees fully briefed the trial court below as to the numerous errors made by Appellant's so-called accounting expert, explaining why these accounting entries were entirely appropriate under GAAP. (See Rec. at 1171-1180.) Since the trial court's memorandum decision did not focus on the peculiarities of each of these accounting entries but, rather, took a more global approach, so too does this brief.

¹² Willis has testified unequivocally that none of the Appellees attempted to influence or manipulate his calculation of the Appellant's buyout. At his deposition, Willis
(continued...)

Second, the mere fact of disagreement between accountants about the application of GAAP is simply not enough to establish bad faith. The implied covenant of good faith and fair dealing protects against acts or omissions that intentionally or purposely destroy or injure a party's right to receive the fruits of the contract. Andalex, 871 P.2d at 1047. The mere fact of disagreement between Rasmussen and Willis about accounting entries does not show an intent or purpose to deprive Appellant of the benefit of his bargain contrary to his justified expectations. Instead, it demonstrates a professional disagreement that does not rise to the level of bad faith. Stated differently, even if Willis had deviated from GAAP, that alone would not show violation of the implied covenant without some evidence such deviation defeated the agreed common purpose of the deal as well as the justified expectations of the parties.¹³

All Appellant and his "expert" have succeeded in demonstrating is GCE's corporate philosophy of shorter rather than longer amortization to achieve maximum tax benefits allowed under law (which also were permissible under GAAP). This strategy not only was approved by Appellant himself, as an insider and officer, it also inured to

(...continued)

was asked to describe the process by which he calculated the Appellant's buyout. Willis testified that after being notified the Appellant was leaving GCE, he went to the books and records of GCE to calculate Appellant's buyout and made those changes necessary to comply with GAAP. (Rec. at 1341-1352.) Willis further testified that he made certain adjustments to the financial statements of GCE to comply with GAAP in calculating Appellant's buyout. Id. His affidavit confirms as much. (Rec. at 1263-1264.)

¹³ Even then, of course, Willis' conduct would not have breached the implied covenant since he was not a party to the Buy-Sell Agreement.

his benefit. It is completely disingenuous for Appellant now to claim that this philosophy deprived him of his justified expectations at the time his buyout was calculated, and that it was agreed by the parties to the contract that Appellant should take extra consideration on both ends (i.e., at the inception of the business by early amortization and at the back end by applying the escalator clause (140% of net book value) while ignoring such amortization). Since no fact or inference has been shown to support a claim that decisions made years before his termination were made with the intention or for the purpose of depriving Appellant of the benefit of his bargain, his claim failed as a matter of law and was properly dismissed by the trial court.

C. THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S CLAIM FOR PUNITIVE DAMAGES ON HIS ONLY REMAINING CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Appellant concedes in his brief that breach of the implied covenant of good faith and fair dealing is a cause of action sounding in contract, and that punitive damages for breach of contract are inappropriate under Utah law. See Brief of Applt. at 39-40 and cases cited therein. Appellant attempts to resurrect his claim for punitive damages by asserting that such damages may be awarded for an independent tort. Appellant does not point out, however, that in eight years of litigating this case and in at least two amendments of the Complaint, he has failed to state a single cause of action in tort. Even in his brief on appeal, Appellant makes only vague assertions of misconduct and does not specifically state the cause of action he alleges much less the elements of such a claim.

The trial court properly concluded that punitive damages were not appropriate in this case, and its decision should be upheld.¹⁴

D. THE TRIAL COURT PROPERLY APPLIED UTAH PRECEDENT IN DENYING APPELLANT'S CLAIM FOR ATTORNEYS' FEES.

Appellant persists in his puzzling battle against the rule, well established in American jurisprudence, that attorneys' fees are generally not recoverable unless provided for by statute or contract. Appellant argues for an "extension" of Utah law that would actually be an almost wholesale rejection of the well-settled rule, relying on Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989) and Heslop v. Bank of Utah, 839 P.2d 828 (Utah 1992).

Heslop is simply inapposite to Appellant's remaining claim for breach of implied covenant of good faith and fair dealing with respect to the Buy-Sell Agreement. Nor does Heslop's reasoning apply to Appellant's dismissed claims arising from the Employment Agreement or his employment relationship with GCE generally.

Appellant was a part owner in a business where he had obtained GCE's promise to buy his stock in the company at a premium if his employment was terminated. Indeed, Appellant received a substantial cash payment for his stock. Moreover, Appellant was able to negotiate even greater consideration than provided under the Buy-Sell Agreement.

¹⁴ In the event of remand, it should be made clear that Appellant may not attempt to introduce facts allegedly supporting a claim for punitive damages in this contract case in the hopes of stumbling upon some tort theory that has not been pleaded. To the extent the trial court's analysis of the attorneys' fees issue can be read to suggest that Appellant may be allowed to introduce such evidence, it is clear that the introduction of such evidence would be highly prejudicial to Appellees.

Consequently, Heslop's considerations regarding the vulnerable position of discharged employees do not apply in this case. In this context, the rationale of Bracey and Heslop clearly do not apply to allow Appellant to recover attorneys' fees.

Finally, the trial court's decision to deny Appellant his claimed attorneys' fees is reviewed for abuse of discretion. Baldwin v. Burton, 850 P.2d 1188, 1199 (Utah 1993). The trial court obviously considered the Bracey and Heslop decisions in its order denying attorneys' fees. (Rec. at 2048-2049.) Under the relevant law, Appellant simply cannot show that the trial court, which clearly considered the facts and law, abused its discretion in denying his award of attorneys' fees where there was no statutory or contractual support therefore. Consequently, the trial court's decision on this claim should be upheld.

E. THE TRIAL COURT PROPERLY CONCLUDED THAT AMENDMENT OF APPELLANT'S COMPLAINT TO ADD A CAUSE OF ACTION FOR UNJUST ENRICHMENT WAS FUTILE.

