

2003

Glade Leon Parduhn v. Natalie Buchi Bennett,
Allison Buchi, Annabelle Buchi, Lance Buchi, and
Jessica Buchi (The "Buchi Children") and Joanne
Buchi, University Texaco : Intervenor Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

<p>GLADE LEON PARDUHN, Plaintiff and Appellant,</p> <p style="text-align: center;">vs.</p> <p>NATALIE BUCHI BENNETT, ALLISON BUCHI, ANNABELLE BUCHI, LANCE BUCHI, AND JESSICA BUCHI (THE "BUCHI CHILDREN") AND JOANNE BUCHI, Defendants, Counterclaimants and Appellees.</p> <p>UNIVERSITY TEXACO, Intervenor and Appellant</p>	<p>BRIEF OF INTERVENOR/APPELLANT UNIVERSITY TEXACO</p> <p>Case No. 20030551-SC</p> <p>Trial Court No. 030500159 Judge: Bruce C. Lubeck</p>
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BRIEF OF INTERVENOR/APPELLANT
Appeal from a Judgment entered by the
Third Judicial District Court, Summit County
Judge Bruce Lubeck

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PARTIES TO THIS PROCEEDING

The parties to this appeal are as follows:

Glade Parduhn, who was the plaintiff below and is an appellant in this Court. Parduhn was a partner with Brad Buchi, deceased, in University Texaco from 1979 to 1997 and the named beneficiary under insurance policy NL00989085 (the "Policy") on the life of Brad Buchi.

University Texaco, a dissolved Utah partnership, and potential intervenor. University Texaco sought to intervene following remand and is an appellant in this Court. Brad Buchi and Glade Parduhn formed University Texaco, and through it they owned and operated two service stations.

Natalie Buchi Bennett, appellee, was the original defendant in this case. Her siblings, Alison Buchi, Annabelle Buchi, Lance Buchi and Jessica Buchi (sometimes collectively with Natalie the "Buchi Children"), subsequently joined the action as defendants and counterclaimants, and are also appellees in this Court. The Buchi Children claimed an interest in the proceeds of the Policy under a Buy Sell Agreement between Parduhn and Buchi. All are the children of Brad Buchi, deceased, and Lissa Buchi, his ex-wife. At the time this suit was filed, all but two had reached the age of majority.

JoAnne Buchi, appellee, joined the suit as a counterclaimant when the Buchi Children other than Natalie joined. Joanne Buchi married Brad Buchi in 1992, and was married to him at the time of his death, although they were separated and she had sued for divorce. Joanne appears in this case in her individual capacity and as executor of Brad Buchi's estate.

She also claims an interest individually in the Policy proceeds.

JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal pursuant to Utah Code Ann. §78-2-2(j).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal filed by University Texaco raises two legal issues:

1. Did the trial court err as a matter of law in denying University Texaco's Motion to Intervene? This is a legal question subject to the discretion of the trial court; the appropriate standard of review is abuse of discretion. *See Utah State Department of Social Services v. Sucec*, 924 P.2d 882, 887 (Utah 1996) (stating appropriate standard of review in a case involving permissive intervention).

2. Did the trial court err in not awarding the Policy Proceeds to University Texaco on equitable grounds? This is a mixed question of law and fact. In cases of equity, this Court may exercise a broad scope of review encompassing both questions of law and questions of fact, and will reverse on the facts when the evidence clearly preponderates against the findings of the trial court, or where the trial court has based its rulings upon a misunderstanding or misapplication of the law. Utah Constitution, Art. VIII, §9; *Reed v. Alvey*, 610 P.2d 1374, 1377; (Utah 1980); *Crimmins v. Simonds*, 636 P.2d 478, 479 (Utah 1981). The Court gives no deference to the legal findings of the trial court. *Parduhn v. Bennett*, 61 P.3d 984 (Utah 2002).

RECORD CITATIONS OF ISSUE RAISED BELOW

University Texaco raised the issues relating to its motion to intervene in pleadings and at oral argument before the trial court. *See* R.1746-1750; 1883-1888 and Transcript of hearing on remand, May 9, 2003 (“Hr’g Tr.”) at 2-13.

University Texaco raised the issues relating to its claim on the merits in pleadings and at oral argument below. *See* R. 1724-1735; 1877-1882 and Hr’g Tr. at 14-21 and 40-52.

STATEMENT OF GROUNDS FOR SEEKING REVIEW

The trial court denied University Texaco’s Motion to Intervene. The court based its ruling on the fact that University Texaco had not intervened prior to trial, and also stated that Glade Parduhn, the sole surviving partner, adequately represented the interests of the Partnership, which had no interest in the outcome. This ruling constitutes plain error and an abuse of discretion, as the court failed to consider all the circumstances of the case as required on a motion to intervene of right, pursuant to Rule 24(a), Utah R. Civ. P., and erroneously applied a likelihood of success on the merits test.

The court also committed reversible error in awarding the Policy proceeds to the Buchi Heirs. It based its ruling on facts not in evidence; it ignored evidence both in the record and presented to it in proffers, and it ignored substantial equitable arguments against the distribution ordered. A ruling without basis in fact or law requires reversal.

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES
OR RULES DETERMINATIVE OF THE OUTCOME**

Utah Code Ann. §31A-21-104 (Copy attached at Appendix Tab 1)

Rule 24(a), Utah Rules of Civil Procedure:

(a) *Intervention of right.* Upon timely applications anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when an 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.

STATEMENT OF THE CASE

Background Facts

This case involves a dispute over the disposition of the proceeds of a life insurance policy, # NL00989085 (the "Policy") on the life of Brad Buchi, deceased. Brad Buchi and Glade Parduhn, plaintiff and appellant, formed a partnership, University Texaco (sometimes referred to as the "Partnership"), pursuant to Utah law, in 1979. Through the Partnership, they owned and operated several service stations. When Parduhn and Buchi formed University Texaco, Buchi was married to Lissa Buchi. The partners executed a written partnership agreement and also entered into a "buy-sell" agreement (the "Buy Sell Agreement"). Plaintiff's Trial Exhibit ("Pltf. Ex.") 1.¹ They funded the Buy Sell Agreement

¹ The transcript of the trial and the trial exhibits were not included in the record counsel
(continued...)

with insurance policies on each other's life in the amount of \$20,000. *Id.* Initially, the Buy Sell Agreement provided in relevant part:

Both partners will be insured for \$20,000 and all of which will go to the deceased persons wife or survivors.

Pltf. Ex. 1.

The partners decided to increase the amount of insurance on each other to \$100,000 in 1984. They rewrote the Buy Sell Agreement when they purchased the additional insurance to reflect the increase:

The Buy-Sell insurance will be \$100,000. In the event of a death of either partner, the remaining partner shall pay \$100,000 to the survivors of the deceased with the proceeds of the \$100,000 insurance policy which each own on each other.

Pltf. Ex. 2.

Five years later, in 1989, the partners again increased the amount of life insurance coverage on each other when they purchased the Policy and a similar policy on Parduhn's life. This time they did not amend the Buy Sell Agreement. R. 1449. The Partnership paid the premiums on both the Policy and the similar policy insuring Parduhn's life. Tr. at 46.

Also in 1989, Buchi took out another policy insuring his life in the amount of \$250,000. That policy named his wife Lissa as primary beneficiary and their children as

¹ (...continued)

obtained from the district court, and repeated calls to the clerks office of this Court and the district courts in Summit and Salt Lake County did not turn up those documents. Therefore, the references to the transcript and exhibits do not include the record pagination. Copies of the trial transcript and admitted exhibits obtained from counsel for Parduhn are included in the Appendix at Tabs 1 and 2 for the Court's reference.

secondary beneficiaries. Pltf. Ex. 5.

