

1988

Jerry Aarts v. Willow Creek Country Club, a Utah Corporation : Petition for Rehearing

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

JERRY AARTS,

Plaintiff-Respondent,

v.

WILLOW CREEK COUNTRY CLUB, a
Utah corporation,

Defendant-Appellant.

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Case No. 20752

APPEAL OF A JUDGMENT FROM THE
DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY, STATE OF UTAH

HONORABLE DAVID B. DEE, JUDGE

RESPONDENT'S PETITION FOR REHEARING

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FEB 25 1988

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

JERRY AARTS,	:	
	:	
Plaintiff-Respondent,	:	
	:	
v.	:	
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Utah corporation,	:	
	:	
Defendant-Appellant.	:	

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TABLE OF CONTENTS

	<u>PAGE</u>
<u>NATURE OF THE CASE</u>	1
<u>DISPOSITION IN LOWER COURT AND ON APPEAL</u>	1
<u>STATEMENT OF ISSUES PRESENTED IN PETITION FOR REHEARING</u> . .	2
<u>ARGUMENT</u>	2
I. Reasoning behind Utah Supreme Court's Decision to Reverse the Lower Court Judgment and Remand for Entry of Judgment in Favor of Defendant.	2
II. The Lower Court Used the Correct Standard of Review in Determining Whether Defendant's Board of Directors had Cause With Which to Terminate Plaintiff's Employment.	3
III. Even if the Lower Court Utilized the Wrong Standard of Review in Determining Plaintiff's Breach of Contract Action in the Lower Court, the Findings of Fact Entered by the Lower Court Were Sufficient to Support an Affirmation of the Judgment Under the Correct Standard of Review.	7
IV. If the Lower Court's Findings of Fact Are Not Sufficient to Support Its Judgment Under the Correct Standard of Review. This Matter Should be Reversed and Remanded for a New Trial.	8
<u>CONCLUSION</u>	9
<u>CERTIFICATION OF GOOD FAITH</u>	11

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Action v. Deliran</u> , 737 P.2d 996, 999 n.4 (Utah 1987) . . .	8&9
<u>Benton v. Albuquerque National Bank</u> , 103 N.M. 5, 701 P.2d 1025, 1033 (N.M. App 1985)	9
<u>Branch v. Western Petroleum, Inc.</u> , 657 P.2d 267, 276 (Utah 1982)	7
<u>Chiodo v. General Water Works Corporation</u> , 17 Ut.2d 425, 413 P.2d 891 (1966)	5
<u>Davis v. Tucson Arizona Boys Choir Society</u> , 137 Ariz. 228, 669 P.2d 1005 (1983)	5
<u>Gilbert v. City of Caldwell</u> , 112 Idaho 386, 732 P.2d 355, 364-65 (Idaho App. 1987)	9
<u>Goodsel v. Dept. of Business Regulation</u> , 523 P.2d 1230, 1232 (Utah 1974)	7
<u>Great Salt Lake Minerals & Chemical Corporation v. Arthur G. McKee & Company</u> , 539 P.2d 371, 373 (Utah 1975)	9
<u>Howarth v. Ostergaard</u> , 30 Ut.2d 183, 515 P.2d 442, 444 (1973)	9
<u>Kinsman v. Kinsman</u> , 73 Utah Adv. Rep. 110 (1988)	8
<u>Rosecrans v. Intermountain Soap and Chemical Company, Inc.</u> , 100 Idaho 785, 605 P.2d 963 (1980)	5
<u>Thermo-Kinetic Corporation v. Allen</u> , 16 Ariz. App. 341, 493 P.2d 508 (1972)	5
<u>Umrein v. Nelson</u> , 70 Or. App. 104, 688 P.2d 419, 422 (1984)	9

NATURE OF THE CASE

This is an action commenced by the plaintiff for breach of an Employment Agreement. Plaintiff alleged that defendant had no "casue" to terminate him from his employment under the Employment Agreement, and accordingly he was entitled to one-third (1/3) of his yearly salary as liquidated damages, pursuant to the provisions of the Employment Agreement. Defendant answered by asserting that plaintiff's termination was for "cause" due to actions by the plaintiff which were unethical and/or were acts of moral turpitude.