After two amendments of his Complaint and two motions for summary judgment, Appellant moved the court for leave to amend his Complaint a third time to add a cause of action for unjust enrichment. This motion, which was objectionable on several grounds, was denied by the trial court. Appellant's motion was properly denied, among other reasons, because he could not possibly state a cause of action for unjust enrichment based upon GCE's accounting for and receipt of the Arizona Tax Refund. As a result, that cause of action would have been subject to immediate dismissal and the motion was, therefore, futile. Andalex, 871 P.2d. at 1046 (leave to amend complaint should be denied when party seeks to assert a new claim that is insufficient or futile).

To state a claim for unjust enrichment, Appellant must show: 1) a benefit conferred on one person by another; 2) an appreciation or knowledge by the conferee of the benefit; and 3) the acceptance or retention by the conferee of the benefit under circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value. American Towers Owners Ass'n v. CCI Mech., Inc., 930 P.2d 1182, 1192 (Utah 1996). The remedy of unjust enrichment presupposes that the benefit is conferred by the party seeking the remedy and received by the party from whom relief is sought. For example, in the American Towers case, this Court noted that the plaintiff “did not confer any benefit upon any of the appellants and therefore cannot claim that any of the appellants have been unjustly enriched. Any enrichment received by appellants was not to the detriment of the [plaintiff] because [the plaintiff] did not pay any of the consideration which appellants received under the contracts.” Id. at 1193. On that basis, the American Towers court granted summary judgment dismissing the unjust enrichment claim, which was affirmed by the Utah Supreme Court. Id.

In this case, Appellant’s claim rests solely upon the receipt by Appellees of the so-called Arizona Tax Refund. It cannot be disputed that this refund was not paid by Appellant to GCE; rather, it was a refund paid to GCE by the State of Arizona from taxes paid by GCE’s customers, not Appellant. Because Appellant cannot show that he conferred any benefit upon Appellees in connection with the Arizona Tax Refund, he

could not succeed on an unjust enrichment claim, and the trial court properly denied his insufficient and futile motion to dismiss.¹⁵

VIII. ARGUMENT ON CROSS APPEAL

A. THE TRIAL COURT IMPROPERLY DENIED GCE'S MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING ARISING OUT OF THE ARIZONA TAX REFUND.

In denying GCE's motion for summary judgment on Appellant's implied covenant claim as it related to the Arizona Tax Refund, the trial court melded the disparate legal theories of implied covenant of good faith and fair dealing and unjust enrichment to create a new equitable remedy heretofore unrecognized under Utah law. (Rec. at 1737.107-1737.114, 1868-1870.) There is simply no legal support for this novel remedy.

1. The Undisputed Facts.

The facts regarding the Arizona Tax Refund are set forth in detail in the record below, and are outlined in less detail above. (Facts, supra, ¶¶ 36-57.)¹⁶ Briefly, the Admissions Tax was charged by GCE to its customers and then paid by GCE to the state of Arizona. A request to refund the Admissions Tax was filed in 1990 as a bargaining chip in conjunction with another tax dispute. GCE was informed from the outset by its tax counsel, Ann Dumenil, that it was unlikely to prevail on the Admissions

¹⁵ Appellant's proposed claim for unjust enrichment would also fail since unjust enrichment is not available as a remedy arising from a written contract like the Buy-Sell Agreement. American Towers, 930 P.2d at 1192.

¹⁶ Citations to the record on appeal on this issue are contained in the Statement of Facts.

Tax issue because of existing legal precedent. Even if it did prevail, Dumenil opined that GCE probably would be obligated to repay the taxes to its customers rather than retain them. Denoyer therefore instructed Dumenil in 1991 to dismiss the protest once the other tax issue was resolved. Dumenil did not do so, however, and neglected to inform GCE she had not dismissed the protest.

Significantly, GCE's accountant, Nyle Willis, knew of this refund request long before Appellant's departure. (Rec. at 1807-1809, 1868.) He did **not** book the refund request as an asset because it was a remote contingency that, if it ever matured, likely would result only in expenses to the corporation to refund the refund to its customers.¹⁷

Willis calculated Appellant's share of book value assuming that the protest was still extant but, nevertheless, not an asset for the reasons discussed above. Appellant signed the Separation Agreement on July 25, 1992 and thereby accepted this calculation of book value.

Shortly after the Separation Agreement was signed, Denoyer was informed that the refund request still had not been dismissed. He again instructed Dumenil to dismiss it.¹⁸ Several years later, the Arizona Court of Appeals essentially reversed itself and found

¹⁷ Although Willis was unaware that Denoyer had asked Dumenil to dismiss the refund request, it simply did not matter to him because it had not been booked as an asset anyway. (Rec. at 1807-1808, 1868.)

¹⁸ Documents were discovered following the last ruling on summary judgment demonstrating that the refund request at issue apparently was dismissed. Accordingly, if Judge McIff is not overruled, this matter may be ripe again for summary judgment based on this new evidence.

that the Admissions Tax was impermissible under Arizona's tax statutes. The Arizona Supreme Court affirmed. ADOR permitted river running companies such as GCE to keep a portion of such tax refunds while requiring them to refund another portion to their customers.

2. The Trial Court's Decisions

Appellant first raised the Arizona Tax Refund in an oblique manner at the hearing on the first motion for summary judgment. The matter was then addressed more directly in the second motion for summary judgment. (Rec. at 831-832.) Judge McIff's second memorandum decision denied summary judgment on this issue even though the trial court found that Appellant could not state a claim for unjust enrichment since GCE's customers, rather than Appellant, had bestowed this benefit upon the corporation. (Rec. at 1751-1752.) Nevertheless, Judge McIff ruled that it was for a jury to decide whether the Appellant had a reasonable expectation of participating in this refund based on the implied covenant even though the contract between the parties had been terminated years before the refund was granted. (Rec. at 1750-1751.) The opinion also makes reference to imputing Dumenil's knowledge to GCE's president and speaks, in unfortunately vague terms, about "sharp practices" without further elaboration. (Rec. at 1748-1750.)

