

1999

Lee O. Barney v. Jon D. Siddoway and Standard Tile, Inc., a Utah Corporation : Reply Brief

Utah Court of Appeals

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LEE O. BARNEY)
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Plaintiff and Appellee,)
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vs.) Appellate Court No. 990579-CA
)
JON D. SIDDOWAY and STANDARD)
TILE, INC., a Utah Corporation,) Priority No. 15
)
Defendants and Appellants.)
)

APPEAL FROM A JUDGMENT IN THE THIRD DISTRICT COURT
ON JUNE 7, 1999
THE HONORABLE DAVID S. YOUNG PRESIDING

Attorney for Defendants/Appellants
Jon D. Siddoway & Standard Tile, Inc.

COURT OF APPEALS

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I. THE TRIAL COURT'S DECLARATION OF BARNEY'S 25% OWNERSHIP IN STI CORPORATION IS A CONCLUSION OF LAW.

Contrary to Barney's assertion, the trial court's statement of Barney's percent ownership in STI corporation is a conclusion of law, not a finding of fact. The Utah Supreme Court has long ago noted that, regardless of whether a trial court classifies a statement a finding of fact or a conclusion of law, if it states a party's legal rights the statement is "purely a conclusion of law." *Duncan v. Hemmelwright*, 186 P.2d 965, 969 (Utah 1947). On the other hand, as this Court has noted, findings of fact are to "inform the parties about the mind ["analysis"] of the court" and "provide a basis on which an appellate court can review the judgment. *Dover Elevator Co. v. Hill Mangum Investments*, 766 P.2d 424, 426 (Utah App. 1988).

In the present case, just because the trial court referenced similar language in both its findings of fact and its conclusions of law, that fact cannot reduce a legal conclusion to a finding of fact. *See State v. Genovesi*, 871 P.2d 547, 551 (Utah App. 1994) (appellate court refuses to regard trial court's legal conclusions as findings of fact even though so classified in the lower court decision.)

In its Findings of Fact, the trial court first laid out its factual findings regarding Barney's purchases of stock, a bonus check never paid to Barney, and what it considered unfair benefits taken by Siddoway. (Findings, 1-28). In Finding no. 29, the trial court

reached its legal conclusion that Barney was thus entitled to 25% ownership in STI corp. Thereafter, the trial court entered the same conclusion as its first Conclusion of Law (Conclusions, no. 1).¹ The trial court's declaration of Barney's percent ownership constituted a decisive step from underlying facts to legal inferences from those facts, which court's recognize as conclusions of law. *Sandall v. Hoskins*, 137 P.2d 819, 822 (Utah, 1943). Such a conclusion was also a statement of a Barney's legal rights and thus purely a conclusion of law. *Duncan*, 186 P.2d at 969. Hence, the appropriate standard of review is one of "correctness." *State v. Ramirez*, 817 P.2d 774, 782 (FN3) (Utah 1991).

II. MRS. BARNEY WAS NOT QUALIFIED BY EDUCATION, TRAINING OR EXPERIENCE TO PROVIDE EXPERT OPINION REGARDING THE NATURE OF THE BENEFITS RECEIVED BY SIDDOWAY.

"The critical factor in determining the competency of an expert is whether that expert has knowledge that can assist the trier of fact in resolving the issues before it." *Patey v. Lainhart*, 977 P.2d 1193, 1196 (Utah 1999) citing *Wessel v. Erickson Landscaping Co.*, 711 P.2d 250, 253 (Utah 1985). It is clear that Mrs. Barney did not have the requisite knowledge to be able to assist the trial court to resolve the accounting issues presented by this case and the trial court erred in admitting and relying upon her opinion testimony.

Although it is true that formal training or education is not a prerequisite to giving

¹ The trial court also stated in Conclusion no. 6, "[t]o the extent that the foregoing Findings of Fact or any of them constitute a Conclusion of Law, the same are incorporated herein and by this reference made a part hereof . . ." (Conclusions, no. 6).

expert testimony, the proffered expert must at least be shown to have some specialized training or experience in the relevant area beyond a layperson so that his or her opinion can be seen as reliable and based on more than mere speculation. *Utah Rules of Evidence* 702.

