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Jeffrey Silvistrini; Cohne, Rappaport & Segal; counsel for apellee.
Jerrald D. Conder; counsel for appellant.

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IN THE UTAH COURT OF APPEALS

SKYPARK AIRPORT ASSOCIATION
LLC, A Limited Liability Company. et al

Appellee

APPEAL
Appellate Case No. 20100273

Vs.

JAY JENSEN and Elinor Jensen,
Individually, and Gas Busters., et al

Defendants, Appellee

DYNASTY CORPORATION
Petitioner in Intervention/ Appellant

REPLY BRIEF OF APELLANT
Appeal from the Second District Court, Davis County, Judge Page

JEFFREY SILVISTRINI
COHNE, RAPPAPORT & SEGAL
Counsel for Skypark/Appellee
257 East 2nd South, #700
Salt Lake City, Utah 84147

JERRALD D. CONDER
JERRALD D. CONDER P.C.
Counsel for Appellant
341 South Main Street #406
Salt Lake City, Utah 84111

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UTAH APPELLATE COURTS

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JEFFREY SILVISTRINI
COHNE, RAPPAPORT & SEGAL
Counsel for Skypark/Appellee
257 East 2nd South, #700
Salt Lake City, Utah 84147

JERRALD D. CONDER
JERRALD D. CONDER P.C.
Counsel for Appellant
341 South Main Street #406
Salt Lake City, Utah 84111

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I. INTRODUCTION

Skypark's brief is void of any explanation or justification as to why it failed to comply or made any attempt to comply with Utah R. Civ. P. 19 at the time it initiated the action to enforce the restrictive covenants against the Gas Buster defendants. Had Skypark complied with Rule 19, it is likely that this appeal would not be necessary; all parties with an interest in the enforceability of the restrictive covenants would have been joined, and all interests of those parties beyond the issue of the sale of aviation fuel would have been decided. Instead, knowing that there were other landowners who were subject to the restrictive covenants, Skypark sued only those landowners who refused to pay a fee to Skypark for the waiver of the covenants and failed to notify all persons with an interest in the subject matter of the action to allow them the opportunity to participate in the litigation.

Appellee has never argued in the lower court, nor in its brief on appeal that it complied with Rule 19 or that Dynasty and the other parties it sought to join were not indispensable parties. Likewise, Skypark has never argued that it was not aware of other landowners who were concerned with and had an interest in the restrictive covenants Skypark sought to enforce and declare

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valid against the Gas Buster Defendants.[1] Skypark had been charging fees to waive enforcement of the restrictive land use to many property owners who were burdened by the covenants.

This case should stand for the proportion that filing litigation without fairly complying with Rule 19, by notifying all of those who have an interest in the litigation, should have consequences. The rights of all interested parties are required to be protected. Failure to join indispensable parties requires dismissal of the action.

II. ARGUMENT

A. The District Court Erred in Determining That Dynasty's Application was Untimely.

Skypark relies on the general rule that Intervention will not be permitted without a "strong showing of entitlement and justification, or such unusual or compelling circumstances as will justify the failure to seek intervention earlier." (See Appellee Brief at pp. 8-9, citing *Jenner v. Real Estate Services*, 659 P.2d 1072, 1074 (Utah 1983)).

In this case, regardless of whether a judgment had been entered, the more significant reason the court erred is the undisputed fact that Dynasty

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[1] See Exhibit A to Addendum I of Appellant Brief at R. F. 29 p. 10444-10514 (Agreements where Skypark claimed to waive the restrictive covenants with Precision Air-Power, Hal Young Valley Fliers, James Hoddenbach, Park City Helicopter, and Quality Aircraft Components.)

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was never given notice of the action and was not aware of the litigation. (See Appellant Brief at p. 22; See also Declaration of M.K. Ebeling, Addendum Q to Appellant Brief, R. F. 32 p. 11128-11130).

Dynasty makes a clear showing of justification and a compelling circumstance that justifies the failure to seek intervention earlier. Dynasty's application for intervention should be deemed timely because certain parties (who were not adequately represented) had not been given notice of the litigation. Consequently, it would have been impossible for those parties to intervene earlier. (See Appellant Brief at pp. 22-23).