The issue was revisited on the third motion for summary judgment. The trial court stood by its earlier ruling despite undisputed testimony that the refund claim was not a bookable GAAP asset at the time of Appellant's separation from employment in 1992. The trial court declined to apply the same accord and satisfaction or waiver principles to this issue as it did with respect to all other accounting issues. (Rec. at 2050-2051.)

While the lower court's analysis is not entirely clear as to when the purported breach of the implied covenant possibly occurred (i.e., in 1992 when the buyout was calculated or years later when the refund was made and GCE did not share it with Appellant), it appears that Judge McIff's result-oriented ruling is predicated on what happened in the years following termination of the Buy-Sell Agreement rather than at or about the time of such termination in 1992. In essence, the decision is predicated on the lower court's sense that it was unfair of Appellees not to share the refund with Appellant. (Id.)

3. Utah Law

Breach of the implied covenant of good faith and fair dealing gives rise to a legal remedy for breach of contract. St. Benedict's, 811 P.2d at 199. Unjust enrichment, on the other hand, is a purely equitable remedy that is to be applied only where there is no express contract. E.g., American Towers, 930 P.2d at 1192. Borrowing principles from an equitable remedy like unjust enrichment to apply to a legal cause of action sets a very dangerous precedent. The same rationale, for example, could be used to unwind a bad bargain on the grounds that it was inequitable or unjust. The implied covenant plainly is not intended as a vehicle to incorporate bits and pieces of unjust enrichment law into the law of contracts.

It is also important to understand what the constructive covenant of good faith and fair dealing means under Utah law. Utah courts repeatedly have stated that the covenant is a constructive promise that neither party will **intentionally** or **purposely** do anything that will destroy or injure the other party's right to receive the fruits of the contract. E.g., Andalex, 871 P.2d at 1047 (citation omitted). This standard does not mean that the

covenant is breached by an act or omission that is unintentional or not purposeful (i.e., a mutual mistake). Similarly, the implied covenant does not create an equitable claim based on vague and ambiguous principles of fairness.

Utah courts have also stated that a party's actions must be consistent with the **agreed common purpose** and **justified expectations** of the other party. *Id.* (emphasis added). This does not mean that hindsight can be used to bootstrap a breach of implied covenant claim. It also does not mean that the covenant can be construed to establish new, independent rights or duties that have not been agreed upon by the parties. *Id.* If the Buy-Sell Agreement requires application of GAAP, then GAAP should define what assets are included in the calculation of Appellant's buyout at the time the buyout is required to be calculated. To expand that concept to include general principles of equity and fairness to Appellant's buyout impermissibly expands the scope of the contract without legal justification.

Finally, and significantly, Utah law does not provide that the implied covenant survives termination of the contract which gave it life in the first place. Neither Appellant nor the trial court below has cited any authority from Utah or any other jurisdiction holding that an implied covenant of good faith and fair dealing survives termination of the underlying contract. In fact, the legal authorities are precisely to the contrary. See Republic Group, Inc. v. Won-Door, Corp., 883 P.2d 285, 289-90 (Utah Ct. App. 1994) (implied covenant ends when underlying contract terminates). The law of this jurisdiction certainly should not be extended to create amorphous rights that exist in

perpetuity and, therefore, deprive contracting parties of any certainty or finality when their relationship is terminated.

4. The Trial Court's Analysis is Fundamentally Flawed for Several Reasons.

Summary judgment should have been granted to GCE on the Arizona Tax Refund issue for several independent reasons. First, there is no rational basis to distinguish the Arizona Tax Refund from the other accounting issues about which the court found accord and satisfaction, waiver, estoppel and/or ratification. Second, the lower court's reliance, in whole or in part, upon imputation of knowledge from outside tax counsel to the corporation to create a claim where none otherwise existed is unavailing. Further, there is absolutely no evidence from which a rational jury could conclude that Appellant had a reasonable or justified expectation to share in the refund when it was not a bookable asset at the time his buyout was calculated, any more so that GCE had a reasonable or justified expectation that Appellant would share in any liabilities arising after the termination of his employment related temporally to his period of employment. Finally, as a matter of law, the covenant did not survive termination of the Buy-Sell Agreement and, therefore, is not available to support a claim based on conduct occurring years later.

a. Accord and Satisfaction and/or Waiver

In its second and third memorandum decisions, the trial court essentially held that Appellant had reached an accord and satisfaction, waiver or estoppel as to his accounting claims with the sole exception of the Arizona Tax Refund. (Rec. at 1747-

1755, 2047-2058.) The trial court's basis for distinguishing this accounting issue from the plethora of other accounting issues raised by Appellant below is unpersuasive.

The trial court mistakenly concluded that a distinction existed because the issue was "not discussed nor contemplated when the settlement documents were prepared and executed and is entirely beyond the fixing of values by the accountant." (Rec. at 2050-2051.) Judge McIff is simply wrong. This is not a case of an undisclosed or overlooked "asset". Although there was confusion about whether the appeal had been dismissed, that confusion is irrelevant because the refund claim was **not** an asset regardless of its status or the parties' knowledge of its status. In fact, the person charged with calculating the buyout: 1) knew about the refund claim; 2) did not consider it an asset; and 3) did not know the corporation had requested withdrawal of the tax protest. (Rec. at 1807-1808.) Thus, any "discussion" of the refund would have been meaningless and there clearly was no "oversight" by the accountant as suggested in the third memorandum decision.

Furthermore, the trial court's reference to the issue being "beyond the fixing of values" strongly supports Appellees' theory that Judge McIff decided to rewrite the parties' contract to decide this issue as a matter of equity. The calculation of Appellant's buyout was to be made based upon "fixable values" not according to undefined equitable principles. The refund, as a remote contingency, was "beyond the fixing of values" only because it **had no value** at the time of Appellant's buyout. There is no sound basis, therefore, upon which to distinguish this particular accounting matter from the other accounting entries at issue.

b. Imputation of the Tax Attorney's Knowledge is a Red Herring.