DISPOSITION IN LOWER COURT AND ON APPEAL

The Lower Court, in a bench trial, ruled in favor of the plaintiff. The case was heard by the Honorable David B. Dee, Judge of the Third Judicial District Court of Salt Lake County, Utah. After oral argument before the above-entitled Court on February 9, 1988, and pursuant to Rule 30(d) of the Rules of the Utah Supreme Court, the above-entitled Court reversed the Judgment of the Lower Court and remanded the case for entry of Judgment in favor of the defendant.

STATEMENT OF ISSUES PRESENTED IN PETITION FOR REHEARING

1. Did the Lower Court use the correct standard of review in determining that the defendant had no factual or legal bases to determine that plaintiff's conduct was unethical or an act of moral turpitude?

2. If the Lower Court did not use the correct standard of review, did it nonetheless make Findings of Fact sufficient to support an affirmation of the Lower Court's Judgment on proper grounds even though different from those relied upon by the Lower Court?

3. If the Lower Court's Findings of Fact were not sufficient to support a Judgment upon the correct standard of review, then should the matter be reversed and remanded for additional Findings of Fact or a new trial, rather than reversed and Judgment entered for defendant?

ARGUMENT

I. Reasoning behind Utah Supreme Court's Decision to Reverse the Lower Court Judgment and Remand for Entry of Judgment in Favor of Defendant.

Because the Utah Supreme Court elected to hear the Appeal in this matter pursuant to Rule 30(d) of the Rules of the

Utah Supreme Court, and subsequently the parties received notice of the above-entitled Court's decision a few days after oral argument without an explanation of the bases of the decision, plaintiff can only assume that, in light of the questions of the Justices at oral argument on February 9, 1988, this Court decided to reverse the Lower Court's Judgment because it felt that the Lower Court had used an inappropriate standard of review of the employment contract language, and therefore the Lower Court's Judgment was error as a matter of law.

It is plaintiff's position that the Lower Court used the correct standard of review in ruling in favor of the plaintiff in the Lower Court proceeding. However, even if the Lower Court used the wrong standard of review, the Findings of Fact entered by the Lower Court support Judgment for the plaintiff under what the plaintiff assumes is this Court's determination of the correct standard of review, or at the very least, this Court should reverse and remand for a new trial to be held whereby the Lower Court will be directed to utilize the correct standard of review.

II. The Lower Court Used the Correct Standard of Review in Determining Whether Defendant's Board of Directors had Cause With Which to Terminate Plaintiff's Employment.

Plaintiff assumes that this Court determined that, given the language in paragraph 1(f) of the Employment Agreement between defendant and plaintiff, the Board of Directors of

defendant had total discretion by which to determine whether the conduct of the plaintiff was unethical or involved an act of moral turpitude. Accordingly, this Court determined that the Lower Court should have determined whether the Board of Directors' discretionary judgment was made arbitrarily and capriciously, or in bad faith and therefore contrary to the implied duty of good faith and fair dealing in all contracts.

Even if the Lower Court had followed this standard of review it would have had to find the facts as it did in the Lower Court proceeding. In order to determine if the judgment of the Board of Directors was arbitrary and capricious, the Lower Court would have to analyze the bases of the Board of Directors' allegations of unethical conduct or acts of moral turpitude by the plaintiff. The Lower Court did this, and made specific findings thereon. Similarly, in order to determine whether the Board acted in good faith in coming to its decision with regard to plaintiff's conduct, the Lower Court would have to determine whether there were any bases to the allegations made by the Board of Directors as to plaintiff's actions. If the Lower Court is not entitled, under the standard of review as determined by this Court, to review the factual underpinnings of the Board of Directors' judgment, it has no way to determine the good faith or capriciousness of that judgment short of hearing self-serving testimony from the various directors of defendant regarding to

their intentions and mental processes in coming to their decision regarding plaintiff's conduct.