In 1992, Brad and Lissa Buchi divorced; also in 1992 Brad Buchi married Joanne Buchi.² Tr. at 151. Brad Buchi and Joanne Buchi had no children together. Joanne Buchi sued for divorce in April 1996. That action was pending when Brad Buchi died. *Buchi v. Buchi*, Third District Court, Salt Lake County, Civ No. 964901449 DA. Buchi died intestate; Joanne Buchi has been named the personal representative of his estate. *In re Estate of Brad Buchi*, Third District Court, Salt Lake County, Case No. 973901394; see also testimony of Joanne Buchi, Tr. at 153.

In July 1997, the partners sold the two service stations owned by University Texaco to Blackett Oil Co. in an asset sale. Tr. at 31. This dissolved the Partnership. *Parduhn v. Bennett*, 61 P.3d 982, 984-85 (Utah 2002). Three weeks later, Buchi died. The partners had not wound up the Partnership's affairs before Buchi died, and in fact the winding up continues due to the pendency of this lawsuit.

Following Buchi's death, Parduhn, as the named beneficiary on the Policy at issue here, applied for the Policy proceeds with the insurance company, Northern Life. Northern Life informed Parduhn that Natalie Buchi Bennett, Brad and Lissa Buchi's oldest daughter, had also claimed the proceeds. Parduhn filed this case, disputing Natalie Buchi Bennett's claim to the Policy proceeds.

² Although Joanne and Brad Buchi were married at the time of his death, Joanne Buchi had sued for divorce and they were separated; the status of their marriage was an issue on remand that the court refused to consider. See Point II.C.1. below. All the Buchi children are the children of Brad Buchi and Lissa Buchi.

Procedural History of the Case

Parduhn originally filed this action against Natalie Buchi Bennett only, as she was the only person to have made a claim on the Policy proceeds. R. 1-8. Subsequently, Northern Life interpleaded the Policy proceeds into court pursuant to stipulation by the parties. R. 33-35. Following a motion by Parduhn to have Natalie Buchi join all necessary parties, the remaining Buchi Children and Joanne Buchi, (purportedly in her capacity as personal representative of the estate of Brad Buchi as well as individually) joined as defendants and filed an amended answer and counterclaim. Amended Answer and Counterclaim, R. 275-281.³

The case was originally set for trial before Judge Stirba. In March 2000, Judge Stirba signed a scheduling order that set August 18, 2000 as the cut off date for all motions except motions in limine. R. at 344. On October 26, 2000, Joanne Buchi filed pleading styled a "Motion in Limine" seeking to have the court declare that Utah Code Ann. §31A-21-104(5) applied to bar plaintiff Glade Parduhn from receiving any of the Policy proceeds. R.1093 at 1094 (Motion) and R. 1096 at 1098 (Memorandum in Support of Motion).

Following Judge Stirba's death, the case was transferred to Judge Lubeck, who held a bench trial in August 2001 and issued findings in a Memorandum Decision. R. 1448-1458. The trial court found that the sale of its major assets dissolved the Partnership. R. 1451. He also held that the Buy Sell Agreement survived the sale of the service stations and governed

³ Brad Buchi's ex-wife, Lissa, to whom he had been married when he took out the Policy, disclaimed any interest in the Policy for herself or her minor children. R. 381-382.

disposition of the Policy proceeds. *Id.* The court also found that the Partnership paid the premiums on the Policy. R. 1452. The existence of the Buy Sell Agreement made ambiguous the policy's beneficiary designation of Glade Parduhn. R. 1454. The court therefore held that although the Policy named Parduhn as the beneficiary, the Buy Sell Agreement required the court to award the Policy proceeds to Joanne Buchi and the Buchi Children. R. 1458. Glade Parduhn appealed the decision to this Court.⁴

This Court issued its ruling on appeal on September 6, 2002. It found that the sale of the partnership's major assets caused the dissolution of the partnership. *Parduhn V. Bennett*, 61 P.3d 982, 984-85, ¶8. It reversed both the holding that the Buy Sell Agreement survived that event, and the holding that the Buy Sell Agreement made the beneficiary designation ambiguous. *Id.* at 984, ¶7 and 986, ¶15. The Buchi heirs were not entitled to the Proceeds, the Court ruled, because the Buy Sell Agreement was no longer effective. In a matter of first impression, however, the Court also ruled that the dissolution of the Partnership ended Parduhn's insurable interest in Buchi's life pursuant to 31A-21-104 (1)(b) and (2)(a). *Id.* at 986, ¶16. Given these rulings, the Court did not award the Proceeds to any of the claimants. Instead, it remanded the case to the trial court with instructions to distribute

⁴ In connection with his appeal, Parduhn sought a stay of execution in this Court. Prior to the time that stay was entered, the trial court had paid the proceeds to the defendants. This Court ordered the defendants to pay back into court all funds they still had in their possession. Although the Buchi Children repaid most of the funds they had received, Joanne Buchi had used her portion of the funds to pay off the mortgage on her house and did not return any of the proceeds she had received. See accounting filed by Joanne Buchi, R. 1718-1719.

the proceeds pursuant to §31A-21-104(5) to “some person who is equitably entitled to them.” Utah Code Ann. §31A-104(5).

After noting that the word “person” includes a partnership, the Court stated, “[p]roperty acquired with partnership funds are [sic] presumed to be assets of the partnership, including insurance on the life of a partner” and concluded that “in the event the insurance policy is an asset of the partnership, the proceeds would be divided . . . pursuant to the partnership agreement regarding asset division at winding up.” (*Id.* at 987, ¶17 n.3.) The Court then noted that “the trial court found that the intent of the partners was to keep the cost equal for the partnership and that the partnership in fact paid the premiums.” *Id.*

Following remand, the Buchi Heirs filed a pleading styled “Amended Order and Judgment on Remand,” but filed no motion with it. R. 1890-1893. Upon the objection of Parduhn, the court ordered the “Amended Order” be treated as a motion, and ordered responses to be filed within ten days. R. 1649. Within the time set by the court for responses to the “Amended Order,” the Partnership moved to intervene of right pursuant to Rule 24(a), Utah R. Civ. P. R. 1746-1750. At the same time, it filed an objection to the “Amended Order” and a motion for an order awarding the proceeds of insurance policy to the Partnership. R. 1724-1745. The Buchi Children and Joanne Buchi argued the timeliness of University Texaco’s motion to intervene, but did not challenge University Texaco’s right to intervene on other grounds.⁵

⁵ The Buchi Heirs argued that the motion was barred by the scheduling order entered (continued...)

The trial court heard oral argument from University Texaco, Parduhn, the Buchi Children and Joanne Buchi on both the motion to intervene and the ultimate disposition of the Policy proceeds. Some of the argument presented included reference to facts not in evidence before the court.⁶ The court declined to hold an additional hearing to take new evidence, however, and purported to rule solely on the evidence provided at trial, without considering the additional materials provided to it in the pleadings on remand. R. 1902.

In a Memorandum Decision, the court denied University Texaco's motion to intervene as untimely, and again ordered the insurance proceeds paid one-half to Joanne Buchi and one-half to the Buchi Children. R. 1894-1906 (copy attached). The court held that although “the buy-sell agreement was no longer effective, as decided by the Supreme Court, it does provide guidance in deciding Buchi and Parduhn’s intent when they obtained the policies with the intent to provide their respective heirs with immediate funds and to cash out the surviving partner’s interest in the partnership”. R. 1902. The court believed that such intent was “clear” and that Buchi and Parduhn intended the Buchi Heirs to be the “sole beneficiaries” of the Policy. *Id.* “If they intended the surviving partner to retain any portion

⁵ (...continued)

by Judge Stirba setting a cut off date for adding new parties, the statute of limitation for bringing an action on a written insurance policy and by laches. R. at 1770-1774; 1781-1784.