In its second memorandum decision, the trial court suggested that the tax attorney's knowledge that the refund request had not been dismissed was imputed to the corporation. In response, Appellees' third motion for summary judgment addressed precisely why the trial court's theory of imputation was irrelevant. This analysis is explained in detail in the record below and will not be repeated in full here. (Rec. at 1855-1861.)

Briefly, if the tax attorney's knowledge was imputed to corporate officials, then it was imputed to all corporate officials, including Appellant. Therefore, the parties were operating on equal footing, and Appellant cannot argue any mistake or impropriety. On the other hand, if the knowledge of the attorney was not imputed to GCE, then no one was aware that the appeal had not been withdrawn. A claim of mutual mistake is simply insufficient as a matter of law to establish breach of the implied covenant. Finally, even if such knowledge was imputed to Appellees but not Appellant (a unilateral mistake theory), no claim will lie because knowledge of this remote contingent claim that (a) was unlikely to succeed, (b) was unlikely to yield a refund that the corporation could even retain if successful, and (c) that the corporation wanted dismissed, would have **not** resulted in any different calculation of Appellant's buyout based on Mr. Willis' undisputed testimony.

In the third memorandum decision, the trial court attempted to address this issue in a footnote. (Rec. at 2055, fn. 2.) The trial court's reasoning is unpersuasive. If the other officers and directors had constructive knowledge that the tax appeal had not been

dismissed a year before Appellant's termination, then Appellant was invested with that knowledge as well. Once possessing this "imputed knowledge," Appellant was not suddenly divested of such knowledge when his relationship with Appellees became "adversarial" in July 1992. In short, Appellant is not imputed to have such knowledge and then to constructively have forgotten it. Neither Appellant nor the trial court cited any authority for this unusual proposition.

c. Appellant Has No Reasonable or Justified Expectation to Share in the Refund Claim.

The Buy-Sell Agreement provided that Appellant's buyout was to be calculated as of the date of his separation of employment. It also provided that net book value upon which his buyout was to be calculated was based upon GAAP as determined conclusively by GCE's accountant. (Rec. at 292.) Thus, what was or was not an asset was to be determined according to GAAP as of July 1992 not based upon an asset springing to life years later.

It is also undisputed that GCE's accountant was aware of the refund claim well in advance of Appellant's termination. (Rec. at 1808-1809, 1868.) However, he determined that it was not a bookable asset under GAAP since it was a remote contingency that, if it ever matured, most likely would result in a refund that GCE would be obligated to then refund to the customers who had paid the tax. (Rec. at 1808.) Appellant's expert offered no opinion to the contrary.

The memorandum decisions addressing the Arizona Tax Refund do not clearly delineate when the jury may be permitted to find a breach of the implied covenant

occurred. The only two conceivable times would be July 1992, when the buyout was calculated, or several years later when the refund was made. In either event, Appellant could have had no reasonable or justified expectation of sharing in the refund and no reasonable jury could conclude otherwise.¹⁹

i. July 1992

It is inconceivable that any rational jury could find that Appellant had a reasonable or justified expectation in July 1992 that this remote, contingent tax refund claim should have been included as an asset even though it was unbookable under GAAP. This is not a case where an asset was hidden or mistakenly overlooked. GCE's accountant knew of the refund claim and concluded that it was not a bookable asset. Appellant's own expert has not offered a contrary opinion.

Even if Dumenil's knowledge that the protest had not been dismissed is imputed solely to Denoyer, rather than to all officers and directors, the result does not change. All Denoyer would have known in 1992 was that a refund claim that he wanted dismissed had not been dismissed. This knowledge would not have changed Dumenil's underlying advice that GCE was unlikely to succeed on the claim or to be able to keep the money if it did succeed, or Willis' opinion that the claim had no value. There is simply no basis to conclude that any of the Appellees acted intentionally or purposely to deprive Appellant

¹⁹ Because the facts can reasonably lead only to the conclusion that Appellant had no reasonable expectation of participation in the Arizona Tax Refund, summary judgment on that question was proper. English v. Kienke, 774 P.2d 1154, 1157 (Utah Ct. App. 1989), aff'd, 848 P.2d 153 (1993).

of some reasonable or justified expectation to share in this tax refund in July 1992 when it was not included as an asset in Appellant's buyout.

The trial court's opinion also impermissibly rewrites the underlying contract. The Buy-Sell Agreement provides that Appellant's buyout was to be calculated according to GAAP. (Rec. at 292.) Since the undisputed evidence is that the refund claim in July 1992 was not a GAAP asset, the inquiry should end there. Although Judge McIff noted this testimony, the lower court stated that it is not “solely determinative of relevancy” without articulating what else would be “determinative of relevancy” as of July 1992. (Rec. at 2052-2053.) Whatever was meant by this phrase, it suggests that the trial court was attempting to rewrite the underlying deal between the parties. It is black letter Utah law that an implied covenant does not restructure the fundamental agreement of the contracting parties. Brehany, 812 P.2d at 55 (covenant not construed to establish new, independent rights or duties not agreed upon by the parties, to nullify rights granted by a contract to one of the parties or to require a party to exercise contractual right in a manner contrary to its own legitimate self-interest); Brown, 871 P.2d at 564 n. 20 (implied covenant of good faith and fair dealing must not be construed to establish new rights “not agreed upon by the parties”). Therefore, the accountant's undisputed testimony is, indeed, determinative of this issue.

ii. 1995 and 1996

A jury should not be permitted, as a matter of law, to find a breach of the implied covenant several years after termination of the Buy-Sell Agreement that gave rise to the covenant itself. The question of whether the implied covenant survived

termination of the Buy-Sell Agreement is a question of law about which Judge McIff made no decision except, perhaps, by implication. Rather than make an express determination, and grapple with the exceedingly difficult questions that would arise from extending the implied covenant virtually in perpetuity, Judge McIff simply punted this fundamental legal question to the jury.