Simply because Mrs. Barney has been employed in positions that have required her to perform general accounting duties does not mean that she has the requisite experience and training to review and analyze corporate/accounting records to determine which benefits and expenditures were inappropriate. If such were the case, anyone who had run their own business, worked as an office manager or in an administrative position in an accounting department could have provided similar "expertise" to the issues presented by this case. Mrs. Barney's "qualifications" simply do not satisfy the minimum requirements of Rule 702.

Mrs. Barney is not a Certified Public Accountant. She has an associate degree in accounting from a local junior college and has worked for several years as an office manager and before that a customer service agent. One of her former employers obtained a judgment against her for taking money from the company and exposing the company to liability because of her incompetent "accounting" services.

Finally, while objectivity is not a requirement in expert witnesses, bias is ever a point for impeachment. Mrs. Barney is the Appellant's wife, with a complete interest in his potential damages. The fact of this bias should have called her objectivity into

question from the outset.

The trial court's error in qualifying Mrs. Barney as an expert is analogous to a legal malpractice case where the plaintiff seeks to qualify as a legal expert an individual who has a degree from an un-accredited law school, has never taken or passed the state bar exam, has worked several years as a paralegal in a law office, but who was sued by a former law firm for exposing the firm to liability for dishonesty and incompetency, and is the spouse of the plaintiff. There can be no doubt that it would be an abuse of discretion to qualify such an individual to provide expert opinion on complex legal issues and the applicable standard of care. Nonetheless, this is tantamount to the ruling of the trial court in this case by admitting Mrs. Barney as an expert accounting and damages witness.

The trial court abused its discretion in qualifying Mrs. Barney as an expert. This abuse of discretion constituted prejudicial error because without Mrs. Barney's testimony and exhibits there was no other specific evidence presented by Barney with regard to the alleged improper compensation and benefits received by Siddoway upon which the trial court could have relied to reach its decision.

III. THE TRIAL COURT ERRED IN ACCEPTING INTO EVIDENCE IMPROPER SUMMARIES BY MRS. BARNEY.

As a general rule, an expert may not guess, speculate, or offer opinion testimony which is mere conjecture. *State v. Jarrell*, 608 P.2d 218, 231 (Utah 1980). Furthermore, where an "expert" admits that his or her opinion is based upon speculation, it is proper to

strike the expert's opinion from the record. *Stevenson v. Goodson*, 924 P.2d 339, 347 (Utah 1996). Mrs. Barney's opinions and conclusions were shown by her own testimony to be based on conjecture and speculation, and thus, the trial court erred in accepting her so-called "summaries" into evidence.

As has been shown, Barney's attempt to qualify Kristi Barney as an expert witness with expertise sufficient to testify about STI corporate accounting or damage summaries in litigation was contrary to the facts presented to the trial court. Her incompetence as an accounting expert witness in this matter was matched only by the complete lack of credibility in her exhibits which, by her own testimony were selective, arbitrary and substantially unsupported (Transcript, pp. 302, 315, 316, 328, 340-41, 342, 397).

A. The Trial Court's Reliance Upon Kristi Barney's Summaries Was a Prejudicial Error.

When trial evidence is not sufficient to support the verdict without wrongfully admitted evidence, an error in admitting the evidence is prejudicial and a ruling which follows such evidence is prejudicial. *See Sokol Crytal Products, Inc. v. DSC Communications Corp.*, 15 F.3d 1427, 1435 (7th Cir. 1994). In making a "harmlessness" evaluation with regard to the admission of evidence, the court must consider the centrality of the evidence at issue and its prejudicial effect in the trial court's consideration. *See Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 102 (1st Cir. 1997).

Moreover, although several individual evidentiary errors might not, standing alone,

have affected a party's substantial rights, the court may find that the collective effect of multiple evidentiary errors in fact deprived the moving party of a fair trial. *See Phoenix Associates III v. Stone*, 60 F.3d 95, 105 (2nd Cir. 1995).