B. Skypark Waived Objection to Declarations Submitted by Dynasty

Skypark's argument that Dynasty's declaration was improperly filed for the first time in a reply brief ignores the fact that it failed to file a motion to strike the declaration or submit an opposing declaration. (See Appellee Brief at p. 10).

An issue can, in fact, be raised in a supplemental memorandum or reply brief. (See Appellant Brief at p. 29, referencing *Pratt v. Nelson*, 127 P.3d 1256 (Utah App. 2005); *Hartford Leasing Corp. v. State*, 888 P.2d 694, 702 n.9 (Utah App. 1994)). After the issue was raised by Dynasty in a supplemental memorandum and objected to by Skypark in oral argument

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only, the court obviously considered the issue but did not grant Skypark's objection.

Failure to file a motion to strike constitutes waiver of any objectionable material. (See Appellant Brief at p. 30, citing *Lister v. Utah Valley Community College*, 881 P.2d 933 (Utah App. 1994)). As a matter of judicial economy, where an issue is raised for the first time in a reply memorandum and where the issues could be raised simply by filing a separate motion, the trial court has discretion to consider the argument raised for the first time in a reply memorandum. (See Appellant Brief at p. 29, citing *Pratt v. Nelson*, 127 P.3d 1256; *Hartford Leasing Corp. v. State*, 888 P.2d at 702 n.9).

C. The District Court Erred in Determining That Defendants in the Underlying Action (the Gas Buster Defendants) Adequately Represented Dynasty's Interest

Relying on *Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996), *Adarand Constructors, Inc. v. Romer*, 174 F.R.D. 100, 104 (D. Colo. 1997), and other cases, Skypark erroneously characterizes the interests of Dynasty and the "Gas Buster Defendants" as identical when they are not. (See Appellee Brief at pp.13-14; See also Appellant Brief at pp. 20-22).

Skypark argues that the ultimate goals of Dynasty and the "Gas Buster Defendants" were the same – to obtain a declaration that the use restrictions

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were invalid. (See Appellee Brief at p. 15). Dynasty does not have the same objectives as the Gas Buster Defendants. The Gas Buster Defendants sought to have covenants set aside in order to sell aviation fuel. (See Appellant Brief at p. 18). Dynasty, on the other hand, seeks to preserve property values by seeking consistent application of the covenants equally as to all property owners if they are determined valid. Dynasty, through declarations that were unopposed and not objected to, demonstrates that failure to enforce covenants equally affects property values and marketability. (See Appellant Brief at pp. 20-21; See also Declaration of Jerry R. Webber, Addendum R to Appellant Brief, R. F. 32 p. 11132-11133; See also Declaration of Gabe Chadsey, Addendum S to Appellant Brief, R. F. 32 p. 11135-11136). Clearly, this is a separate objective than that of the Gas Buster Defendants.

D. Skypark's Reliance on *Lima* is Misplaced to Support the Court's Ruling Denying Intervention

Skypark argues that intervention would have been improper and that the court was correct in denying intervention for an additional reason, relying on *Lima v. Chambers*, 657 P.2d 279, 284-285 (Utah 1982), because the intervenor "must accept the pending action as he finds it; his right to litigate is only as broad as that of the other parties to the action." (See Appellee Brief at p. 15, citing *Lima*).

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This argument is made because Dynasty as intervenor sought equal enforcement applicable to all landowners that the restrictive covenants affected, regardless of how the court ruled, together with a money judgment against Skypark based on inaccurate and fraudulent assessments. (See Appellant Brief at p. 18).

Utah R. Civ. P. 24 was amended after *Lima*. (See Appellant Brief at p. 31). Cases following *Lima* have interpreted Rule 24 to mandate intervention on even more liberal terms than it did when *Lima* was issued. See *Chatterton v. Walker*, 938 P.2d 255, 258 (Utah 1997).[2]

Skypark argues that Dynasty's argument relating to the amendment of Rule 24 is insufficiently briefed. (See Appellee Brief at p. 19). *Chatterton* was cited simply for the purpose of describing how courts have interpreted Rule 24 after it had been amended. (See Appellant Brief at p. 31).

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[2] "Since we decided Lima, however, Rule 24(a) has been amended. It now states in pertinent part: Upon timely application anyone shall be permitted to intervene in an action ... when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Utah R. Civ. P. 24(a). Instead of requiring applicants to show that they will be "bound by a judgment in the action," the new rule now requires applicants to demonstrate only that "the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest." Thus, the text of Rule 24 now mandates intervention on even more liberal terms than it did when we issued Lima."