⁶ Parduhn and University Texaco each argued that the court could not award the proceeds to the Buchi Heirs without hearing additional evidence. The Buchi Children and Joanne Buchi each argued that no additional evidence needed to be taken; however, they too, relied on facts not in evidence in their briefs and during oral argument. See, e.g. Hr’g Tr. at 24-25; see Point II.B. below.

of the proceeds, the court believes that such a provision could have and would have been provided to show such intent.” *Id.*

Parduhn and University Texaco filed this appeal following issuance of a final judgment by the trial court on June 18, 2003. R. 1972-1973.

SUMMARY OF ARGUMENTS

University Texaco raises two issues in this Appeal.

First, the trial court should have allowed University Texaco to intervene of right because (a) its motion was timely, given the Supreme Court's opinion and the unusual circumstances of this case; (b) it claims an interest in the subject matter of the action; and (c) its interests were not adequately represented by the existing parties. Rule 24(a), governing intervention of right, requires only that a potential intervenor make a timely application, claim an interest in the property or transaction at issue, and be situated such that disposition may impair or impede the intervenor's ability to protect its interest. Timeliness is not a mechanical concept, but must be determined from the facts and circumstances of each case. *Jenner v. Real Estate Serv.*, 659 P.2d 1072, 1073-74 (Utah 1983). Courts must examine in particular whether substantial justice favors intervention, and whether intervention will prejudice existing parties. *Frost v. Liberty Mut. Ins. Co.*, 778 S.W.2d 670, 673 (Mo. App. 1989).

Here the circumstances required the court to grant University Texaco's motion to intervene. This Court had rejected the legal claims of both the Policy beneficiary and the

asserted beneficiaries of the Buy Sell Agreement. It remanded the case for the express purpose of determining, in equity, who was entitled to the proceeds of the Policy on the life of Brad Buchi. The Court remanded with instructions to consider the Partnership's claim in equity to the proceeds. None of the existing parties can be prejudiced by University Texaco's intervention at this point, because this court's remand required the court to re-visit the issues and hold additional proceedings, whether or not University Texaco intervened. Because the trial court refused to consider all the circumstances, this court must reverse the decision below and grant University Texaco's motion to intervene.

Second, the court should have awarded the Policy proceeds to University Texaco in equity. Of all the claimants, University Texaco was the only one whose claims this Court had not already rejected. Equity rests in the sound discretion of the court, but where the court's exercise of discretion has no foundation in the record, this Court must reverse. *Millard County v. Utah State Tax Commission*, 823 P.2d 459, 462 (Utah 1991); *Bellon v. Malnar*, 808 P.2d 1089, 1095 (Utah 1991). Equity required the trial court to deal fairly with all concerned, and to fashion a remedy *based on the evidence before it* that would achieve a proper balance of conflicting interests. The trial court instead ignored the evidence in the trial record and relied on assertions of counsel wholly unsupported in the trial record. The trial court committed reversible error in relying on extra judicial facts and in discarding inconvenient facts to avoid a decision in favor of the Partnership. *Thurston v. Box Elder Co.*, 892 P.2d 1034, 1995 Utah Lexis 24, * 6-7. (1995).

Equity required an award of the proceeds to University Texaco. Such an award would

have allowed the Court to “do equity” in the broadest way possible, by allowing everyone who had any economic interest in Brad Buchi’s life to share in the proceeds.

ARGUMENT

POINT I. THE COURT SHOULD HAVE ALLOWED UNIVERSITY TEXACO TO INTERVENE AS OF RIGHT

This Court should reverse the trial court’s denial of University Texaco’s motion to intervene as untimely. The Court believed that Parduhn, as the sole surviving partner, “had the duty and discretion to pursue any claims on behalf of University Texaco” and failed to do so prior to trial. R. 1899. The court erred in making that ruling. Timeliness is not a mathematical calculation, but depends on all the circumstances presented by each case, including the posture of the case at the time intervention is sought, whether the party seeking intervention could have done so earlier, and the relative prejudice to the parties and the intervenor. *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994); *Jenner v. Real Estate Serv.*, 659 P.2d 1072, 1073 (Utah 1983). The court also wrongly rejected University Texaco’s motion to intervene on its view of the underlying merits. R. at 1900. (“Furthermore, University Texaco did not have an interest in the proceeds. . .”).

In denying University Texaco’s motion to intervene, the trial court failed to consider any of the circumstances that support allowing the Partnership to intervene. It ignored this Court’s express suggestion on remand that the Partnership was entitled to the proceeds in equity. It ignored the fact that at the time the Partnership sought to intervene, all the claims

advanced at trial had been rejected. It ignored the fact that the parties will suffer no prejudice from the Partnership joining the case on remand. It ignored the fact that *anyone*, including the Buchi Heirs or the court itself, could have joined the Partnership prior to trial, if they had viewed the Partnership having a potential claim to the proceeds.⁷

In short, the court committed an abuse of discretion in denying University Texaco's motion to intervene. University Texaco filed its motion in a timely fashion, and satisfied all the requirements of Rule 24(a). This Court should reverse the trial court and allow University Texaco to intervene for the purpose of asserting a claim to the proceeds.

A. Rule 24(a) Required the Trial Court to Look at All the Circumstances of the Case Before Ruling on University Texaco's Motion to Intervene.

Rule 24(a) governs intervention as of right. That Rule states in relevant part:

Upon timely application, anyone shall be permitted to intervene in an action . . . (2) 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 impeded his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a), U.R. Civ. P. The rule does not define "timely" or give any guidance to the courts. However, Utah courts as well as other state and federal courts agree that timeliness is "a flexible concept." *Kim v. H.V. Corporation*, 688 P.2d 1158, 1161 (Haw. 1984). The court must look at the prejudice to the parties, the intervenor and whether the intervention

⁷ The court erroneously stated in its Memorandum Decision following remand that only Parduhn could have added University Texaco to the case. R. 1899.

will delay the proceedings. *Reeves v ITT*, 616 F.2d 1342, 1349 (5th Cir. 1980) (in analyzing timeliness of motion for permissive intervention, “[a]n ‘absolute measure of timeliness,’ . . . is of little significance in determining the propriety of” the motion”). Cf. *Jenner v. Real Estate Serv.*, 659 P.2d 1072, 1073-74 (Utah 1983) (denying intervention under the facts before it, but recognizing that timeliness “must be determined under the facts and circumstances of each particular case and in the sound discretion of the court”); *Lima v. Chambers*, 657 P.2d 279, 284 (Utah 1982) (allowing insurance company to intervene after summary judgment on liability). Even post judgment motions may be granted in appropriate circumstances. *Jenner*; *United Airlines v. McDonald*, 432 U.S. 385, 395-96 (1977) (unnamed class member allowed to intervene after judgment denying class status).

“The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner. Federal courts should allow intervention ‘where no one would be hurt and greater justice could be attained.’” *Sierra Club*, 18 F.3d at 1205; see also 7c Wright, Miller & Kane, *FEDERAL PRACTICE & PROCEDURE* § 1916, at 425-26 (2d ed. 1986) (the “requirement of timeliness is not a means of punishment for the dilatory and the mere lapse of time by itself does not make an application untimely” (footnote omitted)).⁸ In *Sierra Club*, the court identified four factors by which to evaluate the timeliness of a motion to

⁸ Although these cases and authorities all involve the federal rule, F. R. Civ. P. 24(a) is identical to Utah Rule 24(a) in all material respects. Compare Rule 24(a), F.R. Civ. P. (copy attached at Appendix Tab 2) and Utah R. Civ. P. 24(a).

intervene: (1) the length of time applicants knew or should have known of their interest in the case; (2) prejudice to existing parties caused by applicants' delay; (3) prejudice to applicants if their motion is denied; and (4) any unusual circumstances. 18 F.3d at 1205. It also noted that courts should not encourage *premature* intervention. *Id.* at 1206.