In the present case, the trial transcript itself demonstrates very clearly that without reliance upon Kristi Barney's flawed testimony and improper summaries, the trial court would have had little or no basis for its finding that Barney was a 25% shareholder in STI corp. During cross-examination Mrs. Barney admitted that her conclusion that Siddoway had wrongfully received excess compensation and benefits was based on speculation. (See Appellant's Brief, statement of facts 35-41). Siddoway objected to the speculative nature of Mrs. Barney's testimony and summaries but was overruled each time. (Transcript, pp. 304, 307, 321, 323-324, 352, 361-365).

The only relevant testimony offered to the trial court besides that of Siddoway and Mr. Okuda was Barney's, which amounted to a brief and bland description of his view of the company and his minor role in it. He offered no real testimony about improper benefits and only limited evidence as to a compensation agreement with Siddoway.

Barney's claim that Siddoway admitted the unfair benefits (Appellee's brief, p. 22) is untrue. Siddoway repeatedly denied that Barney was ever entitled to an equal share of everything in the company, and while he acknowledged certain expenses, (i.e. key pad on his garage, fishing trip) the expenditures were shown to be justified in other testimony. (Transcript, pp. 342, 345). Thus, Kristi Barney's improper summaries *were central* to the

trial court's determination and their admission as evidence was prejudicial to Siddoway, and not "harmless error."

B. Barney's Insurance Benefits Argument is Betrayed by Competent Testimony and the Trial Court's Findings.

Arguing under the incorrect assumption that Barney, who, by the most generous count possible, purchased only a fraction of company stock, was entitled to a dollar-for-dollar share of anything touched by Siddoway, Barney argues that Siddoway abused the benefits of insurance policies through the company. (Appellee's brief, pp. 20, 21 & 24.) This argument is fundamentally flawed, first because no credible evidence suggested that Barney was entitled to an equal and commensurate benefit at every level of company operation. Secondly, the trial court admitted that its review of insurance policies showed that it was administered according to "the agreement." (Findings, no. 33).

Barney admitted to the trial court that the company paid his insurance premiums for approximately three years (Transcript, p. 214) until he and his wife *chose* to take advantage of another policy through his wife's employment instead. (Id.) He also recalled of at least one instance when the company paid medical costs for him over and above any insurance payment. (Transcript, p. 215). Kristi Barney's "summaries" make no mention of such payments or benefits.

Kristi Barney testified that Barney was actually covered by a life insurance policy for a premium of \$96.50 each month and that Mr. Siddoway was covered with a premium

of \$252.80 each month—with a net difference of \$156.30. (Transcript, pp. 312-313). The difference in value was thrown around by Barney as if Siddoway had derived an unfair benefit. But Siddoway had already testified that higher priced policies on him served as a less expensive insurance alternative which anticipated the higher cost of replacing his services to the company (as apposed to Barney's services) and he clarified the fact that the company—not his wife or him--would be paid in the event of a claim on that policy. (Transcript, p. 140).

C. The Trial Court's Finding of Unfair Compensation to Mrs. Siddoway Goes Against the Only Competent Testimony on the Subject.

Both Siddoway and Mr. Okuda, the company accountant, testified as to the valuable services rendered the company by Mrs. Siddoway (without other compensation) (Transcript, pp 144-145, 444). Barney offered nothing on the subject. Yet the trial court found that Siddoway had unfairly benefitted by having his wife's car paid for through the company. This finding could only be reached by ignoring the competent evidence offered on the subject which showed that Mrs. Siddoway's use of the company car was the only compensation she received for her valuable services to the company. (Transcript, pp. 144-145). As an employee, Barney also received the benefits of a company vehicle, (Transcript, pp. 226-227) yet unlike Mrs. Siddoway, he was paid a salary for his work. The car should not have been considered an unfair benefit by the trial court, and without reference to Kristi Barney's improper "summaries", the trial court would have no basis

for having done so.

D. Barney's Continued Reference to Payments for Legal Services are Irrelevant and Misleading.

Barney attempts to make an issue of the fact that a company check paid for legal assistance to Mr. Siddoway in a prior divorce action. (Appellee's brief, p. 20). However, the record shows, at page 147, that the payment in question was made when Siddoway was the sole owner of the company and before Barney ever purchased stock. Therefore, references to any such payment are not only irrelevant but distractive to actual issues. Nonetheless, it is instructive to note that the trial court once again overruled Mr. Schmutz' objection on that point and allowed the testimony in. (Id.)