The case law extant in Utah and surrounding jurisdictions that has dealt with interpretations of employment contracts similar to that at issue here is limited. Most of the decisions concern employees of corporations or other business entities where the contractual provisions do not discuss an employer's discretion in determining whether its employees' actions or omissions rise to the level of the contractually-defined "cause." Nonetheless, the cases that exist support a standard of review by the Trial Court similar to that used by the Lower Court in this action, that is, making findings of fact with regard to the employees' actions or omissions rather than reviewing whether the employer's decision was arbitrary or made in bad faith. See, Chiodo v. General Water Works Corporation, 17 Ut.2d 425, 413 P.2d 891 (1966); Rosecrans v. Intermountain Soap and Chemical Company, Inc., 100 Idaho 785, 605 P.2d 963 (1980); Thermo-Kinetic Corporation v. Allen, 16 Ariz. App. 341, 493 P.2d 508 (1972).

In Davis v. Tucson Arizona Boys Choir Society, 137 Ariz. 228, 669 P.2d 1005 (1983), plaintiff was the director of the defendant. Defendant was a non-profit corporation, just as the defendant in the instant case is. The contractual language, as quoted in the opinion of the Arizona Court of Appeals, is

similar to that in the employment contract between the plaintiff and defendant herein:

8. TERMINATION OF CONTRACT: the Society shall have the right by and through the action of the Board of Directors to remove the Director for neglect of duties or inappropriate behavior.

9. WRONGFUL DISCHARGE: in the event the Society shall wrongfully discharge the Director for any reason, then and in that event, the Society shall pay to the Director all compensation which would have been earned by the Director from the time of wrongful discharge until the last day of the following June.

In the Tucson Arizona Boys Choir Society case, as in the instant case, the Board of Directors of the defendant non-profit corporation had the discretionary right to determine whether the director had been neglecting his duties or had engaged in inappropriate behavior. The Trial Court utilized the standard of review supported by plaintiff herein, analyzing the bases of the "cause" by which the defendant Tucson Arizona Boys Choir Society terminated their director. The Trial Court found in favor of the plaintiff and awarded liquidated damages to him as called for under the employment contract. On appeal the defendant argued, similar to the questioning of this Court at oral argument in the instant case, that the Lower Court was limited to reviewing the good faith of the defendant's actions, rather than whether there was a factual basis for justifying

termination for "cause." The Arizona Court of Appeals responded to that argument as follows:

The contract provided that the appellee could be discharged for neglect of duty or inappropriate behavior. There was evidence of discipline problems, some poor musical performances, poor business judgment, etc. However, as could be expected, there was a conflict in this evidence. Whether the Board had cause is a question of fact, and the Trial Court implicitly found it did not. The appellant contends that as long as it acts in good faith it does not matter whether the appellee had neglected his duties or had been guilty of inappropriate behavior. The appellant is wrong.

Davis v. Tucson Arizona Boys Choir Society, 669 P.2d at 1009-10.

In short, the Lower Court in the instant case utilized the correct standard of review during the trial, notwithstanding the language in the Employment Agreement that whether plaintiff engaged in unethical acts or acts of moral turpitude was in the judgment and determination of the Board of Directors of defendant. the Lower Court's decision should be affirmed.

III. Even if the Lower Court Utilized the Wrong Standard of Review in Determining Plaintiff's Breach of Contract Action in the Lower Court, the Findings of Fact Entered by the Lower Court Were Sufficient to Support an Affirmation of the Judgment Under the Correct Standard of Review.

It is well-settled in Utah that the Utah Supreme Court can affirm a Trial Court's decision on proper grounds even though different than those relied upon by the Trial Court. Branch v. Western Petroleum, Inc., 657 P.2d 267, 276 (Utah 1982); Goodsel v. Dept. of Business Regulation, 523 P.2d 1230, 1232 (Utah 1974).

This rule was most recently affirmed by the Utah Court of Appeals in Kinsman v. Kinsman, 73 Utah Adv. Rep. 110 (1988). Even if the proper grounds are not argued by the parties, this Court can decide the case on the proper grounds. Action v. Deliran, 737 P.2d 996, 999 n.4 (Utah 1987).

As noted above, even if the correct standard of review for the Lower Court was to determine whether the Board of Directors of defendant acted arbitrarily and capaciously or in bad faith in determining that plaintiff engaged in unethical conduct or acts of moral turpitude, the only way the Lower Court could engage in such a review was by analyzing the underlying factual allegations utilized by the Board of Directors in coming to its determination. The Lower Court did that, and entered specific Findings of Fact to that end. Accordingly, the Lower Court's decision that plaintiff was terminated without cause was correct, albeit possibly according to the wrong standard of review. This Court can affirm the Lower Court's Judgment under the correct standard of review.