Another state court, interpreting a rule essentially identical to Utah's Rule 24(a), held that the two most important factors are whether substantial justice favors intervention, and whether intervention will prejudice existing parties. *Frost v. Liberty Mut. Ins. Co.*, 778 S.W.2d 670, 673 (Mo. App. 1989) (noting at page 671 that the Missouri rule is "essentially the same" as Federal Rule 24(a)). "If the trial court failed to give appropriate consideration to these factors, then the decision is subject to reversal for an abuse of discretion." *Id.* The court here never examined these factors.

The court also rejected University Texaco's motion based on the second requirement of Rule 24(a), when it found that University Texaco had "no interest" in the matter because the court was going to award the proceeds to the Buchi Heirs. Courts should look to pleadings to determine interest, however, not the likelihood of the intervenor prevailing. *College Park v. Jenkins*, 819 A.2d 1129, 1135 (Md. 2003).

The trial court here denied the Partnership's motion to intervene without any substantial reasons for the denial. A court's denial of a motion to intervene is not unreviewable simply because the court has broad discretion; the denial must be based on substance, or it will be overturned. *Millard County v. Utah State Tax Commission*, 823 P.2d 459, 462 (Utah 1991) (reversing tax commission's denial of statutory motion for

intervention). As shown below, the record demonstrates that the court abused its discretion in denying the Partnership's motion to intervene without substantial reason.

B. The Court Should Have Allowed University Texaco to Intervene, as it Met All Requirements of Rule 24(a).

The district court erred in rejecting University Texaco's motion to intervene without considering the particular circumstances of this case when it filed its motion or the prejudice to the parties. *Millard County*, 823 P.2d at 462; *College Park*, 819 A.2d at 1135; *Kim*, 688 P.2d at 1161; *Sierra Club*, 18 F.3d at 1205; *Long v. City of Hoover*, 844 So. 2d 1273, 1282 (Ala. 2002).

The trial court primarily rejected the Partnership's motion to intervene because it felt that the Partnership could and should have intervened at an earlier stage of these proceedings. The court faulted Parduhn for not having joined the Partnership earlier, surmising that Parduhn did not join the partnership because he "wanted the proceeds in full." R. 1899-1900. In fact, if the Partnership should have been joined prior to trial, the responsibility for joinder more properly fell to Natalie Buchi Bennett. First, early in the history of this suit Parduhn filed a motion to force Natalie Buchi to join *all* necessary parties. (See Memorandum in Support of Motion to Compel Counterclaimant to Join Necessary Parties of Dismiss Counterclaim, R. at 253-265.) In response, the rest of the Buchi children and Joanne Buchi joined with Natalie as counterclaimants. R. 275-281. None of them sought to have the Partnership join.

Second, it was the Joanne Buchi, not Parduhn, who albeit belatedly raised the issue

of Utah Code Ann. §31A-104(5) to argue that Parduhn should not receive the proceeds. She did not suggest that the statute might give the Partnership (or anyone other than the Buchi Heirs, for that matter) a right to the proceeds. R. 1096-1102. Nor did she put on evidence of who might be entitled to the proceeds under that section. She did not argue that anyone other than herself and the Buchi Children had a right to the proceeds under any principle of law.

Moreover, the Buchi Heirs had a greater interest than Parduhn in not joining the Partnership. An award to the Partnership would not only mean splitting the proceeds with Parduhn, but also it would require the proceeds to pass through the Buchi estate, giving creditors of the estate a portion of the proceeds as well. This the Buchi Heirs have consistently argued against. See Point II.C.2. below.

In any event, the issues at trial relating to the Policy proceeds involved two narrowly drawn *legal* claims to the Policy proceeds. Parduhn asserted that the Policy, which named him beneficiary, entitled him to the proceeds, while the Buchi Heirs claimed that the Buy Sell Agreement entitled them to the proceeds. No one asserted a claim based in equity. The Court did not take evidence on anyone's equitable rights to the proceeds. The only time the subject came up was in argument. *See* Tr. at 93; 202-203. Yet, even then, counsel for the Buchi Heirs argued only that under the statute the Buchi Heirs should get the entire proceeds because they were related to Buchi. *Id.*

The Partnership was not named as a beneficiary of either the Policy or the Buy Sell Agreement, and never had any basis *in law* to claim the Policy Proceeds. Until this Court's

ruling on appeal, no one had any reason to analyze whether someone other than the named Policy beneficiary or the beneficiaries of the Buy Sell Agreement might be entitled to the proceeds. For the Partnership to have intervened prior to trial would have required the Partnership to anticipate this Court's holding on appeal. The law does not require potential litigants to anticipate all possible claims and outcomes. *See, e.g. Frost*, 778 S.W.2d at 673-74 (refusing to uphold denial of motion to intervene even though intervenor knew of the pendency of the case, but waited until after trial to intervene).

Even assuming, *arguendo*, that the Partnership could have successfully intervened prior to trial, the other factors the court failed to consider mandated allowing intervention following remand. This case does not involve an intervenor attempting to set aside or change a judgment that has become final. University Texaco did not sit on the sidelines waiting to see what the outcome would be and then seeking to alter the outcome. Instead, the Supreme Court itself invited the intervention and changed the posture of the case, through its reversal of the trial court and its holding that *none* of the parties had a legal right to the proceeds. The remand required the district court to start over and award the proceeds to a different party on a different basis from that originally considered by the court. By its comments in footnote 3, the Court invited the trial court to open the universe of potential claimants beyond those already before the court, particularly University Texaco. 61 P.3d at 987, ¶17n.3⁹ As a result, University Texaco's intervention does not involve the same concerns

⁹ At the hearing following remand, the Buchi Heirs suggested that perhaps Blackett Oil
(continued...)

that would ordinarily confront a court faced with a post judgment motion to intervene.

Moreover, neither the Buchi Heirs nor Parduhn showed any prejudice from allowing University Texaco to intervene at this time. The Buchi Children baldly asserted that “the rights of existing parties would be highly prejudiced because additional discovery, delay and costs would certainly result from intervention by University Texaco.” R. 1784. Joanne Buchi claimed that to allow University Texaco to intervene would “delay ... distribution of the proceeds of the life insurance ...” R. 1774. Beyond their mere allegations, however, the Buchi Heirs could not demonstrate actual or potential prejudice.

Given the posture of this case, no prejudice could have resulted to the parties from the intervention of the Partnership. First, the court had already scheduled briefing and determined to hold an argument on the issue on remand. R. 1649. University Texaco filed its briefs within the time allotted by the court. R. 1724-1750. Second, as the Partnership argued below, the trial court could have ordered the proceeds distributed to the Partnership without taking new evidence or incurring additional delay beyond that caused by the Court’s remand. Even without University Texaco in the case, the Court’s order of remand made clear that the trial court would have to consider equitable issues that the parties had not

⁹ (...continued)

would be entitled to the proceeds. If the asset purchase agreement between University Texaco and Blackett Oil (which was never introduced into evidence) purported to sell Blackett Oil assets such as the Policy, that suggestion would not have been far fetched. In fact, however, Blackett Oil purchased only the realty and limited associated personal property. The Buchi Heirs’ suggestion, without factual basis, appears to have figured heavily into the court’s holding, however. *See* Point II below.

raised at trial. If in fact the court needed to hear new evidence, that need arose from this Court's reversal and remand instructions, not the intervention of University Texaco.¹⁰

In any event, the Buchi Heirs misconstrue "prejudice." "The prejudice prong of the timeliness inquiry 'measures prejudice caused by the intervenors' delay – not by the intervention itself.'" *Utah Association of Counties v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001), *quoting Ruiz v. Estelle*, 161 F.3d 814, 828 (5th Cir. 1998). Obviously, the Buchi Heirs would have preferred that the trial court simply award them the proceeds without any further hearing, and anything to prevent that would cause them to "suffer." But that sufferance does not constitute "prejudice" and it does not result from the timing of University Texaco's motion; it merely results from the proper application of the law.