E. The Trial Court's Position on Siddoway's Use of Jazz Tickets Was Not Based Upon Competent Evidence.

The trial court found, and Barney continues to allege in his brief, impropriety in the way Mr. Siddoway, as president of the company, made use of company Jazz tickets. (Appellee's brief, p. 20). It should be noted, however, that without reference to and dependence upon the improper "summaries" supplied by Kristi Barney, the only evidence upon which the trial court could have relied with regard to Jazz tickets was Siddoway's testimony that: 1) the company had been ticket holders for more than 15 years (Transcript, p. 192); 2) that all employees used the tickets, including the Barneys (Transcript, p. 148); 3) that he (Siddoway) attended perhaps as many as 50% of the home games (Transcript, pp. 192-193); and 4) that as part of his job in business/client

development and advertising, the company benefitted significantly by him taking current and potential clients to Jazz games. (Transcript, pp. 192-193).

Barney himself offered no testimony about use of Jazz tickets. However, Kristi Barney admitted going to Jazz games (Transcript, p. 353) and she admitted that her only basis for counting the Jazz tickets as an unfair benefit to Siddoway was the fact that Siddoway attended the games when she and her husband attended. (Transcript, p. 354).

On the other hand, Mr. Okuda testified that company expenditures were proper (Transcript, p. 433) and that he never thought that Mr. Barney and Mr. Siddoway were to be compensated the same and that in fact, from his understanding of the operation and management of the company, he assumed that Mr. Siddoway would receive more for his extra duties in managing the company and for his majority ownership. (Transcript, p. 453).

Therefore, without reliance upon Kristi Barney's alleged "summaries" of improper benefits to Siddoway, the trial court had no valid basis for its position that Siddoway took improper benefits in his use of the Jazz tickets. The only *proper* evidence before the trial court on that point was testimony by Siddoway and Okuda, which explained both the use and distribution of Jazz tickets and dismantled Barney's repeated allegation of equal entitlement to every facet of a company in which he was an extreme minority shareholder.

F. Mrs. Barney's exhibits are not summaries within the meaning of Utah Rule of Evidence 1006.

Barney's argument at page 23 and 24 of his brief misses the point with regard to Mrs. Barney's exhibits being improper summaries under Utah Rule of Evidence 1006. Obviously each of Mrs. Barney's exhibits does not need to summarize every business record relating to STI. However, common sense dictates that if Barney proffers a summary purporting to summarize checks and invoices for expenses of STI and/or Siddoway personally (See Barney's Trial Exhibit 14), all of the checks contained in STI's financial records should be included in the summary. Mrs. Barney did not review all of the checks contained in STI's financial records and only included in Exhibit 14 those items that she believed were personal expenses of Siddoway. (Transcript, pp. 302, 328).

The fact that Siddoway had possession of the underlying documentation or that information missing from Mrs. Barney's exhibits was contained in exhibits presented by Siddoway does nothing to cure the deficiencies in Mrs. Barney's exhibits as suggested by Barney at pages 23-25 of his brief. Mrs. Barney's summaries were clearly improper under Rule 1006 and it was error for the trial court to admit them into evidence.

G. The Trial Court erred in admitting Mrs. Barney's summaries as they violate the hearsay rule.

For Kristi Barney's summaries to be admissible, they must qualify both as an exception to the hearsay rule under Rule 803(6), Utah Rules of Evidence, governing the admission of business entries, and as a proper summary under Utah Rule of Evidence

1006. *Shurtleff v. Jay Tuft & Co.*, 622 P.2d 1168, 1174; *Trolley Square Assoc. v. Nielson*, 886 P.2d 61, 68 (Utah App. 1994).

Barney claims that Mrs. Barney's summaries do not violate the hearsay rule because they summarized documents prepared by Siddoway and kept in the ordinary course of business. (Appellee's Brief, p. 27). Barney's argument is without merit. It makes no difference that the records being summarized by Mrs. Barney were prepared in the ordinary course of business if the summaries were also not made in the ordinary course of business. *Id.* Mrs. Barney's exhibits clearly were not prepared in the ordinary course of business for STI as she was never an employee of STI and testified that the exhibits were prepared shortly before trial.