IV. If the Lower Court's Findings of Fact Are Not Sufficient to Support Its Judgment Under the Correct Standard of Review. This Matter Should be Reversed and Remanded for a New Trial.

If it is the determination of the above-entitled Court that the Lower Court used the in correct standard of review in coming to its judgment, and that the Lower Court's Findings of Fact are not sufficient to support its Judgment even under the

appropriate standard of review, the correct decision on appeal is to reverse and remand for a new trial. Gilbert v. City of Caldwell, 112 Idaho 386, 732 P.2d 355, 364-65 (Idaho App. 1987); Umrein v. Nelson, 70 Or. App. 104, 688 P.2d 419, 422 (1984).

This Court cannot overturn a Lower Court decision and compel Findings of Fact in favor of the defendant unless the evidence in the record is such that all reasonable minds must come to that finding. Great Salt Lake Minerals & Chemical Corporation v. Arthur G. McKee & Company, 539 P.2d 371, 373 (Utah 1975); Howarth v. Ostergaard, 30 Ut.2d 183, 515 P.2d 442, 444 (1973). In the instant case, where the judge who presided over the Lower Court proceeding has retired, this Court should reverse and remand for a new trial rather than for additional findings of fact. Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987). Benton v. Albuquerque National Bank, 103 N.M. 5, 701 P.2d 1025, 1033 (N.M. App 1985).

CONCLUSION

According to the case law of Utah and surrounding jurisdictions, and in the context of the review of an employment contract provision calling for termination for cause, the Lower Court used the correct standard of review in finding for the plaintiff in this matter. Even if this Court determines that, as

a matter of law, the Lower Court used the incorrect standard of review, this specific Findings of Fact entered by the Lower Court support the correct standard of review as determined by this Court.

If it is the determination of this Court that the Lower Court's Findings of Fact do not support the correct standard of review, than this matter should not be reversed and remanded to the Lower Court for entry of Judgment in favor of defendant, but rather reversed and remanded for a new trial based upon the proper standard of review.

Dated this 26th day of February, 1988.

TIBBALS, HOWELL, JONES & MOXLEY

By


Jeffrey R. Orritt

Attorneys for Plaintiff-Respondent

CERTIFICATION OF GOOD FAITH

STATE OF UTAH)
 :ss
COUNTY OF SALT LAKE)

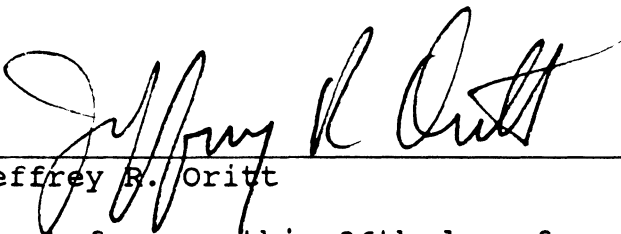
I, JEFFREY R. ORITT, being duly sworn, hereby depose
and say that:

1. I am the attorney for the plaintiff-respondent in
the above-entitled appeal.

2. I have prepared and, on this date, submitted to
the above-entitled Court plaintiff-respondent's Petition for
Rehearing pursuant to Rule 35 of the Rules of the Utah Supreme
Court.

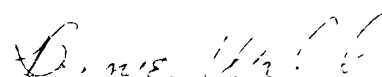
3. Pursuant to Rule 35(a) of the Rules of the Utah
Supreme Court, I hereby certify that this Petition is presented
in good faith and not for delay. There are significant points of
law and fact, as set forth in this Petition, which plaintiff-
respondent feels the above-entitled Court has overlooked or

misconstrued. Accordingly, plaintiff-respondent's Petition for Rehearing is hereby submitted.



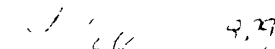
Jeffrey R. Orritt

SUBSCRIBED AND SWORN to before me this 26th day of February, 1988.



NOTARY PUBLIC
Residing at:

My Commission Expires:



CERTIFICATE OF MAILING

I hereby certify that on the 26th day of February, 1988
I caused four true and correct copies of the foregoing Petition
for Rehearing of Respondent to be delivered by placing the same
in the United States mail, postage prepaid, to the following:

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