Neither the Buchi Heirs nor Parduhn will suffer prejudice if University Texaco is allowed to intervene. University Texaco filed its motion to intervene in a timely manner after remand, within the time set by the trial court for motions on the issue remanded. No proceedings in furtherance of the remand had yet occurred when University sought intervention. Therefore, this Court should reverse the trial court and allow University Texaco to intervene for the purpose of asserting its right, in equity, to the proceeds of the Policy. *Utah Assoc. of Counties*, 255 F.3d at 1251.¹¹

¹⁰ In their briefs and in oral argument, University Texaco and Parduhn made several proffers of the evidence that the court should hear before making any decision to award the proceeds to the Buchi Heirs in equity. *See* Point II below.

¹¹ If the Court for any reason affirms the denial of University Texaco's Motion to
(continued...)

POINT II.

THE TRIAL COURT SHOULD HAVE AWARDED THE POLICY PROCEEDS TO THE PARTNERSHIP IN EQUITY

Merriam Webster's On-Line dictionary defines "equity" as "justice according to natural law or right; *specifically*: freedom from bias or favoritism." Equitable means "dealing fairly and equally with all concerned." Merriam-Webster Online, <http://www.merriamwebster.com/>.

This Court remanded this case to the district court with instructions to determine the person to whom it should award the proceeds *in equity*. Instead, the lower court used a chain of unsupported inferences to run roughshod over the concepts of justice, fairness and impartiality. It awarded the proceeds to the Buchi Heirs without a shred of factual, equitable or legal basis for its decision. In doing so, it ignored the evidence in the record and proffers of additional facts that supported an award to the Partnership and contradicted the award to the Buchi Heirs.

Equity may rest in the discretion of the court, but that discretion must have some foundation in the record. *Millard County*, 823 P.2d at 462; *Bellon v. Malnar*, 808 P.2d 1089, 1095 (Utah 1991). Here, no such foundation exists. The court instead based its decision solely on the unsubstantiated arguments made by counsel for the Buchi Children and the Buchi Heirs. This Court cannot allow the ruling to stand.

¹¹ (...continued)

Intervene, the Court should treat this Memorandum as an amicus curiae brief and still hear arguments of the Partnership.

In *Bellon*, the Court recited the standard language of review, saying it would not set aside a trial court's findings of fact in a case at equity or law "unless clearly erroneous." 808 P.2d at 1094. However, said the Court, where the appellate court has "a definite and firm conviction" that the trial court has made a mistake of fact, it must reverse on that basis. *Id.* at 1095, quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987). No greater mistake of fact can be made than basing a decision entirely on facts outside the record. As shown below, the trial court did just that. This Court must reverse the decision of the court as contrary to the facts and law.

A. The Court's Ruling in Favor of the Buchi Heirs Has No Support In the Record.

University Texaco and Parduhn specifically asked the court to take new evidence. The court allowed counsel to include in argument various points of fact not introduced into evidence in the trial. Nonetheless, the court expressly declined to hold a hearing or second trial to consider new evidence, stating:

The court believes that [evidence received at trial] is the best evidence as to the intent and conduct of the parties, rather than now entertaining someone's opinion and rather than now hearing *facts tailored to the issue before the court*.

R. 1902 (emphasis added).

In the pages of its Memorandum Decision the court devoted to explaining why it would not award the proceeds to University Texaco, however, *not one of the "facts" relied on by the court exists in the trial record*.

Although the remand instructions did not direct the district court to take additional

evidence, certainly this Court could not have intended the trial court to enter an order supported only by assumptions, suppositions or naked assertions made by counsel in argument. Where instructions on remand are not specific about subsequent proceedings, the trial court “has discretion to deal with those issues as it sees fit, including allowing supplemental filings or proceedings.” *4447 Associates v. First Security Financial*, 973 P.2d 992 (Utah Ct. App. 1999), quoting *Slattery v. Covey & Co.*, 909 P.2d 925, 928 (Utah Ct. App. 1995). Where a court chooses not to take new evidence on remand, it cannot simply find a fact to be true because it wants the fact to be true, or because the record contains no evidence to the contrary. Thus, in *4447 Associates*, the court rejected as unsupported a defense the defendant attempted to raise for the first time following remand. The new defense required evidence that the defendant acted in good faith and in a commercially reasonable manner. The defendant presented no new evidence, arguing that the absence of evidence of bad faith or unreasonableness in the record established the defense. 973 P.2d at 997, ¶17. The court rejected that argument, holding that the record contained insufficient evidence to establish the defense. *Id.*, ¶18.

In this case, of course, the new issue was raised by the Supreme Court, not by one of the parties. However, that distinction did not give the district court the luxury of filling evidentiary holes with its own suppositions to find in favor of the Buchi Heirs, wholly unsupported by the record. On remand, it was incumbent on the judge to ensure that the record contained sufficient facts on which to base the decision, or order the taking of additional evidence. *See In the Matter of the Adoption of W.A.T.*, 808 P.2d 1083 (Utah 1991)

(reversing dismissal of petition to adopt and remanding because the district court did not afford the petitioners a “comprehensive evaluation hearing”).

Although the trial court stated it would not take additional evidence, it in fact based its distribution of the Policy proceeds to the Buchi Heirs instead of the Partnership on assertions of fact raised only in the argument of counsel. First, the court “found” that the sale to Blackett Oil in July 1997 involved all or substantially all the assets of the Partnership, and since Blackett Oil did not purchase the Policy, it could not have been a Partnership asset. R.1902. Second, the Court claimed that other “evidence” produced at trial contradicted the evidence that the Partnership paid the Policy premiums.

The trial court is wrong. These two “factual” prongs for the court’s decision have absolutely no support in the record.¹² This Court cannot allow such an unsupported ruling to stand.

In oral argument on remand, counsel for the Buchi children raised for the first time an argument that had the Policy truly been an asset of the partnership, it would have, or should have, been sold to Blackett Oil. Transcript of Hearing, May 9, 2003 (copy attached at Appendix Tab 5) (“Hr’g. Tr.”) at 23. Apparently the court found this argument persuasive,

¹² Of course, it is impossible to cite to an absence of a fact, so no particular pages of the trial transcript are here cited. However, if any testimony existed about the way the Partnership paid its bills, or the terms of the sale to Blackett Oil, it would most likely appear in the testimony of Glade Parduhn (Tr. at 16 to 58 and 153 to 154), or Larry Johnson (the Partnership’s accountant) (Tr. 59 to 66). Counsel invites the Court to review those sections, and in fact the entire trial transcript, which consists of only 157 pages, excluding closing argument.

as it stated “that factor alone” indicated that the Policy did not belong to the Partnership. R. 1902. The record, however, simply does not support a conclusion that the Policy was or should have been sold to Blackett Oil. The only testimony about the sale inferred that the stations, as opposed to all the assets, were sold:

20 Q. What was the fate of the *service stations* on that
21 date? What happened to them?

22 A. They were sold.

23 Q. To whom?

24 A. Blackett Oil Company.

Tr. at 31 (Glade Parduhn testifying, emphasis added).

20 Q. And then on July 14th the *service stations* were sold
21 to Blackett Oil Company, correct?

22 A. Yes.

Tr. at 34 (Glade Parduhn testifying, emphasis added)

18 Q. Now, are you aware that *the stations* were sold to
19 Blackett Oil Company on July 14th, 1997?

20 A. Yes.

* * *

5 Q. Since the *sale of stations*, what type -- and I am not
6 asking about -- but what type of income has been earned by
the

7 partnership since the stations were sold?