Similar to the present case, in *Trolley Square Associates*, the appellate court reversed the trial courts admission of exhibits which were summaries of monthly rent payments, fees and insurance payments due the plaintiff as business records because the summaries were not records made at or near the time of the condition being recorded—the accrual of the indebtedness. *Id.*

Likewise, in this case, the trial court's admission of Mrs. Barney's exhibits must be reversed.

Barney also argues that even if the exhibits were not admitted there was other evidence presented upon which the trial court could have based its judgment against Siddoway for taking excessive benefits and compensation. (Appellee's Brief, p. 27). As

has already been shown above, the only competent evidence available to the trial court without Kristi Barney or her summaries does not support the trial court's finding that Siddoway received excess benefits and compensation in breach of the agreement between the parties. Therefore, the only evidence the trial court could have relied upon to reach its conclusion are the testimony and exhibits of Mrs. Barney. Indeed, the only evidence specifically mentioned as a basis for the trial court's Findings of Fact are Mrs. Barney's exhibits and one of Siddoway's exhibits. (See trial court's Finding of Facts 28 and 31) Accordingly, the trial court's admission and reliance upon Mrs. Barney's exhibits was prejudicial error.

IV. THE TRIAL COURT COMMITTED SEVERAL ERRORS WITH REGARD TO THE ADMISSION OF THE SUMMARIES PREPARED BY MRS. BARNEY AND LIMITING DEFENDANT'S CROSS-EXAMINATION AND REBUTTAL TESTIMONY.

Barney claims at page 28 of his Brief that the trial court properly denied Siddoway's pre-trial motion to exclude exhibits prepared by Mrs. Barney which were produced after the close of discovery and shortly before trial, because the accounting records relied upon by Mrs. Siddoway to create her exhibits were always in the possession of Siddoway and therefore he should have had an intimate knowledge of the records.

It is true that the accounting records were in the possession of Siddoway, but this does not mitigate the prejudice imposed on Siddoway by the trial court's admission of the

Exhibits. Until Mrs. Barney produced her exhibits detailing what Barney claims were improper benefits taken from STI by Siddoway, Siddoway could not review the underlying documentation upon which Barney relied in an effort to rebut the summaries. Mrs. Barney had taken months reviewing records and creating her exhibits. The summaries were produced approximately a week prior to trial and after discovery had closed. As a result, Siddoway did not have an opportunity to cross-examine Mrs. Siddoway prior to trial regarding her damages exhibits, nor did Siddoway have sufficient time to review the exhibits and the underlying documentation in an effort to rebut Mrs. Barney's conclusions.

The prejudicial effect of the trial court's ruling denying Siddoway's pre-trial motion to exclude Mrs. Barney's exhibits was compounded by the trial court's limitation and direction with regard to Siddoway's cross-examination of Mrs. Barney, specifically with regard to Exhibit 14 which allegedly reflects improper benefits taken by Siddoway and upon which the trial court relied to conclude that Barney was a 25% shareholder in STI.

The record clearly shows that Siddoway was limited in his cross-examination of Mrs. Barney in several ways. First, Siddoway's counsel warned the trial court that his cross-examination of Mrs. Barney would necessarily be a laborious process because Siddoway had not been able to depose Mrs. Barney on the improper benefits allegedly taken by Siddoway as reflected in Mrs. Barney's exhibits because they were not produced

until shortly before trial. (Transcript, p. 348)

The trial court responded several times that it didn't want Siddoway to cross examine Mrs. Barney in any great detail with regard to exhibit 14 because Siddoway could rebut the testimony with his own or that of Mr. Okuda. (Transcript, pp. 348, 352, 360 and 365).

At page 360 of the transcript, the trial court interrupted the cross-examination of Mrs. Barney once again and after a discussion with Siddoway's counsel, stating "Don't use this witness to try and rebut that" (the lack of foundation and supporting documentation and the speculative nature of Mrs. Barney's conclusions in Exhibit 14) (Transcript, p. 364). The trial court concluded the discussion by stating "You don't demonstrate that (the lack of foundation and supporting documentation and the speculative nature of Mrs. Barney's conclusions in Exhibit 14) through this witness.... where you do that is with your own client or with Mr. Okuda" (Tr. p. 365) Siddoway's counsel then moved on to the next Exhibit as it was obvious the trial court would not entertain any further cross-examination of Mrs. Barney regarding the alleged improper benefits taken by Siddoway.