The Buy-Sell Agreement terminated in July 1992. Judge McIff should have ruled as a matter of law that the implied covenant did not survive its termination. See Republic Group, 883 P.2d at 289-90. The trial court's refusal to rule on this issue is directly contrary both to the letter and policy of Utah law. The trial court's result-oriented opinion based on principles of fairness lends no certainty or finality to contractual relationship even years after their termination.

Nor is Judge McIff's decision supported by GAAP, which governs the calculation of Appellant's buyout. When the refunds were made in 1995 and 1996, GCE's accountant took them into income for those periods. He did not note them as prior period adjustments because, under black letter GAAP, they did not qualify for that treatment. (Rec. at 1806-1807.) Although Appellant's accountant disputed whether the refunds were or were not prior period adjustments, his testimony is inadmissible for the reasons discussed below. (See Section VIII.B., infra.) More importantly, even if the entries should have been noted as prior period adjustments in 1995 and 1996, Appellant's own expert agreed that this accounting notation would not have called for recalculation of Appellant's buyout or restatement of corporate income for 1992 and prior years. Instead, the refund would simply be noted on the financial records of GCE in 1995 and 1996 as

prior period adjustments and nothing more would have happened. (Rec. at 1183-1186, 1806.) Thus, even under GAAP, there is no basis for Appellant to share in the refund as it was income in 1995 and 1996.

Neither the trial court nor Appellant has demonstrated any legal basis for allowing him to share in the Arizona Tax Refund under a theory of breach of the implied covenant of good faith and fair dealing or any other theory. Accordingly, the trial court erred in denying GCE's motion for summary judgment on this ground. The trial court's decision should be reversed and judgment entered as a matter of law for Appellees.

B. THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF APPELLANT'S EXPERT DERK RASMUSSEN.

In opposition to Appellees' second motion for summary judgment, Appellant submitted an expert affidavit. In this affidavit, Appellant's expert, Derk Rasmussen, opined that GCE did not comply with generally accepted accounting principles in its treatment of the Arizona Tax Refund and certain assets in the Sobek transaction. A copy of Rasmussen's Affidavit is found in the record. (Rec. at 1510-1522.)

Appellees moved the trial court to exclude Rasmussen's "expert" testimony under Utah Rule of Evidence 702 on the grounds that, in rendering his opinions, Rasmussen relied upon superseded accounting principles, misapplied the black letter of other accounting principles, and relied upon a clearly erroneous factual foundation while ignoring other significant and undisputed facts. Additionally, many of Rasmussen's opinions were, however misguided, entirely irrelevant to the inquiry before the trial court. Despite the unreliable and irrelevant nature of Rasmussen's opinions, however, the trial

court denied Appellees' motion to exclude Rasmussen's expert testimony without analysis or reasoning.²⁰

It is well-established that reliability and relevance concerns with regard to expert testimony are not, as Appellant suggests, matters that are merely left to a jury; rather, they go directly to the threshold determination that a trial court must make in exercising its critical "gatekeeping" function under Utah Rule of Evidence 702. Accordingly, the trial court's failure to exclude Rasmussen's "expert" testimony was error.

1. Standard of Admissibility of Expert Testimony

Trial judges are in a unique position to evaluate witnesses, evidence, and the trial in its entirety. State v. Parsons, 781 P.2d 1275, 1282 (Utah 1998) (stating that trial courts have the obligation to "control and manage the proceedings and preserve the integrity of the trial process"). "As to the admission of scientific, technical, or other specialized evidence, when counsel has made a proper objection to its admissibility, a trial judge is charged with the responsibility of being a 'gatekeeper to carefully scrutinize [the] proffered evidence.'" Franklin v. Stevenson, 987 P.2d 22, 26 (Utah 1999) (quoting State v. Ramirez, 817 P.2d 774, 778 (Utah 1991)). "As gatekeeper, it falls to the trial court to ensure that [expert testimony] proffered by either party meets the appropriate standard of admissibility." Id.

²⁰ With regard to Appellees' motion to exclude Rasmussen's expert testimony, the trial court's Memorandum Decision merely states: "Each motion has been extensively briefed and argued. After careful consideration, the Court has determined to deny [Defendant's motion to exclude the testimony of Appellant's expert]." (Rec. at 1755.)

The general rule for admissibility of expert testimony is Utah Rule of Evidence 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.²¹ (Emphasis added.) It is axiomatic that to “assist the trier of fact,” expert testimony must, at a minimum, be relevant and reasonably reliable. See, e.g., Turck v. Baker Petrolite Corp., 2001 WL 589470, *9 (10th Cir. (Okla.)) (“In order to assist the trier of fact, expert testimony must be reasonably reliable.” (emphasis added)). Rule 702’s “‘helpfulness’ standard also implicates Rule 403 considerations, since if the evidence is confusing or unfairly prejudicial it will hinder rather than aid jury decision making.” Campbell v. State Farm Mutual Auto. Ins. Co., ___ P.3d ___, 2001 UT 89, 86, cert. denied, 122 S.Ct. 2326 (2002) (internal quotations omitted); see also Rimmasch, 775 P.2d at 398 n. 8 (stating that “any expert evidence, scientifically based or otherwise,” must be excluded if it would result in “confusion of the issues” or “mislead[] the jury” (emphasis added)).

²¹ In State v. Rimmasch, this Court mandated further 702 inquiries where expert testimony is based upon novel scientific principles or techniques. 775 P.2d 388, 396 (Utah 1989). Although this Court has held that “the Rimmasch test was not intended to apply to all expert testimony,” State v. Adams, 5 P.3d 642, 646 (Utah 2000), it has not held that a trial court’s “gatekeeping” responsibilities do not extend to all expert testimony. To the contrary, this Court explained in Rimmasch that “any expert evidence, scientifically based or otherwise,” must be excluded as part of the trial court’s critical gatekeeping function if it does not meet the strictures of Rule 702. Rimmasch, 775 P.2d at 398 n.8 (emphasis added); see also Franklin, 987 P.2d at 26 (stating that a trial court’s “gatekeeping” function extends not only to the admission of “scientific” evidence, but also to the admission of “technical or other specialized evidence” as well).