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E. The Court Erred by Failing to Analyze Whether Dynasty and the Parties it Sought to Join Were Necessary Parties

Skypark's argument that Dynasty's Rule 19 Motion could not be addressed by the lower court because it had not been allowed to invervene pursuant to Rule 24 lacks merit. (See Appellee Brief at p. 17).

In order to fairly consider Joinder under Utah R. Civ. P. 24, a Rule 19 analysis must be completed to determine whether a party is necessary. "Anyone shall be permitted to intervene in an action... when the applicant claims an interest relating to the property or transaction which is the subject of the action." See *Chatterton*, 938 P.2d at 258. Dynasty must demonstrate only that "the disposition of the action may as a practical matter impair or impede its ability to protect that interest." See *Id.* at p. 258. "Failure to join parties indispensible to a proper resolution of the controversy is grounds for dismissal of the action," *Bonneville Tower Condominium Management Committee v. Thompson Michie Associates, Inc.*, 728 P.2d 1017, 1019 (Utah 1986), citing *Kemp v. Murray*, 680 P.2d 758 (Utah 1984), "and can be raised at any time in the proceedings, including for the first time on appeal." *Jennings Investment, LC v. Dixie Riding Club, Inc.*, 208 P.3d 1077, 1086 (Utah App. 2009).

Dynasty is also a party to Dynasty v. SAA, where the court deemed all parties necessary, but did not allow Joinder because it was not filed

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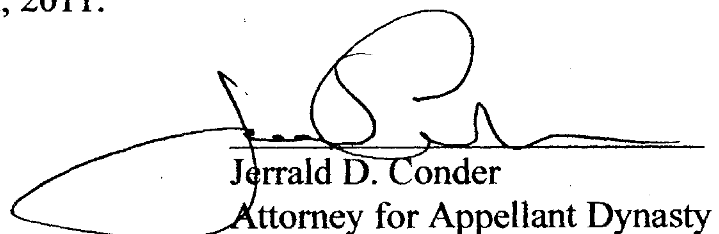
timely. See *Dynasty v. SAA*, Civil No. 090700634 Addendum. L. R.F.32 p. 10168-11083. This case and the Dynasty v. SAA case are essentially identical, with two exceptions: (1) Dynasty sought consistent and uniform application of covenants to all parties, and (2) the fraud allegation with respect to wrongful assessments. Here, the court fails to analyze whether the parties seeking to be joined are deemed necessary under Rule 19. (See Appellant Brief at p. 27).

III. CONCLUSION

Based on the foregoing reasons, the district court erred in denying Dynasty's Motion for Intervention to Join Parties and Set Aside Judgment. Accordingly, the case should be reversed and remanded for new trial.

DATED this 7th day of March, 2011.



Jerrald D. Conder
Attorney for Appellant Dynasty

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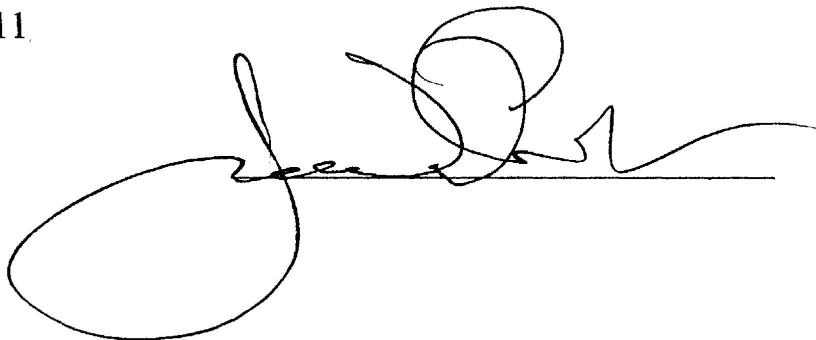
CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March, 2011, I caused two true and correct copies of the Reply Brief of Appellant to be delivered via USPS priority mail to the following:

Jeffrey L. Silverstrini
Cohne, Rappaport & Segal
Attorney for Skypark Airport
257 East 200 South, Suite 700
Salt Lake City, Utah 84111



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