Standing alone this may not have constituted harmless error if the trial court had, in fact, allowed Siddoway to rebut Mrs. Barney's testimony with his own testimony or that of Mr. Okuda. However, when Siddoway attempted to have Mr. Okuda rebut the testimony of Mrs. Barney with regard to information contained on Exhibit 14, the trial

court sustained Barney's objection that Mr. Okuda's testimony lacked foundation because he had not reviewed the underlying documentation (Transcript, pp. 445-449). Despite the trial court's earlier assurances (upon which Siddoway's counsel relied) that Siddoway would have an opportunity to present evidence through Mr. Okuda rebutting Mrs. Barney's testimony, the trial court thwarted Siddoway's efforts to do so.

Further, the trial court improperly sustained Barney's foundational objection to Mr. Okuda's testimony. Barney stipulated that Mr. Okuda was qualified to provide expert opinion with regard to the accounting practices of STI. (Transcript, p. 401). As an expert, Mr. Okuda should have been allowed to offer opinion testimony as to Mrs. Barney's classification of the expenditures on Exhibit 14 as personal to Mr. Siddoway or business expenses of STI even though he had not reviewed all of the underlying documentation. An expert can give opinion testimony based on facts and testimony presented during the trial. *Lamb v. Bangart*, 525 P.2d 602 (Utah 1974). Siddoway should have been allowed to take Mr. Okuda through Mrs. Barney's Exhibits and based on the information contained therein, provided his opinion as to whether Mrs. Barney's classification of the benefits and expenditures was proper. It was error to deny Siddoway this opportunity.

During the discussion between Siddoway's counsel and the trial court regarding this objection, the trial court was informed that Siddoway planned on reviewing the individual expenses contained on Mrs. Barney's exhibits to demonstrate that they were

business expenses and not personal benefits improperly taken by Siddoway. The trial court informed Siddoway's counsel that it did not want to go through that process as it had already come to a decision that Siddoway had in fact taken benefits in excess of what was the agreement between Siddoway and Barney. (Transcript, pp. 449-450 and 456-457). Based on this discussion with trial court, Siddoway's counsel informed the trial court that he would not even attempt to rebut the individual entries on Mrs. Barney's exhibits during Mr. Siddoway's direct examination. (Transcript, pp. 485-486). Based on this series of events, how can Barney argue that the trial court did not "limit or preclude Siddoway from presenting evidence he chose?" (Appellee's brief, p. 30).

Plainly, these series of errors by the trial court amounted to prejudicial error against Siddoway under the cumulative error doctrine. *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920 (Utah 1990). The trial court admitted into evidence damage exhibits from Mrs. Barney that had not been produced until approximately a week before trial so that Siddoway did not have sufficient time to perform discovery to rebut the information in the exhibits; and then the trial court limited Siddoway's cross-examination of Mrs. Barney, stating that Siddoway could rebut Mrs. Barney's testimony and exhibits with his own testimony and/or that of Mr. Okuda. When Siddoway attempted to do so the trial court would not allow it.

Together these errors were prejudicial to Siddoway because there was no other "evidence" presented by Barney upon which the trial court could have relied to find

specific benefits taken by Siddoway that were in excess of the agreement between the parties which in turn the trial court used to find that Barney was a 25% shareholder in STI.

V. BARNEY IS NOT ENTITLED TO PRE-JUDGMENT INTEREST AS THE DATE STI WAS DISSOLVED AND THE AMOUNT OF DAMAGES COULD NOT BE ASCERTAINED WITH CERTAINTY.

In Utah, the award of pre-judgment interest is proper where the loss is fixed at a definite time and the interest can be calculated with mathematical accuracy. *Coalville City v. Lundgren*, 930 P.2d 1206, 1212 (Utah Ct.App.1997).

If the fact finder must determine the loss by using its best judgment as to the valuation rather than fixed standards of valuation, prejudgment interest is inappropriate. *Shoreline Development, Inc.*, 835 P.2d 207, 211 (Utah App. 1992).