Applying these well-established principles to Rasmussen's testimony yields the inexorable conclusion that Rasmussen's opinions are inadmissible under Rule 702 and should have been excluded by the trial court.

2. Rasmussen's Opinions Clearly Do Not Meet the Standard for Admissibility Under Rule 702.

a. Rasmussen's Opinions About Treatment of the Arizona Tax Refund Are Unreliable and Irrelevant.

Rasmussen opined that the tax refund received by GCE from the state of Arizona, years after Appellant's voluntary resignation, should have been treated as a "prior period adjustment" under GAAP. (Rec. at 1510-1511.) Rasmussen's opinion is inadmissible, however, for three independent reasons: (1) Rasmussen relied on a superseded accounting principle; (2) Rasmussen unquestionably misapplied the proper accounting principle; and (3) Rasmussen's opinion is completely irrelevant.

Rasmussen's first error was relying upon a superseded GAAP principle. Although Rasmussen identified no accounting principle indicating that the tax refund must be treated as a "prior period adjustment" in his affidavit, he finally stated in his deposition that Accounting Principles Board Opinion ("APB") No. 9 is relevant to this issue. (Rec. at 1480 (depo. transcript at p. 216).) Rasmussen admitted, however, that APB No. 9 was superseded by Statement of Financial Accounting Standards ("FAS") No. 16 nearly twenty-five years ago. (Rec. at 1480 (depo. transcript at p. 216, 219).) While GAAP may not be "law," it does provide the accounting standards against which the accounting practices of GCE are to be measured. Accordingly, Rasmussen's reliance on APB No. 9, an accounting principle that has admittedly been outdated for nearly twenty-five years,

renders his opinion regarding the Arizona Tax Refund fundamentally unreliable, and consequently, inadmissible under Rule 702.

Rasmussen's second error was misapplying the correct GAAP principle, FAS No. 16, which was promulgated in response to a request for reconsideration of APB No. 9. As Rasmussen conceded, FAS No. 16 defines when income realized in a later period might be attributed to activities of a prior period. FAS No. 16 states the rule as follows:

Except as specified in paragraph 11 and in paragraphs 13 and 14 with respect to prior interim periods of the current year, all items of profit and loss recognized during a period, including accruals of estimated losses from loss contingencies, shall be included in the determination of net income for that period.

(Rec. at 1457 (footnotes omitted) (emphasis added).) Accordingly, FAS No. 16 unequivocally states that an item of profit or loss, such as the Arizona Tax Refund, shall not be treated as a prior period adjustment unless the exceptions identified in paragraphs 11, 13, or 14 are applicable. Rasmussen, however, conceded in his deposition that the exceptions set forth in paragraphs 11, 13, and 14 were inapplicable in the instant case. (Rec. at 1478 (depo. transcript at p. 233-234).) Therefore, by Rasmussen's own admissions, in no event could a trier of fact conclude that GCE's accountant violated GAAP by not treating the Arizona Tax Refund as a prior period adjustment.²²

²² Appellant argued before the trial court that FAS No. 16 may define some of the exceptions where income generated in a later period may be attributed to activities of a prior period, but not all of the exceptions. Appellant is mistaken. FAS No. 16 plainly defines the universe of exceptions; its exceptions are exhaustive, not merely illustrative. Appellant's argument is a classic example of why an expert's testimony must be excluded where the principle is improperly applied by the expert. Rasmussen should not be free to redraft this GAAP standard in order to further Appellant's interests.

Finally, and perhaps most importantly, Rasmussen's opinion regarding the Arizona Tax Refund is entirely irrelevant. Rasmussen's affidavit offered absolutely no evidence that the accounting performed at the time of Appellant's buyout in 1992 would have to be revisited by reason of the Arizona Tax Refund received years later. Indeed, Rasmussen admitted that GAAP does not require adjustment of prior financial statements or recalculation of a shareholder buyout based upon a subsequent economic event:

Q. But you don't go back and adjust the prior periods' financial statements under FASB 16?

A. No. I have never claimed that you adjust the prior periods' financial statements. I'm saying that it —

* * *

Q. What do you think Mr. Smith wants to do here, just have it noted and do nothing with it?

A. I think what he wants to have happen — I'm guessing because he hasn't told me — is he wants it recognized as that it relates to time periods when he was — he had an ownership interest.

Q. And GAAP doesn't require that, does it?

A. It doesn't — there is no GAAP that requires you to go back and restate the financial statements.

(Rec. at 1478 (depo. transcript at p. 236–237) (emphasis added).) Accordingly,

Rasmussen's opinion about whether to treat the Arizona Tax Refund as a prior period adjustment, is entirely irrelevant to this inquiry as it cannot permissibly lead to the

conclusion that Appellant's buyout has to be recalculated based upon such an adjustment.²³

For the foregoing reasons, Rasmussen's opinion that the Arizona Tax Refund should have been treated as a "prior period adjustment" is inadmissible under Rule 702 as it cannot "assist the trier of fact to understand the evidence or to determine a fact in issue" and will only result in "confusion of the issues." Rimmasch, 775 P.2d at 398 n. 8. As such, the trial court's failure to exclude this opinion was plain error.

b. Rasmussen's Opinions Concerning the Covenant Not to Compete and the Concessions Contract Are Irrelevant and Unreliable.