8 A. Interest.

Tr. at 62-63 (Larry Johnson testifying, emphasis added).

Such limited testimony does not support the court’s conclusion. Had the court felt that the claims made by counsel raised a relevant factual issue, it should have taken additional evidence. Had it done so, it would have learned that the Partnership sold only

very specific assets to Blackett Oil. Objections to Proposed Findings of Fact and Conclusions of Law filed by Parduhn, and Exhibit A thereto at R.1932 and R.1939-1946.¹³

The rest of the “evidence” on which the court relied to deny the Partnership the proceeds similarly lacks a factual foundation in the record. The court stated that “the partners treated the partnership rather casually, basically taking what they needed in many instances.” R. 1902-03. It referred to “evidence at trial that partnership proceeds were used to pay for various things that were not considered partnership assets.” R. 1903. A search of the entire trial transcript and exhibits reveals no such evidence, nor anything that could be construed to support such a conclusion, even with great liberties of language.¹⁴ The only place such assertions exist are in the memoranda filed by the Buchi Heirs following remand and counsel’s argument to the court. Hr’g. Tr. at 24-25, 36. After making his argument, Mr. Tanner assured the court that the record included the “facts” he was citing, saying “Absolutely. Absolutely it does.”¹⁵

¹³ Upon being shown the falsity of its assumption about the sale, the court withdrew the statement. R. 1972-73. It did not change the conclusion it drew from that erroneous fact, however.

¹⁴ Counsel for Joanne Buchi did ask Parduhn about expenditures of Partnership funds after the sale to Blackett Oil. Neither those questions nor Parduhn’s answers to them directly or indirectly support a conclusion that the Partnership so commingled funds that its payment of the premiums should be ignored. Tr. 57 (Glade Parduhn testimony). Nor did counsel attempt to draw such an inference from the answers. See Tr. 188 (argument of Counsel for Buchi Children).

¹⁵ In so assuring the court, Mr. Tanner cited to the memorandum filed by Joanne Buchi. Hr’g. Tr. at 25. However, that memorandum clearly admitted that the “facts” it recited on
(continued...)

Argument of counsel and exhibits to memoranda do not substitute for evidence admitted under appropriate evidentiary safeguards. Because the court declined to hear additional evidence, it could only look to the evidence admitted at trial in fashioning an equitable distribution. Not only did that evidence show that the Partnership paid the premiums on the Policy, therefore presumptively making the Policy an asset of the Partnership, but no other claimant produced evidence of a stronger equitable right to the proceeds of the Policy to overcome that presumption. The trial court committed reversible error in relying on extra judicial facts and in discarding inconvenient facts to avoid a decision in favor of the Partnership. *Thurston v. Box Elder Co.*, 892 P.2d 1034, 1995 Utah Lexis 24, * 6-7. (1995). This court should reverse the decision of the court below and enter judgment in favor of the Partnership based on the record evidence.¹⁶

B. The Evidence Supports an Award of the Policy Proceeds to the Partnership.

In footnote 3 of its opinion in the first appeal, this Court noted that the word “person” as used in Utah Code Annotated §31A-21-104(5) includes a *partnership*. 61 P.3d at 987 n.3, ¶17. The Court then stated that “[p]roperty acquired with partnership funds are [sic] presumed to be assets of the partnership” and concluded that “in the event the insurance

¹⁵ (...continued)
this point were not before the court. R. 1858.

¹⁶ As shown below, the evidence would allow this Court to reverse and enter judgment in favor of University Texaco. At the very least, however, the Court should reverse and remand again with specific instructions to the court to hold an additional evidentiary hearing to determine who is equitably entitled to the proceeds.

policy is an asset of the partnership, the proceeds would be divided . . . pursuant to the partnership agreement regarding asset division at winding up. *Id.*

At the trial in this case, Glade Parduhn testified that the Partnership paid the premiums on the Policy. Tr. 46 (Glade Parduhn, cross examination).¹⁷ This testimony remained uncontroverted throughout trial. Based on that testimony, the trial court found that “the partnership in fact paid the premium.” R. 1452. The Supreme Court adopted this finding on appeal. 61 P.3d at 987 n.3, ¶17) The finding thus became part of the case on remand. *Thurston*, 892 P.2d at 1037 (“‘law of the case’ is a legal doctrine under which a decision made on an issue during one stage of a case is binding in successive stages of the same litigation”) citing *Plumb v. State*, 809 P.2d 734, 739 (Utah 1990); see also *Waters v. Jorgenson*, 29 P.3d 2, 5 (Utah Ct. App. 2001) (finding that second district judge had erred in entering order that contradicted facts found in earlier order in the case, without taking any new evidence). A lower court “is bound to follow [instructions from the appellate court], even though it considers the ruling erroneous.” *Slattery v. Covey*, 909 P.2d 925, 928 (Utah Ct. App. 1995), quoting *Street v. Fourth Judicial District Court*, 113 Utah 60, 191 P.2d 153, 158 (1948).

When this Court remanded the case to the trial court, it identified several factors the court should consider in determining whether the Policy should be deemed an asset of the

¹⁷ In fact, the other parties had an incentive to put on evidence to the contrary, as such evidence would have bolstered their contention that they were entitled to the proceeds. However, in spite of ample opportunity to do so, no one challenged this evidence.

Partnership. 61 P.3d at 987, citing 59A Am. Jur. 2d Partnership § 359 (1987) and 56 A.L.R.3d 892. Of those factors, *“the most important [are] the source of the premiums, and the beneficiary designated.”* 56 A.L.R.3d 892, 895 (emphasis added).

Notwithstanding the foregoing principals of law and this Court’s adoption of the factual finding that the Partnership paid the Policy premiums, the trial court determined not to award the proceeds to the Partnership. It did so even as it acknowledged that the Policy named Parduhn as beneficiary and that the Partnership paid the premiums. It rejected those factors as not worthy of consideration, however:

The Supreme Court noted that the partnership paid the premiums and that was a factor in determining the equity of the situation. **It is a factor that seemingly favors distribution to the partnership.** The Supreme Court also stated that the named beneficiary is a factor in determining who is equitably entitled to the proceeds. Of course what makes this case difficult, among other things, is that here the partnership paid the premiums but Parduhn was the named beneficiary. Whatever guidance this court can take from [these factors] is thus diluted as those factors are opposed to each other and lead to different “equities.”

R. 1901.

To solve the apparent conundrum, the court turned to the very document this Court had already rejected as a basis to award the proceeds to the Buchi Heirs: the Buy-Sell Agreement.

The court found that the Buy Sell Agreement “provide[d] guidance in deciding Buchi and Parduhn’s intent when they obtained their policies.” R. 1902. The court may be correct in finding guidance in the Buy Sell Agreement; it certainly erred in interpreting that

guidance. To the court, the Buy Sell Agreement indicated that Buchi and Parduhn *must have intended* the heirs of a deceased partner to get the entire proceeds of any insurance policy. This is not an error of fact, as again, no fact exists to support the conclusion the court draws from the Buy Sell Agreement. Rather, it is an error of interpretation, an error of law. As such, it is entitled to no deference by this Court. *Parduhn*, 61 P.3d at 984 ¶5.

One cannot find an intent to have the full amount of the 1989 policies included in the Buy Sell Agreement as it stood at Brad Buchi's death. The Buy Sell Agreement, following the 1984 amendment, contained clear direction that directly contradicts the court's interpretation:

“The Buy-Sell insurance will be \$100,000. In the event of a death of either partner, the remaining partner *shall pay \$100,000 to the survivors of the deceased* with the proceeds of the \$100,000 insurance policy which each own on each other.”