In the instant case, the Court was correct in denying Barney's request for pre-judgment interest because a definite time for the dissolution of STI was not established and the damages awarded Barney were determined subjectively by the Court rather than be a fixed standard of valuation. The trial court did not use a fixed standard of valuation to arrive at its conclusion that Barney was a 25% shareholder in STI. In the trial court's Finding of Fact Nos. 15, 16 and 17 it is concluded that up to December 31, 1994, Barney had paid \$14,500.00 to obtain a 14.5% ownership in STI; that the remaining balance owed Barney when STI was dissolved was \$5,130.00 which the trial court applied toward a stock purchase bringing Barney's total ownership interest in STI to 19.87%.

Then without any "fixed standard of valuation" or any indication as to specifically how the amount was determined, the trial court states that "Barney's share of the excess benefits taken by Siddoway far exceeds the \$5,130.00 and therefore Barney has paid well in excess of \$25,000.00 for his 25% interest in the corporation, STI, and is therefore a 25% shareholder in STI." (Trial court's Finding of Fact No. 19). The trial court seems to have made an equitable decision that although it could not determine the specific numbers it found that Siddoway took some excess benefits to which Barney was entitled and therefore this amount would make up the difference for Barney's claimed 25% interest in STI. The trial court's finding that Barney was a 25% shareholder in STI served as the foundation upon which the damages against Siddoway were calculated.

Because it is clear that the trial court "determined this loss by using its best judgment as to the valuation rather than fixed standards of valuation, prejudgment interest is inappropriate." *Id.*

Further, the trial court was correct in denying Barney's request for pre-judgment interest because a definite time for the dissolution of STI was not established. In its Finding of Fact No. 20, the trial court simply states that STI was "effectively dissolved as of the end of February 1996 when the parties no longer worked together." The testimony of the parties regarding when STI was actually dissolved is even more ambiguous. Siddoway testified that sometime in February 1996 he and Barney had an argument at the STI office during which Siddoway told Barney that he did not work for STI any longer.

(Transcript. pp. 107-108)

Barney testified however, that he continued to work for STI for a couple more weeks after this argument took place. (Transcript. 218-222). There was never a written dissolution agreement between the parties with a date certain nor can a date certain for the dissolution of STI be inferred from the evidence presented at trial

In a case similar to the instant one involving the dissolution of a partnership, the Utah Supreme Court found that an award of prejudgment interest was improper because the plaintiff had not presented evidence of "specific date" when the partnership was dissolved. *Cheves v. Williams*, WL 701230 at p. 11, (Utah 1999). Since a specific date cannot be established in the this case for the dissolution of STI, Barney's request for prejudgment must be denied.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY CHOOSING NOT TO AWARD BARNEY DAMAGES FOR SALARY ALLEGEDLY TAKEN IN EXCESS BY SIDDOWAY

Appellate courts review the trial court's decision to award damages under a standard which gives the trial court considerable discretion, and will not disturb its ruling absent an abuse of discretion. *Thurston v. Box Elder County*, 892 P.2d 1034, 1041 (Utah 1995). Furthermore, because the adequacy of a damage award is a factual question, the appellate court will not reverse the trial court's findings unless they are clearly erroneous. Utah R. Civ. P. 52(a); *In Re Knickerbocker*, 912 P.2d 969, 981 (Utah 1996).

In the instant case, Barney has not shown that the trial court abused its discretion

in deciding not to award Barney damages for excess salary allegedly taken by Siddoway. Exhibit 17, which Barney primarily relies upon as evidence of Siddoway's excess salary, was shown to be wholly unreliable through cross examination of Mrs. Barney who prepared Exhibit 17 and through whom Exhibit 17 was proffered. Accordingly, even if the trial court improperly relied upon Kristi Barney and her summaries for other findings, it is certainly not an abuse of discretion that the trial court refused to award Barney damages for Siddoway's alleged excess salary based on this evidence.

During cross examination of Mrs. Barney it was revealed that she did not even know whether the yearly totals for Siddoway reflected on Exhibit 17 constituted salary or bonus (Transcript, pp. 378-379) nor did she know during which month in 1989 Barney began receiving a salary from STI (Transcript, pp. 380-381).