In his affidavit, Rasmussen testified that GCE violated GAAP by allocating \$1,000,000 of the purchase price of the business owned by Ron Smith prior to 1987 to a Covenant Not to Compete (the "Covenant") granted to GCE by Ron Smith. (Rec. at 1515-1520.) Rasmussen opined that the Covenant was "worthless" and that, consequently, the \$1,000,000 paid for the Covenant should have been booked to GCE's Concession Contract with the National Park Service and amortized for forty years, rather than the four years GCE amortized the Covenant.²⁴ (Id.) Like his opinion regarding the

²³ Appellant argues that Rasmussen's testimony is relevant as to the period of time in which the Arizona Tax Refund received by GCE was generated. However, regardless of whether Rasmussen's opinion relates to a time period during which Appellant was employed, he admits that it is of no consequence because GAAP does not require restatement of financials or recalculation of Appellant's buyout.

²⁴ Not surprisingly, this maximum amortization period provides the maximum benefit to Appellant by adjusting the net book value as of the date of his resignation.

Arizona Tax Refund, Rasmussen's opinions regarding the Covenant and the Concession Contract are irrelevant and unreliable, and therefore, inadmissible.

i. Rasmussen's Opinions Are Irrelevant.

Rasmussen's disagreement with GCE about characterization of the \$1 Million payment for the Covenant is another red herring. If the Concession Contract could have been amortized over the same period as the Covenant, or over a substantially similar period, then there is no evidence of bad faith. Accordingly, any opinion Rasmussen might offer about what he personally would have done with the Concession Contract is irrelevant.

Rasmussen agreed that APB No. 17 is the governing authority for amortization of intangible assets such as a covenant not to compete or acquisition of a contract right, like the Concession Contract at issue. (Rec. at 1490 (depo. transcript at 139).) APB No. 17 states the rule as follows:

9. The Board concludes that a company should record as assets the costs of intangible assets acquired from others, including good will acquired in the business combination. A company should record as expenses the costs to develop intangible assets which are not specifically identifiable. The Board also concludes that the cost of each type of intangible assets should be amortized by systematic charges to income over the period estimated to be benefited. The period of amortization should not, however, exceed forty years.

(Rec. at 1463, ¶ 9 (emphasis added).) Thus, APB No. 17 establishes a ceiling for amortization, not a floor. Indeed, Rasmussen himself acknowledged that the language of APB No. 17 vests discretion in the accountant applying the enumerated factors affecting amortization (Rec. at 1488 (depo. transcript at p. 153)); that it is possible to amortize the

Concession Contract over the term of its existence (which is what GCE did with the Covenant), (see id. (depo. transcript at p. 155)); and that there is no black letter law that says these type of assets must be amortized over forty years. (Rec. at 1484 (depo. transcript at p. 187).)

In light of Rasmussen's concessions, there is no basis upon which the trier of fact could conclude from Rasmussen's opinions that amortization over four years rather than forty years is bad faith.²⁵ Since the Concessions Contract could properly, under APB No. 17, be amortized to the end of the four-year payment stream or to the end of its term in 1992, whether the \$1 Million payment was properly characterized as payment for the Covenant, or should have been characterized as payment for the Concessions Contract, makes no difference.

ii. Rasmussen's Opinions Are Based Upon An Erroneous Factual Foundation While Ignoring Other Significant and Undisputed Facts.

In addition, Rasmussen's amortization opinion is fundamentally flawed. Specifically, Rasmussen's opinion is based upon the erroneous assumption that at the inception of GCE's business in 1986, an accountant was required to assume that the useful life of a concession contract ran in perpetuity, and therefore, the maximum amortization period of forty years applied. (Rec. at 1485 (depo. transcript at p. 178).) In

²⁵ A breach of the covenant of good faith and fair dealing does not occur where one accountant decides, as Rasmussen has done, that it would be more reasonable to account for an asset in a different manner than another accountant. Rather, a breach is shown only where there is no basis for a decision. See, e.g., Morton v. Continental Baking Co., 938 P.2d 271, 274 (Utah 1977).

making this assumption, however, Rasmussen ignored several critical, undisputed facts, such as: (1) the Concession Contract itself provided for a limited term ending on December 31, 1992;²⁶ (2) the contract did not provide a period for renewal; and (3) although federal law provided a right of preference to an existing concessionaire, as of 1986 it provided absolutely no guarantee that an existing concessionaire would be able to renew its contract. Accordingly, Rasmussen's "perpetuity assumption" is devoid of factual support in the record.

Rasmussen's perpetuity assumption is not the only factual and analytical flaw in his amortization opinion. In GCE's memorandum of points and authorities in support of its motion to exclude Rasmussen's expert testimony, GCE outlined at least twenty-one additional factual errors that undermine the reliability of Rasmussen's assumptions and conclusions. In the interest of space, GCE will not repeat those arguments here, but rather incorporate herein by reference the relevant portions of its memorandum of points and authorities in support of its motion to exclude Rasmussen's expert testimony. (Rec. at 1171-1180.)

**iii. Rasmussen's Opinion That the Covenant Was
"Worthless" Lacks Sufficient Foundation For Admission.**

Finally, if Rasmussen is wrong about allocation of the \$1 Million between the Covenant and the Concession Contract, then the entire issue is moot as the Covenant

²⁶ Under APB No. 17, this is the most significant fact in determining proper amortization. (Rec. at 1462, ¶ 27.)

could properly be amortized over its four-year term. Rasmussen's main criticism regarding GCE's valuation of the Covenant is the absence of work papers. (Rec. at 1511-1520, ¶7.) This criticism is remarkable in light of the absence in Rasmussen's own work papers of any evidence demonstrating how he valued the Covenant. (Rec. at 1487 (depo. transcript at p. 162); Rec. at 1494 (depo. transcript at p. 106-108).) Indeed, the only work product Rasmussen generated was his signature on an affidavit drafted by Appellant's lawyer. Therefore, if Rasmussen is correct that an opinion about the value of a covenant not to compete is unreasonable without substantiating work papers, then his opinion about the value that should be given to the Covenant (i.e., that it is worthless or has some nominal value) is inadmissible.