The Buy Sell Agreement does not say “the Buy-Sell insurance will be \$300,000.” It does not say “the remaining partner shall pay *all the proceeds* to the survivors of the deceased.”¹⁸

Whatever the partners might have done, or might have thought about doing, they did not amend the Buy Sell Agreement again after 1984. Clearly, Buchi and Parduhn knew how to amend the Buy-Sell Agreement, as they had done just that in 1984 when they first increased the amount of life insurance they carried on each other. Pltf. Ex. 2. Just as clearly, they did not do so again in 1989, nor in the following eight years until Buchi's death. The mere fact

¹⁸ Interestingly, prior to 1984, the Buy Sell Agreement provided “Both partners are insured for \$20,000 and *all of which will go to the deceased persons wife or survivors.*” Pltf. Ex. 1.

that Buchi might have considered doing so in 1990 (Defendant's Trial Exhibit 3), does not support a finding that he "clearly" intended 100% of the proceeds to go to his heirs, especially in light of other evidence (Lissa's divorce suit, filed Sept 1990 (Tr. 109-110); his purchase of other insurance for his family at the same time (Tr. at 117-118)).

Yet, the court held that "[i]f they [Buchi and Parduhn] intended the surviving partner to retain any portion of the proceeds, the court believes that such a provision could have and would have been provided to show such intent." R. 1902. Neither logic nor the evidence the court had before it supports this reasoning. First, Parduhn testified as to his intent. He stated that he never intended the family of Buchi to get more than the \$100,000 stated in the face of the Buy Sell Agreement. Tr. at 27. He testified that he and Brad Buchi did not amend the Buy Sell Agreement at the time or after they bought the Policy in 1989, and never discussed amending it. *Id.* Brad Buchi, of course, could not testify to his intent.¹⁹ Moreover, uncontradicted testimony established that at about the same time that Buchi and Parduhn took out the Policy and the similar policy insuring Parduhn's life, Buchi also purchased additional insurance on his life that named his then wife Lissa and his children as

¹⁹ Lissa Buchi, Brad Buchi's wife in 1984 and 1989 did testify that *she* intended the entire Policy proceeds to be paid to the heirs of the deceased partner. Tr. at 100-101. She also testified that the divorce court ordered Brad to keep the \$300,000 Policy in force. Tr. at 105-106. On cross examination by Parduhn's counsel, however, she corrected herself, stating that the policy the court ordered Brad to maintain was a different policy that named her as beneficiary. Tr. at 113, Pltf. Ex. 5; Tr. at 120, Pltf. Ex. 21. At the time of Brad's death, three of their five children were financially dependent on him. Tr. at 105-107. This testimony is at odds with Parduhn's proffer, discussed below. She also testified that in the conversations with Glade Parduhn, no discussion about the Policy proceeds going to him came up. Tr. at 108.

beneficiaries. Tr. at 104, 188, 120-121, Pltf. Ex. 5 & 21. Sheldon Hanson, the insurance agent who wrote the 1984 policies as well as the 1989 policies and other life insurance policies Brad Buchi purchased to benefit his family directly, testified that Buchi intended to have insurance both for his family and for his partner:

13 Q. So, the buy/sell insurance was aside from some
14 addition substantial amount of insurance he [Buchi] had
acquired in

15 some other fashion, correct?

16 A. That's correct.

17 Q. Is it very common in your practice and in your
18 experience for a person to want to have a policy such as the
19 policy that Brad Buchi purchased for Lisa and the children in
20 addition to the benefits that they would be entitled to under a
21 buy/sell agreement-type policy?

22 A. Yes, I think that was Brad's intent, that they had
23 their own individual coverage -- I am sorry, a coverage on
him

24 for their specific direct benefit, coverage on him for the
25 benefit of the partner.

Tr. at 148 (emphasis added).

Given the testimony of Parduhn and Sheldon Hanson, and the clear language of the 1989 Buy Sell Agreement, one can only conclude that if the partners intended the *survivors of the deceased partner* to get *more than the \$100,000 specified in the Buy Sell Agreement*, such a provision *could have* and *would have* been provided to show such intent. It was not, and the court committed error in reading such an amendment into the document. 4447 *Associates*, 973 P.2d at 997 ¶18. This error is reversible, because the court relied solely on this non existent “intent” in awarding the entire proceeds to the Buchi Heirs.

Because the facts do not support the award to the Buchi Heirs, the decision must be reversed. *Bellon*, 808 P.2d at 1094.

C. The Equities Favor Distribution of the Proceeds to the Partnership.

In addition to the legal presumption that the Partnership should receive the proceeds because it paid for, and thus owned the Policy, the equities also favor distribution of the proceeds to the Partnership. The court's ruling, however, utterly failed to take into account the equities favoring distribution to the Partnership, and the lack of equities favoring distribution to the Buchi Heirs. No other party has or could establish a stronger equitable claim to the proceeds.

This case originally involved a \$300,000 life insurance policy, a terminated Buy-Sell Agreement that never addressed anything other than the first \$100,000 of insurance, and two competing camps of claimants – the decedent's former partner, and his family members. This Court has already rejected the claims of Parduhn and the Buchi Heirs. 61 P.3d at 986 ¶15 and ¶16. This Court rejected those claims even in the face of dictum by the district court that it would have awarded the proceeds to the Buchi Heirs in equity. R. 1456-57.²⁰ On remand, the court again awarded the proceeds to the Buchi Heirs, this time citing the family

²⁰ That dictum, based on an assumption that the Buchi Heirs had an insurable interest is irrelevant to the decision on remand, because 31A-21-104(5) requires analysis without regard to insurable interest or consent. In any event, having an insurable interest would not make the Buchi Heirs beneficiaries of the Policy. Insurance law is clear that on a legal basis at least, only a named beneficiary has a right to policy proceeds. *U.S. Fidelity & Guar. v. Sandt*, 854 P.2d 519,522 (Utah 1993), citing *Browning v. Equitable Life Assur. Soc.*, 80 P.2d 348, 352 (1938).

relationship and the Buy Sell Agreement. When stripped of the court's unfounded reliance on a non-existent intent in the now terminated Buy Sell Agreement, however, the court's award to the Buchi Heirs rests solely on the familial relationship. *See* R. 1903 ("When considering the equitable claims of the other potential universe of claimants, including that of a long-term business partner, the court finds in favor of the family"). The family relationship alone, however, cannot support the award to the Buchi Heirs in equity, as it ignores the reality of the relationships between Brad Buchi and the defendants as well as the claims of Glade Parduhn and University Texaco.

1. Equity Does Not Support Distribution of the Proceeds to The Buchi Heirs.

The trial did not include any evidence on the nature of the relationship between Brad Buchi and any of the Buchi Heirs. The record does not disclose whether the Buchi Children were estranged from or on good terms with Brad Buchi, or whether they had at his death any economic interest in his life.²¹ Nor did the trial deal with the quality of the relationship between Joanne Buchi and Brad Buchi, although the evidence did show that she had sued him for a divorce. R. 151. Thus the record does not support the award to the Buchi Heirs in *equity*. Nor did the Buchi Heirs proffer any new facts on remand that would support distribution to themselves in *equity*.

²¹ Interestingly, none of the Buchi Children testified at trial. The trial contained no evidence of the relationship between Brad Buchi and his children, other than Lissa Buchi's statement that the children were dependent on him for child support and some even lived with him. Tr. at 108.