Further, Barney testified that in 1993, when he discovered that Siddoway was receiving a higher monthly salary than him, the two of them reached an agreement that Barney would receive a raise and Barney was satisfied with the arrangement after that. (Transcript, pp. 241-242).

Finally, although Siddoway testified that on occasion he received \$200.00 to \$300.00 more in monthly salary than Barney, he also testified that this was not contrary to their agreement and that Barney was aware of the salary that each of them was receiving. He also testified without contradiction that there were times when he was not paid but that Barney was—and that Barney never went without a paycheck. (Transcript, p.168-169).

Siddoway. testified that the original agreement was that Siddoway and Barney would receive the same salary for the tile setting work they performed for STI. However, on occasion, Siddoway would receive extra salary for other duties that he performed for STI such as estimating and bookkeeping. (Transcript, pp. 33-34). Siddoway testified that Barney was aware of this arrangement and that they would both receive raises at different times based on the profitability of STI during a given time period. (Transcript, pp. 35-41).

Based on any or all of the following testimony and evidence, the trial court could have reasonably concluded that Barney had not carried his burden of proving that Siddoway had received excess salary from STI contrary to the parties' agreement. Accordingly, the trial court's decision not to award damages to Barney for the alleged excess salary taken by Siddoway was not an abuse of discretion and Barney's Cross-Appeal must be denied.

VII. BARNEY IS RAISING FOR THE FIRST TIME ON APPEAL THE ARGUMENT THAT HE IS ENTITLED TO THE FULL AMOUNT OF THE ALLEGED EXCESS SALARY TAKEN BY SIDDOWAY FROM STI.

Barney admits in his Cross Appeal that, at trial, he argued that he should have received 25% of the excess salary received by Siddoway. Now, on appeal, Barney attempts to change his argument, claiming for the first time, that "in reality," he should have received the full amount of the alleged excess salary received by Siddoway plus interest in the amount of \$42,025.00. (Cross Appeal, pp. 34).

Because Barney failed to present this argument to the trial court, he is precluded from raising this issue on appeal. *Ong International (U.S.A.), Inc. v. 11th Avenue Corp.*, 850 P.2d 447, 455 (Utah 1993); *State v. Carter*, 707 P.2d 656, 660-61 (Utah 1985). As a result, Barney's Cross Appeal must fail.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT


The trial court erroneously concluded that Mr. Barney is entitled to 25% of the ownership of STI, and further erred in applying that percentage to the assets of the corporation in awarding Mr. Barney a judgment in the amount of \$41,036.17. The judgment also erroneously includes 50% of a note receivable from Mr. Siddoway, which should correctly have been treated as an asset of the corporation. The court should have distributed 14.5% of the same to Mr. Barney.

For the reasons set forth above, this court should reform the judgment to award a 14.5% ownership interest in the assets of STI to Mr. Barney and award him judgment in the amount of \$25,584.66. In the alternative, this Court should reverse the trial court's judgment and remand this matter for recalculation of damages based upon a 14.5% ownership of STI by Mr. Barney.

Further, the Court should deny Barney's Cross Appeal seeking prejudgment interest and additional damages. Barney is not entitled to pre-judgment interest because the date STI was dissolved and the amount of damages could not be ascertained with certainty. Furthermore, despite its multiple errors, the trial court did not abuse its

discretion by choosing not to award Barney additional salary damages related to alleged unfair salary payments to Siddoway. Furthermore, Barney raises his salary argument for the first time on appeal and is therefore not entitled to relief.

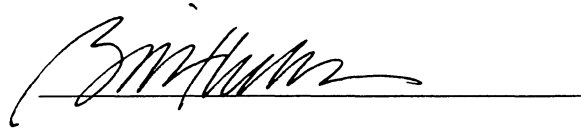
HILL, JOHNSON & SCHMUTZ, L.C.


Evan A. Schmutz (BoH)

CERTIFICATE OF SERVICE

I certify that on the 10th day of April, 2000, I caused a true and correct copy of the foregoing brief to be served by depositing the same in the U.S. mail, first class postage prepaid, addressed to the following:

Larry Kirkham
3040 W. Jonquil Drive
Taylorsville, UT 84118

A handwritten signature in cursive script, appearing to read "L. Kirkham", is written over a horizontal line.