In addition to his lack of work papers, Rasmussen identified the "facts" upon which he based his opinion that the Covenant is worthless in his affidavit. Rasmussen's so called "facts," however, are not facts at all. Like the assumptions underlying his amortization opinion, the assumptions underlying his opinion that the Covenant is worthless are so flimsy and devoid of factual support as to lack sufficient foundation for admissibility. GCE will not repeat those arguments here, but rather incorporate by reference the relevant portions of its memorandum of points and authorities in support of its motion to exclude Rasmussen's expert testimony. (Rec. at 1166-1169.)

3. Rasmussen's Opinions Concerning the Sobek Accounting Entries Are Unreliable and Irrelevant.

Finally, Rasmussen contended that GCE improperly adjusted the \$1.2 Million Sobek purchase price by deducting negative retained earnings in the amount of

\$229,304. (Rec. at 1520-1521, ¶ 5.) Rasmussen attempted to identify the components of the Sobek negative retained earnings in his affidavit. (Rec. at 1514-1515, ¶7(b).) The first component Rasmussen points to is an alleged error by GCE's accountant in booking the asset at \$1.17 Million instead of \$1.20 Million, creating a difference of approximately \$30,000. In his deposition, however, when shown the relevant financial data to which he had access, Rasmussen conceded that this was a mistake on his part. (Rec. at 1483 (depo. transcript at p. 191).)

Rasmussen then pointed to depreciation in the amount of \$59,304 for physical assets that had been acquired, according to Rasmussen, "approximately one month earlier." (Rec. at 1514-1515, ¶ 7(b).) Rasmussen offered no evidence, however, that this depreciation violated GAAP, but rather, concedes in his own affidavit that it "may be on the very high end of what is allowable by generally accepted accounting principles." (*Id.*, emphasis added.) Because a deduction is relevant only if it violates GAAP, the above concession renders Rasmussen's testimony about this depreciation item irrelevant.

Finally, Rasmussen argued that GCE's accountant improperly recorded "a negative cash balance" of \$140,000. (*Id.*) As was clear at his deposition, Rasmussen did not understand the \$140,000 entry reflected as part of the negative retained earnings account. (Rec. at 1483 (depo. transcript at p. 194, 197-198).) His misunderstanding of this entry obviously arose from his failure to even review the agreements pursuant to which GCE acquired Sobek, which required GCE to book the \$140,000 payment as an expense for previous advertising. (Rec. at 1816-1823, 1825-1839.)

In conclusion, Rasmussen's own affidavit and deposition testimony affirmatively establishes that his opinions about the Arizona Tax Refund, the Covenant and the Concessions Contract, and the Sobek transaction are unreliable and, in most respects, irrelevant. As such, the trial court's failure to exclude Rasmussen's "expert" testimony under Rule 702 was error.

C. THE TRIAL COURT ALSO CREATED NEW LAW BY HOLDING THE INDIVIDUAL APPELLEES LIABLE FOR THE CORPORATION'S ALLEGED BREACH OF CONTRACT.

The trial court did not limit its effort to create new Utah law to its treatment of the Arizona Tax Refund. The individual Appellees moved to dismiss all claims against them on the grounds that the Buy-Sell Agreement was a contract between Appellant and GCE rather than among Appellant and all Appellees. Although Appellant argued to the contrary, the trial court evidently was not persuaded by Appellant's obviously strained reasoning as it did not cite any of Appellant's theories in support of its decision denying the motion for summary judgment on this ground. Instead, the court found that since this was a privately held, Subchapter S corporation, it would not dismiss the individual Appellees. (Rec. at 1748.)

The trial court plainly erred. It is well-settled in Utah that individual shareholders are not liable for breach of a corporation's contracts absent exigent circumstances that do not exist here. Reedeker v. Salisbury, 952 P.2d 577, 582 (Utah Ct. App. 1998). There is no Subchapter S or "privately held corporation" exception to this rule. Individual Appellees, therefore, should be granted summary judgment on all claims.

IX. CONCLUSION

The trial court's grant of summary judgment dismissing Appellant's claims should be affirmed because he reached an accord and satisfaction with GCE or waived those claims. Alternatively, the judgment can be affirmed on the ground that Appellant was, at all times, an at-will employee of GCE.

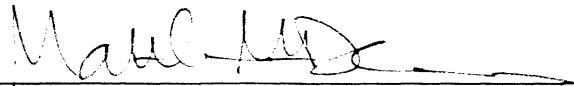
Similarly, the trial court's grant of summary judgment on Appellant's claim for breach of the implied covenant of good faith and fair dealing as to the Buy-Sell Agreement should also be dismissed. Appellant reached an accord or waived those claims when he signed the Separation Agreement as well. Moreover, he is estopped from complaining of GCE's accounting practices, of which knew and approved as an officer of GCE, and from which he benefited as a shareholder. Additionally, the undisputed facts show that the net book value of GCE was determined by GCE's accountant in accordance with GAAP, precisely as required by the Buy-Sell Agreement.

The trial court properly denied Appellant's claims for punitive damages and attorneys' fees as a matter of law, and those decisions should also be affirmed. Appellant's complaint does not allege a tort claim; consequently, punitive damages are inappropriate. Similarly, Utah law on attorneys' fees does not support such an award based on the undisputed facts of this case.

The trial court should have granted Appellee's motion for summary judgment on the Arizona Tax Refund. Appellant reached an accord on this claim just as on all his others. Additionally, the undisputed facts show that Appellees did nothing to intentionally deprive Appellant of his reasonable expectations as to the Arizona Tax

Refund. Moreover, the implied covenant was extinguished upon termination of the Buy-Sell Agreement.

The testimony of Appellant's expert on accounting issues, in addition to being irrelevant, should have been deemed by the trial court as unhelpful. Finally, there is no basis to hold any of the Individual Appellees liable for any of Appellant's claims. The trial court's denial of Appellees' motion dismissing all claims against the Individual Appellees was in error.

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

Matthew M Durham
John A. Anderson
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2002, I caused to be served by first class mail, postage prepaid, BRIEF OF APPELLEE to the following:

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