In fact, had the court considered all the circumstances, and sought to reach a result that would be equitable for all concerned, he would have considered the proffers by Parduhn and University Texaco. Although no evidence came in at trial about the quality of the relationships between Brad Buchi and his children, counsel for Parduhn proffered evidence at trial that would have shown that the children no longer had an economic interest in Buchi's life at the time of his death. *See* Tr. at 128-129. Parduhn's counsel attempted to introduce through Lissa Buchi evidence that Brad Buchi had actually satisfied fully his child care obligations prior to his death, but the court upheld an objection to the line of questioning. Tr. at 123. Subsequently, Mr. Fishburn proffered that shortly before the dissolution of the Partnership, Buchi paid off his entire remaining child support obligations by giving his ex-wife a lien on Partnership property. When the Partnership sold the service stations to Blackett Oil, Lissa Buchi liquidated her lien and collected the full amount of Buchi's remaining child support obligations from the proceeds of the sale. Tr. at 128-129. In addition, Lissa Buchi testified that she was the primary beneficiary another \$250,000 insurance on Brad Buchi's life, as well as some term insurance. Tr. at 104, 116. Plaintiff's Exhibit 21, received into evidence at Tr. 120, showed that the Buchi Children received directly by assignment a \$100,000 policy on Brad's life.

This proffer and evidence should have at least put the court on notice that it could not award the proceeds to the Buchi Children without taking additional evidence. Buchi had provided amply for his children's support through other sources, negating any need for the court to search for an intent to have them receive fully half the entire Policy proceeds as

well.

The trial record also contained enough evidence about Joanne and Brad Buchi's relationship to indicate to the court that the mere fact that Joanne was "legally married" to Brad Buchi did not mean she had a right – legally or in equity – to the proceeds of his life insurance. Utah Code Ann §31A-21-104, as interpreted by this court in the first appeal of this case, requires that a person have an insurable interest both at the time an insurance policy is purchased, and throughout the term of that policy, up to and including the death of the insured. 61 P.3d at 986, ¶16.

Joanne Buchi was not married to Brad Buchi when the insurance was procured. No one disputed that Joanne and Brad Buchi were separated and in the process of a divorce at the time of his death. Tr. at 151. The record contains no evidence of a warm and loving relationship between Brad and Joanne such that one could assume he intended Joanne to receive a portion of the proceeds. Thus, the record does not establish that Joanne Buchi had an insurable interest in Brad's life. 4447 Associates, 973 P.2d at 997.

Moreover, the record reveals not one iota of evidence that would tend to support an award of the proceeds to Joanne Buchi individually on any other basis. What evidence does exist tends to show that she should *not* get any of the proceeds in equity. "In any equitable proceeding, the fundamental rule is that he who seeks equity must do equity." *Tuttle v. Henderson*, 628 P.2d 1275, 1277 (Utah 1981). Joanne cannot meet this test.

Joanne Buchi is the personal representative of Brad Buchi's estate, and she appeared in this case as such. R.275. She did not argue for an award to the estate in equity however;

to the contrary, she argued only that the proceeds should go to her individually in a non-testamentary transfer. R.1862. Her failure to articulate a position of the estate on remand, where the court had instructions to award the proceeds to the person(s) entitled to them in equity, cannot be overlooked in determining her own individual right to the proceeds in equity.²²

As the record now stands, no basis exists on which this Court can uphold the award of half the proceeds to Joanne Buchi or the Buchi Children in equity. The court should reverse the decision of the trial court and order Joanne Buchi to pay to University Texaco the proceeds she received from the court. If necessary, the Court should impose a constructive trust with Joanne Buchi as the trustee for University Texaco and impose a lien against her home. At a minimum, this Court should reverse the award as it applies to the Buchi Heirs, and order the trial court to take additional evidence on the actual relationship between Brad Buchi and his children as well as on the marital situation of Joanne and Brad Buchi and her actions as personal representative of the estate of Brad Buchi, to determine whether they have any claim in equity to the proceeds.

2. Equity Requires an Award of the Proceeds to the Partnership.

Equity favors distribution of the proceeds to the Partnership. Only through judgment for the Partnership can the court “achieve a proper balance of conflicting interests” and

²² A review of the pleadings filed in the Buchi Estate shows five claimants, other than Parduhn and University Texaco, made claims against the estate, totaling over \$50,000. See Appendix, Tab 7. These claims were not introduced below.

provide “equal treatment of all concerned.” Merriam Webster On-Line, www.merriamwebsteronline.com. The court’s award to the Buchi Heirs was not based in impartiality, justice or fairness; it was not equitable. Neither the Buchi Heirs, nor any other potential claimant had any expectation in fact, law or equity of receiving the entire proceeds. Surely, Brad Buchi and Glade Parduhn did not intend the Buy Sell Agreement to provide a windfall to either the insured’s partner or his survivors.²³ Giving the award to the Buchi Heirs may have benefitted them, but it left out all other claimants and failed to achieve any kind of balance between conflicting claims.

Although the Buchi Heirs and Glade Parduhn were the only claimants below, they were not the only persons with an economic interest in the partnership or Brad Buchi’s life.

Others include creditors of the Partnership and creditors of the estate of Brad Buchi. Certainly, Buchi’s long term business partner also had an interest.²⁴ The award to the Buchi Heirs entirely ignores the interests and equities of these other potential claimants, even though those interests were raised in argument. *See e.g.*, Hr’g Tr. at 17-21; 43-47; 56-58; R. 1665-1672; 1735-1749; 1877-1881.

Distribution of the Policy proceeds to the Partnership will ensure that not only the

²³ Buy sell insurance simply provides the funds for one partner to buy out the other in the event of death; it should not replace other insurance on the lives of the partners, and did not do so here. *See e.g.*, Tr. at 104, 118 and Pltf. Ex. 21.

²⁴ Parduhn’s economic interest in Buchi’s life did not end with the dissolution of the Partnership. Parduhn asserted claims of conversion of partnership assets below, which remain unresolved, as the court bifurcated those issues from the issues now on appeal. *See* R. 1-8; 1272.

claimants below, but virtually all others with an economic interest in Brad Buchi's life or estate, will also get a portion of the proceeds. By ordering distribution of the proceeds to the Partnership, any remaining creditors of the Partnership can be paid, and the net assets divided between the estate of Bard Buchi and Parduhn, (after appropriate accounting and credit for any amounts shown to have been wrongfully taken by Buchi). Joanne Buchi as Buchi's surviving spouse, and the Buchi Children, will receive the net estate proceeds.

An award to the Partnership will satisfy the requirements of 31A-21-104(5), fit the evidence in this case, and benefit Buchi's Heirs, as well as each other person or entity that had a stake in Buchi's life. Greater equity could not exist.

CONCLUSION AND RELIEF SOUGHT

Utah Code Ann. §31A-104(5) requires that the Court award the Policy proceeds to a person or persons entitled to them in equity. That section also allows this Court to establish a constructive trust, if necessary to complete the equitable distribution of the insurance proceeds. Here, as shown above, the Court should reverse the trial court's award of the proceeds to the Buchi Heirs as an abuse of discretion, and remand with specific instructions to the court to distribute the proceeds to the Partnership in equity and to impose a constructive trust, with Joanne Buchi as constructive trustee of the proceeds she has already received. Utah Code Ann. §31A-21-104(5). Furthermore, the Court should instruct the trial court to declare a lien on Joanne Buchi's home for the full amount of the proceeds she received, plus interest at the legal rate, until she pays the proceeds over to the Partnership

and order her to remit the entire amount of the proceeds, with interest, to the Partnership within 30 days of the order, or have judgment for the full amount due, with interest, entered against her. In the alternative, the Court should remand with specific instructions to the trial court to take additional evidence tailored to the specific issues before it in equity.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Nanci Snow Bockelie", followed by a horizontal line.

NANCI SNOW BOCKELIE
Attorney for Intervenor/Appellant
University Texaco

CERTIFICATE OF MAILING

On this 26 day of Nov, 2003, I deposited in the United States Mail,
postage prepaid,, a true and correct copy of the foregoing BRIEF OF INTERVENOR/APPELLANT
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